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and
Canadian Bar Association

NATIONAL FAMILY LAW PROGRAM,
2006

SINCERITY

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

Prepared by
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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 2004 to June 2006.

June 2006

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DEDICATION

James G. McLeod

1947 – 2005

(*prepared by Alfred Mamo, legal counsel, author, editor, lecturer, and member of the Ontario Bar*)

On October 4th 2005, at approximately 5:15 p.m., the enormous energy, encyclopedic knowledge and unmatched intellect of the irrepressible Professor James G. McLeod (Jay) came to an abrupt end, brought about by a massive heart attack. Family law has lost its "oracle" but, in his prolific writings, Jay has left us a compass that we can still use to guide us for a long time to come when we are deliberating a particular point of view in family law matters.

To Jay's wife, Margaret, and his children, Erin, Jamie, Kathleen, Ian and Michael, who featured so prominently in so many of Jay's writings, we offer our most heartfelt condolences and thanks for sharing your husband and father with us for all these years. I know that your love energized him and provided him with the drive to accomplish so much for the benefit of all of us.

His Philosophy of life:

- "To paraphrase Oscar Wilde, I think, consistency, is the mark of a small mind."
- "Honesty is the best policy, at least if you have no choice. Mark Twain, I think…"
- "I worry about overly committed people, regardless of what they are committed to."
- "Search for a final, final agreement, seems like a search for a rounder circle."

Interpreting Judgments:

- "Don't assume Judges will interpret a contract reasonably. Or, if you prefer, it is still a bad time to be a husband."
- "It may be a nice answer, but not to any question I can think of."
- "Make up your own explanation, because I don't have one."
- "I have no idea how what happened, happened…pass and pretend it did not happen."
- "Yes, yes alcohol is a disability for employment law purposes, but Family Judges know different."
- "This has to be wrong for any number of reasons, if only I could think of them…"

Understanding of Human Relationships:

- "For the father, it had to be his way. There was not even much room for the high way."

DEDICATION
(*Continued*)

- "They agreed on nothing, assuming nothing, is something you can agree on."
- "The children did not especially like the new partner, but, luckily for the mother, her history of instability suggested that he was on his way out anyway."
- "He did not speak English and trusted his wife. Silly man."
- "The parents met on the internet and after the initial euphoria of gigas byting, reality set in."
- "If you get to marry, you get to divorce. They go together [-] life love and marriage, just later."

The Practice of Family Law:

- "Family Law Rule 3: There is a support law for women, a support law for men, a support law for wealthy men and a special set of rules for wealthy men in the 416 telephone exchange."
- "Since mother and child were both Canadians, they would just be sent back here where the only risks are SARS, mad cow and hockey teams that break your heart."
- "This is a great case to save for when your local legal "butthead" delivers one of his or her usual annoying affidavits."
- "In the end, the Rules of Procedure and litigation involve[ing] self-represented litigants are a lot like weebles – you expect them to wobble but not fall down."
- "This is one of those cases that make you want to do real estate law."
- "Consents, like agreements, can be dangerous to your wealth."

To Sum it all up:

- "It's scary sometimes when common sense and law intersect."
- "My fingers are getting tired and I have a tee time coming up."

1.0 INTRODUCTION

Nature Of Paper

This anthology summarizes, and excerpts from, judicial decisions, book and journal scholarship, legislation and reports, published primarily from June 2004 to June 2006, which address (i) selected principles of responsibility – professional, ethical, and legal – governing the law vocation and (ii) the practice of those theorems of responsibility, particularly by "family law" practitioners. (Unless essential to understanding of the text, footnotes are omitted from excerpted material.)

Previous Papers

Six previous comparable anthologies have been published: "Scruples" (1987), 2 C.F.L.Q. 151-197 (canvassing the period from date of legal memory to 1986); "Scrutiny" – for the National Family Law Program, 1996 (covering the period 1986 to 1996); "Security" – for the National Family Law Program, 1998 (covering the period 1996 to 1998); "Sanity" – for the National Family Law Program, 2000 (covering the period June 1998 to June 2000); "Sagacity" – for the National Family Law Program, 2002 (covering the period June 2000 to June 2002); and Sensitivity – for the National Family Law Program, 2004.

Caveat

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

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

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

> Our legal culture undergoes constant and inevitable change, and so too, then, do expectations and standards pertaining to lawyers' behaviour. What was contentious fifty years ago may seem totally unproblematic today, and vice versa, Or the

> preferred method of approaching an issue may change dramatically over time. Ideas about legal … [responsibility] by no means mutate daily, yet … [t]his topic … is definitely not static.

Practising Lawyers In Canada

The constituency of the subject of this anthology comprises, as of 31 December 2004, 91,187 lawyers (and notaries); 82% of whom (74,822) – including 23.7% (17,797) female lawyers – hold practicing status (Federation Of Law Societies Of Canada).

Challenges Facing Lawyers Practising Family Law In Canada

Issues of responsibility are most likely to present, frequently and meddlesomely, not to mention expensively, for those lawyers who practise what customarily, if not curiously, is called "family law"; although more accurately may be described as the "law of uncoupling".

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

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

Lawyer Responsibility

(a) Sources

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

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

(b) Professional And Ethical Responsibility

The principal code of responsibility in Canada is the Code of Professional Conduct. This document had its origins in the *Canons of Legal Ethics* (very general statements of principle) established by the Canadian Bar Association on 02 September 1920; materially influenced by comparable Canons adopted by the American Bar Association in 1908. Canada's *Canons of Legal Ethics* were, on 25 August 1974, replaced by the *Code of Professional Conduct*, comprised of general rules and supporting commentary ("CBA Code") which, in turn, in August 1987, was substantially revised and, in August 1995, was amended by addition of Chapter XX (regards non-discrimination), and by other substantial alterations and additions in 2004.

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

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

In the United States, the original *Canons of Professional Ethics* (very general statements of principle) were adopted by the American Bar Association on 27 August 1908 and replaced on 12 August 1969 by the *Model Code of Professional Responsibility* (which distinguished between professional principles and ethical disciplinary rules). The *Model Code*, in turn, on 02 August 1983, was replaced by the *Model Rules of Professional Responsibility*. The *Model Rules*, like the CBA Code, integrates professional principles and ethical discipline rules and furnishes supporting commentary. About two-thirds of United States state Bar governing bodies have approved standards based on the *Model Rules*. The other one-third of state Bar governing bodies copy, more or less, the *Model Code.* The *Model Rules* are undergoing major revision based on the November 2000 proposals of the Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct.

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

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

A helpful definition of the distinction between the concepts of "professionalism" and "ethics" was provided by the State of Delaware Chief Justice, E. Norman Veasey, when he was Chair of the National Conference of Chief Justices of the United States. He wrote:

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

Former State of Georgia Justice Harold Clarke also usefully articulates the difference between ethics and professionalism:

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

Professionalism is often viewed as an aspirational goal, with the consequence that unprofessional behaviour need not be accompanied by a concern for being disciplined by courts or Bar disciplinary authorities. However, judicial attitudes toward such disregard are changing. Chief Justice Veasey, when he was Chair of the Board of the National Centre for State Courts, wrote:

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

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

(c) Legal Responsibility

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

> A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings. See, for example, *Law Society*

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

Program History

This is the eleventh National Family Law Program. The first Program was presented in Toronto in 1978. Since its second presentation, ten years later in Montreal, the Program has been conducted in alternate years.

Copyright Exception

2.0 SOURCES AND STANDARDS OF RESPONSIBILITY

2.1 Professional and Ethical Responsibility

"Professionalism V. Ethics"

Harris, Allen K, (2001), 12 *the Professional Lawyer* 9

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

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

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

"Whiplash and Other Useful Illnesses"

Malleson, Andrew (Montreal: McGill-Queen's University Press), 2002, pp. 247-248

The effects of lawyers' activities on a country's economy are controversial. Lawyers can be useful, but it seems, only in small numbers. Stephen Magee, a professor of finance and economics at the University of Texas, is a leading expert on the economics of the legal profession. Using a mass of data, Magee has calculated that up to a ratio of 23 lawyers per 1000 white-collar workers lawyers add generously to the economy. At higher ratios the story is different; they detract from it badly.

The United States has 38 lawyers for every 1000 white-collar workers (some 40 per cent or 300,000 lawyers too many) each costing the American economy $1 million a year. A pessimistic economist has calculated that if the last two decades' trend in increased legal activity continues, then "within a mere 100 years, [the United States] will have a gross national product of minus $1.25 quadrillion in today's prices." Many Americans would love to reform the calamity of their legal system, but it is difficult to curtail the abuses of the Mafia let alone the abuses perpetrated by the very people whose job it is to prevent them.

"Bringing Buddhism to family law"

Duncan, Pauline, *Canadian Lawyer*, August, 2003, pp. 36-37

Buddha, who lived in India around the fifth-century B.C., "was the greatest psychologist of all time," says Regina lawyer Pauline A. Duncan, who practices Buddhism and promotes it to her clients. "He gained insight into the fear of death that lurks in our subconscious. In our conscious mind this is translated into a fear of change. At some level, we develop the belief that if we can keep everything the same, we won't die."

Buddhism, she says during an interview, "takes fear and exchanges it for curiosity."

Six years ago, Duncan, a partner at Duncan Reimer Canham, decided she needed something to reduce stress and make her life and legal career more fulfilling. "Basically, I wanted to matter in my life," she says. "I wanted to matter to my clients. I was very frustrated with everything, with what I was observing around me. There was so much disempowerment and feelings of helplessness in my life. I felt like I had to find some better way of being."

Duncan began in 1996 what she calls "an intense search," which included taking some personal development courses at a private college in Regina. "Without acknowledging it, the

course emphasized a lot of Buddhist principles," she says, adding that she feels fortunate that Regina has "an active Buddhist community."

As she learned more, she became more intrigued. "I could see how the teachings were manifesting in my life," she says, "so I started looking at spiritual paths. I stumbled across Regina's Insight Meditation Group, believing that meditation was certainly something that could benefit me. I was also lucky enough to find a local Buddhist teacher who brought in other teachers from the United Stated and England. Eventually, I started doing silent retreats, where we typically stay silent for four days."

She explains that Buddhism, which utilizes discussions and lectures as opposed to conventional church services, "is a very interesting spiritual tradition. It's not grounded in a belief in God *per se.* It's more an energy type of spiritual path. In other words, you seek energy, you seek knowing, you seek being in that state of *nirvana* or ecstatic bliss. You also get a sense of just being so at peace with everything in your life."

Moreover, Buddhism is about being awake, says Duncan, who says she's convinced more than a few clients to convert. "In fact, 'Buddha' means 'awake.' Metaphorically speaking, there are two ways to live life, asleep or awake.

"If we choose to be awake, we make the choice to be fully conscious and take responsibility for ourselves. We look within rather than blame what is outside us for the events that occur in our life. If we choose to be asleep, we try to become victims and look for a reason to give away our power to choose."

Duncan, whose book, *The Power of Goodbye: A Legal/Spiritual Guide to Separation and Divorce,* is due out next spring, notes that traditional lawyering often promotes the 'asleep' kind of consciousness in clients. "And I believe that is a great disservice to them," she says.

"Being a victim eliminates choice and keeps clients stuck in a powerless place. They often project their dysfunctional behavior onto the other party or even their lawyer. Lawyers sometimes do this too [project dysfunctional behavior], and they need to be aware of it and do their best to help themselves and their clients gain greater insight into what motivates them."

Through Buddhism, Duncan, who is divorced, came to understand that "conflict is inevitable. My work as a family lawyer causes me to interact with people who are experiencing profound conflict. Often people, because they don't know themselves or what is in their best interest, feel more comfortable wearing a label of 'victim' rather then seeking empowerment.

"I consider it my job to help clients shed the 'victim' role and become empowered."

[**Editor's Note:** Ms. Ducan is now: Pauline Duncan Bonneau, Q.C., a sole practitioner in Regina, Saskatchewan. Pre-publication orders for her book may be sent to pauline@thelovelawyers.com]

"Reference roulette"

Arnot, Alison, *National,* June-July, 2004, p. 14

Time was, when you were asked to give a reference for someone who's left your employ, you could be reasonably candid about that employee's good points and, especially, bad points. But this near-formality is now a legal minefield.

Rebuffed job seekers in the U.S. who traced their rejection to a bad reference have brought their rejection have brought and won lawsuits against their former employer. Accordingly, some firms have now established no-reference policies, or provide only the basic facts about a person's employment. But this avenue is also problematic, says an employment lawyer.

"The courts have now suggested that a blanket policy of giving no references is not going to be fair to the former employee," says Micheal Sherrard, a partner with Sherrard Kuzz in Toronto and Chair of the CBA's National Labour and Employment Law Section. "Employers have to revisit whether [such a] policy is appropriate."

In the 1995 Ontario case *Lim v. Delrina (Canada) Corp.*, for example, although the court held that a 12-week notice period was reasonable, it added eight more weeks to reflect "the defendant's unreasonable refusal to give the plaintiff a letter of reference." Damages in this case amounted to more than $26,000.

While Canadian courts are holding employers to task for failing to provide references, employees seeking damages for a poor reference have had less success. For instance, in the 2002 Federal Court case *MacNeil v. Canada,* a former RCMP officer lost his suit against his former supervisor for providing a negative reference.

So how should a law firm approach the touchy subject of employee references? Sherrard provides the following tips:

- Seek the consent of the former employee. And make sure it's informed consent; the employee needs to know the type of reference you will give and what you plan to say.
- Make sure this information exchange – with the former employee and potential employer – is in writing.
- Be honest. If you don't feel you can give a positive reference, tell the former employee.
- Designate a centralized person in the office who will provide employee references (*e.g.*, the human resources manager).
- Finally, don't give "cookie-cutter" references. Each reference should be tailored to the individual employee.

"Evaluating employees"

Mackay, Brad, *National,* June/July 2004, p. 14

Most lawyers get used to confrontation on the job, and learn to develop a critical attitude almost as second nature. But in one respect, lawyers face the same reluctance to bear bad news as does every other professional: in the delivery of constructively critical employee evaluations.

For many law firms, a formalized evaluation system remains sometimes a luxury – an afterthought. Greg Nash would beg to differ, however. As chair of the Litigation Group at Ogilvy Renault's Vancouver office, he thinks comprehensive evaluations are a critical element of his firm's success.

"We spend a lot of time and energy and money looking to recruit the best associates," he says." [Lawyers are] a valuable asset, and it behooves us to do the best to ensure that their career is on track."

To ensure this, he conducts semi-annual evaluations with his lawyers (in spring and fall) in which partners assess associates on a wide range of factors – from intellectual skills, efficiency and business sense to commitment, integrity and interpersonal relationship skills.

The standard evaluation forms include both formal checklists and sections for written comments. The results are then boiled down to an overall rating, which is used as a benchmark for future evaluations.

Even though some partners may find it difficult to address associates' areas of weakness, Nash thinks that's a crucial task for a mature organization. "I think there can be a tendency sometimes not to want to deal with potentially negative issues, to let them slide a little," he says. "I think it's better to deal with them and get them on the table.

"People have to be open and honest about these things. You have to be able to say 'This didn't work.' It doesn't mean you're a terrible lawyer; it just means it didn't work out this way and it needs to be corrected for the next time."

And while no one expects that curmudgeonly partner to morph into Dr. Phil, a simple and open evaluation process has tangible benefits. Even an informal lunch meeting to talk over issues is better than nothing, says Nash.

"I think people always want to know how things are going," he points out. "It doesn't matter whether they're lawyers or anybody else, they just want to know where they're at."

"Family time hard to find, lawyers say"

Kleiman, Carol, *The Gazette*, 17 July, 2004, p. B6

Chicago - In 2000, when Jeffrey Garson, then a commercial bankruptcy lawyer in Philadelphia, felt his "work and life were disconnected," he decided to do something about it. Garson went back to school, got a degree in social work and today is a very happy psychotherapist and career coach.

"You can make a lot of changes and stay in the law, but I made the choice to leave, not change the way I worked as a lawyer," he said. "Now, I get up every day and do what's important to me. My work is satisfying and I see a lot more of my family."

Four years later, he's pleased he decided to go for more balance between work and family.

"I love my life," the psychotherapist said.

Not all male lawyers who want more personal time decide to leave the law. There are some very brave ones who try to remain lawyers but also take the risk of working from within to achieve their goals – despite the very real obstacles of having to work long hours, dealing with demanding clients and being expected to have a single-focus commitment to getting ahead.

It's as simple as this: if you want to be a partner, you're expected to put in the same sweat equity as everyone else.

But that, too, is changing, according to one expert.

"Male lawyers want to have a life, too," said Jessica DeGroot, president and founder of ThirdPath Institute, a nonprofit organization based in Philadelphia that works with individuals, families and organizations to help them redesign their work in order to create more time for family, community and other interests.

"If real change is going to happen, men have to make changes at work, too," said DeGroot, who has an undergraduate degree in feminist studies and an MBA. "And we're finding more and more men who want to do that."

From the time DeGroot started ThirdPath in 1999, she says she was "determined to work with men, too, because we know that men, as well as women, care about this issue."

And that's why the topic of a recent conference DeGroot gave in Philadelphia was titled: "Having a Life: Creating work/life balance in the law." One-third of the 85 people who attended were men.

"There are real difficulties," DeGroot pointed out. "Lawyers who seek balance around family needs often are relegated to a subordinate career track or decide to leave the field – the consequences can be substantial. Right now, it feels riskier for the male lawyer than for female lawyers because the men say they have less room to manoeuvre and fear paying a more significant price for daring to do so."

Yet there are a few brave men.

"Michael Friedman left his job with a large law firm in the summer of 1999 and now job-shares with a female attorney as an associate general counsel for a secondary mortgage company in Washington," DeGroot said. "He is married and has two children and works part time. His wife now works full time. Previously, he used to make it home for dinner once in a while. Now, he has the time with his family that he wants and needs."

"The perils of practicing 24/7"

Slayton, Philip, *Canadian Lawyer*, September 2004, pp. 18, 19
(in part)

In his book *Authentic Happiness* (2002), psychologist Martin Seligman argues that lawyers are naturally pessimistic. By "pessimistic," he means viewing bad events as pervasive, permanent and uncontrollable, rather than local, temporary and changeable. "And if you don't have this prudence to begin with," writes Seligman, "law school will seek to teach you. Unfortunately, though, a trait that makes you good at your profession does not always make you a happy human being." He argues that lawyers who can see clearly how badly things might turn out for their clients can also see how badly things might turn out for themselves."

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It's a fact that many, many lawyers are unhappy. Patrick Schultz, lawyer and law professor, former editor of the *Harvard Law Review,* former law clerk to Supreme Court Justice Antonin Scalia, wrote in the Autumn 1999 *Notre Dame Magazine*: "Lawyers suffer from depression, anxiety, hostility, paranoia, social alienation and isolation, obsessive-compulsiveness, and interpersonal sensitivity at alarming rates." A Johns Hopkins University study, reported Schultz, found that lawyers suffered from major depressive disorder at rate 3.6 times higher than non-lawyers who shared their key socio-demographic traits. Schultz thinks that lawyers are unhappy because they work to hard. To him, it's simple. Every hour a lawyer spends at his desk, he writes, is an hour away from things that give him joy and meaning to life – playing with children, suggests Schultz, or reading a book.

Seligman has a different explanation for the misery of lawyers. As well as innate pessimism, he blames competition and the "classic win-loss" nature of legal practice. Seligman argues that once the practice of law meant giving good counsel about justice and fairness, but now it's a big business in which billable hours, take-no-prisoners victories and the bottom line are the principal ends. "Lawyers are trained to be aggressive, judgmental, intellectual, analytical and emotionally detached," he writes. "This produces predictable emotional consequences for the legal practitioner: he or she will be depressed, anxious and angry a lot of the time.

In *The Marriage of Heaven and Hell,* William Blake wrote: "For man has closed himself up, till he sees all things thro' narrow chinks of his cavern." What makes lawyers unhappy is that they think and behave the same way in their personal lives as they do in their professional lives. We can't help that.

"Taking care of their own"

***The Economist*, 18 December 2004, pp. 90-91**
(in part)

Law is certainly an odd industry, and its practitioners would like to keep it that way [in Britain]. Collectively, they regulate entry to the trade and can prevent non-lawyers even from investing in the business. They concoct elaborate rules (barristers are not allowed to tout their success rates, for example) and enforce them. Outfits like the Bar Council and the Law Society, which represents solicitors, hear complaints against their own members while also defending the profession against criticism. They might not run almshouses or put on mystery plays, but in other ways they carry on much like medieval guilds.

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Allowing doctors and lawyers to look after their own, albeit with some oversight, has advantages. The main one is that they know their stuff: educating outsiders to a level sufficient to second-guess the experts would take lots of time and money. There is also a kind of consensus that comes from self-interest. If a group of likeminded people develop and enforce their own rules, they are likely to believe in them, which means they will keep them in mind even when the door is closed.

The problem is that these outfits are, in effect, monopolies. Barristers cannot opt out of the Bar Council control and choose another regulator instead. Because there is no competition, there is little incentive to drive up standards and other than the desire to escape further interference from government. And codes of conduct are always liable to morph into trade-union rulebooks.

So reforming the professions is likely to remain a grinding, thankless task, subject to endless carping and obstruction from practitioners.

"Revealing the Soul of a Soulless Lawyer"

Rimer, Sara, *The New York Times*, 26 December 2004, Section 9, pp. 1, 5
(in part)

He lives at the law firm blowing off his wife's dinner parties, not to mention the birth of his son. He finds no satisfaction in his work, but he is trapped by high salary and partner title.

He disdains everyone lower in the hierarchy: the smarmy $2,400-a week summer interns, the idealistic associates who want to help people on company time, the associates who have the audacity to become pregnant and his incompetent secretary who broke the crystal plaque he received from a client.

He is, in short, a petty, cynical, sexist, miserable, overpaid corporate creep. He is also fictional.

But he is apparently all too familiar to thousands of lawyers across the country who are regular readers of his Web log, Anonymous Lawyer, in which he chronicles the soulless, billable-hours-obsessed partners, the overworked Black-Berry-dependent associates and the wrecked families that are the dark underside of the life at his large firm in Los Angeles.

"What A.L. posts on a daily basis are the precise reasons I have left practice and am now in a 'law-related field,' " one reader wrote.

Hilarious, poignant, maddening (even the readers chide one another for their high-priced whining), the blog, which began appearing in March, has become an anonymous, online 24-hour confessional for disaffected associates at large, elite law firms around the country. (Many comments are posted late at night when, presumably, the readers are still at the firm.)

And even though the blog (anonymouslawyer.blogspot.com) makes clear that Anonymous Lawyer's stories are fiction, readers write in to say they identify with him and especially with the associates he tyrannizes.

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"Anonymous Lawyer is a cultural phenomenon," said William Henderson, an associate professor at Indiana University School of Law, who uses the blog in class. "It strikes a nerve with the deep-seated ambivalence that lawyers in big law firms feel about big law firm life."

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As it turns out Anonymous Lawyer is Jeremy Blachman, a self-effacing 25-year-old third-year Harvard law student whose firsthand experience of Big Law comes down to a round of recruiting interviews last fall … and three months as a summer associate at a large Manhattan firm. While Anonymous Lawyer has been gloating over his view of the Pacific. Mr. Blachman has never even been to Los Angeles.

"Osgoode Hall"

Lau, Evelyn, *Treble* (Vancouver: Polestar / Raincoast Books, 2005)

We climb the scorched staircase,
embrace under the sightless gaze,
of men no longer able to judge
or defend. In the red room,
the bordello room, you turn to me,
the lies of the courthouse in your eyes,
a flake of ash on your tongue . . . .

on the famous steps you say
you are never leaving her,
and your finger signs the contract,
on the page of air between us,
traced in oxygen,
struck in stone.

"Professionalism [:] Changing Interior Voice to Exterior Voice"

Bacon, Roxie, (2005) 15 *the Professional Lawyer*, No. 4, p. 21

. . . .

So is there a realistic way to embed professionalism in our daily professional lives? Yes. And it is disarmingly simple. But it's very, very hard to actually execute.

It has nothing to do with Codes and Creeds and Rules and Discipline Commissions and Disbarment. It has to do with the piece in each of us that seeks a larger meaning in what we do in our lives. It has to do with whether we play the game with sharp elbows or a helping hand. It may well have an inverse relationship with our personal dollar profits. And it certainly treads on dangerous ground for a profession that spends three formal years training us to disengage feelings from intellect.

It has to do with the spirit and the soul.

I do not mean religion or punishment, both of which are too pejorative and colonial to meet this far more demanding and intimate test. Rather, it has to do with the pursuit of grace, a liquid word that carries within a centered core of simple directive: Everything you do has to be as respectful as you can make it to the people your action touches. No fudging on the "everything you do."

- Starbucks line is long and people don't have their "frequent caffeine" cards ready and you – very important you – start to fuss, letting everyone feel your impatience? That counts.

- Secretary mails document to the wrong address and you lash out? That counts.

- Opposing counsel ask to continue a depo for a week because … well, because of anything, and you say "No" because that's what tough lawyers do? That counts.

- You use the "F" word, and the rest of the alphabet's angry words, frequently, and around anyone? That counts.

- You have a 2,000 billable hour requirement and you're short and so you pad a little here and there for a client who will never know? That counts.

- A lawyer is leaving your firm and may take clients. She's a good lawyer. You tell the clients she's not. That counts.

- You are a senior member in a firm that had a very good year, and you can recommend that the whole firm, including staff, share in the extra? That counts.

- You're tired. You're overworked. You're important. You're rich. You're getting rich. You're right. And (a) a neighbour wants to ask a legal question again for free; (b) your son wants you to turn off your Blackberry and your phone and the TV and just be there; (c) your spouse wants to focus on her ideas as hard as you focus on your partners'? That all counts.

I double dare you to try this humbling exercise of being your own "respectful behaviour" monitor. Just for one day. Heck, just 'til noon!

After you do, you'll be different. Not enough, of course, because this exercise is the one that no one, not even the best spiritual leaders in any culture, has been able to do flawlessly. And I am painfully aware that.

I am an infant in the effort.

But if you try, you will realize the artificiality of divorcing the profound elements of professionalism from our most private lives and choices. And you will realize why we should never try to separate them if we want to be better in life, not just in law.

"Law blogs – clicking with clients"

Blackwell, Gerry, *Canadian Lawyer*, April 2005, p. 10
(in part)

Right from the start, Lorne MacLean knew that the Internet would be crucial in successfully marketing his new Vancouver family law practice. After 19 years practicing in other firms, MacLean went out on his own in 2002, launching MacLean Family Law Group.

Even before the firm's launch, he worked with a U.S.-based web designer to develop an attractive Web site. It now includes more than 300 pages. He also started an online client newsletter, which currently has over 2,500 subscribers. But the biggest marketing bang for his Internet buck, he says, comes from the blog he launched in October 2003.

Blog?

A blog (weB LOG) is a special kind of Web site – an online diary, crossed with a news service, usually with daily entries posed by the "blogger." One of the keys to the growing popularity of blogs is that the technology used makes it simple for non-technical people to compose new entries and publish them instantly to the blog Web site.

"Blogs are more tasteful and less expensive than a lot of lawyer advertising." MacLean says. "And they're superior to Web sites because they show up better in search engines. A blog enhances your reputation as a go-to person, as someone to be trusted in your particular area."

Too many blogs – and there are hundreds of thousands, possibly millions, of them on the Net – are just soapboxes for the opinionated, but not necessarily knowledgeable. The best, though, like MacLean's (which comments on family law-related developments in the news) are tightly focused, well written and useful.

Blogs are a bigger deal in the U.S., where they're often quoted now in mainstream media. Many U.S. lawyers blog, but only a handful in Canada have caught on to the idea.

"I'm puzzled why more lawyers don't do it," MacLean says. "Maybe they're too busy, or think they are – which reminds me about of the old saying about the logger who's too busy chopping wood to sharpen his axe."

MacLean says 90 percent of his new referrals now come from the Internet, 10 percent from a yellow pages ad. He can't be sure how many are coming from the blog and how many from the Web site, since the two are interlinked. "But probably a significant portion are coming from the blog," he says.

Many prospective clients find the blog when they do a Web search using key words such as "BC" coupled with "divorce" or "family law" because links to it consistently appear at or near the top of the search list. The reason for this, MacLean says, is that search engines like Google give priority to sites that are consistently updated, as most blogs are. It's one reason they're such powerful marketing tools.

He won't say how many Web referrals he's receiving, but the firm has seen rapid growth.

"Lost and Found"

Hanson, Mark, *ABA Journal,* May 2005, pp 34-38, 73

Oakland, Calif., trial lawyer J. Gary Gwilliam doesn't feel comfortable talking about his losses. He would rather forget them. But he can't. They have taught him too many valuable lessons.

Gwilliam estimates he has tried more than 175 jury trials to verdict in his 40 years of practice. The vast majority of them have been wins. But Gwilliam believes that trial lawyers rarely, if ever, learn anything from winning. He thinks that some of life's most important lessons come from defeat. And he admits to having lost about 30 jury trials in his career.

His hardest loss came in 1977. By then, Gwilliam had been a trial lawyer for 15 years and a plaintiff's lawyer for more than 10. His trial record was solid, he says, and he was as full of himself as anyone.

The case was a lawsuit against General Motors Corp. involving a gas tank explosion in a 1974 Chevrolet pickup truck. A young man who was speeding at the time crossed the center line in his car and collided head-on with the pickup truck in which Gwilliam's clients were riding.

In the resulting conflagration, the driver of the truck was killed. His wife was horribly burned and aborted an eight-month pregnancy. Their 5-year-old son also was severely burned. Another young boy in the truck also died, and his parents, who had been following the truck in another vehicle, witnessed the accident and watched helplessly as their son burned to death before their eyes.

After a three-week trial and seven days of deliberations, the jury came back with a defense verdict. Gwilliam still recalls his reaction to the verdict as if it had been rendered only yesterday.

He felt full of shame and anger. He replayed his mistakes over and over again in his mind. He didn't want to go back to the office to face his partners. He didn't even want to call in and tell them the result.

"I wanted to go crawl into a hole somewhere and not come out for a very long time," he says.

Although his partners and friends sympathized, Gwilliam says he was filled with self-blame. He tried to shrug it off, but the pain persisted. He turned to alcohol and attempted to compensate for the loss in the only way he knew how. He worked harder. He dove back into his other cases, feeling that only a big win could heal the wound of his loss.

It wasn't until 1985 – eight years later – that Gwilliam finally won a multimillion-dollar verdict. By then, he had stopped drinking and changed his life. He also had changed his attitude toward trying cases.

"I had come to realize that I couldn't be truly successful without completely and honestly facing the fear of losing before a case began," Gwilliam says. By successful, he says, he means being able to face himself no matter what happens in a case. "It means recognizing that even if you lose, you did the best you could and shouldn't beat yourself up for not doing better."

. . . .

But the fact is, there are only two kinds of trial lawyers: Those who have lost a case and those who will. Losing, at least occasionally, is simply a reality for a trial lawyer practicing in the real world.

You Can't Win 'Em All

Kansas city, MO, trial lawyer Glenn Bradford, who wrote a state bar journal article about losing in 2002, says he was motivated to do so by the appearance of several high-profile lawyers on television who claimed never to have lost a case. Such claims give the public the false impression that if they spend enough money to hire the best lawyer, they can't lose. They also give young lawyers the wrong impression that if they lose a case, they're failures, he says.

"I just felt like somebody ought to tell the truth: That if you try a routine number of cases, you're going to lose every now and then," he says.

Bradford says that defeat is the acid test for a professional advocate. And after 33 years of trying cases, he says he can speak with some authority on that point.

Working hard on a case for several years, doing a good job at trial and reaping the benefits of a favorable verdict is easy, he says. But working hard on a case for several years, doing a good job at trial, losing the verdict and getting fired by the client is difficult.

"This is the point where you determine whether a litigation career is really what you want to do with the rest of your life," he says.

Bradford cites several studies that suggest the quality of a lawyer's performance has little effect on the outcome of most jury trials. "The literature makes it clear that trial lawyers do not influence jury verdicts nearly so much as they think they do," he says.

Accepting the proposition that a trial advocate can only do so much to affect the outcome of any given case is a necessary step in putting winning and losing in proper perspective, Bradford says. In that respect, he says, a trial lawyer is like a jockey. A good jockey can sometimes make the difference between winning and losing a close race. But even the best jockey cannot make a Breeders' Cup winner out of a Budweiser Clydesdale.

"Trial lawyers have to be honest with themselves about what they are able to accomplish with the facts and the law they have been given to work with," Bradford says. "We are not always dealt winning hands or hired to ride the fastest horse."

. . . .

[Chicago lawyer Christopher] Hurley learned… [a] pair of important lessons from a personal injury case he lost at trial in the early 1990's.

. . . .

…. . Now, whenever he has a client who makes a poor witness, he tries to settle. And he tells every client before taking the stand not to look at him during cross-examination.

. . . .

"Fighting the Fear Factor"

Keeva, Steven, (2005) *ABA Journal* (July 2005), at p. 72

Of the emotions that typically tinge the experience of practicing law, it seems to me that one stands alone in both its impact and the frequency with which it arises: fear.

It motivates and enervates, distorts and feeds on itself.

Think about it: There is certainly a lot to be afraid of in the legal profession. If you're a trial lawyer, for example, there's that gnawing fear that you're insufficiently prepared to prevail in a given matter, that you're simply not up to the job you've taken on, or that you haven't anticipated all that you should have.

There's the stomach-churning fear of going up against an opponent whose reputation as a force of nature precedes her.

There's the fear of not being thought of as successful, of not making partner, of never being asked to second-chair an important case. There is also the fear of malpractice.

And the endemic fear of failure.

In fact, in some cases it is accurate to describe a given law firm as a fear-based organization. And because fear tends to inhibit growth, such firms are in danger of becoming stuck, and incapable of meeting the challenges that time and change will inevitably throw at them. It can be very difficult, however, to get a grip on this problem in an organization that does not take time for

individual and group introspection. After all, to do so might impinge on the furious pace of billing hours.

But there are ways to deal with fear, once you realize how it's affecting you both physically and emotionally. For one thing, you can devote some time and attention to recognizing it when you're in its grip. Without doing so, you're more than likely to find yourself at its mercy.

In his best-selling book, *What Happy People Know*, psychologist Dan Baker refers to "the biological circuitry of fear" as the biggest obstacle to our happiness.

His point is that the atavistic structures in our brains, in particular the brain stem (commonly known as the reptilian brain), still operate like they did tens of thousands of years ago, when very different dangers threatened our prehistoric forebears. We are, Baker writes, "hardwired for hard times."

You see this when you're walking down a trail and you step on a branch. You're apt to flinch, instinctively reacting as if it were a snake. But when you get your wits back, you realize it was just a stick. The reptilian brain, with its simple fight-or-flight orientation to reality, had you fooled.

Unfortunately, for many lawyers the reptilian brain seems to be working close to full time. And why not? Is there any profession apart from the law in which other people – all of them highly intelligent, skilful, motivated and working in teams – are trying to make you fail? Can you imagine a physician in a similar position, having to worry that another doctor might try to kill one of his patients? Clearly, not all of what causes fear among lawyers is chimerical.

A Focus on You

The concept of emotional intelligence, known as EQ, has been with us for more than a decade, having been applied to many professions since author Daniel Goleman brought it into the popular culture.

In a new book on the topic, *The Emotional Intelligence Quickbook*, its authors, by way of defining the concept, have this to say: "Effective communication between the rational and emotional centers of the brain *is* [my emphasis] emotional intelligence."

That means, among other things, learning to make peace with the reptile within.

Dallas trial lawyer John McShane, a student of both emotional intelligence and the culture of fear to which I've referred, sees an antidote to fear-based practice in EQ's first and most important skill: self-awareness.

"The great thing is that once you realize you're being driven by fear, and that it comes from this ancient part of you, you can let it go," McShane says. "Without that awareness, you tend to feel captive."

Jean Greaves, co-author with Travis Bradberry of *The Emotional Intelligence Quickbook*, points out that being self-aware means that you're able to know what is going on inside you – as it is happening.

"For example," the authors writes, "the emotionally intelligent lawyer feels her heart race when she spots a critical thread of facts in a complex case. She feels excited and knows that she's on to something, but she also knows that when her heart races she sometimes jumps too quickly to conclusions."

The alternative to developing this aspect of EQ – and yes, it can be developed – is getting lost in the fear that runs rampant in the legal profession. And guess what: Research over the last decade has conclusively demonstrated that emotional intelligence predicts success more than any other single factor – more than subject matter knowledge and job experience, according to Greaves.

I don't mean to suggest that lawyers are the only professionals who would do well to turn an eye inward and grapple with issues of self-awareness. Not at all. But given the stressors that are peculiar to law practice – which include cultural pressures to avoid emotions altogether – it's important that we correct for certain unhealthy attitudes and habits.

To the extent that you can make your own internal emotional patterns as worthy of attention as you make your clients' and opponents', the role fear plays in your practice and your life will surely diminish.

"Fewer lawyers want to become sole practitioner, survey finds"

Raymer, Elizabeth, *The Lawyers Weekly*, 08 July 2005, p. LB 7
(in part)

Significantly fewer lawyers are willing to hang out a shingle today than they were a couple of decades ago, a new survey indicates.

Results of a new Robert Half Legal poll, released in June, revealed that 93 per cent of lawyers polled would not establish their own law firm, even with the necessary capital.

This represents a steady increase from similar surveys conducted in 2002 and 1997, when 84 per cent and 78 per cent of respondents, respectively, indicated no interest in going out on their own.

The question "If you had the necessary capital, would you start your own law firm?" was put to 200 lawyers from among the 1,000 largest law firms and corporations in the United States and Canada. Just five per cent of respondents to the 2005 survey said they would start their own firm, compared to 16 per cent in 2002 and 20 per cent in 1997.

These findings buck the trend – in Canada, at least – toward self-employment, says Michael Crawford, principal and founder of Marketingdept.biz, a Toronto-based firm specializing in marketing/consulting services for professionals.

In 2000, Statistics Canada reported that two million Canadians were self-employed, he says.

"The number started to shoot up in 2002, and now we're back at record highs: 2.4 million individuals are self-employed. … People are more entrepreneurial lately," he added, noting that some of the StatsCan numbers may reflect people starting part-time businesses.

. . . .

The downside of leaving a firm practice to go solo – or set up with a few other lawyers – is that "there's only so much work you can attract on your own; often teams of lawyers are required," says Bongard.

"Going out on your own is only good for lawyers who don't need access to the rest of a (large) team. Not a lot of lawyers these days require only one lawyer; often they need junior lawyers and other staff.

Concerned about pressures facing sole practitioners and small firm lawyers (defined as five or fewer lawyers), the Law Society of Upper Canada launched a task force to identify ways of supporting these members, who comprise 52 per cent of the practising bar, and 94 per cent of firms in Ontario, largely in rural areas and smaller cities. (The Bar is now being invited to give its comments on the task force's report, which include recommendations providing more tools and resources to sole and small-firm practitioners.)

Aside from financial deterrents, task force co-chair Abraham Feinstein, an Ottawa lawyer, sees the administrative work and the isolation as two key challenges for this group of lawyers.

"You have to do all the administrative work on your own, so it does make it more challenging. I think, too, if you're practising on your own, you're in isolation. You don't have the support that you would if you were with a bigger firm," he explained.

As well, "disbursements can be astronomical" for large litigation cases. "It takes a lot of money, as a litigator, to finance a few pieces of litigation, where you're paid at the end."

. . . .

So why does setting up your own firm hold so much less appeal now than it did a few years ago?

"Twenty, 30 years ago, it was a lot easier to hang out a shingle on your own, to be a general practitioner," said Dan Pinnington, director of practicePRO, the risk management and claims prevention initiative of LawPRO. "Today, that has switched around in reverse: the vast majority

of lawyers are a specialist in one form or another, especially in larger firms, and even at the small boutique firms.

"Few are going out to be a general practitioner; law today is tremendously more complex, so to practise competently in any area takes a lot more to get up to speed," he added.

"Wound Up? Wind Down"

Ward, Stephanie Francis (2005) *ABA Journal* (August 2005) p.32

. . . .

But whatever works, have a plan and stick to it, advises Karen Kaplowitz, a former employment litigator who now focuses on business development consulting in Princeton, N. J. Given the stress of being in trial, it's not the time to develop a new routine, she says. The first trial, she adds, is often the hardest, in terms of how it affects you physically.

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For sleepless nights – and stressful days – he advises a breathing technique called thoracic breathing, which helps the body obtain more oxygen.

"Under stress, our breath just stops, so you're only breathing with the upper third of your lungs, and the breath literally doesn't get down and fill up the lungs," Warren says. "If you can open up and breathe deeply, it changes the blood chemistry."

According to Warren, associates tend to blame the stress they feel during trial on judges, partners and opposing counsel. Instead, he advises young lawyers to look deeper.

"Those aren't the real issues; they're just circumstances," he adds. "The real issue is how you're relating to it. If what you have is an anxious, fearful perspective that's what you're going to get."

"Attention, shoppers [:] Where the lowest price really is the law"

Mah, Douglas, *National,* September 2005, p.58

I once had occasion to discuss with a group of doctors the legal relationships surrounding their employee benefits. They wanted paid holidays, Blue Cross, a pension plan and similar rewards, but they didn't want the corresponding liability for income tax.

I explained to them that taking the benefit without the burden would be difficult to achieve. The response? "Good Lord, man, we're doctors. We're *healers*. We shouldn't have to pay income tax."

Yes, doctors are special. And so are lawyers – in Canada, at present, only lawyers can operate law firms. Only lawyers can regulate lawyers. That stands to reason, if there is to be an independent and effective legal profession.

But there are storm clouds brewing on the horizon. Someone wants to rain on lawyers' parade. An ominous figure, the legal profession's own Darth Vader, looms large. His name is Clementi.

No, I don't mean Roberto Clemente, the Pittsburgh Pirate Hall of Fame outfielder who played 18 seasons, batted .311 or higher 13 times, recorded 3,000 hits, and was MVP of the National League in 1966 and the World Series in 1971. Not him.

I'm referring to David Clementi, former Deputy Governor of the Bank of England, now Chairman of insurance giant Prudential LLP and bean-counter extraordinaire. In December 2004, Sir David released a groundbreaking and controversial report on reorganizing the legal profession in the United Kingdom. The Blair government is expected to soon implement the Clementi report in some fashion.

Lawyers on both sides of the pond are taking a dim view of this development. For one thing, Sir David suggests that a government-appointed board – one that includes non-lawyers and is separate from the profession – handle all lawyer discipline.

What's more, responding to a government trial balloon concerning "alternative business structures" for the delivery of legal services, Clementi has recommended liberalizing the legal services market so that non-lawyers could take part. This has led some Britons to call for retailers to be able to offer legal services just like any other consumer product.

Such a notion is fantastical in Canada. Or is it? Supermarkets now offer mortgages and financial services. Department stores have embraced the "one-stop" principle and now feature photography studios, hairdressing salons, and optometry shops in addition to their usual wares. In box stores in the United States, consumers can purchase cars and grand pianos. If a governments' objective is to increase accessibility to legal services, promote competition and drive down prices, isn't retail the way to go?

What can we expect if retailers are allowed to sell legal services? We might see retired lawyers and judges hired as greeters to welcome and direct customers to "Wal-Mart, Barristers &Solicitors." Those plastic signs that dangle from the ceiling will say:

Ladies Fashions ⧫
Housewares ⧫
Sporting Goods ⧫
⧫ Legal Services

We'll hear red-hot deals announced over the store PA: "Attention, shoppers! Until 5:30 today, uncontested divorces are just $500, while supplies last!" Which will prompt married couples to say to one another, "Honey we can't pass up a deal like that. Let's go get one!"

There will be coupons to be clipped from newspaper ads that read: "Our limited time 3-for-2 sale is just criminal. Get two summary conviction trials for $2,000 each. Commit your third offence free of charge. This coupon has no cash value."

During a sale, live lawyers will be stuffed into bins for discerning customers to touch, prod and question. The company slogan ("The lowest price is the law") will be given new vitality.

While the store policy of "Satisfaction Guaranteed Or Your Money Back" will put a lot of pressure on counsel to perform well, they'll have to meet the service expectations of today's demanding customer. Consumers won't have to bother with the inconvenience and delay of a complaint to the law society; all they'll need to do is produce the receipt and ask for a refund.

If innovative delivery channels are the new order, then the marketing geniuses will surely dream up Amazon.Lawyer.ca. Why even leave the comfort of your home to get legal advice, when you can have a lawyer delivered directly to your front door? The lawyer is yours to keep for as long as you pay our low monthly fee.

Like a loyal dog, your 24-hour lawyer will even sleep at the foot of your bed, in case any legal questions occur to you during your sleep. This will give a whole new meaning to being on a retainer.

Time will tell if Clementi is promising a Brave New World for lawyers. Some might argue that we ourselves have created what many perceive is a crisis of accessibility. I like to think not, but as a profession, we need to be more convincing that legal advice and representation are not simply consumer products, indistinguishable from groceries, clothing, power tools, furniture, and kitchen gadgets.

Like doctors, we lawyers are not special. But our work is. Let's say so. Because otherwise, our future might be in retail

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"Love of criminal work still inspires framed Greenspan brothers"

Bertin, Oliver, *The Lawyers Weekly*, 23 September, 2005, p. 22

Edward Greenspan – Canada's most famous criminal lawyer – billed just $3,300 in his first year in practice. In his second year, he doubled that sum to $6,900.

"I told my wife that if I didn't do any better next year, I'd go home to Niagara Falls," he said. But he persevered with his legal aid clients, his pro bono work and his private clients, knowing full well that he would receive meager pay – or none at all – for much of his work.

"I did it because I so enjoyed a criminal practice," he said.

Thirty-five years later, Greenspan has an enviable list of clients, a healthy bank account and a track record that includes some of the most noteworthy cases in Canadian legal history.

"I am a contented man," he said. But he added that he is still stiffed by his clients on a regular basis.

Greenspan and his younger brother Brian were speaking at an Ontario Bar Association educational meeting held on Sept. 8 on The Nuts And Bolts Of Criminal Defence Work, partially sponsored by LexisNexis Canada Inc., publisher of *The Lawyers Weekly*.

Their talk ranged from the problems of collecting debts, to jury picking, legal aid, capital punishment and the special needs of high-profile clients.

"High-profile people were usually successful people, usually demanding, intelligent and well-informed," said Brian. "That's really the only difference" between them and other clients.

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A lawyer can win fame and fortune but the two brothers said they have as much trouble collecting their bills as any other lawyer. "If I could recover all my bad debts, I might own my house today. I don't," said Brian, who at 58 years old is three years younger than Edward.

They've tried hefty retainers. They've tried monthly billings and they've tried billing after landmark events in their cases.

"We take a sizeable retainer because the appreciation of a client drops off to zero when we get close to an acquittal," Edward said. "Usually, the last days or weeks of a trial are rarely paid."

Brian has even used mortgages and other securities to cover a debt. But he usually gives up in frustration because nothing seems to work. "We're both lousy at getting paid," he said.

Edward doesn't even talk money with his clients. "I hate that part of it," he said. "I don't do it. I'm a lawyer not a businessman."

So why do they put so much effort into their jobs? The bottom line, they said, is they love the practice of criminal law. "I want to do this until I'm 95," Edward said. "I want the jury to say 'Not guilty.' And then I die."

Edward may have been joking, but he had a serious message for the young lawyers and students in his audience. He urged them to practise law for the love of it, not for the money. And the money will follow.

He had no grand strategy when he started his legal practice. He took whatever cases he could get and made the most of them. He would visit clients in (Toronto's gritty) Don Jail seven nights a week. He worked long hours for little pay because that's what lawyers had to do to build a successful practice.

"It's all building blocks," he said. "Show you care and you will get the high-profile clients and the money clients. You have to treat every case as if it is the most important case you have. Treat every judge as if he [or she] is on the Supreme Court.

"It's just luck — and hard work."

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"Under the Radar [:] Depression Takes a Toll"

Keeva, Steven, *ABA Journal*, January 2006, p. 38-39
(in part)

It may not quite be the disease that dares not speak its name, but in the legal profession it comes pretty close.

Where depression is concerned, there is clearly a tendency for individual lawyers, and the profession as a whole, to let it languish in the shadows rather than acknowledge its prevalence and confront the terrible toll it takes.

In a very real sense, the story of lawyers and depression is the quintessential "under the radar" item. Unlike substance abuse, which often draws attention in the form of odd behaviour, grandiosity, fumbling, neglected responsibilities and so on, depression can be hard to detect – and deadly.

Several studies highlight the problem. Out of more than 100 occupations studied by Johns Hopkins University in 1991, lawyers were most likely to experience clinical depression. A survey that same year by the North Carolina Bar Association found that 11 percent of the lawyer respondents had thoughts of committing suicide at least once a month.

In Austin, Texas, last year, a beloved appellate judge took his own life. It seems that Judge Mack Kidd told no one about the suffering that made his life a torment. He appeared to have everything one could want: a great reputation – both when he was a trial lawyer and a judge – a wonderful family and a bevy of accolades.

It didn't matter. He kept his pain so far under his own radar that apparently no one could have known he needed help.

Lawyers and judges tend to be self-sufficient types who expect too much from themselves. Many become perfectionists.

Psychologist Amiram Elwork has written at length about the psychological issues facing lawyers. "The fact that lawyers experience higher rates of depression than the average suggests [,] that there is something about their work that contributes to the problem," he says.

Elwork sees occupational stress as the most likely reason for higher rates of depression among lawyers. That, he says, is caused "by the discrepancy between the demands of bring a lawyer and the capacity of lawyers to manage such demands."

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Legal Malpractice and Ethical Issues: How Are They Connected?

Rolph, Debra (Toronto: Lawyers' Professional Indemnity Company), August 16, 2004
(in part)

[**Editor's Note:** From unpublished address to a Canadian Bar Association meeting, Winnipeg, August 2004.]

Lawyers are liable to be sued for malpractice. …[I use] the term "malpractice", rather than "professional negligence", because lawyers are sued not only for negligence, but also for intentional torts, breaches of contract, breaches of fiduciary duty, and breaches of trust. The term "malpractice"" encompasses all of these causes of action. Malpractice suits are governed by the law of torts, contracts, trusts, and fiduciary duty, as expounded by the Courts and occasionally, by statute. In addition, lawyers who practice litigation are also subject to the authority of the Courts, which have the power to discipline their own officers. The Courts have both inherent and statutory power to financially sanction lawyers who cause costs to be wasted. ["Ordering Solicitors to Personally Pay Costs" by Paul Perell, (2002) 25 *Advocates' Quarterly* 103.] Thirdly, all lawyers are subject to the disciplinary powers of their respective Law Societies. [*Barristers & Solicitors in Practice* - Lysyk*Sossin*Lundie*Mackenzie*Newbury, Butterworths, Looseleaf edition, p. 1.21.] The various provincial Law Societies, or in Quebec, the Barreau du Quebec, and in Nova Scotia the Barrister's Society, as well as the Canadian Bar Association, have evolved their own codes of ethics, contained in their respective rules of professional conduct. Breaches of the Law Societies' rules of professional conduct may lead to disciplinary action.

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[1] Does Breach of an Ethical Rule Necessarily Give Rise to a Cause of Action?

After a period of some uncertainty, authoritative jurisprudence over the past ten years holds that the answer is "no".

The Supreme Court of Canada recently had occasion to remark on this issue in *R.v.Neil* [2002] S.C.J. No. 72, dismissing appeal from a judgment of the Alberta Court of Appeal (2000), 266 A.R. 363, [2000] A.J. No. 1164 (QL), allowing an appeal against a judgment of the Court of Queen's Bench (1998), 235 A.R. 152, [1998] A.J. No. 1135 (QL).] Mr. Justice Binnie wrote:

> "A client whose lawyer is in breach of his or her fiduciary duty has various avenues of redress. A complaint to the relevant governing body, the Law Society, may result in disciplinary action. A conflict of interest may also be the subject matter of an action against the lawyer for compensation, as in *Szarfer v. Chodos*. [1986 CarswellOnt 766] **Breach of the ethical rules that could raise concerns at the**

Law Society does not necessarily give grounds in a malpractice action or justify a constitutional remedy." (emphasis added)

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The Ontario Court of Appeal came to the same conclusion in *Hall v. Frederick.* [(2003) 64 O.R. (3d) 191 (C.A.), revising [2001] O.J. No. 1135 (QL).]

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The Ontario Court of Appeal reiterated this conclusion in *Currie v. Halton Regional Police Services Board.* [[2003] O.J. No. 4516 (C.A.).]

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Brignolio v. Desmarais, Keenan [[1995] O.J. No. 3499 (Ont. Ct. Gen. Div.); Appeal dismissed [1996] O.J. No. 4812 (Ont. C.A.).] held that a breach of an ethical code confers no cause of action on a disaffected non-client. This judgment also established that a solicitor's breach of his or her duty to the Court confers no cause of action for malpractice.

A husband brought an action for damages against the solicitor for his wife in matrimonial litigation. It was alleged that the solicitor for the wife met with the teenaged child of the marriage, and poisoned his mind against the husband.

Lane, J. summarily dismissed the action. Insofar as the action against the solicitor was framed in negligence, Justice Lane relied on the judgment of the Divisional Court of Ontario in *George Cluthe Manufacturing Ltd. v. ZTW Properties Inc.* [[1995] 23 O.R. (3d) 370.] In *Cluthe*, the Divisional Court held that: "There is no authority to support the proposition that a litigant, or his solicitor, owes a duty of care to an opposing party."

The plaintiff also alleged that the solicitor's acts were unethical and contrary to the standards of the bar. The plaintiff sought to rely on the judgment of the House of Lords in *Meyers v. Elman* . [[1939] 4 All E.R. 484 p. 99]. In *Meyers v. Elman*, the House of Lords ordered costs against a solicitor who countenanced the filing of an incomplete affidavit of documents. Lane, J. reasoned that the *Meyers v. Elman* case dealt with the duty of a solicitor to the Court, not to an adverse party. Since the duty is owed to the Court, rather than to the plaintiff, it cannot be the basis of an action for damages. Lane, J. held that if the solicitor had behaved unethically, the plaintiff had other remedies – a complaint to the Law Society, or a motion in the matrimonial litigation to sanction the solicitor for costs pursuant to Rule 57.07 of the Ontario *Rules of Civil Procedure*.

Brignolio was applied in *Shuman v. Ontario New Home Warranty Program et al.* [[2001] O.J. No. 4102 (S.C.J.).]

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It is noteworthy that in *Hall, Currie, Brignolio and Shuman*, non-clients sought to rely on ethical breaches to establish a cause of action. Alleged ethical breaches were unsuccessfully used

to "shore up" claims that had little chance of success on the usual contractual, fiduciary or tortious bases.

[2] Why are Canadian Courts unwilling to hold that a breach of ethical duty confers a cause of action for malpractice?

Canadian case law articulating the Courts' reasoning on this issue is sparse. Some assistance in understanding why it is inappropriate for an ethical breach to confer a cause of action for malpractice may be found in the American text *Legal Malpractice* - Fifth Edition – by Mallen and Smith. [*Legal Malpractice* – Fifth Edition by Mallen and Smith, West Group, St. Paul, Minn., 2000, Volume 3, article 19.7, pp. 98 – 110.] The American position is that with few exceptions, the courts agree that the violation of an ethics rule does not create alone a cause of action, constitute legal malpractice *per se* or necessarily create a duty. Mallen and Smith extensively discuss the rationale for this position. The reasons given are for the most part as true in Canada as they are in the U.S.

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- In drafting the ABA *Model Code* and *Model Rules*, the authors did not discuss the ramifications of ethical principles in civil litigation, nor did they design the ethical standards to achieve civil objectives. Thus, the drafters did not promulgate the ethical standards to be used in civil litigation.

Canadian Comment: The various Canadian *Rules of Professional Conduct* do not address the ramifications of breach of ethical principles in the context of civil actions for legal malpractice. Nor are the Canadian ethical codes designed to achieve civil objectives.

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- Mallen and Smith [in their book] point out that ethical provisions are designed for use in regulating lawyers, with the remedy of discipline. Those procedural and substantive rules governing the establishment of a disciplinary violation do not coincide with those rules governing proof of civil malpractice actions.

Canadian Comment: The complainant is not a party to a disciplinary proceeding. The Law Society is not a party to a malpractice proceeding. The extensive provisions for documentary and oral discovery provided by the rules of civil procedure are not available in disciplinary proceedings.

- Mallen and Smith state that the objectives of discipline are punitive, to punish a lawyer; exemplary, to warn the profession; or prophylactic, to protect the public. The premise in identifying these issues for disciplinary consideration did not necessarily include whether the conduct caused pecuniary damage to a client. Therefore, none of these objectives coincide with the analysis appropriate to formulating a civil remedy to compensate for an injury.

Canadian Comment: The rationale for malpractice litigation is first and foremost compensatory. In negligence claims (although not in claims for breach of contract), damages are an essential ingredient of the cause of action. A plaintiff who has sustained no damages because of a solicitor's

unethical conduct, and who receives competent advice, is unlikely to proceed with a malpractice action, even where the unethical conduct is a breach of a recognized legal duty. Damages are not a precondition for disciplinary charges.

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♦ Mallen and Smith note that ethical rules may be invoked by an appearance of impropriety.

Canadian Comment: A good Canadian illustration of this point is *Macdonald Estate v. Martin.* [[1993] 3 S.C.R.1235.] This judgment discusses not only the role of ethics in safeguarding the justice system against the appearance of impropriety, but also the role of codes of ethics in general.

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♦ Mallen and Smith point out that an ethics rule is not a statute designed to protect specific individuals from designated harm. The purpose is to maintain the integrity of the profession, and to provide for discipline and regulation of lawyers. In most jurisdictions, ethical rules are not promulgated by the legislature, but by the state's highest court, with the only expressed purpose being the regulation of the profession.

Canadian Comment: See… the judgment of Sopinka, J, [in *Macdonald Estate v. Martin*, [1993] 3 S.C.R 1235]. Ethical standards are set out by the provincial Law Societies, under a grant of power by the provincial legislatures. The Canadian Bar Association, a voluntary association, also fulfils an important role in that regard.

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♦ Mallen and Smith state that there are significant procedural and substantive differences between a civil malpractice action and disciplinary proceedings. A lawyer can be disciplined even if the misconduct does not cause any damage. Disciplinary rules protect the public and the integrity of the profession.

Canadian Comment: A sample of actual Law Society of Upper Canada discipline cases illustrates this point. *The Ontario Lawyers Gazette* – March/April 2004 [*Ontario Lawyer Gazette*, March/April 2004, pp. 26-27, published by the Law Society of Upper Canada.] contains a section entitled "Discipline Digest". The article advises that "in keeping with the Law Society of Upper Canada's mandate to govern Ontario's legal profession in the public interest" the Law Society has disciplined four lawyers. The lawyers' names and the details of the disciplinary charges laid against them are given, as well as the disposition of the disciplinary charges.

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♦ Mallen and Smith observe that the prophylactic purpose of the ethics rules may result in disciplinary action even if the conduct is not a civil wrong. A violation of a disciplinary standard may not be negligence.

Canadian Comment: See the discussion of *Macdonald Estate*, above. Failure to comply with various screening provisions may not be civilly actionable, if in fact no confidential or privileged information is improperly disclosed.

Another example of breach of an ethical rule which does not necessarily give rise to civil liability is a solicitor's duty to suggest independent legal advice to an unrepresented non-client. Many reported malpractice actions criticize solicitors for failing to recommend independent legal advice. [*Tracy v. Atkins* (1979), 105 D.L.R. (3d) 632 (B.C.C.A.); *Panko v. Simmonds* ([1983] 3 W.W.R. 158, 42 B.C.L.R. 50 (B.C.S.C.)); *Ruxton v. Kelly, Peters & Associates Ltd,* [1995] 1 W.W.R. 66, 58 B.C.L.R. 317 (B.C.S.C.).]

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♦ Mallen and Smith observe that whereas the *Model Rules of Professional Conduct* set a minimum level of conduct with the consequence of disciplinary action, malpractice liability is premised upon the conduct of the "reasonable" lawyer. The standard of care depends on the particular circumstances.

Canadian Comment: Insofar as the *Rules of Professional Conduct* deal with competence, they do so in a very general manner. They provide little guidance as to whether the standard of care has or has not been met in any particular circumstance. It is necessary to resort to the case law, or to expert opinion, to establish whether or not the standard of care has been met in any given situation.

In any event, Law Society Discipline Departments rarely concern themselves with negligence claims. Generally, only blatant cases of failure to adhere to the most minimal standards of competency will subject a lawyer to disciplinary action. [*Barristers & Solicitors in Practice.* above, p. 8.54]. In disciplinary proceedings, the rule seems to be that the test for competency has a low threshold and is decided on the basis of the lowest common denominator. [above, at pp. 8.54-8.55.] In assessing conduct today, the Law Societies are primarily concerned with behaviour that reflects poorly on the profession, or that calls into question the suitability of an individual to practice law. Negligence was not historically considered a component of "conduct unbecoming" and was not generally considered to be within the disciplinary jurisdiction of the law societies. It is now generally the case, however, and in some instances it is legislated, that incompetence is conduct unbecoming if it tends to harm the standing of the legal profession or is inimical to the best interests of the public or the members of the law society. [above, at p. 1.26.] Disciplinary action is usually restricted to cases of fraud, misappropriation and failure to maintain proper trust accounts; negligence is not a common basis for discipline unless it is gross and habitual. [*Lawyers' Professional Liability* - Second Edition - Grant & Rothstein, pp. 8-10.]

♦ Finally, Mallen and Smith note that ethics rules were not designed to be jury instructions and only fortuitously would be appropriate for that purpose.

Canadian Comment: Jury trials in legal malpractice cases are rare in Canada. According to Mallen and Smith, plaintiffs' counsel in the U.S. attempt to establish that a lawyer broke an ethical rule, in order that the lawyer might be characterized as "unethical" for the purpose of the malpractice litigation.

[3] Are Ethical Standards Relevant in Malpractice Litigation?

Yes they are. As noted above [from Macdonald Estate v. Martin, [1993] 3 S.C.R. 1235] in a slightly different context, Mr. Justice Sopinka stated that "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." On the other hand, it would be most unusual in a malpractice judgment if a Court did not back up its reference to the ethical rules with case law.

For instance, in *Forbes v. Siskind, Cromarty, Ivey and Dowler*, [[2203] O.J. No. 4533 (Ont. S.C.J.); as to Costs [2003] O.J. No. 5210.], Trafford, J. relied on *Demarco v. Ungaro et. al.*[(1979), 21 O.R. (2d) 673 (H.C.J.).]; *Wong v. Thomson, Rogers* [[1994] O.J. No. 1318 (C.A.).]; *Blackburn v. Lapkin et. al.* [(1996), 28 O.R. (3d) 292.] and Rule 4.01 as setting out a barrister's duty of care to his or her client in the prosecution of litigation.

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Peppiatt v. Nicol et al; Soloway, Wright, Victor (Third Parties) [[1998] O.J. No. 3370 (Ont. Ct. Gen. Div.).] is another illustration of a Court's reliance on the *Rules of Professional Conduct* as well as the case law in determining whether the solicitors had breached their professional duty.

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[4] Does the Fact that a Solicitor Committed no Breach of any Rule of Professional Conduct Mean that there Can be No Liability for Malpractice?

Not necessarily, according to the Court in *Stewart v. Greenspan* [[1997] O.J. No. 2271 (Ont. Ct. Gen. Div.).], Greenspan, a criminal lawyer, acted as counsel for the plaintiff when he was charged with criminal negligence causing death. Over ten years later, Greenspan appeared as host and narrator of a television show which re-enacted the crime and the trial. He did so over the objections of the plaintiff, who did not want the matter re-publicized.

Greenspan relied on the fact that the Ontario *Rules of Professional Conduct* do not prohibit counsel from publicly discussing their cases. MacDonald, J. responded that while the *Law Society Act* gives Convocation the right to make rules regulating lawyers' conduct, Convocation has no right or power to regulate the client's rights. Furthermore, the rules are not an all inclusive code governing lawyers' conduct in every circumstance which may arise in professional life. The Court is left to determine the extent to which Convocation's pronouncements should influence the standard to be applied in judging the lawyer's discretionary conduct and the client's entitlements.

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[5] Disciplinary Committees' Findings – Significance in Subsequent Litigation

Ontario case law holds that where a lawyer is found guilty of professional misconduct, the findings of the Discipline Committee are admissible in a subsequent civil action as *prima facie*

evidence of the misconduct, subject to the lawyer's right to rebut this *prima facie* evidence on the merits.

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[6] Breach of Ethics and Legal Malpractice: Procedural Issues

Sometimes a situation will raise ethical issues, issues concerning the solicitor's duty to the Court, and malpractice issues. Should a Court deal with all of them simultaneously? The Privy Council had this to say in *Harley v. McDonald.* [[2001] Lloyd's Rep PN 584 (P.C.).]

> "Circumstances which involve serious breaches of the practitioner's duty to the court may raise questions about his duty to the client which involve allegations of professional misconduct. They may also raise questions as to whether the practitioner is liable in damages to the client for negligence. But it is not appropriate when considering whether or not to make a costs order [,] for the court to rule upon whether, in addition to a breach of duty to the court, there has been a breach of the rules of professional conduct. Nor is it appropriate for the court in exercising its summary jurisdiction to make a costs order [,] to say whether the client has a cause of action against his barrister or solicitor for negligence. This is a matter which ought to be dealt with in a separate proceeding, in which the issues of fact and law between the client and the practitioner are clearly focused and the practitioner is given a full and fair opportunity to respond to the client's claim."

[7] Staying Disciplinary Actions

A leading Canadian case concerns accountants' malpractice. In *Howe v. Institute of Chartered Accountants of Ontario* [(1994), 21 O.R. (3d) 315 (Gen. Div.); affd C.A.], an accounting firm that was simultaneously defending civil actions and professional misconduct charges with respect to the same facts asked the Court to stay the hearing before the discipline committee pending the final disposition of the civil actions. This request was an application for an order quashing the discipline committee's refusal to stay their process, and requiring the committee to permit the stay. The Divisional Court held that the decision of the discipline committee would not be binding in a subsequent civil action, as the Plaintiffs in the civil actions were not parties to the disciplinary proceedings. However, the Court stated that the findings of the discipline committee would undoubtedly be granted some deference in the civil actions, and might in fact be of considerable persuasive value. Nevertheless, the Court held that to permit the disciplinary hearing to be blocked indefinitely by the existence of a civil action that might not be prosecuted expeditiously, and which might ultimately be settled, would be inconsistent with the public interest in disciplinary proceedings.

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[8] Conclusion

One can now say with confidence that a breach of an ethical code does not, in and of itself, give rise to a cause of action for malpractice. The Rules of Professional Conduct devised by the various provincial law societies and the Canadian Bar Association were designed to provide guidance to lawyers and to provide a structure for regulating conduct through the provincial law societies. They were not designed to be a basis for civil liability. The various provincial legislatures have given the provincial law societies the power to devise rules to regulate the profession in the interest of the profession and the public. Legislatures have not empowered law societies to give or take away causes of action for malpractice. The rules governing the establishment of a disciplinary violation do not coincide with those rules governing proof of civil malpractice actions. The rationale for malpractice litigation is first and foremost compensatory. Damages are not a precondition for disciplinary charges. Rules of Conduct aim to protect the profession and the public as a whole. They are not devised to protect the financial well being of individual members of the public.

Insofar as the Rules of Professional Conduct deal with competence, they do so in a very general manner. They provide little guidance as to whether the standard of care has or has not been met in any particular circumstance. It is necessary to resort to the case law, or to expert opinion, to establish whether or not the standard of care has been met. Many of these rules aim at preventing acts of malpractice, rather than prescribing what is or is not malpractice.

Ethical standards are, however, relevant in a malpractice action. 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. Evidence that a solicitor has breached a rule of professional conduct may be relevant and admissible in a malpractice action, subject to the caveats above.

The findings of a Law Society Discipline Committee concerning professional misconduct are admissible in a malpractice action, and will constitute *prima facie* evidence that the misconduct has taken place. However, the solicitor is free to rebut the findings by calling evidence of his or her own. The findings of the Discipline Committee may have considerable persuasive value in a subsequent malpractice action.

In the right circumstances, a Court may stay disciplinary proceedings pending a civil action. There is considerable reluctance to do so, however.

"One dog; two leashes"

Linton, Tanya, *National Post*, 25 September 2004 p. Sp2

Recently, in Alberta, in what appears to be a first in Canada, a Court of Queen's Bench awarded monthly dog-support to a woman caring for her ex's St. Bernard.

"You're probably going to see a few more cases pop up, but I don't do dogs," says lawyer Darlene Madott, a partner with Teplitsky, Colson in Toronto. "The concept of a custody battle over pouchy poo just doesn't cut it." This may sound heartless, but the matrimonial law has scruples. "I never deliver divorce petitions on Christmas Eve in a box of roses – and I won't battle dog custody. When families are breaking up, I make them list the pet as part of the property split."

"Are Lawyers Happy?"

CBA.ORG, 10 December 2004, www.cba.org

As part of its Emerging Professional Issues Initiative, the CBA is seeking to find out if lawyers are happy with their choice of profession, and the reasons for their level of satisfaction or dissatisfaction.

Last spring, 975 law students and lawyers responded to an Ipsos-Reid on-line survey commissioned by the Canadian Bar Association. They were asked about their motivations for becoming lawyers, their level of satisfaction with their choice of career, and what being a lawyer means to them.

The survey found a significant gap between expectations about the practice of law and the reality. To find out why, read an interview with Darrell Bricker, President, Ipsos-Reid Public Affairs.

This is an interview with Darrell Bricker, President, Ipsos-Reid Public Affairs, about the results of a survey conducted among 975 law students and lawyers in spring 2004 for the Canadian Bar Association.

The on-line survey sought out four distinct cohorts. Of those who responded:

17% were students
34% were lawyers who had been practicing for 2 years
32% were lawyers who had been practicing for 7-8 years, and
17% were lawyers who had been practicing for 15 years.

Are lawyers happy?

DB: That depends on what groups of lawyers you are talking to. The longer they are in the profession, the happier they are. Initially, in school they are pretty happy but in the period between

when they leave school and when they have been in practice for a few years there are lots of trials and tribulations.

What are the trials and tribulations?

DB: It seems that lawyers go through a period of reflection in their first couple of years in the profession. They are probably wondering 'is this what I want to do for the rest of my life?'

How come they don't know that already?

DB: Two things confront them. First is the realization that what they thought being a lawyer is turns out not to be what being a lawyer is all about. Second is that the first few years out of law school are the toughest. If they get over this period, they get happier. The happiest lawyers are in the prime of their careers.

Do they grow into being happier or do some lawyers change paths and look for something else?

DB: We know from the survey that at the beginning of their careers lawyers go through some serious reflection. A fair number of them leave.

Look at the per cent of lawyers in the survey who said that they had considered leaving the profession. 70%. That's very high. Lawyers continue to think about whether they should leave during their careers but the self-questioning is particularly intense during the first years out of law school.

Why is lawyering not what they thought it would be?

DB: When you take a look at what it is that gives people a rush about being a lawyer, it is a sense of civic responsibility. They have an expansive view of what it is that you can achieve by being lawyer, of what it means to be a lawyer. There's a fairly large emphasis on community service as opposed to making money.

So money isn't an issue?

DB: No, that doesn't rank as a significant contributing factor.

Is this about job stress and work-life balance then?

DB: No, frankly all high-level professionals – doctors, psychiatrists, accountants – are having a hard time with work-life balance. Everyone is experiencing it. For lawyers it is a contributing pressure but the civic responsibility element is clearly there.

Being a lawyer isn't a job to people who are getting into law school. It is a calling. Does the reality satisfy the calling? What the survey showed is that for a significant number of people it doesn't.

Why?

DB: You find this in a lot of professions in which the process of getting into the profession has many obvious and immediate rewards. Students write tests. Get good marks. They get into law school. Write tests. Get good marks. They move on to the next stage. Write tests. Become lawyers.

But, once you get into the profession the pats on the head are fewer and farther between and moving on to the next stage takes a lot longer.

Success, initially, is externally driven but afterwards it is internally driven. You have to find your own rewards.

What can the legal profession do to respond to this period of adjustment?

DB: What can the legal profession do? Understand it. Change in a meaningful way to reduce the impact of that time.

Change legal education to better reflect what people will encounter? Maybe. Change the process by which people become lawyers? Probably.

After a law firm has invested in bringing in some of these new bright lights, they have to have a strategy for helping them to adjust.

What we are dealing with here is not that straightforward with an obvious practical solution. This is more metaphysical, something that is happening between the ears. It is complex.

Work-life balance issues are easier to respond to. The solutions are obvious. But our survey results are more troubling and complicated. It is much harder to deal with.

What our survey did was to quantify the anecdotal, to provide statistical proof of what people have experienced. We captured a critical period in the lives of lawyers in which they are making decisions about their future. There is a hazing process or conversion process that new lawyers go through. It's not 15 years in. It's two years in. During this period, they are thinking a lot about whether or not they are going to continue their career in law.

The legal profession can no longer ignore this as an issue.

"Pro bono policies entrenched"

Marlin, Beth, *The Financial Post,* 12 January 2005, p. FP12
(in part)

A kinder, gentler sensibility appears to be taking root at the institutional core of many of Canada's most powerful Bay Street law firms.

Known more for their sweatshop culture, in which the number of billable hours can make or break an associate's hopes for a coveted partnership, seven of Toronto's biggest firms have recently announced new policies that not only encourage lawyers to do more free legal work for those in need, but – quite radically – also gives pro bono hours the same credit as chargeable hours in calculating their paycheques, bonuses and partnership points.

And, in the coming year, many more law firms are planning to introduce similar policies to formalize – and put their money where their mouth is – their support for the pro bono legal work that many of their lawyers have been doing on their own time for years on behalf of needy community groups and individuals not otherwise covered by legal aid.

. . . .

Pro bono work also provides important training opportunities for young lawyers, allowing them a chance for courtroom advocacy experience or to work directly with clients, opportunities they might not have as a junior member of a large team working on a corporate file. “It's also a good way to build a sense of team spirit and community within the firm,” says Anne Ristic, assistant managing partner of the Toronto office of Stikeman Elliott LLP.

As well, law firms are keenly aware of the need to ensure such legal work – even if it is provided free of charge – is first submitted to a proper conflicts check and is properly supervised by a senior lawyer so the firm is not exposed to conflict issues or liability for errors and omissions by lawyers who might agree to do freelance pro bono work of a nature with which they are not fully experienced.

“Lawyers, of course, have been doing this kind of work forever, whenever they've felt the need. What they used to do is just not keep track of their time or they did it on the sly and a file never got properly opened,” says Peter Lockie, of Ogilvy Renault. “I don't think that [a concern about liability] is a driver of this, but that would be an issue. The firm would be liable for errors and omissions. It would be embarrassing if we had conflicts that we didn't deal with properly. What we're saying is that pro bono clients are entitled to all the full range of services we offer, all the confidentiality, the same quality of service, and so it needs to be run like a proper file.”

Even with the new policies in place, lawyers with several firms say they are still waiting for some lawyers to officially open files for pro bono legal work they had begun previously.

Still, they say they haven't experienced problems with pro bono matters, nor have they found the new policies that encourage such work have had any negative impact on their bottom line.

“In 15 years of supervising the program, I have not seen a problem with lawyers doing pro bono work to the detriment of their chargeable work,” says Osler's Brian Morgan, who says lawyers at his firm have contributed 2,500 pro bono hours a year for each of the past several years. “We could always do more.”

"Law Society of B.C. task force to examine unbundling of services"

Efron, Sarah, *The Lawyer Weekly*, 25 February 2005, p. 6, 21.
(in part)

The Law Society of B.C. has formed a new task force to look into the "unbundling" of legal services as a way for lawyers to offer limited assistance to clients who are representing themselves in proceedings and transactions.

The creation of the task force came about after the law society's 2004 Access to Justice Committee recommended a study to look into unbundling—also referred to as a limited retainer or discreet task representation—because it saw the potential benefits to members of the public who otherwise couldn't afford legal representation. Rising legal costs and cutbacks to legal aid have led to an increase of *pro se,* or self-represented clients.

"We want to determine whether or not there are ethical issues in the way in which discreet legal services are given to clients," said Bencher and task force chair Grant Taylor. "We want to look at what fields of law this could work in. One of our concerns is if there should be a defined retainer agreement between the solicitor and the client, so that each party understands exactly what task will be performed by each party."

Unbundled legal services have traditionally been used in the area of corporate law, but the concept is now spreading to personal legal services. A lawyer and a client can agree to share the work between them, or the lawyer may offer a specific service only to a client, like divorce consultation or form preparation.

Law societies across the country have very few rules concerning unbundled legal services. It's not prohibited to offer discreet task representation, but most regulations were created without considering it.

Legal experts say that unbundling is already going on in Canada, but there has been little research determining how common it is. The topic has also been widely debated in the U.S.

"The idea is that it allows people who wouldn't otherwise be able to obtain legal services to get some legal assistance," said Will Hornsby, staff council for the American Bar Association's Standing Committee on the Delivery of Legal Services. "Therefore it expands the pool of people who are able to use those services. Whether that is in fact the case is something I don't think has been determined yet."

Various American states have created different rules in regard to unbundled legal services. Some use a checklist to create a contract between the lawyer and the client, so both parties know what their tasks are.

"What we're doing is overcoming the mindset that people are either represented or *pro se*," said Hornsby. "The rules are predicated on the assumption that people are either represented or they're not, and that's really not the case. *Pro se* doesn't necessarily mean that you are entirely without a lawyer. It can mean that you just don't have full representation."

. . . .

However, Steve Coughlan, associate professor as Dalhousie Law School, said he doesn't think many lawyers are interested in offering unbundled services. He's also not convinced that limited services will lead to an overall improvement in the legal situation of lower income clients.

"It could be potentially useful to some clients. For some people, it may mean getting something rather than nothing. But for others, it may mean they're getting something rather than everything," he explained.

"There are also concerns that lawyers won't be able to give people adequate advice if they don't know the whole story; and if they're dealing with a client on an unbundled basis, they're very likely not to know the whole story," he added.

Alison Brewin agrees with that assessment. The program director for West Coast LEAF, who helps self-represented women dealing with difficult family law cases, thinks unbundling legal services can make a difference, but it doesn't replace full representation.

"Providing access to legal services in any way is a good thing," said Brewin, "but for people involved in complex family law cases, what most of them need is full representation and they need it consistently throughout the case. That's what they need, and nothing less."

But Vancouver divorce lawyer Carey Linde says he feels he has an ethical obligation to offer discreet task representation, as well as pro bono legal services, for clients who can't afford full representation.

"We help people get prepared to argue in court themselves," he said. "We help draft motions and help people get through all the bureaucratic procedures. We give them tips on how to argue and tell them what judges think is important and then they go forward and do what they can on their own."

Linde admits that he makes a lot less money on unbundled services because he doesn't charge for the initial consultation and he ends up giving away a lot of advice for free. "Every year, more and more people can't afford the high costs of services and they have to represent themselves, so I just think it's the right thing to do."

However, there are other important practical and business—related issues that must be considered, most importantly, will offering unbundled services *en masse* have an impact on insurance premiums?

Coughlan doesn't think so, although he said it's an issue law societies may want to raise with insurers. He said proponents of unbundling south of the border argue that lawyers using this

method tend to do the same small tasks repeatedly and they develop greater expertise in these areas, reducing the likelihood of something going wrong that could lead to a claim. But opponents of unbundling believe that lawyers may be less informed on the cases they are involved in, which could lead them to make poor decisions that could result in legal actions against them.

The task force will study this issue as well as others related to the unbundling of legal services, including conflicts of interest and communications with opposing counsel. It may then make recommendations for rule revisions.

"Modern Obligations"

Faguy, Yves, *National*, April/May 2005, p. 53

Are you up to date on caselaw and legislation? Check. Got all your professional procedures down pat? Check. Are you ready to practice law competently and ethically? Check – maybe, if you've got basic computer skills. Knowing your way around an operating system is poised to become the latest requirement to be a good lawyer.

Last August, CBA Council adopted numerous revisions to its Code of Professional Conduct. Among them was a revised Chapter 2 of the Code, which addresses competence and quality of service and now carries the following commentary:

> "The lawyer should also develop and maintain a facility with advances in technology in areas in which the lawyer practices, to maintain a level of competence that meets the standard reasonably expected of lawyers in similar practice circumstances." (Commentary 4)

Is this a sign of the times? A number of professions are now debating internally whether to include similar requirements in their own regulations. Critics of such developments warn against imposing burdensome obligations on practitioners just to improve their computer skills.

But no one expects lawyers to become computer wizards, says Alan Stern, a partner with McInnes Cooper in Halifax and Chair of the CBA's Ethics and Professional Issues Committee. "Lawyers shouldn't be forced to acquire computer skills unless they relate to their practice area," he says.

In contrast to the CBA's rules, the Barreau du Quebec has opted for a more voluntary approach. William Dufort, Executive Director of the Barreau's Professional Inspection Committee, has made the computerization of the profession a priority.

During visits to some 800 private practices, inspectors have urged lawyers to make efficient and secure use of information technology. "They will try to convince lawyers of the benefits of proper use of technology, rather than try to impose anything on them," he says.

“Safety handbook for lawyers unveiled”

Schmitz, Cristin, *The Lawyers Weekly*, 26 August 2005, p. 3
(in part)

Responding to the ugly reality that its members face a small, but growing, risk of harm in the line of duty, the Ontario Bar Association has issued practical guidelines to help lawyers “minimize risks to personal safety.”

Unveiled Aug. 13 at the CBA's conference, the "Personal Security Handbook 2005" provides advice on everything from risk assessment, to reacting to various types of threats including e-mail threats and being followed on foot or by car, to improving home and office security.

"Safety is one of the most pressing issues that the profession faces. The threats are real and they continue to escalate," said John McMunagle, chair of the Lawyer Safety Task Force which began work on the project Dec. 5, 2003.

"We want every lawyer ... to have a number to call, and a process to follow, when they fear that they, their families, friends, colleagues and employees are in danger," explained McMunagle, who practices criminal law with Ottawa's McCann Law Offices.

Joseph Bellows, senior Crown counsel with the organized crime unit of British Columbia's Ministry of the Attorney General, said he believes the B.C. legal community is still "rather naive" about security threats they face.

"When you go into the law courts of the British Columbia Supreme Court and Court of Appeal there is no security at all as you walk in the front door," said Bellows, lead Crown at the Air India trial, a case which raised concerns for the prosecution team's safety. "There have been cases in this province of lawyers being severely injured in the courtroom," said Bellows, citing lawyer stabbings in Vancouver and New Westminster. "Of course if someone is absolutely determined to do violence, there may not be anything you can do to prevent that, but every effort should be made to minimize that person’s opportunities,” he said.

Tony Keller, of Keller Morrison and Winny in Waterloo, Ont., echoed his sentiments.Keller was on the spot in 1978 when lawyer Fred Gans was shot at close range in the hall of a Toronto courthouse by the husband of Gans’s female client in a divorce case. "It was a horror show. I was in shock. I knew from that moment on that if a person wanted to kill a lawyer, that it would happen. You can have all the peace bonds in the world but if somebody wants to kill you, they can kill you.”

In the opinion of Keller, a former part-time Crown, family law cases tend to be "much more dangerous" than criminal cases.

The handbook explains how to assess risk levels: minimal (the threat lacks realism, vague, and indirect); medium (more direct, concrete and detailed but no strong indication that the aggressor has taken preparatory steps); and high (direct, specific and plausible, with suggestions that concrete steps have been taken such as the aggressor has a weapon or has the victim under surveillance, *e.g.* "At 10 o'clock tomorrow morning I will shoot my wife's lawyer.")

The OBA handbook advises that "a threat that is assessed as 'high' will almost always require immediate law enforcement intervention."

What does one do to prevent, or react to, disruptive behaviour? Among the safety task force's tips, "prior to arriving at a meeting that could be problematic, ensure that everything which could be used as a projectile (water pitcher, glass/cup etc.) is removed from the room" and "if possible have a table or desk between you and the person being interviewed."

Lawyers who are suffering from criminal harassment should keep in mind that such behaviour "rarely escalates to physical violence," says the handbook.

"Personal safety under threat when acrimony hits home"

McNish, Jacquie, *The Globe and Mail*, 14 September 2005
(in part)

It is no secret that lawyers are often the target of verbal abuse in high-stakes legal face-offs. What is not so well known is that they are coming under attack in their homes.

Bruce Thomas shrugged it off last year when he was verbally threatened during the course of a complex litigation battle involving money owed to a financial institution. The menacing words became horribly real weeks later when the veteran litigator sat in his Toronto home and heard glass breaking in his living room. A few seconds later he found the room engulfed in flames.

Mr. Thomas, a partner with Cassels Brock & Blackwell LLP, wasn't available to comment and a spokesman for Metro Toronto Police declined to discuss the case. Associates of the Cassels lawyer said a police investigation revealed that the fire was ignited by a Molotov cocktail. A year and a half later no arrests have been made in the case.

Harvey Strosberg, a prominent class-action litigator, experienced his own home invasion last month when he woke up to find a swastika had been painted on the driveway of his Windsor home. Mr. Strosberg said he was threatened several years ago with physical harm by legal opponents, but there have been no warnings recently. He said he believes he was singled out in the

anti-Semitic attack because of his faith and prominence as a lawyer. There have been no arrests in the case.

"This is a reminder that we are all vulnerable," Mr. Strosberg said. "It was such an enormous shock. It made me so angry. I have spent my whole life acting for people in the best traditions of the bar and then, to have this happen."

Paul Vesa, a Toronto assistant crown attorney and past president of the Ontario Crown Attorney's Association said the home attacks are not isolated. In the past three years various lawyers and police contacts have advised him about a number of violent acts and threats against lawyers and crown attorney.

Mr. Vesa has worked with the Ontario Bar Association and a number of Ontario police authorities to win more police protection and support for lawyers when they are threatened. For example, he said, he hopes police forces in major cities will have protocols in place to assess threats and, if necessary, quickly move lawyers and their families to secure locations.

Some lawyers, however, counter that increased security and precautions won't thwart criminals.

"There's nothing you can do when a professional wants to take you out," said Joseph Groia, a Toronto securities lawyer and former prosecutor with the Ontario Securities Commission. He should know. When he was prosecuting securities crimes for the OSC in the late 1980s, Mr. Groia received a voice mail from an unidentified person warning him that the next time he started his car would be the last.

He advised the Ontario Provincial Police about the chilling call, but after a brief investigation, during which police were unable to trace the call, Mr. Groia said, "the OPP made it pretty clear to me that there wasn't much anyone could do."

Mr. Groia said his response was to get an unlisted phone number and "I spent a long time being careful about where I parked."

Spokespeople for a number of major law firms said they were not aware of any recent incidents of violence against lawyers, and they have no plans to increase office security. Indeed, most major firms continue to a publish home phone numbers of partners and associates in phone books as a client service.

Mr. Vesa said he is frustrated by such nonchalance.

"We have to take these threats seriously, I fear something horrible will happen before people wake up to the danger," he said.

Horrible things have happened south of the border. In the past decade more than a dozen U.S. lawyers have been killed in their offices by disgruntled clients and legal opponents. In most cases the killers were mentally unstable people who blamed the lawyers for personal or financial misfortunes.

In Canada, fewer than half a dozen lawyers have been killed by clients or legal opponents in the past two decades, and most of those cases related to acrimonious criminal or marital cases. In the past three years, Mr. Vesa said, he is aware of 15 Ontario crown attorneys that received what he called "serious personal threats."

What is surprising about the home attacks against Mr. Thomas and Mr. Strosberg is that they involve a corporate lawyer and class action litigator, areas of law that have historically been insulated from violence.

"Animosity and antagonism can be so huge these days in civil actions and people can loose their perspective," Mr. Strosberg said.

"Shared quarters"

Faguy, Yves, *National*, October 2005, Volume 14, No. 7, p. 51

For sole practitioners, the benefits of sharing office space are undeniable. Aside from splitting the high costs of rent, library materials and office equipment, solo lawyers can avoid isolation by bouncing ideas off their office-mates and, of course, gaining those prized referrals.

But for all its convenience, office sharing raises some serious ethical concerns. Clients can be given the wrong impression about the relationship between you and your fellow tenants. And while sharing space is acceptable, sharing information about your clients is not.

In law firms, partners are deemed to have knowledge of their other partners' clients. Lacking this presumption, sole practitioners sharing office space face more onerous measures to protect confidentiality. They can create a risk of public confusion that lawyers involved are affiliated with each other when, in fact, they are independent.

"The sharing of space by sole practitioners is an excellent way to reduce overhead," says Victoria Rees, Director of Professional Responsibility at the Nova Scotia Barristers' Society in Halifax. "But they have to adopt measures to demonstrate that they're in a purely space-sharing arrangement and that they are effectively functioning as separate law firms."

To avoid confusion, Rees recommends that lawyers advise clients in writing of the arrangement and the identity of the other unaffiliated lawyers. Also, a client should be informed of any cases where an unaffiliated lawyer is acting for others with adverse interests. It's also helpful to separately identify the names of each lawyer at the suite entrance.

Beyond the entrance sits the receptionist, another source of ethical hazards. Hired to handle calls for the various tenants, the receptionist must avoid implying the existence of an association among unaffiliated lawyers whenever answering the telephone or greeting visitors.

Shared receptionists must also avoid taking substantive messages and should be briefed - along with all the employees in the arrangement—on professional responsibilities to not reveal client matters. It's wise, says Rees, to ask them to sign confidentiality agreements. "They should also be carefully trained with respect to trust account keeping and filing to avoid mistakes," she adds.

Countless logistical possibilities in office-sharing arrangements threaten client confidentiality, particularly in the common areas. The waiting room, for example, is a breeding ground for confidentiality breaches. Overheard comments on the phone from down the hall, or comments to clients on their way out, should be avoided at all cost. "Lawyers must strictly avoid gossip and indiscreet shop talk," says Rees.

Files and storage space in shared office areas must be considered carefully. Avoid leaving confidential files lying around or in unlocked file cabinets or storage areas within shared office space. Lawyers should also consider the ethical implications of sharing a single fax line, computer networks or printers that could allow sensitive information to reach unauthorized parties.

"The complexity of the arrangements to be put in place will vary depending on the number of sole practitioners, the shared staff and the size of the practice," says Rees. "A clear management office policy which addresses all of these measures should be in place, and clients should be aware of those measures."

In the end, though, it's about being upfront with the client. "Clients should never be misled to believe they may be dealing with a firm instead of a lawyer or firm in a space-sharing arrangement," Rees concludes.

"Credit where it's due"

Macaulay, Ann, *National*, February 2006, Volume 15, No. 1, p. 48
(in part)

The use of credit has become so commonplace in our culture that lawyers might not worry about ethical issues that lurk behind this form of payment. But before you agree to accept payment by credit or debit cards, check with your law society's rules first. The rules do vary across the country.

"Lawyers need to be fully aware of their jurisdiction's trust account regulations and their duty to ensure that in offering this method of payment, they're operating in line with the rules and

regulations of their law society," says Victoria Rees, Director of Professional Responsibility for the Nova Scotia Barristers' Society in Halifax.

In particular, says Rees, the timing of deposits and the handling of charges can be important. In Nova Scotia, if a lawyer deposits a credit card payment to the trust account, he must "make sure that this deposit is occurring within the time frames that are required for deposit of trust funds."

The fees that credit card companies charge can't come out of the trust account—they must come out of the general account. "Lawyers have to make appropriate arrangements to ensure that any charges of the financial institution are not being withdrawn from the trust account," says Rees.

In Newfoundland, "it's okay to take a retainer by credit card or debit card, as long as the credit card is attached to the general account," says Pamela Bursey, Professional Responsibility Administrator for the Law Society of Newfoundland in St. John's. "Therefore, the service charges go into the general account for that transaction. Then the funds are transferred from general into trust within one banking day following receipt."

Over in Ontario, the Law Society of Upper Canada's *Bookkeeping Guide* specifies that "you cannot deposit both retainers and payments into one account, then immediately transfer the funds that do now belong in that account to your other account." In order to accept payment by credit or debit card, therefore, lawyers must arrange to have retainers for future fees and disbursements paid directly into the trust account, while payments for bills to clients are paid directly into the general account.

The Guide adds: "With credit cards, you could use an imprint machine and deposit the vouchers through your deposit book to the appropriate bank account. If you accept both types of payment by debit card, you will have to use two machines, one for your trust account and one for your general account."

And on the west coast, the Law Society of British Columbia's Website stresses that lawyers who plan to accept retainers by credit or debit card "must take some precautions." The separate account "must be designated as a trust account, since according to Law Society Rule 3-51(2), 'Except as permitted under section 62(5) of the Act, a lawyer must deposit all trust funds to a pooled trust account.'

"Having this special account designated as a general account and withdrawing the funds in order to deposit them into a trust account," the LSBC adds, "is not sufficient compliance with the Rules."

Accepting credit or debit cards from clients can be an excellent payment option, but Rees advises lawyers to be careful. Credit card fraud is not uncommon, and lawyers could open themselves up to potential problems "if the credit limit is exceeded or somehow they're not going to get paid.

"It's obviously more secure than a personal cheque," she adds, "but in offering that credit, it's important that lawyers know their clients and are comfortable that this is an effective method of payment."

"What tears may tell"

Keeva, Steven, *ABA Journal*, February 2006, p. 80

I know a lot of lawyers in a lot of cities and towns, but it wasn't until about five years ago that I saw a lawyer cry.

It happened at a meeting in a medium-size Midwestern town, where about 12 local lawyers and a couple of judges had come together to discuss some of the ups and downs of practicing in their part of the world.

One by one, the attendees took their turns, describing the good and the bad, the gratifying and the grating.

But the tone of the gathering changed markedly when the lawyer in question – I'll call him John – took his turn.

Graying and in his mid-50s, John was a litigator, highly regarded in legal circles and in the larger community as well.

Unlike his colleagues at the gathering, he told the group a story – of something that happened during his earliest days in practice.

It concerned a child who had been institutionalized for behavioural problems and after many months was desperate to go home. His parents were ready to have him back, so John was hired to handle the legalities. He did so, he recalled, with a great passion and commitment.

But then he turned inward, as he described the moment when the child was reunited with his parents: "He was so excited, so emotional," John recalled. "He asked me, 'Do you mean I really get to go home?' I told him, 'Yes, that's right,' and he smiled and said, 'You are the greatest lawyer in the whole world.'"

That's when John's voice broke, the tears began to flow, and it became clear to me that despite all his professional plaudits, something was more important – the personal contact and a feeling of having made a clear difference in someone else's life.

Conveying Trust

The fact is, allowing yourself to show genuine emotion in others' presence is to communicate in a special way, one that acknowledges your humanity and opens the door to deeper connections. In John's case, for example, it appeared to have been a way of saying that he trusted his colleagues in the room – something that mattered deeply to him.

Still, a question hangs in the air: Is the ability to mask one's emotions a critical aspect of the lawyer's job description? Of course, but only in certain circumstances. (Trying a case in a courtroom comes to mind.)

Not, for example, if the emotion happens to be anger, which seems to come quite easily to a large sector of the bar for whom more delicate feelings can be challenging.

Too often, lawyers sense there are roles to play that preclude real human-to-human contact with clients. This can be particularly uncomfortable when clients are clearly suffering, as they so often are when they seek a lawyer's help.

But again, what about the emotions that make us feel connected to clients and colleagues? This is crucial, partly because nonlawyers seem to have a sense that lawyers put process above people.

In fact, this complaint appears to be emblematic of a whole range of grievances that describe a profession populated by practitioners who are more concerned with the case – that is, an artificial construct – than the person sitting across the desk.

We think that if we cry, people will think we're unstable and weak. But lawyers need to know there are other lawyers who feel that way too, and they can take solace from a story like John's.

Dashing Assumptions

Personal injury lawyer Rick Halpert of Kalamazoo, Mich., has spent most of his career assuming that his clients want to be in the hands of powerful people, knights on steeds and such – certainly not the kind that cry. But that assumption was dashed one day when he talked to the mother of a child who had recently died in an accident. As she described her son, Halpert found himself taken by how much the boy sounded like his son.

When she began to cry, Halpert found himself crying too, something he had not previously allowed himself to do in such cases because he thought it might imply weakness to the client. But later on, the client told him that his tears made her feel that she had been heard.

From then on, in child death cases, Halpert has allowed himself to do what feels natural – he cries when listening to parents of deceased children.

We live in a culture that militates against our natural capacity to be aware of our feelings. The density of information that ceaselessly bathes and assaults us makes it more challenging than ever to feel what is delicate and evanescent, as is so much that makes life meaningful.

A metaphor I particularly like for describing many practitioners' obsession with thinking like a lawyer comes from Saki Santorelli, executive director of the Center for Mindfulness in Medicine, Healthcare and Society at the University of Massachusetts Medical School. "The linear, discursive mind has come loose from its moorings – its proper place," he has written.

"We have built a boat and mistaken it for the sea. Yet beyond the labels of patient or practitioner [read 'client and lawyer'] we are all in the same boat thirsting for the same living water."

"Why Do So Few Women Reach the Top of Big Law Firms?"

O'Brien, Timothy L., *The New York Times*, 19 March 2006
(in part)

Hundreds of feet above Manhattan, the reception area of Proskauer Rose's headquarters boasts all of the muscular, streamlined ornamentation that symbolizes authority and power in a big city law firm — modern art, contemporary furniture, white marble floors, high ceilings and stunning views. The background music floating about this particular stage set is composed of the steady, reassuring cadences of talented, ambitious lawyers greeting their clients.

Bettian B. Plevan, a 60-year-old specialist in labor and employment law, has spent more than three decades at Proskauer navigating the professional riptides and intellectual cross-currents of firm life on her way to reeling in one of the legal world's most storied and most lucrative prizes: a partnership. Her corner office has evidence of the hard work that has gotten her here: stacks of legal documents sprout like small chimneys on her desk and floor, amid rows of black binders and brown accordion folders.

Compact, sharp-minded and direct, Ms. Plevan occasionally allows a knowing, engaging grin to wrap itself around her sentences as she shares her reasons for pursuing a partnership.

"I decided I wanted to be a partner shortly after I got here—by nature I have a lot of drive, I'm competitive and I have a lot of energy," she says. "For me, being a partner was a way in which my talents and skills could be recognized. And I wanted that recognition."

Ms. Plevan has that recognition. Besides the handsome salary and bragging rights accompanying the grueling hours and emotional juggling that constitute a partnership, she has earned ample plaudits from peers outside Proskauer. According to a small plaque, one among many stacked along her window, other lawyers around the country have voted her one of the "Best Lawyers in America" in each of the last 13 years.

Following in the footsteps of Elihu Root, Charles Evans Hughes, Whitney North Seymour Jr. and Cyrus R. Vance, Ms. Plevan is president of the New York City Bar Association, only the

second woman to hold that position since the organization's founding in 1870. She has a job that makes her happy and reflects her sense of herself. She is an accomplished lawyer. She has arrived.

She also is an anomaly.

Although the nation's law schools for years have been graduating classes that are almost evenly split between men and women, and although firms are absorbing new associates in numbers that largely reflects that balance, something unusual happens to most women after they begin to climb into the upper tiers of law firms. They disappear.

According to the National Association for Law Placement, a trade group that provides career counseling to lawyers and law students, only about 17 percent of the partners at major law firms nationwide were women in 2005, a figure that has risen only slightly since 1995, when about 13 percent of partners were women.

Even those who have made it to the top of their profession say that the data shows that women's legal careers involve distinct, often insurmountable hurdles and that those hurdles remain misunderstood or underexamined.

. . . .

Although women certainly leave firms to become more actively involved in child-rearing, recent detailed studies indicate that female lawyers often feel pushed into that choice and would prefer to maintain their careers and a family if a structure existed that allowed them to do so. Some analysts and many women who practice law say that having children isn't the primary reason most women leave law firms anyhow; most, they say, depart for other careers or for different ways to practice law.

"Supervised Lawyers Report Struggle to Balance Work and Family, Survey Shows"

Chanen, Jill Schachner, *ABA Journal Report,* 2006

It's no secret that law and job satisfaction don't always go hand in hand, but a recent survey shows just how miserable some lawyers really are, especially those newer to the practice.

The reason boils down to work-life balance, according to a survey by the National Association for Law Placement Foundation. The struggle to find that balance is especially pronounced among lawyers in supervised or nonmanagerial positions, the survey found.

More than 70 percent of these lawyers report moderate to major problems handling family and household responsibilities and finding time for leisure activities. Close to half feel high levels

of stress and fatigue. And about two-thirds say they are forced to sacrifice personal fulfillment outside of work in order to advance their careers.

These findings were reported late last year in *In Pursuit of Attorney Work-Life Balance: Best Practices in Management*, a national, cross-profession survey of more than 6,000 lawyers working in law firms, corporate legal departments and government.

Lead researcher Susan Saab Fortney, a law professor at Texas Tech University in Lubbock, says the survey attempted to get a true picture of the work-life balance issues facing lawyers at all levels and in all types of law practice. The survey had a response rate of 9.4 percent for attorneys in managerial positions and 12.3 percent for supervised attorneys.

Fortney says the high levels of discontent uncovered in the survey were consistent with other surveys that both she and NALP have conducted showing not only widespread professional and personal dissatisfaction among lawyers, but also how undesirable the carrot of partnership is to younger lawyers. Those studies show that younger lawyers think that making partner just makes their life worse. "It's akin to a pie-eating contest where the prize is more pie," she says.

. . . .

Still, most of the managing attorneys surveyed showed some level of support for work-life balance initiatives in their workplaces. Indeed, only one-third of those surveyed say that use of these initiatives would hurt a lawyer's chance for long-term professional success, and only 21 percent feel that reduced-hour arrangements harm clients.

If there is a bright spot in the survey results, it's that attorneys working part-time are happier than their peers. In Fortney's survey, the mean level of work-life balance satisfaction for them is higher than any other group. "There is so much discussion of how part-time attorneys struggle in terms of achievement and advancement, so for them to register such high degrees of satisfaction says to me that, despite obstacles, these arrangements can work and that people remain with their employer," Fortney says.

. . . .

Nannes believes that more law firms will offer more flexible work schedule options as the current generation of managerial attorneys is replaced with the next generation, most of whom shared child care and other family obligations with their spouses. "Once you have experienced a problem with a court date or filing and realize that it pales in comparison to missing the carpool at 3 o'clock—once those in leadership roles have experienced that, it conditions them."

"Problematic Perfectionism"

Keeva, Steven, *ABA Journal*, April 2006, p. 80

How do you respond to Gandhi's words? With a deep breath and an "amen," or with a sense of certainty that although he may have been a great man (and an excellent lawyer to boot), he couldn't have possibly hacked law practice today?

You might think that over the years we would have made more progress toward curbing the demon of perfectionism. Perhaps we have—in some professions. But in the legal world, this mindset remains prevalent. In fact, it seems only to have become more pervasive.

Colleges and universities across the country offer information to help students cope with a variety of psychological and behavioural difficulties. The University of Texas, for example, is one of numerous schools that publish booklets on the effects of perfectionism. They describe these costs: depression, performance anxiety, social anxiety, writer's block and extreme compulsiveness. Other sources point to effects such as insomnia, pessimism and sometimes immobilization.

Here, I offer three observers' takes on perfectionism in law:

Pat McHenry Sullivan is an Oakland, Calif., writer who has, over the years, also worked as paralegal and a legal secretary. In all, she has worked for hundreds of lawyers, with some only briefly and with others for rather long stretches. In every instance, she made a point to get to know them at least a little bit (it must have been the writer in her).

Sullivan refers to what she calls "perfectionist dragons."

"It's as if the entire legal world is haunted by two dragons. One breathes fire and warns, 'Hurry up! There's always more you can do!' While the other has an icy, paralyzing breath that whispers snidely, 'Be careful. Everything you do could be wrong.'"

"The best attorneys I know," she says, "have made peace with the dragons by doing their equivalent of standing humbly in front of each one and admitting, 'You're right. There is always something I could do, and anything I could do could be wrong.'"

Of course, developing that approach requires a healthy sense of humility and the realization that as close as you may come to the prize, new obstacles will arise. Matters beyond your control will get in the way, impeding your ability to move forward. Acknowledging what you can—and can't—control is a necessary step in limiting the harmful effects of perfectionism.

Kathy Morris, chief career development officer at Chicago's Gardner Carton & Douglas, has given quite a bit of thought to the effects of perfectionism.

"The quest to be perfect often stops people from jumping in and trying new things—from volunteering for assignments to trying a new practice area to giving talks at their law schools."

But, Morris says, things have changed. "In today's practice, where time is compressed, often clients are not looking for a perfect job." They are looking for a quality job. So reading every single possible case might not be necessary. And it may not be necessary to do everything to the nth power.

"You're taught to be right," Morris says, "and not to say 'I don't know.' But in the real world, it shouldn't be a quest for perfect, but for what's possible."

Morris goes on to say that striving for perfection can be a professional liability. "It holds people back from being creative and innovative, and it just takes an awful lot of time."

"Uncivil law"

Marron, Kevin, *Canadian Lawyer,* May 2006, pp. 17-20
(in part)

In Ontario, The Advocates' Society compiled a 16-page set of guidelines, *Principles of Civility for Advocates*. There were calls for law schools to do a better job of teaching courteous conduct and for law firms to provide better mentoring. Judges and leaders in the legal profession pleaded with their peers to reign in their tempers, hold their tongues and restore the sense of collegiality and dignity that the legal profession has long prided itself on possessing.

Now, three years later, people are beginning to wonder whether anyone was listening. Family court lawyers are still complaining about clients being bullied and berated by opposing counsel. The consensus among litigators is that lawyers generally manage to keep the lid on any proclivity to incivility in open court, but the mask comes off in pre-trial discoveries when the judge isn't watching.

The Barreau du Quebec is the latest law society to raise concerns that incivility may be at the root of an increase in complaints about lawyers from the public. And the saga of the Brampton courthouse is reminding everyone that the issue has not gone away, while suggesting that—as some people have long suspected – even judges are not immune from the plague of incivility.

. . . .

While many members of the legal profession maintain that the *Felderhof* [2003 CarswellOnt 4943] case has had a salutary effect and that civility standards have improved in the past few years, concerns about badly behaved lawyers are still rampant, particularly in big cities where relative anonymity seems to give some people a licence to be rude. Ontario Superior Court of Justice Colin Campbell, who was chair of the Task Force on the Discovery Process in Ontario, notes that lawyers in smaller communities generally get along, while in larger centres "you get the

kind of aggression that can be exacerbated when you don't know the person on the other side and you don't have to appear before the same judge regularly."

David Scott of Borden Ladner Gervais LLP, who appeared for the Crown in the *Felderhof* appeal, says incivility is most commonly encountered today in pre-trial discoveries or arbitration – settings that are not monitored by the judiciary. Part of the problem, he says, is that relatively few trials and "discovery battles" provide aggressively inclined lawyers with their only opportunity for "venting."

"A lot has happened by way of improvement, but because of the adversarial nature of the process civility does not go away just because we talk about it," says Scott. It is something that should concern everyone, he adds, "because, if people are barking at each other, that barking is accompanied by adopted positions like, 'I'm not going to give you this' and that leads to motions and judicial assessments of what's gone on."

"Civility and professionalism tend to move the process along, whereas incivility and unwanted aggression tends to get the process off the rails into side issues which are unproductive. I've never been involved in a hard-fought lawsuit, where there is a lot of incivility, where it wasn't prolonged and made more expensive," Scott adds.

Incivility is so rife and so hard to stamp out that Eugene Meehan, chair of the Supreme Court of Canada practice group at Lang Michener LLP, advises young lawyers to adopt civility as a tactical tool in litigation. "Civility is most effective when you are living and working in an uncivil world," he says. In examinations for discovery, for example, "If you think the other person is being uncivil, it is entirely appropriate to let the record show that and let the record show that you are being civil in response," he suggests, illustrating his point with an anecdote about another Ottawa lawyer, whose standard response to bullying is to tell the opposing lawyer on the record, "Shouting your responses does not give further weight beyond higher noise. My client and I will take a 10-minute break to allow you to cool down."

When lawyers get out of line in his court, Justice Campbell reaches for a copy of The Advocates' Society's *Principles of Civility for Advocates,* which he keeps with his bench book and holds it up for them to see. Usually, he says, "That's all I have to do."

In courtrooms, as in barrooms and hockey rinks, it takes two to make a fight and Justice Campbell says he keeps his eyes open for the instigators, the lawyers who provoke a conflict by acting unreasonably. It often starts with arguments over costs, he says. "You get one side saying, 'We want the sun, the moon and the stars on a substantial indemnity basis.' And they do that in every case. I find it a bit offensive as a judge because they should know that it is only the exceptional cases in which that is going to be done. And this attracts retaliation from the other side, just like the hockey players, and they say, 'Well it should be nothing, because they're lying, cheating and falsifying their records. '"

Courtroom wrangles are often exacerbated, he adds, in situations where lawyers have not had enough experience in court largely because there are fewer trials than there used to be – and have not had the benefit of mentoring, which law firms tend to do less than they used to. "You

don't develop the competence that allows a lot of people to roll with the punches. You don't have many people with a good bank of trial experience to know in terms of expectations what is important and not important," Justice Campbell says, noting that inexperienced lawyers sometimes respond almost in a paranoid way to an argument or a remark that should simply be ignored.

The bottom line on civility, for Justice Campbell, is that it's everybody's business—including judges. "I know that the bar has a legitimate concern in a number of instances about what they regard as incivility from the bench. I have no doubt that occurs from time to time. I'm sure I do things once in a while that on reflection I wouldn't have done," he says.

Joseph Groia's experience has certainly taught him a lesson about incivility. Since the *Felderhof* appeal, he says, "I've been a little bit more careful in how I go about responding to things and I'm much less willing than, perhaps, I was before to take the bait, so to speak."

But he is also aware of the risk of going too far in trying to avoid incivility. "I have been much more guarded in my language, but I am confident in my own mind that I've not been one bit less zealous in my representation of clients."

This concern was encapsulated by Brian Greenspan, of Toronto's Greenspan Humphrey Lavine, who acted with Groia for Felderhof in the appeal hearing. "It would have a chilling effect on the vigour of defence advocacy, if counsel had to parse their language and self-censor each word to ensure that it was perfectly tailored to the occasion and could give no offence," he argued.

A factum submitted on Felderhof's behalf concluded with a quote from the annals of English law suggesting that the much-vaunted tradition of civility in the legal profession has a disreputable kin who also serves the cause of justice.

The quote is from Lord Henry Brougham, speaking in defence of Queen Caroline in the House of Lords in 1820: "An advocate, in the discharge of his duty, knows but one person in all the world and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing that duty he must not regard the alarm, the torments, the destruction which he may bring upon others."

[**Editor's Note:** The Advociate's Society. *Principles of Civility for Advocates* (Toronto: The Advocate's Society). The Advocate's society web address is: www.advsoc.on.ca.]

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3.0 APPLICATIONS OF STANDARDS OF RESPONSIBILITY

3.1 Relationships With Clients – Retainer And Authority

"Confirming Oral Advice In Writing"

LawPRO [Newfoundland and Labrador], January/February 2004, p. 13
(in part)

Revenue Canada reassessed Mr. H by disallowing his deductions of these payments. He objected but ultimately, in 1993, the Tax Court of Canada rejected Mr. H's position.

Mr. H then sued D for the amount of the reassessment alleging that she did not properly look to his interests in the process of reaching a settlement of the matrimonial litigation. Although the amount claimed was relatively modest, LawPRO agreed with D to strenuously defend the matter that after ten years, culminated in a five-day trial.

In a decision released earlier this year [*Hauschildt v. Lewis, Day et al*, 2003 NLSC(TD) 38] Mr. Justice Thompson found no negligence on D's part. D had identified the risk of a tax assessment and adequately apprised her client of the risk. D had done her best to minimize that risk in the course in reaching a comprehensive settlement of all the issues between Mr. and Mrs. H. Justice Thompson further found that the action was in any event statute-barred by the *Law Society Act*.

Notwithstanding D's complete success at trial, D might possibly have avoided being sued and enduring a trial in which credibility was a key issue. The absence of correspondence to H confirming her advice on tax-deductibility of the support payments created a credibility issue that could only be resolved by a judge. H did not recall D advising him on the issue. H relied on the absences of any specific mention of it in D's correspondence to him. Had D done so, H faced with written evidence, might not have attempted to visit the consequences of his being reassessed on D and a claim that cost nearly $55,000 to defend might have been avoided.

Zeleny v. Zeleny

(2004), 69 O.R. (3d) 287, 1 R.F.L. (6th) 455 (Ont. Sup. Ct.), Henderson J., paras. 1; 4-6; 12-13; 17; 20

1 This decision considers the effect of the retainer agreement between the respondent ("wife") and her lawyer on the quantum of costs payable by the applicant ("husband") to the wife.

. . . .

4 The wife retained her lawyer through the C.A.W. Legal Plan ("the Plan"). Pursuant to the Plan, the wife and her lawyer entered into a written Fee Agreement dated November 5, 2002 ("the Fee Agreement") that states, in part, that the lawyer would charge the wife for all legal services rendered "*at an hourly rate of $90 per hour, . . . or actual costs recovered, whichever is greater*".

5 Counsel for the husband submits that because the wife's lawyer has accepted the base rate of $90 per hour for the purpose of calculating the wife's legal fees as between solicitor and client ("solicitor/client costs"), the wife's claim for costs against the husband as between party and party ("party/party costs") should be limited to a maximum of $90 per hour.

6 It is clear that, but for the Fee Agreement, the wife would be entitled to party/party costs based on an hourly rate that is much greater than $90 per hour. Counsel for the wife has requested party/party costs at an hourly rate of $195 per hour, which I find to be an acceptable rate…, subject to my decision about the effect of the Fee Agreement.

. . . .

12 How then does the Fee Agreement in this case affect the quantum of party/party costs to which the wife is otherwise entitled? To answer that question one must start with the legal maxim that the costs of a proceeding are in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid, subject to the provisions of an Act or rules of court. See the *Courts of Justice Act*, R.S.O. 1990, s. 131(1).

13 In exercising that discretion the court must consider the three fundamental purposes of costs as confirmed by the Ontario Court of Appeal at paragraph 22 of the *Fong* decision [*Fong v. Chan* (1999), 181 D.L.R. (4th) 614]:

(i) To indemnify successful litigants for the costs of litigation;

(ii) To encourage settlements; and

(iii) To discourage and sanction inappropriate behaviour by litigants.

. . . .

[Henderson J. addresses (i) above, then writes, as to (ii) above:]

17 In matrimonial actions, the encouragement of settlements is an important principle. The greater the potential party/party costs, the greater the financial risk to an unsuccessful litigant. The greater the financial risk, the greater the likelihood of settlement. If the Fee Agreement limited the wife's party/party costs to a maximum of $90 per hour, then the costs for which the husband was

at risk would also be limited to a maximum of $90 per hour, as opposed to $195 per hour in this case. This interpretation of the Fee Agreement would have the effect of reducing the incentive for the husband to settle these motions.

. . . .

20 In my view, the court should consider the terms of the Fee Agreement on the issue of costs, but those terms are not determinative of the quantum of party/party costs that the wife may recover from the husband. After considering all of the principles set out above, I find that the Fee Agreement in this case should not limit or restrict the wife's claim for party/party costs against the husband. That is, the hourly rate claimed by the wife for party/party costs will not be reduced because of the terms of the Fee Agreement.

"New light shed on joint retainer questions"

Cline, Bev, *Law Times*, 24 October 2005
(in part)

Historically, there have been many discussions as to best practise for lawyers in regard to "joint retainers" as they apply to wills. The recent amendment to Rule 2.04(6) of the Rules of Professional Conduct sheds new light on the issue.

"It's always been an issue how to treat a retainer to prepare wills for spouses," says Hilary Laidlaw of McCarthy Tétrault LLP.

"Although this has generally meant husband and wife, the commentary [to the amended rule] makes it clear that the application extends beyond husband and wife to common-law spouses, including same-sex spouses. Actually, 'partners,' defined in the Substitute Decision Act, would be board enough to theoretically encompass siblings who live together in a close relationship or have a close personal relationship that is of primary importance in both persons' lives."

At issue also is the onus on the lawyer to suggest the client obtain independent legal advice about a joint retainer. This applies especially to those situations in which one of the clients is less sophisticated or more vulnerable than the other, to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

"What the commentary means is that there is an explanation required of the lawyer at the outset," says Toronto-based Laidlaw, whose practice is in trusts and estates. "There needs to be a discussion that clarifies the parameters of the relationship between the lawyer and the partners. The clients must realize that there can't be any confidential caucus between one partner and the lawyer, that it's full and open disclosure between the partners and the lawyer."

Theoretically, down the road if the partners' relationship sours, then the lawyer may not be able to keep the business, she suggests.

"There has been a lot of confusion about spousal retainers and when the retainer actually ends. Is it a discrete retainer or and ongoing relationship? Is it a continuation of the same retainer if one party calls the lawyer and gives new instructions that conflict with the interest of the partner who was party to the initial joint retainer?"

This is becoming an increasingly important issue with the increase in marriage breakdown. The commentary seeks to clarify the situation by signalling that the joint retainer ends with the signing of the will, says Laidlaw.

"Any subsequent request by either party is now treated as a fresh retainer. The lawyer has to say, 'I can't act for you in regard to this new will unless your spouse agrees, unless the marriage is ended, or a partner has died.'"

At the heart of the matter is the way in which the lawyer communicates with the clients, say Laidlaw. Rule 2.04(8) speaks to the lawyer obtaining the partners' consent to act.

"This may sound simple, but if I'm really diligent about informed consent, the clients are exhausted by these discussions before they even start to work through the details of the will.

"I think we've go to be practical and economical about how lawyers address the joint retainer and consent. Most people are intelligent enough to understand the concepts. What I typically do is send the consent for signature at the same time as the draft will."

What the recent commentary makes clear is that what the partners tell you is not confidential, say Dickson.

"Let's say the partners both come in and give you instructions. Then later, one comes back and says, 'I want to leave a bequest to my mistress.' Once you take on a joint retainer, you can't hold any information one partner tells you as confidential. If one wants to change the will, you have to get consent from the other partner."

The commentary has brought the issue of joint retainer and conflict to the forefront, continues Dickson.

"It's always been clear in a real estate deal or business transaction that if you're negotiating a contract, the two parties should have separate representation.

"Strictly speaking, this approach applies in the family situation, too. But is doesn't work in a practical sense, because the partners need to work together to create a cohesive plan to pass assets on to the next generation. Having two lawyers involved would be too confrontational."

Although the commentary does address the question of when the retainer ends, there are other possible considerations, says Dickson.

"Notwithstanding this commentary, it would always be open in a court as to when the retainer ends and when representation is a conflict," she contends. "A lawyer may not be in breach according to the law society, but the 'duty of loyalty' is an open question."

. . . .

3.2 Relationships With Clients – Conflicts Of Duty

3.2.1 Generally

"It's not you, it's us"

Marlin, Beth, *The Financial Post*, 26 January 2005, p. FP12

Some clients of Canada's biggest national law firms – which are increasingly mired in potential conflict-of-interest issues that daily require them to turn away significant commercial clients – may soon find themselves presented with a "Dear John" letter immediately after their retainer matter has been completed and their bill paid.

Many top 1aw firms are strongly considering following the lead of their more aggressive U.S. brethren, who routinely issue end-of-engagement letters to clarify the transfer of current client's status to that of a former client, an important distinction that weighs heavily in the Supreme Court of Canada's seminal Neil judgment of 2002. (In a decision penned by Justice Ian Binnie, the Court concluded a lawyer cannot act for more than one client when providing legal services for one client will prove adverse to the interests of another current client, even if confidential information is not involved and even if the retainers are unrelated.)

"I think what's happened in the States will now come to Canada and that is, law firms, when they finish transactions, will frequently be writing non-retainer letters" says Warren Wilson, a retired partner with the Vancouver office of Borden Ladner Gervais and a past president of the Law Society of British Columbia. "They'll be saying: 'Our retainer is complete. We're finished, terminated. We're no longer acting for you.'"

End-of-engagement letters have been issued in some cases by lawyers at Torys LLP, although the firm does not yet systematically use them because of some "sensitivities" and other issues, says Jim Tory, the Toronto-based chairman of the firm's risk management committee. "They are something that we are making more use of. I'm sure other firms are as well."

Conflict-of-interest issues have risen to the top of the law firm management agenda in recent years with a spate of very public conflicts rulings – all with quite different fact situations – against such powerhouse law firms as Blake Cassels & Graydon LLP, Stikeman Elliott LLP and Miller Thomson.

The Neil ruling and others, coupled with the growing potential for conflicts as law firms grow in size and geographical spread with more lateral movement between firms, along with consolidation of Canadian businesses, have forced law firms to take "a more rigorous approach" to conflict issues, Mr. Tory says. He says some big law firms are currently under-going voluntary

risk management and client intake audits by their insurer, although he would not say whether his own firm was participating in this program.

It is important to document a former client's status through end-of-engagement letters because caselaw and the professional conduct rules that govern conflicts are less restrictive for former clients than current clients, lawyers say. While a lawyer cannot act in an unrelated matter against a current client without their consent, lawyers can act against a former client in a matter unrelated to the one in which they represented them as long as the lawyer does not have any related confidential information from the retainer.

An area of greater complication is whether it is possible for a law firm to represent more than one competing bidder for a project, says Hein Poulus, a partner in the Vancouver office of Strikemans and a member of the firm's national ethics committee.

Big firms face other quandaries when they are asked to represent a client in putting out requests for proposal for a project, without knowing whether any of their other clients might want to bid on it, potentially putting them in a conflict situation well into their retainer.

In other cases, lawyers are asked by a company to bid against other law firms for legal work in a process known as a "beauty contest." If the law firm doesn't get the retainer, however, they may also be conflicted from representing other clients against that company in the project if they received confidential information as part of the bidding process. And, of course, a lawyer cannot represent either client if one of their clients decides to take over another client's business.

"It can be exasperating and frustrating and no lawyer or law firm likes to ever have to turn down a matter but we have to think of the client's interests and put them ahead of our own," says Winn Oughtered, a managing partner for professional issues in the Toronto office of Borden Ladner Gervais. "We don't want to be perceived to be on two sides of something."

However, lawyers are increasingly taking an assertive position to avoid losing work to potential future conflicts of interest in such cases. "What we've been doing most recently is that we say to our clients: "To avoid this type of situation, we think you should put a clause in the request for proposal or the bid for proposal that says: "'Our lawyers are Borden Ladner Gervais and if you respond to this bid, you are consenting to them continuing to act for us and they will not act for you.' I'm paraphrasing, but that's the way we are handling it and it generally works," Mr. Wilson says "The trouble is, occasionally you find a client who picks up a bid proposal and reads that and says: "Well, I don't like this very much. I was going to go to you guys. Are you saying you can't act for me?"

"The most important cost is if you strike the balance between tolerating some measure of conflict and trying to avoid conflict totally – if you strike it quite far in the direction of avoiding potential conflict totally – it will close the door, particularly to highly specialized help, for particularly smaller clients," Mr. Poulus says.

"Just say no [:] The perils of taking on family and friends as clients"

Rogers, Bill, *National*, March 2005, p. 53

"It was the worst kind of malpractice claim," recalls Tana Christianson, Director of Insurance for the Law Society of Manitoba in Winnipeg. "A guy missed a limitation on his dad's car accident. I felt really bad for him. His father was fairly annoyed, and it was beyond the normal annoyance of a client."

Lawyers who act for family and friends do so at their peril. "Based on our experience," says Christianson, "friends and family do not always subscribe to the theory that 'friends do not sue friends.' No, they *will* sue you."

Statistically, it's actually more likely things will go wrong when your client is a friend or family member. One pitfall is what Christianson calls the "casualness" that creeps into the lawyer-client relationship when the client is your brother or your buddy.

So it's best to avoid acting for family and friends. But if you *must* do it, then do it professionally, Christianson advises. Behave as you would toward any client. Don't discuss the matter within earshot of others; make the client come to your office. Open a file. Do a conflicts check. Send the usual letters – terms of retainer, confirming letters, progress reports, etc.

"If you meet with them on the matter," she adds, "make notes to your file. This includes conversations you may have in your living room, or at the football game." Even if you're working for free – which often happens – it does not relieve you of your duties and responsibilities as a professional.

Another hazard, warns Christianson, is a "clouding of judgment: that often occurs when your client is part of your family. It's hard to sort out the conflicts when you're acting for a family member," she says. "You might make some assumptions about family dynamics and who needs independent legal advice.

"It comes up often in the context of closely held corporations, where the shareholders are multigenerational in the same family," she adds. "Your view might be clouded by your family relationship."

If you decide to act for family or friends, and even if you follow normal protocols and treat them like any client, this still doesn't mean they'll treat *you* like a lawyer. Dan Pinnington, Director of PracticePRO in Toronto, points out that "family can and will be more demanding. They'll call you 24 hours a day. You probably won't have a retainer, they're probably going to complain about the bill – in fact, they're probably going to want to pay little or nothing."

Another problem, depending on where you practice, is that your errors & omissions insurance may have exclusions and/or limitations on coverage in the event that you act for family or friends. Some provinces have such restriction, some don't; check with your insurer.

For example, in British Columbia, you will not have coverage "for a claim the payment of which would personally benefit you, your family, or your law firm." So if you act for your father in a personal injury action leading to a settlement, and your dad subsequently develops "settler's remorse" and sues you for making a bad deal, the claim would not be covered because it would directly benefit your father.

"Sometimes it's hard for lawyers to say no," says Pinnington. "They want to help. There's an emotional connection." But saying that tiny little two-letter word to a family member or friend who wants legal help might just be the smartest thing you'll ever do.

Gauthier v. Gauthier

[2005] O.J. No. 976 (Ont. Sup. Ct. J. [Fam. Ct.], M. Z. Charbonneau J., paras. 33-37

¶ 33 I accept the evidence of Mr. Simard that he fully explained the agreement to Mrs Gauthier so that she understood she was waiving on a final basis any claim for a property division and any claim for support from Mr. Gauthier in the future. I find that she understood that even before entering Mr. Simard's office. It must be understood that this was not a complex agreement. There never was a belief on her part that anything else had to be done to complete the agreement. This is why she never called Mr. Simard back when she did not hear from him directly.

¶ 34 By way of another example of her confused testimony, the respondent testified that upon her return home on December 8, 2001, she told the applicant she had signed in order to get him off her back. This would connote telling him the deal is done. However, she later testified that she had told him nothing was really finalized. These two statements are contradictory. The fact is she admits the applicant never bothered her again about the contract.

¶ 35 Mr. Hughes' submission to the effect that the court should set aside the contract on the basis of "non est fatum" arises out of the evidence of Mr. Simard who emphasized the property waiver provisions of the agreement. Mr. Hughes asks the court to conclude that the other provisions were not addressed with Mrs. Gauthier and therefore she never was fully aware of the full effect of the agreement. I reject that contention on two bases. Firstly, I find on the totality of Mr. Simard's evidence that in the time he spent with her, he fully reviewed all the terms of the agreement. Secondly, even if that was not the case, for all of the reasons outlined previously, I find the respondent was fully aware and fully understood that she was waiving any claim for property and support.

¶ 36 The respondent submits that the agreement should be set aside because Mr. Simard was in a conflict of interest situation and was acting at all times in collusion with the applicant in clear breach of his fiduciary duty to the respondent. There is no evidence whatsoever of any type of dishonest conduct by Mr. Simard. He had acted for Mr. Gauthier in the past, but he did not have any outstanding retainer with him when he accepted to give the respondent independent legal advice. The subject matter of his previous retainers with Mr. Gauthier had nothing to do with Mr. Gauthier's matrimonial affairs. Indeed, Mr. Gauthier had retained Mr. Cadieux in his separation from his former wife and had also retained Mr. Cadieux for his family law needs in this case. Mr. Simard was not in a position of conflict.

¶ 37 Even if the respondent was successful in establishing that Mr. Simard provided her with incompetent legal advice, this would not be grounds to set aside the contract in this action. Any remedy would have to be sought against Mr. Simard in an action against Mr. Simard.

"Prohibited Provisions"

Gordon, Leslie A., *ABA Journal,* April 2005, p. 18

Litigators check your form files. If your standard settlement papers include a clause prohibiting opposing counsel from representing future clients with the same claim, you're violating ethics rules.

Typically a defendant's tool, this provision – known as a no-further-representation clause – is popular in class action and mass product-liability settlements. But a little-known ethics rule prohibits lawyers from agreeing, or even offering to agree, to a restriction on an attorney's right to practice law.

Despite the ethical prohibition, Lisa Bernt, a Boston-area employment labour lawyer, has personally seen these provisions in settlement offers. Opposing counsel attempt to include them, she explains, to constrain a lawyer who has "done a tremendous amount of work reviewing documents" and "learned where the bodies are buried."

The advantage, Bernt says, is clear: "The opponent doesn't want to see this again, especially with this counsel, who already is miles ahead of any other lawyer."

To Bernt, a provision restricting her right to handle future cases "smelled bad," so she rejected it. Those two cases still settled, meaning the clause wasn't a deal breaker, she says.

Brent's sense of smell served her well. Indeed, state ethics rules based on Rule 5.6 of the ABA Model Rules of Professional Conduct bar lawyers from participating in such agreements. The rule helps ensure that the best, most experienced counsel are available to clients, according to ABA Formal Opinion 93-371, issued in 1993.

Although public policy favors fair settlements, provisions restricting a lawyer's right to handle the future cases could provide settling parties with rewards that bear less relationship to the merits of claims than to the defendant's desire to essentially "buy-off" plaintiff's counsel.

Practice-restriction provisions also create a potential conflict between the interests of present and future clients – or worse, between the lawyer who wants to handle the similar cases, and the client, who is being offered a favourable settlement – the opinion continues.

"The rules are designed to preserve a client's right to be represented by counsel of choice, including expert counsel who has experience bringing an industry expert to its knees," says Pam Phillips, a San Francisco-based attorney specializing in legal ethics. "The rules also preserve the right of attorneys to practice their profession."

Willful Ignorance

Still, there appears to be a certain willful ignorance of Rule 5.6. Phillips has advised clients against these clauses at least a half-dozen times in the last few years. If settlement provisions like this are discovered, the agreement would probably be deemed unenforceable and a court could report the settling lawyers to the state bar, she says.

Even including a restriction less onerous than a complete prohibition on a lawyer's rights to practice could run contrary to Rule 5.6 if it essentially limits a lawyer's ability to practice. For example, requiring a lawyer to turn over work product or preventing a lawyer from using an expert witness in future cases is generally not allowed. But some nonmaterial restrictions may be permitted in settlement agreements, the rule's commentary states, such as a provision requiring a lawyer to return documents obtained in discovery.

The Rule 5.6 nuances vary by state. In Colorado, for example, the test is whether the agreement would restrain the lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation. And Rule 1-500 of the California Rules of Professional Conduct forbids even offering a practice restriction as part of a settlement.

Regardless of the restrictions, there's always a chance opposing counsel may attempt to get their practice restrictions into a settlement agreement It's not that the lawyers are unethical, says Phillips. More likely, she says, is that they just don't know about the rule.

"Beyond Conflicts of Interest to the Duty of Loyalty [:]
From *Martin v. Gray* to *R. v. Neil"*

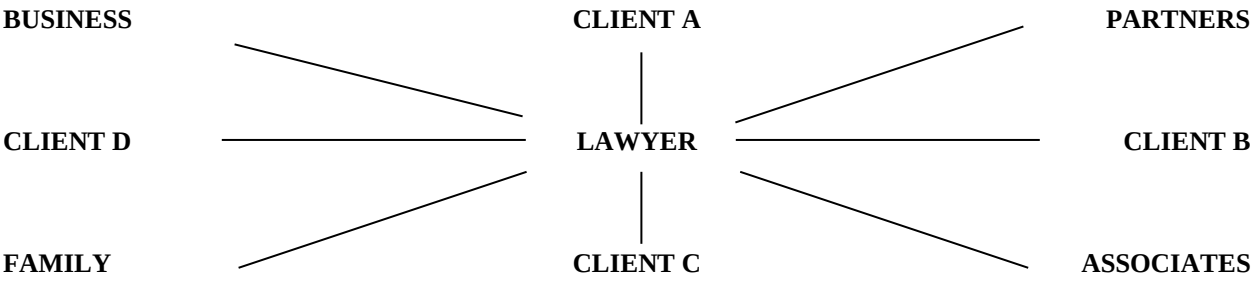
Devlin, Richard F. and Rees, Victoria, *Nova Scotia Barristers Society*, 19 December 2005, *(in part)*

Introduction

Conventional wisdom tells us that conflicts of interest are probably the most common type of ethical challenge that lawyers experience in their everyday practice. Some conflicts are obvious; for example, the obligation not to represent two sides in a dispute. Other conflicts are subtle, nuanced, obscure and complex; for example, what can a lawyer do with physical evidence of a crime? Conflicts arise because lawyers find themselves caught in a complex web of relationships, both professional and personal. These include relationships with: current clients; former clients; other lawyers; partners and associates; co-parties; witnesses; judges; adjudicators; and family members.

One way to visualize this complex set of relationships is to consider the following diagram:

LAWYER'S WEB OF RELATIONSHIPS



These potentially conflicting relationships give rise to a number of concerns:

- Disclosure of confidential information about client A to client B;
- Divided loyalties between two clients, C and D;
- Resolute advocacy: because of loyalty to A, a lawyer may not be a strong enough advocate for C;
- Fiduciary obligations: the client's interests should have priority, but there may be economic self interest on the part of an individual lawyer;
- Client choice: if a lawyer is conflicted, some clients may be denied access to lawyer of their preference;
- If conflict requires a transfer of a file to another lawyer, this may cause a duplication of work and generate delay, disruption and expense;
- Conflicts claims can be used tactically to impose expense on the other side, and deprive the other side of access to effective and experienced lawyers (a.k.a. beauty contests or taint shopping);
- Economic interests of the legal profession generally.

One straightforward solution to these challenges is to go back to first principles: lawyers are fiduciaries, clients are sovereign, justice should not be done but manifestly and undoubtedly be seen to be done, hence a lawyer should avoid even the appearance of impropriety. In short, there is a principle of absolute loyalty. As Harradance J.A. has said in *Ramrakha v Zinner*:

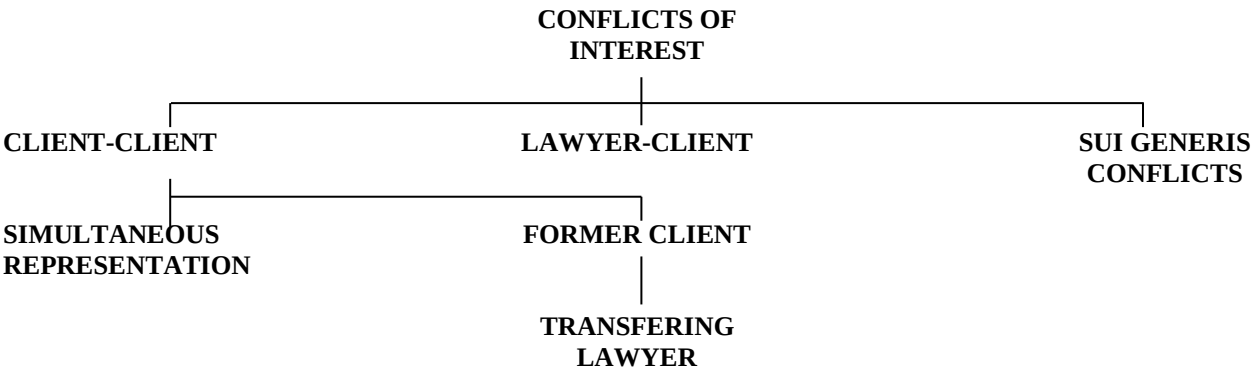
> A solicitor is in a fiduciary relationship with his client and must avoid situations where he has, or potentially may develop a conflict of interest: …the logic behind this is cogent in that a solicitor must be able to provide his client with complete and undivided loyalty, dedication and full disclosure, and good faith all of which may be jeopardized if more than one interest is represented.

…, however, this has not been the practice in Canada, and it is not what most codes of conduct demand.

Overview

Although it may appear surprising, nowhere in any of the codes in Canada is there a foundational principle of absolute loyalty. There is nothing that is the equivalent of Chapter 1 of the Nova Scotia *Handbook*, Chapter 1.03 of the LSUC *Code* and Chapter 1 of the CBA *Code*, all of which create a foundational principle of Integrity. Instead we have a few passing references to loyalty and a series of extensive but piecemeal and adhoc sets of provisions that deal with various aspects of the problems of conflicts of interest.

Traditionally in Canada, we have tended to categorize conflicts into three distinct groupings: client-client, lawyer-client and sui generic conflicts:



Discussion of *sui generis* conflicts is beyond the scope of this essay, but examples include a lawyer acting for a corporation, serving as a prosecutor or fulfilling public office.

The historic focus has been on client-client conflicts. The rule is that simultaneous representation in any dispute is prohibited. But note that this is not absolute; it is permissible if there is informed consent. With respect to subsequent matters, i.e., acting against a past or former client, the basic rule is that there is a prohibition on acting the "same or related matter" but, if it is "a fresh and independent matter wholly unrelated" to the first then there is no prohibition. The justification for these expectations for "informed-consent" and "unrelated, fresh and independent matters" is that it is necessary to balance the rights of a former client to confidentiality, the rights of a new client to a lawyer of her choice, and the economic self interest of law firms.

. . . .

…, it is also important to mention, albeit briefly, the other part of our tree chart, i.e., lawyer-client conflicts. Once again, there are a series of prohibitions: on business transactions; gifts; loans; and standing bail. But yet again there are exceptions: business transactions are deemed legitimate if there is informed consent; and gifts are acceptable if independent legal advice has been given. Such exceptions represent a tempering of the idea of absolute loyalty.

Dobbin v. Acrohelipro Global Services Inc.

[2005] N.J. No. 124 (QL) (N.L.S.C. C.A.),
Welsh J.A. (for the Court), Cameron and Roberts JJ.A., paras. 32-48

¶ 32 The analysis of the law relating to conflict of interest begins with MacDonald Estate v. Martin, supra. Sopinka J., speaking for the majority, first set out the underlying policy considerations. He said, at page 1243:

> In resolving this issue, the Court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession.

¶ 33 Sopinka J. went on to emphasize the fundamental importance to the functioning of the judicial system of maintaining public confidence in the legal profession, and in this respect, ensuring that information exchanged between solicitor and client remains confidential. He concluded that the professional codes of ethics governing lawyers, while not binding on the court, provide a statement of public policy that may be of assistance in assessing an alleged conflict of interest.

¶ 34 Sopinka J. then set out, at page 1260, an approach suggesting two questions to be answered in the typical situation:

> (1) 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?

The standard to be applied in considering these questions is the reasonably informed person.

¶ 35 He explained further, at page 1260:

> ... 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.

¶ 36 Sopinka J. went on to deal with the question of confidentiality as well as the sharing of information among solicitors within a law firm, and the effect this has in assessing conflict of interest. This issue is relevant in this case because Mr. Harrington was not personally involved with the work for the Bank regarding the Vector credit facility. Sopinka J. explained, at page 1262:

> ... There is, however, a strong inference that lawyers who work together share confidences. In answering [the second question, regarding the risk that the confidential information will be used to the prejudice of the client], the court should therefore draw the inference [that information has been shared with the solicitor's colleagues], 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 [who received the confidential information from the client] to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence.

¶ 37 Further discussion of this part of the analysis is unnecessary because, in this case, counsel for Mr. Harrington was clear that he was not relying on means used to prevent the exchange of confidential information among solicitors within the firm. Rather, he submitted that conflict of interest did not arise because there was no client or near client relationship involved in this case, and even if there was the necessary relationship, the conflict had been waived. I have dealt with the question of waiver.

¶ 38 In considering whether this case involves a client or near client relationship, and the effect of that determination, I turn, first, to the Law Society of Newfoundland and Labrador Code of Professional Conduct. Commentary 8 of Chapter V of the Code says:

> A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who are involved in or associated with the client in that matter) in the same or any related matter or take a position where the lawyer might be tempted or appear to be tempted to breach the rule relating to confidential information. [emphasis added]

¶ 39 The extension of this rule to "persons who are involved in or associated with the client in that matter" gives breadth to the rule consistent with the mischief against which conflict of interest concerns are directed. That mischief is succinctly stated in *Manville Canada Inc. v. Ladner Downs*

(1993), 100 D.L.R. (4th) 321 (BCCA). Speaking for the Court, McEachern C.J.B.C. said, at page 327:

> It is apparent that the Supreme Court of Canada in MacDonald Estate v. Martin has imposed a very high standard upon the legal profession where there is a risk that confidential information given to a lawyer or his firm may come to the knowledge of an opposing interest.

¶ 40 This principle led to the following comments by Burnyeat J. in *Salico Property Marketing Corp. v. Farris Vaughan Wills & Murphy*, [2005] B.C.J. No. 166, 2005 BCSC 116:

> [38] While Sopinka J. worded the conflict of interest test in terms of confidential information received in the course of a solicitor-client relationship, subsequent cases have expanded the circumstances under which a disqualifying conflict of interest will be found so that a strict solicitor-client relationship is not necessary for a disqualifying conflict of interest to arise. Rather, it is the communication of confidential information in circumstances creating an expectation of privacy or confidentiality.
>
> [39] Accordingly, a person who is not a client of a lawyer may be afforded protection from the possible disclosure of communications by that lawyer if the person conveyed the information in circumstances creating an expectation of privacy [cases cited]. [emphasis added]

¶ 41 A similar approach is found in *UCB Sidac International Ltd. v. Lancaster Packaging Inc. (1993)*, 51 C.P.R. (3d) 449 (Ont. Gen. Div.). After adverting to the broad meaning of client to include "persons who were involved in or associated with [the client] in [the] matter" in the Code of Professional Conduct, and identifying the overriding question to be whether there is a disqualifying conflict of interest, Blair J. commented, at page 452:

> ... In addressing this question, one should look to see whether there is a "previous relationship" not only between the lawyer and the client but also between the lawyer and the "person involved in or associated with" the client in connection with the original matter "which is sufficiently related to the retainer from which it is sought to remove the solicitor" to justify the removal sought.

¶ 42 The appropriate standard to be applied in answering this question is summarized by Blair J., at page 453:

> ... In the interests of ensuring, in the eyes of the reasonably informed member of the public who is possessed of all the facts, "that even an appearance of impropriety should be avoided", the law firm should cease to act in the action.

¶ 43 A similar approach has been applied in the context of the solicitor's duty of loyalty. The duty of loyalty, which focuses on the fiduciary relationship between lawyer and client, goes beyond, but includes, the duty to avoid conflicts of interest. A comprehensive discussion of the duty of loyalty is found in R. v. Neil, supra. While Neil is a criminal case, I see no basis on which to confine the fundamental principles to the criminal context. The underlying rationale applies equally in the civil context. (See, for example, *Drabinsky v. KPMG (1998)*, 41 O.R. (3d) 565 (Gen. Div.), cited with approval in Neil, at paragraph 18.) Binnie J., speaking for the Court in Neil, noted the long history of the duty of loyalty, and said, at paragraph 13:

> The value of an independent bar is diminished unless the lawyer is free from conflicting interests. Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of an adversarial system rests.

¶ 44 Binnie J. went on, at paragraph 18, to describe the following comment of Ground J., in Drabinsky, as unassailable in defining the duty of loyalty of a lawyer to current clients:

> I am of the view that the fiduciary relationship between the client and the professional advisor, either a lawyer or an accountant, imposes duties on the fiduciary beyond the duty not to disclose confidential information. It includes a duty of loyalty and good faith and a duty not to act against the interests of the client. [emphasis added]

¶ 45 Binnie J. then identified three dimensions to the duty of loyalty, in addition to issues of confidentiality:

> [19] . . . (i) the duty to avoid conflicting interests ...
>
> (ii) a duty of commitment to the client's cause (sometimes referred to as "zealous representation") from the time counsel is retained, not just at trial, i.e. ensuring that a divided loyalty does not cause the lawyer to "soft peddle" his or her defence of a client out of concern for another client ...
>
> (iii) a duty of candour with the client on matters relevant to the retainer ... If a conflict emerges, the client should be among the first to hear about it. [emphasis in original]

¶ 46 The rationale underlying the duty of loyalty is further expressed in a decision of **Wilson J.A.** (as she then was), cited by Binnie J., at paragraph 26:

> The underlying premise ... is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith.

¶ 47 In Neil, in finding that the law firm, and one of the solicitors in particular, "put themselves in a position where the duties they undertook to other clients conflicted with the duty of loyalty which they owed to the appellant", Binnie J. said:

> [31] ... I adopt, in this respect, the notion of a "conflict" in s. 121 of the Restatement Third, The Law Governing Lawyers (2000), vol. 2, at pp. 244-45, as a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person".

¶ 48 These cases provide a framework of basic principles within which to consider the alleged conflict of interest in the case now before this Court.

"Duty of Loyalty"

MacNair, M. Deborah, *Conflicts of Interest* (Aurora, ON: Canada Law Book, [1954]) Release No. 1, May 2006, pp. 5A-1 – 5A-36

…. There is now a significant body of jurisprudence on what constitutes a conflict of interest, whether the existence of a conflict of interest disqualifies a lawyer from providing legal services or representing a client and, if so, in what circumstances. Arguably, a large part of a lawyer's understanding of that concept is based on the duty to keep information confidential. Consequently, many of the tests developed by the courts about the existence of a conflict of interest are based on whether or not confidential information has been disclosed or if there is potential for it to be disclosed. Barely a decade after the well-publicized Supreme Court of Canada ruling in *Martin v. Gray,* legal practitioners were faced with a second landmark decision in 2002 by the same court, *R. v. Neil,* in which the duty of loyalty was given a prominent, overarching role. Whether or not one accepts that the *Neil* decision has altered the existing common law, there are two consequences, maybe unintended perhaps, of that decision.

As a general matter, the first impact is the attention that is now paid to the lawyer's duty of loyalty. While in the previous decade, lawyers had focused their efforts on the protection of confidential information from disclosure, often in the context of motions to disqualify, the court in *Neil* concluded that the duty of loyalty is greater than, and extends beyond, the duty to protect confidential information and has now become an additional ground on which to challenge a lawyer's actions. In many respects, the *Neil* case has assumed center stage in litigation for the

disqualification of lawyers along with *Martin v. Gray.* Although the facts of the case were very specific in both cases, the principles gleaned from them have since been used to articulate the greater spirit of the law with respect to a lawyer's duties in any given situation.

Secondly, there is a new concept and a developing body of case law in relation to what are referred to as "business conflicts". These are the conflict of interest issues related to the business interests of a law practice whereby a firm may be limited in taking on new retainers if to do so would run afoul of the duty of loyalty principles articulated in *Neil* in respect of the duty to current clients. Since the conflict of interest issues are about a law firm's ability to take on new clients and to remain competitive in the marketplace, they are aptly referred to as "business conflicts". While unintended, this new development may have opened up a Pandora's Box for the legal profession as lawyers struggle to come to grips with whether or not the practice of law is still a profession or if it has moved completely into the business arena as a full-fledged commercial enterprise. This is particularly true for law firms seeking to remain competitive and who have merged with other law firms or who have established offices in different jurisdictions inside and outside of Canada.

. . . .

The first part of this Chapter is devoted to a review of *Neil*, including a summary of the case and the subsequent court cases that have relied on it or rejected it. In the second part of this Chapter, consideration is given to the concept of "business conflicts" and a recent British Columbia case on the matter, *Strother,* which may be heard by the Supreme Court of Canada in 2006 and which has generated considerable discussion in the legal community.

Neil has perhaps overtaken *Martin v. Gray* as the case most talked about with respect to its impact on conflict of interest awareness among legal practitioners. The case started innocuously enough. However, it has gained some notoriety as much for Mr. Justice Binnie's comment about a "bright line" as for the debate it has inspired afterwards about the extent to which it may or may not have changed the law and the practice and procedure in law firms for conflicts searches. In particular, there remains an ongoing debate about the appropriate test to use in cases involving current clients and when lawyers can act against them. In one respect, the case appears to have introduced a seemingly rigid test which involves crossing a bright line and which is based on a tolerance test for the lawyer's duty, including the duty to avoid conflicting interests. In other respects, the subsequent cases approach the interpretation of the principles in the case as requiring a balancing of interest.

In essence, the *Neil* case was about the breach of a duty to a client when a lawyer encouraged another client to submit evidence of wrongdoing to police in the context of unrelated divorce proceedings about a long-standing client retained by the law firm to represent him in criminal proceedings.

5A:20 BACKGROUND - NEIL

The facts of the *Neil* case are complex and merit some elaboration. The appellant, Mr. Neil, asked for a stay of a criminal conviction on the basis that his lawyers breached their duty of loyalty to him. The duty of loyalty, he alleged, grew out of the law firm's conflict of interest. He maintained that, while his lawyers had a solicitor-client relationship with him, they encouraged information to

be given to the police which then resulted in additional criminal charges against him. The Supreme Court of Canada declined to grant a stay and dismissed Mr. Neil's appeal. In doing so, the court recognized that they were leaving Mr. Neil without a remedy but noted he could have a remedy by complaint to the law society.

Mr. Neil operated a paralegal business in Edmonton for several years with an associate, Helen Lambert. He used the services of the Venkatraman law firm for client referrals in those cases where he did not think he was competent to act as a paralegal. Mr. Lazin, a lawyer, had shared office space and facilities with the Venkatraman firm in 1994. The trial judge concluded he should be considered as a member of the Venkatraman firm as of January 1, 1995. In fact, on May 1, 1995 Mr. Lazin became an employee of the law firm. The status of Mr. Lazin is relevant because the Law Society of Alberta had adopted a new *Code of Professional Conduct,* which became effective on January I, 1995, and which included a broad definition of "firm". In order to reflect the reality of existing practice, the definition of "firm" included lawyers sharing office space and, for purposes of the provisions on conflict of interest and confidentiality, it specified that the lawyers with independent practices were a law firm only for the purposes of those provisions.

In October, 1994 the Law Society of Alberta forwarded complaints about Mr. Neil to the prosecutor's office and a subsequent police investigation resulted in a Criminal Code indictment of 92 counts. These counts were ultimately separated into five indictments. It was alleged by the Crown that the offences occurred mainly in 1994 and 1995. Some of the allegations concerned the fabrication of court documents; others related to mortgage fraud and misappropriation of funds from an estate. Two of the five indictments were before the Supreme Court of Canada and they formed the basis of the conflict of interest concerns. One matter was referred to as the *Doblanko* case; the second, the *Canada Trust* incident. Mr. Neil was also charged with some 40 offences on the basis that he provided legal advice without a licence to practice law, contrary to the Alberta *Legal Profession Act* and under provincial licensing legislation for real estate agents. These other charges were withdrawn in January 2001. Mr. Neil was convicted in the *Doblanko* matter, which was the first matter to go to trial. While sentencing was delayed until the other criminal proceedings continued, the *Canada Trust* matter then went to trial. At the trial, the lawyers in the Venkatraman law firm objected to testifying on the basis of a conflict of interest. A mistrial was declared and Mr. Neil then proceeded to ask for a stay of all proceedings, which the trial judge granted. He framed his arguments as an abuse of process because of the conflicts of interest created by Mr. Lazin's actions. The *Canada Trust* matter did not proceed. The Alberta Court of Appeal overturned the stay, which led to the hearing of the matter by the Supreme Court of Canada. At the Court of Appeal, Crown counsel argued that there was no causal link between Mr. Lazin's actions and the decision by his client, Mr. Doblanko, to go to the police to complain about Mr. Neil. Counsel maintained that anyone else could have also gone to the police. However, the trial judge did conclude that the Doblanko matter only came to the attention of the police as a result of Mr. Lazin's breach of his professional duty to avoid conflicts of interest. Mr. Neil was convicted and sentenced and his appeal to the Supreme Court of Canada on the grounds of unreasonable delay was dismissed on June 30, 2005.

As noted above, there were essentially two matters before the Supreme Court of Canada. It is necessary to briefly review the facts giving rise to an allegation of conflict of interest in the *Canada Trust* matter. The allegations grew out of a joint effort by Ms. Lambert and Mr. Neil to

obtain a mortgage from Canada Trust for a couple who could not obtain financing because of a recent bankruptcy. According to the Crown's theory, having obtained the mortgage in favour of Ms. Lambert, Mr. Neil would then arrange for it to be transferred to the couple. Mr. Neil retained the Venkatraman law firm to act for him in the various criminal proceedings he was facing. Two lawyers from the firm went to see Mr. Neil who was in custody on April 18, 1995. Mr. Lazin joined them briefly although he was representing Ms. Lambert. The trial judge concluded that Mr. Lazin went to the meeting to obtain information favourable for his client Ms. Lambert. The Supreme Court of Canada concluded that, at this time, members of the law firm knew or ought to have known that his associate, Helen Lambert, for whom the firm was also acting in divorce proceedings, would be charged in the *Canada Trust* matter. Mr. Lazin did represent her when she was formally charged subsequently and tried to make a deal for her with the Crown prosecutor whereby she would testify against Mr. Neil if the charges against her were dropped. The Venkatraman law firm did withdraw from its representation of Mr. Neil after the fact because of its retainer with Ms. Lambert.

In another separate matter, referred to as *Doblanko*, it was alleged that Mr. Neil had prepared a false affidavit of service in a divorce action. Mr. Doblanko visited Mr. Lazin in July 1995 while the criminal proceedings against Mr. Neil and Ms. Lambert were ongoing. Mr. Neil had obtained a divorce for Mr. Doblanko's wife years earlier. Mr. Lazin, relying on the suggestion of the trial judge in the divorce action, encouraged Mr. Doblanko to go to the same police dealing with the Neil charges in the *Canada Trust* incident for the purpose of reporting the filing of the false documents. Mr. Lazin consulted the Law Society of Alberta's Practice Advisor and a justice of the Court of Queen's Bench. Both advised that the matter should be reported to police. While Mr. Lazin did not reveal any confidential information he obtained as a result of his meeting with Mr. Neil and other members of the law firm, he did mention that Mr. Neil was facing criminal proceedings. Mr. Neil's situation was widely known in the paralegal and legal community in Edmonton. As a result, Mr. Neil believed this reporting was done to help build the case against him in order to bolster Ms. Lambert's case.

The reasons for the majority in the Supreme Court of Canada were startling in some respects. Apart from dealing with the specific conflict of interest in the case before them, the court took the opportunity to look at the broader professional conduct issues for the legal profession. The defining principle which framed the judgment for the court was the duty of loyalty. The duty of loyalty, opined the court, went beyond the use or misuse of confidential information, although this had played a role in the *Canada Trust* matter when Mr. Lazin had sat in on a meeting with other counsel with Mr. Neil to discuss his defence to criminal charges. Furthermore, this duty could be said to comprise three main elements: the duty to avoid conflicting interests, the duty of commitment to the client's cause and the duty of candour.

The arguments of the Supreme Court of Canada can be broken down as follows. The Crown maintained that this case was about the conflict of interest principles for *former* clients and not *current* clients. This distinction is important because the rules relating to former clients were viewed until then as less problematic and well-established in professional rules of conduct. In essence, law firms could continue to act against a former client in three main situations: 1) with a client's consent; 2) in a fresh and independent matter unrelated to that client's previous retainer and if confidential information was not transferred; and 3) if screens and other appropriate measures

had been put in place to stem the flow of confidential information to the lawyer and within the law firm. In the case of acting against current clients in different matters, the law and the related rules of professional conduct were viewed as less clear. The trial judge found, however, that there was a continuing solicitor client relationship on general legal matters in addition to the advisory services provided to Mr. Neil by the law firm as a result of the criminal proceedings. In fact, the Venkatraman law firm had also argued in the *Canada Trust* matter that there was an ongoing solicitor-client relationship with Mr. Neil. Consequently, the Supreme Court was not prepared to disturb this finding.

The conflict of interest, according to the court, manifested itself in different stages. At one level, the law firm was in a conflict of interest by simultaneously representing Mr. Neil, a longstanding client, and his business associate, Ms. Lambert, in a dispute where their interests were adverse. Mr. Lazin was representing Ms. Lambert in her divorce when he joined the meeting in April, 1995 with Mr. Neil and other members of the Venkatraman firm. The firm did not charge a fee for their services and ultimately Mr. Neil chose other counsel to represent him in the criminal proceedings. It was only subsequently that Mr. Lazin was also retained by Ms. Lambert as defence counsel in her criminal proceedings related to the *Canada Trust* matter. The meeting occurred on April 18, 1995; Ms. Lambert was arrested on June 6, 1995. However, the trial judge concluded it was reasonably foreseeable that Ms. Lambert would be charged as she had been implicated along with Mr. Neil in the *Canada Trust* matter. The criminal proceedings against Ms. Lambert were active until 1996.

A second conflict of interest was identified in the *Doblanko* matter. The Supreme Court concluded that the law firm also breached their duty of loyalty to Mr. Neil by placing themselves in the position of having to submit evidence about the illegal activities of their client in order to regularize a divorce retainer for an unrelated matter between Mr. Doblanko and his former wife. The court rejected arguments that the *Doblanko* and *Canada Trust* matters were unrelated and that Mr. Lazin, as an employee of the law firm, had not misused confidential information in his retainer with Mr. Doblanko. To the contrary, counsel for Mr. Neil argued, there was a link between the two cases as a result of Mr. Lazin's decision to obtain information about Mr. Neil in order to make his defence on behalf of Ms. Lambert. By pitting the interests of one client against the other in the criminal proceedings in the *Canada Trust* matter, Mr. Lazin had betrayed Mr. Neil and breached his duty of loyalty to him. The court noted that, when seeking advice from the Law Society Mr. Lazin had also failed to disclose that Mr. Neil was a client of the law firm where he worked and that he also directed Mr. Doblanko to the same police officer that was investigating charges against Mr. Neil. This supported evidence of a strategy by Mr. Lazin to undermine Mr. Neil's representation. Mr. Justice Binnie describes these actions as "putting the cat among the pigeons" and "contributing to Mr. Neil's downfall".

The policy rationale for the court's reasons is discussed at length. Emphasis was placed by the court on the need for loyalty to a client in order to maintain the integrity of the system of justice and confidence of the public. Beginning with a quotation from a well-known address on the lawyer's duty to a client to the House of Lords by Henry Brougham in the defence of Queen Caroline in a charge of adultery brought by her husband, King George IV, Mr. Justice Binnie then starkly reminded the legal profession that:

> These words are far removed in time and place from the legal world in which the Venkatraman law firm carried on its practice, but the defining principle - the duty of loyalty is - with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained: *MacDonald Estate v. Martin,* [1990] 3 S.C.R. 1235 at pp. 1243 and 1265, and *Tanny v. Gurman,* [1994] R.D.J. 10 (Que. C.A.). Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies: *R. v. McClure,* [2001] I S.C.R. 445, 2001 scc 14, at para. 2; *Smith v. Jones,* [1999] 1 S.C.R.455.

Harkening back to the statements in *Martin v. Gray* on the need for an independent bar, and the importance of the integrity of the legal profession, Justice Binnie left no doubt of the importance of a lawyer's duty to avoid conflicting interests. Given that it had been almost a decade since *Martin v. Gray* had first been heard, perhaps the Supreme Court of Canada seized upon this case as an opportunity to revisit and reinforce the fundamental principles and values upon which the legal profession has been built. It is noteworthy that on this occasion the court had before it a criminal and not a civil matter as was the case in *Martin v. Gray.*

A number of key words surfaced in the judgment: integrity, loyalty, conflicting interests, independence of the bar, fiduciary nature of the solicitor client relationship and fairness. Seizing on this case as an opportunity to remind lawyers of the importance of their role in public service to the public they serve, and the principles that underpin it, has probably led to a fundamental rethinking of the generally accepted principles, however expressed in layman's terms, that a lawyer should neither serve two masters nor wear two hats at one time. In professional responsibility terms, this is the widely accepted rule that a lawyer cannot represent different clients without having regard to conflict of interest considerations and obligations.

These conflict of interest obligations generally break down as follows: a lawyer cannot represent opposing parties with adverse interests in a contentious matter that involves a dispute; a lawyer cannot act for more than one party when there is a conflict of interest or potential conflict of interest unless consent is obtained from all parties, after full disclosure by the lawyer occurs and the lawyer is convinced it is possible to represent the parties effectively; a lawyer cannot act without consent against a client or former client if the lawyer has confidential information that could prejudice the client by taking on the new retainer. The representation in these circumstances drives an inappropriate wedge into the solicitor-client relationship. The lawyer effectively appears to be a turncoat. Up until the *Neil* case, those "circumstances" were narrowly drawn to include the existence of a related matter, whether the relationship involved a current or former client, full disclosure by the lawyer, informed consent by the client, the availability of independent legal advice to the client in their decision to consent or waive the conflict of interest and reasonable belief by the lawyer in their ability to provide effective representation of the different clients.

The court also took into consideration the "domino effect" if the duty of loyalty were to be formulated too narrowly. The duty of loyalty inspires confidence of the public and the client; it forms the cornerstone of the lawyer's duty to be free of conflicting interests; it inspires and supports

other objectives, including mobility of the legal profession, effective representation, which is important to problem-solving in the adversarial system, the client's right to have counsel of choice unburdened by conflicting duties, the active discouragement of tactical attempts to disqualify counsel on the basis of conflict of interest or by using the symbolism of integrity in order to mask what are really vexatious proceedings that inevitably undermine the fairness of the proceedings.

As in *Martin v. Gray,* the court was not unmindful of the impact of the judgment for the legal profession. The court did not ignore the practical consequences for the legal profession of its interpretation in this case and in fact took pains to articulate the policy rationale for its conclusions about the duty of loyalty. Mr. Justice Binnie took the opportunity to refer back to Mr. Justice Sopinka's concerns about the impact on mobility in *Martin v. Gray:*

> Sopinka, J. in *MacDonald Estate, supra,* also mentioned as an objective the "reasonable mobility in the legal profession" (p. 1243). In an era of national firms and a rising turnover of lawyers, especially at the less senior levels, the imposition of exaggerated and unnecessary client loyalty demands, spread across many offices and lawyers who in fact have no knowledge whatsoever of the client or its particular affairs, may promote form at the expense of substance, and tactical advantage instead of legitimate protection. Lawyers are the servants of the system, however, and to the extent their mobility is inhibited by sensible and necessary rules imposed by client protection, it is a price paid for professionalism. Business development strategies have to adapt to legal principles rather than the other way around. Yet it is important to link the duty of loyalty to the policies it is intended to further. An unnecessary expansion of the duty may be inimical to the proper functioning of the legal system as would its attenuation. The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests.

Perhaps best dubbed the "loyalty case", the *Neil* decision creates an interesting dilemma for practising lawyers. Taken broadly, it revises the existing approach to conflict of interest by casting the professional duties of lawyers widely in terms of general principled duties. Taken narrowly, it is a case that is noteworthy because of the criminal law context in which it was considered and it can be distinguished on that basis.

The court noted that the duty of loyalty encompasses the avoidance of conflicts of interest and is not restricted to the use or abuse of confidential information. In civil cases, it was observed, the main issue in resolving the conflict of interest determination is whether the lawyer has misused confidential information provided by a client. Mr. Justice Binnie was careful to note the premises on which the judgment was reached: the misuse of confidential information was limited to the *Canada Trust* matter and was not at issue in the *Doblanko* action; it was not necessary for confidential information to be imputed from one partner to another in the Vakatraman law firm as Mr. Lazin's actions were common to both matters; the conflicts of interest were actual and not apparent.

Having noted that Mr. Lazin was present at the client meeting with Mr. Neil, the court went

beyond the issue of whether or not the importance of the misuse of confidential information to frame the "bright line" test. The test, as formulated by Mr. Justice Binnie for the purposes of *Neil*, is that "a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client - *even if the two mandates are unrelated* - unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other" (emphasis in text).

Aside from the conflict of interest considerations, the court had to grapple with the issue of an appropriate remedy. The court drew a distinction between ongoing and post-conviction matters. In this instance, Mr. Neil was looking for more than a new trial. He wanted a stay of the conviction in *Doblanko* and further proceedings in the *Canada Trust* matter. His arguments were founded on the lack of effective representation contrary to s. 7 and s. 11(d) of the *Canadian Charter of Rights and Freedoms* and abuse of process if further proceedings were continued. Relying on *R. v Graff,* the court concluded that in order to succeed, Mr. Neil must satisfy a two-part test. He must demonstrate the existence of a conflict of interest and he must establish that this conflict of interest affected his lawyer's representation of him adversely. As a result, the appellant was left with relying on the residual category of cases where an abuse of process will be recognized if the prosecution of the matter would upset fundamental notions of justice and call into question the integrity of the administration of justice. The court concluded that Mr. Neil's case did not fall into the residual category and, in doing so, dismissed any notion that the court could intervene on the basis that a lawyer was an officer of the court which could engage scrutiny of state action under the *Charter*. Again in the words of Mr. Justice Binnie, "The appellant's argument that the purity of the waters of the fountain of justice was irredeemably polluted in these cases by the actions of the Venkatraman law firm (to borrow a metaphor from Lord Brougham's era) is very difficult to sustain on the facts.

The court addressed the issue of remedy in some detail. Recognition was given to the existence of remedies when conflict of interest allegations are made. The court confirmed the possibility of complaints to a law society which can lead to discipline; the members of the court also acknowledged the possibility of civil action. Both of these remedies would be independent remedies. For criminal law matters, it was also noted that an accused can make an application to disqualify counsel at trial or on appeal. In denying a remedy based on abuse of process to the appellant for both the *Doblanko* verdict and the *Canada Trust* matter, the court noted that the charges were very serious and that the criminal proceedings had gained some notoriety in the Edmonton community. The protection of the client and the public were therefore very much an issue. With respect to *Doblanko,* there were several considerations for denying a stay: the law firm was not involved in obtaining the false documents as Mr. Doblanko discovered those on his own; the law firm's involvement ceased when Mr. Doblanko reported the false documents to police; the confidential information obtained by Mr. Lazin was unrelated to the *Doblanko* matter; the actions of the law firm in breaching its duty of loyalty did not meet the test of an affront to the justice system as set out in *O'Connor;* the severity of the charges was important. With respect to the *Canada Trust* charges, the law firm did not represent Mr. Neil, the charges involving Ms. Lambert were resolved in 1996, the breach was brief and, after the initial consultation with Mr. Neil, the firm did not represent Mr. Neil.

What conclusions can be drawn from the *Neil* case? As noted earlier, there have been differing interpretations of the *Neil* case since it was decided in 2002. Since this was a criminal proceeding, it is arguable that the case can be limited to, and distinguished on, the unique considerations inherent in these matters. In fact, Mr. Justice Binnie makes specific reference to the fact that it was important that this was a criminal proceeding. It is also arguable that the court was sending a signal to the legal profession that a conflict of interest related to business interests was now a sustainable notion. The court placed great emphasis on the fact that Mr. Lazin was developing his defence strategy for Ms. Lambert on the basis of the information he gleaned from his initial meeting with Mr. Neil and the subsequent information that came to light in the unrelated divorce proceeding for Mr. Doblanko. Arguably, the court was simply signaling to the legal profession that a return to the basic structure and values that form the professional foundation for lawyers was necessary.

Therefore, the decision touches on a wide variety of implications for the legal profession, including internal practices and procedures, the rules relating to dealings with current clients, remedies, and the scope of professional duties for lawyers. It may, however, require some adjustments to traditional thinking in conflict of interest matters. As an example, the concept of what constitutes a retainer has taken on added significance. While firms have a tendency to codify their relationship with a client in a formal written agreement, the court's interpretation of what constitutes a retainer goes beyond the four corners of a written document.

Secondly, the duty of loyalty cannot be viewed as absolute. If taken as such, it could seriously impede the economic interests of firms and overshadow mobility of lawyers across jurisdictional boundaries in providing legal advice. Thirdly, the case emphasizes the need for conflict of interest checks to be an ongoing obligation, not only in the context of a current relationship, but also when a client is characterized as a former client. Fourthly, there is a need to consider what can be described as the "situational" conflict of a lawyer. In this case, Mr. Lazin was placed in a situation where he could take advantage of confidential information provided to his firm by Mr. Neil and further his personal interest in keeping the retainer with Ms. Lambert. It is possible that an examination of whether or not a conflict or a potential conflict exists may be more contextual that previously thought. Indeed, the favourable situation also contributed to Mr. Lazin's ability to develop a strategy for Ms. Lambert by using what the court referred to as a "cut-throat defence" by portraying Mr. Neil in a negative light, thereby favouring Ms. Lambert's ability to obtain a deal on her case with the Crown prosecutor. Fifthly, the case left an opening for those situations not involving a real or actual conflict of interest, particularly in criminal matters, where concern for the public interest stakes are much higher due to the impact of a criminal prosecution on the individual charged with serious offences and the community affected by them. The regulation of paralegals had been a concern for the legal profession for some time? While the case dealt with an actual conflict, there are cases where the appearance of a conflict of interest can be just as damaging. Sixthly, while not an issue in this case, Mr. Justice Binnie does acknowledge two practical difficulties of reducing the risks associated with conflicts of interests in an operational firm setting. In particular, he refers to the difficulty of conducting conflict searches in the modern day office and to the efficacy of Chinese walls to maintain isolation measures for current clients. He notes, for example, that conflict searches are "inefficient". Mr. Justice Binnie also suggests the duty of loyalty is not just about the duty of an individual lawyer; in fact, it is a duty owed by the law firm. These references, however, do underscore the need to use processes

such as conflict searches as but one tool in the determination of whether or not a conflict of interest exists. Mr. Justice Binnie mused *in obiter* as to whether or not Chinese walls used by accountants for current clients are sufficient in the absence of informed consent by the clients but confirms that the legal profession still has a duty beyond the duty not to disclose confidential information.

Lastly, the *Neil* decision may not have mirrored the current practice of lawyers or the rules adopted by law societies in the various codes of professional conduct at the time and arguably helped to bring clarity to the duties of law firms toward current clients. Until that case was decided, law firms may have interpreted their conflict of interest obligations to current and former clients only through the lens of the use or misuse of confidential information. To this end, it was generally accepted by some that firms could not act against a current client in a same or related matter but that a retainer could be accepted in a new, independent matter. It was also accepted by some that the rules relating to acting against a person in a new and unrelated matter was linked to former, as opposed to current clients. At best the practices across the country had been unclear. This varied interpretation had developed because some codes of law societies simply did not expressly address the issue. Firms in some cases were left to develop their own practices based on current business realities. In other cases, the codes of professional conduct were adopted by incorporation of a widely accepted reference to "conflicting interest". In the case of the *CBA Code*, for example, "conflicting interest" is defined in the Guiding Principles of Chapter V, Impartiality and Conflict of Interest Between Clients, as "one that would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to a client or prospective client". A further Guiding Principle is that "conflicting interests include, but are not limited to, the duties and loyalties of the lawyer or partner or professional associate of the lawyer to any other client, whether involved in the particular transaction or not, including the obligation to communicate information". These two Guiding Principles flowed from the generally accepted Rule that a lawyer could not advise or represent both sides of a dispute or act or continue to do so in a matter without consent or where there is, or is likely to be, a conflicting interest.

In the end, it may still be difficult to understand what rules apply in accepting new business until all of the law societies adopt rules to clarify the situation. By playing down the importance of the passing of confidential information to a new client, given the facts unique to *Neil*, and emphasizing a broader duty of loyalty, the Supreme court shifted the focus to the general professional duties of not only the individual lawyer but also of the law firm.

There are other implications that are more far-ranging. As was the case when *Martin v. Gray* was first decided, there is a residual concern that this judgment opens up to some a potential tactical advantage by retaining a number of firms in unrelated matters in order to prevent the firm from further acting against that client in other matters. Moreover, firms may be hesitant to accept retainers from other than long-standing clients with ongoing retainers for fear that new clients could hamper their ability to deal with their existing clients in other matters. Consequently, this may force a realignment of business practices. Conflict searches continue to be important even though it is recognized that there remain difficulties with the efficacy of this tool.

Record-keeping and good records management practices remain crucial for practitioners. It may be equally important for a firm to maintain a records system not only for those clients whose retainer is accepted but also for those retainers a lawyer or law firm turns down. Some firms still

maintain manual systems along with software programs in order to ensure that they have a safety net. Retainer agreements may have to be changed to include express provisions about the role of the lawyer and the law firm, the tenure of the relationship, the requirements for consent and provisions for the commencement and termination of the relationship. As informed consent is an exception to the dilemma outlined in *Neil,* it would also be wise to develop agreements for obtaining consent along with a written rationale outlining the basis on which it is being obtained. This may also necessitate a lawyer writing a letter at the end of a retainer to indicate that the client's status has changed to that of a *former* client. Such a practice may not always be desirable from a public relations point of view but it could help to alleviate concerns about the status of a client for conflict of interest purposes. It is arguable that the lawyer's obligations regarding a relationship with a former client, in light of *Neil,* are possibly less restrictive than the obligations to current and prospective clients. In the case of a former client, the rules seem to remain unchanged and limited to whether the matter is unrelated and if the lawyer has acquired confidential information as a result of the retainer. Lastly, in accordance with the "bright line" rule, firms may want to develop policies outlining the circumstances under which they can fulfill the requirements for reasonable belief that they can represent a client without adversely affecting another client. This may include circumstances such as the ongoing nature of the client relationship and whether it is a call-up for services on a sporadic basis, the length of time for which the client has retained the firm, the expectations of the client, the corporate status of the client such that the client is more flexible and tolerant of new clients, the practice of the firm for isolation and screening measures, if representation of one client will weaken the case for the other and the willingness of a client, and the appropriateness of asking the existing client, to sign a waiver.

There are some points of interest in the case which should be noted. For those who want to make an argument for imposing the duty of loyalty, there are some useful references to the fiduciary nature of the solicitor-client relationship and the role of the lawyer as a professional advisor. The court also looked to other professions and to the English House of Lords for guidance. In rendering its decision, the court referred to the broader rules of the accountant as a professional advisor. Mr. Justice Binnie relied on *Drabinsky v. KPMG* to assert that the advisor-client relationship necessitates more than just a duty not to disclose confidential information. In fact, he maintained, it entails the further duties of loyalty and good faith and a positive duty not to act against the interests of the client. This reference to the duty of accountants was noted again in describing the nature of the duty of loyalty to existing clients in the House of Lords decision, *Bolkiah v. KPMG*. In that decision, the House of Lords drew a distinction between the duties of accountants to former and current clients. In commenting on the duty owed to *current* clients, the House of Lords concluded that the disqualification of an accountant was not linked to the possession of confidential information but that the conflict of interest was one that was an intrinsic part of the situation. This distinction was necessary to maintain, according to the House of Lords, on the basis that neither a fiduciary nor the fiduciary's firm can act both for and against the same client. The House of Lords also felt that the consent of the client would be necessary in order for a firm to act in those circumstances. On the other hand, in the case of former clients, the possession of confidential information was still key to the court's intervention in order to address the conflict of interest of the professional advisor.

An interesting evidentiary issue is the extent to which the court was prepared to rely on sources from other jurisdictions in support of its conclusions. This may have been due in part to

the absence of case law directly on point but also the willingness of the court to take into consideration the issues faced commonly by many professions with similar obligations to the public. As noted above, the House of Lords judgment in *Bolkiah* was cited to support the need to look at the broad duties of professional advisors (in that case, accountants). Also, reference was made to the definition of conflict in the American Law Institute's Restatement Third, *The Law Governing Lawyers,* which introduced the concept of "materially and adversely affected" as a criterion for determining a lawyer's duties in the representation of a current or former client. The concept of "material" was already found in Rule 1.7 of the American Bar Association *Rules of Professional Conduct.28* Rule 1.7 provides that a lawyer cannot represent a client where the representation is a concurrent conflict of interest. A concurrent conflict of interest exists in two situations: 1) if the representation is directly adverse to the interests of another client; or 2) where there is a significant risk that the lawyer's representation of the different client's interests will be "materially limited" by obligations to another client, a former client, a third party or the lawyer's personal interest. Some representations are still permitted if they fall into four categories: 1) the lawyer's reasonable belief in effective representation; 2) no prohibition at law for the representation; 3) the absence of a claim by one client against another in the same litigation or before a tribunal; or 4) each client provides informed written consent.

Reliance is also placed in *Neil* on the role of the fiduciary in support of the broader duty of loyalty and, in particular, the nature of the trust reposed by a client, as the beneficiary, in the lawyer as the fiduciary. The solicitor-client relationship was portrayed as having a fiduciary nature attached to it, thereby incorporating by reference the attributes of the fiduciary of loyalty, trust, dedication, good faith and confidence. These comments suggest that the Supreme Court will not tolerate the compartmentalization of a lawyer's duties one from the other in order to avoid over-reliance on the duty to respect the confidentiality of client information, for example, in preference to another duty. As the solicitor-client relationship is by its nature that of a fiduciary, it is inescapable, the court reasoned, that a lawyer must have a broadly based duty of loyalty.

While not necessary to the decision on the facts of the *Neil* case, Mr. Justice Binnie also referred to the difficulties inherent in obtaining express consent of the client where a lawyer or law firm wants to take on files involving adverse interests for existing clients but in the case of what he describes as "professional litigants". His comments may give some solace to law firms and lawyers who act as legal agents for corporations and state entities. He accepts, therefore, that in "exceptional cases" consent can be inferred but he does not elaborate further as to why he reached this conclusion. In referring to corporate clients, for example, he suggests that they will be predisposed to accepting that law firms may, in fact, act against them and that this is an understanding accepted in business generally. Mr. Justice Binnie comments that there is more give and take in the case of the professional litigant:

> In exceptional cases, consent of the client may be inferred. For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled. Chartered banks and entities that could be described as professional litigants may have a similarly broad-minded attitude where the matters are sufficiently unrelated that there is no danger of confidential information being

abused. These exceptional cases are explained by the notion of informed consent, express or implied.

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5A:30.40 Conclusion

There are some who believe that the greatest impact of the *Neil* decision has been on the larger firms. This argument is made for several reasons. They are most likely to have been involved in mergers with other firms, thereby making the continuity of ongoing client representation procedurally more difficult and challenging, especially in light of court rulings about the weaknesses of establishing ethical walls and taking isolation measures. The mobility of lawyers across boundaries and the movement of lawyers among large law firms make it difficult to maintain and sustain profitable client relationships and to determine when a client relationship begins and ends. Client loyalty is different and law firms are now competing for business on different terms than what would have occurred a year ago. For those who eschew the familiarity of the law firm as a profession in favour of a gentler, kinder era, it is now accepted in the mainstream that law firms are businesses rather than groupings of professional individual lawyers. Law societies have recognized this development by permitting law firms to organize themselves accordingly by using the LLP designation.

Conflict of interest changes are usually the result of case law, not amendments to statutes. They articulate a policy rationale on conflict of interest and they have the inherent jurisdiction to enforce it. This places the law societies, and law associations, in a reactive, rather than proactive mode.

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In many respects, conflict of interest, following *Neil,* has created a catch-22 argument. The conundrum is this. Are the courts driving the law or are they confirming the rules that always existed, but in light of the unique circumstances before them where they were unable to award a specific remedy but wanted to recognize the egregious professional conduct? Did *Neil* introduce new rules or refresh legal memories about existing professional obligations? Is the law on conflict of interest changing or are lawyers better equipped to understand the application of the law since the landmark ruling in *Martin v. Gray?* Is the law catching up with practical realities of modern day law practice? It may be impossible to find easy answers to these questions until the law societies formulate uniform rules on the matter across the country similar to what occurred following *Martin v. Gray.*

The case has had some specific consequences for management practices of law firms. Law practice risk and management practices are changing by necessity with more of a focus on limiting risk in the operational environment. This case has placed at the forefront the need to examine the retainer agreement and to expressly consider when it begins and ends so that a line is drawn between a former and current client relationship. Although it is not clear what the courts will say about the content of these retainer and termination agreements, some law firms are adding clauses that will on paper at least permit them to act against clients in the future. Other additional steps may be necessary. It may be appropriate to distinguish ongoing from single transaction

relationships for this purpose so that obligations with long- standing clients are protected from attempts by some to establish what is known as a "ghost" client relationship to interfere with a law firm's continued representation of a client. Such a relationship arises when a client approaches several law firms with a view to ensuring that the firm cannot represent other clients in a matter as they are conflicted out. Any written agreements will not completely alleviate all conflict of interest problems because the court in *Neil* concluded that the solicitor-client relationship goes beyond the sharing of confidential information and imposed an overarching duty enforceable at law. In other words, while a law firm can attempt to reduce its intentions in writing, including the expectations of the client, this will not override the court's inherent jurisdiction to interfere and impose its own interpretation.

Conflict searches remain an issue. Software programs have been developed with the capability to manage records, contacts and client lists with searchable data bases. However, at best these tools help to identify a potential problem; they do not replace personal knowledge or manual systems completely. They may not be timely measures given that firms practice across the country and in different time zones. These systems are also highly dependent on the quality, timeliness and currency of the information that is entered. Some preventative measures can be taken. Conflict searches should be undertaken before opening a client file, not afterwards, and updated on a regular basis, if necessary, with additional measures taken for archived files. Also, law firms will need to continue to use conflicts and ethics committees for different functions. These include the responsibility to provide advice, to act proactively to locate software, to provide legal education for all staff, including those who are not lawyers, to update practices for legal agent matters and adapt technology to a law firm's needs and to resolve disputes about conflict of interest matters. ….

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Beyond these considerations, there are other ramifications for the Canadian legal profession. While in the past the courts were able to draw distinctions between strategic know-how and thinking and confidential information based on a narrow definition of client information, this characterization may need to change if clients become more vociferous about their role and what they want, to protect all aspects of the solicitor-client relationship. Perhaps consideration will need to be placed on obtaining consent from clients so that law firms can continue to act against current clients and in developing appropriately worded consent documents. The consent will have to be full and informed and preferably in writing to be useful and defensible if challenged in court. As the courts have indicated on several occasions that they do not have to be bound by law society rules, it may be difficult for law societies to put in place adequate rules, practices and safeguards as the courts are prepared to find that they are deficient. Corporate clients may require law firms that act as legal agents to restrict their practice to their needs exclusively so that their corporate knowledge, including business strategies, remains intact and they are able to better manage the risk of inappropriate dissemination of that corporate knowledge. Inevitably, the addition of new clients can engender a lack of trust for existing corporate clients. This potential of lack of trust can grow over time and place new obligations on law firms to develop strategies around their professional obligations for corporate clients that minimize these risks.

As was the case in the years following the decision in *Martin v. Gray,* it is expected that

litigation on discrete issues will continue and not diminish. Motions to disqualify can still be brought for tactical reasons, although the courts try to discourage them. The scope of the duty of loyalty still remains unclear and it may take several years to uncover and flesh out the full implications of *Neil.*

There are issues which remain unresolved, some of which are linked to the way law firms have been structured externally, as a mega film practising across provincial and territorial borders, and some of which relate to the internal ordering and governance of law firms. The practice with respect to former clients still remains unclear in one major respect. Similar to the argument that is posed in many of the cases - when is a client a client for conflict of interest purposes - it may also be imperative to continue to pose the question another way - when is a former client a former client for conflict of interest purposes.

How will lawyers determine who is a former client if they practice in different parts of the country? If a client is a client of a firm but consults them in different matters at different times over a long period, does the retainer continue for conflict of interest purposes for former clients because of the fiduciary nature of a solicitor-client relationship? Can lawyers who practice together in the same firm either in one city or in different parts of the country find themselves running afoul of the duty of loyalty standard by giving different advice to different clients on the same matter due to insufficient internal file control mechanisms? Will issue conflicts, which relate to advancing similar arguments in different forums, assume greater importance now in conflict of interest matters because of the possible adverse implications this type of conflict of interest creates for different clients in the same firm based on a broader duty of loyalty? Law firms may need to reassess how clients organize themselves as business organizations become more complex and, in particular, their representation of corporate entities, including parent and subsidiary companies, in light of the comments by the Supreme Court of Canada about the duty of loyalty.

While in recent years many of the decisions in conflict of interest focused on the individual responsibility of lawyers, this decision shifts the burden back to the law firm, both with respect to how it is organized as a corporate entity and how it remains competitive in the marketplace with other commercial entities while staying true to the values and principles of the legal profession. Many of Mr. Justice Binnie's comments relate to the obligations of the law firm in the modern realities of the solicitor-client relationship. Evidence of this trend is found in a recent decision in British Columbia Court of Appeal, which is discussed in the next section.

5A:40 THE STROTHER CASE

Intense scrutiny has been given to a recent judgment from the British Columbia Court of Appeal in *Strother*. It has resulted in a further review of the implications in *Neil,* as well as business practices regarding conflicts in law firms. As was the case in *Neil,* the decision has generated a lot of interest in the legal profession as to whether or not the case extends or confirms existing law. The size of the judgment, $32 million, and the use of the remedies of disgorgement and accounting, while unusual in conflict of interest cases, has also led to further discussion about the scope of the duty of loyalty to a client, and the appropriate remedies and the limits to liability of a partnership in conflict of interest cases. The Court of Appeal concluded: 1) that the law firm, while not liable directly … [or] vicariously for the profits made by Strother, was liable for the legal fees paid by

Monarch as well as those billed to Sentinel after the conflict of interest crystallized; 2) that Strother must account for all benefits and profits he received or was entitled to receive as a result of creating Sentinel as a new business undertaking and the court imposed a constructive trust; and 3) the action against Mr. Dare, the former employee, could not succeed.

The case has been appealed by the parties - Monarch, Strother, Davis & Company - to the Supreme Court of Canada. Davis & Company is questioning why it must give up the legal fees that were paid and which are traceable to Strother's conflict of interest; Strother is appealing the order to account for and disgorge the profits he earned from Sentinel; Monarch is arguing that Davis & Company should be jointly and severally liable for the full amount earned by Sentinel.

The British Columbia Court of Appeal made two orders in reasons for judgment released separately on January 21, 2005 and July 25, 2005. The court concluded that a lawyer had breached his duty of loyalty to his client and ordered him to account for and disgorge the profits he had received as a result of two conflicts of interest. According to the court, the lawyer not only had a personal conflict of interest but he had a professional conflict of interest between two clients with competing interests as well. The court then ordered the law firm, a partnership, to disgorge profits it earned in legal fees as a result of breaching its duty to a client by acting for a second client.

The facts in *Strother* are complex and detailed. There are three separate streams to consider in the development of the case. The first concerns the relevant facts surrounding the relationship between the plaintiff company Monarch and Davis & Company and its lawyer, Strother. The second relates to the dealings between Strother and Davis & Company. The third is the relationship between Strother and the company he helped to create with a former employee of Monarch, Sentinel.

With respect to the solicitor-client relationship created between the law firm and Monarch, and Strother and Monarch, it was established in the evidence at trial that Monarch Entertainment had been a client of the law firm Davis & Company for several years for general legal advisory work. Monarch dealt with one tax lawyer in particular, Mr. Strother, concerning tax implications for its business of promoting tax-assisted production services. This business had grown in Canada due to the financing of the American motion picture industry in Canada through tax shelters. In essence, the tax mechanisms permitted investors to defer their taxes and shelter their income.

The principal actors in Monarch who are central to the claim are Mr. Knutson and Mr. Dare. The business concept on which Monarch operated had been developed by a Los Angeles attorney in the motion picture industry, Mr. Cheikes. Monarch was owned by Mr. Cheikes and Nova Bancorp Capital Management Ltd., whose main principal was Harry Knutson, a venture capitalist. Mr. Dare was an employee of Monarch, first as the chief operating officer and then as the chief financial operator, the second position being a demotion. Mr. Darc left Monarch at the end of October, 1997. Monarch, as the promoter, had acted as the middleman between the motion picture companies and the investors since 1993. Mr. Strother was the lawyer in Davis & Company who provided advice to Monarch on tax-exempt investment mechanisms on behalf of the firm. Davis & Company had in fact introduced Mr. Cheikes and Mr. Knutson to each other. Mr. Strother resigned from the firm in early 1999.

Davis & Company entered into written retainer agreements in 1996 and 1997. The 1997 agreement contained an exclusivity clause which largely limited Davis & Company to acting for Monarch for production services financing. As the business was highly dependent on the position taken by Revenue Canada (subsequently the Canadian Revenue Agency), and therefore in a precarious position each year, Mr. Strother had a crucial role in obtaining advance tax rulings which Monarch needed to maintain investor confidence. By all accounts the business operated in a limited market of investors, studios and agents for public offerings. Competition grew in 1996 when others entered the market and therefore the financing structure was an important element of the promoter's success. The government announced its intention in November, 1996 to make amendments which would essentially bring an end to the tax shelters. This announcement then led to a series of decisions by Strother and Davis & Company which gave rise to the conflicts of interest issues. Mr. Strother advised Mr. Knutson of the government's announcement and his conclusion that this meant the end to the tax shelter business. Mr. Knutson accepted the advice and Monarch and the other two companies involved in the business stopped their operations at the end of October, 1997.

The events that happened next may have laid the foundation for the law suit by Monarch against Mr. Strother and Davis & Company and it brings into play the third stream, the relationship between Strother and a former employee of Monarch, Mr. Darc. Mr. Strother decided to continue to pursue financing initiatives in the film industry while still employed with Davis & Company. In March, 1998, he asked for an advance tax ruling on behalf of Sentinel Hill**,** a company owned by Mr. Darc, a former employee of Monarch. Mr. Strother did so without a fee in return for sharing in the profits of a share option if the ruling was successful. The tax ruling was issued in October, 1998 and ultimately Sentinel Hill started business operations. He also used the services of a Mr. Bradly Sherman, who had been involved in a competitive company to Monarch. Mr. Strother then joined Mr. Darc at Sentinel as a shareholder. Sentinel evolved into various entities and remained a client of Davis & Company until September, 2001 when further government amendments closed the tax business schemes down. Monarch continued to use the services of Davis & Company for general corporate work, which included the services of Mr. Strother to shut down Monarch and in exploring other business opportunities. Mr. Knutson was unaware of the dealings between Mr. Strother and Sentinel. Neither Mr. Strother nor Davis & Company advised Monarch of the request for an advance tax ruling or of the dealings with Sentinel. Mr. Knutson learned of the advance tax ruling after it was issued, at which point he terminated his relationship with them. Monarch never did fully enter the market again to resume its business.

As Strother was formulating his advice and conducting his personal dealings, there were also dealings within the firm which are significant. The Court of Appeal concluded that the two conflicts of interest crystallized no later than January, 1998, well before Strother's departure from the firm in early January, 1999. This was evident as the result of several steps taken, or not taken or acceded to, by the firm or Mr. Strother. The first significant action in the creation of the personal conflict of interest was the drafting of a contract by Strother in which he agreed to form new corporations and limited partnerships for an advance tax ruling for Sentinel. Secondly, Strother was advising two different clients on a related matter without the knowledge or consent of the first client, Monarch. Monarch did not become aware of the favourable advance tax ruling for Sentinel until early 1999. The evidence also suggests that Strother was not completely honest in his disclosure to his law firm. The law firm was aware of the specific retainer between Strother and

Monarch dated October 8, 1996, which expired in 1997, whereby Strother became the billing partner. Strother did ask for advice from another lawyer in the firm about the status of the retainer agreement and whether it had expired. There was a suggestion that rumours existed about Strother's arrangement with Sentinel so that by August 4, 1998 the firm's managing partner suggested Strother alert the firm's management committee. The court concluded that the memorandum prepared by Strother contained inconsistencies about his arrangements with Sentinel. The management committee chair informed Strother immediately that he could not own an interest in Sentinel. Strother left the law firm as of March 31, 1999 but received money from Sentinel before his employment ended.

The main conclusions with respect to Strother were that: 1) he was in a personal conflict of interest by undertaking a new venture and he had a duty to withdraw unless he had the informed consent of Monarch; 2) Strother was in a professional conflict of interest by advising two clients with competing interests; 3) Strother could have disclosed his interest and asked Monarch to retain another law firm; 4) the written retainer did not define the solicitor-client relationship – Strother had a higher fiduciary duty which was separate and apart from the contractual obligations in the retainer; and 5) Monarch was not required in equity to establish that it had suffered a loss.

With respect to Davis & Company, the Court of Appeal found that Davis & Company did not perpetrate the conflict of interest as it did not have full knowledge of Strother's activities. When informed in late 1998, the managing partner did instruct Strother to cease his involvement. However, the court did observe, in providing a remedy for legal fees, that the law firm should not be able to profit as a result of the conflict of interest.

The court concluded that the duty of loyalty trumped the arguments raised by the defendant Strother and that, in accordance with *Neil,* Strother had crossed the "bright line". It also applied as much to solicitors in a commercial practice as to barristers involved in litigation. He argued that the written retainer had expired and secondly that he had a duty not to disclose the confidential information he obtained from the second client Sentinel. This duty entailed three elements: the duty of candour; the duty to be free of conflicting interests and the duty of commitment to the client's cause. The duty of loyalty was more than the duty to keep information confidential. In establishing a breach, it is not necessary for a plaintiff to prove bad faith or fraud. Consequently, Strother owed a duty of complete candour to Monarch and he breached it when he withheld all information about his relationship with Sentinel from it. Secondly, there was evidence that Strother had contacted the Law Society of British Columbia, who had directed him to Chapter 7 of the *Professional Conduct Handbook.* The law society advisor indicated that, while it was not clear if "matter" included a commercial transaction, as opposed to litigation, because he had asked for the advance ruling, the only party who could complain would be Darc and that consequently he should disclose his situation to him and obtain his consent, which he did.

In terms of the duty to avoid conflicting interests, Strother, according to the court, had entered into client relationship with Sentinel on matter related to his retainer with Monarch. Based on this reasoning, therefore, it was not sufficient for Strother to argue that his relationship with Sentinel was founded on a new idea or that it was highly speculative in nature and dependent on a favourable advance tax ruling. While a lawyer cannot be expected to disclose all possible risks associated with a client's undertaking, the lawyer's duty of care must give way when there is a

conflict of interest, at which point the lawyer is obligated to disclose. A lawyer cannot at that point state that the matter was not within the scope of his retainer, as the conflict of interest taints the matter. Moreover Strother's personal interest in Sentinel could affect his loyalty to Monarch by not pursuing his own interests in preference to those of Monarch. Strother had options - he could have declined to become involved with Darc and once he did accept Darc as a client he should have withdrawn completely and disclosed his dilemma to Monarch. Even if Strother left the firm, according to the court he was obligated to obtain Monarch's consent to continue with Darc and Sentinel. Strother was also aware that his advice to Monarch in 1997 that he could not pursue the tax shelter business any further was incorrect but he chose not to go back to Monarch and instead advanced his personal interest with Sentinel. As a result, he placed himself in the position of being a business competitor of his own client with whom he had had a long-standing relationship. In fact he benefited from the secrecy. It was not relevant that the success of obtaining a favourable advance tax ruling was a possibility. Lastly, he had a duty to act quickly and could not excuse his actions on the basis of developments that are not foreseeable when first starting on a course of action.

The discussion of appropriate remedies is remarkable in this case. The remedies of disgorgement and accounting had not arisen that often in conflict of interest matters. In making their case, Strother and Sentinel argued that there must be a causal connection between the breach of a fiduciary duty and the plaintiff's loss in order for Monarch to succeed. To the contrary, the court noted, the question is whether or not the fiduciary, in this case Strother, has benefited improperly from the conflict of interest. Therefore, Monarch could claim disgorgement of profits which flowed from the breach of the duty of loyalty. "

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5A:40.10 Strother - Follow-up

…, the *Strother* case has attracted a lot of attention in legal circles. If the judgment regarding liability of the firm stands, this could have a significant impact on how law firms do business and the scope of their liability when sued by clients. The professional responsibility issues are also far-ranging. It has been accepted by lawyers that they can advise business competitors within the normal limits imposed by law societies. *Neil* had already introduced the concept of the duty of loyalty and the more than symbolic stature of the solicitor-client relationship in terms of the fiduciary obligations it imposes. The Supreme Court of Canada in *Neil* confirmed that lawyers are professional fiduciaries. It left open, however, for further elaboration the scope of the duty of loyalty owed by them as professional fiduciaries. Remedies in conflict of interest situations now may include accounting and disgorgement of profits and fees against lawyers or law firms, depending on the circumstances and, in the case of the law firm as a partnership, possibly even when the client has not suffered a loss.

The Court of Appeal judgment on Strother's liability only contains a passing reference to *Neil.* Madame Justice Newbury refers to the duty of loyalty by referring to the case of *Ramrakha v. Zinner,* which was quoted with approval in *Neil.* In doing so, she notes that the exchange of confidential information may or may not be present as an element in the duty to avoid conflicts of interest. Therefore, the case does lend support to the general principles governing a lawyer's

conduct but the principles as stated in *Neil* were of minor importance in the determination of the outcome.

When Strother consulted with the advisory service of the Law Society of British Columbia, they referred him to Chapter 7 of the *Professional Conduct Hand Book.* This chapter is devoted to "conflicts of interest between lawyer and client". In the preamble to the principles it is noted that "Generally speaking, a lawyer may act as legal advisor or as business partner, but not both." According to its terms, a lawyer is generally prohibited from: 1) providing legal services to a client *in a matter* where the lawyer, or related parties (which includes a partner and family) has a direct or indirect financial interest and, in the case of the related party where the interest would reasonably be expected to affect the lawyer's professional judgment; and 2) providing legal services for a client with whom the lawyer has a financial interest which would reasonably be expected to affect the lawyer's professional judgment. These provisions should have been sufficient to trigger concerns on the part of Strother's dealings with Sentinel and Darc. Unfortunately, the law society official was unaware of Monarch's interest when the advice was sought, which highlights the obligation on any lawyer to make full disclosure so that the law firm, when relying on the advice, has all of the facts before it so that reasonable assessments can be made about its liability.

The established principles for direct and vicarious liability by lawyers and law firms where they are employed are now up for scrutiny in the Supreme Court of Canada, possibly in the fall of 2006. For law firms, the legal landscape has changed and many have converted to limited liability partnerships, thereby shifting liability more to the partnership. Settlements may be more common in cases where issues in advising businesses are identified. This could change the perspective of the client such as Monarch who is seeking to hold the law firm responsible on the basis of joint and several liability with Strother for the full amount of the profit he earned from the Sentinel venture. It could also place greater emphasis on insurance, how policies are structured and how lawyers protect themselves against risk. Typically clients rely on the particular branding of law firms by their reputation or standing in the law profession in choosing where they take their business. Lawyers used the partnership vehicle as an expression of trust in running their business and to confirm acceptance of joint and several liability. Davis & Company was not an LLP until 2005. The British Columbia Law Society insurance policy also excluded coverage in certain instances, including where the lawyer would have greater than a 10% interest in the venture under review with Sentinel.

The legal principles for conflict of interest have really not been altered in the *Strother* case. Strother was in a personal conflict of interest and the principles surrounding it are not novel. However, the case does raise some practical issues surrounding the duties of lawyers to law firms when these personal interests arise. The Committee reviewing Strother's request accepted his memorandum in which he alerted the firm to his venture. No one questioned the accuracy of the information despite there having been rumours about Sentinel. It is also unclear how conflict searches were conducted and by whom to ensure that safeguards were in place when the new client, Sentinel, was accepted. There is also the question of the scope of such searches and whether they should be expanded to include the scope of the retainer and advice given. The decision does underscore the need for consistency in legal advice, particularly for mega firms where lawyers may practise for the firm but in different parts of the country. Even before the personal interest

became known at the firm, there is the question of the impact on the firm if different lawyers in the firm advised different clients on the same tax matter but without any disclosure to the first client. This could have a significant impact on both clients if they pursue different or similar courses of action in their business as a result of the advice. In the past, most lawyers would focus on litigation, as opposed to strictly commercial matters. In this case, Strother had advised Monarch that there was no hope for the tax shelter business surviving in light of recent tax rulings by the Canada Revenue Agency. Nevertheless, he decided to pursue the issue as a speculative adventure on his own. When consulted, the Law Society did alert Strother to the possibility that "matter" included more than litigation. There is no indication that the conflicts committee had a process in place in the firm so that they would be alerted to this consultation at the time it took place and to the conclusions of the law society. There may also be consequences where law firms choose to diversify so that they become compartments of specialized law form practice areas. This means that information is shared among lawyers less frequently and mechanisms need to address how this happens. If Monarch is successful with its arguments on joint and several liability of Davis & Company for the full amount of the profit earned by Strother, it may establish for those firms that are not limited liability partnerships that the sharing of information among partners does not alter the result for liability. Where there is a limited liability partnership, individual partners will not want to take any steps that would attract liability on the basis of the actions of others or where the sums would be significant financially. Under the limited liability structure, partners cannot easily rely on the partnership structure for relief.

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Another practical consequence of the decision is that law firms may need to rely increasingly on independent legal advice and experts on conflicts of interest matters, not only to provide arm's length advice but to ensure that the advice, which is now specialized in nature, is complete. In *Strother*, the lawyer sought the advice of in-house counsel in the firm to review the exclusivity agreement with Monarch and he concluded it had expired. What counsel did not take into consideration were the overarching fiduciary lawyer obligations that arose at law. This may also be necessitated as the result of informal controls for risk management that will be needed to manage conflicts while facing the prospect of actions for negligence and breach of fiduciary duty, motions for disqualification and loss of client business where proper controls and safety checks are not put in place.

It remains unclear the extent to which screens and other isolation measures remain valid. There is very little evidence currently either about their cost or effectiveness. They are difficult to maintain and enforce. They may do little to sooth the client's concerns about the lawyer's duty of loyalty. In *Neil*, for example, the lawyer who went to see Mr. Neil along with two other members of the firm did not discuss his intentions with them about his purpose for being at the meeting. Evidence indicated that he went to the meeting to be able to meet a "cut-throat" defence for his client, a co-defendant in the criminal proceedings. As well, the exchange of confidential information was not an issue in the determination of the case by the Supreme Court of Canada; rather it rested on the lawyer's judgment about his duties to his client.

Increasingly, lawyers now refer to the concept of "business conflicts". This has been described by one commentator as "one that might not constitute an ethically impermissible conflict

but could anger a client, creating a risk of losing that client's business". This trend of law firms moving more to a business than a model based on a profession may now have come to fruition as a result, in part, or pressures relating to the management of conflicts of interest. This may have the effect of moral suasion in a law firm's decision to decline client business in circumstances where the relevant rules of professional conduct still permit the representation to occur. In other respects, this development may also increase the gap between small, medium and large law firms as large corporate clients may have considerable clout in retaining the larger firms and financial power in retaining them.

Risk management and audit practices will probably be required by insurers more than ever as vigilance by self-regulation comes under increasing scrutiny. In its publication on significant statistics, LAWPRO in Ontario indicated in 2003 that conflicts of interest were the third most common and the second most costly error reported for professional indemnification purposes. Perhaps in foreseeing the situation that arose in *Strother,* the practice note includes the following warning:

> The most claims-prone conflicts arise when lawyers act for more than one person or entity on a single matter, and when lawyers act for a client on a matter where the lawyer has a personal interest other than reasonable professional fees. This personal interest is frequently a direct financial stake in a matter, or a client who is a family member or personal friend.

In a similar vein, LAWPRO cautions lawyers about the need to exercise caution and vigilance when acting for conflicting or competing positions:

> Take for example the situation of lawyer who is acting for two clients who are, and always have been, strangers to one another on matters that have been, and always will be factually separate. Where is the potential for conflict? The lawyer could be representing opposing legal positions or claims that directly or indirectly compete for limited resources. The lawyer's success or failure for one client will establish a precedent or a reduction of available resources that will help or harm the interests of the other client. Thus, the lawyer's success for one client will come at the expense of the other, and the lawyer will have had a conflict of interest in trying to serve both clients. Although this type of conflict of interest occurs most often in litigation cases, it can occur in administrative and commercial law matters where clients are directly or indirectly in competition.

The trend towards business conflicts may also increase the pressure for lawyers to develop business interests with clients, friends or family members, to mix business and family matters as matters within the scope of their legal advisory services or to develop businesses with significant financial implications. The existing law society rules do contain references to outside activities and the limitations placed on lawyers but they may need to be re-examined in light of recent cases such as *Strother*. Where there is a blending of interests because of a lawyer acting for clients in both family and business matters, there is always a risk that the court will find that confidential information has been exchanged in cases involving former clients. In those cases, the burden is on

the lawyer to establish that no confidential information was imparted. It is likely, however, that, if a lawyer or a firm acquires substantial knowledge about the financial affairs of a client through family matters, it will be difficult to prove that confidential information has not been given to the lawyer or law firm. The presumption of sharing confidences may be applied even where the lawyers work in different law firms and they are retained by a lawyer as experts. Some law societies are moving towards a more objective standard for the definition of client. The Law Society of Manitoba's commentary to their definition of client in the *Code of Professional Conduct* is referred to in *Bellan v. Curtis.* The Commentary provides as follows:

> 6.The question of whether a person is to be considered a client of the lawyer when such person is lending money to the lawyer, or buying, selling, making a loan to or investment in, or assuming an obligation in respect of a business, security or property in which the lawyer or an associate of the lawyer has an interest, or in respect of any other transaction, is to be determined having regard to all of the circumstances. A person who is not otherwise a client may be deemed to be a client for purposes of this Rule if such person might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the transaction. In those circumstances the lawyer must consider such person to be a client and will be bound by the same fiduciary obligations that attach to a lawyer in dealings with a client. The onus shall be on the lawyer to establish that such a person was not in fact looking for guidance and advice.

As a result, it is important more than ever for lawyers to ensure that they define the beginning and end of a retainer, not only for determining issues related to the solicitor-client relationship such as the application of solicitor-client privilege, but also for ensuring minimizing risks associated with conflict of interest. Whether or not a client is a past client, current client or prospective client, it is crucial that both the client and the lawyer understand if there is a relationship that attracts rights and obligations for conflict of interest purposes. …

. . . .

Given the attention that the decision in *Neil* now places on the obligations of the law firm, one of the challenges for the law societies and the legal profession will be to look at the extent to which the business of law, and how law firms do business, meshes with the current obligations as set out in codes of professional conduct. In many respects, the existing codes are built on the premise that the law firm has a traditional business structure and is therefore a partnership or sole proprietorship, rather than a business entity that is a limited partnership. Consequently, the codes of professional conduct have been fashioned primarily with the former structure in mind rather than the latter. Indeed, the continuing reference to "matter" as the mechanism by which the review of ethical norms in relation to conflict of interest is triggered may not fit the practice of some law firms with respect to the number of ongoing matters they encounter or the number of clients affected by the matters in which they are involved. When Mr. Strother contacted the Law Society of British Columbia, he was in fact concerned about the definition of "matter" and whether or not it includes commercial transactions. There are some commentators who are critical of the reliance of lawyers on codes of professional conduct in order to formulate ethical responses and they put forward the

thesis that such codes in fact inhibit them in arriving at specific solutions to their problems.

One of the subtleties of the current ethical norms and standards in relation to conflict of interest is that they have built on certain understandings within the legal profession and these understandings may not evolve at the same pace as the changes to how lawyers practice law or do business. These include the role as legal advisor as distinct from that of advocate. By tradition, legal advisory matters may not have been viewed as raising matters that are contentious or adverse to the same extent as those in litigation. Moreover, joint retainers in real estate and family matters have been built of the model of the lawyer as trusted advisor capable of resolving matters between different parties. Law firms still straddle the great divide between the practice of law as a profession and a business despite ongoing change in regard to transfers between law firms, the growth in the size of firms and the pressure to remain competitive and to serve client needs. Quite innocently enough a line may have been drawn between the small and medium firms and the larger mega firms. In this regard, codes may also not meet the needs of those lawyers who are in-house counsel for corporations or government counsel where the governance structure of their clients is built by statute or other methods than what exists for law firms. This leaves openings for judge-made rules with respect to specific transactions which may not be ideal if lawyers need specific guidance that is timely and cost-efficient. There is also the risk that the resolution of business conflicts will operate outside of the ethical norms because of the need to resolve matters at a practical, business level.

[**Editor's Note:** Canadian Bar Association was, on 29 May 2006, granted leave to intervene in the *Strother* appeal in the Supreme Court of Canada.]

McWaters v. Coke

2005 CarswellOnt 989, J. Zuker, 11 March 2005
(*Summary*)

Mother consented to her lawyer husband representing her in application in which she was claiming child support. Respondent's lawyer moved for order removing husband as solicitor of record. Motion granted. Court had to weigh potential for any breach of lawyer's fiduciary obligations to his client and any likely confusion of his personal and professional roles. Relationship created potential that lawyer husband might be called as witness on behalf of mother. Highest standard of ethical conduct was required since client in family law litigation was often particularly vulnerable. Mother's consent was not relevant to proceedings since lawyer's freedom of action and judgment, as officer of court, was subject to other interests, duties and obligations. Lawyer's intimate personal relationship with mother might conflict with his duty to provide objective, disinterested professional advice to her. In circumstances, lawyer had to avoid engaging in any relationship other than that of solicitor-client.

Hildinger v. Carroll

2.R.F.L (6th) 331 (Ont. C.A.), Laskin (for the Court), Cronk, and Armstrong JJ.A., paras. 11-16

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11 Mr. Carroll submits that Ms. Hildinger's counsel, Mr. Vallance, had a conflict of interest and should not have been allowed to conduct the trial for his client. He contends that the conflict compromised his right to a fair trial. We permitted the parties to lead fresh evidence on this issue. Here are the facts.

12 A legal secretary for Mr. Levencrown during part of the time he acted for Mr. Carroll was dismissed by Mr. Levencrown's firm and went to work at Kimmel, Victor, Ages, where Mr. Vallance is a partner. While working for Mr. Levencrown the secretary typed his correspondence to Mr. Vallance and prepared court documents. She took no part in any strategy discussions between Mr. Levencrown and Mr. Carroll. She left Mr. Levencrown's employ in May 2000. She began working for Kimmel, Victor, Ages in October 2000. She worked exclusively for Stephen Victor, another partner in the firm. She did not work for Mr. Vallance.

13 Mr. Carroll nonetheless submits that her employment at Kimmel, Victor, Ages raised a conflict of interest, which should have precluded Mr. Vallance from acting for Ms. Hildinger. I see no merit in this submission.

14 Most conflict of interest cases in this area deal with lawyers changing law firms, not legal secretaries. Still, I accept that in some circumstances a non-professional employee's change of firms could give rise to a disqualifying conflict of interest. However, no such circumstances exist here.

15 The Supreme Court of Canada has approved a straightforward test for determining whether a conflict of interest should disqualify a lawyer or a law firm from acting. The party against whom the allegation of conflict is made must demonstrate that a "reasonably informed person would be satisfied that no use of confidential information would occur." See *MacDonald Estate v. Martin* , [1990] 3 S.C.R. 1235 (S.C.C.) at paras. 44-51 and *Davies, Ward & Beck v. Baker & McKenzie* (1998), 40 O.R. (3d) 257 (Ont. C.A.), at 258-59. Ms. Hildinger and her law firm easily satisfied this test for these reasons:

- The secretary did not work for Mr. Vallance. She worked for another lawyer on a different floor of the firm's offices.

- The secretary gave unchallenged evidence that she was told by her new firm not to discuss the case with Mr. Vallance, she did not discuss the case with him and she did no work for

him on it save for photocopying a single book of authorities, not knowing that it was for this case.

• Mr. Vallance did not have a financial relationship with the secretary. She was employed by the firm's management company. Kimmel, Victor, Ages is a loose association of five separate financial partnerships and economic entities and each lawyer hires his or her own support staff.

• Kimmel, Victor, Ages instituted password protection on Ms. Hildinger's file so the secretary could not gain access to it.

16 In the light of these considerations any reasonably informed member of the public would be satisfied that Mr. Vallance did not use confidential information obtained from Mr. Levencrown's office.

R v. Barsoum

[2004] O.J. No. 1166 (QL), Ont. C. A.,
(Laskin and Rosenberg J.J.A. and Aitken J. (*ad hoc*), paras 1-3)

¶ 1 **THE COURT** (oral endorsement):— The appellant appeals his convictions for fraud and theft on the sole ground that the Crown prosecutor, Mr. George Orsini, was in a conflict of interest because he had previously acted for the appellant on an assault charge. This ground is raised for the first time on appeal. The appellant has filed fresh evidence, which includes affidavits of Mr. Barsoum, Mr. Orsini, Mr. Barsoum's trial counsel and that counsel's legal assistant. We have reviewed that fresh evidence and admit it in order to address the appeal.

¶ 2 When an allegation of conflict of interest is raised for the first time on appeal the party making the allegation bears a more stringent burden. Because the appellate court has the benefit of the trial record, the party making the allegation, here the appellant, must show an actual conflict of interest that prejudiced him during the trial proceedings.

¶ 3 We are not satisfied that the appellant has made out a conflict of interest. The assault charge and the fraud prosecution were entirely independent matters. A lawyer is not precluded from acting against a former client unless during the previous retainer the lawyer obtained confidential information relevant to the subsequent retainer. Having considered the fresh evidence material as a whole we are not persuaded that Mr. Orsini received any relevant confidential information during the time he acted for the appellant on the assault charge, a period of about three weeks.

3.3 Relationships With Clients – Rendering Services

3.3.1 Generally

"Divorce the most expensive event in one's life: survey"

17 July 2004, *The Financial Post*, p. IN4
(in part)

A majority of Canadians who have been through a divorce believe it was the most expensive event of their lives and advise newlyweds to sign pre-nuptial agreements, a new study shows.

Nearly half of respondents in an Investors Group report released yesterday said divorce made their financial situation worse than before. In fact, 35% said they went into debt, 28% sold household items or personal assets, 27% sold or redeemed financial investments and 22% sought financial aid from friends and family.

"In many cases, even with a very fair settlement, your standards of living will be reduced after a divorce. In some cases it may be a radical reduction," said Debbie Ammeter, vice-president of advanced financial planning at Investors Group.

The survey's respondents represent a hefty segment of the Canadian population: about 352,000 couples called it quits between 1998 and 2002, according to a Statistic Canada report.

About 60% of the 160 respondents in the poll, conducted by Decima Research, said divorce is the most expensive event in a person's life, and 16% said the financial impact of a divorce is more difficult than the emotional one.

Another 57% of divorcees said newlyweds should sign pre-nuptial agreements to avoid the financial hardship of separation.

. . . .

Couples seeking divorce should understand their legal rights regarding division of property and custody of children, Ms. Ammeter said. They should also consult a lawyer and financial planner to have a separation agreement planned and assessed.

But Barry Stork, a 51-year-old divorcee in Toronto, said people should be wary of some lawyers who aren't necessarily looking for amicable solutions.

"Some lawyers are there to try to resolve things. . . Other lawyers are there to milk you for all you are worth," he said.

Mr. Stork, who was divorced in 1990, said splitting couples should ask friends and family to recommend an honest lawyer.

"Quebec lawyers have new weapon against fraud with expert graphologist"

Millan, Luis, *The Lawyers Weekly*, 17 December 2004, p. 23
(in part)

When Eric Potvin suspected that the signature penned on the will that lay before him was a forgery, it was nothing more than a hunch. The Montreal lawyer knew he would have to rely on the expertise of a handwriting analyst that could lay bare his suspicions in a case that pitted father against son. At stake was ownership of a home bequeathed by the mother.

Enter René Laflamme, a graphologist who specializes in the analysis of legal documents. Laflamme proceeded to examine using state-of-art equipment the signature on the will and compared it to several samples of the signature of the deceased. There was no doubt about the verdict – the signature on the will was a forgery.

"You see a document and you know the signature has been forged but you really can't tell how," noted Potvin, who represented the son in the matter. "Laflamme tells you why, giving you 12 different reasons. His report was a beautiful piece of work, which I filed as an expert report. It was detailed, so scientific, so well-made. The exhaustiveness of the report really impressed me. The fact that the other party did not even offer a counter-expertise speaks for itself."

Most of the cases Laflamme handles don't wind up before the courts. The weight of the evidence exposed by the panoply of high-tech instruments he used to expose fraudulent acts is so overwhelming that most perpetrators buckle and confess – something appreciated by lawyers who resort to his expertise as clients are spared long-drawn court battles and an expensive legal tabs.

"Access to Justice? Forget it!"

Slayton, Philip, *Canadian Lawyer*, January 2005, p. 12-13

A famous 1973 New Yorker-cartoon has a lawyer saying to his client: "You have a pretty good case, Mr. Pitkin. How much justice can you afford?"

In this country, we are almost all members of the middle class. Statistics Canada reports average individual annual earnings in 2002 were about $25,000 for women and $39,000 for men. Only about 12 percent of Canadians earn more than $50,000 a year. Only 2 percent earn more than $100,000.

In the cities, where most Canadians live, even a junior lawyer charges $200 or more for an hour's work. A client can run up legal fees equivalent to the price of a new car in no time at all. Fees of this magnitude are beyond almost every Canadian's ability to pay. How much justice can the average Canadian afford? None.

Justice is denied to: the woman journalist in a messy divorce; the high-school teacher who bought a badly built new house or condominium from a developer; the disabled person with discovers that the disability benefits provided by his group insurance policy aren't what he thought they were; the small businessman involved in a contract dispute with someone a lot bigger than he is; the taxpayer harassed by the taxation authorities.

It is different for the rich – which, in this discussion, means government and business. A 1996 Fraser Institute study found that in 1993, government was responsible for 54 percent of all civil justice expenditures; business, for 35 percent; and consumers, for a mere 11 percent. The study reported that in 1992, consumer spending on legal services, excluding accommodation-related legal costs, was $108 per family. (The Fraser Institute study bemoaned the lack of data about spending on civil justice, and the situation doesn't seem to have improved much since 1996.)

On paper at least, it's also different for the poor; even some of them get more justice than the middle class. Every province has a system of legal aid which, in limited circumstances, makes lawyers available to the indigent. As well, some attempts have recently been made in Canada to promote *pro bono publico* (free) legal representation of the poor and disadvantaged. Witness, for example, the creation in 2002 of *Pro Bono* Law Ontario, a professional organization that doesn't provide free legal services itself, but supports "volunteerism in the legal sector" (a similar organization exists in British Columbia). Most commentators agree, however, that, for the moment at least, there are very little *pro bono* legal services provided in Canada.

(The United States has a strong *pro bono* tradition. The *American Lawyer* magazine reports that in 2002, the 200 largest firms in the United States reported just over 3 million *pro bono* hours.)

And justice for the middle class? Those in authority tell us that contingency fees and class actions offer soccour. For example, in October 2002, the then treasurer of the Law Society of Upper Canada, Vern Krishna, announced a new law society conduct rule for contingency fees. He said: "The strength of our legal system lies in its ability to be accessible to all people ..." (The new rule was prompted by the judgment that year of the Ontario Court of Appeal in *McIntyre Estate v. Ontario (Attorney General)*, which held that contingency fee arrangements are not necessarily illegal.)

Should such statements reassure us? If; as the treasurer said in 2002, the strength of the legal system lies in its ability to be accessible to all people, then how strong is the legal system? The generals in their headquarters announce access to justice, but the foot soldiers on the front lines seem to see things a little differently.

Albert J. Hudec is a senior partner in the Vancouver office of Davis & Company, and one of Western Canada's most experienced and thoughtful practitioners. He talked to me about what

he calls the litigation gap: “If you're an ordinary member of the middle class,” says Hudec, “and you've got a civil claim under about $200,000, you should walk away from it. It's not worth pursuing. Needless to say, you won't get legal aid or *pro bono* representation. Your claim is too small for a lawyer to do it on a contingency basis – he’s going to want to be paid his hourly rate, come what may. You may not win in the end and in the meantime your lawyer will want money up front, and more as he goes along and the total fee will be a big number.”

Henry R. Kloppenburg has practised in a family firm in Saskatoon for over 30 years. “Look at average after-tax incomes,” he told me. “Subtract the cost of housing, of a car, of groceries. There's nothing left for lawyers!” Kloppenburg argues that the ordinary person can only pay legal fees in those occasional circumstances where those fees are in effect capitalized – for example, if they can be rolled into a mortgage when a house is bought, or paid out of the proceeds when a house sold. The ordinary person cannot pay lawyers out of current income.

Kenneth A. Filkow, a Winnipeg lawyer with D'Arcy & Deacon LLP, was chairman of the Manitoba Human Rights Commission from 1988 to 2001. I asked him who gets access to justice. “The rich,” he said, “and sometimes maybe the poor, but not the people in between. They're foreclosed from the system. It's a big issue. Part of the problem is that the court system has become enormously bureaucratic and demanding, and therefore extremely expensive. Maybe the answer is alterative dispute resolution, done on the cheap.” Filkow doesn't think that contingency fees do much of anything. “In my experience, lawyers only take on contingency fees in personal injury cases, when there is no question about liability, and the only issue is how big damages will be. Otherwise, given the cost of running a law firm, you just can't take on contingency work. You just can't take the risk of being paid nothing.”

Bonnie A. Tough was once a partner in a Bay Street giant and now runs her own Toronto litigation boutique, Tough & Podrebarac LLP. She is best known for successfully representing hemophiliacs as a class in the tainted blood scandal litigation of the 1990s. Tough thinks that part of the solution to the access problem is entrepreneurial lawyers who will take on class actions and contingency fee work. “Myself, I've never been too concerned about payment. You've just got to grit your teeth and ride out the valleys. Mind you, what does worry me, if I'm acting for the plaintiff in a class action, is the possibility that costs will be awarded against my clients, costs that I may end up paying. That has a chilling effect on the class-action system, to say the least.”

And so, what is to be done for the middle class? How can the vast majority of Canadians take ownership of what by rights is theirs – the justice system? There is no easy answer, but here are three steps in the right direction:

1. Work to develop a strong *pro bono publico* practice in Canada, and not just one that benefits the very poor. Follow the lead of the United States. Mean it, don't just say it. (Irwin Cotler, the federal minister of justice, has recently spoken of his “plan” to create a *pro bono* culture in Canada)

2. Further develop alternative dispute resolution (as Filkow suggests), sidestepping the enormous costs to participants of an increasingly complex court system.

3. Encourage lawyers to be more entrepreneurial (as proposed by Tough), routinely using contingency fees. So long as lawyers insist on charging by the hour no matter what, and themselves aspire to wealth, the middle class will remain on the outside of the justice system looking in.

The phrase "access to justice" has a mantra-like quality. We hear it chanted persistently by just about everybody who officially matters. But, as a caution, I give you two definitions of mantra, pulled from the web: (1) "sacred words or sounds invested with the power to transform and protect the one who repeats them"; (2) "a word or phrase that is to be chanted repetitively in an effort to empty the mind.

"Make Clients feel important"

Ryder, Trey, *Trial*, April 2005, p. 72, cols. 2-3

Every client should know that he or she is an important part of your law practice. Make this apparent in both your words and actions.

Make every contact pleasant. Is your receptionist courteous and attentive? When a caller must be placed on hold, does the receptionist ask, "Mat I put you on hold for a moment?" Most people don't mind holding if the receptionist asks politely. But when he or she says, "Hold please," the caller knows the receptionist has more important things to do.

Conversations are more friendly when a caller can address the person who answers by name. Ask everyone who answers the telephone in your office to identify themselves when they take a call.

Help clients get to you. Give clients clear directions to your office, and provide special parking spaces if possible. Once, when I arrived at my business lawyer's new office building, I saw this painted on the curb: "Reserved for law firm clients." What's more, the space was covered, and it was the first one off the main sidewalk, closest to the main entrance.

Providing reserved parking for clients increased the lawyer's overhead, but I felt like the most important person in the world when I drove into that covered spot.

Make you reception area welcoming. Is your reception room furniture comfortable? Is the atmosphere pleasant? Are your magazines neatly arranged? Are they recent, or do they announce the upcoming 2000 Summer Olympics?

As I waited to see my lawyer in his new office, I sat in a beautifully decorated room. A telephone was available in case I had calls that just wouldn't wait. Each lawyer in the firm had a business-card holder on the end table stocked with cards. Every time I entered this law office, I felt important.

Put clients at ease. Clients sometimes believe their cases are their lawyers' lowest priority, based on little signals they pick up. For example, if you accept phone calls while meeting with clients, you indicate that the calls are more important to you. When clients hear you tell your secretary to hold your calls, they know that for the duration of their appointment, they have your undivided attention.

Where do you and your client sit? If you're behind your desk, your client may feel as if there is a barrier between you. To make the meeting more friendly and personal, come around and sit next to your client. If you need to review paperwork, sit next to each other at a conference table.

"Ethical Issues and Dilemmas in an Elder Law Practice"

Soden, Ann, *Advising the Older Client*, (Markham, ON: LexisNexis/Butterworths, June 2005), chapt. 1, pp. 13-33

A. GENERAL ETHICAL STANDARDS

Lawyers, accountants, health-care, and other service professionals frequently enter the lives of their older clients at crucial moments where timely action is often necessary. The professional is privileged to have intimate contact with older persons and their families, and is uniquely placed to identify current or future needs before those needs would otherwise be identified or addressed. Because of their status, lawyers, in particular, and other professionals enjoy a high degree of respect, deference, and compliance. This special trust and special power carries a heightened responsibility to see that neither is abused.

Special responsibilities and ethical principles include guarding against such subtle abuses as paternalism and ageism. A paternalistic attitude leads one to substitute one's own judgment of what one feels is in the client's best interest, and then to convince the client of this view. Benign ageism is a generalized view of older persons as frail or vulnerable and requiring protection. The autonomy of a physically frail or vulnerable older person, but one who is otherwise competent, or of the mentally impaired person are at times co-opted in the name of expediency when a professional fails to zealously advocate the least intrusion upon a person's rights of independence and self-determination. In addition, legal and other professionals often unintentionally err on the side of protecting against risk, rather than supporting autonomy.

Many other ethical implications arise in fulfilling these special responsibilities. Most arise in the course of providing ordinary professional services to the older client and often go unacknowledged because they are so obvious. For example, it is an ethical requirement that lawyers represent all clients, including older clients with an appropriate degree of professional skill and knowledge. A lawyer needs a grounding in law generally but also in the special legal concerns of older people. Older people are more likely than younger people to suffer from chronic physical and/or mental impairment, and are more likely to feel vulnerable to undue influence,

abuse, and exploitation, or to be candidates for protective services. They are closer to serious illnesses and death and have a more timely need for estate and advance health care planning.

Being a competent Elder Law lawyer demands more than a strict technical knowledge of the law. A lawyer serving an older client will frequently be called upon to assume the additional roles of advisor, counsellor, drafter, supporter, reinforcer, and friend. The older client will depend on the lawyer to deal with needs that exceed the strictly "legal," and the lawyer has to be sensitive to these needs. For example, a family in the midst of a dispute over a nursing home placement may present a superficial legal problem, but one with deep psychological roots and intergenerational dimensions. The lawyer has to evaluate these roots and factors as well as the legal issues.

B. REPRESENTING THE CLIENT WITH DIMINISHED CAPACITY

One phenomenon which is correlated to, though not caused by, older age is dementia. The label implies no specific cause or pathological process, nor is it an inevitable part of normal aging. While prevalence of dementia double every five years from 1 per cent of 60 year olds to 30 to 35 per cent of 85 year olds, a substantial majority of older adults, even into great old age, never suffer from any cognitive impairment, or alternatively, its presence or degree does not adversely affect the normal activities of their daily lives.

The most obvious ethical dilemmas for a lawyer arise when an older client has diminished mental capacity. A person with diminished capacity may be totally demented without legal capacity at all or have diminished capacity but be capable of making binding decisions for some matters and not others.

The lawyer's legal imperative in representing the client with diminished capacity is the least intrusive alternative principle. This goal is twofold: to intrude to the least extent as possible on the client's decision-making and autonomy and to foster and maximize the client's residual capacities. However, the principle only works in practice if reasonable available alternatives are identified, valued, and actively advocated. Even when the lawyer has to serve as an advocate, as much attention should be devoted to securing an acceptable result as to defending legal rights. The lawyer had to present feasible alternatives for the client, the family, the court, and service agencies. And advocacy does not end when the legal issue is decided. The real issue is what will happen to the client after a decision has been made. The lawyer has an ethical obligation to monitor the effectiveness of the remedies achieved or imposed.

Nevertheless, in appropriate circumstances the lawyer will have a role in encouraging the release or transfer of some measure of an older client's authority and independence if that client becomes partially or totally incapable or simply in need, for example, of assistance in his or her personal or financial affairs. However, advocating through the formal legal system is expensive and often achieves only minor results. There should be a preference for informal problem resolution and prevention where possible through, for example, the use of enduring powers of attorney, or, in Quebec, mandates given in anticipation of incapacity. Advance legal, financial, and even housing and health care planning can help an older client (or any client addressing later life and disability planning) to maintain a degree of control over decisions in the event of disability and at the end of life. Planning can be an effective, proactive and preventative measure against

abuse and exploitation, and ensure peace of mind generally over life matters. The lawyer should routinely discuss with his or her competent clients advance planning in the event of disability in order to avoid guardianship and curatorship.

C. CHALLENGES OF A NORMAL LAWYER-CLIENT RELATIONSHIP

Certain provincial codes of professional conduct address representing a client with diminished capacity. They generally instruct the lawyer to maintain a normal or routine relationship with the client, yet little guidance is given as to what this means or as to the many situations that may arise. Although it appears that the initial problem for the lawyer representing the client with diminish capacity is ethical, more fundamentally, is it practical. How does one maintain a normal relationship?

While a normal lawyer-client relationship is difficult to define when dealing with a client with diminished capacity, it still involves the same components of any legal relationship: confidentiality, communication, loyalty, and the prohibition against conflicts of interest.

Different legal acts require different degrees of capacity. Even an incapacitated client may have the capacity to enter into a lawyer-client relationship. The relationship may have to be restricted or modified by diminished capacity, (for example a client can be given less information or given information in smaller doses), but the framework remains the same.

Nevertheless the ability to communicate with a client with diminished capacity might be severely hampered by the client's dementia. This may occur at the outset, with the passage of time with a long-standing client, or even over the course of a single mandate. Although the attorney can explain, can the client continue to understand? Can the client reach an informed decision, if able to reach a decision at all? If the client's mental incapacity is severe and protective action is needed to safeguard the client's health or safety, loyalty can be severely compromised if the lawyer takes protective action for the client.

Consider the ethical dilemma arising from the duty of loyalty to a client who cannot initially form, nor during the course of representation maintain, a lawyer-client relationship. The lawyer, in his or her client's best interests, must obtain the client's consent to a capacity evaluation for the transaction at hand and , if agreed to by the client, petition for permanent or temporary guardianship if the future needs of, or risks to the client, or the complexity of the transaction at hand so demand. To arrange for any assistance from a third party or to take other protective action without the consent of a client violates duties of loyalty and confidentiality, unless legislative or judicial leave is granted in all but arguably the most grave and urgent cases. Though persons with advanced dementia may not be able to consent to an assessment, the client should be given the benefit of the doubt so as not to undermine residual capacity.

Lawyers are bound by their provincial codes of professional conduct but they can draw guidance, where their codes or handbooks are silent, from the various approaches described herein, subject to verifying with independent legal counsel and/or their professional ethics committee in all doubtful cases.

When a lawyer ultimately seeks protective action, in appropriate circumstances, he or she, in most instances, should not represent *any* of the parties to the proceeding but should instead become the petitioner and seek the appointment of an appropriate fiduciary or representative for the client. In order to decide upon the appropriate course, the lawyer must ask himself or herself why the action is being sought. When protective action is initiated by the lawyer or by a family member of a client with the client's consent (provided the client is capable of consenting to such a proceeding), the lawyer may represent the allegedly incapable older client in such proceeding. However, the lawyer should seek formal appointment by the court to do so, even if the sole purpose of the proceeding is the appointment of a legal representative(s) for the client. On the other hand, where there is any opposition by family or others to an action seeking appointment of a legal representative, or if the incapable person resists or refuses the lawyer's recommendation of the need for protective action, be it partial or total, temporary or permanent, the lawyer's formal appointment as petitioning legal counsel should also be approved by the court. In such a case, the lawyer should see that the client has independent legal counsel in order to ensure that due process procedures are complied with, that the process is completely transparent, and that the client is provided a full and fair hearing in which his or her incapacity and need for such protective action is independently assessed and evaluated.

Can a lawyer represent a client whose capacity is progressively diminishing or intermittent, against the client's wishes, even if the lawyer believes that his actions are in the client's best interests? The guiding ethic is that a client is the director of all courses of action taken. The lawyer has to scrupulously guard against substituting his own wishes, values, and notions of what is in the "best interests" of the client and against inadvertently but persuasively influencing the client to achieve this end. Nevertheless, logic and reasonability impliedly require the lawyer to maintain a normal lawyer-client relationship as much as possible and as far as practicable for clients with a mental disability. If a competent client expresses a wish, for example, not to have a guardian appointed or to go into a nursing home, the lawyer's duty is clear. The lawyer must faithfully advocate the client's view. If, however, the client is incapable of clearly expressing a wish, or worse yet, demands that counsel embark on a foolish or fruitless course of action, the lawyer's duty is less clear. The rule that the lawyer must advocate for his client's wishes cannot be absolute. The lawyer's role should be to advocate his client's wishes and zealously advocate the client's autonomy as long as such advocacy does not pose unreasonable risks for health, safety and welfare of the client.

A lawyer who developed a relationship with a client at a time when her or she was competent has a clear advantage. The client may have articulated intention, concerns, and an approach to legal issues in the course of representation. Consistent with the normal lawyer-client relationship, the lawyer's duty in such cases is to advocate and implement the client's wishes to the extent known and to the extent that they do not pose unreasonable risks.

No guidelines are provided as to how long representation of a client with diminishing capacity should continue or when it is appropriate that protective action should be taken by the lawyer. The lawyer must be mindful of the varying degrees of capacity which may require expert independent evaluation, as well as other options, before resorting to the extraordinary measure of

seeking protective action or guardianship for one's own client, a measure which is generally recognized as a drastic and often complete deprivation of rights.

Indeed, one must question whether protective action should be taken in all cases. This matter is currently the subject of a policy debate in the United States. Proponents would argue that lawyers act paternalistically all the time. A lawyer is directed to involve the client in decisions but in the final analysis, at times, ends up acting as *de facto* guardian, making decisions for the client. One example is a client who currently has diminished capacity but originally was able to form a lawyer-client relationship. The client had given the lawyer the mandate to challenge a tenancy rental increase or the application of unfair regulations in a residence. These actions, although undoubtedly in the client's best interests and a reflection of his or her wishes, are replete with ethical obstacles. Although the client's capacity has diminished over the course of the representation and he or she can no longer instruct counsel, pursuing protective action and formal guardianship can be expensive and traumatic, and a violation of the client's interest in privacy, confidentiality, and autonomy.

From a public policy point of view, taking into account relative human and financial costs, the practice of acting as *de facto* guardian or advisor to an incompetent client may be preferable to the routine appointment of separate legal counsel and formal guardianship for every older person of questionable or impaired mental capacity who seeks legal counsel or representation on a matter. While the formal legal path offers the technical assurances of due process protection, the benefits may be more intangible and illusive than they are real and substantial, and are usually not valuable enough to justify intrusion into the older person's life, if there is otherwise no evident need or risk to the older person in the activities of his or her life. The responsibility of acting as *de facto* guardian forced the lawyer to be more competent and to foster good communication with the older person.

The counter argument to *de facto* guardianship is that this concept contravenes the requirement that the lawyer maintain a normal lawyer-client relationship. Under the proponents' theory the lawyer could complete a sales transaction even though the client could no longer direct the representation. This course of action runs counter to concepts of agency, or mandate, and of informed consent. It allows a lawyer to usurp a client's autonomy without due process or any judicial or public supervision. Critics would state that it is a slippery slope leading to a lack of accountability and restraint. In all questionable cases, lawyers should always seek independent counsel from a second lawyer and/or from their law society ethics committee and, where appropriate, formal authority from a court to bring an existing mandate to its conclusion without the appointment of a personal representative for the incapable client.

D. DETEMINING WHO THE CLIENT IS: DANGERS OF JOINT REPRESENTATION

Lawyers who work with clients with diminished capacity, or clients who are competent but have physical disabilities or frailties, frequently interact with the family members of these clients. For example, a former client becomes demented or loses capacity, and the lawyer's prior representation of that client involved planning for that very possibility through an enduring power of attorney and other advance directive. Often the family of the client with diminished capacity will contact the lawyer for help in dealing with situations presented by the incapacity, including

establishing a guardianship over the client. Conversely, the client with diminished capacity may need representation in contesting the capacity proceeding. Such cases present some interesting ethical issues for the lawyer. Who is the client? And to whom does the lawyer owe the duty of loyalty? The lawyer should clarify for all involved as early as possible to whom the lawyer owes the duty of loyalty and what the implications for confidentiality and decision-making are.

The lawyer must also be aware of confidentiality issues which should not be breached. Consider the family of a former client, currently incapable, who seeks the advice and services of a lawyer to take some protective action for their incompetent relative. While the former client is no longer capable of forming a lawyer-client relationship, the lawyer may have learned personal, as opposed to generally known, information from his former client over the course of representation. That information could be used to the disadvantage of the former client in the course of representing the children.

While most lawyers understand that there are difficulties inherent in simultaneous representation or sequential representation or multiple clients, they may sometimes forget that there are actually two separate issues at work in joint representation: the actual interest of the clients may be opposite and there is the need to maintain confidentiality of both client's communications. These can usually be resolved by clients agreeing that confidences will be shared before the lawyer can agree to act and by using waivers of conflict and confidentiality provisions with competent clients. Clients with diminished capacity may, with adequate information and sufficient explanation, understand the nature of the waiver of conflict and confidentiality, however, it is obvious that any double about the ability of the client to waive the confidentiality or conflict requirement should be resolved against such a waiver and that will usually make it very difficult for a lawyer to represent an incapable client and any other individual in connection with the same or a related matter.

Even in a situation in which a waiver has been understood and consented to by the client who has diminished capacity but who is still capable of giving a valid consent, the waiver will not apply if a conflict later arises which has not been or cannot be waived. In such a case the lawyer, due principally to the privileged communications he or she has been privy to during the joint representation, will have no option but to withdraw from representation of *all* parties, and, in particular, from the representation of the older person when her or she needs the continued representation most urgently.

In avoiding conflicts of interest, the lawyer's duty to protect the older person's best interest again extends beyond the apparent resolution of the immediate problem. When drafting a trust or a power of attorney instrument or negotiating a guardianship or curatorhip, a lawyer should be ethically obligated to assure that formal authority has not been transferred to another person who turns out to have a conflict of interest with the older person. In such a situation the lawyer could potentially violate his fiduciary duties to the older person. The nature and extent of these due diligence and monitoring duties, though evident, are unclear.

E. CONFIDENTIALITY AND THE INCAPABLE CLIENT

The issue of confidentiality and the mentally incapable older client will increasingly face lawyers, as well as finance, social work, and health professionals. It is also an important issue of public policy. May a lawyer, who believes that an older person is incapable of making decisions, and who further believes that the client is imminently at risk for a substantial deprivation of property or serious personal injury, breach privilege for the purpose of protecting the client? Is disclosure ever permissible or advisable?

The primary purpose for preserving confidentiality in the relationship between any professional and his or her client (or patient) is to protect the interests of the latter. Limiting the disclosure of information acquired in the course of providing professional services is a requirement intended to benefit the person seeking services, and permissible breaches of the ethic of confidentiality are rare. Exceptional circumstances include those where a client or patient threatens serious harm to another person and seems reasonably likely to carry out the threat. Indeed, the majority decision of the Supreme Court of Canada in *Smith v. Jones* reinforces the position that the privileged communications between a lawyer and his or her client may be disclosed, in the absence of specific legislated permission, where there is justifiable fear of imminent death or serious physical injury to a person or persons. The guidelines of our highest court are clear in such life-threatening situations. There are also situations in which a violation of the ethic of confidentiality is legislated: notably, admissions of child abuse and, in some jurisdictions, admissions of abuse of a mentally incapable older person, both of which must be reported to an appropriate authority.

When faced with the kind of ethical dilemma around disclosure that is not expressly permitted by relevant statutes having jurisdiction over the issue or enunciated by the Supreme Court of Canada, the first question should always be: "what will benefit the client?" Is it better to preserve confidentiality or should the practitioner opt for the protection of the client's physical and material interests? In most instances, the client will make the choice and may well decide that the police, for example, should be notified because this will be to the client's benefit. The decision, even if not beneficial, is not to be interfered with, so long as the client is capable of making such a decision. This is entirely consistent with the principles and procedures found in adult protection legislation in North American jurisdictions. Mentally capable adults have a right to be abused and neglected if they so choose, and to refuse any support or assistance that is offered to them.

The issue becomes more difficult when the client is mentally incapable. In these circumstances, and in the absence of previous written instructions to the contrary, made while capable, or an authorized substitute decision-maker to make such decisions (for example, a court-appointed guardian), protection of the client from harm would appear to be in the client's interest rather than the preservation of confidentiality. A key question for the practitioner to pose is: "what would this particular client choose to do under these particular circumstances?" If this question cannot be answered because the values of the client are not known or knowable, the appropriate course of action is to make a decision that is in the "best interests" of the client. What would the reasonable client in such circumstances choose to do? The practitioner will, in effect, be following the hierarchy of decision-making found in most modern adult guardianship and substitute decision-making legislation.

Arguable, the ethic imperative of confidentiality must give way to disclosure if this will protect a mentally incapable client from substantial loss or harm. Under such circumstances, the client's best interests would be clearly better served by choosing to protect rather than by remaining silent. Nevertheless, disclosure of information in such compelling circumstances should be limited to what is reasonably necessary to protect the client's interest.

Notwithstanding the foregoing commentary, professional codes of ethics do not allow for breaches of confidentiality in the absence of statutory or case law directives and some would argue that save for these instructions, disclosures should be discouraged if not forbidden. The provincial ethics committee of each profession should be consulted in potential cases of substantial harm or exploitation, or a judicial order to disclose obtained, where practicable. It may be that the breach is not more than technical, where the only person benefiting from the action in disclosure is the client and the reasonable client, if competent, would have authorized and, indeed, been grateful to the professional for protecting him or her in these limited, though important, circumstances.

There are no easy answers in representing a mentally impaired or incompetent client and many lawyers recognize a pressing need to address these issues and set practice guidelines. Abandoning an impaired client in such a situation is never ethically permissible where it would result in adverse effects to the client.

F. PROVINCIAL CODES OF PROFESSIONAL CONDUCT AND THE CLIENT WITH A DISABILITY

Canadian lawyers can find guidance on the subject of representing a client who is mentally impaired or incompetent, subject to provincial rules of conduct having jurisdiction on the matter, in the Code of Professional Conduct of the Canadian Bar Association (CBA). In 1993 the CBA added a rule entitled "Client Under a Disability", as set out below:

> A.) When a lawyer reasonably believes that a client's capacity to make adequately considered decisions in connection with representation of that client is limited, whether because of minor, mental disability or for some other reason, the lawyer shall maintain, as far as reasonably possible, a routine client-lawyer relationship.
>
> B.) A lawyer shall refuse to take instructions from a client if the lawyer reasonably believes that the client cannot adequately instruct the lawyer to act in the client's own interests. Should the lawyer form such a belief in the course of providing legal services in which further instructions will be required, the lawyer shall secure the appointment of a substitute decision-maker for the client.
>
> C.) Nothing in this Rule prevents a lawyer from representing a client who is apparently incapable of instructing a lawyer,
>
> > (a) if the lawyer is appointed by a court or tribunal or by operation of statute; or

(b) in a proceeding in which some aspect of the client's mental capacity is in issue.

The Code of Professional Conduct provides commentary to the rule. The lawyer is advised to apply an objective test to determine whether instructions should be accepted. Factors to consider include the person's ability to understand the subject matter and the options being discussed, and to appreciate the consequences of the options. Further, a lawyer who has concerns that the "client may give instructions against the client's own interests" is directed to consult with another lawyer for a second opinion. The Code reminds lawyers that a person's capacity may vary with time. If a clinical assessment is desired, the consent of the person being assessed is mandatory. Finally, the CBA directs lawyers to specific provincial rules for further guidance.

Only five of the provinces' codes of professional conduct specifically address the issue of advising a client with diminishing or impaired capacity.

Alberta lawyers can look to the Law Society of Alberta's Code of Professional Conduct, Chapter 9, Rules 7.1, 7.2 and 8, for guidance. In this jurisdiction, a lawyer who determines that a client is incapable of giving "proper" instructions, "must make reasonable efforts to cause the appointment of a legal representative for the client." Until such an appointment is made "the lawyer must continue to act in the best interests of the client to the extent that instructions are implied or otherwise permitted by law." A waiver of the duty of client confidentiality is implied, to the extent reasonably necessary, during the appointment process.

The Alberta Code of Professional Conduct also addresses emergency situations. If the "…health, safety or financial interest of a person lacking capacity is threatened with imminent and irreparable harm," the lawyer is permitted by rules to take legal action on behalf of the person to maintain the status quo or to avoid harm, despite his or her inability to form or sustain a client-lawyer relationship. When a lawyer is retained by the legal representative of an incapable person and reasonably believes the legal representative's actions involve bad faith or are beyond the authority of the representative, such as in the case of theft or fraud, the lawyer must take steps to protect those interests.

In March of 2003, the Law Society of British Columbia added Chapter 3, Rules 2.1 through 2.4 and Chapter 5, Rule 16, to the Professional Conduct Handbook. If a person cannot "adequately instruct counsel" the lawyer is mandated to maintain a normal client-lawyer relationship. Protective action or the appointment of a guardian is permitted if it is believed necessary to protect the client's interest but the lawyer cannot take any action contrary to instructions that were received when that client had capacity to give instructions. In an ongoing action the lawyer is permitted to continue to act for the incapable client "to the extent that instructions are implied or otherwise permitted by law."

The British Columbia Handbook also addresses the situation in which capacity is questionable during an initial consultation. Despite being prevented from forming a client-lawyer relationship, the lawyer is permitted to "provide reasonable and necessary minimal assistance to the person." Disclosure of confidential information is permitted provided that the lawyer "discloses the minimum amount of information required" and "does not take action contrary to any direction

given to the lawyer by the person." A similar limited waiver of the duty of confidentiality is found in Rule 16, for the purpose of "… securing the appointment of guardian or in conjunction with other protective action… ."

Chapter 4 of the Law Society of New Brunswick's Code of Professional Conduct deals with incapacitated clients under Rule 10. If a lawyer believes the person seeking advice or representation is "… mentally or otherwise incapable of comprehending the legal advice sought or of giving instructions concerning the matter the lawyer shall decline to act for that person." Discovery of incapacity in a person with whom the lawyer has an established client relationship means the lawyer "… shall make reasonable efforts to cause the appointment of a legal representative for the client in relation to the matter;… ." In the meantime, the lawyer "… shall continue to act in the best interests of the client to the extent that instructions are reasonably implied or otherwise permitted by law."

As under the Alberta Code, the New Brunswick Code addresses an emergency situation. If "imminent and irreparable harm" threatens the "health, safety, security, freedom or financial interest" of the incapable person, the lawyer is permitted to take enough appropriate action (including legal action) "to maintain the *status quo* or to avoid the harm."

The rules under the Law Society of Newfoundland's Code of Professional Conduct provide guidance for advising Special Needs Clients, defined as people who are unsophisticated or who lack "… education, experience, financial acumen or intelligence." If a client "… is unable to provide proper instructions in a matter due to incapacity" the lawyer must make reasonable efforts to cause the appointment of a legal representative and in the meantime is mandated to continue acting to "… preserve and protect the client's position and interests to the extent possible while avoiding steps that would normally require an exercise of judgment and provision of instructions by the client." Carrying out implied instructions is acceptable, "… such as filing a statement of claim on a client's behalf when a limitation period is about to expire." If a legal representative is not appointed after all reasonable efforts have been made, the lawyer must withdraw from representation.

The Law Society of Upper Canada publishes its Rules of Professional Conduct to regulate lawyers who practice in Ontario. Rule 2.02 (6) simply states that the lawyer shall maintain a normal lawyer and client relationship with persons who are incapable. While the Ontario rule is a mandatory instruction to the lawyer on the broader issue of the right of representation for persons with diminished capacity in the commentary to the Rule, it is acknowledged that "… if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed… ." The commentary refers to the pervasive ethical obligation of Ontario lawyers in this area. "In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned."

The duties under the foregoing provincial codes are stated in either voluntary or mandatory terms. While the directives have been drafted in such a way as to be consistent with the general language of each code, the standards and duties are unmistakable. There is, in each case, a positive duty to address the representation of a client under a disability and to take reasonable, appropriate

and considered action in the client's best interests, according to the circumstances and the guidelines set forth in each code of conduct, subject to appropriate independent consultation or authorization in questionable situations.

A more thorough consideration of advising persons with diminished capacity is contained in the Model Rules of Professional Conduct of the American Bar Association. Extensive commentary is associated with Rule 1.14. The substance of the Rule is quite similar to Canadian rules currently in place, and it also states that attorneys are permitted to take protective action if the client is at risk of substantial harm. Commentary 5 to the Rule is a good example of the more detailed guidance that is found in the ABA Rules. It elaborates what are considered to be "protective measures":

> [Protective] measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

Commentary 7 to the Rule contains a valid caution: "In many circumstances, however, appointment for a legal representative may be more expensive or traumatic for the client than circumstances in fact require."

The ethical problems inherent in legal representation of clients who are vulnerable or with diminished capacity are substantial and perplexing. While formal ethical rules require the lawyer to maintain a normal relationship, that will often be difficult in the real world. The client's limited ability to make good legal decisions, coupled with the possibility of shifting capacity and a strong paternalistic tradition, make representation of this client more difficult. Such issues as how to employ the least restrictive alternative and when to withdraw from representation, when to consult with another lawyer, when to seek court approval for representation, and when to take protective action are matters that need elaboration and further guidance from law societies. In order to protect the client's legal interests and the lawyer's professional standing, the best course of action is for a lawyer to act as an advocate for the client's wishes and to avoid the possibility of conflicts of interest or disclosure of confidential communication by representing more than one member of a family.

G. EFFECTIVE COMMUNICATION AND THE LAWYER-CLIENT RELATIONSHIP

Effective communication is fundamental to the lawyer-client relationship. The ability of a lawyer, as a professional, to communicate effectively with an older client is dependent upon a combination of attitude awareness, and skills. In addition to an interest in the client, one needs to

be aware of the special needs of some older clients who may be coping with increased vulnerability or changes in physical or cognitive functioning.

The following are some of the skills to be utilized in communicating with the older client. These basic communication techniques will be helpful in dealing with clients of all ages; however, in some cases, these carefully honed communication skills will be crucial to interaction with older clients.

1. Set the Scene

It is imperative to understand that most older clients (unless they were previously engaged in a profession or business) find a visit to a lawyer's office intimidating. Many will have had little experience with lawyers during their lives. Very often the subject matter of the interview is emotionally laden, as the issues requiring the client's interaction with counsel deal with mortality or potential loss of independence. Extra care is needed to ensure the client's comfort so that communication can proceed uninhibited.

Older clients often have the support of a third party in the course of representation, starting with the initial interview. A competent but dependent client or one with some diminishing mental capacity may rely on another person to articulate his or her wishes. A lawyer must ensure the client's decisions are free and enlightened and that the client is not subject to undue influence. Always provide time to interview the client alone to confirm capacity, freedom from undue influence, and the goal of representation.

Minimize background noises deficits are exacerbated by sounds in certain register. Sit directly across from the client and maintain eye contact at all times. Speak slowly and enunciate carefully. Don't look away from the client to read from documents try to avoid interruptions.

2. Simplify Verbal and Written Language

An older client may be experiencing physical or sensory deficits which require special attention. For example, hearing impediments or the effects of a stroke may present a challenge but not make it impossible to achieve sound communication.

Visual deficits associated with normal aging can also present a challenge for a client. This is further aggravated if a client is faced with a lengthy document in small print.

Use language that everyone can understand. Legal tradition forces lawyers to wade knee-deep through words that are unnecessarily long and/or antiquated. Use terms like "will" instead of "testamentary document" or "land" instead of "real property," etc. For written language, consider throwing away some precedents, and rewriting wills and releases that speak to the client rather than to tradition.

3. Ask Open-ended Questions

When interviewing a client, ask open-ended questions where possible. The use of open-ended questions empowers the other party in a conversation. Giving up control in an interview situation may be something lawyers are reluctant to do but in the end it likely will enhance communication.

4. Give Client Time to Answer

Increase response time for answers and pause between questions. The older client, whether or not he or she is experiencing deficits, may require longer to formulate answers to questions.

5. Give Key Points to Client in Writing

Few clients are sufficiently organized or sophisticated enough to take notes in an interview with a lawyer. Therefore, it is helpful if the lawyer provides the client with a copy of key considerations about the issues which the client has decided, or the issues about which the client needs to decide.

6. Multiple Sessions

Meet with the client for two or more sessions preparatory to making final decision with respect to an issue. If a client has time to ponder issues in the security of his or her own home, attitudes on various issues may evolve. The lawyer must be prepared to change a will or affidavit that has been drafted after the first session in order to ensure that it reflects the client's wishes. It is advisable to start every session by asking the client whether or not she or he has had any second thought with respect to the issues discussed in a previous session.

7. Presume and Optimize Decision-making Capacity

To associate incapacity with aging is fallacious and ageist, but when it is present in a client the lawyer requires appropriate knowledge, attitudes and ethical standards.

Capacity is task-specific and time-specific and no definition of decision-making capacity has been universally agreed upon. It is important to remember that a client may suffer cognitive deficits in some domain but remain intact in others. Some clients may exhibit poor orientation regarding date or time, but be well aware of how they want to distribute their estates. Conversely, some clients with significant cognitive deficits may appear cognitively intact owing to their abilities to revert to over learned behaviour, such as appropriate social graces or past business experience.

Sometimes one just has to wait for a lucid moment to maximize decision-making ability. This often entails a good deal of patience and the willingness to meet in those settings and at those times that put the client at ease. Meeting at home or accompanying a client to a regular appointment as part of the client's normal routine may optimize the client's skills and facility with communication. It is also the way to get to know the client, his or her values, standards, culture, and history. The standard against which capacity should be measured is the standard set by the individual's own habitual or considered standards of behaviour and values, rather than against

conventional standards held by others. Without knowledge of this personal frame of reference, capacity judgments have insufficient anchor and are liable to be based on someone else's judgment of the propriety of certain behaviour, clothed in the clinical language of incapacity.

When a lawyer does not know a client, greater inquiry is clearly required. However, such and inquiry need only be related to the task or transaction at hand. Careful inquiry involves being able to answer the question: is the decision consistent with who the client is? Looking into values, standards, and the subjective frame of reference of the client may help confirm that the decision at hand, which might otherwise be considered ill-advised or lacking in good judgment on the part of the client, is consistent with that person's character and goals, and not an evidence of incapacity or undue influence. Sometimes it is simply by developing a rapport that a lawyer can appreciate and understand a client with some cognitive impairment.

If a lawyer is unsure about a client's mental capacity, it is imperative that the lawyer have a solid process to follow in order to ensure a client's capacity before taking any instructions. There are some obvious warning signs which should trigger this necessary process. They include:

1) arrangements for the initial meeting with a client are made by someone other than the client;
2) another person accompanies the client to the meeting and is involved in the meeting with phrases like, "What I think mom wants to do with her money is… .";
3) the client is in a hospital or a personal care home; and
4) the client appears to have some mental deficits such as impaired short-term memory.

Because the process of assessing capacity involves an invasion of privacy and potentially a loss of autonomy and rights through guardianship or other protective action, there should be substantial evidence of decision-making inability before assessment is recommended.

In questionable cases, the lawyer may consult with a mental health professional first, usually over the phone. Sometimes the mental health professional can help the lawyer to understand what is going on, suggest alternatives, and ultimately help the lawyer determine whether a full-fledged examination is advisable. If the consult is carried out in such a way that the client's identity is kept anonymous, then the client's consent is not needed.

If one has any substantial doubts with respect to a client's mental capacity, following a diligent but reasonable investigation, the lawyer should obtain the client's consent to be examined by an appropriate diagnostician. A psychiatrist or other physician who is an expert in the field of psychogeriatrics or geriatrics is preferable. The examination should include a physical exam. Many apparent cognitive deficiencies are caused by medication, diet, disease, or other reversible or treatable conditions. Indeed, with a sensitive explanation, even the impaired client should understand that a capacity assessment is not intended to place him or her under guardianship but rather to ensure that his or her capacity enter the transaction in question, whether it be a will, a property transfer, power of attorney, a new living arrangement, consent to care, or marriage, will not be challenged at some later date.

H. CONCLUSION

While lawyers regularly make judgments about capacity, our rules of practice give no guidelines as to how to make a preliminary determination of capacity. A lawyer should act on a reasonable belief based on appropriate investigation that a client is able to make a considerate decision and is not temporarily confused, misguided, or disabled due to sickness, medication, depression, or delirium (an acute and normal reversible state). Careful consideration of the client's character, need life standards, and circumstances should be made as capacity should be judged according to that person's habitual behaviour and values. A great danger in incapacity assessment is that eccentric, stubborn, abnormal, risk-taking behaviour will be confused with incapacity. Any sure reasonable doubt as to incapacity for the task at hand should be resolved in favour of seeking the client's consent to an independent professional evaluation for the transaction at hand to remove any questions or concerns about a future challenge.

The Manitoba Court of Appeal, in the case of *Slobodianik v. Polasiewicz*, provided and example of a situation that can result when council fails to inquire into the capacity of an older client. In this case, counsel attended the bedside of a testator in his room at a personal care home in the company of one of his stepchildren. Counsel did ask the testator's stepchild to leave the room for approximately 15 minutes. However, he failed to ask the testator for an inventory of his assets and did not speak to the staff at the personal care home with respect to the testator's functioning. He did not direct any specific questions to test the mental functioning of the testator, nor did he take any notes.

After a review of the relevant case law, the Court concluded:

> In my opinion, Mr. ['s] evidence simply does not meet the obligation expected of a lawyer in circumstances such as those before us. There were no notes; conclusions were expressed but the factual background required to justify these conclusions was either absent or substantially lacking in detail. The testator was not examined in any meaningful way as to his ability to understand. There was no systematic assessment of the testator's capacity, and no detail was provided to enable the court to determine whether adequate steps had been taken to satisfy the question of testamentary capacity.
>
> This is simply not good enough.

The guiding ethical principles of professional assessment and intervention emphasized throughout this text are: the presumption of capacity in the maximizing of client decision-making and autonomy when, in appropriate cases, some measure of protective action is recommended; and the promotion of the wishes of the incapable client to the extent known or knowable, and in default of these, according to the client's known or knowable values, standards, and finally, best interests. There is also the connected but subsidiary goal of fostering community connections and resources to assist and support the mentally impaired client so that he or she remains secure yet involved in decision-making to the extent of any residual capacity.

Professional ethics is not a subject separate from other facets of professional activity, but rather is interwoven into every aspect of acting professionally. The field of Elder Law presents unique

challenges that go to the very heart of a lawyer's desire and obligation to serve older clients and their families competently and loyally, particularly clients in vulnerable circumstances and those with diminished capacity.

"Handle difficult clients with the care they deserve"

Pinnington, Dan, *The Lawyers Weekly*, 03 February 2006, p. 7

Difficult and demanding clients are a fact of life for many lawyers. In some areas of practice they are more common than others – such as family law, for example, where emotions run very high.

Difficult clients can be very hard, and even impossible, to satisfy. This can be frustrating and upsetting to a lawyer. They will ignore your advice and may treat you or your staff badly. They will often be unhappy with the progress of the case, no matter how hard you have worked or how good the results are.

These things alone are enough to make you want to avoid difficult clients, but they are even more of a concern because they are more likely to do the three things that distress lawyers most:

- not pay the lawyer;
- complain to the Law Society about the lawyer; or,
- bring a malpractice claim against the lawyer.

It doesn't take long for most lawyers to learn to recognize the difficult client. Often it is obvious in the first interview, and even in the phone call to set-up that interview. Here are some questions that will help you ferret out difficult clients:

- Am I the first lawyer dealing with this particular problem for you?
- How many lawyers have you consulted or retained about this problem?
- Why did you leave your previous lawyer(s)?
- Can I talk to your previous lawyer(s)?
- What stage is this problem at (particularly if the problem is in litigation)?

Last, explore the potential client's expectations. If they have unreasonable or unrealistic expectations about the time, results or costs involved in resolving a matter, the warning bells should go off.

All lawyers should learn to listen to and trust their instincts when it comes to recognizing the difficult client.

An appreciation of the different types of difficult clients can also help you stay out of trouble with them.

In a paper she wrote, "Dealing with the Difficult Client," Toronto family law lawyer Carole Curtis identified nine following types of difficult clients:

1) Angry/Hostile
2) Vengeful/with a mission
3) Over-Involved/Obsessive
4) Dependant
5) Secretive/Deceitful/Dishonest
6) Depressed
7) Mentally Ill
8) The Difficult Client with the Difficult Case
9) The Client who is Unwilling to Accept/Follow/Believe any of the lawyer's Advice

Her paper provides specific suggestions on how you deal with each of these types of difficult clients and is available at www.practicepro.ca/difficultclients.

Curtis suggests some basic options for handling difficult clients, including whether to act for them at all.

You can, under certain circumstances, refuse to act for a particular client. This is less difficult for lawyers who practice in large urban centres, where the client can usually find another lawyer, and is less difficult for lawyers who restrict their practice to certain areas of law.

If you do decide to act for a difficult client, Curtis suggests you do five things to protect yourself.

First, you must understand that your role is to analyze a given situation, and offer a course of action or solution to the problem presented.

It is the client's job to make decisions about which course of action to follow, not the lawyer's. After all, it is the client's life, or the client's business, or the client's estate, or the client's litigation.

Some categories of difficult clients are often unwilling to make decisions about their legal issues and want the lawyer to do that for them.

DO NOT DO IT.

Let some other influential person in their life help the client with the decision. Your job is to help the client understand the choices.

Second, you must protect yourself at every step along the way when dealing with a difficult client.

Document everything you possibly can, including telephone calls, voice mail messages and e-mail messages. Confirm the client's instructions to you in writing, and confirm your instructions and advice to the client in writing.

It is also necessary to include, in writing, the possible consequences of various courses of action the client may be contemplating. Practice management software programs can make this task less cumbersome and more reliable than scraps of paper the lawyer scribbles on.

Disputes between lawyer and client as to what was said or not said, or done or not done, are one of the most common areas of disagreements, and they are also among the least documented things in the file.

In LAWPRO malpractice claims, where there is disagreement about the information or legal advice given to the client and that advice is not documented courts have often preferred the evidence of the client on this issue.

Third, be calm, be patient, and be clear. Do not let the difficult client turn you into the difficult lawyer, or the unhappy lawyer, or the depressed lawyer (or worse, the yelling lawyer, the drinking lawyer or the swearing lawyer). If you find you are becoming a difficult lawyer, perhaps it is time to transfer the file to someone else.

As a supplement to her paper, Curtis shared the "Administrative Information for New Clients" and "Billing Information for New Clients" documents she uses in her practice. These documents are also available at www.practicepro.ca/difficultclients. They very clearly spell out how the file and retainer will be handled. Curtis's clients are asked to read the documents in the reception area before they meet with her, and to sign them when the retainer is signed.

Fourth, help your staff deal with difficult clients. Make sure your staff clearly documents their dealings with difficult clients.

And remember, difficult clients are often much more difficult with the staff then they are with the lawyers. Deal directly and promptly with any client that is abusive or inappropriately treats your staff. Institute a zero tolerance policy on abusive behaviour toward staff.

Lastly, and most importantly, the lawyer's job is managing expectations. Often clients are difficult for lawyers to deal with, at least in part, because they have unrealistic expectations about the services you will provide, or the outcomes you can achieve for them. Some clients' expectations (as to services and costs) or goals are totally outside the realm of what legal services could ever achieve for them.

It is important to identify, as early as possible, what the client's expectations are in retaining a lawyer to deal with this particular issue. Have a frank, early discussion with the client about their expectations.

It is especially important to bill clients with high service expectations frequently and regularly, so they can understand the cost of those expectations.

Know when to fold – and end your relationship with the difficult client. It is not possible to satisfy all clients. In some lawyer-client relationship, there comes a time when the client no longer has confidence in the lawyer's advice or strategy, and that is the time to suggest that the client find another lawyer.

Know when to leave the file. If you are transferring an active file you need to ensure that the client is not disadvantaged, and that all material needed to allow the client to move forward with the matter is released (even if the client owes you money).

"Keep your clients in the loop"

Vesper, Thomas J., *Trial*, April 2006, p. 70
(in part)

You must keep your clients reasonably informed, so they can make informed decision. Sometimes, because of time constraints or case logistics, you may choose a tactic or path of attack or retreat without explaining all your reasons for doing so. Your judgment may be impeccable, the strategy may be brilliant, and the maneuver may be hailed in trial advocacy journals, but the client may feel ignored and left out of the loop.

Whenever clients are left out of the decision-making about their cases, they may show resentment, either openly or behind the attorney's back. Clients are inclined to feel that because their input was not considered, any result—even a good one—was achieved improperly or unethically.

Some lawyers act like portrait painters who won't show their subject the painting until it's finished. But this is not good practice as a lawyer.

You're asking for disaster if you don't let your client know about your developing game plan. If the plan works, you client may resent the fact that you kept a secret. If it doesn't work, he or she may blame you because you didn't disclose the failed strategy beforehand, so he or she could have chosen not to proceed. You want your client to see that rough sketches and preliminary plans for his or her deposition or trial.

"Is solicitor-client privilege on tax advice alive and well?"

Mairandola, Salvatore, *The Lawyers Weekly*, Vol. 24, No. 13, p. 17
(in part)

Belgravia Investments Limited: In Belgravia Investments Limited v. Her Majesty the Queen, the CRA sought a number of documents from various taxpayers who had invested or were otherwise involved in an alleged tax shelter.

The taxpayers applied to the Federal Court of Canada for a determination of solicitor-client privilege in relation to a large number of disputed documents.

In the course of his analysis, Justice Heneghan summarized various principles relevant to the determination of solicitor-client privilege. For example:

There are two distinct branches of solicitor-client privilege: litigation privilege and legal advice privilege.

Solicitor-client privilege derives from a client's right of confidentiality in respect of communications made in the context of a solicitor-client relationship for the purpose of obtaining legal advice.

An accountant's communications are privileged only if they are made as a result of a request by the client's lawyer to be used in connection with litigation, or where the accountant acts as the client's representative in placing a factual situation or problem before a lawyer to obtain legal advice or assistance. ….

"Canadian Child Welfare Law[:] Children, Families and the State"

Bala, N.; Kim Zapf; M., Williams; R. James; Vogl, R.; Hornick, J. P.
(Toronto, ON: Thomson Educational Publishing Inc., 2004) pp. 254, 375
(in part)

Confidentiality and Reporting Obligation of Child's Counsel

All Canadian provinces have laws imposing a duty on those who have reasonable grounds to suspect child abuse or neglect to report these suspicions to a child protection authority. This obligation extends to professionals such as a family physician or a therapist who may have confidential or privileged information. Most of these reporting laws, however, preserve solicitor-client privilege by overriding the duty to report by a child's counsel.

Counsel for children can often find themselves in the difficult position of having received privileged information from their client that indicates their child client may be at risk of harm. An example is that of a teenage girl who wishes to return home and advises her lawyer that her stepfather is sexually assaulting her and that her mother does not protect her. Counsel will, assuredly advise the child not to return home. However, if the child persists in her desire to return home, then in Ontario, the Law Society of Upper Canada's *Rules Professional Conduct* would allow, but not compel, counsel to breach the privilege, as this is a case where there is "imminent risk of death, serious bodily harm, or serious psychological harm that substantially interferes" with the child's health or well-being. However, if the child's counsel reports to a child protection agency the solicitor-client relationship may be damaged and the child may no longer trust their lawyer. It is for this reason that child's counsel would encourage the chi1d to disclose to a child protection agency worker, or may suggest disclosure to another professional who would not be exempted from the duty to report. A child in these circumstances requires considerable assistance and support. Child's counsel may well be in the position of initiating the process of getting their client needed counselling and other support services.

Leaving aside situations where a child discloses information to a lawyer that reveals a serious risk to the child client, a lawyer for the child will only reveal what the child has said with the permission of the child. A lawyer will generally not share information received from the child with other professionals without the child's permission.

. . . .

Solicitor-client privilege is one of the oldest and most important privileges, afforded the greatest protection. The privilege attaches to communications between the lawyer and the client, for the purpose of giving or receiving legal advice, as part of our societal commitment to personal autonomy and access to justice. In protection cases, this privilege will protect from disclosure the communications between agency counsel and the agency social workers or between parents' counsel and the parents.

More important from a witness perspective is the related privilege known as "litigation privilege," Again, at the centre of the operation of this privilege is the lawyer, but this time the privilege facilitates the lawyer's investigation and preparation of the case. As part of that preparation, the lawyer must contact and retain expert witnesses. For this privilege to arise, litigation must be contemplated or actually underway. The "dominant purpose" for which the report is prepared must be to submit it to the lawyer for advice and use in that litigation, if the report and related communications are to be privileged from disclosure.

When a lawyer intends to call an expert witness, most rules of court require the filing of an expert's report some time before trial and the provision of a copy to the other parties. A lawyer

may ask for a report and, after receiving the report, decide not to call the expert. In that case, litigation privilege will protect that report from production by the lawyer or the expert witness to any other party to the litigation. If the expert is to be called as a witness at trial, then the expert's report will remain privileged from production only until that time when the report must be disclosed under the rules of court.

In practical terms, if the report is prepared on the specific request of counsel, after litigation has commenced, and is submitted directly to counsel, this "dominant purpose" test will be satisfied. Where there has been a pre-existing or ongoing therapeutic or counselling relationship, courts may find that there is more than one purpose for the expert's work and thus the report would have to be disclosed immediately. Similarly, any report prepared and submitted to a lawyer before litigation is contemplated will also not be privileged, and have to be disclosed. For those slated to testify as expert witnesses, care should be taken in obtaining instructions and submitting reports, with proper advance advice and direction from the lawyer, to ensure a clear understanding of the procedures desired by the lawyer. Many lawyers will ask that an expert's initial opinions be provided orally, before requesting the production of a written report.

"The Meaning Of 'Forever"

Cohen, Elizabeth J., *ABA Journal*, November 2004, p. 28
(in part)

Everything you learn relating to the representation of a client is confidential. It does not matter how you learned it, and it does not matter who else knows it. Unless disclosure would fit within one of a few narrow exceptions (see Rule 1.6 of the ABA Model Rules of Professional Conduct), you may not disclose anything without your client's consent.

The obligation of confidentiality even survives a client's death – but so does the power to waive it. In most states, an executor or other personal representative may authorize the lawyer to disclose confidential information. But even then, the lawyer retains an obligation to consider the interests of the deceased client.

. . . .

And what if personal representative consenting to disclosure happens to be the very family member to whom the client didn't want to reveal the information?

Opinion 03-04 issued earlier this year by the Nassau County Bar Association on Long Island concerned a woman who retained a lawyer to file her divorce petition. But she told the lawyer she did not want her husband to know about it until she had told her children. Ten days later, the woman died. When the husband found the check stub for the retainer fee, he asked the lawyer about it.

The bar's ethics committee advised the lawyer to first confirm that the husband is the duly appointed executor of the estate. Then, the lawyer should try to satisfy the husband with redacted billing information and a redacted copy of the retainer agreement – in other words, take out the reference to the divorce.

If that doesn't work, advised the committee, the lawyer will have to decide for himself if the husband is acting to protect the estate or to satisfy his own personal interests. Unless the lawyer is satisfied that the husband is acting wholly in the interests of the estate, he is not bound by the husband's waiver of confidentiality. If the husband is dissatisfied with the lawyer's decision, he may seek a court order; this would give the lawyer his chance to make an in camera showing and let a judge decide.

"Lawyers and Ethics: Professional Responsiblitiy and Discipline"

MacKenzie, Gavin (Scarborough, ON: Thomson/Carswell, 2004), pp. 3-7 to 3-8.

The identity of a client may … be both confidential and privileged. Rules of professional conduct stipulate that lawyers should not disclose that they have been consulted or retained by a particular person about a particular matter unless the nature of the matter requires such discloser. In a 1973 decision of the British Columbia Supreme Court, the name of the client was held to be a privilege communication. There, a driver who had left the scene of a collision disclosed his identity confidentially to his lawyer for the purpose of receiving professional advice. The court held that by virtue of the nature ofthe matter the essence of the confidential communication was the client's identity.

The same problem was litigated in a widely publicized American case 13 years later. On March 9, 1986, Mark Baltes died as a result of a collision caused by a driver who left the scene. More than 24 hours later the driver consulted a lawyer. He asked the lawyer to try to negotiate a settlement with the authorities without identifying him. The lawyer retained a second lawyer to act as an intermediary, so that the client's identity would not be discovered by surveillance of the first lawyer's office. The negotiations failed. The first lawyer identified himself as the driver's counsel.

Mr. Baltes' parents were dismayed by the fact that the lawyer who knew who had been responsible for their son's death refused to identify him. They commenced a civil action for damages against John Doe, the unidentified driver, and attempted to subpoena the lawyer to testify on the issue of the driver's identity. The lawyer claimed that the information was privileged, and his claim was upheld by a State Circuit Court judge. A few weeks later the judge rescinded his order so that the issue could be reconsidered. Before the issue was determined, however, the police located the driver of the car.

The case attracted an extraordinary amount of media attention. The New York Times and CBS News were among many news organizations that covered the controversy.

Public opinion was largely critical of the role played by the lawyer. To the extent that the opinion was based upon fear that offenders could avoid detection merely by admitting wrongdoing to lawyers, it was of course misinformed, as the outcome of the case demonstrates.

It is true that if it were not for the solicitor-client privilege the driver of the car which struck Mark Baltes would have been brought to justice sooner. It does not follow that lawyers' duty to protect the public interest requires them to disclose the identity of clients who admit having committed offences. To impose such a requirement would limit access to legal advice and defeat the right to counsel. Without an expectation that his communications with his lawyer would be maintained in confidence, the driver would not have sought his lawyers' advice. Instead he would have realized that approaching a lawyer to ascertain the extent of his possible legal exposure would be tantamount to confessing to the police. In the long term, society would suffer. Lawyers' professional duties should not be equated with those of police officers.

"Dead Sea Scrolls"

Karpman, Diane L. (2005), 15 *the Professional Lawyer* (No. 4), p. 24

Everyone dreams of the paperless office. But how do we reconcile our dreams of a paperless office with our fiduciary duties to keep our client's files safe and to communicate with clients?

There are legions of rules and ethics opinions concerning the necessity of releasing files to clients. There are zillions of cases that consider what type of information should or should not be included in a client's file. Obviously, all those cases and opinions were referring to paper files, because that was the only kind that existed at the time. Yet, this underlying presumption – that a "file" is a hard copy, as opposed to an electronically digitalized product – is so last century.

We are witnessing a litigation revolution with the exposure of e-mail in employment, insurance bad faith, and a legion of other cases. Generally, the development of legal ethics lags decades behind technology. But a couple of recent ethics opinions have considered electronic files and the impact on a layer's ethical duties.

A visionary Maine ethics opinion (Maine Board of Bar Overseers Professional Ethics Comm'n, Op. 183, 2004) fleshes out the theories sustaining the Model Rules. Several different rules implicate files, but it is upon withdrawal or termination of representation in conjunction with Model Rule 1.16 (d) that file turnover becomes of paramount importance. The purpose of Rule 1.16 (d) is to ensure the transfer of information of the client. That requires a subjective consideration of the client's status. If you are representing a technologically challenged client, electronic files would not constitute appropriate compliance with ethical obligations of the Rule.

In terms of disciplinary or legal malpractice liability, the best protection is the client's consent (at the onset of representation) to receipt of an electronic file.

If you are obtaining consent to maintain an electronic file, this gives you a superb opportunity to evaluate your client's level of technological knowledge and resources. If you are handling a workplace discrimination claim, and your client shares a facsimile machine with one hundred other employees, that would be good to know before you fax your bottom-line settlement proposal. If your client doesn't have an e-mail account, the concept of electronic files might be meaningless altogether.

Clients come in all shapes and all sizes. Your client might be adverse to cellular or cordless phones. Someone like Tony Soprano might be adverse to all forms of telephonic communication. It is important to understand a client's unique circumstances at the beginning of the representation. If your client consents to a particular method of communication, and does so using that method, this confirmation could provide a defense in the state bar grievance or in the civil arena should a problem arise later.

Even if you establish that your client is sufficiently tech-savvy to handle electronic communications, your efforts to facilitate such communications may themselves prove problematic. The Wisconsin opinion considers hardware and software used by the firm – and whether providing that technology to the client violated copyright or other "contractual restrictions."

Another potential problem of the paperless office is that electronic data degrades faster than paper records. And even if the data has not yet degraded, it may be irretrievable: Many lawyers cannot access electronic files from the early 1990's because they no longer have the necessary software. If an attorney is choosing to go paperless, he or she must maintain the ability to open and access the data – and to communicate it to clients. The Maine ethics opinion advises that the attorney should maintain the appropriate hardware or software program to open and access the information contained in the file.

Digitalized electronic files are an extremely fragile method of communication. Consider how degraded old facsimiles were, when compared to the Dead Sea scrolls. Those scrolls were meant to last centuries. Can your digital files survive the decade?

"Pushing The Envelope Of Production"

Chiasson, Q.C., Basile, *Hot Topics In Litigation* (Ottawa: Canadian Bar Association (Continuing Legal Education); Toronto: Canadian Bar Association Of Ontario (Continuing Legal Education), 2005, chapt. 22, pp. 5-7

C. Legal Privileges

Generally speaking, legal privilege is a mechanism available to protect from disclosure confidential communications or documents prepared for adversarial proceedings.

The two main types of legal privilege are solicitor-client privilege and litigation privilege.

Litigation privilege is the narrower of the two privileges. Its rationale is the protection of information to facilitate the adversarial process that is investigation and preparation of a case for trail. Litigation privilege is a qualified one that can be limited by other competing interests. In considering a claim of litigation privilege, courts must weigh the interest of privacy to facilitate adversarial preparation against the competing interest of disclosure to foster a fair trial.

Litigation privilege can only arise when communications or documents were made for the dominant purpose of reasonably contemplated litigation or existing litigation. The dominant-purpose standard has been adopted by appellate courts in Nova Scotia, New Brunswick, Ontario, Alberta, and British Columbia.

Litigation privilege in the civil litigation context has several features of importance:

(a) solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature brought into existence for the dominant purpose of litigation;

(b) solicitor-client privilege exists any time a clients seeks legal advice from his solicitor whether or not litigation is involved. Once in existence, it remains forever. Litigation privilege, on the other hand, applies only in the context of litigation itself. It ends with the litigation;

(c) litigation privilege developed as an outgrowth of solicitor-client privilege to encompass communications between the client or his solicitor and third parties if made for the solicitor's information for the purpose of pending or contemplated litigation;

(d) although litigation privilege may trace its origins to traditional solicitor-client privilege, the policy justifications for the two differ: solicitor-client privilege is based on the need for the protection of a relationship, whereas litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. It protects a process;

(e) neither privilege in the civil context affords a privilege against the discovery of facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if, otherwise, the party would be bound to give discovery of them;

(f) the rationale for solicitor-client privilege is very different from that which underlies litigation privilege.

What are the different rationales at work? The interest that underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. It describes the privilege that exists between a client and his or her lawyer. Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system may function properly. It is a jealously guarded privilege, which, once established, is considerably broad and all-encompassing.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. It has been defined as a practical means of assuring a zone of privacy to solicitors. Litigation privilege is essentially a creature of adversarial proceedings.

Litigation privilege has been referred to as the "lawyer's work-product" in the American jurisprudence. This description has not found wide-spread acceptance in Canada.

Prevailing academic wisdom has held that the first privilege does not encompass the second. They are separate and distinct. At first blush, these differences are clearly articulated and the need to distinguish between the two seems to have been judicially accepted. They are nevertheless interrelated.

D. Confusion Above, Pandemonium Below: Appeal Courts at Odds

There has been disagreement from the outset whether there is actually any difference between the solicitor-client privilege and the litigation privilege.

In *Hodgkinson v. Simms ("Hodgekinson")*, the British Columbia Court of Appeal held, at page 583:

> "It appears to me that, while this privilege is usually subdivided for the purpose of explanation into two species, namely:
>
> (a) confidential communications with a client; and
>
> (b) the contents of the solicitor's brief,
>
> it is really one all-embracing privilege that permits the client to speak in confidence to the solicitor, for the solicitor, to undertake such enquiries and collect such material as he may require to properly advise the client, and for the solicitor to furnish legal services, all free from any prying or dipping into this most confidential relationship by opposing interests or anyone."

In contrast, the Ontario Court of Appeal, in *Chrusz*, held the opposite thesis in recognizing two separate privileges. Other appellate courts had also held similarly. For example, in 1996, the Alberta Court of Appeal held that "the solicitor-client privilege and the litigation privilege are distinct, and should not be confused."

In New Brunswick, the Court of Appeal has held in *Lamey (Litigation Guardian of) v. Rice ("Lamey")* that communications between counsel and a third party are privileged under the solicitor-client privilege rather than the litigation privilege on the basis of agency. What makes this case from the New Brunswick Court of Appeal interesting is that it did not mention *Chrusz*, which had held that an adjuster was not an agent of the insurer's solicitor and that accordingly, solicitor-client privilege would not protect his reports from disclosure.

In *Chrusz*, the Ontario Court of Appeal held that if there was to be protection, it would have to be considered under the litigation privilege rather that solicitor-client privilege. The New Brunswick Court of Appeal, *Lamey*, held that the adjuster carrying out an investigation was acting as agent of the client at the direction of the client's lawyer and as a result, produced documents to assist the lawyer in advising the client. The Court concluded that the file was therefore protected by solicitor-client privilege because of the agency relationship. This conclusion only adds to the analytical confusion of the issues.

"Voice Mail: The New Smoking Gun?"

Cline, Bev, *National*, April/May 2005, p. 10

"Lawyers and clients need to understand that technology has made it very simple for voice mail messages to be preserved." That's the message Martin Felsky, CEO of Toronto-based litigation support services company Commonwealth Legal Inc., wants to send out to the legal profession.

"The digital world in particular has changed how these messages are stored and retrieved," says Felsky. "There's no doubt that as time goes on, lawyers will be asking more and more for these messages to be called as evidence."

"When you look at the history of production of documents, what lawyers were referring to was generally material that could fit into file folders, tons of manila envelopes, with the odd photograph, video or audio tape thrown in," he explains. "Then attention was turned to e-mail and computer files. Now voice mail is becoming an important part of the discovery process."

Voicemail was originally meant to be a short-term communication and, accordingly, was generally much more casual; people are less careful about what they speak than they would be in a letter or even an e-mail. But with companies opting for digital technology and unified messaging systems, voicemail is developing a longer lifespan.

"Now that voicemail is increasingly digital, it's often saved on a server, capable of being copied and forwarded," Felsky points out. "The capability is there for e-mail, faxes and voicemail to all appear in your Inbox on your computer. You can't print the voice mails, because they're sound, [so] you simply turn on your speakers to hear the message.

"But this is the important part: the voicemails you receive will have a time and date stamp, and will be preserved in your company's digital messaging system," he warns. "Voicemails are ubiquitous, and opposing lawyers are going to say, 'These are documents, I want them.'"

What about leaving a voice message on a cell phone? "Now, this is even more complicated," says Felsky. "The message is sitting, let's say, on a cell phone company server. Will that company be required to produce it for evidentiary purposes? This is an issue to be left to the lawyers."

In the business world, there's an assumption that voice mails are private and confidential. But with the increasing use of digital recording technology, the question might really be: Who will hear your message a year or two down the line?

H. (A.) v. H. (J.T.)

(2005), 13 R.F.L. (6th) 149 (B.C.S.C.), Fisher J.
(Annotation, James G. McLeod, pp. 151-155)

Fisher J.'s reasons for judgment in *H. (A.) v. H. (J.T.)* [(2005) 13 R.F.L. (6th) 39] touch on the extent to which mediation discusses are privileged in proceedings between the parties to the mediation. As family litigants abandon traditional family law litigation in favour of other forms of dispute resolution, the issue is likely to arise with increasing frequency. While Fisher J. delved into the issue of client confidentiality, he did not question whether the mediator had any privilege of her own in the circumstances. Although there is limited authority on point, it is submitted that a mediator who undertakes mediation on the basis that the discussions would remain confidential should be allowed to claim personal privilege from testifying in litigation between the parties, at least so long as doing so would not result in a miscarriage of justice.

The parties agreed to mediate a marriage agreement with a mediator who was also a practising lawyer. The mediation agreement included a provision whereby the mediator agreed to keep the mediation discussions confidential unless she was required by law to disclose what was said, such as if one or both parties disclosed child abuse, as well as a provision that neither party would subpoena or require the mediator to be a witness in respect of any dispute arising out of the mediation. The agreement also acknowledged that the parties might have adverse interests and had been encouraged to obtain independent legal advice before signing any agreement resulting from the mediation.

The mediator prepared a marriage agreement on the instructions of the parties that both parties signed. The formal agreement acknowledged that the parties had undergone mediation and that each had made full financial disclosure. The agreement was expressed to be a full and final settlement of all property issues between the parties, and the wife undertook to discontinue her pending proceedings against the husband. Each party acknowledged that he or she had received independent legal advice about his or her rights and obligations under the agreement.

Subsequently, the wife applied for an equal division of family assets under the *Family Relations Act* contrary to the terms of the marriage agreement. The wife alleged that in fact she had not received independent legal advice and could not read, speak, or write English, so that she did not understand the nature and effect of the marriage agreement, although both the mediation agreement and the marriage agreement were endorsed by an interpreter who stated that before the agreement was signed he had interpreted it for the wife into Hungarian, and the wife appeared to understand the agreement. The husband subpoenaed the mediator, who applied to set aside the subpoena. The wife did not appear on the motion to set aside the subpoena but refused to waive any privilege associated with the mediation, so that two of the three parties involved, including the person who called the validity and effect of the agreement into question, resisted forcing the mediator to testify.

Fisher J. identified three issues: (i) Where the mediation discussions privileged as communications in furtherance of settlement: (ii) If so, did an exception to the privilege apply regarding a dispute about the existence or terms of the marriage agreement? and (iii) Assuming an exception to privilege applied, was the mediator's evidence likely to be sufficiently probative to justify the intrusion into the confidentiality of the mediation process?

The obvious question that the wife will have to answer at some point is why she did not attempt to call the mediator herself or at least consent to the mediator's testifying. Presumably, the wife was concerned that the mediator's evidence would not advance her case. Regardless of her reason for apposing the husband's request, in the absence of a solid explanation, most judges likely would be tempted to draw an adverse inference to this effect: see e.g. *Murphy v. Murphy*, 2001 CarswellOnt 1739, 50 R.F.L (5^{th}) 131 (Ont. S.C.J) (judge drawing adverse inference from party's failure to call lawyer who acted on settlement to explain alleged flaw in formation). The husband relied on the fact that the wife had put the validity of the mediation agreement into question to support his argument that the wife had waived whatever privilege she may have had arising out of the agreement with respect to statements made in the course of the mediation.

Three things stand out in this case. First, nothing should turn on whether the mediation was "closed" or "open", since the husband was not trying to use anything that either party said during the mediation to advance his litigation position. Second, in addition to whatever privilege attaches to mediation generally, the fact the agreement represented a settlement of the wife's pending litigation invoked the privilege that attaches to settlements. Third, the person who attacked the integrity of the mediation process in this case was the one trying to maintain the privilege that attached to the process.

In reviewing the case law to date, Fisher J. accepted the importance of confidentiality to the mediation process, so that courts should resist attempts by a party to force disclosure of what was said as part of the evolving settlement discussions unless the parties agreed their discussions were "open". If parties are unable to reach agreement during "closed" mediation, all that may be disclosed is the fact no agreement was reached, without editorial comment about why the discussions where unsuccessful. On the other hand, if the parties agreed to open mediation, anything that was said in the mediation can be raised after the fact unless it is subject to some additional privilege.

The situation should be different where the parties disagree on the interpretation of the words used in an agreement resulting from the mediation. In this case, a court should be able to allow evidence of discussions insofar as it assists the court in ascertaining what the parties intended by the words used in the agreement without compromising the integrity of the process. In a related vein, a court should allow evidence of what was said in the course of the mediation to decide whether the parties were ad idem on the meaning of the words used in the formal agreement or if an issue arises that the words used in the formal agreement did not reflect the parties' actual oral agreement. The latter may assist a court in deciding whether the formal agreement should be rectified, while the latter may justify a court in declaring the apparent agreement void for lack of consensus ad idem. In the event court sets aside a mediated agreement of this basis, neither party should be allowed to refer to the mediation discussions on the substantive merits of the case.

The husband acknowledged the general privilege that attaches to mediation discussions but alleged that his request to call the mediator fell within the range of exceptions suggested above. The parties had reached an apparent agreement that the wife now alleged was flawed in its formation as a result of her lack of understanding. The husband did not attack the validity of the agreement, which meant that he should be bound by his promise not to call the mediator. His case in this regard revolved around the assumption that the wife was estopped from relying on the parties' express undertakings not to call the mediator since she had put the validity of the agreement itself in issue. She should not be allowed to take advantage of the term in the contract whereby the husband agreed not to call the mediator as a witness if she alleged that the agreement as a whole was invalid or otherwise not binding on her. This argument would not have been open to the husband if the wife had accepted the agreements as valid and wanted to override only the property division under the *Family Relation Act* as "unfair".

The husband could also argue that the undertakings not to disclose mediation discussions did not extend to discussions that touched only on procedural aspects of the mediation. While settlement discussions in the courts of pending litigation are privileged, a court may consider the way the discussions were conducted to decide whether to override the settlement pursuant to the Supreme Court of Canada's reasons in *Miglin v. Miglin*, 2003 CarswellOnt 1374/1375, 34 R.F.L. (5^{th}) 255 (S.C.C.) and *Hartshorne v. Hartshorne*, 2004 CarwswellBC 603/604, 47 R.F.L. (5^{th}) (S.C.C.). Similarly, although discussions in judicial settlement conferences are privileged, a court may consider what was said to decide if a settlement was reached: *Majaess v. Majaess*, 2004 CarswellNS 12, 1 R.F.L. (6^{th}) 275 (N.S. C.A.). The husband's request to have the mediator testify seemed to be similarly focused.

The key to the husband's case was that he did not need the mediator to testify about the content of any of the negotiation. He simply wanted the mediator to confirm that discussions took place and the wife appeared to participate. He needed the mediator to testify only as to what she saw and heard in the general sense to prove the fact of what happened without getting into the substantive or tactical content of what was said.

From the husband's point of view, the mediator could give evidence touching on whether the wife participated in the mediation proceeding and/or appeared to understand what was going on to respond to the wife's attempt to rescind the agreement. What she wanted or did not want was

less important than the fact she participated. At a different level of abstraction, assuming the agreement was valid, the mediator could also give evidence about whether the agreement was fairly negotiated in a procedural sense.

Fisher J. held that the discussions at the mediation were privileged because the parties agreed their discussions were privileged and because the discussions were settlement negotiations. While this may have affected the content of what was said, it would not have affected the mediator's ability to testify to whether the wife participated in the process. Unfortunately, Fisher J. did not address the issue of whether the settlement privilege or general mediation privilege or even the contractual privilege arising from the terms of this particular mediation agreement extended to evidence of the fact as opposed to the content of the discussions.

Fisher J. assumed without analysis that an exception to the general rule of privilege may arise when the party relying on privilege puts the existence to the process and any related agreement into issue. While this may be a valid reason for not allowing the wife to rely on privilege, it ignores the issue of whether the mediator had her own privilege arising out of the mediation agreement or to protect the integrity of the mediation process generally. Indeed, the entire focus of Fisher J's reasons was on the parties' privilege arising out of the process.

Ultimately, Fisher J. avoided having to deal with the nature of the privilege that arises out of mediation proceedings because he decided that the mediator's evidence was not sufficiently probative to justify interfering with integrity of the mediation process. Fisher J. stated that the husband wanted the mediator to give evidence about whether the wife understood the agreement. If this is correct, the husband limited his request too narrowly because the mediator also could have testified to whether the wife participated. The wife alleged that the mediator had told them that the agreement would not be valid without independent legal advice. Fisher J. responded that since the mediator had made clear in the agreement and elsewhere that she was not providing independent legal advice, what she was alleged to have said in this regard was not relevant. Again, this seems an overly narrow view of what the mediator could add to the litigation. Fisher J. was also satisfied that the mediator had nothing of substance to add to the wife's complaint about inadequate disclosure, which probably was true.

Arguably, the entire discussion about mediation privilege was ill conceived so long as the husband wanted to call the mediator only to confirm the extent of the wife's participation in the process. The integrity and efficient operation of the mediation process in rooted in the notion of confidentiality. Parties should be able to rely on the fact that they can be honest and accommodating so long as there is a prospect of settlement, secure in the knowledge that nothing the say will be used against them if they are unable to reach a settlement With respect, it is difficult to see how this objective was relevant in this case. The wife alleged that the process was sufficiently flawed that she should not be held to her mediated bargain. The husband in turn alleged that the wife had participated to such an extent that she should not be allowed to ignore the results of the process. Neither position depended on what either party offered or rejected during the mediation discussions.

The integrity of the mediation process is also dependent on the parties' ability to rely on mediated settlements to settle their matrimonial disputes. The rules the Supreme Court of Canada

established in *Miglin* and *Hartshorne* to limit judicial discretion to override spousal settlement agreements seem particularly relevant to mediated settlements. Allowing the mediator to testify as to the mediation process in the case did not appear to compromise the integrity of the mediation process in the former sense and would in fact promote the integrity of the process in this latter sense.

In a different vein, mediators also may want to keep discussions confidential and be able to refuse to testify about what went on in mediation proceedings for institutional purposes and to protect their own interest in the proceedings. The public interest in the effective operation of and institutionalized mediation process justifies some broader notion of confidentiality that protects a mediator from having to testify to matters that undermine the effective operation of mediation generally even if the parties do not object to the mediator's testifying. Is mediation simply a private dispute resolution technique with no public overtones or should mediators have some privilege separate and distinct from the privilege the parties require to promote participants ability to speak freely in a mediation session? Is the mediator simply the agent of each party or does he or she occupy some separate interests from those of the participants. A mediator who agreed to act only on the understanding that he or she would not be required to testify should not be forced to do so unless allowing the mediator to claim such privilege would result in a miscarriage of justice or itself threaten the integrity of the mediation process.

In this case, the mediator should have been required to testify about what went on in the process to protect the integrity of mediation generally and to promote the parties' expectation that mediated settlements would not be easily overridden. Nothing that the mediator could say in a procedural sense threatened the integrity of the process or the mediator's role. The issue was simply one of relevance. With respect, Fisher J. has taken an overly narrow view of what will promote or threaten the integrity of the mediation process. It is submitted that allowing a party to contest the validity of a mediated settlement based on the process itself without having to worry about the mediator testifying as to the process is a bigger threat to the integrity of the process than allowing the mediator to testify about the process in a particular case.

"N.S. judge removes counsel for reading privileged e-mail"

Jobb, Dean, *The Lawyers Weekly*, 27 May 2005, pp. 1, 17
(in part)

A Nova Scotia judge has sent a stern warning to lawyers that they must not read or use e-mails unless a court has first dealt with any claim of solicitor-client privilege and the senders have waived their right to privacy.

Justice Ted Scanlan of the province's Supreme Court, in what may be the first ruling of its kind in a civil action, has removed a half-dozen lawyers from lawsuits to recover millions of dollars lost in the 2001 failure of Knowledge House, a Nova Scotia high-tech company.

The judge found that lawyers representing National Bank Financial Ltd. accessed or used hundreds of e-mail messages, part of a cache of more than 185,000 e-mails retrieved from a computer server, that contained the privileged legal communications of the company and its former CEO, Dan Potter.

"Solicitors for National Bank Financial Limited (NBFL) did not properly respect solicitor-client privilege of the applicants," Justice Scanlan wrote in a 96-page ruling that stopped short of derailing lawsuits seeking to recover some $8 million lost from the brokerage's margin accounts when Knowledge House stock collapsed.

"The serious nature of the intrusion upon that solicitor-client privilege in the present case leaves this court with no option but removal of all counsel for NBFL who have been or may have been privy to the contents of the privileged solicitor-client communications."

The ruling means Halifax lawyers Alan Parish and Brian Awad are off the case, as well as NBFL executive vice-president Lorie Haber and other in-house counsel.

Knowledge House's collapse produced a flurry of lawsuits and counterclaims that allege a conspiracy to manipulate and inflate the value of the company's stock, which traded on the Toronto exchange. Securities regulators and the RCMP are investigating.

Last year Potter applied to the court for relief after discovering that NBFL's lawyers had gained access to e-mails stored on a computer slated for sale along with other assets of bankrupt Knowledge House. Two German investors caught up in the lawsuits filed a parallel motion to strike out NBFL's defence and counterclaim to their action, claiming it was based on confidential information gleaned from the e-mails.

NBFL's lawyers obtained the server in June 2003 from Halifax lawyer Tim Hill, counsel for a former Knowledge House director.

While there was some discussion within NBFL's legal team about whether it was proper to view the e-mails, Justice Scanlan wrote, no one researched the issue even though it was clear many messages were exchanged with lawyers.

"Mr. Hill says he simply turned the computer over to Mr. Parish who was a lawyer with a sterling reputation and he relied on Mr. Parish to do the right thing. Mr. Parish says he relied on Mr. Hill and Parish's belief that Mr. Hill waived any privilege claim. Mr. Parish says he also relied on Mr. Awad to alert him if any privileged documents were found," the judge noted.

"I am reminded of a circle of friends all pointing fingers at the next person. The circle never ends. I am convinced the circle should have stopped at each and every one involved. They all had an opportunity to do the right thing and none of them did."

The e-mails were copied onto compact discs and circulated to counsel involved in the lawsuits. Justice Scanlan later ordered the material sealed and determined that Awad viewed 135 e-mails that were *prima facie* privileged as solicitor-client communications.

While “the actions of NBFL solicitors verge on the threshold of warranting a stay,” the judge said this extreme remedy was not warranted. “One factor which prevents me from entering a stay is that I am satisfied there was no bad faith or dishonesty in viewing the privileged documents.”

“It was simply a matter of junior counsel, Mr. Awad, not recognizing the nature and extent of privileged documents ... None of the counsel seemed to have appreciated that it was not for them to decide if privilege had been waived by the holder or by the operation of law.”

While the judge declined to remove Hill from the case for his “serious lapse in judgment,” he ordered the destruction of all copies of the e-mails. NBFL has been ordered to retain new lawyers and to redraft its pleadings to remove material gleaned from the e-mails. The judge advised the firm to rethink whether it wants to proceed to trial “as opposed to finding some alternative, perhaps mediated, type of resolution.”

NBFL conceded that the e-mails should not have been accessed, but argued that there was no reasonable expectation that e-mails stored on an Internet server will remain private. Justice Scanlan rejected the argument, saying it would expose every law firm's communications to disclosure.

“When it comes to privileged communications, a server is akin to a filing cabinet. Whether that cabinet is at work, home or in a lawyer's office, it is the nature of the document which affords the special protection, not where the filing cabinet is located.

“Would this case be any different if the solicitor had communicated with his client in writing and that client was an employee who left the letter with the privileged communication locked in their desk at work?" he asked. “Here the privileged communications were locked in a server.”

Halifax lawyer Dale Dunlop, who acts for the two German investors in the matter, says while the ruling on privilege is not surprising, he believes the judge has broken new ground when it comes to protecting confidential messages.

“With respect to e-mail accounts of persons other than your client, it's hands off unless you have specific permission of the person themselves or if you get a court order,” he told *The Lawyers Weekly*. “You absolutely don't open up other people's e-mail, it's that simple. It has a legal expectation of confidentiality.”

Justice Scanlan criticized NBFL's counsel for copying and disseminating thousands of e-mails, with no regard to whether they were relevant to the lawsuits and subject to disclosure.

“When citizens communicate on business matters or private affairs they should expect that others will not disseminate them in the context of litigation unless they are relevant to the proceedings,” the judge wrote. “Most people have secrets. Few such secrets are relevant to litigation.”

Justice Scanlan said he will convene a hearing to assess costs against NBFL. "The removal of all NBFL counsel from the file and the consequential cost ramifications for NBFL should send a very clear message to other counsel that this type of activity will not be condoned and, in fact, will be punished by the court," he wrote.

"Firms begin to see the major benefits of web portals"

Bertin, Oliver, *The Lawyers Weekly*, 15 July 2005, p. 6
(in part)

They may be "the new kid on the block," but web portals are slowly and steadily making in-roads in Canada's legal community as both a marketing and communication tool.

Gowling Lafleur Henderson LLP is using them to attract and keep clients. Osler Hoskin Harcourt LLP hopes to bring them on stream later this year, while Blake, Cassels & Graydon LLP is planning a firm-wide rollout in 2006.

Despite these inroads, few lawyers, understand what they really are. And the term "web portals" is still an unfamiliar term with many of the major firms, while their previous name – extranets – had become only somewhat familiar.

The web-portal concept has been around for at least 20 years under a variety of names. In the 1980's, they would have been called LANs or local area networks. But the latest web portals are far more sophisticated – and can do far more – than the old LANs ever could.

The best way to understand web portals is to show what they can do. Gregory Pichler, founder and president of software developer Open Systems Group Ltd., did just that at a seminar titled "Building Web Portals for Law Practices" held in late June at The Toronto Board of Trade.

Web portals are just one more way for lawyers to communicate with their clients. But these Internet-based vehicles allow the client to read whole files and move information instantaneously between the two parties.

In the days before electronic communications, an anxious legal client would have to drop by the lawyer's office, request the file and sit in an office going through it.

When fax machines arrived, the lawyer could send the file to her client, the only constraint being the size of the file and the client's patience. E-mail speeded the process up tremendously, allowing the lawyer to send more files expeditiously through the Internet circuits.

Web portals are simply the next step in the communication evolution, married to the 20-year-old LAN system.

With old-fashioned LANs, all the lawyers in an office could be wired together into one computer network, allowing everybody to keep tabs on what everybody else was doing, as they were doing it. Lawyers could dig into each other's computer files, check the progress on a brief and see what they were writing, as they were writing it.

Web portals take that concept several steps further. Using Pichler's Open Systems approach, clients with proper authorization can simply punch in the lawyer's Internet address, type in a password and gain access to the lawyer's computer.

They can read the latest brief and the 10 before that. They can also check a patent document or mortgage, search the law library, check their account, find which lawyers and secretaries are working on the file and perhaps digest an advertisement or tow that promotes the law firm.

. . . .

The virtue of web portals is that they can be tailored to may different uses, with multiple security levels.

A typical client is given access to the information they need, but no more. Lawyers on the file get access to the entire file, including draft documents and memos. Other interested parties are given limited access to specific documents that they can be allowed to see.

. . . .

These systems cost between US$25,000 and US$100,000 to install, depending on the size of the law firm, according to Jay Moeller, who uses a Microsoft-based system out of the Buffalo office of SV Technology.

Moeller and Pichler give many reasons to spend that much money on a web portal. Not only does it give clients unprecedented access to their files in a simple, efficient and easy manner, they say web portals also give the law firm an extra selling point when it's trying to obtain a client or give an already existing client a good reason to stay on board.

It also saves money when providing files to the client. It eliminates the cost of reproducing files, couriers, faxes and general paper-handling.

There are downsides, though. Mervyn said the single biggest issue is security. There could be serious consequences if the client or the opposing side gain access to the wrong documents.

Web portals are also difficult to develop. They are almost impossible for a law firm to set up without external advice. They are also hard to introduce into a conservative law firm and, Mervyn said, they can cut into a firm's traditional sources or revenue – charging clients to see their own documents.

Even with the cost and complexity, many firms are going ahead with web portals.

"E-mail Evils [:] The Internet's Postal System Has Become Bloated, Blocked, Risky and Less Reliable"

Beckman, David, and David Hirsch, *ABA Journal,* January 2006, p. 60

Good wine and good lawyers get better with age. But one thing that hasn't gotten better is e-mail. Now that it is everywhere, e-mail is harder to use in a way that makes sense.

Now, we are not advocating getting rid of e-mail, but its ever-increasing limitations must be noted.

Fifteen or 20 years ago, the e-mail system had three big problems:

- Most people didn't have it.
- Proprietary e-mail that did not run over the Internet still had a strong foothold.
- Much bandwidth was at a pathetic 1200 baud. At that transfer rate, a large file was functionally equivalent to a computer virus, bogging things down.

Then along came real computer viruses attached to e-mail. Some organizations instituted electronic rules that blocked executable files – ready-to-run forms of programs that may be viruses or worms – or even blocked all attachments. And e-mail volume was already becoming a problem when spam suddenly appeared.

E-manage Mail

If one develops good e-mail management technique, one can probably manually handle about 30 spam messages a day. But it is not unusual for someone with a public e-mail address to receive 200 spam messages a day – an impossible volume without a spam strategy.

The best spam strategy is a spam filter program. But with a spam filter, no matter how good the algorithm, it is impossible to guarantee that some real e-mail won't get deleted along with the spam.

It is also possible to require white-listing (pre-approval of an e-mail address) for e-mail to get through. Lots of weaknesses there, not the least of which is not knowing in advance from whom important e-mail may come.

One doctor client told David Hirsch to communicate with him primarily by e-mail. Hirsch got all the doctor's messages. The problem is, it took awhile to realize that the doctor was getting none of Hirsch's messages because the doctor had not white-listed Hirsch's address. Many organizations block bounce messages, so the sender does not know if the message didn't reach the addressee. And even if the bounce goes out, it may be filtered on the other end.

Manually creating rules routing e-mail at the user level (as opposed to the server level) also creates holes. The No. 1 weakness there is you won't be able to keep up with the changing situation.

One's outgoing e-mail may go to the bit bucket because a firewall or a mail server has a relay trap, and for whatever reason, your e-mail may look like it is a relay – a technique used to distribute spam.

Or your domain may have been put on one of the many spam lists that Internet service providers and others subscribe to, blocking its mail as spam. While that is not likely, it has happened to legitimate domains, including the ABA. Getting de-listed can be a chore.

Ubiquitous bandwidth and its relative cheapness also tend to foster a lack of concern with e-mail usage both in size and volume. Some may remember becoming skilled at packing maximum information into a brief long-distance telephone call to cut costs. But words are now cheap. Syntax and diction, if not irrelevant to some e-mail writer, frequently are of little concern.

And with nearly everyone now using electronic mail, the average e-mail skill level is below what it was 15 years ago, even though there is more total skill out there.

This tends to facilitate mistakes such as misaddressing, long subject fields, over quoting or under quoting prior messages, using e-mail for ill-suited purposes (like attempting to resolve contentious issues or venting) and too much cc'ing.

On top of that, e-mail queues can now be so long that even if your message gets through, it may get lost in the flood.

E-mail is too useful to eliminate, so developing e-mail technique is essential. Lawyers, judges and support staff who pride themselves on communication skills will welcome the challenge.

"The E-mail Advice Line [:] Participating in Web Site Answer Services Can be Gratifying, but Ethics Issues Abound"

Chanen, Jill Schachner, *ABA Journal,* January 2006, p. 22

Between handling employment disputes and other small-business issues, Francisco Romero often takes a few minutes out of his day to answer legal questions e-mailed to him by complete strangers.

Questions range from mundane (Can I sue?) to silly (Is there a law requiring you to tip a waitress?). They come via LawGuru.com, a Web site that allows anyone to submit a legal question, free of charge, to a network of member lawyers.

"It's almost like people are just looking for guidance," says Romero of Fort Collins, Colo. "A lot of [my answers] are just commonsense advice." But if that advice can help someone, he says, then he is happy to give it.

Lawguru.com isn't the only Internet site specializing in linking nonlawyers with legal experts – plug "legal questions answered" into any search engine and myriad Web sites pop up, some legitimate, some dubious. Even Google has gotten into the game with Google Answers, which provides a roster of researchers who can be hired to field queries in countless disciplines, including law.

The appeal of such sites is obvious: Questioners can quickly receive legal advice at a cost ranging from nothing to not-so-much. For participating lawyers, however, the benefits seem less connected to the bottom line.

Romera says he signed up with Lawguru.com hoping it would drive some clients to his nascent solo practice. It hasn't. But that hasn't stopped him from answering e-mails, even though he does so free of charge.

"I thought is was kind of interesting that there are these services out there where people who have a simple question can get it answered without needing to go through the expense or hassle of contacting a lawyer," Romero explains. "My hope is that I am helping people to get a couple more steps down the road than they would have been without these little simple pieces of advice."

Besides, Romero adds, it's much less of a time commitment than taking phone calls that come into his office from people who are also looking for free legal advice.

It's the interest factor that keeps Meyer Silber of New York City connected. Silber lends his legal expertise to both Lawguru.com and Allexperts.com, a free online Q&A service covering topics ranging from pets to parenting.

He say's he's contemplated quitting, especially since Allexeperts.com, unlike Lawguru.com, doesn't allow him to refuse to respond to a query. But, because some of the questions are quite interesting, he says, he continues to hit that send key.

Ensuring Ethical Advice

Before providing legal advice through an online Q&A service, however, lawyers should consider the ethical implications. For example, if the service takes a cut of the fees that a customer gives to a participating lawyer, it can raise a question whether the payment is fee sharing or simply a permissible administrative fee, says Will Hornsby, staff counsel for the ABA's Division for

Legal Services. Another concern is whether the e-mail exchange creates an attorney-client relationship, which could raise confidentiality and privilege issues, he says.

It was issues such as these that caused James Gross, a Chevy Chase, Md., family lawyer, to end his five-year affiliation with Ingenio.com, a fee-based service that facilitates phone contact with lawyers. Ingenio.com allows users to scan a list of lawyers licensed in their jurisdiction and choose one based in part on whether that lawyer is ready to take their answers.

Despite his ethics concerns, however, Gross applauds the company for filling a very real void – helping people get legal advice at a low cost. "There is tremendous demand for advice," he says.

"General Solicitor-Client Privilege Rule"

Editor's Note

(a) Evidentiary rule

1. Generally, as to "the existence for the right of the lawyer's client to confidentiality" (*Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)), Lamer J. (for the Court, at p. 603), cited 8 Wigmore, *Evidence* (McNaughton rev. 1961, para. 2292, p. 554), which states:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived [by the client].

(b) Substantive rule

2. Historically conceived as a rule of evidence (see, e.g., *Descoteaux, supra,* at p. 602), the need for protection of the right of the lawyer's client to confidentiality, which generated the evidentiary rule, has "also since given rise to a substantive rule" (*Descoteaux, supra,* at p. 604) constituting a "fundamental civil and legal right" (*Solosky v. Canada* (1980), 105 D.L.R. (3d) 745 (S.C.C.), per Dickson J. at p.760). Thus, the right of the lawyer's client to confidentiality is not only preserved by an evidentiary rule in judicial and other proceedings but, additionally, is protected by a substantive rule in circumstance not involving "testimony before a tribunal or court" *(Desoteaux, supra,* at p.604).

3. In *Descoteaux* (*supra,* at pp. 604-605) Lamer J. formulates, in four points, the substantive rule which, previously, had been "applied …, without actually formulating it, …". Here *apropos* are the third, and a portion of the fourth, points of the rule:

3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with …[the right of the lawyer's client to confidentiality], the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it, except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

4. … enabling legislation referred to in para. 3 must be interpreted restrictively.

4. The evidentiary and substantive privilege rules protecting the right of the lawyer's client to confidentiality do not operate independently of one another. For example (per *Descoteaux, supra* at p. 605), the evidentiary rule "does not in any way prevent a third party witness … from introducing in evidence confidential communications made by a client to his lawyer." However, in deciding whether and the extent to which to admit such communications (i.e., from a source other than the solicitor and client to the communications), the court must be satisfied, "through the application of the substantive rule that what is being sought to be provided by … [introduction of the confidential solicitor-client communications] is important to the outcome of the case and that there is no reasonable alternative form of evidence that could be used for that purpose."

Limitations of Evidentiary and Substantive Privilege Rules

5. Solictor-client privilege – either expressed as an evidentiary rule or as a substantive rule – is not an absolute privilege and does not apply to everything coming to the solicitor's attention while the solicitor is retained by the client. Per Farley J., in *Canadian Pacific Ltd v. Canada (Competition Act, Director of Investigation and Research)* ([1995] O. J. (Quicklaw) No. 1867, 02 June 1995, at paras. 13 to 16):

> [13] … it is an exception to the concept of full disclosure.
>
> [14] Clearly this privilege only extends to legal advice – not everything which a lawyer does related to legal advice. Anything which is "mechanical", "administrative" or "record keeping" would not seem to fall within legal advice. See Ontario Securities Commission v. Greymac Credit Corp. at p. 337.
>
> [15] … privilege would not attach to information which the lawyer has obtained otherwise than form the client (or persons working for the client in that particular capacity) see Re United States of America v. Mammoth Oil Co. at p. 327.
>
> [16] … the material must not only be involve in the legal advice being sought and given but there must be an intention that it remain confidential – see R. v. Bencardina et al. at p. 358. If it does not remain unrevealed then naturally the privilege is lost (unless reviewed on the narrow grounds of disclosure as permitted). Normally if the material is otherwise disclosed the privilege is lost.

6. The duration of solicitor-client privilege is summarized by Barclay J. in *Law Society of Saskatchewan v. Robertson Stromberg* ([1994] S.J. (Quicklaw) No. 511, 13 October 1994, at para. 38):

> The right to have the communications protected must also be capable of being asserted on any later occasion when the confidence may be in jeopardy at the hands of anyone purporting to exercise the authority of the law. (See Descoteaux et al. v. Mierzwinski and Attorney-General of Quebec et al. (1982), 141 D.L.R. (3d) 590 at 613 (S.C.C.) where Lamer J. (as he then was approved the reasoning in Re Director of Investigation and Research and Shell Canada Ltd and Re Borden & Elliot and Queen (1975), 10 D.L.R. (3d) 579 (Ont. C.A.).)

Other Species of Privilege

7. Three other species of privilege are solicitor-client litigation privilege, ethical or professional solicitor-client privilege, and what is here described, for convenience sake, as "negotiation privilege."

(a) Litigation privilege rule

8. An offspring of general solicitor-client privilege, litigation privilege affords protection to material which came into existence for the substantial purpose (Ontario) or dominant purpose (some other provinces) of litigation that is either reasonable expected or in progress. Whereas general solicitor-client privilege protects communications "of a confidential character, between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice", the scope of litigation privilege, on the other hand, covers "all papers and material created or obtained specially for the lawyer's 'brief' for litigation, whether existing or contemplated" (*SusanHostery Ltd. v. M.N.R.*, [1969] 2 Ex. C.R. 27 at p. 33, cited by Watson Q.C., Garry D. and Au, Frank in: "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation", in (1998), 77 Can. Bar Rev. Nos. 3 &4). The litigation privilege embraces "counsel's work in assembling documents, interviewing witnesses, consulting with experts, and developing the theory of the client's case" (Atkinson, P.Y., "Production Obligations: the Narrowed Scope of the Work Product Privilege" (1994), 13 Advocates' "Soc. J. 6, at p. 7). (In the United States, an attorney's communications with third parties and document preparation for proceedings, either existing or contemplated, are protected as "lawyer's work product": *Hickman v. Taylor* 329 U.S. 495 (1946), at p. 508.)

9. However, litigation privilege, unlike general solicitor-client privilege, prevails only for so long as the litigation, which generated the documents and third party communications, is reasonable expected or existing. (Sopinka, John; Lederman, Sidney N., and Bryant, Allan . *The Law Of Evidence In Canada* (Toronto: Butterworths, 1992), at pp. 659-660.)

(b) Ethical solicitor-client privilege rule

10. Another species of solicitor-client privilege is the professional or ethical duty that, as a general rule, is owed by solicitor to client, to refrain form disclosing information received from a client save with the client's approval. (*Code Of Professional Conduct* [*of the Canadian Bar Association*, 1974], c. IV). This professional or ethical duty "is wider than the evidentiary [or the substantive solicitor-client privilege [and the solicitor-client litigation privilege] and applies without regard to the nature of the source of the information or the fact that others may share the knowledge" (*The Law Of Evidence In Canada*, *supra*, at p. 627).

11. A characteristic of solicitor-client privilege rules is that, generally, the privilege is owned by the clients and, without the client's consent, cannot be relaxed or vitiated. The authors of *The Law Of Evidence In Canada* (*supra*, at p. 638) write:

> If the solicitor is authorized or instructed by the client to transmit a communication to others, then it cannot be said that the client desired it to be confidential. Thus, in *Fraser v. Sutherland* the Court ruled that communications made to a solicitor, which were intended to be and were put before the clients' creditors as a compromise proposal, were not privileged. Similarly, in *Conlon v. Conlons Ltd.*, the English Court of Appeal held that privilege did not extend to instructions given by a client to his solicitor for the purpose of presenting an offer of settlement to the opposite party.

(c) Negotiation Privilege

12. Perhaps trite to add, this principle is subject to another, articulated in *The Law Of Evidence In Canada* (supra, at pp. 719, 722); for convenience sake here described as "negotiation privilege"):

> … the courts have protected from disclosure [in litigation existing or within reasonable contemplation] communications, whether written or oral, made with a view to reconciliation or settlement. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession that they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming.

(Needless to add, this protection lasts only until the subject of reconciliation or settlement efforts has been resolved by negotiations or litigation.)

13. Where a solicitor-client communication involves documents, Dickson J., in *Solosky v. R.* ((1979), 50 C.C.C. (2d) 495 (S.C.C.), at pp. 508-509) writes that

> … [P]rivilege can only be claimed document by document, with each document being required to meet the criteria for the privilege - - (i) a communication between solicitor and client; (ii) which entails the seeking

or giving of legal advice, and (iii) which is intended to be confidential by the parties.

3.3 Relationships With Clients – Rendering Services *(Continued)*

3.3.3 Negotiations

"Ethics: Holding the Question"

Cameron , Nancy, J. *Collaborative Practice: Deepening the Dialogue* (Vancouver: The Continuing Legal Education Society of British Columbia, 2004) pp.233-239

How do we identify an ethical dilemma within collaborative practice? As a lawyer, I am trained to turn to the professional conduct handbook when I encounter what I perceive to be an ethical dilemma. The ethical guidelines set out in the handbook are akin to a flashlight on a dark night – illuminating very particular matters, leaving the edges a bit difficult to distinguish. The various legal canons of ethics have been written to structure ethical behaviour within an adversarial paradigm. They are designed to mandate behaviour in part to ensure that the adversarial process operates properly. "A lawyer should always bear in mind that the profession is a branch of the administration of justice..."

What guidance do we rely on when our clients have specifically opted out of the justice system? Can we expect any guidance from ethical canons based on an adversarial paradigm when our client instructs us not to be adversarial? Does collaborative practice require that we use a new ethical framework? If it does, how do we form this framework?

How do we agree on it? Where do we look for direction on questions of ethics, morals, and values? Do we look inward? To clients? To colleagues?

Lawyers newly trained in the collaborative process face this question early on: if my personal ethics and the ethics of my client clash with the ethics of an adversarial paradigm how do I reconcile them? In the United States lawyers struggle to reconcile a professionally prescribed duty to zealously represent their client within the bounds of the law and the non-adversarial advocacy of the collaborative process. In Canada, though the language in the professional codes is less strident, the sentiment set out under duty to the client is similar:

> A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence which is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law… . No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety."

Clearly, collaborative process does not suggest that lawyers no longer advocate for their clients. It does, however, demand that lawyers learn to do this outside the adversarial setting, and without the use of traditional adversarial strategies and techniques.

PUBLIC PERCEPTION OF LAWYERS' ETHICS

Given that the purpose of our professional ethics is to ensure that members of the profession act within a certain adversarial framework, what happens to our personal ethical compass? Is there a chasm between the personal ethic and the professional ethic? If there is, do lawyers and the public at large have a shared view of this chasm?

The public perception of lawyers and ethics in Canada and the United States could be summed up as follows: the term “ethical lawyer” is an oxymoron. Polls in the Untied States have listed lawyers second to last on lists of professions that inspire confidence (substantially below doctors, police officers, and educators), and have had close to one-third of respondents list lawyers as less honest than most people.) Since successful discipline complaints against lawyers for ethical breaches involve only a small percentage of practising lawyers, there is obviously a huge gap between the public understanding of ethical lawyering and the definitions set out in the ethical codes. Does this matter? If we believe it does, how do we stimulate a dialogue about it? Can something be done to narrow the chasm?

PROFESSIONAL ETHICAL CODES

Legal professional codes set out ethical obligations to clients, to the court, and to other lawyers. We are used to letting these set the parameters of our ethical framework and, so long as we operate within this framework, we tend not to consider ethics too deeply in day-to-day practice. We take much of what we do for granted, not questioning matters until facing a particular decision brings us squarely into the realm of a particular rule of conduct.

If codes of conduct construct our ethical parameters, I would suggest that professional blind spots also contribute to our recognition of and decision-making around ethical issues. The tension between personal and professional ethics is likely more marked for practitioners who are guided predominantly by an ethic of care within their personal lives. For family practitioners whose professional lives are dominated by an ethic of care, work within the litigation system might produce a particularly acute sense of ethical dissonance. To lessen the anxiety producing dissonance that would otherwise occur the lawyer might choose to ignore his personal moral framework when it conflicts with zealous advocacy.

These blind spots protect us. Systemically, they allow lawyers to function within the institutional legal framework of divorce. Personally, they serve to insulate us from an ongoing examination of professional ethical dilemmas, provided they do not slam us up against our professional code of ethics. As long as we are operating within the moral framework of the judicial process, and are abiding by our ethical canons, we allow ourselves to become desensitized to what might otherwise be gnawing ethical concerns.

Julie MacFarlane, in her study of collaborative lawyering, defines an ethical dilemma as: "any decision over competing courses of action whether in client consultation, negotiation or advocacy – which raises questions of personal moral judgment over the appropriate professional response." This definition takes ethical discussion far beyond the parameters of our professional ethical codes and asks us to look beyond our professional blind spots and ask a number of questions about both traditional and collaborative practice.

ETHICAL CONVERSATIONS WE HAVEN'T HAD

Given that applying "personal moral judgment" is a requisite characteristic of an ethical dilemma, is it a dilemma if we make decisions within one moral framework when our client would use another? Is this an issue we should raise with clients when we make decisions about process choice? Does our duty to have these conversations increase in family matters where arguably clients may wish to bring an ethic of care to structuring process and the justice system is framed by an ethic of rights and obligations? How do we determine whether or not our moral framework or our values around particular issues align with our client's? If they don't, how do we address the difference?

In making process choices, how often do we consider the dichotomy between a professional interest in practicing defensively (that is in a way that protects the practitioner from any possible negligence) and meeting client needs for expedience and cost effectiveness? It could be argued that there is a continuum of defensive practice. How do we determine the point that effectively meets client goals in a cost-efficient manner? How do we determine this on a case-by-case basis?

As the number of civil trials in Vancouver has decreased, the length of the trials has correspondingly increased. Can this be attributed solely to more complex trials? Or is this in part an economic response by a profession wanting to maintain the same number of trial days generating the same kind of income? In making litigation process choices (for example, what witnesses to call, what evidence to adduce, what documents to introduce) how much weight is given to efficiency and cost effectiveness?

How does the profession as a whole respond to a growing public disenchantment with padded billings? Our discipline bodies have framed this as a "fee dispute" problem, rather than an ethical one. This helps to limit discussions about the ethics of a number of practices or conflicts:

- Billing for "thinking about" a file while we multitask-whether it be in the shower, having a cup of coffee prior to a meeting, scrolling through e-mails, or while travelling at the expense of another client

- Having minimum billing increments that exceed the actual time spent

- Knowing that working slower is better economically for the practitioner

In making process choices, how often do practitioners speak to clients about how these choices might escalate conflict? What do we say about the impact particular positions may have on movement towards resolution? on cost for the client? and on continuing relationships?

How ethical are tactics that exploit the economic inequalities of the parties? Certainly they lie well within ethical canons. Yet they have detracted from the fairness of the adversarial system for centuries, and this fundamental flaw continues to be a hallmark of our legal intuitions.

ETHICAL QUESTIONS IN THE COLLABORATIVE LAW PROCESS

To the extent that collaborative practice is a new and unique process, it will attract criticism of the underlying ethical framework. This is evident in some of the early published work which has scrutinized the collaborative ethical framework much more closely than the ethical framework underlying traditional practice. As a lawyer, I welcome this scrutiny, and hope it initiates a deeper dialogue about ethics in other practice areas.

In collaborative practice, there are some readily identifiable ethical dilemmas arising from the process itself. If part of changing the nature of our professional role involves growing self-awareness, then it is important to identify choices that raise questions about, or depend on, a moral structure or values. It is only by learning to identify these junctures that we can begin to attune ourselves to the more complicated ethical questions.

Some of the ethical questions that arise in collaborative practice include:

- How do we deal with the pace of the file? Collaborative process often moves at the rate of the slowest party. When does pacing become prejudicial? How do we deal with this if it is becoming prejudicial for one spouse?

- How do we deal with billing? Since speed of resolution will relate directly to cost, how do we address the tension between hourly billing and numerous, unproductive meetings? Is there any time when a dilemma arises around billing? What about increased time spent because lawyers are struggling with adversarial behaviour that clients have been assured will not be part of the process?

- How do we build in compliance around interim issues? How do we decide what needs to be reduced to a written agreement and what doesn't?

- What do we do when our personal values diverge from our client's values? How do we even know this? What can we assume and when do we need to have detailed conversations?

- Does a better practice life for lawyers always mean a better service to clients? Is this a potential conflict? If it is, how can we be both mindful of and transparent about this?

- How do we define professional boundaries within the collaborative team? What do we do if someone on the team is stepping over a professional line? If this requires time from all team members to sort out, can we charge our clients?

- What if a final agreement means my client is taking a smaller piece of the pie? How do I justify this? How do I separate my sense of the interplay between financial outcomes and

what Pauline Tesler defines as the "relational estate" from my client's comfort with the resolution in both of these areas? This calls forth deeply held questions about personal values. Am I clear on my values in these areas (money and relationships)? Do I understand my client's values? Does the agreement reflect my client's values?

- What if my client is wavering about staying in the process? How do I offer guidance?

- What if I am concerned that the other side is not really negotiating in good faith? How do I articulate this concern? What do I do about it? Whom do I approach first with my concerns: my client, or the other lawyer?

- Is there a conflict between my ongoing professional relationships in practice groups and my relationship with my client? If a conflict arises, how do I identify it? How do I resolve it?

These are complex questions that require examination of our own underlying values in a number of different areas. My hope is that raising these questions will generate discussion and thought about ethics in collaborative practice. Groups may wish to make some of these questions the focus of dialogue for a case conference or study group, or to enlarge this dialogue by discussing other ethical dilemmas that may arise. In an interdisciplinary group, lawyers have the benefit of an opportunity to learn about the training mental health professionals have received around ethical dilemmas within their own domain.

"Two Income Couples"

(2004) 20 Can. J. Fam. L., pp. 323-327
(in part)

PRESENT SITUATION

Judgments on entitlement and quantum in matters of spousal support for couples where both spouses are employed can be very different despite similar facts. Because of this when lower income spouses seek legal advice at marriage breakdown, the situation is at a point where lawyers in some areas of Canada are having to tell clients that depending on the judge who is hearing the case, they may or may not be awarded spousal support and the quantum of what may be awarded may also vary significantly.

Many spouses have learned that if they fight long and hard enough, the lower income spouse can be pressured to give up a claim for support or if the claim is pursued to trial, a judge may be persuaded that even if there is a significant disparity in income, the lower income spouse earns enough to be considered self-sufficient. The potential payor is often prepared to apply

considerable pressure to avoid paying spousal support. The lower income spouse may renounce to rights to support if this means that otherwise there cannot be an amicable settlement of claims.

The uncertainty of the outcome of requests for spousal support can make claimant spouses feel very weak, both in a lawyer-assisted negotiation and especially in mediation. This is a very serious problem at a time when mediated settlements are being actively encouraged as the best way to resolve financial issues in a divorce. Many spouses renounce to rights to support without receiving anything in return, because of the emphasis put on the premise that any settlement, even if unsatisfactory, is better than a judgment.

HOW MEDIATION HAS CONTRIBUTED TO FEWER WOMEN RECEIVING SPOUSAL SUPPORT

In an article entitled "Would ADR Have Saved Romeo and Juliet?", Pam Marshall writes that the process of mediation puts pressure on the participants to settle amicably and thus on women to give up support claims if otherwise a settlement cannot be reached. Marie Gordon also provides valuable input about the problems resulting from mediation.

In an article titled “Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law,” Craig Martin analyses why women are able to stand firm in mediation on matters of property and child support but not on spousal support. He concludes that the uncertainty of the case law is the most important reason for the frequent renunciation of support. In paragraphs 17 and 18 he writes:

> To the extent that general rules are clearly articulated and unambiguous as to what the outcome of a claim would be if it were adjudicated, they help to define the claim. They ‘endow’ the bargainer making the claim. The rules also inform what the alternative to agreement is for the parties – that is, what the court will likely decide in the absence of negotiated agreement. The more uncertain the rule is, the less it can meaningfully endow the bargainer with a basis for his or her claim.
>
> General uncertainty as to the alternatives to agreement also acts as an independent variable agreement also acts as an independent variable because it will influence the bargaining behaviour of the parties differently according to their risk-preferences. The more risk-averse party will attempt to avoid uncertainty, and so, if alternatives to agreement are fraught with uncertain outcome, the more risk-averse will be at a disadvantage in the negotiations.

Martin explains prospect theory, a negotiation theory which outlines how people value losses differently than gains. For example, he points out that people will care more about losing $5 they already have, than losing the right to $5 they don't yet have, even though in either scenario, they are losing the same amount of money. According to Martin, prospect theory can explain why people are less likely to take a risk when they are looking at pursuing a gain rather than when they are trying to protect themselves from a loss. He writes:

> ...[I]n the context of negotiations ... parties will be concession-averse in the domain of loss, or more precisely, will be highly resistant to making concessions that will require a loss and less resistant to making concessions that constitute only foregone gains. Concessions that increase losses will be felt as being more painful than those that only sacrifice potential gains.

What this means is that whether in mediation or when negotiating matters of spousal support, a spouse who will lose income by having to pay support will be prepared to take more risks (that is, risk high legal fees and conflict with his spouse) to avoid paying support than a spouse will be prepared to take risks trying to obtain support.

Martin also makes the point that because the Divorce Act, 1985 does not characterize spousal support in terms of a strict legal entitlement but rather sets out factors and objectives, it is very difficult for a claimant spouse to be sure of either entitlement or quantum. Thus the lower income spouse's risk becomes very high and the riskier it is to fight for a gain, the more averse she will be to take it.

Martin writes about spousal support:

> The weakness in the claimant's bargaining position is all the more acute when the issue is only one of four, of which some have more predictable non-agreement outcomes with respect to which the party is far more loss-averse. In other words, a risk-averse party is not going to hold out over an issue about which the rules are highly uncertain, if they have already secured reasonable terms on the other three issues. It should be noted that the property divisions provisions of the Family Law Act of Ontario are very clear bright line rules, which are generally applied consistently by the courts; that custody continues to be awarded to women in the vast majority of divorces; and that child support is awarded (if not actually paid) to women in 93 per cent of the cases in which it is requested.

In areas of the country where judges often grant shared physical custody, it is even more likely that a woman will renounce spousal support if a mediated settlement means that she can avoid a contestation of her claim for sole custody.

The lower income spouse is generally the least capable of the two spouses to afford legal fees. Not knowing if the money will be wasted because the outcome is unclear discourages her from exercising her rights to support especially since the decision to abandon a support claim is often made soon after the marital breakdown and before she has felt the effect of living on only her income. Also if her husband is vehemently opposed to paying support and she wants the children to benefit from parents who will cooperate, abandoning a support claim may seem like the only thing to do in order to avoid having the children being caught in the middle of ongoing conflict.

"Husband who balked at $2M settlement now faces $7M divorce judgment"

Schmitz, Cristin, *The Lawyers Weekly*, 10 December 2004, pp. 1, 25
(in part)

A Toronto businessman who won a court fight four years ago to resile from a $2-million matrimonial settlement now faces a record $7-million divorce judgment, plus up to $2 million for his former wife's legal costs. [*Debora v. Debora*, [2004] O.J. No. 4826 (QL).]

"The moral of the story is the old Chinese adage: 'Be careful what you wish for because it may occur,'" observed McCarthy Tetrault's Stephen Grant of Toronto, with who partner Gerry Sadvari won the Nov. 24 judgment for the wife, Miriam Graham.

"This is an epic eight-year legal struggle in which our client has finally been vindicated," Grant said of the long-running case which has been likened to Dickens' *Jarndyce v. Jarndyce*.

In the wake of the judgment Graham, who remarried after she split from millionaire David Debora nine years ago, experienced "a mixture of elation and relief," Grant said.

Following her rejected offer to settle four years ago, Graham made another offer to settle going into the 2004 trial, Sadvari told *The Lawyers Weekly*.

"We offered to settle for $3 million all-inclusive, including costs and interest, and the other side didn't have an offer outstanding at trial."

Saying the wife will seek $2 million in legal and valuation costs, Sadvari predicted that "when the dust settles" the award by the Superior Court Justice Nancy Backhouse against the founder of the world-wide "Lifestyles" diet and nutraceutical empire could result in a payout of $10-12 million, including costs and pre-judgment interest running from 1995.

"It is certainly amongst the largest awards in Canadian divorce history. With the interest … it will make it in all likelihood the largest award in Ontario history."

However, Debora's counsel, Gary Joseph and Deidre Smith of Toronto's MacDonald & Partners, noted Graham's claim at trial was for $22 million and costs, including $13 million in retroactive child support.

Smith and Justice Backhouse's rejection of Graham's child support claim suggests that in such cases, courts will not award unrealistic amounts generated by a straight application of child support guidelines. "When you start to get into really high-income levels you are really back to looking at the children's needs on a qualified basis," Smith said.

. . . .

Calling Debora's policy of tactical non-disclosure "the cancer of matrimonial property litigation," Justice Backhouse said "on many occasions, different and conflicting answers were given, suggestive of a deliberate attempt to mislead."

"Much of the evidence is only before me because of a tireless struggle by the wife's counsel and Mr. DeBresser to locate assets," she said. "I have concluded that the husband made a tactical decision early on in these proceedings that a policy of non-disclosure and non-co-operation would benefit him and that all assets would be found. Regrettably, I am of the view that this has proved accurate."

Rejecting most of Debora's evidence, she said he treated this action as a game that only he could afford to play. He did his utmost to frustrate his wife's rights and this court assessment of those rights and his obligations."

"Annual Review of Family Law"

McLeod, James G. and Mamo, Alfred A., *Domestic Contracts* (Scarbourough, ON: Carswell, 2005), pp. 453-456, 467-469
(in part)

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2. Settlements and Agreements Between Counsel

As a general rule, settlements of pending litigation between counsel acting within the scope of their retainer will be upheld in order to maintain the integrity of the settlement process, regardless of whether the agreement meets the formal requirements under the local domestic contract legislation. While a court may decline to enforce a settlement between counsel, so long as the lawyers acted within the scope of their retainers and there was no obvious overreaching, this is unlikely: *Delaney v. Delaney* (2002), 2002 CarswellNB 506 (Q.B.), affirmed 2003 CarswellNB 87, 2003 CarswellNB 88, 2003 NBCA 13 (C.A.) (binding settlement between counsel); *Deluney v. Deluney*, 2004 NSCA 72, 2004 CarswellNS 212 (C.A.) (settlement between counsel); *Mellows v. Mellows*, 2004 CarswellBC 889, 2004 BCSC 547 (S.C. [In Chambers]) (court enforcing settlement according to its terms notwithstanding wife's complaint lawyer missed an issue); *Kuhn v. Kuhn*, 2004 CarswellSask 287, 3 R.F.L. (6th) 70, 247 Sask. R. 247, 2004 SKQB 166 (Q.B.) (that lawyer may not have been good as other lawyer insufficient reason to set aside settlement). But contrast: *W. (D.S.) v. W. (N.A.)*, 2004 BCSC 437, 2004 CarswellBC 709 (S.C.) (counsel not reaching final agreement on all issues in dispute); *Chappell v. R.* (2003), 2003 CarsweliNat 4207, 2004 TCC 39 (T.C.C. [Informal Procedure]) (no agreement reached); *Grant v. Jovic*, 2005 CarswellAlta 577, 2005 ABQB 323 (Q.B.) (settlement between counsel in scope of retainer).

In *Majaess v. Majaess*, 2004 NSCA 9, 2004 CarswellNS 12, 1 R.F.L. (6th) 275 (C.A.), the NSCA held that a court could take into account statements made at settlement conferences in deciding whether a settlement had been reached.

In *Richardson v. Richardson*, 2004 CarswellAlta 1442, 2004 ABQB 771 (Q.B.), the plaintiff's lawyer sent the defendant's lawyer an offer to settle. The defendant's lawyer advised the plaintiffs' lawyer that he had been instructed to accept the offer. The plaintiff's lawyer drafted documentation to formalize the settlement but the defendant's lawyer changed a term that the plaintiff refused to accept. Marshall J. held that there was no agreement. With respect, the court confused the formal agreement evidencing the settlement between counsel with the settlement itself. On the other hand, in Alberta, a property agreement, whether negotiated between the parties or their lawyers, apparently has to be in writing and contain a declaration of ILA to be enforceable: *Grant v.Jovic*, 2005 CarswellAlta *577, 2005* ABQB 323 (Q.B.).

It is difficult for a person to avoid a settlement if he or she participated personally in the negotiation process resulting in the settlement: see *Majaess v. Majaess*, 2004 CarswellNS 12, 1 R.F.L. (6th) 275 (C.A.) (wife held to agreement negotiated with counsel at settlement conference where she subsequently decided property was worth more); *Galbierz v. Galbierz*, 2002 CarswellBC 3125, 2002 BCCA 656, 35 R.F.L. (5th) 342, 179 B.C.A.C. 280 (C.A.) (settlement between parties and lawyers upheld); *Noonan v. Lis* (2004), 2004 CarswellOnt 477 (C.J.) (court upholding reasonable agreement negotiated with assistance of counsel).

In *Salmon v. Salmoll*, 2004 BCSC 597, 2004 CarswellBC 976 (S.C. [In Chambers]), Harvey J. held that in the absence of a fundamental breach, a court should grant judgement according to the provisions of a settlement between counsel of pending litigation even though the party relying on the settlement was himself in breach of the terms of that settlement. Any minor breaches could be dealt with through enforcement proceedings or otherwise as provided in the settlement.

A lawyer negotiating with a self-representing litigant should ensure that the other party understands the nature and effect of the agreement and exchange full financial disclosure: *c.f Davis v. Davis* (2003), 2003 CarswellOnt 2800, [2003] O.J. No. 2938, 44 R.F.L. (5th) 56 (S.C.J.) (little weight to self-represented agreement); *Lang v. Lang* (2003), 46 R.F.L. (5th) 200, 2003 CarswellMan 527, 2003 MBCA 158, [2004] 6 W.W.R. 454, 180 Man. R. (2d) 223, 310 W.A.C. 223, 234 D.L.R. (4th) 525 (C.A.) (problems negotiating with self-represented spouse).

Although a court will not complete an incomplete settlement, if the parties settled a case in substance but left open a few minor things, a court may be willing to finalize the arrangement: *Chan v. Lam* (2002), 2002 CarswellOnt 901, 24 R.F.L. (5th) 327, 157 O.A.C. 264 (C.A.), additional reasons at (2002), 2002 CarswellOnt 1850 (C.A.), leave to appeal refused (2002), 2002 CarswellOnt 4382, 2002 CarswellOnt 4383, 307 N.R. 199 (note), 180 O.A.C. 396 (note) (S.C.C.); *MacRae v. Simpson* (2002), 2002 CarswellOnt 4425, [2002] O.J. No. 4931 (S.C.J.), additional reasons at (2003), 2003 CarswellOnt 404,36 R.F.L. (5th) 376 (S.C.J.) (substantially complete settlement enforced). Contrast *Goyal v. Singh* (2003), 2003 CarswellOnt 736 (S.C.J.) (settlement not covering all issues not binding); *Deluney v. Delutley*, 2004 CarswellNS 212, 3 R.F.L. (6th) 27, 2004 NSCA 72 (C.A.) (no binding settlement where wife's lawyer making clear she did not have client's instructions to settle a significant issue).

In *Umholtz v. Umholtz* (2004), 2004 CarswellOnt 1683, 238 D.L.R. (4th) 736 (S.C.J.), the parties settled their outstanding litigation, and more. Although the litigation did not cover support, the settlement released support, Corbett J. held that the parties agreed on the terms of the settlement and had to agree to a stand-alone release clause for support. With respect, unless the settlement was in writing, signed by the parties, and witnessed, it was not an enforceable domestic contract. Nor can counsels' agreement outside the scope of the pending litigation be deemed an enforceable settlement within the settlement by counsel exception.

A lawyer who negotiated a domestic contract for a client may end up as a witness if the agreement comes under attack. If that happens, he or she cannot continue to represent the client. In *Leopold v. Leopold* (1999), 1999 CarswellOnt 1837, 48 R.F.L. (4th) 388 (C.A.), the Court of Appeal held that a person could not compel his or her spouse's lawyer to testify in such circumstances unless the spouse consented, because doing so would breach privilege, even if the spouse was relying on his or her intention and/or understanding at the time of the agreement to set aside or override the agreement. See also *Hutchinson v. Hutchinson*, 2002 CarswellMan 111, 2002 MBCA 36, 25 R.F.L. (5th) 289, 163 Man. R. (2d) 249, 269 W.A.C. 249 (C.A.) (lawyer not compellable regarding basis for settlement). Legal niceties aside, it is difficult to see how a judge could avoid drawing an adverse inference if the client refused to call his or her lawyer and refused to waive privilege on the point. In *Murphy* v. *Murphy* (2004), 2004 CarswellOnt 1739, 50 R.F.L. (5th) 131 (S.C.J.), Jarvis J. did not appear concerned about the legal niceties involved and was clearly prepared to draw an adverse inference from a party's failure to call the lawyer who acted on the agreement to explain the alleged flaw in formation.

There is a difference between when an offer to settle expires so that it can no longer be accepted under general contract law and the Ontario Rules of Civil Procedure: *Scanlon v. Standish* (2002), 2002 CarswellOnt 128, [2002] O.J. No. 194, 155 O.A.C. 96, 57 O.R. (3d) 767, 24 R.F.L. (5th) 179 (C.A.) (different effect of counter offers).

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(g) **Independent Legal Advice**

In some jurisdictions, a domestic contract is invalid or unenforceable unless the parties had independent legal advice: *e.g., Grant v. Jovic,* 2005 CarswellAlta 577, 2005 ABQB 323 (Q.B.) (agreement unenforceable under *Matrimonial Property Act* unless in writing and declaration of ILA). The *Family Law Act,* R.S.O. 1990, c. F.3 does not contain such a provision. Nor is independent legal advice a prerequisite to a valid contract at common law: *Raaymakers v. Green* (2004), 2004 CarswellOnt 2712, 4 R.F.L. (6th) 120 (S.C.J.) (ILA not precondition to valid contract); *Somerville v. Somerville* (2005), 2005 CarswellOnt 1139 (S.C.J.) (ILA not prerequisite to valid agreement).

The fact a person had independent legal advice minimizes the risk of mistake, undue influence, etc.: *McGregor v. Van Tilborg,* 2005 CarswellBC 933, 2005 BCCA 217 (C.A.) (difficult to prove duress, undue influence, and unconscionability where ILA); *Bowes v. Bowes*, 2005 CarswellBC 945, 2005 BCSC 593, [2005] B.C.J. No. 882 (S.C.) (courts less inclined to find undue influence, duress, or unconscionability where party has ILA, even if only on and off during

negotiations); *Gauthier v. Gauthier* (2005), 2005 CarswellOnt 956, 13 R.F.L. (6th) 128 (S.CJ.) (lLA minimizing risk of duress, undue influence, and unconscionability); *Poirier v. Poirier,* 2005 CarswellBC 540, 2005 BCSC 306 (S.C.) (difficult to set aside agreement with ILA). That a party may have had independent legal advice during the negotiations will often be sufficient to ensure he or she understood the nature and effect of an agreement even if he or she did not have a lawyer at the time the agreement was signed: *Dehart v. Dehart,* 2005 CarswellBC 1912,2005 BCSC 1152 (S.C.) (court not influenced by wife's complaint of inadequate ILA where she was in rush to finalize separation and declined further assistance); *Chan v. Murray,* 2005 CarswellBC 343, 2005 BCCA 81, 12 R.F.L. (6th) 266 (C.A.) (that wife satisfied with advice received acceptable reason for no further advice). *But see Simpkins v. Simpkins* (2004), 2004 CarswellOnt 2402, 187 O.A.C. 325, 1 R.F.L. (6th) 219 (C.A.) (wife's mental problems leaving her vulnerable notwithstanding ILA); *Dhanna v. Dhanna* (2004), 2004 CarswellOnt 6131 (S.C.J.) (wife not understanding bargain because of inadequate ILA); *O. (M.E.) v. M. (S.R.),* 2004 CarswellAlta 200, 346 A.R. 351, 320 W.A.C. 351, 48 R.F.L. (5th) 80, 25 Alta. L.R. (4th) 16, 2004 ABCA 90, [2004] A.J. No. 202 (C.A.) (court overriding custody/access agreement where not in child's interests even though parties had ILA).

The presence or absence of independent legal advice also appears to be a significant consideration in a court's decision to maintain or override a support agreement under the *Divorce Act* or a property agreement pursuant to provincial legislation providing an override power, pursuant to the thresholds established by the Supreme Court of Canada in *Miglin v. Miglin* and *Hartshorne v. Hartshorne.* See *Hannigan v. Hannigan,* 2005 CarswellBC 1910, 2005 BCCA 408 (C.A. [In Chambers]) (property agreement upheld where both had ILA); *Jones v. Murray* (2005),2005 CarswellOnt 2861 (S.C.J.) (support agreement upheld on interim motion where both had opportunity for ILA); *J. (S.M.) v. W. (R.H.C.),* 2005 CarswellBC 998, 41 B.C.L.R. (4th) 28, 15 R.F.L. (6th) 200, 2005 BCCA 254 (C.A.), additional reasons at 2005 BCCA 455 (C.A.) (court maintaining agreement where wife insisted on signing against lawyers' advice). See also *H. (C.R.) v. H. (B.A.),* 2005 CarswellBC 1174, 13 R.F.L. (6th) 302, 2005 BCCA 277, [2005] B.C.J. No. 1121 (C.A.) (court maintaining custody/access agreement despite ILA); *Irwin v. lrwin* (2005), 2005 CarswellOnt 1152 (S.C.J.) (court refusing to override support agreement where party declined opportunity for advice as unnecessary because understood agreement).

Most courts are not inclined to set aside a domestic contract where a person declines to seek legal advice notwithstanding the ability and opportunity to do so: See *Keough v. Keough,* 2005 CarswellNfld 147, 2005 NLTD95 (T.D.) (court not setting aside agreement where spouse knew could have ILA and had opportunity); *Chan v. Murray,* 2005 CarswellBC 343, 2005 BCCA 81, 12 R.F.L. (6th) 266 (CA.) (court not impressed by complaint of insufficient advice where further advice declined); *Dehart v. Dehart,* 2005 CarswellBC 1912, 2005 BCSC 1152 (S.C) (court upholding agreement even though no ILA where wife declined because understood agreement). But see *Lang v. Lang,* 2003 CarswellMan 527,2003 MBCA 158, [2004] 6 W.W.R. 454, 180 Man. R. (2d) 223, 310 W.A.C. 223, 46 R.F.L. (5th) 200, 234 D.L.R. (4th) 525, [2003] M.J. No. 463 (C.A.) where Manitoba Court of Appeal suggested that courts would take a long hard look at self-epresented agreements and may be more inclined to set aside and/or override a final agreement between a legally represented spouse and a self-represented spouse, even if the self-represented spouse had been requested and advised to consult a lawyer; *D. (W.A.) v.* C. *(J.R.),* 2004 ABQB 168, 2004 CarswellAlta 199 (Q.B.) where Lee J. refused to hold a payor to the provisions of a

maintenance agreement that far exceeded the payor's ability to pay because he had entered into it without independent legal advice.

A lawyer negotiating with a self-represented party should emphasize that, he or she is not providing advice to the self-represented person, to reduce the risk the self-represented spouse might think that the lawyer is somehow protecting his or her interests as well. See *Lang v. Lang*, 2003 CarswellMan 527, 2003 MBCA 158, [2004] 6 W.W.R. 454, 180 Man. R. (2d) 223, 310 W.A.C 223, 46 R.F.L (5th) 200, 234 D.L.R. (4th) 525, [2003] M.J. No. 463 (C.A.) (courts to take long hard look at process and agreement between legally and self-represented parties).

Rother v. Rother

2005 CarswellNS 152, Cromwell, Saunders, Hamilton JJ. A., 06 April 2005
(*summary*)

Husband and wife met with counsel for settlement conference on all outstanding issues shortly before scheduled trial. Counsel agreed to settlement at end of meeting. Husband received agreement six days later but refused to sign on ground that he wanted agreement to be conditional on review of figures by accountant. Counsel withdrew representation of husband on basis that final settlement had already been reached. Wife brought motion for declaration of binding settlement agreement. At hearing husband took position that he had placed limitations on solicitor's authority to settle unconditionally. Motion was granted. Husband appealed. Appeal dismissed. Trial judge did not make palpable and overriding error in finding that no limitation on husband's solicitor's authority to act on his behalf was communicated to wife, or that there was in fact no such limitation. Husband's argument was nothing more than attempt to retry case. Trial judge made clear that he accepted evidence of husband's former solicitor over husband's. Husband did not establish that purported limitation on his solicitor's authority to settle on his behalf was ever communicated to wife or wife's counsel. Husband's own testimony was that he told only his former solicitor, not wife or her solicitor, that his agreement to pay amounts agreed to at settlement meeting was conditional in any way.

Brewer v. Hewitt

2006 CarswellNfld 17, Orsborn, D.B., J., 26 January 2006
(*summary*)

In December 2004 the plaintiffs served a formal offer to settle for $200,000. On November 22, 2005, the defendants' solicitor received instructions to accept the 2004 offer; however, that same day, before any acceptance was sent, the plaintiffs' solicitor served a further offer to settle for $250,000. The defendants' solicitor took the position that the 2004 offer had not been formally revoked in the manner provided for in the Rules of Court and accordingly served acceptance of

the 2004 offer. The defendants then applied for an order that judgement be entered in accordance with the 2004 offer. The court dismissed the application. The court held that, assuming that the Rules of Court could validly govern issues of offer and acceptance, the Rules did not provide the exclusive means by which an offer to settle may be revoked. In the circumstances, the 2004 offer had been revoked by necessary implication by the service of the higher 2005 offer.

Ristimaki v. Cooper

2006 CarswellOnt 2373, Armstrong J.A., Cronk J.A., and Gillese J.A. (Ont. C.A.), 21 April 2006 (paras. 59, 60 (in part), 61, 62 (in part)

Analysis

(i) Standard of care

59 Counsel for Mrs. Ristimaki acknowledged that the trial judge correctly articulated the following principles in respect of the standard of care of a lawyer:

> (a) A solicitor must bring reasonable care, skill and knowledge to the professional service which he or she has undertaken; see *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at 208;
>
> (b) For a solicitor who holds himself or herself out as having particular expertise in a given area of the law, a higher standard of care applies; see *Confederation Life Insurance Co. v. Shepherd, McKenzie, Plaxton, Little & Jenkins* (1992), 29 R.P.R. (2d) 271 (Ont. Gen. Div. [Commercial List]), varied on other grounds (1996), 88 O.A.C. 398 (Ont. C.A.); and,
>
> (c) A lawyer who does not adequately or diligently protect the client's interests will be found negligent: see Stephen M. Grant and Linda R. Rothstein, *Lawyers' Professional Liability*, 2nd ed. (Markham: Butterworths, 1998) at 23.

60 Although counsel for Mrs. Ristimaki accepted that the trial judge's articulation of the above principles was correct, he further submits that the trial judge erred in applying the 'egregious error' test …. [T]he trial judge relied upon the judgment of Anderson J. in *Karpenko v. Paroian, Courey, Cohen & Houston* (1980), 30 O.R. (2d) 776 (Ont. H.C.). In that case, Anderson J. observed at p. 790 that, 'it would only be in a clear and exceptional case that the decision of counsel to recommend settlement could be successfully assailed.' Anderson J. further observed at p. 791 that, in order to establish negligence against a lawyer in respect of his or her advice concerning the settlement of a case, proof of an egregious error is required.

61 Unfortunately, at the time that the trial judge delivered his judgment in this case, he did not have the benefit of this court's decision in *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (Ont. C.A.), which had not yet been argued in this court. In *Folland v. Reardon* , the court held that there

is no justification for holding lawyers to a different and lower standard than other professionals. Doherty J.A., speaking for the court, said at paras. 41 and 42:

> I see no justification for departing from the reasonableness standard. That standard has proven to be sufficiently flexible and fact-sensitive to be effectively applied to a myriad of situations in which allegations of negligence arise out of the delicate exercise of judgment by professionals. Without diminishing the difficulty of many judgments that counsel must make in the course of litigation, the judgment calls made by lawyers are no more difficult than those made by other professionals. The decisions of other professionals are routinely subjected to a reasonableness standard in negligence lawsuits. I see no reason why lawyers should not be subjected to the same standard: *Major v. Buchanan* (1975), 9 O.R. (2nd) 491 at 510 (H.C.)
>
> Recognition that some decisions made by lawyers are subject to a different standard than the reasonableness standard would also require courts to decide whether the impugned conduct of the lawyer fell under the rubric of 'barrister's work' or was properly described as 'solicitor's work.' This distinction would be difficult to make in some situations. Sometimes, the alleged negligent conduct by the lawyer will encompass both kinds of work.

62 It necessarily follows that the trial judge erred in his application of the 'egregious error test'.

"Decision should alert family lawyers to rethink their settlement negotiation style"

Huddart, Judith L., ***The Lawyers Weekly*****, 26 May 2006, p. 16**

The standard of care applied to a family law lawyer's advice in recommending settlement recently came under scrutiny by the Ontario Court of Appeal. In *Ristimaki* v. *Cooper* [2006] O.J. No. 1559 a family law client successfully appealed dismissal of a negligence claim against her former lawyer. The court found lawyers should be held to the same standard of care as other professionals when they make "judgment calls" for clients. This decision could be a wake-up call for family law lawyers.

Settlement is now the norm in the majority of family law cases. Experienced family law lawyers advise most clients to settle cases outside court and to settle as soon as possible, If a case does go to court, judges often repeat this advice. In theory, as judges decide fewer cases, responsibility for resolution should shift to the parties themselves. In practice, responsibility for-settlement has shifted to the parties' lawyers. While it makes sense in litigation for lawyers to assume a role of control, given the current trend in the law on solicitor's negligence, lawyers should consider carefully before assuming this same role in settlement discussions.

Negotiations in family law present unique challenges. Clients are usually not functioning at their best. Their judgment may be temporarily clouded by grief or a desire for revenge. It can be tempting for lawyers to assume responsibility for decision-making for emotional Clients. Beware according to *Ristimaki* v. *Cooper*, if a lawyer managing the negotiation process makes a recommendation for settlement which their client accepts, the lawyer may be held liable for this advice if the recommended outcome is less favourable than anticipated.

Consequently, the more a family law lawyer shares control and decision-making with their client in settlement negotiations, the more the client should share responsibility for the outcome of their case. It may be challenging for a lawyer to share control of a family law case with an emotional client, and just as challenging for that client to make important decisions while their lives are in turmoil. But involving a client in a more meaningful way in their case can be mutually beneficial. When clients have necessary information and input into negotiations they are better equipped to make decisions and accept the consequences of those decisions. When lawyers share information and involve clients in negotiations they are less likely to be second guessed later if things do not work out as well as clients had hoped, or to be sued by their clients for negligence as a result of their conduct.

Lawyers have been slow to recognize the need to actively involve their clients in settlement negotiations and slow to recognize the benefits of sharing responsibility for outcome with their clients. The collaborative approach in family law may be the first lawyer initiative to specifically build client responsibility for the outcome into the process. Collaborative lawyers have learned to apply their legal knowledge and negotiation skills as problem-solvers. Collaborative training provides lawyers with necessary skills to involve and educate their family law clients not only about their legal rights, but also their interests. Instead of I lawyers taking responsibility for generating a settlement proposal the lawyers facilitate informed settlement discussions, encourage clients to generate options' and then to choose the option that best meets their needs.

The collaborative process attracts clients not only because their lawyers agree to keep matters outside court, but also because they have a meaningful role to play with their lawyers in negotiations. Clients agree up front in a collaborative case to share responsibility for resolution. Unlike *Ristimaki* v. *Copper,* where negotiations followed the traditional lawyer to lawyer approach, negotiations in a collaborative case take place primarily at four-way meetings with clients present, represented by their lawyers, and directly involved in the discussions. Minutes of the progress and issues covered at each meeting are circulated to everyone for review and approval. If additional expertise is needed to resolve child or financial issues the parties agree to jointly retain these experts, who report back to the clients as well as their lawyers.

Family law lawyers may need to re-think their negotiation styles to reduce potential liability for negligence arising from settlement recommendations to clients. Consider the following:

- take training to offer family law clients a collaborative process option

- if a collaborative option is not possible, make sure clients are well informed on an on-going basis about settlement discussions; report back to clients regularly and

document these reports; ask clients for input and for written instructions before making any settlement proposal.

"How do lawyers deal with clients who become emotionally attached?"

Carter, Terry, *National* (Ottawa: Canadian Bar Association), June 2003, p. 80
(in part)

Mahoney, Reeves W.
Huff, Poole & Mahoney
Virginia Beach, Va.

There's one problem I've found too often when I represent a woman in a divorce who has been not only in a bad marriage but also dominated as far as power and money are concerned. There is a strong emotional component in divorce anyway, but here it's more so because the woman suddenly feels empowered when you go in and fight for her. Now there's a man listening to what she has to say and making her the focus of attention. And more than in any other area of law practice, this kind of client might tend to form an emotional attachment that is not appropriate.

There are ways of keeping professional distance while staying very close to the client and the case. If the relationship is to personal, for instance, you might have to drop the client and end up with a divorce within a divorce. I have female paralegals who are good at handling these clients, not as a buffer but by bonding with them professionally in a way that helps maintain my professional distance, too. And I've learned not to relate my own personal information, much more so than with clients in other areas of my practice. If I'm busy with my family and my kid's ball game, I just say I have a commitment.

These clients are emotionally raw and they need to be helped and guided in somewhat personal ways, but only by the proper distance.

Tucker, Marna S.
Feldman Tucker Leifer Fidell
Washington, D.C.

There's another aspect to the problem of emotional attachment in divorce. I've seen lawyers come through my firm over the years, and some of them just want to be truly needed and liked in a way that's not healthy.

They'll tell clients to call them at home, call them anytime; they'll carry their cell phones on the golf course and encourage a client's dependence on them.

Family law is very stressful, which is why so few of us do it. If you're going to do it for a long period of time and keep your mental health, it requires setting boundaries for yourself as a lawyer.

Levine, Jonathan R.
Levine & Smith
Atlanta (Chair, ABA Family Law Section's Committee on Trial Practice and Techniques)

While criminal defense attorneys see bad people at their best, divorce attorneys see good people at their worst. They're upset and acting on emotions.

It can help if you require some of these clients to do some of the work, like preparing a detailed marriage history and collecting documents such as financial records.

Giving homework makes for a better attorney-client relationship and ultimately helps the attorney get paid. The client has a better appreciation for how hard it is to obtain information and documents.

"Bordering on chaos"

McIlroy, Anne, *The Globe and Mail*, 17 January 2004, p. F 7
(in part)

They are the patients many doctors dread. People with borderline personality disorder can be manipulative and needy, and often attempt to form the same chaotic relationships with their physicians as they do with everyone else in their troubled lives.

Almost 80 per cent are women, and many have serious problems with boundaries – the clinical term that explains why a now infamous 50-year-old Toronto woman demanded she be allowed to masturbate on the floor of her family physician's office.

Dr. Allan Abelsohn … [was found guilty … of accusations of professional misconduct involving abuse and incompetence . . . .

Drugs generally don't work for borderline patients, although they can take the edge off some of the symptoms, which include impulsiveness and wild mood swings. Patients can also suffer from depression and bulimia. Some hear voices. Some mutilate themselves. Therapy works for some, but not others, and poorly designed therapy sessions can actually make some patients worse. The cost of failure is tragically high. About one in 10 patients succeed in killing themselves, and many make repeated attempts.

In fact, many patients first get medical attention after they are taken to emergency rooms after slashing their wrists or swallowing an overdose, says Joel Paris, chairman of the McGill

University department of psychiatry. He has been treating and studying borderline patients for 35 years, and is considered one of North America's leading experts on the disorder.

The term "borderline" is a misnomer, Dr. Paris says. It dates back 60 years, when psychoanalysts theorized that these patients where somewhere on the border between neurotic and psychotic. This is no longer considered to be true, but no one has come up with a better description for patients who are emotionally unstable and impulsive. It is estimated that 1 per cent of the population is affected.

Patients with borderline personality disorder tend to become more quickly involved with people and just as quickly disappointed with them, Dr. Paris says. They make enormous demands on other people, and are fearful of being abandoned. A significant number have been sexually, physically or emotionally abused as children, but others report relatively normal upbringings. Their emotional lives are a roller coaster, and Dr. Abelsohn
wasn't the only therapist who has suddenly found himself going along for the ride.

. . . .

The "boundary issue" can pose problems for an, inexperienced doctor. The majority of patients don't seek a physica1 relationship with their doctors. It probably happens with roughly one-tenth of the sickest patients, says Mary Zanarini, who works at the McLean Hospital, a renowned psychiatric facility near Boston associated with Harvard University.

"One is always hearing horror stories, but they are a combination of the patient's desperation and treater's inexperience. It begins innocently but gets completely out of control," she says.

She estimates that 1 one per cent of patients would act like the 50-year-old woman in the Abelsohn case, who made escalating demands for physical contact, fell obsessively in love and wanted a romantic relationship with him. When he stopped treating her, she began harassing him, rifling through his recycling box and writing a vicious letter and e-mail to his girlfriend. She once followed the girlfriend to her office, and once, entered and walked through his house when no one was home.

. . . .

Dr. Zanarini says her boundary-challenging patients are more likely to do something such as phone her at 3:00 a.m. to chat. She often finds she can change their behaviour by simply explaining that most adults are asleep at that time.

There are other reasons doctors don't like to treat borderline patients. Young doctors can have trouble with them during their training, when they encounter them either in the emergency room or in psychiatric rotation.

"These people are desperately ill, but look good, and they are not as docile and respectful as other patients. In many ways, they are in-your-face kind of people. I don't see this as a problem, but it can upset people terribly.

. . . .

Dr. Paris uses a highly structured approach in his therapy that involves a mix of psychoanalytical and behaviour modification techniques. Over the years, he has developed strict rules – including no physical contact – which he insists on keeping even if his patients leave treatment as a result.

"Touching is definitely a no-no. These people are lonely and needy. You want to be understanding, but you need to maintain the proper distance."

Dr. Zanarini has the same rules. She will shake hands with the patient if she is leaving for a prolonged vacation, but that's it. If someone is sobbing in her office, she will hand her a tissue and show her empathy in ways that do not involve touching.

They both stress that borderline personality disorder is a serious illness. These people aren't "difficult" women. "People don't burn "I'm a bad person" into their arm with a cigarette because they are difficult," Dr. Zanarini says.

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Dr. Zanarini has done work that found a highly purified omega-3 fatty acid – found naturally in fish oils such as salmon, albacore tuna and trout – can reduce overt aggression in patients, including how often they scream at people or hit them. It can also reduce depression, and has no side effects.

Other drugs can make therapy more productive. One type of therapy may hold particular promise for patients. Called dialectical behaviour therapy, it aims to get patients to identify their upset emotions and to sit back and think about them rather than acting on them.

"Suppose someone suffers a rejection, and thinks they are going to cut their wrist… The idea is to help them not to jump immediately to that action," Dr. Paris says. His therapy involves elements of this approach.

A clinical trial in the United States has found that the treatment can reduce the risk of suicide among patients after a year. A $368,000 trial, funded by the Canadian Institutes of Health Research, is under way in Toronto to compare the progress of patients treated with dialectical behaviour therapy and those who get a combination of drugs and psychotherapy.

The good news for borderline patients is that many of them get better on their own as they mature and grow older. Dr. Paris has followed up on patients 25 years after treatment, and found that 80 per cent of them had significantly improved.

"There is a natural maturation, a learning. They learn how to handle things better, or how to avoid the things that give them trouble.'

Only about half the women were in a relationship, and only half had children. Those who did have children reported a decrease in symptoms after they became mothers.
There is no evidence, however, that hormones are a significant factor.

One of the most troubling questions about the disorder is why it affects so many more women then men. Some feminist therapists have pushed to have it reclassified as post-traumatic stress syndrome, since so many patients have experienced abuse.

But most therapists argue that traumatic history isn't sufficient to explain the severe symptoms of borderline personality disorder. The best thinking, Dr. Zanarini says, is that it is the result of a mixture of a vulnerable temperament and a stressor, like abuse or emotional neglect. With someone who is particularly vulnerable, the stress wouldn't have to be a severe one.

Dr. Paris says a disproportionate number of men suffer from a different personality disorder, anti-social disorder.

People with antisocial disorder are also impulsive, but they tend to do different kinds of things. They tend to more criminal actions, to take advantage of people, to con them, he says.

"In a way you might say that the male version is more predatory, and the female version looks more like the victim. Is that the way we've defined things? Are they really two different things?" Dr. Paris asks.

"Most people would say yes, they are different."

"Codifying conduct"

Kujack, Mark, *National*, October 2004, p. 53
(in part)

More than four years of debate came to a head in Winnipeg in August, when CBA Council decisively rejected two resolutions on the controversial issue of sexual relations with clients, and voted on several amendments to the CBA *Code of Professional Conduct*.

The hour-long debate on sex with clients took place within the scope of the review of the CBA Code, during the 2004 Canadian Legal Conference.

The first resolution (04-02-A) called for a prohibition of new sexual relations between lawyers and clients. The second (04-03-A) allowed for more flexibility, by calling a commentary that sex exploitation of a client by a lawyer would be considered a conflict of interest.

Many Council members argued against the rigidity of a complete ban, which would allow for exception – for example, where a law firm partner enters into a relationship with a client who is the CEO of a large company. "In the real world, absolutism has never been a good idea," summarized CBA Past President Simon Potter of Montreal.

Arguments against the second option included the Resolution's wording, questions over the actual imbalance of power that exists within the lawyer-client relationship, and the fact that the issue is already addressed by the law society codes of conduct and other ethical rules.

"The Canadian Bar Association has no place in the bedrooms of its lawyers," said David Paul of Kamloops, B.C., in adaptation of the famous quote by former Prime Minister Pierre Trudeau.

There are still general provisions in the CBA Code that deal with taking advantage of clients. The defeat of the two Resolutions simply means that the specific issue of sex with clients will not be set out in the Code. However, the decision does not preclude a new Resolution on sex with clients from being drafted and proposed in the future.

"ODARA: Ontario Domestic Assault Risk Assessment"

Wakefiled, Graham, *For the Defence*, Vol. 26, No. 6, December 2005, pp. 27-29
(in part)

Domestic violence charges in our criminal court system comprise two extremes and every variation in between. At one end of the spectrum are a very limited number, albeit still far too many, of historical violence culminating in homicides, while the other end is the multitude of low-level allegations of common assaults with little risk of escalating into a homicide or even repeated physical violence.

A mistake in assessing the differences between those two extremes can be catastrophic and terminal, or impose traumatic hardship, both emotional and financial, on families who neither desire nor are compliant with state mandated sanctions pending resolution in the courts. An easily utilized tool to reliably assist in differentiating where if at all a suspect falls within the extremes would assist everyone affected by a domestic violence investigation and prosecution.

The Ontario Domestic Assault Risk Assessment is the result of a project devised by the Mental Health Centre Penetanguishine Research Department with the Ontario Provincial Police Behavioural Sciences Section arising from a mandate from the Ontario government derived from various coroner inquest recommendations on domestic violence.

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The completed checklist provides a score which in turn shows the percentile rank of the subject male as to likelihood of, and apparently indicates as well the risk of increased number and severity of future repeated assaults. The accuracy of the checklist to any specific case requires the person completing the checklist to do so accurately and reliably pursuant to the ODARA requirements.

. . . .

The checklist comprises 13 questions:

In this incident, were there threats to harm or kill, whether the complainant or someone else, whether carried out or not, but excluding threats to property, pets, of legal or financial, or child custody consequences, or threats from prior incidents.

In this incident, were there actions preventing the complainant from leaving, such as holding onto car keys, locking doors, actual or attempts to confine the complainant, but excluding ripping the telephone out, prior incidents of confinement, or confinements which were part of a physical assault.

Was substance abuse or use of alcohol/drugs just prior or during the assault, or in the days prior to the assault, or was there an increase in that use in the days leading up to the assault; is the male more angry or violent when using drugs or alcohol; on prior occasions when using drugs or alcohol, was he charged with any type of offence; have there been substance abuse since the age of 18.

On any prior occasion have the police attended due to his assaulting or threatening the spouse, former spouse, or any children or either relationship, but excluding any complaints regarding any other individuals.

On any prior occasion have the police attended due to any kind of violence by the male, excluding violence towards pets or property.

Is the male violent towards any other people outside of the domestic relationship (which means that a score for question 5 automatically results in an additional score for this question).

On any prior occasion has the male been imprisoned for 30 days or more (even if released earlier) for any offence but excluding pre-trial custody.

Has the male ever breached a court order, even if not charged, including this assault if it occurred in breach of an court order, fail to appears, no alcohol terms, missing probation appointments or any other breach.

Does either the male or the female have two or more children whether together or in prior relationships, including adopted children?

Does the complainant have a child from a previous relationship, whatever the age of the child and whether living in the same home or not.

Has the male ever assaulted the female while she was pregnant, or threatened while holding a weapon, and including all incidents whether the police attended or not.

Does the female have any misgivings regarding future assaults on her or the children, even if she changes her mind about such concerns?

Are there any obstacles to the female accessing help, such as lack of phone, transportation, young children, lack of neighbours, her own substance abuse, health issues or any other matter which could make it difficult for the female to get help.

Having interviewed the complainant, and tallied up the checklist score, the interviewer then assesses the risk of the male to re-offend. Even if some questions on the checklist could not be answered, the score is calculated. Each of the answers is based on the comparison with the 600 male offenders in the OPP files.

According to the clinical review format booklet prepared by the ODARA team, at one end of the scale, a score of 7 or more results in a 70% likelihood of recidivism within 5 years, and only one out of ten of the base group would score this highly. At the other end of the scale, the where the male does not score any points at all, the ODARA scale would still suggest that 5% of such males will assault again. The certification process does not include a category of zero chance of recidivism. While there are no doubt liability issues to prevent an assessment that a male is not a risk, the assessment process is geared to provide a basis to find a risk of violence in the subject male.

. . . .

While there can never be a perfect predictor of future behaviour, and there will always be resistance to releasing defendants without a show cause hearing, thereby delegating to the courts the responsibility for consequences of a release resulting in further violence, a mechanism which permits an objective well founded assessment of risk factors at both the release and sentencing stages of proceedings would be invaluable. Community resources could be focused on individuals most likely to re-offend while if used to exclude suspects as well would have the benefit of minimizing the disruption of families struggling to stay together.

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"Ripple Effects [:] Education and Self-Care Can Help Lawyers Avoid Internalizing Client Trauma"

Greenwood, Arin, *ABA Journal,* January 2006, p. 20

Margaret Drew had just started her family law practice when one of her clients tried to commit suicide.

Drew was so upset by her client's situation that she started experiencing physical symptoms like heart palpitations and insomnia. At the time, Drew wasn't familiar with terms like "secondary trauma" and "vicarious trauma," but she was certainly feeling the effects.

Today, more than 20 years later, Drew is well-versed on these two types of trauma common among members of helping professions. As director of the Domestic Relations/Violence Clinic at the University of Cincinnati College of Law, she helps lawyers and law students deal with adverse reactions arising from work with suffering clients.

Those who experience secondary trauma can feel as if they've suffered their clients' traumas themselves, says Dr. Andrew Levin, an assistant clinical professor of psychiatry at Columbia University College of Physicians and Surgeons in New York City. Common reactions are depression, irritability and feelings of being burned out.

Jean Koh Peters, who runs two legal clinics at Yale Law School in New Haven, Conn., likens secondary trauma to a boulder falling into raging river: "The raging river is the client's life," she says. "The boulder falling is the trauma occurring. The image of secondary trauma is a lawyer standing in the river. They don't get hit by the boulder, but they feel the ripple effect."

When an attorney-client relationship is particularly intense or long-term and the lawyer internalizes the client's central schemas, including assumptions about the world, trust and dependency, Levin says.

Secondary and vicarious traumas are occupational hazards for lawyers who work with trauma victims, Peters says. Levin has found that the attorneys he's worked with in the family court system are especially prone to the problem. He points out attorneys often see people when they're at their worst. "Once they're OK, you don't see them anymore," he says.

In a study Levin conducted and then wrote about in *Pace Law Review*'s fall 2003 issue, he found that lawyers working with domestic violence victims and criminal defendants experienced a higher level of secondary traumatic stress and burnout than two control groups of mental health providers and social service workers.

Levin noted the lawyers encountered more traumatized clients than the other professionals did, and they often lacked knowledge about trauma and its effects on both clients and themselves.

Lawyers said that their supervisors weren't knowledgeable about trauma, and that they had no regular forums to talk about their feelings. These factors contributed to secondary trauma.

Recognizing, Then Recovering

Lawyers at risk for secondary and vicarious trauma can avoid its effects just by educating themselves, Levin says. "I would say 60 or 70 percent of dealing with traumatized people is being aware of what effect working with them might have on you – preparing people for secondary trauma is a big part of the battle."

Drew says understanding the limitations of her role as a lawyer helps her. "Domestic violence clients have multiple things going on – housing, employment, a whole range of issues," she says. "We can still help with the other issues, but not by doing the work ourselves. We can make referrals.

"We need to figure out what our skills are and work in that arena. I became more careful to recognize what issues I could deal with in the legal framework."

Drew now requires her clients to be in some sort of support system, be it a 12-step program or a shelter, so long as it can help them cope with trauma.

Peters emphasizes self-care for her students and herself. She avoids disturbing scenes, whether they're in newspapers, movies or novels, so she doesn't hit trauma overload. Exercise helps, too. "Sometimes the best thing students can do for their clients," she says, "is go for a run."

3.5 Relationships With Clients – Special Cases

"Difficult Clients and Ethical Issues"

***Money & Family Law*, December 2004, pp. 93-94**

Lawyers who negotiate marriage contracts are often faced with unique ethical issues, as well as practical problems which are presented by difficult clients. These can include the following:

(i) The Client Who Arrives on the Eve of the Wedding

In the experience of the authors, it is not possible to properly negotiate and execute an enforceable marriage contract in less than three to four weeks. A client who arrives in your office on the eve of the wedding (and for a marriage contract purposes, this can mean as much as a month prior to the wedding date) is already in a situation wherein the pressures to finalize the agreement before the wedding have likely created a situation of duress. In such circumstances, it is doubtful that the lawyer can certify that the client executed the agreement willingly. While it may be tempting to advise the client who would prefer for the agreement to be unenforceable that the circumstances of duress surrounding its execution may very well lead to that result, in our view it is improper (and courting future litigation at the hand of the client) to recommend that the client execute the agreement in the hope that a Court will subsequently find it to be unenforceable on the grounds of duress.

(ii) The Parry who Refuses to give Financial Disclosure or Obtain Independent Legal Advice

When met with a refusal either to provide financial disclosure or to obtain independent legal advice, the lawyer must explain to the client that the marriage contract will likely be unenforceable without compliance with these two essential requirements. If your client still refuses to comply, it is our view that you should decline to act. Occasionally, clients will offer to include in the agreement an explicit waiver of the right to financial disclosure or independent legal advice. In our view, such a waiver is not a sufficient basis for proceeding, even though there have been occasional reported cases in which courts have upheld agreements notwithstanding the absence of one or more of these requirements.

(iii) "My Way or the Highway"

Occasionally you will find yourself in a situation where one of the parties adamantly insists on terms that are clearly aggressive which the other party is prepared to accept rather than run the risk of the termination of the relationship. If acting for the unreasonable party, counsel should explain that an unreasonable contract is less likely to be upheld by a Court and that, as a result, moderation might be in that client's best interest. If acting for the other party, counsel will likely

provide the same advice, while cautioning the client against relying on the unfairness of the agreement as a ground for attacking the contract in the future. If your client insists on executing a contract which you believe to be unreasonable, you should either decline to act (if the circumstances are grossly inequitable and the timing is such that the client is not left without counsel at an inopportune time) or, at a minimum, you should insist that the client execute (before executing the marriage contract) a written acknowledge that he or she had been advised not to execute the agreement but that he or she insisted on doing so regardless of that advice.

(iv) The Client is Prepared to Sign but You Suspect Duress or Undue Influence

Where your client wishes to execute the agreement but you suspect that he or she is being subjected to duress or undue influence, your options are to decline to act (and to confirm in writing your reasons for so doing) or to continue to act but to water down the wording of the solicitor's certificate so that you are not vouching for the client's voluntariness beyond what you believe to be the case. Obviously, the presence or absence of duress or undue influence are often matters of degree and subjectivity. If you reasonably suspect that either or both of these factors are present to the extent that the client is or may be unable to execute the agreement willingly, your better course would be to decline to act. What do you do if the vulnerable client is on the other side? At a minimum, YOU must advise your client (the potential oppressor) as to the possible vulnerability of the agreement in these circumstances. The best course is to avoid any situation that could give rise to an allegation of duress or undue influence (for example by postponing the wedding, deferring the discussion of the marriage contract until after the wedding, etc.). If these options are not acceptable to your client then, at a minimum, you must have your client acknowledge in writing receipt from you of advice that the agreement may not be enforceable as a result of the presence of one or more of these vitiating factors.

(v) Is it Acceptable to Accept Payment from the Other Side?

Some practitioners question the propriety of accepting payment of their legal fees from the adverse party on the ground that it may undermine the independence of the legal advice that you provide your client. It is our view that there is no impropriety in accepting payment of your account from the adverse party, provided the fee arrangement is acknowledged in writing by both parties (we prefer to also acknowledge it as a term of the contract) and provided further that the financial arrangement does not actually impair your ability and willingness to provide your client with whatever advise or services that the circumstances warrant. In this regard, we usually insist on payment of a retainer by the adverse party before commencing negotiations.

Conclusion

As can be seen from the above, the variety of potential contracts is vast, and the circumstances surrounding the negotiation and finalizing of these contracts can be fraught with difficulties. In our view, it takes a delicate balance of sensitivity and perseverance to adequately address these issues with clients, while being careful not to open oneself up to unnecessary liability.

"Pro bono? No thanks – I gave at the office"

Selick, Karen, *Canadian Lawyer*, March 2005, p. 46
(in part)

Like many lawyers in the field of matrimonial law, I occasionally reduce my fees or even work free of charge for selected clients. There are many different reasons. Sometimes I think that the law or the courts or even their former spouses have handed them a raw deal, so I try to make them feel there's at least one person in the world willing to give them a break. Sometimes I know they just can't afford to pay full fees, but their case is an interesting one. Sometimes the client asks for a reduction and simply happens to catch me in a benevolent mood. Whatever the reason, the only person I ever consider is the individual client. I never think to myself, "I'll cut my bill to give something back to the community."

That phrase, "giving back to the community," has become the mantra of *pro bono* advocates. I wince whenever I hear it. It implies that lawyers in the ordinary course of their practices *take* something from the community – something they haven't earned, something they need to make restitution for.

You never hear anyone say that hairdressers should give a few haircuts for free, or that mechanics should fix a few cars for free in order to give back to the community. The suggestion seems to be reserved for high-income professionals – mostly doctors and lawyers – as if the mere fact of above-average earnings were proof, in itself, that we're doing something sinister.

It isn't. Every voluntary commercial transaction in our society improves the well-being of at least two members of the community.

. . . .

Nevertheless, some lawyers may have good reason to feel guilty about their above-average incomes, particularly if they advocate measures that propel lawyers' incomes to levels that the marketplace wouldn't ordinarily sustain [lawyers who want to limit entry into the profession by limiting law school class size: lawyers who advocate the perpetual expansion of laws and regulations to increase the publics need for lawyers: and litigation lawyers who have helped convert tort law from a system of compensating injured into a scheme for extracting windfall gains for a few lucky plaintiffs].

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Lawyers in these categories may indeed owe something to the community, but the solution is not for them to continue with their loathsome, community-harming ways and then toss a few alms back into the pot to save their consciences. The solution is for them to understand why what they're doing is wrong and to stop doing it in the first place.

329. (1) Subject to subsection (2), no husband or wife, during cohabitation, commits theft of anything that is by law the property of the other.

(2) A husband or wife commits theft who, intending to desert or on deserting the other or while living apart from the other, fraudulently takes or converts anything that is by law the property of the other in a manner that, if it were done by another person, would be theft.

(3) Every one commits theft who, during cohabitation of a husband and wife, knowingly

(a) assists either of them in dealing with anything that is by law the property of the other in a manner that would be theft if they were not married; or

(b) receives form either of them anything that is by law the property of the other and has been obtained by the other by dealing with it in a manner that would be theft if they were not married. R.S., C-34, s.289.

SYNOPSIS

This section sets out the general rule that no husband or wife commits theft of any item which is the property of the other during the period in which the spouses are living together. This rule does not apply when a husband or wife fraudulently takes or converts the property of the other if that spouse intends to desert or, in fact, lives apart from the other spouse. Subsection **(3)** stipulates that a person who knowingly assists a husband or a wife who are cohabiting in dealing with the other spouse's property in a manner that would be theft if they were not married, or who receives from either of them anything that is the property of the other and that has been obtained in a manner that would be theft if they were not married, himself commits the offence of theft.

3.6 Relationships With Third Parties

Trube v. Hodgson, Russ, LLP

Florida, Palm Beach County Cir. Ct., No. CA 02-11886 AI, June 2004.

Editor's Note

Settlement for the estate of a woman who was shot and killed by her brother during mediation at a law firm to settle a dispute over their mother's estate. Her brother allegedly proclaimed during a previous meeting that he would "have to kill" his sister if the attorney could not resolve the dispute. The woman's son, on behalf of her estate, sued the law firm, alleging failure to warn of its client's violent threat, among other claims.

"Surveillance Still a Useful Shield Against Claims"

Bertschi, D. and Mussely, L., of Lang Michener LLP, *In Brief*, Fall 2004, p. 4
(in part)

The first decision on the issue of the admissibility of video surveillance, obtained after January 1, 2004, but prior to the new regulations, in the context of civil lawsuit, was recently rendered by the Ontario Superior Court in *Denise Ferenczy v. MCI Medical Clinics and Dr. Gary Weinstein*. Justice Dawson held that, for the reasons discussed in this paper, video surveillance, obtained in the context of a civil litigation, was not a contravention of the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") and, as such, was admissible as evidence.

In that case, the plaintiff sued her doctor for professional negligence in relation to a diagnosis and treatment of a ganglion cyst located on the inner aspect of her left wrist. In Court, during her examination in chief, the plaintiff stated her injury had adversely affected her employability and income earning capacity on a permanent basis. When she was cross-examined by the defendant, she indicated that she could not grip a hairbrush with her left hand and that she had difficulty holding a cup with same. She further stated that she would invariably grip a cup in her right hand as oppose to her left hand.

The defendant applied for leave to use an eight minute clip of video surveillance evidence taken in January 2004 showing the plaintiff holding a Tim Horton's coffee cup continuously with her left hand.

In his judgment, Dawson J. analyzed several points of law, including the issue of privilege, the *Charter of Rights* and the issue of probative value and concluded that the evidence of surveillance was admissible.

Not surprisingly, counsel for the plaintiff raised PIPEDA as a bar to the use of the surveillance evidence, as they alleged it was collected in contravention of the Act. Interestingly enough, the Judge refuted the plaintiff's argument.

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"Recent Ontario Case May Limit Impact Of New Privacy Laws"

Young, David and Baichoo, Roslyn, of Lang Michener, *Brief*, September 2004
(in part)

A decision of the Ontario Superior Court released in April of this year may significantly limit the impact of the new federal privacy law (the *Personal Information and Protection of Electronic Documents Act*, or "PIPEDA") on the collection, use and disclosure of personal information in legal proceedings, insurance claims and other matters. The case focused on the use of private investigators and video surveillance, but the Court's decision has much broader implications. For example, insurance companies, as part of their claims adjustment process, routinely seek information about third parties making claims against their policyholders. If this information involves personal data about the third party, the insurer may not be able to obtain it unless it has the third party's consent, or PIPEDA provides an exemption or does not apply. This recent case suggests that the scope for collection of such information outside of PIPEDA's limitations may be broader than previously believed.

The case, *Ferenczy v. MCI Medical Clinics*, involved a patient, Denise Ferenczy, suing her doctor for an allegedly failed wrist surgery. Ms. Ferenczy claimed that the procedure had left her wrist in a worse state than before the surgery – that she was not able to hold small items such as a coffee cup for any period of time. To rebut this claim, the doctor's lawyer obtained a videotape of Ms. Ferenczy holding a mug in a local coffee shop, apparently without difficulty. The tape was recorded by a private investigator without Ms. Ferenczy's knowledge or consent.

Admissibility of the videotape

The issue before the Court was whether to allow the videotape to be used as evidence against Ms. Ferenczy. Ms. Ferenczy's lawyer opposed the admission of the videotape, relying on the procedural rules governing evidence, as well as on the ground that collecting information on the tape contravened PIPEDA.

As a preliminary *but significant* point, the Court found that even if PIPEDA had been breached, this alone would not render the evidence inadmissible. PIPEDA contains rules, including

a dispute resolution framework, to regulate the collection of personal information for commercial purposes; it does not address the issue of admissibility of such information as evidence in a trial. Applying exclusively evidentiary rules of procedure, the Court concluded that the videotape could be admitted at trial, for certain limited purposes.

Quite apart from the narrow question of admissibility, this conclusion – that the new privacy law does not impinge on a self-contained legislative or judicial framework outside of PIPEDA's ambit – has broad potential impact. The reasoning, if confirmed in subsequent judicial rulings, would suggest that distinct statutory regimes providing for the collection, use or disclosure of personal information may not be restricted or limited by the PIPEDA rules unless express acknowledgement of such limitation is made within the particular statute.

Compliance with PIPEDA

The Court therefore determined that the videotape was admissible without consideration of PIPEDA, and that PIPEDA compliance was not a requirement for admissibility. However, it proceeded in any event to consider the plaintiff's argument that the collection and any use or disclosure of the information on the tape would contravene PIPEDA. The Court's reasons for concluding that there was no breach of PIPEDA address a number of key issues under that Act.

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Private investigators are agents of their clients.

The Court's determination that private investigators are simply agents of their clients represents a significant gloss on PIPEDA, with important potential impact for a wide range of relationships in which organizations act as intermediaries or representatives on behalf of others. For example, a lawyer advising clients in a commercial transaction or in a litigation matter may receive personal information about others from the client. If the Court's characterization of the agency role is correct, this information is not disclosed to the lawyer within the PIPEDA model, but is received from the client for limited purposes, as the client's agent. It is the client's purposes that are relevant in determining whether the information is subject to PIPEDA and, if it is, what uses and potential disclosures may be made by the lawyer (i.e. on behalf of the client).

The agency concept is not articulated expressly in PIPEDA but it is reasonable that it should be implied. The Act does contain a limited recognition of the role of agents, in what is commonly referred to as the “third-party processor” provision (paragraph 4.1.3 of the Schedule to the Act). This provision recognizes that information transferred to a third party by a data collector solely for the purposes of performing services for the data collector is not “disclosed” within the meaning of the Act, and provides further that the data collector – not the third-party processor – remains primarily responsible for protecting the information. The logical extension of the third-party processor rule is the agency concept articulated in the *Ferenczy* case. Under an agency relationship, a third party receiving personal information solely on behalf of and for the benefit of another person is responsible to that person for compliance with the legislation, and may use or disclose the information only for the authorized purposes identified by that other person. It is that other person's purposes that are relevant and must be consented to by the individual data subjects.

Recognition of the agency concept is found in Ontario's new *Personal Health Information Protection Act*, 2004 but not, to date, in any other Canadian privacy legislation. Wider acknowledgement of the agency characterization would clarify – and simplify – many commercial relationships in which personal information transfers occur. For example, PIPEDA's existing "third-party processor" provision is understood to extend broadly to most outsourcing arrangements, in which data is transferred to service providers for purposes of data management, including potential collection of additional data. Recognition of a clearer "agency" concept under PIPEDA would confirm that *any* collection, use or disclosure by a third party for the benefit of another will be governed by the original data collector's privacy compliance rules and will not require separate privacy compliance procedures by the third party under the statute.

"Fair play for paralegals"

Parker, Stephen H. and Feltham, Elizabeth, *The National Post*, 26 October 2004, p. A15
(in part)

An increasing number of people who need assistance with routine or relatively simple legal matters are consulting a paralegal, rather than a lawyer. In most cases, paralegals provide their services at a fraction of the fees charged by lawyers.

Studies, some commissioned by the Ontario government, found high levels of consumer satisfaction with paralegals' services. Nevertheless, there is general agreement within the paralegal and legal communities that paralegals must be regulated, like lawyers, engineers, accountants and doctors, in order to protect the public against fraudulent or incompetent practitioners. Regulation would create minimum competency standards, require the matching of competencies with specific areas of practice, and create a complaints and disciplinary process along with a compensation fund for aggrieved clients.

The current issue is not whether paralegals should be regulated, but *how* they should be regulated.

The major studies were commissioned by the Ontario government on the regulation of paralegals. One was headed by Dr. Ron Ianni (who was then president of the University of Windsor), the other by a former Justice of the Supreme Court of Canada, the Honourable Peter de C. Cory. Both recommended regulation, but not in such a way that the public's access to paralegals would be impaired.

Ianni and Cory rejected out-of-hand regulation of paralegals by the Law Society of Upper Canada, which is the regulatory body for Ontario's lawyers. Cory was emphatic that "it is of fundamental importance that paralegals be independent both from the Law Society of Upper Canada and the Province of Ontario." The law society itself initially acknowledged the potential for a conflict of interest because paralegals compete with lawyers. The Manitoba Law Reform

Commission and even the Canadian Bar Association have opposed regulation of paralegals and lawyers by the same body. The majority of paralegals agree, fearing that regulation by the law society will mean that they are regulated in the best interests of the legal profession, rather than in the public interest and in the interests of their own profession.

It came as a total surprise, therefore, when on Jan. 22, 2004 Ontario's Attorney-General, Michael Byrant, announced that he had decided that paralegals should be regulated by the Law Society of Upper Canada. Mr. Bryant, who is himself a lawyer, rejected regulation by an independent body as recommended by Ianni and Cory because, in his view:

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The Ontario government has been presented with a major opportunity to, in Cory's words, "extend access to justice and to ensure the protection of the public." Paralegals and many of their clients are convinced that regulation by the law society won't achieve that objective. Some form of independent regulation will.

"Violence against lawyers increasing"

Schmitz, Cristin, *The Vancouver Sun*, 13 August 2005, p. A3

Practising law is not known as a high-risk occupation, but Canadian lawyers are stalked, stabbed, shot and even killed in the line of duty, says the Canadian Bar Association.

Citing growing physical threats against legal professionals, the 34,000-member association will distribute a new "personal security handbook" for lawyers at its annual four-day conference which kicks off today in Vancouver.

"Safety is one of the most pressing issues that the profession faces. The threats are real and they continue to escalate," explained John McMunagle, chair of the Lawyer Safety Task Force of the association's Ontario branch, which devised the handbook.

The personal security handbook gives lawyers practical advice about how to assess, and minimize, the risks presented by disgruntled clients, criminals and the occasional deranged individual they may encounter at work.

"We want every lawyer…to have a number to call, and a process to follow, when they fear that they, their families, friends, colleagues and employees are in danger," said McMunagle, an Ottawa criminal defence attorney.

Joseph Bellows, senior Crown counsel with the organized crime unit of British Columbia's Ministry of the Attorney-General, noted the problem of security for lawyers deserves more attention.

"When you go into the law courts of the British Columbia Supreme Court and Court of Appeal there is no security at all as you walk in the front door," said Bellows, lead prosecutor at the high-profile Air India trial, a case which raised concerns for the safety of the prosecution team.

"There have been cases in this province of lawyers being severely injured in the courtroom," Bellows pointed out. "There have been several severe stabbings…in Vancouver and New Westminster. Of course if someone is absolutely determined to do violence, there may not be anything you can do to prevent that, but every effort should be made to minimize that person's opportunities."

Vancouver lawyer Phil Rankin was the victim of assault in 2001 when he was attacked by the family of a murder victim outside the new Westminster courthouse after he got his client out on bail.

Some lawyers have died in court. In 1982, Oscar Fonseca was killed by a gunman at Toronto's Osgoode Hall. Four years earlier, Tony Keller, a Waterloo, Ont., lawyer, was within three metres of Fred Gans when Gans was shot in the chest at close range by the enraged husband of Gans's female client in a divorce case.

"I was in the middle of my argument, and we heard a gunshot right outside the door and we heard this ungodly scream," remembers Keller. "We opened the door and there was Fred Gans, his feet were trembling and kicking the door. It was a horror show. I was in shock. I knew from that moment on that if a person wanted to kill a lawyer, that it would happen."

"How was work today, dear?"

Hansen, Mark, *ABA Journal*, October 2005, p. 30
(*in part*)

Lawrence J. Fox guesses that the obligation to preserve client confidences is the ethics rule that lawyers break more than any other.

The confidentiality principle is straightforward. Rule 1.6 of the ABA Model Rules of Professional Conduct, for instance, states, "A lawyer shall not reveal information relating to the representation of a client."

Rule 1.6 does contain a few exceptions, especially when a lawyer reasonably believes breaching a confidence is necessary to prevent death or serious injury, or to protect his or her own legal interests in connection with a case. (The ABA Model Rules of Professional Conduct are the basis for most state ethics codes for lawyers.)

But Rule 1.6 makes no exceptions for table talk—or pillow talk—with spouses or significant others. Nor does the rule exclude other family members, neighbors, golf buddies, bridge partners or, as Fox puts it, Saturday nights at 11 p.m. after a couple of martinis.

"It's my sense that that kind of pillow talk goes on all the time," says Fox, a lawyer in Philadelphia and a past chair of the ABA Standing Committee on Ethics and Professional Responsibility. "But it's a hard violation to catch because the person they're confiding in typically isn't going to let it go any further."

Fortunately, Fox says, those kinds of violations of Model Rule 1.6 and its variations at the state level generally do little, if any, harm.

Nevertheless, say Fox and other ethics experts, lawyers should keep the confidentiality rule in mind even in conversations at home and among friends.

But how closely lawyers heed that caution appears to vary. And finding the appropriate line can get even trickier when a spouse, for instance, also is a lawyer.

In many cases, practicalities help to offset potential problems with pillow talk violations of the confidentiality rule, says Lynda C. Shely, the former director of lawyer ethics far the State Bar of Arizona. Shely is now a private practitioner in Scottsdale, Ariz., who advises other law firms on ethics and risk-management issues. Her husband is a commercial litigator.

Shely, a member of the ABA Standing Committee on Professionalism, says she and her husband never talk about client matters at home. "With three kids and a dog, we have enough to talk about without talking about work," she says. "The reality is that most of the time the spouse is so bored by it, he or she never tells anybody else."

TROUBLE AT HOME

Miriam Rittmaster, a solo practitioner in overland Park, Kan., who is married to another attorney, says lawyers may not realize how much leeway they actually have to discuss their cases since much of what they do is a matter of public record. Moreover, she says, ethics rules generally allow a lawyer to consult with other lawyers on cases.

"My feeling is, as long as the individual person is not identifiable, I can talk in generalities and hypotheticals without violating the client's confidences," she says.

But just to be on the safe side, Rittmaster says, her standard fee agreement specifically provides that she may seek her husband's advice on client matters.

David Abeshouse, a solo in Uniondale, N.Y., says he probably is overly cautious when it comes to protecting client confidences. His wife, a nurse, doesn't fully understand his secrecy, says Abeshouse, especially when some of her friends who are married to lawyers tell her things their spouses have told them about their clients.

"I explain to her that this is precisely one of the reasons I can't—and they shouldn't—divulge client confidences," Abeshouse says.

Fox can empathize with that dilemma. Years ago, he says, a family friend of theirs asked him in confidence to recommend a divorce lawyer. Later, Fox's wife was shocked when their friend revealed she was getting a divorce. And then, as Fox recalls, the friend said to his wife, "I talked to Larry about this months ago. Didn't he tell you?"

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"Office romance: a bad idea just got worse"

Ray-Ellis, Soma and Hornett, Colin, *The Lawyers Weekly*, 04 November 2005, p. 13

It is well-established law that a supervisor who is sexually involved with someone who reports to him or her has a conflict of interest. However, a recent decision of the California Supreme Court has exposed office romances to potential claims for sexual harassment by uninvolved co-workers on the grounds that it constitutes a poison work environment.

This is of great importance because it takes traditional sexual harassment law into a new frontier. It is consistent with the Canadian concept of poison work environment law, which has typically dealt with such things as posting lewd pictures, name calling, jokes, etc. that create a discriminatory environment. Although the facts of this case are egregious, the principle can easily be applied in the more mundane office romance and favouritism situations.

Background

Edna Miller first began working with the Correctional Department of California in 1983. In 1994, while working for the Central California Women's Facility, she heard that the warden of the facility, Lewis Kuykendall, was having three sexual affairs at the same time with his subordinates: secretary Kathy Bibb, associate warden Debbie Patrick and another employee Cagie Brown. Much to the surprise of Miller this was common knowledge, and the women flaunted their sexual relationships as tools of power and persuasion. According to Brown, it was accepted as "common practice in the Department of Corrections."

While serving on an interview committee, Miller and the rest of the panel passed over Bibb for a promotion. Bibb was outraged and complained to her lover/boss. He in turn made it clear to the panel that in terms of the promotion he wanted them to "make it happen".

When Miller finally complained to the chief deputy warden about Kuykendall's promiscuous activities, the lover guards retaliated. According to Miller, one of the lovers assaulted her and held her captive for two hours. Miller retired shortly after the incident in 1998.

On June 15, 1999, Miller, along with the now deceased Frances Mackey who was substituted by her son Sterling Odom as a party in his capacity as personal representative of her estate (hereinafter "the plaintiffs"), brought an action against the California Department of Corrections (hereinafter "the department"), the Valley State Prison for Women, Cal Terhune as director of the department, and various unnamed persons collectively referred to as the defendants.

The plaintiffs alleged that over the course of employment with the department, they were subjected to sexual harassment and discrimination in violation of the *California Fair Employment and Housing Act* (hereinafter "FEHA"). The plaintiffs also claimed that the defendants retaliated against them because of their complaints about the harassment and discrimination. They also filed claims on other grounds.

Trial history of Miller's claim

The trial court rejected the plaintiffs retaliation claim and decided that the evidence of the warden's sexual favouritism did not amount to discrimination or harassment under the FEHA. The plaintiffs appealed.

The Court of Appeal affirmed the lower court's decision. They concluded that "supervisor who grants favourable employment opportunities to a person with whom the supervisor is having a sexual affair does not, without more, commit sexual harassment toward other, non-favoured employees". The Court of Appeal said the plaintiffs were in the same position as their male colleagues who also failed to acquire the benefits that Kuykendall bestowed upon Bibb, Patrick and Brown.

California Supreme Court decision

On appeal from the Court of Appeal, Justice George, speaking for the entire court, explained that "an isolated instance of favouritism on the part of a supervisor-toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment" of other employees. However, it was decided that an employee may have a cause of action for sexual harassment if they can demonstrate "widespread sexual favouritism is severe or pervasive" in the organization, which has the effect of manipulating the working conditions and creating a hostile working environment.

It was determined that the awarding of summary judgement was unwarranted given the evidence that the advancement for female employees at the prison was based upon "sexual favours." Kuykendall viewed women as "sexual playthings" and his conduct affirmed his belief, which had an overarching effect on the work-force in its entirety.

The California Supreme Court concluded that the sexual favouritism demonstrated by the warden "blocked the way to merit-based advancement for the employees". It was the unanimous view of the California Supreme Court that the plaintiffs were victims of sexual harassment, therefore reversing the judgment of the Court of Appeal and remanding the matter back to the Court of Appeal for further proceedings consistent with their opinion.

Conclusion

The decision is consistent with the development of human rights law and particularly sexual harassment law in Canada. It is extremely likely to be followed and extended to cases which are much less egregious. It also puts companies on notice that they should have clear conflict of interest policies, harassment policies and the latest trend in office romances; a love contract to avoid consensual relationships becoming fodder for sexual harassment claims.

"Hidden Harassment"

Neil, Martha, *ABA Journal*, March 2006. pp. 43-64
(*in part*)

Once upon a time, there was a general preception that no employee would file a sexual harassment action against a powerful group of attorneys over the kind of "boys will be boys" behavior typical in some workplaces around the country.

But that perception changed dramatically one day in 1994.

A secretary at Baker & McKenzie, one of the country's biggest and best known law firms, filed an employment discrimination case against the firm and a partner, Martin R. Greenstein, alleging the Greenstein had sexually harassed her and other firm employees in conduct dating back to 1991 and earlier. Among other things, she alleged that he gestured as if he were going to cup her breasts and asked her about the wildest thing she had ever done.

On Sept. 1, 1994, a California Superior Court jury awarded the secretary a total of about $7 million.

The total price tag eventually included $50,000 in compensatory damages against both defendants, $225,000 in punitive damages against Greenstein, and $6.9 million in punitive damages against the firm (reduced by the trail court to $3.5 million). The damages were affirmed in *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128 (1998).

Evidence in the case revealed that numerous female employees had complained to the firm about his suggestive remarks and physical gestures. Some of the women testified that they quit their jobs because they felt so uncomfortable. (Baker & McKenzie and Greenstein, who no longer works at the firm, both declined to discuss the case for this article.)

The California verdict against Baker & McKenzie sent shock waves through the legal community, says Patricia K. Gillette, a San Francisco attorney who co-chairs her 700-lawyer firm's labor and employment practice group. "It was like, 'Oh my God, this actually can happen! He got hit personally—out of his own pocket.'"

Michael J. Leech, a partner at a midsize Chicago-based firm known for its professional liability work describes the Baker & McKenzie case as a turning point for recognition that sexual harassment is an issue in the legal workplace. The case sent the message that "juries take these things seriously, and we have to as well," he says.

But it is unclear just how much the legal profession did wake up to the problem of sexual harassment after the outcome of *Weeks v. Baker & McKenzie* and other cases alleging sexual harassment by lawyers.

"I think there is much more awareness than there ever was before, and I think there's more concern that this could be a liability," Gillette says. "I don't know that this translates to a change in behavior."

All signs indicate that sexual harassment of both lawyers and support staff continues to occur even though many law firms and other legal employers have implemented awareness and prevention programs.

POWERFUL ANECDOTES

But the evidence about how often sexual harassment occurs at law firms, how many of those incidents are reported and how firms try to deal with them internally is largely anecdotal.

"There's no official reporting agency, entity or government regulatory body that collects and evaluates the information on an ongoing basis," says Diane C. Yu, the immediate-past chair of ABA Commission on Women in the Profession, who is chief of staff and deputy to the president at New York University. "So we're usually relying on researchers or surveys or the media and individual testimony for updated information."

The women's commission provides some overview on the issue in a handbook published in 2002, titled "Sex-Based Harassment: Workplace Policies for the Legal Profession."

"Despite the widespread publicity that verdicts like the Baker & McKenzie case attract, not all legal employers have heard the message," the handbook states. The book cites a 2000 case in which a New York law firm without a sexual harassment policy that had ignored an associate's complaints was hit with a $300,000 jury verdict for emotional distress and punitive damages.

Even though most legal employers now have anti-harassment policies, states the handbook, "almost three-quarters of women lawyers believe that harassment is a problem in their workplaces." Meanwhile, "Most recent surveys have found that between about two-fifths to two-thirds of female lawyers, and a quarter to half of female court personnel report experiencing or observing sexual harassment."

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AN ETHICS TIME BOMB

As if concerns about lawsuits, internal morale and public criticism weren't enough, a developing line of thinking suggests that lawyers who engage in sexual harassment could be subject to professional discipline for violating ethics rules.

"Egregious harassment can … subject lawyers to disciplinary action," states the women's commission in its handbook for lawyers on workplace harassment. "Although few bar ethical codes include specific prohibitions against sexual harassment, such conduct has been held to violate provisions that ban gender bias and conduct reflecting adversely on fitness to practice law."

In Illinois, Rule 8.4(a)(9) allows a lawyer to be disciplined after the lawyer has been determined in a civil or criminal court proceeding to have violated a law prohibiting discrimination. The rule includes violations for sexual harassment, says James J. Gorgan, chief counsel for the Illinois Supreme Court's Attorney Registration and Disciplinary Commission.

But Gorgan says the ARDC can investigate sexual harassment as violation of general attorney ethics rules, even if there is no court determination that a lawyer violated a discrimination law.

These types of investigations don't occur very often, says Gorgan. "I would guess that you'd see one claim of a violation of 8.4(a)(9) every two years or so," he says.

One ARCD case, brought under a more general provision of Rule 8.4(a), involved a Chicago attorney who allegedly had tied up women with rope in the mid-1990s during the course of law firm job interviews and other practice-related activities.

Although two women filed police reports, the lawyer, Scott D. Clark, "was not prosecuted criminally, and law enforcement officials did not think that there was probable cause to believe that a crime had been committed. However, this does not bar disciplinary proceedings based on the same conduct," a three-lawyer disciplinary panel wrote in a July 30, 2001, opinon responding to the disciplined lawyer's exceptions to prior findings of misconduct, which resulted in his suspension from practice. *In re Clark*, No. 97 CH 111.

The panel did not expressly describe the attorney's conduct as sexual harassment. But it reported that his conduct was sexually motivated, that he had abused his position of authority, and that the three women involved (a legal secretary working with the lawyer and two attorneys interviewing for jobs) were embarrassed and frightened to be tied up in isolated areas. In one case, the lawyer videotaped the women as she struggled to untie herself.

Attorney Jay P. Deratany of Chicago, who represented Clark, says his client was harshly punised for obsessive behavior promoted by a metal illness. Although lawyers are regularly sued in civil actions for sexually harassing women in their law offices, disciplinary authorities in Illinois ordinarily don't pursue such cases as ethics violations, he says. Yet Clark was unfairly singled out for discipline for comparable conduct, Deratany contends.

“I don’t think the Illinois Supreme Court ultimately gave a fair hearing to this guy, I really don’t,” says Deratany of his losing appeal of Clark's case. "They just saw ropes and women and they said, 'That's it; he's out of here!'" Successfully treated, Clark is now married and works as an insurance adjuster, according to Deratany.

A three-member panel deciding a recent disciplinary case in Delaware also based its recommendation that a longtime matrimonial lawyer be suspended for three years in part on its conclusion that his actions amounted to the crime of sexual harassment, a misdemeanor in Delaware.

Adopting the panel's recommendation, the Delaware Supreme Court imposed a three-year suspension on Joel D. Tenenbaum of Wilmington, a past chair of the ABA Section of Family Law, on grounds that he sexually harassed both clients and support staff in his law office. *In re Tenenbaum,* 880 A.2d 1025 (Aug. 5, 2005).

In its report, the disciplinary panel said Tenenbaum's conduct violated Rule 8.4(b) of the Delaware Lawyers' Rules of Professional Conduct. Under that provision, it is misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

The Delaware rule takes its language from Rule 8.4(b) (Misconduct) of the ABA Model Rules of Professional Conduct, which serve as the basis for lawyer ethics rules in most states.

"If there was any question in any lawyer's mind about whether or not such conduct was acceptable, it should be very clear now," says Andrea L. Rocanelli, chief counsel of the Delaware Office of Disciplinary Counsel, who argued the case against Tenenbaum. "This was unacceptable, and it will not be tolerated. And I hope that will be true elsewhere, not just Delaware."

(Tenenbaum has moved from Delaware, according to his counsel, Jeffrey M. Wilmington, and could not be reached for comment. Weiner declined to comment on the case.)

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A FINE LINE

While certain misbehavior is clearly harassing in nature, the problem is recognizing the vast gray zone of behavior that might be interpreted as harassment and taking steps to avoid it without creating an office environment that makes colleagues fearful of one another.

There are times, for example, when one attorney's stab at humor can turn into a sexual harassment complaint by a colleague. Gillette recalls one such incident at another law firm that she represented in employment matters. A male partner apparently thought it would be humorous to send a dozen red roses to a female associate with whom he had worked late the previous evening.

Although the previous night's session had been all business, the male partner had the bouquet delivered to the associate's office with a note that read "thanks for last night." The

associate was embarrassed, and the incident resulted in a permanent rift in her working relationship with the partner, Gillette recounts. Eventually, the associate left the firm and sued it for sexual harassment, she says. The case settled confidentially.

Whether behavior poses a problem can vary considerably depending on the specific situation, says Carol M. Merchasin, an employment lawyer in Philadelphia and a co-author, along with Chapman and Jeff Polisky, of *Case Dismissed.*

Take hugging, for instance. Most lawyers probably would be uncomfortable receiving a daily hug from a supervisor, Merchasin says.

"On the other hand, if I come into the office and I have just come back from leave because my mother died, and my manager puts his arm around me and gives me a hug, it could be perfectly appropriate for the circumstances,'" she says. "And that is why you cannot develop a list of what you can and cannot do, because it all depends on the circumstances."

One big benefit of training programs is that they help participants discuss their different perceptions of such scenarios. Even using the word *harassment* is difficult and could conceivably be taken as an admission of liability in some situations. But, Weiss says, "we've got terms and tools which give people a safe and comfortable and effective way to judge conduct and talk about conduct."

Weiss uses a "traffic light" system of red, yellow and green to characterize conduct. Someone might say, "Hey, buddy, you're in the red," when a colleague makes an inappropriate remark, he says.

Experts say one continuing barrier to dealing effectively with sexual harassment issues is that they often are perceived so differently by managers, still predominantly male, and the people who work for them, often female.

For women, the discomfort of dealing with sexual harassment is compounded by concerns about career consequences if they complain.

"Women may feel they would be jeopardizing their present or future careers," explains Yu. "As much as they may believe they should pursue a complaint, they recognize there are also significant risks."

Some studies have suggested that as few as 10 percent of women who experience sexual harassment file formal complaints, and even fewer file lawsuits. See Note, "The Quality of Mercy Is Strained," *Chicago-Kent Law Review,* Vol. 78, No.2 (2003), which interprets data gathered for a 2000 study by the ABA Commission on Women in the Profession.

But Tribble sees a growing willingness among women to act in response to sexual harassment. "They're more conscious of it now than ever before, so the reporting of it happens more often," she says.

Yet reluctance to complain about sexual harassment can still be high, Tribble says. For instance, she notes, "The support staff, when it happens to them, they're very reluctant to report it because it's such a small world-the whole legal area is such a small world. So they just bear it."

Managers, meanwhile, worry that they could be falsely accused of sexual harassment for even the slightest questionable remark or gesture.

"Protecting men from unwarranted claims is critical to promoting opportunities for women," states the handbook published by the women's commission.

At the same time, dealing with a law firm's management about sexual harassment incidents can be awkward, experts say, because offenders often are in powerful positions.

"It's always difficult when you're counseling a law firm about how you punish someone who's a partner in a law firm," Gillette says. "You can't do things you would normally do in a corporation, like demote them or fire them or take away supervisory responsibilities. So you're left with compensation."

But fining a partner may be problematic, too, especially if the person has political clout in the firm, and because it's hard to decide how much to fine a highly compensated individual, Gillette says. "So it's much harder to come up with the right remedy," she says, "and yet by law you're obligated to come up with the appropriate remedial action."

These dilemmas help illustrate why avoiding sexual harassment should be the primary goal of law firm policies on the issue, Leech says.

"When you see these situations roll out badly and they find their way ultimately into court, there's a lot of human wreckage lying around," Leech says. Sexual harassment "is a horrible thing to be accused of, and it's a horrible thing to endure. It's a very painful thing for anybody who's drawn into it."

3.7 Relationships With Other Lawyers

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

American Bar Association (Standing Committee on Ethics and Professional Responsibility) Formal Opinion 01-422, 24 June 2001 (Chicago: American Bar Association, 2001)
(in part)

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

"Ethics and Liability Issues Presented by Impaired Lawyers"

American Bar Association Centre for Professional Responsibility [Standing Committee on Professionalism], (2004) 15 *the Professional Lawyer* No. 2, pp. 14-15

What are your ethical duties if you are a law firm's managing partner and you discover that one of your colleagues at the firm has a serious drinking problem? The lawyer has been missing court dates and appointments with clients and has long, unexplained absences from the office. Or what if the lawyer has been getting a bit forgetful and sometimes seems disoriented?

These are some of the hypothetical situations posed to the panel moderated by ABA Ethics Counsel George Kuhlman, Kuhlman was joined by Paula A. Barran, labour and employment lawyer at Barran Liebman LLP in Portland, Oregon; Ann D. Foster, Director of the State Bar of Texas Lawyers' Assistance Program; and Roger Warin, partner at Steptoe & Johnson LLP in Washington, DC.

"From a liability perspective," Roger Warin began, "there is no greater risk to a law firm" than its lawyers suffering from substance abuse or debilitating mental conditions. Like all lawyers, impaired lawyers have a duty to provide competent representation and loyalty to their clients. A lawyer's impairment does not excuse the failure to carry out these duties.

How widespread is the problem? Warin reported that lawyers are twice as likely to be alcoholics than those in the general population. Nearly seventy percent of lawyers are likely candidates for alcohol related problems at some time during their career and 20% have used cocaine. Ten percent of lawyers are 3.6 times more likely to suffer a major depressive episode and 19-37% will be diagnosed with clinical depression. A Johns Hopkins study concluded that lawyers are 3.6 times more likely to suffer depression than other professionals. Fifty to 75% of disciplinary cases in Georgia involve a claim of impairment. In Oregon, mental impairment is involved in sixty out of one hundred disciplinary cases.

Making what Warin called this "difficult and vexing" situation even worse is the fact that a lawyer has violated the ethical rules in a manner that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer has a duty to report the violation to the appropriate authority. Having represented law firms in these types of matters, Warin cautioned that this reporting obligation raises sensitive issues. Any statements made by the firm must be factually based, so that the impaired lawyer's reputation or his or her relationship with clients is not damaged without foundation.

Even when a firm does everything "by the book," the consequences may be disastrous. Warin recounted how he represented such a firm, but its impaired lawyer tragically committed suicide on the eve of an intervention program.

Barran cautioned that, in addition to ethical and legal obligations law firms have obligations as employers. Unfortunately, she stated, "these situations happen in crisis mode." How the firm treats an impaired lawyer sets the standard for future cases. A firm must guard against treating economically valuable lawyers more favorably. It also should refrain from engaging in gender-based stereotyping, such as deciding that it is less acceptable to send female alcoholic lawyers to rehabilitation.

"Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law"

American Bar Association (Standing Committee on Ethics and Professional Responsibility), Formal Opinion 04-443, 25 August 2004 (Chicago: American Bar Association, 2004), pp. 7-8

As a practical matter, clients have the ultimate authority when it comes to protecting confidential information. Hence, however salutary and indeed important the reporting of misconduct of lawyers may be, under the Model Rules the hands of lawyers are often effectively tied in these situations by the wishes or even whims of their clients.

Seeking Informed Consent to Disclose the Confidences of Clients

If the lawyer determines that the information necessary to report the misconduct is protected by Rule 1.6, what should the lawyer do? Comment [2] to Rule 8.3 entreats a lawyer to "encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests." Any discussion of consent to disclosure, therefore, must include the potential adverse impact that disclosure may have on the client, including the effect on the client's ultimate recovery in a malpractice action, for example.

Clients may have a variety of reasons for not wanting to consent to disclosure of information. For example, they may be embarrassed by the matter, hesitant to become entangled in the controversy, or simply want the matter to come to an end. As a practical matter, there may be little benefit for the client in consenting to report the misconduct to the disciplinary authorities.

Nevertheless, we believe it would be contrary to the spirit of the Model Rules for the lawyer not to discuss with the client the lawyer's ethical obligation to report violations of the Rules. In essence, this would allow the lawyer to circumvent them.

Conclusion

We interpret Rule 8.3 [(i) of the Model Rules Of Professional Conduct as amended by the ABA House of Delegates, August 2003 and (ii) the predecessor Model Code Of Professional Responsibility of the American Bar Association] as requiring a lawyer to report professional misconduct committed at any time by a licensed but non-practicing lawyer. Even misconduct arising from purely personal activity must be reported if it reflects adversely on the lawyer's fitness to practice law. A lawyer violates the Model Rules and is subject to professional discipline when she fails to report such professional misconduct, in circumstances in which Rule 8.3 requires such reports.

"Motion to squash"

Levocin, Gerald J., *National,* June-July, 2004, p. 10

I read with avidity your article on golf and its contributions to the practice of law ("Foreward", March/April 2004, p. 20). I myself have long used sports as a tool in my practice. However, while the game of golf may be suitable for solicitors, I find that squash is better for barristers. I use it as a negotiating tool.

First of all, I do not play with my client, but rather with opposing counsel. The first hurdle is to convince them that they should play squash with me. Squash is not a popular game and I find that most of them have never played it.

Once on the court, the first quarter of an hour is spent teaching them the rules, the strokes and the nuances of the game. Thereafter, I suggest a friendly contest. My purpose is neither to win nor to lose, but rather to injure my opponent.

The squash ball is composed of a very hard rubber and when properly hit, can be a lethal projectile. You will recall that it is a rubber weapon used in slightly different form by police/military organizations seeking to quell riots. I make it my object to hit my opponent in some fleshy part of the body, preferably the buttocks or the thighs.

While painful, these injuries are not life-threatening. They do, however, produce as a memorial a bruise lasting several weeks. During this period of time, it serves as a constant reminder of an uncomfortable event.

Needless to say, when I strike my opponent I am very remorseful, especially the second time around. The impression obtained by the opponent is that I am not a very skilled player. The game usually ends after the second strike and I insist upon buying several rounds of drinks laced with abject apologies.

Thereafter, every time I phone the lawyer, I make reference to the game, reiterating my remorse but suggesting that we ought to have a rematch and that I am absolutely sure that I will not commit the same mistakes. Such constant reminders appear to encourage counsel to enter into negotiations, in the hopes of bringing our relationship to an end before they are forced onto the squash court again.

While I cannot say that my clients get everything they wish, the opposing counsel does not walk away from the bargaining table. As a result, I have only had to litigate twice in the past five years.

I am aware that there is a convention whereby if a person is in the way of your shot and is likely to be hit, you yell "let" and don't take the shot. Over the years, several of my former opponents have sent me copies of this, but I return their letters marked "opened by mistake" and "no longer at this address."

"Duty Calls [:] Report Colleague's Ethics Breaches Even When Violator Is Not a Practicing Lawyer"

Maher, Katheen, *ABA Journal*, February 2005, p. 28
(*in part*)

It is an established ethics rule that a lawyer must report the professional misconduct of another lawyer if it raises a substantial question about the other lawyer's honesty, trustworthiness or professional fitness.

That obligation extends to professional misconduct by nonpracticing lawyers, states an opinion issued recently by the ABA Standing Committee on Ethics and Professional Responsibility. Formal Opinion 04-433 (2004).The misconduct must be reported, the ethics committee advises, even if it involves activity completely removed from the practice of law.

But if reporting another lawyer's misconduct would require disclosing a client's confidential information, adds the opinion, the lawyer must obtain the client's informed consent or refrain from making the report. Stated more bluntly, notes the opinion, client confidentiality trumps the obligation to report another lawyer's misconduct.

Opinions issued by the ethics committee generally interpret the ABA Model Rules of Professional Conduct, which are the basis for most state ethics codes regulating the professional conduct of lawyers.

The ethics committee's opinion defines a nonpraticing lawyer as one who at the time of the misconduct "did not accept engagements by clients to provide legal services and did not hold herself out as a lawyer prepared to accept such engagements."

A Duty's Expansive Reach

ABA model rule 8.3 sets fourth the duty to report the misconduct of another lawyer, according to the ethics committee's opinion.

Meanwhile, the wide variety of professional misconduct by lawyers that might be reported is described in Model Rule 8.4. For nonpracticing lawyers, criminal activity is the most obvious, and perhaps the most serious, the committee explains. Lawyers may be disciplined under Model Rule 8.4 for criminal conduct that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," even if, as some jurisdictions have held, the lawyer has not been convicted or even charged with a crime.

But Rule 8.4 also prohibits lawyers from engaging in a broad range of conduct that involves dishonesty, fraud, deceit or misrepresentation regardless of whether that conduct is criminal. "This expansive provision reaches any activity or aspect of the lawyer's personal or professional life," notes the opinion.

Model Rule 8.3 requires that two thresholds be met before the duty arises to report another lawyer's misconduct: First, the lawyer must "know" of the violation, which is usually determined by an objective standard; and second, the misconduct must raise a "substantial question" as to the lawyer's honesty, trustworthiness or fitness as a lawyer.

While criminal conduct usually raises a "substantial question" as to fitness, the committee states, noncriminal conduct will almost always require a "measure of judgment," and a lawyer who is uncertain whether she or he must report may opt to do so.

If reporting the misconduct of another lawyer would reveal information relating to a client's representation, Model Rule 1.6 requires the lawyer to obtain the client's informed consent before making the report.

As a practical matter, the committee observes, "Clients have the ultimate authority when it comes to protecting confidential information. Hence, however salutary and indeed important the reporting of misconduct of lawyers may be, under the Model Rules, the hands of lawyers are often effectively tied in these situations by the wishes or even whims of their clients."

The ethics committee acknowledges in its opinion that reporting a colleague's misconduct, particularly if that lawyer is a supervisor, can be awkward and uncomfortable, and it even may put the reporting lawyer's career in jeopardy.

But, the committee emphasizes, "because the legal profession enjoys the privilege of regulating itself, it is critically important that its members fulfill their responsibility to stand guard over the profession's integrity and high standards."

"Law & Marriage"

Carter, Terry, *ABA Journal*, February 2005, pp. 48, 49, 51

Sometimes it isn't easy when a lawyer marries a lawyer. Until the ABA addressed this issue, there was fear of "Typhoid Mary's" causing entire law firms to be disqualified from representing certain clients when the men married women lawyers from other firms. Those "pillow talk" concerns gave way to a more general, contextual approach that looks at personal and financial interests that might affect judgment.

The ABA Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 340 in 1975, said that there is no presumption that married couples would violate ethical rules and that, while the unique relationship might require special caution, there should be no special disqualification rules. Most states have adopted such guidelines, and husbands and wives are sometimes – with the informed consent of clients – even permitted to work on opposite sides in matters.

Had such guidelines not been adopted, the fast-growing number of women entering the profession would have bumped into a greater number of closed doors.

. . . .

There was this reported quip a few years ago from a New Jersey lawyer when his wife became a judge and he was asked what it would be like to call her "your honor": "It's going to be a lot better than the way it's always been, which is 'your highness.'"

One rather common situation over the past generation or so has been the marriage of young women to older men within law firms, with the age differences ranging from a few years to a few decades. Frequently, it is the second marriage for the man and the relationship develops after long periods of time – often several years – of working closely together.

"It used to be a lawyer and his secretary or a doctor and his nurse," says Marna S. Tucker, a family law specialist in Washington, D.C. "Now it's a lawyer and his partner or associate. They're working together on cases, and litigation is very sexually energizing. Anytime you work together on something that's very intense, it creates a sexual energy.

. . . .

The most obvious and common arrangement in firms is to keep spouses from supervising or evaluating each other.

Some devise their own personal rules for the relationship, too, such as Arnold & Porter's Born and Bennett. "We made a very strict rule from Day One," Born says. "When we walk into the house we don't talk about the office. We realized that 100 percent of our lives would be Arnold & Porter if we didn't leave it at the doorstep."

Some go the other way, living cases day and night.

"I could never leave it at the door, because when you are at trial it's part of us and the kids, too, 24 hours a day," says New York City plaintiffs lawyer Judith A Livingston. "How can you not be working at home into the night and preparing for court the next day?"

She and husband Thomas A. Moore try all the cases in their 10-lawyer firm and have won more than 100 million-dollar verdicts, which has gotten them both membership in the elite Inner Circle of Advocates. They have done some cases together.

Children and chores cause an inevitable rub for many lawyer couples. "The problem generally is that many professional women are married to other professionals and a lot of the women end up staying at home part time or full time," says Joan C. Williams, who teaches women's legal history and feminist jurisprudence at American University's Washington College of Law.

The full-time practice of law entails so many hours, Williams says, that the higher you go in the profession the more male it gets. The men working long hours tend to take on fewer household duties and the women are faced with the hard choice of having children with little or no parental care, or cutting back to part-time work or quitting.

But there are workable situations. In her three-lawyer Philadelphia firm, Epstein says, "It's probably easier working with my husband because I'm not answering to a near-stranger when I say I've got to go because of a school play or a sick child or whatever. Then there are days when I can say 'Hon, you're leaving to handle this one because I can't.'"

"E-mail blast nearly leads to 'divorce'"

Rubin, Sandra, *The National Post*, 04 May 2005, p. FP6

An e-mail from a family law practitioner at a well-known Canadian firm has been making the rounds and it eloquently expresses a certain, um, frustration at receiving one too many requests from colleagues looking for fast-and-dirty marital advice for a corporate client.

The author starts by saying she has seen such "bone-headed" calls for free or cheap opinions in the past and let them go by, even though she has cautioned the firm about liability issues in giving one-off, price-driven advice.

"For some reason, if this were an OSC question or even a competition Act request for some cheapie quickie, we'd all be horrified at the thought of some quick-and-dirty advice question," she said. "But not in the area of family law – oh god no. Forget that it's the fastest-growing area of solicitors negligence.

"Forget that at the end of the day the referral you give might some day come back to haunt you because you thought that the advice needed was – after all – just some basic sh*t about family law.

"Hey [name in invisible ink], I just checked my *Yellow Pages*. Why not send your employee of your client to a 'good' lawyer that does a 'free' one-hour consult – there's a bunch on the Danforth that I see. That's better than moderate pricing – that's FREE."

The tone may have been a tad scorching, but the author has a point. The message was followed the next morning by the mea culpa, in which she called her previous missive "intemperate" and said "the sentiments underlying it would have been better left unexpressed.

"I ought to have reflected on a better way to communicate the intent of the message," she said, "and on further reflection, I ought to have sent no message at all."

Interestingly, it was the mea culpa that drew the unfavourable reviews on the Street. More than a few people said she got it right the first time, and there was speculation the firm's management committee may have leaned on her. Surely not. All we know is if we ever get embroiled in a divorce, which is highly unlikely, we want her on our side.

"This communication is from a law firm and may be privileged …"

Rubin, Sandy, *National Post*, 08 June 2005, p. FP8
(*in part*)

Ernie the Attorney (ernietheattorney.net) is fascinated by legal boilerplates, especially those in e-mails. He seems to think some of it is dumb. Consider this: "This communication is from a law firm and may be privileged and confidential (we are too busy to check each e-mail we send out so we're placing the onus on you to read this crap and figure out if it applies to you)," he writes on his Web site. "If you are not the intended recipient, please notify the sender by reply e-mail (which may include spoof e-mail generated by computer viruses) and destroy all copies of this communication." Do they expect people to march into their IT department and insist the backup tapes be deleted, he asks? He complains about the unnecessary load on Internet traffic. He may have a point.

"May vs. Must"

Maher, Kathleen, *ABA Journal*, November 2005, p. 30

Finding the exact boundaries of the ethical obligation to report wrongdoing by others can be a great source of turmoil. What often makes the decision difficult is that a lawyer must reconcile the obligation to report wrongdoing with duties to preserve client confidences.

As a result, the ethics rules don't always offer absolute guidance to a lawyer trying to decide whether to report wrongdoing by a client, another lawyer or a judge, or even someone not involved in a case. While the rules generally permit lawyers to report wrongdoing, they don't always require it.

The Ethics 2000 Commission sorted through this dilemma during its comprehensive review of the ABA Model Rules of Professional Conduct.

Model Rule 1.6 (Confidentiality of Information) as revised by the House of Delegates in 2003 permits a lawyer to reveal information regarding client misconduct "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." The lawyer may also
reveal information to "prevent, mitigate or rectify" that injury. (Rule 1.2 prohibits a lawyer from counseling or assisting the client in conduct the lawyer knows is criminal or fraudulent.)

Other rules do require a lawyer to disclose actual or prospective client wrongdoing in certain circumstances. Rule 4.1 (Truthfulness in Statements to Others) requires a lawyer to disclose material facts to avoid assisting a client's crime or fraud, unless that data is confidential. And Rule 3.3 (Candor Toward the Tribunal) requires a lawyer representing a client in an adjudicative proceeding who "knows that a person intends to engage in, is engaging in or has engaged in criminal or fraudulent conduct related to the proceeding" to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

Model Rule 8.3 (Reporting Professional Misconduct) directs a lawyer who knows that another lawyer or a judge has engaged in misconduct raising a "substantial question" about honesty or fitness to inform an "appropriate authority," unless the information is confidential.

BAD-NEIGHBOR POLICY

But what if a lawyer learns that a neighbor is dealing drugs or engaging in fraud at his business?

The Model Rules are silent on whether lawyers have an ethical duty to report criminal conduct or other wrong-doing by a nonclient or someone outside the profession. But back in 1972, the Committee on Ethics and Professional Responsibility issued an opinion advising that "there is a duty on the part of a lawyer as a good citizen to aid in the enforcement of criminal laws, ... to report unprivileged knowledge of criminal conduct to the appropriate authorities." Informal Opinion 1210.

A few states have reached a different conclusion. In 1988, the State Bar of New Mexico advised that, generally, "a lawyer's duty to report observed or suspected criminal activity is no different than that of any other citizen. One does not become obligated to a different or higher standard of conduct by virtue of qualifying to practice law." Opinion 1988-8. In 1994, the Illinois State Bar Association advised that a "lawyer has no different duty than any other person to report a crime." Opinion 94-23.

If a lawyer learns of someone else's wrongdoing from a client, however, the ethics rules may kick in again. In 2003, Utah Ethics Opinion 03-02 advised that a lawyer, who suspected after speaking with a client and through subsequent investigation that a health care provider was fraudulently billing for services, had no ethical duty to inform law enforcement authorities and could not do so without the client's consent.

So it's important for a lawyer to consider whether "dropping a dime" on someone he or she does not represent might still land with a thud on a client.

. . . .

"Reporting Misconduct of Lawyers: Some Courts are Ready to Take Aim at Fire-at-Will Doctrine"

(2006), 17 *the Professional Lawyer* (Issue 2), pp. 24, 27

A young law firm associate, who is representing a firm client at trial, learns that opposing counsel has engaged in misconduct. When the associate tells the partners at his firm about the incident and that he intends to report it to the disciplinary authorities as required under his state's version of ABA Model Rule of Professional Conduct 8.3,1 he is advised not to do so and warned that filing a complaint will likely cost him his job. The associate could follow the partners' advice and ignore the infraction, perhaps with no repercussions. But if the associate decides that the ethical route is his only option and is subsequently fired by his law firm, does he have any recourse?

The at-will nature of most employment relationships would suggest that there is little the associate can do. But in recent years, jurisdictions have recognized some exceptions to that presumption.

Employment-At-Will Doctrine

Under the traditional common law doctrine of employment-at-will, an employment relationship of indefinite duration can be terminated at will by the employee or the employer for good cause, no cause, or even bad cause). Employment-at-will is the presumptive employment relationship in this country, but many jurisdictions have carved out limited exceptions to the rule in order to prevent employers from firing employees because, for instance, they filed a worker's compensation claim or refused to commit perjury to protect their employer. These exceptions are generally based on theories of contract, the tort of retaliatory discharge and statutes, such as whistleblower laws.

. . . .

Conclusion

The self-regulating nature of the legal professional requires that lawyers abide by the rules of professional conduct and report those who fail to do so. However, filing a disciplinary complaint can be a risky proposition, particularly if the subject of the complaint is a fellow member of the firm. The risks, which could include demotion or loss of employment, mean that a lawyer weighing his or her options might decide that keeping quiet is the better option, particularly when failing to report misconduct often has few repercussions. Providing some recourse for lawyers who are fired for abiding by their ethical obligations could help to balance the scales.

3.8 Relationships With Courts

Canavan v. Feldman

[2004] O.J. No. 3164 (QL) (Ont. Sup. Ct.), Paisley J., paras. 1-3

¶ 1 PAISLEY J. (endorsement):-- John Canavan was 67 years old when he commenced his sentence of 6 months imprisonment for contempt of court. He was shocked and bewildered by his fate.

¶ 2 In short, he had not been present at his trial. There had been no trial. He had not been present at his sentencing. He believed that he had done all that was required of him in executing his responsibilities as an estate trustee. He had trusted and relied on the lawyer who had been retained to advise and assist him in the administration of that estate.

¶ 3 The defendant Feldman is the lawyer who orchestrated the events which lead to Mr. Canavan's misfortune. A motion brought by a beneficiary of the estate to pass the estate accounts, led to a motion to cite Mr. Canavan for contempt. This was brought about due to Mr. Feldman's inaction, but Mr. Feldman assured Mr. Canavan that there was nothing to worry about, that he would take care of the matter, that the matter was settled, and that Mr. Canavan did not need to attend in court.

"The Trial of Mike Tyson"

Dershowitz, Alan M., *America On Trial [:]*
Inside The Legal Battles That Transformed Our Nation
(New York: Warner Books, 2004), pp. 493-494; 496-498

Mike Tyson, the former heavyweight boxing champion of the world, was convicted of rape on the basis of testimony by his alleged victim that he forced her to have sex with him after she voluntarily went to his hotel room at two o'clock in the morning. The evidence that convicted Tyson was known to be false and incomplete by the prosecutors. Indeed, the prosecutors themselves – knowingly assisted by the judge – played an active role in misleading the jurors and in keeping the true story from them. Had the jurors known what the prosecutors knew all along, they would have acquitted Mike Tyson. Indeed, at least four of the jurors, after learning of the false evidence, urged that Tyson be given a new trial.

As one of the jurors put it: "We [the jurors] felt that a man raped a woman . . . . In hindsight, it [now] looks like a woman raped a man." Another juror now believes that Desiree Washington, a beauty pageant contestant who accused Tyson of raping her, "has committed a crime."

In order to understand why these jurors had second thoughts about their verdict, we must go back to the trial itself and see how Desiree Washington, the alleged victim, was presented to the jury. During the trial she did not even allow her name or face to be revealed. She was portrayed as a shy young inexperienced, religious schoolgirl who wanted nothing more than to put this whole unpleasant tragedy behind her. Her family had hired a lawyer for the express purpose of helping to "ward off the media" because she did not want any publicity. She said she had no plans to sue Tyson and she had certainly not hired a lawyer for that purpose. When she and her family were asked whether they had a "contingency" fee agreement with any lawyer – the kind of agreement traditionally made with lawyers who are contemplating a money suit for damages – they all claimed not even to know what that term meant. When Desiree's mother was asked whether there had ever been any "discussions" with lawyers about fees, she said no, and she swore under oath that there were no "written documents relating to the relationship between you and [the lawyer who was supposed to ward off the media]."

Thus, as one of the jurors later put it: "When she [Washington] said she wasn't looking to get any money, I believed her and thought then that we made the right decision." Another juror agreed, saying that at the trial, "she was very, very credible," because she had no motive to lie, since she was not intending to collect any money or benefit in any way from Tyson's conviction.

. . . .

It now turns out that the Washington family did not hire lawyer to "ward off the media," as they claimed, but rather to do precisely the opposite – namely, to sell Desiree's story to the media for huge sums of money. Donald Washington, Desiree's father, has now publicly acknowledged that he discussed movie rights with the very lawyer whom he falsely told the jury he had hired solely to "ward off the media." The tape of an interview he gave after the trial contains the following important admission: "I expected to get money from movie rights, that's where the money is."

It also now turns out that the trial testimony denying any "contingency" fee agreement and any "written document" between the Washingtons and the lawyer concerning a planned money damage suit against Tyson was totally false. Immediately after Desiree Washington's sexual encounter with Mike Tyson, the Washington family went to see a high-powered money lawyer in their home state of Rhode Island. He brought in another high-powered lawyer, and the discussion turned instantly to how the Washington family could parlay Desiree's date with Tyson into big bucks. They talked about movie rights, book deals, and multimillion-dollar lawsuits. The lawyer carefully explained what a contingency fee agreement was – that he would charge a percentage, usually one-third of whatever the family collected from the lawsuits. The family agreed to this arrangement and Desiree signed a contingency fee agreement, which her father and mother officially witnessed. The family was given a copy of this written document to keep.

It was only a few short months after Desiree signed this contingency fee agreement that she and her family were asked, under oath, whether they had a contingency fee arrangement or "any written document" with the lawyer. They denied any such arrangement or document, despite having explicitly asked for the arrangement and having actual possession of the document.

At the time of these denials (and the subsequent ones at the trial itself), the prosecutor was aware of the relationship between the Washington's and their lawyer. Indeed, during the prosecutors' "rehearsal" cross-examination of Desiree Washington, in preparation for her actual in-court cross-examination by Tyson's trial lawyer, the issue of the contingency fee agreement was explicitly raised. Yet the prosecutor did everything in his power to keep the truth from coming out. He objected, on frivolous grounds, when Tyson's trial lawyer tried to ask about a contingency fee agreement, and tried desperately – but unsuccessfully – to obtain a ruling that any evidence about contemplated civil suits would be inadmissible. He then arranged for the Washington family to take the courtroom pass away from their lawyer, so that he could not attend the trial. It now appears in retrospect, that the prosecutor wanted the lawyer out of the courtroom while his clients testified so that the lawyer would not feel ethically compelled to stand up and correct the Washington's testimony when they falsely denied any contingency fee or written agreement with him.

The ploy worked – at least for a while. But the lawyer soon learned that his clients were not being straight with the jury. He began to worry that he might have an ethical obligation to blow the whistle on his clients, as lawyers do when their clients are committing perjury. So the lawyer went to the Rhode Island disciplinary counsel – the attorney in charge of enforcing the ethical rules that govern lawyers – to obtain guidance about what his ethical obligations were in light of the Washingtons' testimony. Disciplinary counsel advised the lawyer to get a copy of the trial transcript. In the meantime, the trial ended with Tyson's conviction. After the verdict, disciplinary counsel reviewed the transcript herself and concluded "that the attorney had an obligation to report to the [Indiana] trial judge the fact of his contingent fee agreement." She also asked the Rode Island Supreme Court for guidance.

After reviewing the materials from disciplinary counsel, and after questioning the attorney face-to-face, the Rode Island Supreme Court issued an unprecedented opinion concluding that "the attorney had no obligation to disclose the existence of his contingent fee agreement to the [Indiana] criminal trial court." The state's highest court found that the agreement's "existence might well of had a bearing upon the jury's determination." The Rode Island court then directed the attorney to disclose to the Indiana court the information that the Washingtons had withheld. He did so, but the Indiana trial judge refused to make the contingency fee agreement available to Tyson's legal team, despite its obvious relevance and despite the conclusion of the Rode Island Supreme Court that it might well have affected the jury's verdict. Indeed, what could be more important than the fact – unbeknownst to the jury – that Desiree Washington had lied in denying that she had millions of dollars riding on whether Mike Tyson was convicted or acquitted, since without a conviction it would have been difficult for her to collect monetary damages or sell her story to the media?

Halton Condominium Corp. No. 242 v. Law Development Group (Georgetown) Ltd.

[2004] O.J. No. 3139(QL) (Ont. C.A.), Catzman, Sharpe and Gillese JJ.A.,

The following judgment was delivered by

¶ 1 **THE COURT**:— It is apparent to us that significant relevant evidence was not drawn to the attention of Master Polika when he struck out the appellant's statement of defence for failure to satisfy undertakings or to Juriansz J. when he dismissed the appellant's motion to set aside the default judgment. In our view, on a full and fair reading of this record, the appeal must be allowed.

¶ 2 At the root of the appeal is the question of what the appellant's former solicitors did or did not do in relation to this file. The motions judge accepted their evidence to the effect that they communicated in a timely manner with their client and made every effort to have the client provide the required answers to undertakings. He rejected the evidence of Richard Law that they failed to communicate with him and that he was essentially left in the dark as to the status of the action and not told about the motion to strike the defence for failure to comply with the undertakings. While his finding is entitled to deference on appeal, in view of the evidence to which we have been directed, we are satisfied that it cannot be sustained.

. . . .

¶ 5 With respect to what Law was or was not told by his former solicitors about the motion to strike the defence and the default judgment, we find the almost total lack of documentation from the solicitors again gives ground for serious concern. They were unable to produce any notes, correspondence or docket entries supporting their assertion that they were in regular communication with their client and that they warned Law of the impending motion to strike out the defence. They could not explain why phone calls they claimed to have made to him were not recorded in keeping with their usual practice. We attach significance to Law's letter of July 13, 2002 and e-mail of July 15, 2002 and which, on their face, support Law's evidence that he was completely in the dark and unaware of the default judgment for some considerable period of time after it had been granted. If these communications were wrong and merely written for a "self-serving" purpose, as suggested by the solicitors, it is difficult to understand that they would not have immediately responded to set the record straight.

¶ 6 In the end, we do not deem it necessary or appropriate to resolve in any definitive manner the dispute between the appellant and its former solicitors. What we do say, however, is that the version of events put forward by the appellant is sufficient to give rise to a concern that its former solicitors did not act appropriately with respect to the undertakings and the motion to strike the defence.

Rideout v. Rideout

(2004) 4 R.F.L. (6th) 147 (Man. C.A.),
Philip (for the Court), Twaddle and Hamilton JJ.A., paras. 1-3; 22-25

1 This is the wife's appeal against the dismissal of her application to the trial judge to rescind a judgment granting ancillary and corollary relief in the parties' marital proceedings. The underlying issue on the appeal is whether the judgment was regularly signed in compliance with the rules and practice of the court.

2 On September 18, 2002, a pre-trial conference, the last of many, was converted into an uncontested divorce hearing when the parties, both represented by counsel, advised the pre-trial judge (who became the trial judge for the consent proceedings) that agreement had been reached with respect to martial property and other ancillary issues. The details of the parties' settlement were put in evidence by the wife. The trial judge then granted divorce and ancillary and corollary relief judgments. The divorce judgment has not been challenged by the wife. I will refer to the ancillary and corollary relief judgment throughout as "the judgment."

3 Following the divorce hearing, the wife discharged her lawyer. (When the lawyer was actually told she was discharged is not clear from the record. In several communications, the wife says the lawyer's "services were terminated effective 10:30AM September 18, 2002.") Two days later, on September 20, 2002, the wife wrote the court indicating that she was "rescinding the offer made by [her lawyer]" on the ground, *inter alia,* that she had been "pressured" by her lawyer. Implied in her letter was the request that the trial judge "reverse the settlement entered into court as a Judgment." The letter was received by the court the same day, and it appears that copies were sent to her former lawyer and to counsel for her husband.

. . . .

22 Unrepresented parties, including those who discharge their counsel following an adverse ruling or order, are, we are told, the cause of significant difficulties, delays and costs in Family Division proceedings. The practice of signing judgments or orders without the approval of all parties that the trial judge described during the hearing of the wife's motion is a response to those situations. It is undoubtedly an expedient solution, but one that, in my view, conflicts, at least in part, with the provisions of the Queen's Bench Rules.

23 There is Ontario jurisprudence that supports the authority of a lawyer who has been discharged by a party to approve a form of order or judgment. See *Skariah v. Praxl* (1990), 70 D.L.R. (4th) 27 (Ont. H.C.), at 50-51, aff'd [1990] O.J. No. 2472 (Ont. C.A.), leave to Supreme Court of Canada refused, [1991] S.C.C.A. No. 34 (S.C.C.), and *Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd.* (1991), 5 O.R. (3d) 65 (Ont. Gen. Div.) (Master Peppiatt).

24 However, an order without the approval of all of the parties represented at the hearing cannot be signed under the rules except in circumstances where the court has otherwise ordered or where Rules 59.04(6) or (7) are invoked. The rules cannot be overridden by expediency, even in the difficult situations that follow in the wake of the unrepresented litigant. The unrepresented litigant is entitled to the same justice as any other litigant.

25 The judgment was irregularly signed and filed. The non-compliance with the rules was not one that could be dispensed with. The trial judge erred in concluding that she was without jurisdiction to consider the wife's application to rescind the judgment. The wife's appeal is allowed. The matter is referred back to Family Division for consideration by the trial judge, or another judge, of the wife's application to rescind the judgment on the ground that she had agreed to the settlement recorded in the judgment because "undue influence and intimidation was [*sic*] used by counsel to settle." The stay of enforcement of the judgment granted by Justice Twaddle will continue until the determination of the wife's application in the Family Division.

R. v. Lyttle

[2004] 1 S.C.R. 193
McLachin C.J. and Major, Binnie, Arbour, LeBel, Deschamps and Fish JJ.
(Major and Fish JJ. for the Court)

The trial judge unduly restricted the right of the accused to conduct a full and proper cross-examination of the principal Crown witness. The accused was not required to undertake to call evidence to support his drug debt theory as a condition for permitting the cross-examination. The right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the right to make a full answer and defence. The right of cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question. It is not uncommon for counsel to believe what is in fact true without being able to prove it otherwise than by cross-examination. "A good faith basis" is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used. The information may fall short of admissible evidence and may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition and there is no requirement of an evidentiary foundation for every factual suggestion put to a witness in cross-examination. Where a question implies the existence of a disputed factual predicate that is manifestly tenuous or suspect, a trial judge may seek assurance that a good faith basis exists for the question. If the judge is satisfied in this regard and the question is not otherwise prohibited, counsel should be permitted to put the question to the witness. In this case, the existence of a good faith basis for the defence's drug debt theory had become apparent over the course of the two *voir dires*. The trial judge erred in law by requiring an evidentiary foundation for the cross-examination.

Brace v. Canada (Customs and Revenue Agency)"

[2004] N.J. No. 228 (QL), Faour J., paras 5-24, 26-35

¶ 5 This is not the first time there has been an application by the solicitors to withdraw in this matter. In February, 2004, a similar application by the same law firm was refused and the firm was directed to continue carriage of the case: that decision, of Green, C.J., is reported at 2004 Carswell Nfld. 32; 234 Nfld. & P.E.I.R. 335. That application was taken just two weeks before the date set for the hearing at that time. The matter did not proceed at that time, and I will have more to say about that application later.

¶ 6 This application, the one I am dealing with now, arose on Monday, June 7, 2004, two days ago, the date that the hearing of the merits of this case was to begin. While an application of this nature would normally be heard summarily and without delay, I did adjourn the hearing to the next day to give Mr. Brace an opportunity to review the application and prepare for his oral submission. It was clear that this application would delay the hearing of the main proceeding. But it was also clear from counsel that it would have been impossible to complete the matter in the time allotted in any event, and therefore its conclusion would have been deferred to a date in the fall.

¶ 7 This application is governed in part by the Rules of Court. However, the Rules do not deal with the substance of the issue, only the procedure flowing from it. Rule 23 provides for a notice of change of solicitors, and on this point Mr. Thistle made a submission respecting the scope of the Rule. If I have his submission correctly, he submits that the Rule does not provide for an inquiry into the solicitor-client relationship, but merely reflects the procedure that is carried out when a lawyer no longer acts for a party. He further submitted that in the earlier application to which I have already referred the Chief Justice, in citing a British Columbia case, applied an incorrect statement of the law, as it then existed in that jurisdiction. The Chief Justice cited Jorgensen v. Kelly Peters & Associates Ltd., [1987] BCJ No. 1890 (BCSC). Mr. Thistle argued that a more correct version of the law in B.C. is stated by the Court of Appeal in Luchka v. Zens 37 BCLR (2d) 127, 36 C.P.C. (2d) 271, 1989 Carswell BC 92. That case dealt with an appeal from a trial judge's refusal to grant a declaration under a rule very similar in wording to our Rule 23.

¶ 8 With respect, I must disagree with his interpretation of that case, and its applicability to the situation we have today. While the B.C. Court of Appeal said at para. 4 (Carswell): "... it (the solicitor-client relationship) is not a matter over which the court has any control ...", the decision clearly recognizes that the contractual relationship between solicitor and client must be seen within the context of the various duties and obligations to which a lawyer is subject. In particular, the lawyer is an officer of the Court, and the Court has the obligation and the authority to supervise the relationship between lawyers and their clients as it affects proceedings before it.

¶ 9 Chief Justice Green said in his February decision that the Court's authority in this matter arises from its inherent jurisdiction as a superior court. The Rule merely recognizes there will be circumstances where, for a variety of reasons, a lawyer may have ceased to act for a party. Some of those reasons may require the approval of the Court. I believe this is one of them.

¶ 10 I note, also, that the Rule recognizes that the request for a declaration is discretionary. This reflects the Court's authority to supervise the relationship, and to consider the consequences of the withdrawal of a solicitor before granting approval. This is meant to be a substantive inquiry, and

not merely a statement of a court recognizing the status quo, or one party's version of the status quo.

¶ 11 In my view the best statement of the obligations of solicitors in this regard, and hence the scope of the inquiry of the Court, is found in the Code of Professional Conduct adopted by the Benchers of the Law Society of Newfoundland on December 7, 1998. It governs lawyers in this province. I refer to Chapter 12 of the Code, and Mr. Thistle referred to it yesterday in his submission. I would like to highlight just a couple of parts of Chapter 12. In paragraph 1 the basic principle is stated, and I will quote a portion:

> Although the client has a right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having once accepted professional employment, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

¶ 12 The Rule then goes on to speak of obligatory withdrawal and notes several circumstances which might give rise to an obligatory withdrawal. I do not believe that this case falls within the scope of the examples set out in paragraph 4, Obligatory Withdrawal. Then it goes on to speak of Optional Withdrawal, and the first sentence, I think, is instructive.

> Situations where the lawyer would be entitled to withdraw, although not under a positive duty to do so, will, as a rule, arise only where there has been a serious loss of confidence between lawyer and client. Such a loss of confidence goes to the very basis of the relationship.

And the Rule then speaks of several examples of cases where there has been a loss of confidence.

¶ 13 In summary, there is a clear implication from the Rule that the lawyer, once engaged, has no automatic right to withdraw but must seek the Court's approval. The Rule contemplates the issue of loss of confidence in the relationship as a key factor.

¶ 14 The Court has a discretion, and can and will exercise it to ensure fairness to both clients and lawyers in proceedings before it.

¶ 15 The test that I must apply is whether there is "justifiable cause" for terminating the relationship as set out in paragraph 1 of Chapter 12 of the Code, quoted above. "Justifiable cause", in my view, arises with the determination of a genuine breakdown in the relationship. Against that has to be balanced the extent to which withdrawal will prejudice the client.

¶ 16 Mr. Brace has very eloquently set out in his verbal submission his clear disagreement with this application. He took issue with many of the allegations of fact contained in the application, and the affidavit of Ms. O'Dea. I make no finding of fact as to which version of the situation is the accurate one. In my view, for the purposes of this application, I do not have to. I believe I must determine whether the submissions disclose a clear breakdown in the relationship.

¶ 17 Before examining the submissions that were made, I want to say that I have seen nothing that would indicate Ms. O'Dea's actions in this matter were anything but professional.

. . . .

¶ 18 The application and supporting affidavit sets out Ms. O'Dea's view of her difficulty in making the final preparations for the hearing of the matter. She submits several grounds. First, the failure of communication between them has seriously impaired the ability of the firm to carry the case. She cites several instances where communication was a problem, and she was unable to either communicate her advice, or to receive adequate instructions. Mr. Brace, on his part, disagrees there was a problem, and indicates he was sufficiently available for these purposes, even if he wasn't available at all times.

¶ 19 Second, while respecting the solicitor-client privilege by not disclosing detailed information, she notes that new information was presented, which was extremely relevant to the case just three days prior to the start of the hearing. Mr. Brace indicates that this information was made known as far back as January.

¶ 20 Third, she notes the refusal of her client to meet with her together with senior members of her firm to attempt to resolve the issues. Mr. Brace agrees that he refused to meet, but says meeting on, and I have used his words, "on their turf", would put him at a disadvantage, and he declined to do so.

¶ 21 Fourth, and I believe flowing from the other grounds mentioned, she cites a complete lack of trust, and I quote from her affidavit, "which made it impossible for applicants to properly instruct me, and prepare with me for this hearing. I no longer believe that I can represent the applicants' interests in a dispassionate manner that they are entitled to. I believe that continuing to represent the applicants would cause me to breach my obligations as a lawyer to the clients".

¶ 22 Mr. Thistle, for the law firm, indicates the firm has made significant efforts to pursue this case on behalf of Mr. Brace and Ms. Curl. While they obviously see it differently, it's clear that the level of trust and confidence needed is not present.

¶ 23 On each of these grounds the parties disagree on essential interpretations of the facts. As I have indicated, I do not believe I have to decide which version is the more accurate. The issue for me is whether the submissions, both of the submissions, indicate a breakdown in the relationship so serious that it can be grounds for withdrawal without undue prejudice to Mr. Brace and Ms. Curl.

¶ 24 I cannot ignore the fact that there was a previous similar application in this case in February. Both parties have referred to the decision of the Chief Justice in February to refuse a similar application from Mr. Brace's counsel.

. . . .

¶ 26 This application is different. It is similar in effect, but the facts are more recent and they

present a different state of affairs. The hearing was scheduled to begin on Monday of this week. Submissions from counsel indicate that, given the expected extent of examination of witnesses, the hearing was not able to be completed in the three days that were available. As a consequence, the conclusion of this matter would be set over to the fall, even if it had begun as scheduled. In addition, the submissions disclose that because of the breakdown in the relationship, final preparations for the hearing this week were not complete, and the matter could not now proceed in a timely fashion.

¶ 27 I said I do not have to decide between the submissions of both parties. Suffice to say that the submissions, as diametrically opposed as they were, in their interpretation of the facts, confirm the breakdown of the relationship. I also note that this, in effect, is a continuation of the difficulties noted by the Chief Justice in the February application.

¶ 28 I have to address the issue of prejudice to the client before I finally decide the matter, and again I go back to February. In February there were two issues noted which might cause, or the Chief Justice noted might cause, some prejudice. The first was the imminent hearing date, some two weeks later. It was felt that the withdrawal of solicitors would have irreparably harmed the client's ability to obtain and instruct counsel to properly carry the case in the time available. That is not an issue at this time, as for a variety of reasons, this matter will now be adjourned for several months. The second was the discussion surrounding the fee arrangement between the parties. It was argued by Mr. Brace at that time that there existed a contract for services to conduct this proceeding for a fixed amount, and that having to secure alternate counsel would impose additional costs on him. That issue was argued by him today.

¶ 29 In February, both issues were seen as significant. In this application only one is present or may be present. That is the issue of the additional costs imposed by Mr. Brace having to seek alternate counsel, even though, as he says, he has already paid for his legal responsibility. In February" the Chief Justice did not make any finding with respect to the existence of a contract for fees as alleged by Mr. Brace. I make no finding on this point as well. But, even if there is a contract, I don't believe that its evidence, by itself, is sufficient to order that the firm continue to act for a client where there is no ability to carry on a proper and appropriate solicitor-client relationship.

¶ 30 In conclusion, I find that the relationship has irretrievably broken down. Notwithstanding Mr. Brace's expressions of confidence that he can proceed with these counsel, that assurance has already been tested since the February application. I see no way that the solicitor-client relationship can continue. I also find that while there will be significant inconvenience to Mr. Brace, there is ample time for him to make alternate arrangements to pursue this matter. The degree of prejudice to his ability to pursue the case is much less at this time than it was on the facts in the February application.

¶ 31 I also note, in allowing the application, the obligation of the law firm, as noted by Mr. Thistle, to act so as to minimize the expense and avoid prejudice to the client. As set out in the Code of Professional Conduct, I expect the firm to do everything reasonably possible to facilitate the expeditious and orderly transfer of the matter to a successor lawyer. That includes making copies of all relevant documents from their files at their expense.

¶ 32 Mr. Brace argued that I should also order repayment of his retainer so that he can use the funds to make alternate arrangements. With respect, the issue before me was confined to the solicitor-client relationship and whether it had broken down. As Chief Justice Green pointed out in February, and as is apparent to me today, there is a disagreement between the parties as to the nature of their fee arrangement. I am unable to decide that issue today, for it may be a separate cause of action for which evidence should be called and heard. I point out, however, that a disagreement over fee arrangements works both ways. While Mr. Thistle has undertaken not to pursue any claim for fees, I am sure he might reconsider if there is an action by Mr. Brace in respect of the retainer paid. And there is a further wrinkle which could be argued, that since February this matter is not entirely governed by the contractual arrangement between the parties that was previously in place. Since February, the relationship has changed, since it was now governed in part, at least, by the Order of the Court that MacInnes Cooper continue as solicitors of record, and I make no prediction as to how that might change, how the relationship would now be viewed by a finder of fact in an inquiry about the fee arrangement.

¶ 33 Further on the issue of fees, Mr. Brace asked me to consider ordering that the law firm be prevented from issuing a statement of claim against him for outstanding fees. I note Mr. Thistle is undertaking not to do so. I considered it, and felt that, since both parties may have a potential claim, I could not make an order in respect of the law firm without also making a similar order in respect of Mr. Brace. My view is that such an order is inappropriate.

¶ 34 One issue that was raised during the hearing of the application is one to which I must make reference. In the application of the law firm there is a reference to certain unidentified facts and circumstances which were subject to the solicitor-client privilege. Mr. Thistle noted, and I agree, that this presented some awkwardness for the law firm, since the very facts on which the application was grounded were unable to be disclosed. Mr. Brace was advised to keep these points in mind, since, unless he was prepared to waive the privilege, he might inadvertently disclose confidential facts. He said he was not prepared to waive the privilege. During the course of the hearing of this application, and the submissions made, I do not believe that any matter was disclosed which would betray the privilege. I note this because there was some concern whether I would be able to sit on the hearing of the merits of this proceeding if I had heard privileged information. I am satisfied that I have heard nothing which would prevent me from continuing to sit on this proceeding. I would, of course, consider submissions from the parties on that point should they arise later. In any event, should there be an issue on that point, there are other judges available who could hear the matter.

¶ 35 On the issue of costs, I expect the firm will not pursue their costs, since Mr. Thistle has already indicated he will not be seeking further compensation from Mr. Brace, and so I make no order as to costs on this application.

"Lawyers and Ethics: Professional Responsiblitiy and Discipline"

MacKenzie, Gavin (Scarborough, ON: Thomson / Carswell, 2004), pp. 7-14 to 7-18.

Monroe Freedman's analysis of the competing professional responsibilities of the criminal defense lawyer left him to conclude that it is proper in some circumstances for criminal defense lawyers to call their clients as witnesses even if they know that the clients will commit perjury. If lawyers were to prevent accused persons from testifying only because of an admission of guilt, Freedman argued, they would be violating their duty of confidentiality by acting upon information disclosed in confidence in a way that would seriously harm clients' interests. They would, in effect, be disclosing the facts learned from their clients that form the basis for their conclusion that their clients intend to perjure themselves. Clients who confide in their lawyers would also be deprived of their right not to incriminate themselves in such circumstances.

Each of the alternatives to leading and relying upon the perjured evidence, Freedman contended, are unsatisfactory. If the lawyer withdraws from the case, the client will approach another lawyer, realizing that the obligation of confidentiality is not what it is said to be, and withhold incriminating information from tiality is not what it is said to be, and withhold incriminating information from the new lawyer. The identical perjured evidence will be presented, and the new lawyer will be in no position to attempt to dissuade the client from presenting it.

For the lawyer to explain the ethical problem to the judge is equally unsatisfactory. A request for a mistrial is likely to be denied because otherwise accused persons would be able to cause a series of mistrials in the same way. The lawyer would violate the duty of confidentiality and rather than resolving the ethical problem would be transferring it to the judge. The accused person would be at risk of being tried before and sentenced by a judge who has been informed of the accused person's guilt by the accused person's own lawyer.

Nor, Freedman argued, is it satisfactory for the lawyer to allow the client to testify falsely without the lawyer's participation, then to omit reference to the clients testimony in argument. To do so is to inform the court of the falsity of the client's evidence.

The only alternative, Freedman concluded, is to put the client on the stand to be examined in the usual way, and to argue the case based upon the client's evidence. Before clients testify falsely, their lawyers have a duty to discourage them from doing so on the grounds of law, morality, and results. Perjured testimony is likely to be exposed as such, and may result in the client's prosecution for perjury among other consequences. The decision, freedman wrote, must nevertheless be the client's.

By proceeding in this way, Freedman added, the lawyer is not suborning perjury. Subornation requires the wilful procuring of false evidence, which is not what happens where a lawyer dissuades a witness from testifying falsely on grounds of illegality among others, but then accepts the client's decision.

Freedman's arguments are difficult to answer, though many have tried, but his conclusion has nevertheless been universally rejected in both Canada and the United States. Some early responses to Freedman's analysis were more visceral than analytical. Perhaps the most convincing counter-argument is that the assumption that lawyers cannot be expected to ascertain all the relevant facts unless they are able to assure clients of unlimited confidentiality is unsound in cases involving accused persons who are innocent; and that though accused persons who are in fact

guilty are entitled to invoke their right not to incriminate themselves, they have no legal or moral right to enlist professional help in deceiving the court through their false evidence. The right against self-incrimination is a right to keep silent, not a right to lie; both involve non-cooperation with the prosecution, but there the resemblance ends. Though accused persons have a right to testify, they have no right to testify falsely.

In other words, Freedman's arguments are based on an indefensible premise. The duty of confidentiality, like the client-lawyer privilege, does no extend to clients' intentions to commit crimes. For policy reasons, moreover, lawyers should not have any duty to assist clients to carry out their expressed intentions to commit crimes. To require lawyers to do so is to corrupt the appropriate role of criminal defense lawyers in the administration of criminal justice.

Canadian rules of professional conduct require lawyers to inform their clients that admissions that make to their counsel may impose strict limitations on the conduct of the defense. If an accused person clearly admits to the lawyer factual and mental elements necessary to constitute the offence, the accused person's lawyer - if convinced that the admissions are true and voluntary - must not call any evidence that, because of the admissions, the lawyer believes to be false. The rules also expressly prohibit lawyers from knowingly attempting to deceive courts and tribunals by offering false evidence or otherwise, and from knowingly assisting or permitting clients to do anything that the lawyers consider to be dishonest or dishonorable.

The Canadian rules also spell out that lawyer's duty upon learning of a client's intention to commit perjury. Lawyers in these circumstances are required to do everything possible to prevent the client from doing so. Despite Freedman's concerns about the ineffectiveness of such a course, the rules provide that if the client persists, subject to rules governing withdrawal, the lawyer should withdraw or seek leave to do so.

Finally, the rules address (albeit obliquely) the lawyer's duty where the client unexpectedly testifies falsely. In such circumstances the lawyer should, subject to rules governing confidentiality, make disclosure to the court and do all that can reasonably be done to rectify the problem. It is of course the qualification ("subject to rules governing confidentiality") that creates the dilemma.

Although the last rule, particularly, is not a model of clarity, the footnotes to it make it tolerably clear (as pointed out in chapter 4) that a lawyer who has innocently introduced false evidence has a duty to correct the false evidence as soon as possible even if the lawyer knows of the falsity of the evidence as a result of a confidential communication with the client.

It should again be stressed that the lawyer's duty not to lead false evidence and to correct false evidence if it is unexpectedly given, apply only to evidence that the lawyer *knows* to be false. The lawyer's knowledge of the falsity of evidence must generally be based upon admissions that the lawyer is convinced are true and voluntary, though a newly discovered alibi that cannot be explained as a failure of recollection is an example of a case in which the lawyer may be sure the evidence is false despite the absence of an explicit admissions. There must be no doubt about the falsity of the evidence, however, for the lawyer's duty to be triggered. Even the fact that the client has told the lawyer different stories is not consistent only with the falsity of the second version. Criminal defense lawyers often harbour suspicions about the veracity of the clients, but the validity ofthose suspicions is for the court to judge. As Sir Robert Megarry has said, often criminal defense lawyers neither believe for disbelieve their clients, but are instead in the neutral state of non-belief. To lead evidence they suspect is false while in such a state is entirely proper. It must be said, however, that this leaves a broad opening for counsel to avoid the ethical issue.

"Alleged money launderer must have counsel: court"

Moulton, Donalee, *The Lawyers Weekly*, 16 July 2004, p. 2
(in part)

Charges of money laundering and possession of proceeds of crime will be dropped against a Nova Scotia woman unless she is able to find counsel to represent her, a Nova Scotia Supreme Court judge has ruled.

Justice Gerald Moir concluded that without professional legal representation Melanie Stephen-Patriquen would not likely receive a fair trial. That legal representation, however, does not have to be practiced or pricey.

"I find Ms. Stephen-Patriquen is in no position to offer terms to counsel. She cannot pay. Also, family or friends are not a source for paying her counsel. In Ms. Stephen-Patriquen circumstances, all avenues have been exhausted," said Judge Moir.

"I will order a stay until the state has offered Ms. Stephen-Patriquen reasonable terms under which she can retain competent but not necessarily very or experienced or expensive counsel," he added.

In light of the decision, Nova Scotia Legal Aid is in the process of attempting to find a lawyer for Stephen-Patriquen who will act for her at the legal aid rate, federal prosecutor Scott Beazley told *The Lawyers Weekly* in an interview.

. . . .

At the heart of the court's ruling is the complexity of the case, the judge said, noting that a fair trial does not necessarily depend on the presence of a lawyer. "Representation by counsel is

not an axiom of a fair trial. In assessing the risk that Ms. Stephen-Patriquen will not receive a fair trial without counsel, I must bear in mind the obligation of the trial judge to provide assistance for an accused who appears on her own behalf. … I must bear in mind her intelligence and skill.

. . . .

"In my assessment," he stated, "the complications of the case overwhelm Ms. Stephen-Patriquen's capacities even under assistance. I find that the probabilities of incompetent blundering in connection with the search and seizure, evidence going to *mens rea* and the knowledge component of the *actus reus* of money laundering, and challenging and responding to the work of the chartered accountant are so great that there is a high probability of an unfair trial."

Lang Michener Supreme Court of Canada Newsletter

Issue No. 39, 02 September 2004

When Mr. Justice William Stevenson was first appointed to the District Court of Alberta in 1975 (later to the Supreme Court of Canada in 1990), he wanted to take a judgment-writing course. This was 1975, so there weren't yet any such courses in Canada. He was matched up by way of a "mentoring partnership" with a senior American judge who was particularly skilled in the art of opinion writing.

Once he had presided over his first substantial trial, his assignment was to write up his reasons, then send them to his mentor, a senior State judge in the U.S. deep south. The case was a matrimonial one with lots of conflicting evidence and argument. His draft, "of which I was quite proud, amounted to 36 pages of analysis". He mailed it to his mentor, and after a short delay, the draft arrived back on his desk "with much red ink". There were very many annotations, as well as helpful observations, most of which he understood and appreciated. But there was one notation he couldn't understand: a red line had been drawn carefully and intermittently down the left margin of each page, covering in total approximately two thirds of most pages, along with the initials "W.G.A.S.".

He wanted to thank his mentor for his detailed efforts, but also wished to inquire about the notation, so Mr. Justice Stevenson phoned the judge directly. After thanking his mentor for his efforts, he posed the question as to what "W.G.A.S. stood for – must be an American term we're not familiar with up here – what did it mean". The judge responded in a southern drawl: "Whaa boy – means: who gives a shit".

"Judge's order blisters skin off counsel"

Rubin, Sandra, *The Financial Post*, 08 September 2004, p. FP 9

In Delaware they have Leo Strine, in Toronto Jim Farley. Well, in Austin, Tex., they have U.S. District Court Judge Sam Sparks. The federal court judge recently joined the list of Judges Who Leave Powder Burns with an order that pretty well blistered the skin off the counsel on both sides of *Klein Becker LLC and Basic Research LLC v. William Stanley and Bodyworx.com Inc.*

Judge Sparks threw a few warmup pitches by saying when he accepted the federal appointment from the U.S. president, no one warned him that his responsibilities "would be the same as a person who supervises kindergarten."

No, he went on to suggest, comparing counsel on the case to kindergarten children was unfair – to the toddlers, that is. "Frankly," he wrote "the undersigned would guess the lawyers in this case did not attend kindergarten as they never learned how to get along well with others."

He said notwithstanding the history of "antagonistic motions full of personal insults and requiring multiple discovery hearings, earning the disgust of this Court, the lawyers continue ad infinitum.

"The Court simply wants to scream to these lawyers, 'Get a life' or 'do you have any other cases?' or 'When is the last time you registered for anger management classes?"

Perhaps he ought to consider mandating it. What he did do is warn both sides that if they "do not change, immediately, their manner of practice," he will strongly consider entering an order requiring parties to obtain new counsel.

"In the event it is not clear from the above discussion, the Motion for Reconsideration is DENIED."

"Judge awarded $568,500 libel settlement"

Cowan, James, *The National Post,* 19 January 2005, p. A2

An Ontario judge will receive $568,500 in a libel settlement announced yesterday stemming from allegations she smoked marijuana in her chambers.

Justice Dianne Pettit Baig also received written apologies from the 13 defendants involved in the case, including *The Globe and Mail,* The Canadian Press and *The Fort Frances Times*.

"It is a substantial amount, which constitutes a substantial and meaningful vindication of Justice Baig's good character and reputation," the judge's lawyer, Robert Rueter, said yesterday.

Mr. Reuter said his client has always maintained she only smoked a cigarillo. “She was known to smoke them by anyone that knew her,” Mr. Reuter said.

The lawyer added the accusations have been disproven in several ways. “She had a drug test done and she also had a forensic analysis done of a hair sample to prove that she had not smoked marijuana. She took the matter very seriously,” Mr. Reuter said.

Accusations against Judge Baig were made public in a front-page *Globe* story on February 8, 2000. The article said accusations against Judge Baig began when locksmith Ken Rogoza was called to the judge’s chambers to change a lock on her bathroom. As he left, Mr. Rogoza reportedly told two courthouse staff the washroom smelled like marijuana.

According to the newspaper account, seven local lawyers than drafted a letter of complaint, which was forwarded to the Ontario Judicial Council for review.

Also named as defendants in the case are the seven lawyers who launched the complaint: Clare Brunetta, Ian McLennan, Wesley Derkson, Ken Koprowski, Lawrence Phillips, Emery Ruff and Donald Taylor.

Mr. Reuter said yesterday the judicial council eventually found there was “no evidence” to support the complaint, but only after the accusation was leaked to the media.

“The complaint to the Ontario Judicial Council is a confidential process. There is no public access to the file, and somehow the matter ended up with the *Globe and Mail*,” he said.

Mr. Reuter would not say whether Judge Baig believed the lawyers were conspiring to have her removed from the bench.

“I don’t think it is constructive to get into that when we do have a settlement,” the lawyer said, adding: “Any member of the public looking at this would have to conclude that when a settlement of this quantum is paid, it’s because the statement was false.”

The *Globe* paid $200,000 of the settlement, the largest amount paid by any defendant. The Canadian Press contributed $100,000, as did collectively the seven lawyers. Mr. Rogoza, the locksmith, paid $60,000, while Donna Anderson, one of the court staff named, paid $40,000 and the other, Margaret Katona, paid $30,000. The *Fort Frances Times* contributed the remaining $38,500.

Several plaintiffs contacted yesterday by the *National Post* declined to comment.

A lawyer for the *Globe* noted the newspaper apologized “very quickly” for its error. Michael Doody noted the paper’s correction ran on Sept. 2, 2000, *Canadian Lawyer Magazine* paid $75,000 to Judge Baig and issued an unconditional apology.

"Client Perjury and the Criminal Defence Lawyer as Lie Detector"

Lafontaine, Gregory, *For the Defence*, Vol. 27, No. 1 February 2006, p. 6
(*in part*)

There has been a great deal written and said about the appropriate response of the criminal defence lawyer to the acquisition of knowledge that a client is bent on lying on the witness stand in an effort to earn an acquittal. Should the lawyer withdraw from the case? Or should the lawyer continue on but restrict the examination in chief of the client to "narrative questioning?" What steps should (or must) the defence lawyer take to encourage the client to abandon the plan to commit perjury?

Undoubtedly, the appropriate reaction of the defence lawyer to knowledge of a perjurious intent is a fascinating, complex and very important ethical issue. However, any discussion of this issue assumes that there is a problem to address – the discussion assumes that "knowledge" of the intended perjury is a given.

But when does the defence lawyer "know" that the client intends to commit perjury? The answer is not a simple one. The answer is, however, of the greatest importance. The defence lawyer must be in a position to know when a concern about client perjury has risen to the level that triggers ethical concerns and mandates an appropriate response. The lawyer who concludes knowledge without sufficient cause does a terrible disservice to the client. The lawyer who does not conclude knowledge in the fact of proof to the level of absolute certainty does a terrible disservice to the profession. The need for a uniform, clear and easy-to-apply standard to guide the defence bar is obvious.

How does any lawyer "know" when a witness intends to lie? In fact, how does the lawyer "know" that a witness intends to give evidence that is, in every regard, the truth? Ethical considerations cannot possibly require near certainty of intended truthfulness before a witness could be called to give evidence. That being said, mere suspicion of the possibility of false evidence cannot possibly be the standard. If it were, the justice system would grind to a halt on account of an acute shortage of witnesses. By the same token, a standard of absolute certainty that a defendant intends to lie on the stand would not amount to a meaningful standard. It would not catch any situation.

In *Ethics and Canadian Criminal Law*, Proulx and Layton conclude that the defence lawyer must not conclude proposed client perjury except in the fact of "irresistible knowledge of guilt." This test is a high one that, quite rightly in my view, protects the client from and fosters an environment in which the criminal bar to pursue the zealous defence of criminal defendants. Except in the moist exceptional circumstances, it is for the Court to decide whether the client is lying or telling the truth, whether the client is guilty or not guilty. It would be anathema to our system of justice to require that the defence lawyer routinely sit in judgement of his or her client.

. . . .

[A.] v. Canada

[1998] T.C.J. No. 278
Bowman T.C.J., paras. 1, 15, 18-19, 22-24, 28-31, 34, 40-41, 44-45, 54-61

¶1 **BOWMAN T.C.J**.:— These appeals are from assessments for the appellant's 1990, 1991, and 1992 taxation years.

. . . .

¶15 … each time a new partner joined him in the practice of law a new partnership was formed. Hence, Partnerships P1, P2, P3, P4, and P5, the last one being the Merchant Law Group. He also had a corporation known as Merchant 2000 Ltd.

. . . .

¶18 … P3 paid expense allowances $6,000 allocated to the partners in predetermined monthly amounts, without any accountability for their use. The same was true of P4, in the amount of $11,725.

¶19 This raises an arguable point. The non-accountable expense allowances for which apparently no vouchers or receipts were required by the partnerships is not an acceptable way of proceeding where substantial amounts are involved. Expenses incurred on firm business, if charged to the firm by partners or employees, should ideally be backed up by specific substantiation. Is it so difficult, even in a busy law firm where undoubtedly travel and entertainment expenses are incurred, to provide vouchers to the office manager? Although the allowance may have been reasonable in light of the fact that, after Mr. Merchant started claiming specific expenses of the type that this allowance was designed to cover, his claims exceeded the amount paid to him as an allowance, I see no reason why such indemnification cannot be substantiated. I therefore disallow the claim.

. . . .

¶22 … the deduction of $15,436.48 in expenses by the partnership without any supporting documentation.

. . . .

¶23 It is my view that there is no requirement in law that expenses be supported by receipts or other corroboration if such expenses can be supported by credible viva voce testimony and the amounts can be identified with a reasonable degree of specificity (Weinberger v. M.N.R., 64

D.T.C. 5060). Subsection 230(2.1) of the Income Tax Act specifically requires persons carrying on business as lawyers to keep books and records. Why lawyers are singled out is uncertain, but I do not regard compliance with section 230 to be a prerequisite to the deductibility of expenses if they can otherwise be proved. Failure to keep books and records carries its own sanction but had Parliament intended that sanction to include non-deductibility of expenses it would have been quite capable of saying so.

¶24 I am satisfied…that $6,587.50 has been established. A number of other items listed in that exhibit totalling $15,436 lack the degree of specificity as to the purpose of the expenditures to justify my interfering with the assessor's decision.

. . . .

¶28 So far as the charitable donations are concerned, the appellant is claiming anything for which he did not have a charitable receipt as a promotional expense. I am not prepared to extend the decision of the Exchequer Court of Canada in Olympia Floor & Wall Tile (Quebec) Ltd. v. M.N.R., 70 D.T.C. 6085 to the point contended for by the appellant. Mr. Merchant may be an indefatigable self-promoter but it would require far more cogent evidence than I have seen to bring him within the principle stated in Olympia. The same is true of his political contributions. The deduction of charitable contributions and political contributions is covered by a very specific regime under the income Tax Act. I do not propose to drive a coach and four through those provisions.

¶29 The appellant claims $7, 860 for entertainment expenses of a promotional nature. Of this, $6,379.46 was for a gala party "Your Friendly Neighbourhood Solicitor". This latter amount has been proved and I regard it as a legitimate promotional expense.

¶30 The appellant claims $4,768.55 for government promotion expenses. He is very prominent as a Liberal politician. Many of these expenses are undoubtedly intended to promote his fortune; within the Liberal party. I cannot however for that reason alone hold that they are not intended to promote his business. His politics and his law practice are inseparable and seem to have a symbiotic relationship. Nonetheless, I am not prepared to allow the expenditures because the printouts under Tab Q are insufficient to establish either the incurring of the expenses or their purpose.

¶31 Business taxes, fees, and licenses are claimed in the amount of $4,438.76. The appellant now claims $10,158.80. I am prepared to accept the Balfour Moss legal costs of $6,105.23. This was in connection with a legal action brought by Mr. Merchant against the Canadian Broadcasting Corporation. The other expenses may have been incurred but it has not been established that one or other of his law firms did not pay them. They appear to be the sort of expenses that the law firm would pay. If Mr. Merchant expects this court to act as an income tax auditor he should not be surprised if the court draws an adverse inference from his failure to establish every constituent element necessary to the deductibility of a claimed expense.

. . . .

¶34 Bad debt expense - $111,672. The Partnerships P4 and P5 had already deducted a reserve for bad debts or doubtful debts. The appellant then claimed the balance of the debts as a bad or doubtful debt. I must confess I have seldom seen anything quite so farfetched. The proposition is that one partner in a firm can, after the firm has deducted a bad or doubtful debt allowance, take the remainder of the firm's debts and personally claim a bad or doubtful debt allowance in respect thereof. The proposition needs only to be stated to be defeated by its own patent absurdity. The claim was properly disallowed and the penalties were properly imposed.

. . . .

¶40 It has not been established that the cost of $9,252.71 relating to the Austrian Consulate is an appropriate business expense. In the absence of adequate evidence to the contrary I think the cost of the appellant's being the honorary consul of Austria should be treated as personal.

¶41 Business tax, fees, licence, dues - $3,842.72. The payment of this amount has been proved. It has not however been established that one or other of Mr. Merchant's law partnerships did not pay this amount or that they did not already deduct the cost. Given the manner in which these expenses have essentially been dumped on the court's doorstep at the eleventh hour, it would be dangerous to find, on a balance of probabilities, that they had been paid by Mr. Merchant and were deductible by him. The point was not pleaded in the notice of appeal and, according to the reply $3,842.72 was claimed. Mr. Merchant now claims $5,059.43, including, as an example of the fatuity of the behaviour of Mr. Merchant, $8.37 for dry cleaning of his vest and gown. To clutter up the record with this sort of thing is an insult to the court.

. . . .

¶44 Salary - $180. This was allegedly paid to Mr. Merchant's wife allegedly for doing some filing in connection with some board that Mr. Merchant was on. This claim is ridiculous.

¶45 Collection costs - $5,674. Collection costs are generally permissible deduction. Mr. Merchant should however have charged the firm for it and the firm should have claimed it, with the result that Mr. Merchant would have been entitled to his proportionate share.

. . . .

¶54 The appeals are allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in according with these reasons.

¶55 In considering the substantive merits of the issues raised I have ignored Mr. Merchant's unacceptable behaviour and solely on the legal and factual issues. In the determination of the merits of a case a litigant's behaviour is generally irrelevant. The place to deal with unacceptable conduct is in the award of costs.

¶56 Mr. Merchant has been given all that he could reasonably expect in respect of the substantive issues. Moreover, he has been given great leeway in respect of the production of documents and the raising of issues. He has, however, treated this court, its rules, the orders of the court and counsel for the respondent, who is an officer of the court, with disdain.

¶57 It is not inconceivable that had he behaved less outrageously at the audit, objection and appeals level he might have obtained further relief that I am not, on the evidence, prepared to give him. However the court is not the place to perform an income tax audit and to foist that function upon a judge is a dangerous and risky game and, as will be apparent from my award of costs, an expensive one.

¶58 It is unusual to award costs against a party who has been partially successful, and particularly solicitor and client costs. The matter is discussed in Young v. Young, [1993] 4 S.C.R. 3. The general rule is that a successful litigant is entitled to party and party costs.

Where success is divided it is not unusual for no order to be made for costs. To depart from the usual rule requires unusual circumstances. For a successful or partially successful litigant

(a) to be deprived of costs,

(b) to be ordered to pay party and party costs,

(c) to be ordered to pay costs to the other party on a solicitor and client costs,

requires a measure of reprehensibility. To award solicitor and client costs against a litigant who has achieved the degree of success that Mr. Merchant has requires a high degree of reprehensible conduct. There must, to use the words of McLachlin J. in Young (supra) at p. 134, be "reprehensible, scandalous or outrageous conduct on the part of one of the parties".

¶59 The jurisprudence on this point has been thoroughly reviewed by Sarchuk J. in Bruhm v. The Queen, 94 D.T.C. 1400 (T.C.C.), and I shall not repeat what he has said. I agree that to award solicitor and client costs against a partially successful party is rare and should be done only in exceptional circumstances. The presiding judge has, under section 147 of the General Procedure Rules, wide discretionary power in respect of the awarding of costs. This is a case for ordering Mr. Merchant to pay the Crown's costs on a solicitor and client basis. From the outset he has done everything possible to obstruct the Crown in its attempt to put its case forward in an orderly way. He has produced documents up to the last minute. He has rendered impossible the conduct of the discovery. The abuse of the assessor, who acted properly throughout, is intolerable. Generally speaking, conduct prior to the commencement of the action is not relevant to the award of costs. The rule is not invariable. Here Mr. Merchant has deliberately frustrated the audit process and the objection process with a view to having matters dealt with by the court that should never have had to come before it. His conduct prior to commencement of the appeal and prior to trial has had a direct impact upon the manner in which the trial proceeded. He has caused a trial that should have lasted no more that one day to last seven days. Moreover such success as he has achieved at trial is not more than he could have achieved at the audit, objection or discovery level had he not seen fit to obstruct the orderly process of assessment and objection laid down in the Income Tax Act and the procedures set out in the rules of this court.

¶60 I find Mr. Merchant's conduct warrants the awarding of costs against him on a solicitor and client basis.

¶61 The respondent is entitled to her costs, including the costs of the trial and of all motions prior to trial, on a solicitor and client bases.

[**Editor's Note:** Appeal to Federal Court of Appeal dismissed: [2001] F.C.J. No. 314 (QL).]

"Lawyers' trust accounts and disbursements"

IT-129R [Income Tax Act Revision of IT-129] 7 November, 1986

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1. The purpose of this Bulletin is to provide information for lawyers in practice on the proper method of reporting their incomes and expenses for income tax purposes with respect to trust funds and disbursements and with respect to funds held for clients involved in litigation. The following rules are considered applicable to all lawyers in practice who maintain trust accounts.

2. With the exception of advances which the lawyer is entitled to treat as his or her funds by specific agreement with the client and retainers which the lawyer is entitled to keep whether or not services are rendered or disbursements are made, advances received from a client for services to be rendered or disbursements to be made are considered to be trust funds and are not income at the time of receipt. The first day when such advances can be legally withdrawn from the trust account for the use and benefit of the lawyer is regarded as the earliest day upon which an account could have been rendered for the purposes of subparagraph 12(1)(b)(ii) and paragraph 12(1)(a). However, the professional may elect to exclude work in progress from income under paragraph 34(a). (Refer to IT-457). Before 1985 a similar result was obtained under paragraphs 34(1)(b) and (c) subject to an election to exclude work in progress from income under paragraph 34(1)(d).

3. Any amount transferred out of the trust account for the use and benefit of the lawyer must be included in income at the time of such transfer unless a corresponding amount in respect of the same services or disbursements was reported as income at some previous time.

4. Disbursements on behalf of a client which are chargeable directly to funds advanced by a client, or would be so chargeable if such funds had been advanced, are essentially expenditures of the client and are not deductible by the lawyer. Examples of such disbursements that may be made on behalf of clients include amounts advanced to complete a real estate transaction or an investment transaction, amounts advanced to meet bail, amounts advanced to pay incorporation fees, etc.

5. Similarly, disbursements which are properly chargeable to the client under the terms of an agreement (see 2 above) (such as travelling expenses), are normally charged directly to the trust account. If so charged, the lawyer's account is not affected. If a disbursement made on behalf of a client from whom an advance is received is not so charged in circumstances where it is reasonable to consider that eventually the lawyer can legally withdraw from the trust fund an amount equal to the amount of the disbursement, no amount is deductible by the lawyer for tax purposes in respect of the disbursement.

6. Disbursements that a lawyer customarily makes in the ordinary course of practice which are not chargeable directly to funds advanced by clients are considered to be the lawyer's own expenses which may or may not be recoverable from the clients through regular billings. Consequently, such expenses of a business nature incurred in a taxation year are deductible in computing income for that year for income tax purposes unless the lawyer chooses to defer such expenses that relate to work in progress.

Interest on Trust Accounts

7. Interest on trust accounts which, by provincial law, is required to be paid to a law society or bar association or some foundation or fund related thereto is not taxable.

8. Where no such law is applicable and no arrangement to the contrary exists between the lawyer and client, interest credited on a trust account to which the client's advances have been deposited belongs beneficially to the client; therefore the interest is income of the client and not of the lawyer.

9. If there is a specific agreement between the lawyer and client that the interest credited to a particular trust account accrues to the lawyer's own use and benefit, then the interest is income of the lawyer at the time when it is credited to the account.

Interest on Funds of Litigants

10. Where funds deposited with a lawyer by a litigant or litigants for safekeeping and investment, pending a court order or settlement establishing their proper disposition, earn income the Department considers such income to be income of a trust and recognizes that the beneficial owner is the eventual recipient of the funds. Therefore, conditional upon waivers being filed by each of the litigants and the lawyer-trustee for the relevant taxation years, the Department will defer assessment of the income until the recipient is finally determined. (Refer to Information Circular 75-7R3, paragraph 5).

"Administrative practices aren't law"

Drache, Arthur, *The Financial Post*, 09 November 2004, p. IN3

One of the recurring themes in these columns over the many years we have written them is that there is an inherent risk in relying on the administrative practices of the taxman. The Canada Revenue Agency publishes many documents that set out its views on how the law will be interpreted, but as all experienced that advisors are aware, these interpretations are not binding.

Of course, this fact can cut both ways. For example, in the article that appeared in these page on Oct. 26, we wrote about a case where the Tax Court refused to accept the administrative position of the CRA that the words "all or substantially all" means 90%.

But individuals seem to assume that just because the CRA announces an administrative position that is helpful to taxpayers, the CRA will feel bound by that position. In most cases, the agency will follow its administrative practices. But they are not bound to do so.

We were forcefully reminded of this fact recently when doing some research. As most people are aware, when married people make charitable donations, it is the administrative practice to allow either spouse to make the claim. Most tax advisors routinely tell people that only one spouse should claim the charitable donation tax credits so that they are maximized by not having two "threshold" amounts that lower the overall tax credits.

But in a 2000 case, Dennis Douziech found the hard way that administrative practices are not law.

In 1998 he made a claim for a credit for charitable donations in the amount of $10,414.20. The claim was based not upon the donations he made during the 1998 taxation year, but upon the basis of donations made by his spouse.

In assessing him the minister disallowed the claim for the charitable donation credit because these donations where made by Mr. Douziech's spouse.

In an oral judgment, the Tax Court judge reviewed the statutory provisions (which say nothing about spouses using the credits interchangeably) and said he was bound by the statute. He then went on to comment on the administrative practice of allowing either spouse to make the claim.

"The practice has been applied for some time by the minister that is demonstrated by the excerpts that you have brought forward from two publications of Revenue Canada. One of them is the "Income Tax and Benefit Guide" for 1998, and the other one is a publication called "Gifts and Income Tax." The minister has, as a matter of administrative practice, accepted as part of an individual's gifts, gifts made by the spouse of that individual, but there is no authority in law for doing so."

Later, the judge makes the point again.

"The definitive decision is that the Supreme Court of Canada in Minister of National Revenue v. Inland Industries Ltd., a 1972 decision, and the Supreme Court of Canada makes it quite clear there that whatever the minister or his officers or employees may say is their interpretation of the law, [that] does not change what the law is."

The judge regretfully said there was nothing he could do and suggested that perhaps the tax paid might be forgiven by the government. We don't know whether that actually happened.

The case demonstrates that if the CRA chooses not to follow a widely publicized administrative practice and taxes a single individual in so doing, the individual has no real recourse. Of course, this case is on the books and creates another problem in that advisors who

routinely tell clients that either spouse may claim a tax credit for charitable donations probably should at least emphasize that the ability to do this is reliant on the CRA following its publicized practices.

Parliament could solve this problem, of course. The drafting of the medical claims provisions clearly allows either spouse to make the claims and almost always the lower-income spouse does so. Changing the wording of the donation provisions to do the same thing would offer a level of protection without the government forgoing a penny of income.

Maybe this would be a nice and modest project for the Opposition parties in a minority government.

"Lawyers targeted for money laundering"

Humphreys, Adrian, *The National Post,* 07 April 2005, p. A4

Lawyers are making themselves targets for unrelenting strong-arming and bribery from powerful mobsters and terrorists by insisting they alone be exempt from strict anti-money-laundering regulations, a confidential RCMP report says.

With bankers, accountants and other money mangers now covered by rules requiring the reporting of suspicious financial transactions, it leaves lawyers bearing the brunt of increasingly desperate criminals with vast sums of dirty drug cash needing conversion into something that can be spent without arousing suspicion, the report says.

That makes lawyers top targets for corruption, it says.

The internal discussion paper on the ro1e of lawyers in handling the proceeds of crime, obtained by the *National Post,* expresses dismay at the legal profession's efforts to exclude itself from the reporting regulations.

The paper says lawyers were originally included in the government's law to protect them.

"It is ironic that one of the objectives of the [anti-money-laundering] act … was to place the members of the legal profession in the position where they would not be approached in their professional capacity to launder money," the report says.

The report estimates $16-million in gang profits were laundered in Canada in 2002.

Asking lawyers to report on clients remains a thorny issue.

The government's 2001 Proceeds of Crime (Money Laundering) and Terrorist Financing Act initially included lawyers among those who had to report suspicious client transaction. That

caused outrage in the legal community and was promptly challenged in court by lawyers'groups in most provinces. After the law groups won court injunctions in Alberta, Saskatchewan, Nova Scotia and Ontario, the government agreed to exempt lawyers from making reports.

Lawyers' groups are still negotiating with the government on an alternative solution.

Law Societies are enacting internal codes conduct limiting the amount of cash lawyers can handle for their clients to a total of $7,500 – under most circumstances.

B.C. and Ontario have the rules already in place and all the other provincial societies will similarly comply by July 1, said George Hunter, chairman of the Federation of Law Societies' Task Force on Money Laundering.

"I'm prepared to concede that lawyers would be a target," said Mr. Hunter after being read portions of the RCMP report. That is why the societies are enacting internal regulations to reduce cash transactions by the legal community without compromising solicitor-client privilege, he said.

The government, however, seems unmoved by the efforts.

"The government remains committed to having lawyers within its anti-money-laundering and anti-terrorist-financing regime. This is an important step in Canada's efforts to meet its [international] commitments," said a Department of Finance official.

The RCMP discussion paper, titled *Lawyers and Complicity in Criminal Conduct – Exploitation of Solicitor-Client Privilege,* was drafted at the request of the RCMP's Officer-in-Charge of Criminal Operations for Ontario.

Last week, Simon Rosenfeld, a Toronto lawyer, was sentenced to four years in prison for laundering what he was told was $500,000 from the sale of cocaine. His lawyer is appealing

Other lawyers are currently before the courts or under investigation by police.

"Lawyers and laundromats"

Slayton, Philip (2005) *Canadian Lawyer* (August 2005), p. 11, 13

Drug users don't use credit cards to score cocaine. Mobsters don't write cheques to buy automatic weapons.

In the world of crime, cash is king. This creates a problem for the criminal. He can't use wads of dollar bills carried in a briefcase to buy a fancy car, a penthouse in Hawaii or a gold watch studded with diamonds. Even were such transactions possible, they would attract too much dangerous attention.

To enjoy the fruits of his labours, the crook had to inject his criminal cash into the legitimate financial system. Al Capone, so legend says, did it by pretending his money came from a chain of laundromats that he happened to own. Capon's effective approach to the problem gave rise to the term "money laundering."

. . . .

Money laundering was made a crime in Canada in 1989. Two years later, the Proceeds of Crime (Money Laundering) Act took the matter further when it introduced a wide range of record-keeping requirements for transactions that involved more than $10,000 cash. But several times in the 1990's, Canada ran up against the FATF. Canada was criticized for not complying fully with the 40 Recommendations, particularly when it came to the key requirement that suspicious transactions be reported to a central authority.

It was to answer these embarrassing criticisms that Parliament, in 2000, replaced the 1991 statute with a new Proceeds of Crime (Money Laundering) Act. The new Act established FINTRAC, the Financial Transactions and Reports Analysis Centre of Canada. Financial industry participants must collect certain transaction data and send that data to FINTRAC, which analyzes it for evidence of money laundering and may disclose "designated" information to national, foreign or international law enforcement agencies. In 2001, FINTRAC was additionally authorized by the new Anti-Terrorism Act to look for financial transactions that constitute threats to the security of Canada, and to disclose this information to the Canadian Security Intelligence Service and other law enforcement agencies.

Regulations under the 2000 Act, which came into force in November 2001, required lawyers (along with other professionals, financial institutions, brokers, casinos, etc.) to report a client's suspicious financial transactions to FINTRAC. The client's identity had to be disclosed, but it was illegal to tell the client that a report had been made. A suspicious financial transaction was defined as one where "there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence." The regulations provided that legal counsel were not required to disclose any communication that is subject to solicitor-client privilege," but the scope of solicitor-client privilege was not defined.

The legal profession was outraged by these provisions, perceiving them as a dramatic attack on the traditional relationship between lawyer and client. Several provincial law societies quickly went to court, arguing that the constitution protects communications between a lawyer and a client, even communications not covered by solicitor-client privilege. The new regulations, it was argued, forced lawyers to act inconsistently with their duty of loyalty and confidentiality to clients.

The courts were highly sympathetic to these arguments, and across the country granted the law societies temporary exemptions from the reporting requirement pending full determination of the constitutional challenge.

In the January 2002 Ontario decision, for example, Justice Maurice Cullity said, "In imposing a duty on legal practitioner to give secret reports of their clients' transactions to a government agency, the legislation clearly impinges on, and alters, the traditional relationship between solicitors, or counsel, and their clients…it strikes at the lawyer's duty of loyalty and the client's privilege against self-incrimination as well as the principle that lawyers should be independent of government."

Faced with these successful court challenges, in March 2003 the federal government repealed the regulations making lawyers subject to the reporting requirement. "This is a testament to the resolve of Canada's law societies," said a spokesman for the Federation of Law Societies. The government pushed back and said, "It is important that Canada's anti-money laundering and anti-terrorist financing regime covers all entities that act as financial intermediaries, including legal counsel and legal firms… The government therefore intends, following consultations, to put in place a new regime for legal counsel…"

Presumably to head off further unpalatable government action, the law societies moved to deal with the acknowledged problem through internal codes of conduct. Adopting a model rule developed by the Federation of Law Societies of Canada, all provincial law societies have now prohibited lawyers from accepting cash in the amount of $7,500 or greater, subject to limited exceptions, and to adopt more stringent record keeping of cash receipts. The Ontario rules came into force at the end of January 2005. The pending constitutional challenge has been adjourned, ready to be revived if the government again tries to bring lawyers within the reporting system.

The issue remains hot. In June 2003, just months after the Canadian government exempted lawyers from the reporting requirement, the FATF revised the 40 Recommendations to include a provision that "lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction…"

The 2004 Report of the Auditor General of Canada, referring to the 2003 revision of the 40 Recommendations, commented that the new exemption for lawyers "is widely regarded as a serious gap in the coverage of the anti-money-laundering legislation. It means that individuals can now do banking through a lawyer without having their identity revealed, bypassing a key component of the anti-money-laundering system." The report went on: "The removal of lawyers from the reporting requirements of the legislation in Canada means that our anti-money-laundering system does not fully meet international standards…"

A 2004 study by criminologist Dr. Stephen Schneider of York University reported that lawyers played a role in half of 149 major money laundering and proceeds of crime cases solved by the RCMP between 1993 and 1998. In most cases, the lawyers were unaware of the criminal source of funds. In June 2004, the prominent and politically influential Toronto lawyer Peter Shoniker was arrested on money laundering charges. In announcing Shoniker's arrest, RCMP Chief Superintendent Ben Soave, head of the Combined Forces Special Enforcement Unit, said criminals take advantage of solicitor-client privilege: "They go out of their way to engage, recruit, compromise, and corrupt lawyers…"

A 2005 RCMP report entitled "Lawyers and Complicity in Criminal Conduct – Exploitation of Solicitor-Client Privilege suggested that by insisting on an exemption from money laundering regulations, lawyers are left "bearing the brunt of increasingly desperate criminals with vast sums of dirty drug cash needing conversion into something that can be spent without arousing suspicion." And at the recent money laundering trial of Toronto lawyer Simon Rosenfeld, a senior RCMP officer who runs a white-collar crime unit testified that "in almost every case we are doing lawyers are central." (Rosenfeld was convicted.)

And so there remain two strongly opposed views. The international community and the Canadian government, including the RCMP, remain convinced that lawyers should be brought within the official reporting system, as a critical part of the fight against organized crime and for the good of lawyers themselves. The legal profession is overwhelmingly opposed, believing that the reporting of suspicious transactions is unconstitutional and a horrible violation of the traditional and valuable rules governing the lawyer-client relationship.

Who is right? Is it really unconstitutional to require lawyers to report a financial transaction to government if there are reasonable grounds to believe that the transaction is connected to money laundering by organized crime? Would such a reporting requirement seriously erode general principles behind the average lawyer-client relationship? Is involvement by lawyers in suspicious transactions, ones that may promote and protect organized crime, best treated as an internal law society disciplinary matter?

Or should we be calling the police?

4.0 PROCEEDINGS DERIVING FROM BREACHES OF STANDARDS OF RESPONSIBILITY

4.1 Administrative: Disciplinary

"The Perils Of The Profession; The Lawyer As Accused"

Trudell, William M., 25 *For The Defence,* pp.32-34

The presumption of innocence and the right to remain silent are basic principles protecting anyone accused of a criminal offence. This also of course includes lawyers.

But the lawyer charged by his own professional self-regulators may find those principles illusory. There is much educational guidance on what to do when the police call. But what to do when the Law Society of Upper Canada (LSUC) calls is often foreign territory. A lawyer can be charged with professional misconduct, defined as: conduct in a lawyer's professional capacity that tends to bring discredit upon the legal profession including;

(a) violating or attempting to violate one of the rules in the Rules of Professional Conduct Of a requirement of the Law Society Act or its regulations or by-laws;

(b) knowingly assisting or inducing another lawyer to violate or attempt to violate. the rules in the Rules of Professional Conduct or a requirement of the Law Society Act or its regulations or by-laws;

(c) knowingly assisting or inducing a non-lawyer partner or associate of a mu1ti-discipline practice to violate or attempt to violate the rules in the Rules of Professional Conduct or a requirement of the WW Society Act or its regulations or by-laws;

(d) misappropriating or otherwise dealing dishonestly with a client's or a third party's money to property;

(e) engaging in conduct that is prejudicial to the administration of justice;

(f) stating or implying an ability to influence improperly a government agency or official; or

(g) knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

or with conduct unbecoming:

conduct in a lawyer's personal or private capacity that tends to bring discredit upon the legal profession including for example:

> (a) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
>
> (b) taking improper advantage of youth, inexperience, lack of education, unsophistication, ill health, or unbusinesslike habits of another; or
>
> (c) engaging in conduct involving dishonesty.

More often than not, the process begins with a complaint to the Society by a client (former or present), another colleague who has taken over a file or as a result of problems spotted in an audit. It may also occur in tandem with a criminal investigation or claim of negligence.

When faced with a discipline complaint the best advice a lawyer can give to a fel1ow lawyer is... to get a lawyer! Most lawyers do not want to let anyone know that they are in trouble... the same approach most accused take. .. with ego added.

The *Law Society Act* section 49.3 states:

> 49.3 (1) Subject to section 49.5, the Secretary may require an investigation to be conducted into a member's conduct if the Secretary receives information suggesting that the member may have engaged in professional misconduct
> or conduct unbecoming a barrister or solicitor.
>
> Powers
> (2) A person conducting an investigation under subsection (1) may require the person under investigation and people who work with the person to provide information that relates to the matters under investigation and, if the Secretary
> is satisfied that there is a reasonable suspicion that the person under investigation may. have engaged in professional misconduct or conduct unbecoming a
> barrister or solicitor, the person conducting the investigation may,
>
> > (a) enter the business premises of the person under investigation between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the person under investigation; and
> >
> > (b) require the production of and examine any documents that relate to the matters under investigation, including client files.

This implies that there is a duty to cooperate with investigators from the LSUC. This of course is held out as a saw-off because we want to self-regulate. But cooperation at what price and with what protections?

Just as in criminal investigations there are investigators who are straight up, there are others who are on fishing expeditions and have prejudged guilt; that same view can infect investigators from our law societies.

Upon receipt of a complaint (not patently frivolous) the investigation department opens a file.

When the file is assigned to an investigator, the complaint letter is probably sent on to the lawyer for comments and a response.

In too many cases the response from the solicitor is done without advice, emotionally, and often without thought beyond the immediate rush to deny that anything but stellar service was given to that ungrateful client. A careless fact recitation and attack on the complainant's motives becomes part of the Law Society file. In the situation where
the complaint is not directly from a former client but from a lawyer who has inherited a file, just calling the new complaining lawyer will not satisfy the Law Society.

A further charge could result. It could read for example, failing to fully respond to communications from the Law Society or failing to cooperate in an investigation by the LSUC or not providing full and complete responses to inquiries made by the LSUC or not producing for examination by the LSUC documents related to the matters under investigation.

Rule 6.02 is heavily relied upon to force lawyers to explain themselves.

6.02 Responsibility to The Society

Communications from the Society

6.02 A lawyer shall reply promptly to any communication from the Society.

It seems there is no right to remain silent; I suggest there is also no presumption of innocence.

Once a lawyer responds or meets with an investigator, more often than not, his/her entire practice will be monitored.

Once investigators sense one problem, they think patterns. The lawyer who thought it would be easy to handle or even dismiss, may find himself/herself on the LSUC's operating table.

Once the investigation is complete, the report goes to the Proceedings

Authorization Committee (PAC) of the LSUC. This committee is composed of Benchers who review the investigation and decide whether to authorize a complaint and issue a Conduct Application. There is no chance of in person submissions to PAC by the solicitor under review.

There is some discretion in whether a matter is referred to PAC, but unless there is a satisfactory explanation from the Solicitor the rue will likely not be closed. This is not to say that investigations do not result in closed files. But an explanation that does not satisfy the complainant or the Investigation Department will result in the file before PAC.

If PAC does not authorize an 'Invitation to Attend' (tantamount to a warning before a panel), the results of a successful conduct application through discipline will result in a finding of professional misconduct or conduct unbecoming that is a 'permanent' record.

The Conduct Application can result in an Order for:

1. disbarment.
2. permission to resign (effective disbarment except for unique circumstances for example, health).
3. a period of suspension with conditions attached.
4. a reprimand.
5. an admonition.

All of these basic dispositions can be accompanied by cost awards.

An admonition, although a misconduct finding, is not publicly reported in the Law Society Gazette.

The record of these dispositions are open to inquiries from the public or interested parties. Unlike the provisions for pardons in criminal justice, a finding of misconduct is forever. It can stand in the way of advancement in the profession, to the judiciary, in the business world, in academia, in government . . . in life.

Discipline hearings are presumed to be in public unless an in camera application is successfully launched, which is rare.

It is the protection of the public that is the primary consideration in the Discipline process. This may indeed be the philosophy behind the duty to cooperate.

Nevertheless the personal costs to the lawyer's reputation are often overlooked.

The seemingly autonomous power of the head of Professional Regulation can easily set a tone that can maintain or tip the balance of a fair process.

The Secretary of the LSUC used to authorize submissions to PAC. The Secretary's duties have now been split between a director of Policy and Legal Affairs and a separate director of Professional Regulation.

Lawyers are problem solvers. We want to help save the world. Sometimes we have egos that defy reality and when we make mistakes we are too ashamed to admit them, and to ask for help. In relation to a complaint from the Law Society, this approach is a flaw that invites disaster.

Too often lawyers make a mistake, then compound it by trying to deny it.

Emotional collapse, stress, resort to drugs, and alcohol, the thankless hours, the financial pressure, and bum out are diseases that visit the lawyer's house.

We need to face this. It is not surprising that in a large percentage of cases that show up in Discipline the lawyer has failed to respond, not responded well and has not asked for assistance.

Over two years ago a group of concerned counsel set up a Duty Counsel system at the Hearing Management Tribunal (HMT) at the LSUC. (This is in effect a 'first appearance Court'.)

Historically over 75% of lawyers would arrive unrepresented and continue to go it alone. Since the introduction of Duty Counsel at this intake stage the percentage has reversed in Ontario. Lawyers who have not been able to ask for help have it provided at an early stage.

Their problem may require a simple explanation. Their problem also could be career threatening. Many do not appreciate which it is, because denial is their preferred approach.

Lawyers need to pay attention to the Discipline process which can be unfriendly.

Discipline Counsel at the LSUC are professional colleagues who work hard and are most often balanced and fair.

By the time they get the file however the tone has been set, the mistakes made and lawyers clearly need assistance to unravel the mess and perhaps save their career. There is in effect no discretion to withdraw without PAC's approval.

The Benchers (three) who sit in judgment on Discipline cases are looking for help. The process is not unlike representing an accused before the criminal Courts, the stakes are very high.

History has not seen many criminal lawyers appear in discipline. History has changed dramatically. Too many defence counsel are finding themselves facing complaints involving trust monies, improper accounting, running loose operations and unfortunately failing to serve their clients. In a striking turn of events, Crown counsel are no longer immune from the Discipline process and some are finding themselves the subject of complaints and discipline.

The surest way to protect oneself is to seek advice, to pause and look at the larger picture. A career, a life can be destroyed very quickly. There is however, always someone to ask for help.

What then of this duty to cooperate and the sword held over the profession by the rules? There is a simple answer. A client calls and says the police want to talk to him, what do you do?

The answer seems obvious. We want to know what is at stake. Is he an accused? What protections are there? Can a statement help?

There should be no difference if that call comes from a lawyer under investigation from the LSUC. There is a duty to cooperate but there is no duty to refrain from consulting counsel.

Indeed it would be foolish not to. The problem may be easily solvable...the problem may also be monumental and career threatening.

Too often lawyers ignore the signs and are quickly in the deep end, way over their heads.

So very much can be at stake when the Law Society calls. Do not ignore the call, take it, promise to get back to them. . . then make another one.

"Complaints Received"

***The Law Society of Upper Canada Annual Report, 2004*, p. 24**

COMPLAINTS RECEIVED BY AREA OF LAW 2004	
Area	**%**
Real Estate	32.17%
Matrimonial / Family	19.07%
Civil Litigation	16.94%
Other	14.05%
Estates / Wills	6.63%
Criminal	4.82%
Corporate / Commercial	2.83%
Administrative / Immigration	2.81%
Student Misconduct	0.67%

Nova Scotia Barristers' Society v. Solicitor "Y"

[2004] N.S.J. No. 260 (QL) (N.S. C.A.),
Glube C.J.N.S., Freeman and Fichaud JJ.A.,
Headnote, paras. 48-50, 59, 62-64 (in part), 68-69 (in part), 71, 92

After investigation, complaints by family law clients against a barrister came before a hearing subcommittee of the Nova Scotia Barristers Society for formal adjudication. He was found guilty of two charges of professional misconduct for failing to honour provisions in the retainer agreements, in one instance limiting legal fees to $2,500 and in the other, providing a money back guarantee if the client was not satisfied with his services. In the one case he sought access to anticipated costs awards in addition to the $2,500 fee. In the other he claimed his offer to provide additional services for a minimal amount invalidated the guarantee. The hearing panel found the increased fees he sought in the one case and his refusal to refund fees in the other could only be justified by agreements amending the retainer agreements. It found the agreements had not been amended. The barrister was ordered to be reprimanded, to pay restitution and to pay costs. He appealed on the merits, and also appealed to protect his name from publicity with respect to the charges against him which had been dismissed.

Issues:

1. Did the barrister charge the first client more than $2,500 and refuse to return legal fees paid by the second?

2. If so, were his actions authorized by agreed amendments to the retainer agreements?

3. Was he entitled to avoid publicity on the charges which were dismissed?

Result: It was reasonable, and not clearly wrong, for the hearing panel to find the alleged facts to be proven with respect to each client. It was equally reasonable for the panel to determine on the evidence that the retainer agreements had not been amended. In the present circumstances, Nova Scotia Barrister's Society Regulation 45, both in its current form and as it existed prior to amendment in January 2002, requires (1) the hearing panel's reasons to be filed in the Prothonotary's Office in Halifax where they become part of the public record, and (2) notice to be given to members of the Society. The appeal was dismissed with costs of $2,700 inclusive of disbursements.

Publication of the decision of the Court of Appeal was ordered delayed until September 8, 2004 to permit the appellant, if he so chooses, to make application for leave to the Supreme Court of Canada and to seek an order banning publication until disposition of any leave application.

. . . .

¶ 48 The appellant continues to defend the propriety of including office expenses such as staff overtime and paralegal expenses as disbursements instead of absorbing them as legal fees. The distinction between fees and disbursements is well understood in the legal community. Lawyers' fees at hourly rates that might seem excessive to the uninitiated are justified by the necessity of covering staff and overhead expenses.

¶ 49 The looseleaf handbook Barristers & Solicitors in Practice states the following:

> 13.56 Disbursements comprise amounts paid or payable to lawyers for outlays made on behalf of their clients …
>
> 13.57 Disbursements also include some expenses incurred by lawyers in their own offices, notably expenses for postage, photocopies and faxes. Many office expenses are not properly attributable to clients as disbursements. Those that are chargeable may most conveniently be described as expenses which would not have been incurred in the lawyers' offices but for the instructions received from the clients to whom the bills containing the disbursements are being sent. Thus wages paid for secretarial overtime occasioned by clients' exigent circumstances are chargeable as disbursements unless the extra expenses have resulted from inefficiencies in the lawyers' offices. Expenses that cannot be charged as disbursements are part of overhead costs and must be absorbed by the lawyers as a cost of doing business.

¶ 50 This is a statement of trite law and any departures from it for borderline matters such as secretarial overtime in some circumstances should be expressly agreed to by clients. It is also a matter particularly within the special expertise of a hearing panel of the Nova Scotia Barristers' Society. I would defer to the panel's finding that the secretarial overtime and paralegal expenses in issue were not properly charged as disbursements, and "constituted charging fees that were not fully disclosed."

. . . .

¶ 59 While the above excerpt from AB's testimony demonstrates she had a good understanding of the importance of the protection the retainer agreement provided her respecting fees, it is not as clear she fully appreciated that costs recovered at the divorce hearing, without agreement to the contrary, would be wholly her money, not her solicitor's. (See The Law of Costs, 2nd ed., Orkin, looseleaf in para. 204 at p 2-25; Wyatt v. Franklin, [1993] N.S.J. No. 624 (S.C.) para. 16; Imperial Life Assurance Co. of Canada v. Schofield, [1995] N.S.J. No. 265 (S.C.) at para. 32 and Harnish v. Perry Rand Ltd., [1994] N.S.J. No. 383 (S.C.) at para 8.) In my view no amendment of the original retainer agreement requiring her to give up her right to costs in favour of her lawyer could have been properly negotiated without a full disclosure and explanation of her rights respecting costs.

. . . .

¶ 62 ….the appellant recklessly created his own difficulty by providing his client with an unrealistic retainer agreement. It was not unreasonable to set a $2,500 cap on the amount AB would

be expected to pay for legal fees from her own resources. He could not have stated this more clearly: "in no event will your fees exceed $2,500 plus disbursements and HST regardless of even very substantial success in litigation against the respondent." It is difficult to believe he would not, from the outset, have anticipated recovering his own fees from any costs awarded against the other side. The retainer agreement did not disclose such an intention. It made no mention of costs, which he knew were the property of the client.

¶ 63 When his own efforts made it clear that the husband had a greater ability to pay than originally anticipated, he had two options which would have left his integrity intact. The more honourable course would have been to have lived with his own agreement and accepted legal fees of $2,500. The alternative was to seek an amendment to the retainer agreement from the client giving him access to costs, based on a complete disclosure and explanation. In the circumstances, given the substantial nature of the change he sought, the expectations he had raised in the original retainer agreement and the power imbalance between himself and the client, such an amendment should have been in writing.

¶ 64 The appellant chose neither of these alternatives. Rather he resorted to tactics a reasonable person would view as bullying and underhanded, such as threatening her with withdrawal of services unless she paid up, while telling her no other lawyer would take the case, and concealing fees as disbursements. He maintained the pretense to her that he intended no departure from the original agreement, and insisted to her new lawyer and the hearing panel that the original agreement had been amended to give him access to costs.

. . . .

¶ 68 After CD signed a standard form of retainer agreement engaging the appellant's services in a dispute with her common law husband, he wrote her a letter containing the following:

> … because of the special circumstances of this case, especially the need to create a bond of trust between you and I, I have told you verbally over the telephone that when this file is concluded and my services are ended if at that time you are not fully satisfied with my services I will refund to you the entire amount of legal fees that you have paid up to that point. Please let this confirm that amendment to our Retainer Agreement. Please note this does not apply to disbursements. … (Emphasis added.)

¶ 69 When the file was concluded and his services ended on an acrimonious note she demanded the return of her money and he refused to honour his agreement. …

. . . .

¶ 71 I find little merit in these grounds of appeal and will deal with them summarily.

1. The only direct evidence of change in the agreement removing the money back guarantee was the appellant’s own. CD testified there had been not change. On the evidence it was a reasonable conclusion by the panel, and not clearly wrong, to find the money back guarantee had not been altered by amendment.

2. The suggestion that the appellant had completed his professional services to CD before going out of the country is simply not factual. On October 5, 2000, immediately before leaving, he wrote her to tell her:

> Further to the above please be advised that I will be away in the United Stated from October 5, 2000, through October 6, 2000 but I will be checking in daily for messages. I will be keeping an eye on this file due to its sensitivity.

He reminded her at the end of the same letter:

> As noted I will be checking in daily and I will keep and eye on this file. Please try to keep your chin up during these difficult times.

3. I am aware of no authority, and the appellant has offered none, for the proposition that a client who creates a disturbance in a lawyer's office thereby voids a money back guarantee in a retainer agreement.

4. While CD's request for her money back in her letter of October 1, 2000 to the appellant may have been equivocal and tied to a demand for further services, her appellant may have been equivocal and tied to a demand for further services, her testimony was that she had also begged him by telephone to return her money so she could get another lawyer. She said the appellant had laughed at her and told her the only way she would ever get her money back was to fie a complaint with the Barrister's Society. The guarantee did not define satisfaction nor propose an objective test for it, but her complaint to the Barristers' Society about not receiving the money was accompanied by two complaints relating to the appellant's performance of his retainer which arose long before the October, 2000 dispute, While these were not upheld, they suggest her dissatisfaction was not without substance, at least in her own view.

. . . .

¶ 92 Having already dealt with the other grounds respecting AB and CD, I would dismiss the appeal with costs to the respondent, which I would fix at $2,700 including disbursements.

"Lawyers Duty to Report Rule Violations by Another Lawyer Who Suffers from Disability or Impairment"

(Chicago: American Bar Association [Standing Committee On Ethics And Professional Responsibility], 2003), Formal Opinion 03-431, 08 August 2003 (in part)

A lawyer who believes that another lawyer's known violations of disciplinary rules raise substantial questions about her fitness to practice must report those violations to the appropriate professional authority. A lawyer believes that another lawyer's mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer's consequent violation of Rule 1.16(b)(2), which requires that she withdraw from the representation of clients.

In this opinion, we examine the obligation of a lawyer who acquires knowledge that another lawyer, not in his firm, suffers from a mental condition that materially impairs the subject lawyer's ability to represent a client. Under Rule 1.16(a)(2) of the Model Rules of Professional Conduct, a lawyer must not undertake or continue representation of a client when that lawyer suffers from a mental condition that "materially impairs the lawyer's ability to represent the client." That requirement reflects the conclusion that allowing persons who do not possess the capacity to make the professional judgments and perform the services expected of a lawyer is not only harmful to the interests of the clients, but also undermines the integrity of the legal system and the profession.

Under Rule 8.3(a), a lawyer with knowledge that another lawyer's conduct has violated the Model Rules in a way that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" must inform the appropriate professional authority. Although not all violations of the Model Rules are reportable events under Rule 8.3, as they may not raise a substantial question about a lawyer's fitness to practice law, a lawyer's failure to withdraw from representation while suffering from a condition materially impairing her ability to practice, as required by Rule 1.16(a)(2), ordinarily would raise a substantial question requiring reporting under Rule 8.3.

When considering his obligation under Rule 8.3(a). a lawyer should recognize that, in most case, lack of fitness will evidence itself through a pattern of conduct that makes clear that lawyer is not meeting her obligations under the Model Rules, for example, Rule 1.1 (Competence) or Rule 1.3 (Diligence). A lawyer suffering from an impairment may, among other things, repeatedly miss court deadlines, fail to make filings required to complete a transaction, fail to perform tasks agreed to be performed, or fail to raise issues that competent counsel would be expected to raise. On occasion, however, a single act by a lawyer may evidence her lack of fitness.

A lawyer may be impaired by senility or dementia due to age or illness or because of alcoholism, drug addition, substance abuse, chemical dependency, or mental illness. Because

lawyers are not health care professionals, they cannot be expected to discern when another lawyer suffers from mental impairment with the precision of, for example, a psychiatrist, clinical psychologist, or therapist. Nonetheless, a lawyer may not shut his eyes to conduct reflecting generally recognized symptoms of impairment (*e.g.*, patterns of memory lapse or inexplicable behavior not typical of the subject lawyer, such as repeated missed deadlines).

Each situation, therefore, must be addressed based on the particular facts presented. A lawyer need not act on rumors or conflicting reports about a lawyer. Moreover, knowing that another lawyer is drinking heavily or is evidencing impairment in social settings is not itself enough to trigger a duty to report under Rule 8.3. A lawyer must know that the condition is materially impairing the affected lawyer's representation of clients.

In deciding whether an apparently impaired lawyer's conduct raises a substantial question of her fitness to practice, a lawyer might consider consulting with a psychiatrist, clinical psychologist, or other mental health care professional about the significance of the conduct observed or of information that lawyer has learned from the third parties. He might consider contacting an established lawyer assistance program. In addition, the lawyer also might consider speaking to the affected lawyer herself about his concerns. In some a situation, however, the affected lawyer's response, rather than the affected lawyer's conduct itself. Care must be taken when acting on the affected lawyer's denials or assertions that the problem has been resolved. It is the knowledge of the impaired conduct that provides the basis for the lawyer's obligations under Rule 8.3; the affected lawyer's denials alone do not make the lawyer's knowledge non-reportable under Rule 8.3.

If the affected lawyer is practicing within a firm, the lawyer should consider speaking with the firm's or supervising lawyers. If the affected lawyer's partners and supervising lawyers take steps to assure that the affected lawyer is not representing clients while materially impaired, there is no obligation to report the affected lawyer's past failure to withdraw from representing clients. If, on the other hand, the affected lawyer's firm is not responsive to the concerns brought to their attention, the lawyer must report under Rule 8.5. We note that there is no obligation to speak with either the affected lawyer or her firm about her conduct or condition before reporting to appropriate authority.

Rumpole and the Penge Bungalow Murders

Mortimer, John (Toronto: Penguin Books Canada Ltd.; 2004), p.1

'Claude Erskine-Brown told my pupil she had extraordinarily nice legs.'

What're her legs like, then? Rather gnarled tree trunks, are they?

'Don't be ridiculous, Rumpole! Lala Ingolsby is a very good-looking girl.'

'With a name like Lala Ingolsby I should have thought she wouldn't mind having her legs complimented.'

'She wouldn't mind! That's what you all say, don't you, Rumpole? Just like a man! Anyway, I have reported Erskine-Brown's conduct to the Chair of the Society of Women Barristers.'

The speaker was Mizz Liz Probert, my one-time pupil and in many ways a helpful and hard-working barrister, when she was not determined to throw the book at Claude Erskine-Brown. He was being tried *in absentia*, having left early to catch about twenty-four hours of the Ring Cycle at Covent Garden.

"18M payout confirmed to victims of defalcation by Vancouver lawyer"

Oakes, Gary, *The Lawyers Weekly*, 25 June, 2004, pp. 17-18
(in part)

If "ballpark guesses" that at least $34.6 million was misappropriated by now-disbarred lawyer Martin Wirick are close to correct, "they represent about a century's worth of claims" against the Law Society of B.C., says a former LSBC president.

On June 14, the law society said it had approved compensation of $18 million for those victimized by Wirick, who practiced in the Vancouver area until he resigned on May 20, 2002.

Before the defalcation – which is believed to be the largest ever by a Canadian lawyer – the average annual payout from the LSBC's Special Compensation Fund had been $348,161.27, and former president Richard Gibbs told members it would have been "much lower but for two 'big' years." The total for the previous 15 yeas was $5,222,419.06.

A press release announcing the $18-million payout said the LSBC "continues to receive and process claims for compensation... to those persons and organizations who lost money due to Mr. Wirick's misappropriations."

"Reyat's ex-lawyer put client's kin on payroll, legal body says"

Blatchford, Christie, *The National Post*, 14 September 2004, p. A6
(*in part*)

The former lead lawyer for convicted Air-India terrorist Inderjit Singh Reyat put his client's relatives on the public payroll and paid them with public money meant for their father's legal defence, the Law Society of British Columbia alleges.

The unproven allegations are contained in a formal "citation" against David John Martin, a prominent Vancouver lawyer, that was quietly issued last week, more than two years after the disturbing story first came to light.

. . . .

A veteran lawyer with 18 years at the bar, Mr. Martin is accused of approving and submitting "fraudulent or inflated accounts" of Mr. Reyat's adult children in February and March of 2002.

It is also alleged that Mr. Martin had promised Mr. Reyat he would provide employment to members of his family, thereby creating "substantial monthly income flow."

. . . .

Shortly after Vancouver lawyer Gil McKinnon joined Mr. Martin's team, he spotted what he suspected were serious irregularities in the Reyat family billings.

He and other lawyers on the team – the cost of Mr. Reyat's defence was borne by B.C. and federal taxpayers – then discussed the matter with Mr. Martin, telling him they would have to resign if he did not.

Mr. Martin did not resign.

. . . .

Eight lawyers – including Mr. McKinnon, well-known Vancouver lawyer Peter Wilson and Todd Ducharme of Toronto, who is now an Ontario Superior Court judge – then abruptly quit the file.

. . . .

Later, Mr. McKinnon, Mr. Wilson and Mr. Ducharme jointly filed the law society complaint under a section of law society rules that makes it mandatory to report another lawyer whose "honesty or trustworthiness" is seriously questioned. It is that compliant, put on hold so the trial could proceed, that last week led to Mr. Martin's formal citation.

. . . .

"The Thin Blue Line [:] How a Lawyer Owed Up to a Fiction and Officer's Murder was solved"

Weiser, Benjamin, *The New York Times*, 26 September 2004, p. 27

It was the coldest of cold cases. Twenty years had passed without an arrest in the killing of Officer Ronald S. Stapleton, who was found shot twice in the stomach with his own revolver, his right eye gouged out, in the parking lot of a Brooklyn bar in 1977. The police investigation had stalled; private detectives hired by his family were stymied, and their $5,000 reward for information went unclaimed.

Then came a startling break. A mobster arrested a Boston drug case told the authorities that a New Jersey truck driver [Tony Francesehi] had bragged to him about killing the officer.

But there was a problem: the truck driver was white, and the old case files said that Officer Stapleton, before he died, had described his attackers as black.

Investigators tracked down Robert R. Race, a lawyer and friend of the officer's who had been at his hospital bedside, and asked if he could help square the discrepancy. Then they got another surprise. Mr. Race confessed he had provided the description of the killers, and that it had been a lie.

"I'm not going to let a murderer walk," he told them. And with that, the lawyer began to try to fix something he had set terribly wrong two decades before. His cooperation, prosecutors say, was critical in convicting the truck driver.

The story of Mr. Race's decisions to lie and then come clean – culled from records in the case and interviews with him and others – defies black-and-white interpretations. It is a tale of good intentions marred by a serious breach of professional ethics, of Mafia secrets and racial stereotypes, and of a disciplinary process that struggled for three years to weigh the bad Mr. Race had done against the good.

In the end, he was suspended from practicing law for three months – a punishment that prosecutors say is far too mild for misleading a murder investigation and endangering the case.

But Mr. Race, 64, contends that his lie was harmless – that police detectives on the case never believed it – and that it was meant to prevent harm to the officer's family. He feared that Officer Stapleton's pension would be in jeopardy, he said, if the police brass learned that the off-duty policeman had been inside the bar, which officers were forbidden to visit because it was frequented by mobsters.

Mr. Race knew what could happen when officers broke the rules: he was a former officer himself, and the son and brother of policemen. And as a fledgling lawyer, he was torn between compelling loyalties.

"I wasn't thinking like an attorney; I was thinking like a cop," he testified. "The first thought is to protect your own."

The office of the Brooklyn district attorney, Charles J. Hynes, reported Mr. Race to the lawyer disciplinary agency for Manhattan, an arm of the Appellate Division, which can impose sanctions as serious as disbarment. Over the next three years, his lie was analyzed and debated by investigators, a referee, a review panel and judges.

In hearings before the referee, the agency's lawyer, Jeremy S. Garber, said that Mr. Race should have known that his invented account could hinder the investigation or the prosecution. The agency asked that he be suspended for a year.

But Mr. Race's lawyer, Jerome Karp, argued that he should simply receive a private letter of reprimand. A year long suspension, he said, would deter other lawyers from admitting past mistakes. Had Mr. Race not been truthful when questioned in 1998, Mr. Karp said, prosecutors could never have convicted Mr. Francesehi – a point that a prosecutor confirmed.

Mr. Karp said his client "could very easily have said, 'Well, I don't remember anything more than I said at the time.' He would have had no problem." The family would have its pension benefits, he said, and a murderer would remain free. "But he chose not to do that, even at the expense of his own career as a lawyer"

Mr. Race defended his fabrication. "Is it wrong? Yes. But he was trying to take care of the wife and kids."

"I mean, who am I to play judge and jury?" he asked, adding, "I felt I – I owed him something."

The referee, Marjorie A. Lesch, ruled that lying by a lawyer is inexcusable. But when Mr. Race lied, he said, he was an inexperienced lawyer moved by his police background "to come to the aid of a fallen comrade." He did not impede the investigation, she wrote, because his false account "was condoned and given with the full knowledge of the detectives investigating the case."

She carved out a compromise on the penalty, recommending a public censure, which would be filed in court records and published in the city's legal newspaper.

But the panel that reviewed her finding called for a three-month suspension. Any penalty less severe, the panel said, "would suggest to the public and the bar that an attorney who lies to the police during an official investigation can be excused if the attorney has an arguably benevolent purpose." The Appellate Division affirmed the suspension in June 2002.

As part of his punishment, Mr. Race had to destroy his stationery and business cards. He canceled his professional telephone listing, withdrew from cases and notified his clients of his suspension. It was actually four months before the court lifted the suspension, in November 2002, and Mr. Race began practicing law again. Two years later, he works from a second-floor-walk-up office on Atlantic Avenue in Brooklyn.

Looking back, Mr. Race said the punishment was fair, but painful and costly, in legal fees and lost income. "I got killed," he said.

Mr. Demartini, the former prosecutor, said the suspension was much too brief, even though Mr. Race had helped convict Mr. Francesehi. "It goes to the heart of what it means to be a lawyer," he said of the lie. "You're supposed to be trustworthy in all aspects of your practice."

Mr. Francesehi, who is serving his sentence at Green Haven, the maximum-security prison in Stormville, N. Y., said in an interview that he was innocent. He said that he believed Mr. Race's initial account that the killers were black, and that the lawyer changed his story to help close the case and make himself look good. "I was used as a scapegoat," said Mr. Francesehi, who has unsuccessfully challenged his conviction in state and federal court.

"Run for cover"

Tchir, Jason, *National*, November 2004, p. 14

It wasn't long into the first meeting with her new client that Pamela Stewart started to worry.

"I should have run when he stood up and grabbed my closet and began to shake it, but I didn't because he needed representation," recalls Stewart, Chair of the CBA Nova Scotia's Family Law Section and a partner with TMC Law in Kentville. "Our next conversation was on the phone, and I could hear him on the other end ripping his headset apart."

Stewart realized that that she and her staff would be constantly stressed out trying to cope with this client's tantrums and "drop everything else" demands, not to mention thinking about their safety. "I told him I didn't believe we could supply the services he required in a manner that was acceptable to him, and he agreed," she says.

Bad clients—those who wouldn't listen, who will complain endlessly, who will take up all of your time or who wouldn't pay their bills—are a source of unnecessary aggravation for every lawyer. The salt in the wound is that they take time away from your good clients.

Stewart says the key is to spot bad clients before taking them on, and to have the courage to tell them no. "When saying no, be honest with the potential client while being respectful to

them," she says. She suggests watching for the following red flags that signal a bad client on the way:

1. The emergency client that needs everything at the last minute and expects you to scramble to get things finished on short notice. "You have to ask yourself: why did they leave something until today when they knew about it four weeks ago?"

2. The CEO type who says, "Tell me why I should hire you." "This could be a demanding client who wouldn't be happy with anything you do.

3. The dissatisfied client who goes through lawyers like most people go through underwear. "If he says, 'You'll be my fourth lawyer on this,' it's a signal to run fast."

4. A client who asks you to review a court decision because it was "bad" or because they weren't happy with their representation. "It could just be somebody who wasn't happy with the outcome."

5. A client who won't come up with the initial consulting fee or doesn't want to talk about costs. "You've got to be business-headed about it," Stewart says. "If you deal with it upfront, you should be able to know whether a client won't be able to pay."

"LSUS panel orders new discipline hearing"

Jaffey, John, *The Lawyers Weekly*, 25 February 2005, Vol. 24, No. 39, p.1
(in part)

An Ontario lawyer's disbarment for alleged sexual harassment has been overturned by a five-member LSUC appeal panel. The panel ordered a new disciplinary hearing for Gary Neinstien, 62, who was found guilty of professional misconduct in November 2003. A hearing panel had imposed the penalty of disbarment in June 2004; that penalty was stayed on June 29, subject to the condition that he "not have primary carriage of any new matters."

The 36-page decision concluded that the hearing panel erred:

1. by substituting its own credibility test for the SCC's test in *R. v. W.(D)*;

2. by failing to properly assess evidence that was contradictory and inconsistent;

3. by failing to provide adequate reasons for its findings; and

4. by imposing an unreasonable penalty of disbarment instead of a 12-month suspension.

"The Wirick Affair"

Slayton, Philip, *Canadian Lawyer*, May 2005, pp. 12, 14

Martin Wirick, once a senior B.C. real estate lawyer, now sells pet food at a store in North Vancouver. The story of his journey from law practice to purveyor of pet food contains several lessons. We learn about the frailties of real estate conveyancing, about the ham-handed way law societies sometimes react to scandal, and about the perils of practicing law when you really don't want to.

In the summer of 1999, when Wirick was working on a real estate transaction for a client named Tarsem Singh Gill, he made an accounting error. He underestimated the amount needed to discharge existing mortgages on a property that Gill, a real estate developer, had built and was selling. When he realized his mistake, Wirick called Gill and asked for the extra money. Gill didn't have it. He told Wirick that he was finishing construction of a second property, and when that second property was sold, some of the proceeds could be used to pay the outstanding mortgages on the first property's mortgage. Wirick agreed to all this. It seemed reasonable enough. After all, he thought, the wait for funds to make up the shortfall should only be about a month.

Several weeks went by. Then Gill came to Wirick's office and asked to borrow the trust funds. He needed the money to finish the second property. Wirick, anxious that the second property be finished and sold so that the mortgage on the first property could be discharged, handed the trust funds over. When the second property was finally sold, some of the proceeds, as planned, were used to pay off the first property's mortgage. But now there were not enough proceeds from the sale of the second property to pay off the second property's mortgages. Don't worry, said Gill: that could be done from the sale proceeds of a third property. The relationship between Martin Wirick and Tarsem Singh Gill began to slide into farce.

Gill kept building and selling properties (by the end, Wirick had acted for him in about 300 separate transactions over a three-year period), "borrowing" the proceeds from one deal to pay off obligations arising from previous ones. Wirick kept telling Gill to stop and to settle all the outstanding mortgages. Gill kept assuring Wirick that, overall, he had sufficient equity to pay off everything. But the money was not coming in fast enough from the sales of new properties to pay off the mortgages on the old properties. Purchasers were asking for particulars about the discharge of old mortgages. Banks holding those mortgages began to get suspicious.

On Saturday, May 18, 2002, Wirick and Gill met in Wirick's office and tried to figure out exactly what was owed. They added up the unpaid mortgages. They calculated the so-called "equity." They were $32 million short. Gill broke down and cried. Wirick knew that it was over.

The next day, Wirick sent a letter of resignation to the law society, referring to "serious errors " in his practice and to breaches of undertakings to pay out funds on a large number of properties (later, he was formally disbarred). Jim Matkin, then the law society's chief executive officer, was quoted by David Baines of *The Vancouver Sun* as saying: "It's like an earthquake. For many years you never have a problem, then you have a problem that is so enormous it is quite frightening."

Martin Glynn, president of HSBC Bank Canada, was reported in *The Lawyers Weekly* as saying that what Wirick had done "affected every lending institution in British Colombia," terming the losses "unprecedented." As stories started to appear in the newspaper, Martin Wirick felt a sense of relief. "The nightmare is over," he thought quite happily.

But, for the law society, the nightmare was just beginning. Angry people who had bought houses in Gill-related transactions were frightened that their titles were in question. Lending institutions apparently had lost millions of dollars. Standard real estate conveyancing practices were revealed as vulnerable to fraud. The law society faced huge claims against its special compensation fund. The society was forced to remove the $17.5 million cap on annual aggregate payments from the fund. The amount payable by each B.C. lawyer to fund in 2003 was increased to $600 from the 2002 amount of $250. The newspapers were full of stories.

In June 2002, the law society struck a task force to look into the issues raised by what it delicately called Wirick's "practice irregularities." Wirick thinks that what bothered the law society most was his dramatic demonstration of weaknesses in the conveyancing system. He'd shown, as he put it to me recently over dinner in Vancouver, "how easy it was to screw up." The first report of the task force came up quickly, on August 6. It proposed a two-cheque system in conveyancing: "…purchasers' lawyers would deal directly with vendors' encumbrancers and, on closing, would provide separate cheques payable to the respective parties entitled to receive the proceeds." It suggested a special new fee on all real estate transactions to pay for the cost to the law society of the Wirick inquiry and of making restitution to all those who had been cheated.

But the law society had stumbled. The reaction to the task force's August report was hugely negative. Lawyers in British Columbia made clear that they did not want the two-cheque system. What they wanted was restoration of confidence in the integrity of solicitors' undertakings (to some extent, the lending community shared this sentiment). And the public (as reported in the newspapers) was outraged by the proposal that the huge costs of dishonest lawyer's defalcations should, by way of a transaction fee on new real estate transactions, be paid by innocent clients.

The law society seemed frightened and confused. The president, Richard Gibbs, in his September 2002 message in the *Benchers' Bulletin*, wrote: "Is Wirick a 'one-off' or do his misappropriations tell us that we were gulled into thinking the base level of misappropriation was different from what it really is? Are there other defalcations out there as yet detected? The last 15 years' experience tells us the answer is almost certainly 'yes.' We don't know what we will experience, but we do know there is a risk – and it is a bigger and different risk than we thought it was earlier this year."

In December 2002, the law society's task force issued a new report with new recommendations. It proposed a so-called "transparency response," requiring a vendor's solicitor to provide to a purchaser's solicitor, within 48 hours of the completion of a transaction, evidence that the vendor's solicitor has repaid existing encumbrances on title. It recommended a "30-30 Rule," which would allow a maximum of 30 days for a financial institution to provide a mortgage discharge and a further 30 days for the solicitor receiving the discharge to process it through the Land Title Office. And it recommended innocent party insurance coverage for future losses (the insurance scheme that was proposed would not pay for losses already incurred), funded by a combination of a general insurance levy assessed against all practicising lawyers, and a transaction fee for client matters. These recommendations seemed to be received favorably, the law society adopted them quickly, and the immediate hubbub died down. So far, more than five hundred claims have been made, for a total amount of more than $80 million. Law society officials say it's not as bad as it sounds: after all, they say, some claims may overlap.

When I talked to him recently, Wirick said that releasing the trust funds held for the mortgage on the "first property" was his key mistake. "I knew it was wrong," he said. When I asked why he did what he knew to be wrong, Wirick replied: "I was tired, emotionally drained. I hated practising law. I just thought, to hell with it, I don't care. I didn't do it for money. I didn't get any money. I did it because I didn't care." (As far as we know, the only money Wirick received from Gill-related transactions were modest legal fees.)

In a final irony, Jim Matkin, the executive director of the law society who had steered the society through the Wirick affair, and a person well-known for his rectitude and integrity, became embroiled in controversy himself and resigned at the end of 2004. The intrepid David Baines of *The Vancouver Sun* "revealed" that Matkin, while working for the law society, was also serving as president and chairman of a company connected to people who had once been sanctioned for serious securities offences. The law society launched an investigation and, on November 25, Matkin was placed on paid leave. By December 6, Matkin had had enough; he quit and the law society called off its inquiry. Matkin says: "I feel a victim of a rotten system. It's as if I was walking down the street and a lump of ice fell off a building and hit me on the head." How the law society's internal politics led to Matkin's resignation may never be fully known by the general public, but his treatment further suggests that the Law Society of British Columbia is a regulatory body deserving of close scrutiny.

"Attorney Coupon offer Clipped"

Dreiling, Geri L., *ABA Journal*, 20 January 2006
(in part)

There's no doubt that clipping coupons can help stretch a tight budget. But penny-pinchers in Ohio who hoped to present coupons to get free or discounted services at their local lawyer's office need to put the scissors down.

The Ohio Supreme Court's Board of Commissioners on Grievances and Discipline ruled that coupons for free or discounted legal services violate the Ohio Code of Professional Conduct. However, in an ethics advisory opinion, the board concluded that while lawyers could not give away a coupon, they could advertise that the first consultation is free. *Opinion 2005-9*, (Dec. 2).

. . . .

The decisions grappling with the coupon issue haven't been consistent, even within the state of Ohio. A Dec. 17, 1991, ethics opinion from the Cincinnati Bar Association's Ethics & Professional Responsibility Committee said a lawyer could include a $50 coupon for a free half-hour consultation in a consumer book. However, the opinion warned the coupon could be "false, fraudulent or misleading," and therefore prohibited by DR 2-101 through DR 2-105, if "the attorney offers the same 'free one half-hour in-house consultation worth $50' to the general public" because then the coupon would be "essentially valueless."

Although the Ohio Supreme Court's discipline board characterized the Cincinnati decision as a contrary result, Cincinnati attorney Patrick Fischer doesn't see any conflict between the two opinions.

The Cincinnati opinion points out that if the coupon "is no more than what the attorney offers to the general public, then there's consumer fraud," says Fischer, former chair of the Cincinnati Bar's ethics committee and a member of the ABA Center for Professional Responsibility. The opinions "are more consistent when you look at the facts."

The state decision notes that bar associations across the nation are divided on the issue. The Alabama State Bar, the Connecticut Bar Association, the State Bar of Michigan, the Philadelphia Bar Association and the South Carolina Bar have ruled that discount coupons are permissible, the Ohio ruling says.

Although the Ohio decision stresses its heavy reliance on the language in its rules, Mercer University law professor David Hricik thinks it misses the point. Hricik is a past chair of the Committee on Ethics and Professional Responsibility of the ABA's Intellectual Property Section and co-host of LegaIEthics.com.

"If, in fact, the [lawyer] is lying and everyone gets a free consultation, then he shouldn't be allowed to print a coupon that says, 'This gets you a free consultation, and nobody else gets it,'" Hricik says. But he says if the coupon is truthful, then the Ohio discipline board is "paying too much attention to the literal wording of the rule without thinking what the purpose of the rule is."

"The ultimate tax tip"

Hemeon, Jade, *The Financial Post*, 11 April 2005, p. FP 10
(in part)

The watchful eye of the Canada Revenue Agency extends not only to income-earning citizens but to the financial advisors who counsel them on tax strategies or help them with income tax returns. If your client is straying from the path of the straight and narrow when it comes to tax matters, you could find yourself in legal trouble if there's been any kind of crossover into your territory.

"An advisor cannot advise a client with respect to any activity that's in contravention of the law," says Mark Siegel, an Ottawa-based tax partner with Gowlings law firm. "If a client is hiding money or receiving undeclared income, and the advisor becomes a party to that or involved in some way, the client and the advisor will be keeping each other company in jail. However, as long as the advisor is not a part of it, he or she is fine."

The problem is that it is easy for the advisor to become a part of it. Most advisors offer tax advice to clients and that alone could implicate you. Or, you may be helping the client invest ill-gotten gains in legitimate securities such as stock, bonds or mutual funds.

"If you have specific knowledge about an illegal offshore account or you know that a client is not reporting income that you are being asked to invest, you are going down a hairy path," Mr. Siegel says. "That's when you say no."

In fact, you should do more than say no; you should document the circumstances in writing. Outline your position clearly, state that you advised against illegal activity, and articulate your refusal to get involved in a letter to your client, backed up by letters to your own files.

"Some advisors think thorough documentation may cramp their style, but the damages can be astronomical," Mr. Siegel says. "Any kind of participation could bring the advisor down both financially and in terms of reputation."

Paul DioGuardi, senior tax counsel with DioGuardi & Co., a tax amnesty law practice based in Toronto and Ottawa, says there are many ways citizens can run afoul of the tax law, and often the transgression is inadvertent. For example, many people who have immigrated to Canada from other countries may be collecting a pension from the old country and don't realize that it is reportable income in Canada. Others may have failed to file tax returns for a few years, unaware that this negligence becomes criminal tax evasion after two years if taxes are owed. With the trend toward self-employment, there's a lot of room for deception when it comes to deductible business

expenses. And the underground economy, whether it be marijuana grow houses or cash-based services such as home renovations, is a huge source of undeclared income.

Mr. DioGuardi says there are cases where criminal charges have been laid against advisors for continuing to act for clients who evade taxes, and the penalties for third-party involvement can be severe. The *Income Tax Act* says any person who has "participated in, assented to or acquiesced in the making of false or deceptive statements" in a tax return or other documents required by the *Income Tax Act* to evade payment of tax is guilty of an offense. If convicted, that person could face a fine of not less than 50% and not more than 200% of the amount evaded, and could also be sent to prison for up to two years.

"People tend to not be afraid of the tax department, but it could be nasty," says Mr. DioGuardi, who worked as a lawyer for the CRA for several years. "Some accountants and advisors are not smart enough to fire their clients."

He points out advisors are not protected by the client confidentiality rules that prevent lawyers from testifying against clients. If advisors are forced by the CRA to testify against a client, they may find themselves the target of a negligence/conflict lawsuit from the client.

A Tax amnesty legal specialist can help a client whose taxes are in arrears to negotiate a settlement with the CRA that does not involve prosecution or punishment. The CRA doesn't need to know the identity of the client until he or she agrees to the terms of the settlement, and the lawyer cannot legally be called upon the reveal the client's identity.

On the other hand, simply becoming cognizant of a client's activities does not legally require an advisor to turn the client in, Mr. Siegel says. Privacy laws preclude professionals from disclosing anything of a private nature to third parties, although the "big qualifier" is that those rules are subject to other legislation that can force an advisor to testify against a client.

"As long as you're not a part of it, you're fine. You are not the police."

"City lawyer to serve year in U.S. jail"

Bolan, Kim, *The Vancouver Sun*, 13 August 2005, pp. B4, B5
(in part)

A Vancouver lawyers who lost his practice after being convicted of witness tampering here in April will have to spend a year and a day in a U.S. federal detention centre, Judge John Coughenour ruled Friday [in Seattle].

But Coughenour also said he was going easy on Kuldip Singh Chaggar, given that assistant U.S. Attorney Todd Greensberg had asked for eight years. Chaggar's lawyers, Jeffery Robinson, had asked for probation with no jail time.

. . . .

Coughenour said he has been struggling with the case against Chaggar since it began with his arrest last September after he visited a Vancouver woman in jail near here, misrepresenting himself as her lawyer.

The woman, Sunita Vartia, was arrested in July 2004 on charges of smuggling 50 kilograms of cocaine worth more than $1.5 million across the U.S.-Canada border. She said she had been threatened by Chaggar and told to change her statement to the U.S. Drug Enforcement Administration implicating a Chaggar client who U.S. authorities claimed was a kingpin in a drug trafficking ring.

Chaggar maintained that he violated his ethical code by misrepresenting himself to visit Vartia, but denied ever threatening her or asking her to lie.

Coughenour said the case was a difficult one, although he found Chaggar guilty on all counts last April.

. . . .

He said the fact that Chaggar entered 150 letters of reference proved he was well regarded by many, not only in the legal community, but in the Sikh community as well.

"The defendant has lost his professional status," Coughenour said. "I don't view the practice of law as another business. It is a calling."

. . . .

Chaggar made a tearful apology to the court, again accepting responsibility for the ethical breach, but denying he had threatened Vartia.

He said it was a "short-sighted and stupid" decision to visit another lawyer's client.

"I know it was a serious mistake that has cost me a career," Chaggar said. "For that I have no one to blame but myself."

. . . .

Chaggar had once represented convicted Air India bomb-maker Inderjit Singh Reyat and is a close friend of Ripudaman Singh Malik, who was acquitted of a role in the bombing last March.

Two members of the Air India Task Force attended Chaggar's hearing here Friday.

Chaggar admitted in April 2004 that he violated a publication ban in the Air India trial by writing details about the family of a protected witness in an article in the *Indo-Canadian Voice* newspaper. The breach was raised as an aggravating factor by the U.S. attorney in the case here.

4.3 Judicial: Summary

"Suddenly uninsured"

Kowalski, Mitch, *National*, November 2003, p. 10

Like most other lawyers slogging away on Ontario's mid-to-large-sized firms, I was not concerned about professional liability insurance. LawPRO provided mandatory coverage of $1 Million, and all such firms obtained excess insurance to cover claims that exceed that amount. It wasn't until I changed firms, then got sued, and then left private practice, that I learned some interesting and scary facts with respect to insurance claims and coverage.

Professional liability insurance policies in Ontario (whether provided by LawPRO or by an excess insurer) are issued on a "claims made and reported" basis. In other words, in Ontario you need to be insured *at the time the claim is made and reported.* The fact that you had insurance *at the time you did the legal work* that gave rise to the claim is irrelevant.

Not every province follows this practice. For example, the Law Society of British Columbia's Captive Insurance Company Ltd. Issues "claims occurrence" policies: as long as the lawyer was insured at the time the legal work was done, she will always be covered for claims arising from that work. Did we really need another reason to move to British Columbia?

Changing firms

After working for two years at my new firm, I was sued by former clients with respect to work done at my previous firm. I assumed that my new employer's excess insurer would cover the part of the claim that exceeded $1 million. I was wrong. An excess insurer typically provides coverage for claims made against past and present partners and/or employees of a firm for legal work done while they were partners or employees of *that* firm.

The following example helps illustrate this issue. Sally the lawyer moves from Firm A to Firm B. While employed at Firm B, a claim for $2 million is made against Sally for work she did while at Firm A. LawPRO provides coverage up to $1 million. But the excess insurer of Firm B denies coverage for the other $1 million, because even though Sally was insured at the time the claim was made, the claim did not arise from work she did while at Firm B.

Sally therefore has to seek indemnity from the *current* excess insurer of Firm A. Note that this indemnity does not come from the company that provided excess insurance to Firm A *at the time Sally did the work* that gave rise to the claim. In other words, Sally must rely upon Firm A to maintain sufficient excess insurance for *any future claims* against her.

In my case, my former firm self-insures for claims under $10 million; the firm's excess coverage – which is considerable – doesn't kick in until a claim exceeds $10 million.

In addition to lawyers, few clients understand the ramifications of a "claims made and reported" policy, particularly those who insist that their lawyers process a certain amount of excess insurance coverage. The required coverage may be in place at the time the work was done, but it may not be there at the time the claim was made – when it is really needed.

Leaving private practice

Because of the predominance of "claims made and reported" policies, Ontario lawyers must obtain run-off insurance when they leave private practice (e.g., to retire, work as a government lawyer, or work as in-house counsel). LawPRO provided free run-off insurance in a one-time amount of $250,000. But this one-time amount, once exhausted, will not be renewed. So if a successful claim for $220,000 is made against you, your excess insurance coverage will be reduced to $50,000 for the remainder of the policy period.

LawPRO also provides additional excess coverage for annual premium (as a real estate lawyer, I purchased this product). But there's a 45-to 60-day coverage gap during the waiting period between the date they file the necessary forms for excess insurance and the date your insurance becomes effective.

If you practice in Ontario, it is vital that you do not leave your firm until the appropriate amount of excess run-off insurance is in place. Lawyers in other provinces should ask their insurers about the nature of their coverage as well.

Suggestions

Over the last ten years, more lawyers than ever before have moved between firms or moved in-house. Most, however, never give a second thought to how these moves affect their personal liability. From my experience, I have some suggestions for lawyers on the move:

1. When considering a move to a new law firm, review the excess insurance policy of your potential new employer to determine if your coverage is higher or lower than at your current firm. Aside from increasing your potential liability, lower coverage will also prevent you from doing work for those of your clients who require higher coverage.

2. No matter where you move, consider obtaining some kind of assurance from your old firm as to the amount of excess insurance it will maintain after you leave. Confirm that all present and future excess insurance policies will cover your past work at your old firm.

3. If you decide to leave private practice, notify your particular province's insurer immediately and file all necessary forms for the required excess run-off insurance, so that this coverage commences the day after you leave private practice.

4. If you're moving in-house, ask your employer to pay the cost of your run-off insurance.

5. If you're being laid off and you will not return to practice, consider whether the cost of run-off insurance should form part of your termination package. Even as an associate, you have incurred liability at that firm that may come back to haunt you. That would only add insult to injury.

"Lawyers and Ethics: Professional Responsiblitiy and Discipline"

MacKenzie, Gavin (Scarborough, ON: Thomson/Carswell), 2004, pp. 24-5 to 24-7.

The standard of care and skill enforced by courts in solicitors' negligence litigation is that of a reasonably competent and diligent lawyer practicing in the area in which the defendant practiced at the time of the alleged negligence. In order to succeed in establishing liability it is not enough for a plaintiff to prove that the lawyer has made an error or given advice on a view of the law that a court later holds to be untenable; the plaintiff must show that the error was such that an ordinarily competent lawyer practicing in the area would not have made it. A lawyer will not be found liable by reason of a violation of competency standards in a case in which there is a rift of respectable professional opinion concerning the acceptability of the measures taken by the lawyer. The Supreme Court of Canada held in a 1991 case, however, that the courts are not bound by expert evidence that the defendant's conduct conforms to the norms of practice of prudent lawyers in the same circumstance. The fact that a lawyer follows the common professional practice at the relevant time is not sufficient to avoid liability unless the common practice is demonstrably reasonable.

Lawyers may be found liable in tort as well as contract, and may be found liable not only to clients but to others who have foreseeably suffered harm as a result of their negligence. The Supreme Court of Canada's decision in a 1986 case that lawyers may be concurrently liable in 'contract and tort had the effect of extending limitation periods in some cases and broadening the categories of remedies that are available to disgruntled clients.

Frequently civil claims asserted against lawyers are framed as breaches of fiduciary duty. The courts have repeatedly affirmed, however, that not all duties of lawywers may be categorized as fiduciary duties. As Justice Southin wrote (when a member of the British Columbia Supreme Court) in a 1987 decision.

> "The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "fiducia" meaning, "trust". Thus, the adjective "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach ofthe special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and do forth is clear. But to say that simple carelessness

> in giving advice is such a breach is a perversion of
> words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert
> of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor?"

Lawyers of course have a duty to follow clients' lawful instructions, and will be responsible for any loss that may ensure as a result of their disobeying them. Lawyers have a duty to seek instructions as necessary; they must not substitute their own judgment either for actual client instructions or what they expect the client's instructions would be if the client were asked.

Folland v. Reardon

[2005] O.J. No. 216 (QL) (Ont. C.A.),
Dorherty J.A. (for the Court), Catzman, Armstrong JJ.A.,
paras. 1-5 (in part), 21-30 (in part), 35-45, 56-63 (in part), 69-94 (in part).

1 The appellant, Gordon Folland ("Folland") was convicted of sexual assault and sentenced to five years in the penitentiary. He served almost three years before he was released on bail pending appeal. This court admitted "fresh" evidence on the appeal, quashed the conviction and directed a new trial. The Crown decided not to retry Folland.

2 The respondent Dennis Reardon ("Reardon") acted for Folland at his criminal trial but not on the appeal. After the criminal proceedings had been completed, Folland sued Reardon alleging that Reardon's negligent conduct of the defence in the criminal proceedings resulted in Folland's wrongful conviction and lengthy incarceration.

3 Reardon moved for summary judgment alleging that there were no genuine issues for trial. He contended that none of the alleged deficiencies in his defence of Folland rose to the level of negligence and that in any event, nothing he did or failed to do caused the conviction of Folland. Counsel for Reardon also submitted, by way of alternative argument, that Folland's claims should be struck as an abuse of process.

4 The motion judge rejected Reardon's abuse of process argument, but accepted the submission that there were no genuine issues for trial. He dismissed Folland's action.

5 Folland appeals.

. . . .

21 Folland commenced this lawsuit in March 2001. The statement of claim alleged that as a result of Reardon's negligence and breach of his fiduciary duty, Folland had suffered damages flowing from his wrongful conviction and imprisonment for two years and nine months. Folland sought general, aggravated, and punitive damages.

22 In response to a demand for particulars from Reardon, Folland provided specifics of the alleged negligence and breach of fiduciary duty. Those particulars alleged that Reardon was deficient in many aspects of his pre-trial preparation and in his conduct of the defence at trial.

23 Counsel for Folland obtained an expert opinion from Alan Gold, a well-known and respected certified specialist in criminal litigation. The material provided to Mr. Gold referred to numerous alleged deficiencies in Reardon's conduct of the defence. Mr. Gold focussed on three deficiencies in his report. He opined that the "prime deficiency" in Reardon's conduct was his failure to secure DNA testing of Mr. Harris prior to the trial to show that Mr. Harris was the source

of the unknown semen on the "K. Beeching" underwear found on the complainant's bed. Mr. Gold acknowledged that his opinion that the failure to obtain these samples constituted negligence could be seen as inconsistent with certain observations made by Rosenberg J.A. in *R. v. F. (G.)*, *supra*. I will address this issue below.

24 Mr. Gold also took the position that Reardon fell below the standard of a reasonably competent criminal counsel when he tested the complainant's eyesight during cross-examination at trial despite the fact that she had demonstrated that her vision was more than adequate under the same line of questioning at the preliminary inquiry. Mr. Gold said:

> I am at a loss to understand why Mr. Reardon would engage in this questioning knowing that the complainant could successfully comply and thereby boost her credibility regarding her identification evidence.

25 The third area identified by Mr. Gold where Reardon's defence fell below the requisite standard of care arose out of Reardon's examination-in-chief of Folland. Folland had purchased some liquor on the day of the alleged assault and at the same time had stolen a 40 ounce bottle of vodka from the liquor store. According to Folland, Reardon knew that Folland had stolen the 40-ounce bottle of vodka and they discussed how this feature of his evidence would be presented during Folland's testimony. Folland said he made it clear that he would not lie about stealing the 40-ounce bottle of vodka. According to him, Reardon was concerned that the jury would be less inclined to believe Folland's evidence concerning the alleged assault if they knew that Folland had stolen the liquor.

26 In examination-in-chief, Reardon asked Folland who had "purchased" the 40-ounce bottle of vodka. Folland responded that he had. In cross-examination, Folland had to concede that he had not "purchased" the liquor as indicated during his examination-in-chief, but had stolen it. The trial judge referred to Folland's evidence concerning the acquisition of the 40-ounce bottle of vodka in the course of instructing the jury as to how they should make their credibility assessments. The trial judge's instruction indicated that Folland's testimony during examination-in-chief about how he came to acquire the 40-ounce bottle of vodka could be taken by the jury as an indication that Folland was prepared to be less than truthful.

27 In referring to this line of questioning, Mr. Gold said:

> This was a case where the accused's defence rested entirely on his own credibility. His credibility was crucial for any hope of an acquittal. That credibility was already under pressure, given his prior record and his dispute with other witnesses regarding certain statements allegedly made by him. It certainly did not need the additional deficiency of an alleged demonstrated willingness to be untruthful under oath.

The Summary Judgment Motion

28 The voluminous material filed on the motion included affidavits, cross-examinations of both Folland and Reardon, and extensive material from the criminal proceedings. Although the events that occurred during the criminal proceedings were a matter of public record, the material

filed on the motion presented two very different versions of conversations which took place between Reardon and Folland in the course of the criminal proceedings and two very different versions of the instructions that were or were not given by Folland to Reardon. The motion judge did not address these factual disputes in concluding that summary judgment was appropriate.

29 To succeed in his action against Reardon, Folland had to demonstrate that Reardon was negligent in his defence of Folland and that Reardon's negligence caused Folland to suffer some damage. The damages alleged flowed from what Folland contended was his wrongful conviction and imprisonment.

30 In granting summary judgment … The motion judge described the absence of any evidence of causation as "the strongest support for the applicant's motion for summary judgment".

. . . .

(ii) – The Standard of care owed by Reardon

35 Given the ubiquitous presence of the reasonableness standard in negligence law, one would expect that Reardon would be held to the standard of a reasonably competent counsel acting in a criminal proceeding: see *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at 208. There are, however, judicial pronouncements in some lawyers' negligence cases arising out of the conduct of litigation that suggests a different and, from the lawyer's point of view, more forgiving standard. These pronouncements appear to hold that a lawyer will be negligent in the conduct of litigation on behalf of a client only where it can be said that the lawyer has committed an "egregious error": see e.g. *Bertucci v. Marchioni*, [2001] O.J. No. 2198 (Ont. S.C.J.), aff'd (Ont. C.A.).

36 The motion judge appeared to accept that Folland had to demonstrate something more than a failure to act as a reasonably competent criminal counsel would have acted. After indicating that a lawyer would be liable to a former client in negligence for the conduct of litigation "in only the clearest of cases", the motion judge quoted from Campion and Dimmer, *Professional Liability in Canada* (Toronto: Carswell, 1994) at 7-29, where the authors indicate that negligence actions against lawyers in the conduct of litigation will succeed only where the lawyer has committed "an egregious error".

37 In referring to the appropriate standard, the motion judge also quoted from *Blackburn v. Lapkin* (1996), 28 O.R. (3d) 292 (Ont. Gen. Div.), at 309, where Borins J. observed that lawyers are not held to a standard of perfection and that errors in judgment do not constitute negligence. The motion judge did not, however, refer to the sentence immediately following the passage he quoted. There, Borins J. said:

> However, a lawyer is answerable to his or her client for any loss incurred by the client which results from a want of that degree of knowledge and skill ordinarily possessed by other lawyers similarly situated, or from omissions to use reasonable care and diligence, or from the failure to exercise in good faith his or her best judgment in attending to the litigation undertaken on the client's behalf [emphasis added].

38 In *Blackburn*, Borins J. saw no inconsistency in recognizing that errors in judgment could not be equated with negligence, while at the same time recognizing that the reasonable care standard applied to the conduct of counsel.

39 Other trial judges who have referred to the "egregious error" standard also appear to regard that standard as consistent with the reasonableness standard. For example, in *Farkas v. Rashwan* (July 26, 2001), Doc. 99-CU-175864 (Ont. S.C.J.), aff'd (Ont. C.A.), Boyko J. said:

> In order to succeed at trial, the respondents would have to demonstrate that the conduct of Farkas in representing Rashwan at her trial on assault charges fell below the conduct expected of a reasonably competent lawyer. The case law indicates that an error in judgment does not constitute negligence. A lawyer's error must be egregious to rise to the level of negligence (at para. 6).

40 The standard to be applied in allegations of negligence arising out of the conduct of litigation was recently considered in detail in *Henderson v. Hagblom* (2003), 232 Sask. R. 81 (Sask. C.A.) at paras. 51-72, leave to appeal to S.C.C. refused, (2004) (S.C.C.). Jackson J.A. referred to many authorities where the phrase "egregious error" was used in describing the kind of conduct which constituted negligence. On her analysis, however, a careful reading of most of those cases did not suggest a departure from the reasonableness standard. Jackson J.A. did, however, acknowledge that some cases seemed to apply a lower standard to allegations of solicitor's negligence where that negligence arose out of what Jackson J.A. described as "barrister's work". These cases suggested that where the alleged negligence arose out of "barrister's work", that is the conduct of litigation, lawyers were legally responsible only for "egregious errors". Where the alleged negligence arose out of "solicitor's work", lawyers were held to the reasonableness standard. Jackson J.A. found it unnecessary to decide whether there were in fact two standards. It is clear from her most helpful analysis that she favoured the application of a reasonableness standard to all allegations against lawyers.

41 I see no justification for departing from the reasonableness standard. That standard has proven to be sufficiently flexible and fact-sensitive to be effectively applied to a myriad of situations in which allegations of negligence arise out of the delicate exercise of judgment by professionals. Without diminishing the difficulty of many judgments that counsel must make in the course of litigation, the judgment calls made by lawyers are no more difficult than those made by other professionals. The decisions of other professionals are routinely subjected to a reasonableness standard in negligence lawsuits. I see no reason why lawyers should not be subjected to the same standard: *Major v. Buchanan* (1975), 9 O.R. (2d) 491 (Ont. H.C.), at 510.

42 Recognition that some decisions made by lawyers are subject to a different standard than the reasonableness standard would also require courts to decide whether the impugned conduct of the lawyer fell under the rubric of "barrister's work" or was properly described as "solicitor's work". This distinction would be difficult to make in some situations. Sometimes, the alleged negligent conduct by the lawyer will encompass both kinds of work.

43 An individual being defended in a criminal case is entitled to expect that his lawyer will perform as a reasonably competent defence counsel. Courts should avoid using phrases like "egregious error" and "clearest of cases" when describing the circumstances in which negligence allegations will succeed against lawyers. These phrases invite the application of an inappropriately low standard of care to the conduct of lawyers. At the very least, these phrases create the appearance that where an allegation of negligence is made against a lawyer, judges (former lawyers) will subject those claims to less vigorous scrutiny than claims made against others: see *Kitchen v. Royal Air Force Assn.* , [1958] 2 All E.R. 241 (Eng. C.A.), at 245. A lawyer defending an accused who fails to perform as a reasonably competent defence counsel would be expected to perform is negligent.

44 In accepting the reasonably competent lawyer standard, I do not detract from the often repeated caution against characterizing errors in judgment as negligence. Lawyers make many decisions in the course of a lawsuit. Those decisions require the exercise of judgment. Inevitably, some of those decisions, when viewed with the benefit of hindsight, will be seen as unwise. The reasonable lawyer standard does not call for an assessment of the sagacity of the decision made by the lawyer. The standard demands that the lawyer bring to the exercise of his or her judgment the effort, knowledge and insight of the reasonably competent lawyer. If the lawyer has met that standard, his or her duty to the client is discharged, even if the decision proves to be disastrous.

45 Plaintiffs who sue their lawyers should not be required to show their claims of negligence are any stronger than any other claims of negligence before they are allowed to proceed to trial. The motion judge's reference to "egregious errors" and "the clearest of cases" tells me that he erroneously demanded something more than a departure from the standard of a reasonably competent lawyer defending a criminal case.

. . . .

56 …The motion judge was wrong in holding that there was no triable issue as to whether Reardon was negligent.

(iii) - Causation

57 Folland pleaded that as a result of Reardon's negligence in the conduct of his defence, Folland was wrongfully convicted, imprisoned and consequently suffered mental distress, loss of income and other damages. In holding that Folland's action could not succeed, even if Reardon was negligent in his defence of Folland, the motion judge said:

> There is no evidence that any act or omission by the Applicant [Reardon] caused the conviction of Mr. Folland. In fact the evidence suggests that Mr. Folland's conduct on the stand that [sic] has a stronger causal link to the conviction than the decisions made by the Applicant [Reardon] in conducting the trial. Because the trial was a jury trial, it can never be known with any degree of certainty how either the conduct of trial counsel or the conduct of the accused on the stand impacted the conviction. There is nothing on the face of the record, however, that suggests that had Mr. Reardon conducted the trial in a different manner, a more favourable result would have been achieved for Mr. Folland. This inability to prove causation

> provides the strongest support for the Applicant's [Reardon] motion for summary judgment [emphasis added].

58 Earlier in his reasons, the motion judge observed:

> The authorities make it clear that the plaintiff must establish that, had the lawyer acted with reasonable care, the results would have been more favourable to the plaintiff whether in a civil or criminal case [emphasis added].

59 At Folland's criminal trial, there were two possible verdicts, guilty or not guilty. It must follow that the motion judge's reference to "a more favourable result" was a reference to an acquittal. The language used by the motion judge and his reliance on *Roncato v. Caverly* (1991), 5 O.R. (3d) 714 (Ont. C.A.), at 718, indicates that he used a "but for" analysis in considering whether Reardon's negligence caused Folland's conviction. On this approach, Folland was obliged to establish on the balance of probabilities that he would have been acquitted had Reardon not been negligent in his defence of Folland. This causation inquiry requires a trial within the negligence trial where the merits of the criminal case will effectively be reassessed on the assumption that Folland was properly defended.

60 The "but for" analysis is the generally accepted, although not exclusive approach to factual causation in tort law: *Laferrière c. Lawson*, [1991] 1 S.C.R. 541 (S.C.C.); *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.); *Arndt v. Smith*, [1997] 2 S.C.R. 539 (S.C.C.); *St-Jean c. Mercier*, [2002] 1 S.C.R. 491 (S.C.C.), at 529; *Cottrelle v. Gerrard* (2003), 67 O.R. (3d) 737 (Ont. C.A.), at 742 -43, leave to appeal to S.C.C. refused 70 O.R. (3d) xvii (S.C.C.): K. Cooper-Stevenson, *Personal Injury Damages in Canada*, 2d ed. (Scarborough: Carswell, 1996) at 751-2. On this analysis, the court looks for a causal connection between the wrongdoing of the defendant and the harm actually suffered by the plaintiff for which compensation is claimed. The link is established if the plaintiff demonstrates on the balance of probabilities that the harm would not have occurred but for the fault of the defendant, even if there are other factual causes that also meet the "but for" standard: *Athey v. Leonati*, *supra*. Absent the causal link, the defendant is not liable even though he may have been negligent.

61 "But for" factual causation has been employed in solicitor's negligence cases, particularly those where the plaintiff contends that he received negligent advice and would have acted differently had he received appropriate advice. In those cases, the plaintiff must show on the balance of probabilities that if properly advised, he would have proceeded in a manner that avoided the damages suffered or obtained the benefit lost as a result of the negligent advice: *Polischuk v. Hagarty* (1984), 49 O.R. (2d) 71 (Ont. C.A.), rev. (1983), 42 O.R. (2d) 417 (Ont. H.C.); *Haag v. Marshall* (1989), 39 B.C.L.R. (2d) 205 (B.C. C.A.); *Major v. Buchanan*, *supra*, at p. 514; *Sykes v. Midland Bank Executor & Trustee Co.* (1970), [1971] 1 Q.B. 113 (Eng. C.A.); Grant, Rothstein *Lawyers Professional Liability* 2nd ed. 1998, (Toronto: Butterworths, 1998) at 174-5. It would appear that in Quebec, a "but for" analysis is also used where a plaintiff alleges that he has lost an opportunity to commence a lawsuit because of a lawyer's negligence. The plaintiff must establish on the balance of probabilities that he or she would have been successful in the lawsuit but for the lawyer's negligence: see authorities discussed in *Laferrière c. Lawson*, *supra*, at 587-89.

62 Assuming that the “but for” approach to factual causation is appropriate to this case, and assuming that Reardon was negligent in the manner described by Mr. Gold, I think that the question of whether Folland could establish on the balance of probabilities that he would have been acquitted had he received proper representation does raise a genuine issue for trial.

63 The motion judge's determination that on the “but for” analysis there was no triable issue on causation is largely conclusory.

. . . .

69 Counsel for Folland made an alternative submission on the causation issue. He contends that Folland could succeed at trial if he could demonstrate on the balance of probabilities that as a result of Reardon's negligence, he lost a real chance of being acquitted. On this approach, counsel submits that Folland could succeed even if that chance, while significant, was less than 50 percent. Folland's damages for this loss of a chance to be acquitted would equal the chance of the acquittal stated as a percentage, multiplied by the total loss suffered as a result of the conviction: K. Cooper-Stevenson, *supra*, at pp. 767-68; J. Fleming, “Probabilistic Causation in Tort Law” 1989, 68 C.B.R. 661 at 673.

70 It is unnecessary for me to address this alternative argument in order to dispose of the appeal from the summary judgment motion. It inevitably follows from my conclusion that Folland had a triable case on a “but for” analysis that he also had a triable case if his claim is analyzed as a “lost chance” claim. I could also avoid the “lost chance” argument since the statement of claim as presently framed does not seek damages based on the “lost chance” of an acquittal, but only on the basis of a wrongful conviction.

71 I am, however, satisfied that I should address this argument at this juncture. Folland's pleadings could be amended prior to trial: see *Henderson v. Hagblom*, *supra*, at para. 205. If the pleadings are amended, the trial judge may have to decide whether Folland could recover on the basis that he lost a realistic chance of an acquittal. To my knowledge, there is no Canadian case law directly on point. This issue could take on considerable practical importance at the trial. If Folland were to establish a real chance of an acquittal absent Reardon's negligence, but were to fail to establish that it was likely that he would have been acquitted but for Reardon's negligence, Folland would not recover anything on a “but for” analysis but would recover part of the total loss suffered by him as a result of his incarceration if a “lost chance” analysis is open to him.

72 The imposition of liability grounded in the loss of a chance of avoiding a harm or gaining a benefit is controversial in tort law, particularly where the harm alleged is not purely economic: see *Laferrière c. Lawson*, *supra*, at 600-606; *Cottrelle v. Gerrard*, *de la Giroday v. Brough* (1997), 33 B.C.L.R. (3d) 171 (B.C. C.A.), at 187-8, leave to appeal to S.C.C. refused (S.C.C.); *Hotson v. East Berkshire Area Health Authority*, [1987] A.C. 750 (U.K. H.L.), per Lord Bridge at 782-83, per Lord Ackner at 793; S.M. Waddams, “The Valuation of Chances”, [1998] 30 Can. Bus. L.J. 86; Black, “Not a Chance: Comments on Waddams, The Valuation of Chances”, [1998] 30 Can. Bus. L.J. 96

73 Whatever the scope of the lost chance analysis in fixing liability for tort claims based on personal injuries, lost chance is well recognized as a basis for assessing damages in contract. In

contract, proof of damage is not part of the liability inquiry. If a defendant breaches his contract with the plaintiff and as a result a plaintiff loses the opportunity to gain a benefit or avoid harm, that lost opportunity may be compensable. As I read the contract cases, a plaintiff can recover damages for a lost chance if four criteria are met. First, the plaintiff must establish on the balance of probabilities that but for the defendant's wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss. Second, the plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation. Third, the plaintiff must demonstrate that the outcome, that is, whether the plaintiff would have avoided the loss or made the gain depended on someone or something other than the plaintiff himself or herself. Fourth, the plaintiff must show that the lost chance had some practical value: *Chaplin v. Hicks*, [1911] 2 K.B. 786 (Eng. C.A.); *Spring v. Guardian Assurance plc* (1994), [1995] 2 A.C. 296 (U.K. H.L.) per Lord Lowry at 327; *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993), 12 O.R. (3d) 675 (Ont. C.A.), at 689-90, leave to appeal to S.C.C. refused 15 O.R. (3d) xvi (note) (S.C.C.); *Multi-Malls Inc. v. Tex-Mall Properties Ltd.* (1980), 28 O.R. (2d) 6 (Ont. H.C.), aff'd (1981), 37 O.R. (2d) 133 (Ont. C.A.), leave to appeal to S.C.C. refused, [1982] 1 S.C.R. xiii (S.C.C.); *Sellars v. Adelaide Petroleum NL* (1992), 179 C.L.R. 332 (Australia H.C.), at 349-55, 362-65; G.H.L. Fridman, *The Law of Contract in Canada* 4th ed. (Scarborough: Carswell, 1999) at 795; S. Waddams, *Law of Damages*, *supra*, para. 13.260.

74 The first criterion is simply an application of the traditional burden of proof. The plaintiff has the burden of demonstrating the "but for" connection between the lost opportunity and the defendant's misconduct. The second criterion is admittedly somewhat nebulous. There is no bright line between a real chance and a speculative chance. An empirical review of the case law suggests that chances assessed at less than 15 percent are seldom viewed as real chances. The third requirement recognizes that where a plaintiff is faced with the difficulty of establishing what would have happened, a past hypothetical fact, had the defendant not engaged in the wrongful conduct, it is too much to expect the plaintiff to establish that hypothetical fact on the balance of probabilities where what would have happened turns on the actions of a third party. The fourth requirement reflects the inherent nature of a damages award. If the chance lost has no real value, neither the compensatory nor restitutionary rationale for damages would justify an award of more than nominal damages.

75 Recovery for lost chances based on lawyers' negligence either in advising clients, or in conducting litigation, is well established in the common law: *Kitchen v. Royal Air Force Assn.*, *supra*; *Cook v. S.* (1966), [1967] 1 All E.R. 299 (Eng. C.A.); *McGregor on Damages*, 17th ed., (London: Sweet & Maxwell, 2003) at paras. 8-038 to 8-043; *Graybriar Industries Ltd. v. Davis & Co.* (1990), 46 B.C.L.R. (2d) 164 (B.C. S.C.), at 189 -194, aff'd (1992), 72 B.C.L.R. (2d) 190 (B.C. C.A.); *Wallace v. Litwiniuk* (2001), 281 A.R. 115 (Alta. C.A.) at para. 34; *Henderson v. Hagblom*, *supra*, at paras. 121-32, 187-206; *Prior v. McNab* (1976), 16 O.R. (2d) 380 (Ont. H.C.), at 382; *Gouzenko v. Harris* (1976), 13 O.R. (2d) 730 (Ont. H.C.); Grant, Rothstein, *Lawyers Professional Liability*, *supra*, at 158-161.

76 The solicitor's negligence cases set out above address liability in terms of the negligence of the solicitor's conduct, but assess damages using contractual principles. In most solicitor's negligence cases, liability rests in both contract and tort. Where, as in this case, the contractual and tort liability is concurrent, I see no reason to assess damages for what is essentially the same wrong in a different manner when considering contractual liability and liability in negligence: *BG Checo*

International Ltd. v. British Columbia Hydro & Power Authority, [1993] 1 S.C.R. 12 (S.C.C.), at 37-8.

77 Cases in which lawyers have negligently missed limitation periods thereby denying their clients an opportunity to pursue a lawsuit provide the clearest example of recovery based on the valuation of a lost chance. Most lawsuits are neither clear winners, nor clear losers. A plaintiff who loses an opportunity to pursue a lawsuit that has some realistic chance of success has lost something of value even if the chance of success is less than 50 percent. The same can be said of a defendant who loses an opportunity to defend a claim, even though the chance of successful defence was less than 50 percent. Lawsuits are settled every day based on counsel's assessment of the possibilities of success or failure and the valuation of those possibilities.

78 The rationale underlying the lost chance analysis is described in the seminal case, *Kitchen v. Royal Air Force Assn.*, *supra*. Lord Evershed, M.R. rejected the contention that the plaintiff had to prove that her action against the third party would have succeeded before she was entitled to any damages as against her negligent lawyer. He said at p. 251:

> In my judgment, assuming that the plaintiff has established negligence, what the court has to do in such a case as the present is to determine what the plaintiff has lost by that negligence. The question is: Has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can [emphasis added].

79 Lord Parker, in a concurring judgment, observed at p. 252:

> If the plaintiff can satisfy the court that she would have had some prospect of success, then it would be for the court to evaluate those prospects, taking into consideration the difficulties that remained to be surmounted. In other words, unless the court is satisfied that her claim was bound to fail, something more than nominal damages fall to be awarded [emphasis added].

80 In *Prior v. McNab*, *supra*, Reid J. applied *Kitchen v. Royal Air Force Assn.*, *supra*, and clearly explained at pp. 383-4 why the plaintiffs should be compensated for a loss of a chance to proceed with a lawsuit even if it could not be said that the lawsuit probably would succeed:

> I therefore conclude that even if the Priors cannot establish that they would probably have succeeded against the police, and even if I were unable to conduct a substitute trial of such an action by reason of an absence of witnesses or lapse of time or some other reason, the Priors would not necessarily be out of Court.
>
> Rather, the question I must ask and answer is simply: did Robert or Elsie Prior have a right of value, a chose in action of reality and substance, arising out of Robert Prior's injury at the hands of the policeman?

81 The loss of chance analysis has been applied in England in a wide variety of solicitors negligence cases, where the answer to the hypothetical question – what would have happened had the solicitor not been negligent? – on the actions of a third party. On these authorities, if the plaintiff can establish a real chance that the third party would have acted in a manner that would have avoided the loss suffered by the plaintiff or bestowed a benefit on the plaintiff, the plaintiff has established the solicitor's liability. The degree of the chance lost is a matter for the quantification of the plaintiff's damages: *Allied Maples Group v. Simmons & Simmons*, [1995] 1 W.L.R. 1602 (Eng. C.A.); *Jackson and Powell on Professional Negligence*, 5th ed. (London: Sweet & Maxwell, 2002) at 680-83.

82 In *Allied Maples*, *supra*, the plaintiffs claimed that they received negligent advice from their solicitors in the course of negotiations concerning the purchase of the assets of another business. The trial judge found that the lawyers did give negligent advice. He held that the plaintiffs could recover if they could establish first, on the balance of probabilities, that had they received proper advice, they would have taken steps to try to protect themselves in the course of negotiations from those liabilities which eventually arose; and second, that there was a real chance that the plaintiffs would have been successful in negotiating with the vendor either a total or partial protection for the plaintiffs from the liabilities which eventually arose. Stuart-Smith L.J., in referring to the second of these two inquiries, said at p. 1614:

> But, in my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.

83 *Acton v. Graham Pearce & Co.*, [1997] 3 All E.R. 909 (Eng. Ch. Div.) applies the principles set out in *Allied Maples* to a case where the alleged negligence occurred in the defence of a criminal trial. The facts in *Acton* bear some similarity to this case. In *Acton*, the plaintiff, himself a solicitor, alleged that the defendant was negligent in the preparation of his defence in a criminal proceeding. The plaintiff contended that the defendant, a firm of solicitors, had failed to make certain inquiries and to obtain important evidence for the defence prior to trial. That evidence was eventually presented on appeal and the plaintiff's convictions were quashed.

84 The trial court held that the defendant was negligent in the preparation of the plaintiff's criminal defence. Applying *Allied Maples*, the trial judge first determined whether on the balance of probabilities the plaintiff would have acted differently had he been given proper advice by the defendant. The trial judge concluded that the plaintiff would have taken the proper advice had it been given by his solicitors. The trial judge then considered whether there was a real or substantial chance that had the lawyers not been negligent, the prosecution would have discontinued the case or the plaintiff would have been acquitted. The trial judge found that there was a substantial chance that the prosecution would have been discontinued or the plaintiff acquitted had the solicitor not been negligent. He said at p. 935:

> The quantification of the value of a chance lost cannot be an exact science. The task is made more difficult when, as in the present case, the value of the chance lost depends on the evaluation of a sequence of chances; each of which contributes to the loss of a favourable outcome overall. I do not think that the task is assisted by over-refinement. The court must make the best estimate that it can.
>
> In my judgment the chance that, had the defendants done what reasonably competent and experienced solicitors would have done in the circumstances of this case, Mr. Acton [the plaintiff] would not have been convicted of the offences for which he was charged can fairly be put at 50% [emphasis added].

85 The trial judge in *Acton* referred to *obiter* in earlier English authorities suggesting that a plaintiff in Folland's position could recover in a negligence action only if he could show the balance of probabilities that he would have been acquitted had his lawyer not been negligent: see e.g. see *Ali v. Sidney Mitchell & Co.*, [1978] 3 All E.R. 1033 (U.K. H.L.), at 1044-5. In preferring the lost chance analysis described in *Allied Maples*, the trial judge said at 931:

> To treat the plaintiff's claim, in an action of this nature, as a claim for damages for the loss of a chance – that is to say, for the loss of the chance that he would not have been prosecuted; or for the loss of the chance that, if prosecuted, he would have been acquitted on different evidence or if the trial had been conducted differently – enables the civil court to avoid a rehearing of the criminal trial. In order to decide whether the plaintiff has lost a substantial chance of an acquittal as a result of the negligence of his lawyers and, if so, to evaluate that chance, the civil court does not have to embark on the exercise, described by the Court of Appeal ... as virtually impossible, of attempting to decide on the balance of probabilities whether a jury in the earlier criminal trial, properly directed on different evidence, would have been satisfied beyond reasonable doubt as to the guilt of the accused [emphasis added].

86 With respect, I cannot agree that the lost chance analysis is so qualitatively different than an assessment which would require a determination of whether the plaintiff would have been acquitted at the criminal trial. In either case, the criminal allegation must be retried, at least to some extent, in the context of the negligence action. Nor is it necessarily less difficult to fix the percentage chance of an acquittal than it is to determine whether on the balance of probabilities the plaintiff would have been acquitted at the criminal trial had he received appropriate representation. Finally, I see no intrinsic value in avoiding a rehearing of the criminal allegation where, as here, the verdict in the criminal trial has been set aside and the Crown has decided that it will not proceed with a new trial. With respect, I do not find the reasons provided in *Acton* for adopting a lost chance analysis persuasive.

87 There are three reasons for not adopting a lost chance analysis in this case. First, Folland's damages all flow from his alleged wrongful conviction and subsequent incarceration. Unlike some cases, he does not allege losses that are not the consequence of the conviction: e.g. *Boudreau v. Benaiah* (2000), 46 O.R. (3d) 737 (Ont. C.A.). Folland could only avoid the damages he says

flowed from Reardon's negligence if he could avoid conviction. Unlike the civil litigant, a mere chance of acquittal had no settlement value for Folland. Nor do I see any correlation between the sentence ultimately imposed on Folland if convicted and his chances of acquittal. For example, it cannot be said that he would have received a lesser sentence and, therefore, suffered lower damages if he had a 30 percent chance of an acquittal as opposed to a 10 percent chance of an acquittal. A mere chance of an acquittal had no real value to Folland in that it would not have avoided conviction, imprisonment and the damages flowing from those events. If Reardon's negligence only decreased Folland's chance of an acquittal but was not a "but for" cause of his conviction, Reardon's negligence resulted only in nominal damages to Folland.

88 My second reason for rejecting a lost chance analysis in this case arises out of the specific nature of the hypothetical fact in issue. In some cases, as for example where the plaintiff loses a lottery ticket because of the defendant's misconduct, the plaintiff has not lost anything more than a chance and it would be unfair to the plaintiff's case to require the plaintiff to show on the balance of probabilities that he would have won the lottery but for the defendant's misconduct: see *Chaplin v. Hicks*, *supra*. In other cases, perhaps because of the complexity of the variables involved or the unavailability of crucial evidence, it will be impossible to realistically assess what would have happened but for the defendant's misconduct. In those cases, the plaintiff may successfully advance a lost chance claim, if that claim meets the criteria discussed above. In doing so, the plaintiff effectively acknowledges that it cannot be determined what would have happened but for the defendant's misconduct but claims that it can demonstrate the loss of a chance having value as a result of that misconduct.

89 In the present case, the hypothetical fact in issue – whether Folland would likely have been acquitted had he been properly represented – cannot be compared to the results of a lottery or a beauty contest where the outcome turns largely, if not entirely, on chance. As Gonthier J. said at p. 605 in *Laferrière*, *supra*, in the course of rejecting lost chance as a basis for recovery in medical malpractice actions:

> Even though our understanding of medical matters is often limited, I am not prepared to conclude that particular medical conditions should be treated for purposes of causation as the equivalent of diffuse elements of pure chance, analogous to the non-specific factors of fate or fortune which influence the outcome of a lottery.

90 Virtually all causal inquiries where harm is alleged as a result of the defendant's misconduct are "what if" inquiries and involve an element of conjecture. The degree of conjecture, however, varies greatly. While no one can know how an individual trier of fact will decide a particular criminal case, I do not think that decision can be attributed to "the non-specific factors of fate or fortune". Criminal trials are supposed to be decided on the basis of the proper application of known legal principles to the facts as found in the evidence. The outcome of a criminal trial is knowable in the sense that an informed, objective, reasonable assessment can be made of what that outcome would be if the relevant evidence is known. Courts sitting on criminal appeals routinely make "what if" objective assessments of the likelihood of acquittals or convictions in deciding the appropriate order when the appellant has shown an error at trial. I see no reason why the same kind of inquiry cannot be made in a negligence trial.

91 As Folland's pleadings demonstrate, he does not contend that he can do no more than show that he lost a chance of an acquittal. He claims that he was wrongfully convicted because of Reardon's negligence. The answer to the "what if" question in this case is relatively straightforward. For example, if the trier of fact decides that Reardon was negligent in not obtaining Harris's DNA, the trier will decide whether it is more likely than not that Folland would have been acquitted had that DNA evidence been obtained and presented. A trier of fact can come to an informed decision on this question. It is reasonable and realistic to call upon Folland to demonstrate on the balance of probabilities that he would have been acquitted but for the alleged negligence.

92 My third reason for rejecting loss of chance as a basis for recovery in this case flows from my conclusion that it is reasonably open to Folland to demonstrate on the balance of probabilities that he would have been acquitted but for Reardon's alleged negligence. If Folland were to set out to demonstrate that he would likely have been acquitted but were to only establish a less than 50 percent chance of an acquittal, by implication the trier of fact would have found that it was more likely than not that Folland had been properly convicted of sexual assault. Public policy would not countenance a damage award to Folland when, on the findings of the trial court, Folland probably committed the crime with which he was charged. As Lord Diplock said in *Saif Ali*, *supra*, at 1044-5:

> The client cannot be heard to complain that the barrister's lack of skill or care prevented him from obtaining a wrong decision in his favour from a court of justice.

93 Folland's claim stands or falls on whether he was wrongfully convicted because of the negligence of Reardon. I think he is entitled to more than nominal damages only if he can show on the balance of probabilities that he would have been acquitted had he received reasonably competent legal advice and representation.

(iv) – Conclusion

94 For the reasons set out above, the motion judge erred in dismissing Folland's action.

CBC hit for $1.8M in Libel Judgment

30 July 2004, p. A4

The CBC was ordered yesterday to pay one of the largest libel awards in Canada when the Supreme Court ruled the public broadcaster severely damaged the reputation of a Montreal public relations consultant.

Gilles Neron won about $1.8 million in damages arising from a television program almost 10 years ago on the Canadian Broadcasting Corporation's French-language network, said his lawyer, Jacques Jeansonne.

"This will have to leave deep tracks and will have to mold the behavior of the media in this country," Mr. Jeansonne predicted. "This guy was totally burned, his career ended."

Mr. Jeansonne said the jobless Montrealer has not worked in his profession since the program aired in January, 1995.

A Quebec company that contributed to tarnishing Mr. Neron's name, but decided against fighting the matter in the Supreme Court, is sharing the costs with the CBC.

"The CBC internationally defamed Mr. Neron and it did so in a manner that fell below the professional standard of a reasonable journalist," Justice Louis LeBel wrote for the 6-1 majority.

"Despite its undoubted importance, freedom of expression can be limited by the requirements imposed by other people's right to the protection of their reputation."

Ten years ago, Mr. Neron was the public relations consultant for the Chambre des Notaries du Quebec, which operates a fund to compensate victims of wrongdoing by notaries.

CBC's news program, *Le Point*, ran a story alleging the organization did not pay people promptly or fairly.

Mr. Neron wrote the CBC, asking for a chance to reply to the allegations. A CBC reporter telephoned Mr. Neron to point out there were two factual errors in his letter. Although she promised him three days to check the mistakes, the program ran a segment two days later about the errors, skipping the complaints that Mr. Neron had raised in his letter.

Notaries in the province were up in arms that Mr. Neron had further irritated the situation and the notaries organization fired Mr. Neron. He then complained to the CBC that his career had been ruined because of the uproar.

CBC's ombudsman acknowledged Mr. Neron's complaint was well-founded because the network failed to mention the five grievances in his letter and focused only on the errors.

The Supreme Court concluded the determining factor in the case was the CBC's shabby professionalism, regardless of whether the news story was true.

"Truth and public interest are merely factors to consider in the overall contextual analysis of fault in an action in defamation," wrote Judge LeBel. "The conduct of the journalist becomes the all-important guidepost."

While the ruling could send a libel chill to media outlets across Canada, the decision is technically confined to Quebec, which is governed by a legal code that does not apply in the rest of the country. In other provinces, truth is a defence in defamation suits.

Justice Ian Binnie, the lone dissenter, said his colleagues were off base by denying the Quebec public the right to accurate information.

"An award of this size built on such a thin foundation can only discourage the fulfillment by the media of their mandate in a free and democratic society," he wrote.

"The information that was published was perfectly true, but my colleague's concern seems to be that the "truth" could have been put in a different light if additional matters had been included in the broadcast."

The CBC apologized to Mr. Neron in a news release yesterday and said it has already paid him its share of the damages of a little more than $500,000.

Mr. Neron's settlement is the "biggest award in Canada against the media," Mr. Jeansonne said.

In 1995, the Supreme Court set a record on libel awards by upholding a $1.6- million, plus interest, payout to former Ontario Crown attorney Casey Hill.

"Client sues lawyer, alleging he raped her"

Patrick, Kelly, *The National Post,* 26 August 2004, p. A7

Windsor, Ont. A senior partner at one of the largest law firms in Windsor has quit after a female client filed a $1.55-million lawsuit alleging he raped her on his firm's boardroom floor 2½ years ago.

[D.1] and law firms [D.2] and [D.3] are named in a civil suit filed in Superior Court on Aug. 13 by [P.], a 43-year-old Windsor woman whose divorce proceedings were handled by [D.1].

A statement provided by [D.2] lawyer said [D.1] "strongly denies any allegations of wrongdoing" but offered to resign so the firm's investigation "could continue in a manner that is free of influence or the risk of compromise." [D.1] had been with the firm and its predecessor for 29 years.

According to the statement of claim, which has yet to be proven in court, [P.] was reviewing a file with [D.1] around 4 p.m. on Sunday, Jan. 6, 2002, when, "suddenly and without warning, [D.1] grabbed [P.] by the arms and with great strength, forced her out of her chair and onto the boardroom floor."

"Once [D.1] had pinned her on the floor, he violently and forcibly removed her pants and underwear and raped her on the boardroom floor."

[P.'s] suit also names [D.1's] firm. The claim alleges [D.1's] colleagues knew their partner, "posed a threat to women" but didn't do enough to protect "vulnerable" female clients like [P.]

More than two years elapsed between the alleged sexual assault against [P's] and her decision to approach police and launch a civil action. There is nothing in the statement of claim that explains the delay, but the claim says [P.] was traumatized and lived in fear for her life from [D.1]."

According to the claim, [D.1] continued to serve as [P.'s] lawyer for at least 18 months after the Jan. 6, 2002, meeting. The pair communicated occasionally via e-mail and met in person only once after the alleged assault, said [P.'s] lawyer Robert Matlack. He said he didn't know why [P.] hadn't severed ties with [D.1] after the alleged attack.

Calls to [P.'s] home went unreturned.

In his statement, [D.2 lawyer] said the firm knew nothing about [P.'s] accusations until she filed her suit. "The law firm commenced its investigation into these allegations immediately after they became known…. [we] will co-operate fully to the extent necessary to insure that all parties are fairly treated," [D.2 lawyer] said.

[D.1] refused comment on Tuesday. "On the advice of counsel, I don't wish to make any statement at this time," he said.

Along with her civil action, [P.] has lodged complaints against [D.1] with Windsor police and the Law Society of Upper Canada, Mr. Matlack said.

Windsor police Staff Sergeant Ed McNorton said the force received a complaint from [P] about a month ago. No charges have been laid. "It's still under investigation," Staff Sgt. McNorton said. "I can't disclose any further details."

University of Toronto law professor Lorne Sossin, an expert in civil litigation, said it is not uncommon for civil proceedings and criminal cases to occur simultaneously. But it is rare for

complainants to commence civil suits before criminal charges are laid, he said. "Victims are better off to wait until there is a conviction."

"Wrongly jailed retiree awarded $400,000"

Dubé, Francine, *The National Post*, 28 August 2004, pp. A1, A3
(in part)

A 67-year-old retiree who spent 35 days in jail because his lawyer so badly represented him in a simple estate matter has been awarded nearly $400,000 by the Ontario Superior Court.

John Canavan was carted off to jail in May, 2003, for ignoring court orders he didn't even know existed. The father of two and grandfather of five, who had never been on the wrong side of the law in his life, found himself jailed in the Niagara Detention Centre in a common cell with 30 other prisoners, eating meals delivered to him through a hole in the wall.

Mr. Canavan's problem began when he agreed to act as an estate trustee for an old friend. When a beneficiary, unhappy with the pace of the process, began demanding to the courts to review estate documents, Mr. Canavan's lawyer, Paul Magnus Feldman, failed to keep him abreast of the orders.

On the occasions when Mr. Canavan did learn of an order, Mr. Feldman would assure him he had nothing to worry about. Even when Mr. Canavan was cited for contempt for ignoring the orders, Mr. Feldman told him not to worry, that he would take care of it, and that Mr. Canavan did not need to attend court.

On March 4, 2003, a bench warrant was issued for Mr. Canavan's arrest.

Several weeks later, on May 23, Mr. Canavan appeared in court for what was going to be the final disposition of his friend's estate, valued at $1.4-million.

Instead, he was arrested and sent to jail for six months.

"He was bewildered," said John Difiore, the Welland, Ont., lawyer who took over Mr. Canavan's representation and won his release after 35 days.

Mr. Canavan, who retired in 1992 after 39 years with Bell Canada and now lives in a small community north of Toronto, declined to comment.

"It's been devastating for both of us at an age when we should be enjoying ourselves," said Gail Marie Canavan, his wife of 44 years. She and her husband had never been apart for more than four days before his wrongful imprisonment. She was awarded $25,000 by the court. Her husband received $366,000, including $100,000 in punitive damages. The couple has yet to collect.

Mr. Canavan suffers form high blood pressure and diabetes. During his time in jail, he was handcuffed and strip-searched.

He was allowed only one 15 minute telephone call to his family each day. When he tried to call his son on Father's Day, he was so filled with anguish he could not speak.

Mr. Feldman, meanwhile, told Mrs. Canavan that he was filing an appeal, that he expected her husband would be home the next day and that he was calling the judge every hour.

In truth, he did not file an appeal until June 3.

It was only after Mr. Canavan hired Mr. DiFiore that he won his release

Mr. Feldman conceded in court that his actions were inexcusable and that his conscience had troubled him every waking hour. He argued that his actions had been clouded by health problems.

He filed a doctor's letter stating that he suffered from major depression and psoriatic arthritis.

Mr. Feldman agreed to ceases his litigation practice by Aug. 23, and in all other areas is only allowed to practice under a supervisor, according to the Law Society of Upper Canada. He could not be reached for comment.

Jerry's Enters Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.

691 N.W.2d 484 (Minn. Ct. App. 2005)
(*Summary*)

A Minnesota appellate Court held that an attorney who fails to exercise legal judgment in an unsettled area of the law that later affects a client adversely may be liable for professional negligence. James P. McCarthy and Christopher L. Lynch, both of Minneapolis, Minn., represented plaintiff in this case.

"Nova Scotia law firm will not face an interim injunction"

Moulton, Donalee, *The Lawyers Weekly*, Vol. 25, No. 48, April 2006, pp. 7, 23, 28

In what it determined was a "serious issue," the Supreme Court of Nova Scotia has refused to grant an interim injunction to the Nova Scotia Real Estate Commission against a law firm and its partners it claimed were trading in real estate without a licence as required under the *Real Estate Trading Act.*

The issue has national implications, said Alan Stern, a partner with McInnes Cooper in Halifax who represented the plaintiff. "The ultimate decision will have relevance for lawyers across the country.

"This is the only decision on the central issue in any of the common law jurisdictions of Canada," he added, noting that "the Quebec decisions do deal with what we consider the critical issue to be."

The Real Estate Commission was seeking an interim injunction against Lorway MacEachern, a Cape Breton law firm, and its partners to enjoin the firm, its partners, associates and employees from what it felt was trading in real estate. The defendants claimed they fell within an exception set out in the Act. The Nova Scotia Barristers' Society was an intervenor in the case.

Douglas Dixon testified that his concern, as Registrar of the Commission, was that Lorway MacEachern was advertising, listing and showing properties, initiatives he considered to be brokerage activities. He referred to the ads, signs and website of Lorway MacEachern. He denied that it was an ad in the *Cape Breton Post* saying six other firms were offering to engage in the same activities as Lorway MacEachern that precipitated the legal action commenced approximately three weeks later.

"What Lorway MacEachern is doing is not in dispute," Justice Suzanne Hood stated in her decision. "The issue here is one of statutory interpretation and, where there are two possible interpretations, the court must, in my view, look beyond what is being done now. Where the historical context of the original act is relevant, the court must be satisfied it has the full factual picture. I am not satisfied in this case that all the relevant facts are now known."

On the issue of irreparable harm, she cited *Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press, Assn. of Optometrists (Manitoba) v. 3437613 Manitoba Ltd. and College of Chiropractors (Nova Scotia) v. Kohoot*, among other and concluded that, "It is clear that a refusal to grant the interim injunction will not so adversely affect the plaintiff's interest that the harm cannot be remedied upon a successful outcome at trial. The evidence is clear that Lorway MacEachern has sold seven properties and evidence is available with respect to the sale price. The harm can be quantified, if necessary. Nor is there any indication that the successful plaintiff could not collect damages from the defendant if it is successful at trial."

The court also explored the term "in the course and part of the practice" as it applied to the practice of law and determined it must be given a broad interpretation. Finally, on the issue of balance of convenience, the court also sided with the defendants.

"The plaintiff, in my view, can show very little on its side of the balance," said Justice Hood. "Lorway MacEachern has sold only seven properties in almost two years and it is difficult

to conclude, without any evidence, the effect this may have had on licensed real estate agents and/or brokers."

"The public interest is protected and no harm has been shown to the Real Estate Commission but Lorway MacEachern has established itself over a two year period doing this sort of work. There would be an adverse impact on them if they had to stop, especially if other lawyers in the Sydney area are in fact doing this work," she added. "If successful at trial, they would have to start over and re-establish themselves. Furthermore, the Real Estate Commission took almost two years to bring this matter to court for an interim injunction and that delay also is an indication to me that the balance of convenience favours the defendants."

The next step in this case in not yet know. "This decision was on an Interlocutory motion only," Stern said. "Our client will have to determine how it wishes to proceed."

5.0 FEES AND COSTS

5.1 Fees

"Billing by the Hour"

Salyton, Philip, *Canadian Lawyer*, June 2002, pp. 16-18

"Never sell your time," My Uncle Harry, who owned a mens' clothing store, told me more than once. "Why's that, Uncle Harry?" I'd ask each time, although his answer was always the same: "Because your time is in limited supply. You've got no more than the next guy. And, besides, if you're selling time, when you stop working, the customers stop paying."

Against Uncle Harry's advice, for 20 years I sold my time on Bay Street. There wasn't much of a choice if, like me, you were a lawyer in a big downtown Toronto firm. We measured out our lives not with Mr. Prufrock's coffee spoons, but in six-minute segments.

Let's quit kidding ourselves, as Uncle Harry (who died a rich man) also liked to say. Billing for legal services by the hour or part of an hour is a foolish and demeaning system. It's absurd to value the work of an intelligent, well-educated person, and especially someone who is creative, according to how much time he or she spends doing that work. On that basis, sudden insight, however brilliant, has little or no value, while laboriously produced hackwork is worth a lot and is to be encouraged. Does anyone at auction, bidding for a great painting, ever ask how long it took the artist to produce it?

Billing by the hour rewards the lead foot and the heavy hand. The contented lawyer is the one who in the morning has a pile of documents on the left-hand side of his desk that he can spend all day moving to the right-hand side. The worried lawyer is the one who creatively solves a client's big problem before it is time for morning coffee and wonders what he is going to do for the rest of the day.

To paraphrase Warren Buffet, it's easier to calculate price than to determine value. What could be simpler for law firms than fixing an hourly rate for a lawyer, marking down the number of reported hours he or she works, and then multiplying? With time-tracking software (such as the unfortunately named "*Carpe Diem*"), and powerful computers, all this can be done effortlessly, with nary a green eyeshade in sight.

Why do most clients accept this travesty? Because it's easy. Checking a legal bill may simply mean seeing whether the time a lawyer put down for a meeting you attended coincides with your recollection of the length of the meeting. This is, of course, a totally meaningless exercise,

but it enables a client to “approve” the bill, and move it off to the accounting department for payment, feeling that he has behaved responsibly and that, by golly, no-one has put anything over on him.

It's a common experience for a Bay Street lawyer to send out a bill for $100,000, or $200,000, or more, and then have the client ring up and argue over a photocopying charge, or about whether a telephone conversation three months ago lasted 10 minutes or 15 minutes.

Typically, after a bit of a tussle, the lawyer will give in ungraciously (in the interests of “client relations,” he will say), and the client will experience a heady sense of triumph over an inconsequential saving.

It's rare for a client to ring up and say: “I don't care how many hours you worked. What you did, and what you achieved, just doesn't justify a bill this size, and I'm not going to pay it.”

When I started practising law most clients were billed quarterly. Some were billed every six months, and some only once it year. A senior lawyer, very well acquainted with the client and his affairs, and with what the law firm had recently done for the client, would think things over and draft an account that would say something like: “For services rendered, $100,000.” Before he sent out that bill, the senior lawyer might have lunch with the client, or call him up on the telephone, and casually ask: “What do you think about $100,000, for up until the end of June?” Sometimes the client would reply: “You know, your people did a first-class job, make if $120,000.” Of course, it also sometimes happened that the client would say that $100,000 was a bit rich, and that $85,000 sounded a lot better.

The point is, once upon a time, many lawyers and clients shared a sense of the value of legal services, and both lawyer and client made good faith attempt to match price to value. Why did it all change? Like Air Canada when it loses your reservation, let us first blame the computer.

The computer made it possible to record easily, in the minutest detail, literally minute by minute, what every lawyer did (or claimed to have done). The computer merrily did the necessary multiplications and produced an enormously detailed bill that clients quickly learned to demand. After all, it seemed only fair that a client should know, in detail, the nature of the services that were costing so much. By the late 1980's the old “for services rendered” accounts were almost extinct.

About the same time, the people who ran big law firms began to think seriously about cashflow. It dawned on them that to work for a year, or even three months, before sending out a bill, was not an economically sound way to run a practice.

A new desire developed, the desire to turn work-in-progress into accounts receivable (generally the basis for partner distributions) as quickly as possible (with the ancillary desire to collect accounts receivable promptly and not have clients treat law firms as if they were lending institutions).

In the late 1980s, in the big firms at least, the result was a billing revolution. Voluminous bills rendered frequently replaced sketchy accounts rendered intermittently. In this fashion, price triumphed over value.

This billing revolution created a dramatic deterioration in the quality of life of the working lawyer, particularly in the big firms. If hours were all that could be billed, then it was billable hours that had to be produced, billable hours and more billable hours. Associates joining a firm were told what was an acceptable minimum number of hours they had to produce if they wanted to stay around.

Senior associates were admitted, or denied admission, to partnerships according to their record of billable hours. Partners increased their participation in profits, or were booted out the door, according to the same criterion. The billable hour became everything, an obsession.

One consequence was inevitable: cheating. So-called "overdocketing," exaggerating the number of billable hours, became a widespread practice, a practice tolerated, if not encouraged, by most firms. Hence the well-known joke about the lawyer who dies young and complains to St. Peter that, at the age of 38, he was called away from earthly pleasures far too soon. "Thirty-eight?" says St. Peter in puzzlement. "According to your dockets you're 74."

As always when it comes to indefensible practices, an arsenal of justifications for overdocketing was quickly assembled, with particular justifications to be invoked as required. For example, an overdocketing lawyer may claim (to himself at least), as he cooks the books, that his work was worth more than the time it took to do it. He will reason that, trapped by the system, he has no choice and must exaggerate the number of hours worked in order to be compensated properly. The problem with this approach is that it requires the lawyer to lie to his client.

Of course, it is always open to a lawyer to negotiate some form of a billing premium, either up-front, or later if a file has been very successful, and to do so is not that unusual. The danger is that a client, faced with an already very-high hourly billing rate, may simply refuse. That is not unusual either.

Another, more indirect, technique is to inflate the length of the work day without focusing on a particular file or a particular client. A subtle variant of this approach was explained to me early in my practising life by a very senior and highly respected lawyer, trying, presumably, to pass on his wisdom to someone obviously in need of it. "For each day I mark down the time I came into the office and the time I left," he said. "And I make sure somebody pays for all the time in between." Ubiquitous time-tracking software encourages this approach: if you have failed to account for a six-minute segment of your working day, your computer will literally demand that you do so. It seems unnecessary to observe that time in the office is hardly the same thing as time that a client should pay for.

Some lawyers – a surprisingly large number – docket once a month or even less frequently. They enter no time at all in their Daytimers or computers until threatened by firm administrators who are looking for work-in-progress to turn into accounts receivable and thereby into profit that

can be distributed to partners. These laggards are forced to reconstruct a largely-forgotten day six-minute segment by six-minute segment. In such trying circumstances, inaccuracies are inevitable.

But a lot of the time, I think, it is just a matter of unvarnished cheating by lawyers in the grip of ambition, greed, fear or panic. These lawyers, with a peculiar honesty, will often freely admit what they are up to, sometimes turning the whole process into a kind of joke and thereby making it seem less pernicious. The pressures for so-called performance are great. The rewards of success are considerable: the consequences of failure are severe. The temptation is great.

Why does everyone put up with billing by the hour, a system in which the incentives are wrong-headed and institutionalized deception is rife? Perhaps some lawyers doubt the true value of what they do and therefore prefer to have contribution measured quantitatively, by the number of hours they put in.

For clients I see no true advantage in the system at all. A billing counter-revolution is overdue.

"The Price is Right"

Chanen, Jill Schachner, *ABA Journal*, September 2004, p. 28

As a partner at a large law firm, Chicago attorney, Greg Scandaglia watched as billing rates rose to help pay for the costs of doing business.

Yet, he couldn't help but wonder whether price really mattered. Clients always stressed cost, but few firms seemed to be doing anything more than paying lip service to the idea that lower rates may keep and attract business.

Four years ago, Scandaglia and a partner broke off from their firm to test a seemingly novel proposition in the legal marketplace: the same lawyers, the same services – but at a lower cost.

The gamble seems to have paid off handsomely. Scandaglia's firm has grown to seven lawyers and has attracted a lust-worthy client roster – due in no small part to lowering rates by nearly a third.

"We have the same resume that we had at [the large firm] and do the same kind of large commercial disputes," he says of Scandaglia & Ryan. "But my billing rate is lower, and I am providing the same service."

Scandaglia is not the only lawyer to see the wisdom of such an approach. Similar thinking is guiding the Midwest expansion of Detroit's Dykema Gossett. Firm chairman Rex Schlaybaugh Jr. says the firm's focus on serving the Midwest allows it to set its operating costs lower than if it were to expand across the nation.

But, Schlaybaugh says, the firm is still able to offer value in the form of expanded services, such as updates on the law, newsletters and access to technology.

"Clients are starting to ask about what kind of value they are getting and what are their alternatives," Schlaybaugh says. "We try to be sensitive to that – be it in rates, quality, partnering – any way that we can provide value to them. If we have a bit of a rate advantage because of our cost structure, that's great."

Schlaybaugh says this approach has been the reason the firm has captured new business from Fortune 500 Clients.

The other side of the coin

Yet, price-based competition is not for everyone. It can limit revenue for staffing, technology and growth. Ralph Baxter, chairman of Orrick, Herrington & Sutcliffe in San Francisco, says he believes it is a wise model for firms that understand their segment of the market.

"The peril is for firms that are not clear-eyed about where they are going in terms of segmentation. They mismatch their resources and revenue potential," he says. Clients with high-stakes legal matters are unlikely to hire lawyers based on price, Baxter says.

Schlaybaugh agrees. "To maintain credibility with our clients, there are certain transactions we are not going to handle" he says. "We do not have an office in Moscow or Beijing. But that is because we have chosen not to grow that way."

Price-based competition is not for Greg Nitzkowski, a partner in the Los Angeles office of Paul, Hastings, Janofsky & Walker.

"Most major law firms have made the decision that the best work is that which is highly valued. It means you have to cut across a lot of disciplines. It means firms have to invest in infrastructure and in areas that are hot. You have to be able to continually serve clients," he says.

Nitzkowski concedes that he has witnessed work that used to stay with one firm go out for competitive bidding. But, like Baxter, he says firms need to study the question of what lower rates will do for them.

"If it's work that you really want and want to keep – even if you recognize that the work is not profitable right now – you can afford to invest in it for longer-term goals," Nitzkowski says.

"Time-based billing disliked, but no better option in sight"

Time-based billing has become the dominant billing system across Canada because it is simple to manage and reasonably fair to all parties. But it is so riddled with problems that many lawyers, judges and especially clients would dearly love to find something better.

Lori Brazier of Catalyst Legal Consulting in Toronto is one of many experts who has been pushing for a new system that would encourage efficiency and cut legal costs.

"Hourly billing carries no incentive for greater efficiency," she told *The Lawyers Weekly*. "The system leads to inefficiencies and excessive billing."

Brazier said hourly billing is used for about 90 per cent of all legal work in Canada even though the drawbacks are huge. She estimates insurance companies could cut their legal bills by 20 to 30 per cent if they moved to a more efficient system.

But she doesn't expect the changes to come from the law firms. The system "will change only if the clients want it. Lawyers are slow to adapt to change. They believe it is better to stick with the devil you know."

"It creates inefficiencies," agreed Murray Gottheil, managing partner of Pallett Valo, LLP in Mississauga, Ont. "We think it promotes too many people on the files, too many people in a meeting. The client doesn't know whether I'm the kind of guy who creates a mountain out of a molehill or the guy who gets the job done."

Simply put, he said hourly billing rewards the lawyer who creates the biggest, deepest, legal morass and penalizes the lawyer who does the quickest, simplest job.

Gottheil looks at hourly billing in a different way from most lawyers. He considers it a measure of the cost of doing a service, not a measure of the value of the client. The trouble is, clients place value for their money over covering their lawyers' costs.

"Blindly taking cost and translating it into billing is something lawyers do a lot," Gottheil said. "There are problems with that. The problem is in translating the cost (of a service) into value for a client."

There are other problems. By its very nature, hourly billing tempts lawyers to pad their bills, to create unnecessary work or even to commit outright fraud.

But fraud is not a subject that Canadian lawyers like to discuss. They will tell stories of lawyers who were disciplined – or even disbarred – for padding their bills, but tracking down the actual cases is difficult to do.

David Gambrill, communications advisor to the Law Society of Upper Canada, said he wasn't aware of any disciplinary hearings related to billing hours, while a spokesperson for the

Superior Court of Ontario's Assessment Office refused to even discuss the issue. Others say fraud is not the real problem with time-based billing. "The problem isn't fraud at all. It's not the lawyers duping clients," Brazier said. "It is inefficiencies."

Diane Carty, chief operating officer of Toronto law firm Minden, Gross, Grafstein and Greenstein LLP, agrees: "I'm not aware of any discipline for overcharging," but she acknowledged that a fair number of clients are so upset with their bills that they apply to the Superior Court of Ontario for an assessment.

Carty said many firms avoid the embarrassment of an assessment by carefully checking their bills before they are mailed to their client, and sometimes rolling back the fees that an over-enthusiastic young lawyer may charge.

Hourly based billing certainly has its critics, but it is the dominant form of billing because it usually works better than the alternatives.

One organization that looked at other methods was Legal Aid Ontario. It tried block billing for a few years, but eventually gave up and went back to time-based billing.

Block billing was "too expensive," said Elaine Gamble, director of communications for Legal Aid Ontario. "We would set a block fee of, say, $250 for a case that would take only five minutes."

Now, the non-profit corporation pays an hourly rate that varies from about $77 to $96 a hour, depending on the experience of the counsel.

Deirdre Martin, senior counsel for the Insurance Bureau of Canada, said the property insurance industry looked for a1ternatives because legal fees are a huge cost, amounting to 40 per cent of an insurer's external claims costs.

The industry looked at flat fees, task-based billing and unit fees, but the magic pill proved elusive. It concluded that hourly billing suits the current insurance environment where increasingly sophisticated plaintiffs are bringing fewer, but more serious cases.

The insurance industry tends to modify hourly billing with strict management controls. "Litigation management is a very, very effective tool," said Martin. "It can save 20 to 30 per cent easily." Brazier applies the lessons she learned in the insurance industry to a wide variety of clients. She recommends a multi-faceted, integrated approach that pays close attention to each step of the long legal process.

She favors early resolution of cases, often by alternative dispute resolution because short cycle times invariably save money.

Brazier suggests that lawyers should work with their clients at each step of the legal process to cut costs. Mutually, they can cut paperwork, bypass unnecessary discoveries and pre-trial

motions, and use a student or paralegal where possible. She says the partner's services should be used for such key rotes as project management or in dealing directly with the client.

But the fundamental need is data collection "Companies don't know how they are spending their money," she said.

Her advice: lawyers should sit down with their clients to explain how costs are allocated and where the money really goes.

"A Billable Revolution"

Middlemiss, Jim, *National*, March 2005, p. 20f p. 24

There is no shortage of alternatives to the billable hour for legal services. Neither is there a single answer to the question of which fee structure is the best. The challenge for the law firms is to develop a menu of billing methods that reflect the services they bring to the table and provide clients with the flexibility they need in their business models. Here are the different types of alternative billing methods from which lawyers can choose.

Flat or fixed fee

The flat or fixed fee is often associated with certain consumer legal services, such as house closings or wills, but it's also useful for incorporating businesses. It works best when there are repetitive tasks that don't vary from client to client. The key is understanding your cost structure and the marketplace in which you compete. You need to create methods that streamline your work processes and leverage your support staff and associates, without sacrificing quality of the final product.

Upside: Easy for clients to understand; provides them with cost certainty.
Downside: Can "commoditize" legal services. If the law firm isn't closely watching its costs, or if a matter becomes unexpectedly complex, the firm could take a bath.

Capped fee

Similar to a fixed fee, the lawyer proposes a billing rate and an estimated number of hours for a task. The fee is capped at a set amount, so that the lawyer earns somewhere in the range between zero and the capped fee.

Upside: In theory, protects clients from a runaway legal bill.

Downside: the lawyer needs to understand the task at hand and account for any surprises that may arise, or at least have an outlet in the retainer to accommodate hiccups.

Project billing

The lawyer is compensated a set amount for the management of a specific project from beginning to end. For example, a firm might be retained by a condo developer to obtain building approvals, buy the property, arrange construction financing, and manage the legal side of the project, all for a specified price.

Upside: Client gets consistency in legal services, delivery and project price.

Downside: Numerous variables mean the firm must carefully break down and price the project according to its components, while assessing the contingencies that could arise at each stage. Law firms need downside protection and an out clause.

Success-based billing

Commonly referred to as contingency fees, this method is popular in litigation. Ontario is the last province to legalize such fees; the government is presently trying to work out the percentage a law firm should be allowed to charge.

Upside: Clients only pay their lawyers' fees if they win or a settlement is reached. Lawyers risk a lot, but rewards can be handsome.

Downside: The firm could do tremendous amounts of work for nothing. Financial conflicts of interest are possible: client may be unhappy with proposed settlement, while law firm wants resolution and payday.

Results-based fee

Useful in both the corporate and litigation settings, the fee is tied to achieving a stellar end result. If an investment banker bids on a financing, the law firm may take 75% of its fees if the deal doesn't go through, but 125% if it does. If a firm manages to knock a court award down or overturn a judgment, it may be rewarded for exceeding the client's expectations.

Upside: More closely aligned with the client's business objective. Lawyers are financially motivated to achieve good results.

Downside: Requires flexibility on the law firm's part and a willingness to share the risk with the client. Lawyers are notoriously risk-averse.

Incentive fee

Similar to a success-based or results-based fee. The firm is remunerated based on performance; the criteria upon which the firm will be judged are worked into the retainer. Exceed the client's expectations and receive bonuses; perform poorly and receive less. For example, a corporation may need a deal done by a certain date and at a specific price: producing successful results early and below budget means bonus payments for lawyers.

Upside: Aligns compensation directly with the client's business objectives. Lawyers can earn bonuses for exceeding expectations.

Downside: Often difficult to structure the incentives. Firm could become focused on the incentive, rather than the underlying problems, and might look to cut corners.

Ongoing retainer

The one-time Cadillac of the legal billing system. A client retains the firm and pays them on a periodic basis, usually monthly. If the firm used up its quota of time, it would be charged more; if it didn't, the amount might roll over to the next month.

Upside: Good for clients who want to lock up specific legal talent. Great for the law firm's cash flow.

Downside: Clients view it as potentially a blank cheque for lawyers. Clients, with no incentive to reduce fees, might call at will and monopolize the lawyer's time.

Discounted hourly rate

The law firm agrees to discount its hourly rates in exchange for a designated amount of work.

Upside: Client saves on fees. Law firm can budget from client.

Downside: Lawyers might start looking for ways to cut corners. Law firms could start to receive demands for discounts from other clients. Firm might have to forego more lucrative work since the firm's resources are at capacity serving the lesser-paying client.

Blended/hybrid rates

Meshes the billing rates of partners with the lesser hourly rates of their senior and junior associates, so that the rate comes out above the typical associate, but below the partner's rate.

Upside: Ensures work is directed to the appropriate level of expertise in the firm.

Downside: Can be difficult to manage. Discourages senior lawyers from getting involved at the lower rates.

"Paid, Not Played [:] Estimating Fees, Charging High Retainers Help Solos Avoid Payment Hassels"

Tebo, Margaret Graham, *ABA Journal*, May 2005, p. 28

Getting stiffed is almost like a rite of passage for solos. Whether it's a client who used to be a friend or one who simply disappeared, experience is often the best teacher when it comes to matters of collection.

Take Joan M. Swartz's story. The St. Louis lawyer once handled a case for a client who was being sued for $25,000 in damages. Swartz won the case, but the client decided not to pay her bill. The client had a home remodeling business and offered to work off some of the fee by working on Swartz's home. After ripping off wallpaper and removing towel bars in a bathroom, though, he promptly vanished.

Steamed at the double betrayal, Swartz continued to pursue payment. One day the client's wife called and tried to talk Swartz into forgiving the outstanding balance. Swartz refused. “I said, ‘You've got to be kidding,’” she recalls.

These days, Swartz takes a smarter approach to getting paid: She customizes her engagement letter for each client to include terms of payment that she has discussed at the first meeting. When someone doesn't pay as agreed, her paralegal will call the client with a reminder. If money is tight, Swartz says she's always willing to revise the payment schedule, as long as the client pays something on a regular basis.

One thing she tries to avoid is suing the client for unpaid fees. She weighs the consequences and the likelihood of recovery carefully. “Any malpractice insurer will tell you that the fastest way to get sued for malpractice is to file a suit for fees,” says Swartz.

For Joel Selik, upfront estimates are the easiest way to ensure getting paid in full.

Selik, who has practiced in San Diego for more than two decades, always tries to estimate the total cost of the representation at the first visit. He asks for a large portion of the estimated fee as a retainer. Clients are rarely unhappy with this approach, he says, because they know he's being forthright with them.

“One thing I've learned is, it’s much easier to get paid when they need you,” he says. “Never, ever wait until the representation is over before you get paid.”

Selik says he's also found that clients tend to pay bills more regularly when he puts a due date on the invoice because most people are used to credit card bills that have due dates. He also bills frequently, sometimes twice a month, because people tend to be more willing to pay a bill for services they've just received than for something that happened a while ago, he says.

Set Upfront Minimum

Richmond, VA., solo Shane Jimison agrees that the best time to get paid is before the representation starts. Jimison’s clients are usually plaintiffs in employment cases or spouses going through a divorce.

"They've been hurt and money is a question mark. If they're sitting in the chair across from me, they need me. I need to know I'm not working for free because I have bills to pay too," says Jimison.

He frequently asks for a retainer that equals the amount he needs to earn from the case. "If I never get another dime after the retainer, at least I'll have the minimum I needed to make the case worthwhile," he says.

Jimison notes it's important to send invoices regularly even when still working off the retainer. Keeping clients informed of exactly where the money goes helps keep them vested in their cases. He also does little things like making sure his bills go out by the 25th of the month so clients have them in hand when they sit down to pay bills on the first of the following month. He always includes a return envelope.

"You can't be shy about asking for what you've earned," he says. "Value your services and, most of the time, the client will, too."

"The money manifesto [:] How to collect your bills and improve client relations"

Spencer, Beverley, *National* (Ottawa: Canadian Bar Association), September 2005, pp. 18-19

Most lawyers aren't very good at asking clients for money. We don't learn it in law school, and we won't learn it if we start our career at a large firm with a dedicated billing centre. Yet getting clients to pay is critical to the success of every law practice.

To keep the revenue flowing, start with a strategy, a good retainer agreement, and an open relationship with your client that establishes the ground rules early. "The big thing is setting out the expectations between the lawyer and clients upfront," says Jennifer Schofield of Farrow Schofield & Deveax in Upper Tantallon, Nova Scotia. "it avoids confusion down the road."

Clients who phone Schofield's firm know what to expect right from the start. Staff members inform callers that an initial 30-minute meeting with a lawyer on any matter will cost $20 plus tax. At the end of the meeting, the lawyer explains the fee structure in more detail, and the client decides whether to pursue the matter.

For some matters – wills or separation agreements, for example – the firm charges a flat fee, says Schofield, Chair of the Nova Scotia Branch of the CBA's General Practice, Solo and Small-Firm Conference. In those cases, the lawyer takes instructions and the client pays for the finished product, knowing from the start what the final price will be.

For more complicated matters, Schofield presents the client with a retainer agreement at the end of the initial interview. She usually advises clients to take it home to review and call if they have any questions. “Having the retainer agreement makes it easier,” she says. “They can take it home and think it over, and nobody feels on the spot or uncomfortable that they don’t have that kind of money.”

Timely billing is crucial to getting paid. For ongoing matters, Schofield usually sends out a bill once a month, outlining the activity on the file. This way, clients can call with questions when they get their monthly bill, instead of waiting six to eight months and trying to untangle any problems from one large bill.

Finally, have a plan for dealing with delinquent accounts. Schofield’s firm sends out reminders when an account is past due and offers some flexibility to clients who may just need some extra time. Clients who can’t pay a lump sum right away may be able to whittle down the bill with post dated cheques. “We try to encourage them to call in and set up a payment plan rather than ignoring us completely.

5.2 Costs

"Costs in Family Law Proceedings"

McLeod J. R., (220), 47 R.F.L. (5th) 184, *Annotation*, pp. 184-187

Jarvis J.'s decision to deny a mother interim disbursements or costs in *Pakka v. Nygard* puts lawyers representing clients with limited resources in a difficult position. If they respect their duty to their client and agree to continue without payment, they prove that their client does not need interim disbursements or costs. The effect of the decision is to force lawyers to fund their client's case, underprepare the case, or abandon a meritorious file.

The mother had applied for child support from the child's father, whom she had a casual relationship. Jarvis J. acknowledged that the father was a very wealthy man whose business affairs were complex. The father had delayed proceedings from the beginning and had not provided full and complete financial disclosure of his income or his business affairs. The confusion surrounding the father's income for child-support purposes was compounded by the fact that he lived in a tax haven, so that his business and personal finances were integrated to a greater extent than would otherwise be the case. Notwithstanding his obligations to make full income disclosure, the father had failed or refused to provide a comprehensive income report.

Although the child-support proceedings were commenced in September 2000, the interim support motion was not heard until April 16, 2002. At that time, the mother sought interim costs to enab1e her to pay her legal fees and retain a forensic accountant to sort out the father's business and personal finances in order to determine his Guidelines income. Kiteley J. noted the father's inadequate disclosure, fixed his income for interim support purposes at $2,000,000 annually, and ordered the Table amount of support - $15,000 monthly. Kiteley J. declined to make an order for interim costs at the time without pre judice to the mother's bringing a further motion for the same relief on more comprehensive material. Her reasons suggested that she would view such motion favourably.

The father applied to reduce the interim child support on the basis that the financial statement he had provided had overstated his income. The mother responded by returning her motion for interim costs and disbursements. Jarvis J. dismissed both motions. While his refusal to change interim support is consistent with the current case law, his decision to deny interim costs and/or disbursements made it difficu1t for the mother to obtain expert evidence of the father's income. With respect, the huge financial disparity between the parties, the father's obstructionist litigation behaviour, and his failure to provide full and complete financial disclosure should have been sufficient at least to justify interim disbursements to fund an income report.

Interim support orders are not intended to be long-term solutions to a dependant's financial need. Rather, interim support is determined by summary motion to provide a dependant with sufficient income to live at a reasonable level until trial. Although the *Federal Support Guidelines*

mandate that a court determine interim child support according to the same principles and objectives as final child support, the proceedings are fundamentally different. Interim support is determined on often conflicting and incomplete affidavit evidence without a full investigation into the merits of the case. As a result, most courts take a cautious approach to imputing income and exercise of discretion generally. That Kiteley J. ordered the Table amount of support pursuant to s. 4 of the Guidelines, although it was arguable that the child did not need the amount of support ordered, is consistent with such approach.

In a related vein, courts are reluctant to change interim support pending trial and prefer that the matter be processed to trial as expeditiously as possible unless the change alleged is so fundamental that the matter cannot wait until trial for correction. The father had already delayed proceedings by contesting the court's jurisdiction and raising procedural objects to avoid dealing with the case on the merits. In this case, the father faced the added problem that he had not made full disclosure in the first place. A payor who fails to make full disclosure invites a court to draw an adverse inference and impute income. The income imputed by Kiteley J. was modest, according to the mother. It is not surprising that Jarvis J. refused to reduce support, given the father's inadequate disclosure. The father had no one but himself to blame if Kiteley J. had overestimated his income.

However, Jarvis J. did not rely on the father's lack of disclosure to deny his motion to change interim support. Instead, he accepted that motions to change interim support should be discouraged and denied unless maintaining the order until trial would cause undue hardship. In this case, the father had sufficient income and other resources that he could easily afford to pay the interim support. If it turned out that he was correct and had been ordered to pay too much, the trial judge could order the mother to repay the excess, assuming that the father was not responsible for the problem in the first place and it would not cause undue hardship on the child or payee mother to order repayment.

Jarvis J's decision to deny interim disbursements and interim costs was more problematic and may have rested on nothing more complicated than that the mother should be able to fund her litigation from the chi1d support being provided, which may or may not be a proper use for that support. At para. 6, Jarvis J. noted that Kiteley J.'s comments suggested that she considered the mother entitled to her interim costs, given the nature and course of the proceedings. However, since she did not hold that the mother was entitled to her costs, the issue was not res judicata. As a result, Jarvis J. held that he could decide the issue as he thought fit. He also noted that the law had evolved since Kiteley J.'s decision to the point that he was comfortable in denying interim costs and disbursements. With respect, while he may have been correct in denying the former, it is more difficult to justify his conclusion to deny the latter.

As Jarvis J. noted, the general assumption is that each litigant will pay his or her legal fees until the proceedings are over. While a court has the power to order interim costs to enable a party to continue a meritorious case, it will not do so as a general rule. Something more than just a limited ability to pay a lawyer's fees as they come due is required. This was reaffirmed in two recent appeal cases decided after Kiteley J.'s decision in *Pakka v. Nygard*.

In *Waxman v. Waxman* (2003), 2003 CarswellOnt 84, 168 O.A.C. 217 (Ont. C.A.), Doherty J.A. confirmed the position adopted by E. MacDonald J. in *Organ v. Barnett*, 1992 CarswellOnt 710, 11 O.R. (3d) 21O (Ont. Gen. Div.), at paras. 20-24, that courts should order interim costs only in exceptional circumstances. Doherty J.A. did not specify what would amount to exceptional circumstances, but he denied interim costs in *Waxman* because the wife's lawyer indicated that he wou1d not withdraw from the case if he was not paid at that time. Jarvis J. denied the mother her costs in *Pakka v. Nygard* for the same reason. If courts routinely deny interim costs in family litigation, this forces lawyers who undertake files for litigants with limited resources to finance the client's litigation or withdraw from the file, assuming that the lawyer is able to convince the client or a judge to allow him or her to do. With respect, it is submitted that this represents an overly restrictive reading of the emerging case law.

In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 CarswellBC 3040/3041 (S.C.C.), LeBel J. also approved MacDonald J.'s narrow view of when a court should order interim costs. Although early case law supported the routine ordering of interim costs to wives in matrimonial litigation, primarily because husbands controlled the family resources, this is no longer the case. Increasingly, women work outside the home and have access to their own income. As well, current case law acknowledges that courts have power to order an interim advance on equalization under the *Family Law Act*, which provides wives with access to further resources to fund their litigation. However, that some litigants have access to such resources is small comfort to a person who does not and is faced with the prospect of litigation against a spouse or former partner with vastly superior resources. LeBel J. went on to note that interim costs should still be granted in family cases where one party is at a severe financial disadvantage that may prevent his or her case from being put forward and cited with apparent approval *Woloschuk v. Von Amerongen*, 1999 CarswellAlta 354 (Alta. Q.B. [In Chambers]), where the court had ordered interim costs in a case where one party's financial position was vastly superior to the other's in terms of funding a protracted lawsuit.

Jeans v. Jeans

N.L.S.C. [U.F.C] 1998 02 U 0524, Cook J.

Application for solicitor-client costs dismissed as offer to settle stipulated a time for acceptance which was not accepted within that time and therefore deemed revoked.
There was no wording in the offer to settle which could again give life to it after it was revoked.

A litigant can postulate as to a possible court ordered costs outcome but it cannot arbitrarily oust the court's right to decide what costs, if any, are awarded to a successful party, irrespective of the wording which it chooses to use in an offer to settle.

Even though trial's outcome was more favourable for the Plaintiff, the position of both parties was adopted on many issues. Neither party deemed more responsible than the other for delaying long and protracted litigation.

Discretion utilized to make no order as to costs.

Party and party costs of the within application awarded to Defendant, a self-represented litigant, subject to a counsel fee not being included in the calculation of such costs.

. . . .

3. It is now undisputed that the Plaintiff's offer to settle was delivered to the Defendant's solicitor on September 15, 2000 and a copy was filed at this Court on the same date. It is also undisputed that the Defendant did not accept the Plaintiffs offer to settle.

4. The offer to settle reads as follows: [in part]

. . . .

9. Upon acceptance of this Offer by 5:00 p.m. Tuesday, September 19, 2000, each party shall be responsible for their own costs of all steps in this proceeding to date. If this Offer is not accepted by 5:00 p.m. September 19, 2000 the Defendant shall be responsible for the Plaintiff's costs on a party and party basis for all steps in this proceeding to the date hereof, and on a solicitor-client basis for all steps taken hereafter.

. . . .

The offer was not accepted

. . . .

6. The Plaintiff submits that the offer to settle was neither withdrawn nor revoked at any time prior to the close of the trial.

7. The Defendant submits that the wording in clause 9 of the offer to settle was valid only until 5:00 p.m. Tuesday, September 19, 2000 when the "time limited" offer expired. He further submits that the second part of the offer to settle was a "threat".

. . . .

10. It is only where an offer has not been revoked, either explicitly or by the expiry of time that there will be a consideration as to whether the Plaintiff may receive solicitor-client costs, if the Plaintiff obtains a judgment as favourable or more favourable than its offer to settle.

. . . .

"No costs to winners for misleading court on time"

Jaffey, John, *The Lawyers Weekly*, 24 October 2003, p. 24

Holding that counsel for four parties in a contested motion has misled the court by booking a lengthy motion into a two-hour time slot, Ontario Superior Court Justice Casimir Herold expressed the court's displeasure by denying costs.

He termed "the pervasive habit of counsel undermining the system by intentionally underestimating the length of motions in order to shoehorn themselves into a position on a motions list" an "attempt to sandbag the motions court staff."

"This practice has to stop," he wrote, "particularly when counsel are called on it and adamantly stand their ground. ...I can do my small part to eradicate this mischief by making no order as to costs of today's proceedings whoever may be successful."

He also cited a precedent for his decision to refuse costs, namely *CHML* / *DKSX et al.* v. *Telemedia Communications Inc. et at.* (1989), 65 O.R. (2d) 753.

In that decision, Justice John O'Driscoll denied costs in a "one -hour motion" that took an entire day, writing: "It is true that sometimes judges turn a blind eye when this sort of conduct comes to light. However ... I cannot ignore the deviation from the norm in this case because it is of such flagrant proportions. To ignore what happened in this case would be to invite its repetition in other cases; that cannot be done." He also commented that lawyers will plead that the matter was urgent or large amounts of money were at stake. "Those may be excuses for lying," he wrote, "but they certainly are no justification. The end never justifies the means."

In his supplementary reasons on costs, Justice Herold indicated that the parties were well aware the motion would take more than two hours. He said he had a banker's box full of material to read in preparation for the motion and a second box of additional transcripts and authorities given him during it. He also noted that the earlier interim motion, which was adjourned to allow for cross examinations, was variously billed as 9.8, 9.0 and 8.5 hours in bills of costs claimed by counsel for the three defendants.

"Judge holds online research can cost less"

Ceballos, Arnold, *The Lawyers Weekly*, 05 May 2006, p. 25
(*in part*)

In a plug for online legal research, as well as an admonition to lawyers to bring other work with them while they wait in court, an Ontario judge has ordered reduced costs on the basis that

legal research could have been done more efficiently using an electronic search, while at the same time refusing to award costs for time spent waiting to argue a motion.

The decision in *Biggin v. Malone*l, [2006] O.J. No. 975 (Sup. Ct. Just.), arose in the context of a family law dispute, where the court was considering the costs to award the successful party in an interlocutory motion. The party, Biggin, was represented by an agent, Edward Hopkins, who was also a lawyer.

The court first dealt with the preliminary matter of whether costs could be awarded to a party represented by an agent. The court concluded that it should not be influenced by the nature of the professional relationship between the client and its counsel in deciding whether to award costs. The court found that the fact that an agent acted for the party was irrelevant to the issue of whether an award of costs should be granted or the amount of such order.

Finding that the motion in issue was not complicated, Justice Campbell of the Ontario Superior Court nonetheless accepted that some legal research was necessary and noted that the agent found several relevant cases relating to the circumstances of one parent's removing children to another locality before trial. However, Justice Campbell found 10.5 hours for obtaining and reading these cases to be unreasonable, stating the "surely in this electronic age, Mr. Hopkins would perform the same task that I, or any other legally trained person, would and 'click' the word 'mobility' into the QuickLaw website." The court declined to award costs for the amount of time claimed for this part of the preparation of the argument.

Hopkins had also claimed 5.5 hours for attending to argue the motion, but Justice Campbell noted that the motion "did not go on longer than an hour, more or less". He was not prepared to order costs for the agent's waiting time, adding that "after over four years in practice, he should have learned to bring other files or work so he could have continued other work during the waiting time."

Justice Campbell reduced the legal fees in Hopkin's bill of fees from $3,840.00 to $1,550.00, which represented 15.5 hours of Hopkin's time at $100 per hour, a rate the judge had noted earlier was "an inordinately low hourly rate for someone with his years of experience."

Hopkins, of Cram & Associates in London, Ontario, said that he expected his bill of costs to be reduced, though he adds that the comments about the research "were somewhat unexpected." He said that there were at least three issues to be researched and he wanted to make sure that he accurately tracked all the time spent on the matter, given that he represented a relatively impecunious client. Ironically, he said that he conducted his research on Quicklaw. "Maybe some people can do it quicker than others," he said about his research.

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