SACROSANCTITY:

PRINCIPLES AND PRACTICE OF PROFESSIONAL, ETHICAL AND LEGAL RESPONSIBILITY

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SYNOPSIS

Summaries of, and excerpts from, decisions, legislation, authors, and reports (usually omitting footnotes or endnotes) on principles and practice of professional, ethical, and legal responsibility; primarily from June 2006 to June 2008

(The seven previous papers on this subject, and an unabridged version of this paper, cumulatively covering the period 03 September 1189 (the birth date of legal memory) to June 2008, are at lewisday.ca>ethics.)

14 July 2008

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DEDICATION

Dugald Christie

1940 - 2006

Dalhousie Law School presented its 24th Weldon Award for Unselfish Public Service on Thursday, March 8th, 2007. This year the award went posthumously to Vancouver lawyer Dugald Christie, Class of 1966, for his unwavering commitment to making justice accessible to all — especially the poor and disabled.

Mr. Christie was best known for founding a network of pro bono clinics, the Western Canadian Society to Access Justice, that today has 61 offices from Campbell River, BC to Winnipeg with over 400 lawyers donating their services.

Mr. Christie's citation, written with the help of his sister Dr. Janet Christie Seely, [which] accompanied this year's Weldon Award presentation [,] commended his selfless work and cited his notable accomplishments:

The citation is reprinted from the summer 2007 issue of Hearsay, published by Dalhousie Law School, Halifax.

Dugald Christie was born in New York on November 7, 1940. After obtaining his law degree from Dalhousie in 1966, he started a law practice in Vancouver and lived in a beautiful house in Lion's Bay. Several dramatic events in his life prompted Dugald's rebellion and major change in his career. An act of God resulted in a landslide that killed his neighbours' two sons and left Dugald's house almost worthless. He took on his neighbours' cause and fought for justice. He succeeded in getting only $5000 in personal recompense and was so incensed by his experience with the justice system that he developed a great empathy for the underdog and more and more pursued his work for the poor. He followed his feelings, but had not said goodbye to reason and prudence.

Dugald wrote of himself: "Now I relieve my rebellion against the ways of the world by bicycling to Ottawa to burn my lawyer's robes, publishing articles that judges are appointed by a system of patronage, by building a small army of lawyers to fight poverty... I lived in a Salvation Army halfway house for three years surrounded by ex-convicts and addicts of all kinds. From that citadel of poverty I attacked the highest figures in the profession.... I do not seem to have any real choice in these matters. Unfortunately, it is not a matter of virtue. I think it comes from my early childhood experiences."

Dugald's first bicycle trip across Canada was in 1998. He was 57 and it wasn't easy. He would cycle across Canada twice more. In 2000, he fasted on the Supreme Court steps in Ottawa to protest the failure of the legal system to provide fair access to the poor in a timely fashion.

In 2002, Dugald took a bus trip from Vancouver to Moncton to pass a resolution at the Canadian Bar Association Annual Meeting to approve a business plan to fund and organize *pro bono* clinics across the nation for every community over 30,000 people. The proposal failed to win the necessary support. He felt despair and bitterness, but he resolved not to give up on the bar. He wrote: "To me, *pro bono* is meeting the poor on their own turf and not in the high rise law office. It is rubbing shoulders with the down and out…sympathizing; not pitying."

In March 2006, Dugald received the Lawyer of the Year Award from the B.C. Law Association. In the summer of 2006, at age 65, he once more set out on his bicycle, this time to present a petition to the Prime Minister, and to try for the third time to put his resolution before the Canadian Bar to establish *pro bono* clinics across Canada at their Annual Meeting in St. John's, Newfoundland. Two days into the journey, he learned that he had been acknowledged for distinguished service by the Canadian Bar. He left his bicycle and took the bus back to Vancouver to receive the award and then resumed his trip.

At 6pm on July 31, 2006 near Sault St. Marie, a mini-van failed to see Dugald on his bicycle and killed him outright. Dugald Christie gave up a lucrative law practice and enviable lifestyle and, in the end, lost his life pursuing the cause of justice for all. His family and the many that supported Dugald and his life's journey pray that the many causes to which he dedicated his life will be completed.

The Weldon Award for Unselfish Public Service, sponsored by the Dalhousie Law School Alumni Association, was established in 1983 to serve as a tribute to the ideals of the Law School's first dean, Richard Chapman Weldon. Mr. Christie's son, Oliver, accepted the award on behalf of the family.

"No right to tax-free counsel" Supreme Court"

Makin, Kirk, *The Globe And Mail*, 25 May 2007.

The Charter of Rights does not provide litigants with a blanket right to obtain legal counsel, the Supreme Court of Canada ruled Friday Morning.

The Court made the statement while unanimously upholding a B.C. tax on legal services that critics had criticized as forming a barrier to those who cannot afford legal services.

"Access to legal services is fundamentally important in any free and democratic society," the judges said, in a ruling that identified no single author.

"In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law."

The ruling soured the legacy of Dugald Christie, a Vancouver lawyer who died several months ago when he was struck by a car as he bicycled across Canada [wearing his black courtroom robes and a "Reform the Justice system" sign on his back] to raise money for his cause – access to justice for the poor. Mr. Christie was just outside Sault Ste. Marie when he was killed.

"Notwithstanding our sympathy for Mr. Christie's cause, we are compelled to the conclusion that the material presented does not establish the major premise on which the case depends – proof of a constitutional entitlement to legal services in relation to proceedings in courts and tribunals dealing with rights and obligations," the court said Friday.

Enacted in 1993, the British Columbia's Social Service Tax Amendment Act imposed a 7-per-cent tax on the price of legal services. While the province maintained that its purpose was to fund legal aid, the proceeds were put into general revenue. This made it difficult to ascertain how much actually ended up enhancing access to justice.

In upholding the tax, the Supreme Court said that its ruling does not foreclose the possibility that in certain, very specific circumstances, it may find that a fundamental right to counsel is guaranteed by the Charter of Rights and Freedoms.

"The right to access the courts is not absolute and a legislature has the power under s. 92(14) of the Constitution Act, 1867, to impose at least some conditions on how and when people have a right to access the courts," it said.

"We conclude that the text of the constitution, the jurisprudence and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel may be recognized in specific and varied situations. But at the same time, they do not support the conclusion that there is a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations."

David Stratas, a Toronto constitutional lawyer with Heenan Blaikie LLP, said that the court has ruled out a "broad right of free access to justice for all on every occasion.

"In other words, government does not have to set up a 'judicare' scheme where people have cost effective access to legal services in all contexts at all times," Mr. Stratas said. "While the door is slammed shut on broad claims of access to justice without obstacles, it remains ajar for individual claims based on good evidence showing tough circumstances."

Mr. Strates said that the claimant's aim was too sweeping. "The problem with the claim was that it tried to strike out the tax on all occasions in all contexts without sufficient evidence in support of such a sweeping remedy," he said. "A more surgical approach based on a few clients' circumstances might have gotten further."

"Another way of seeing the case is that the litigant gave the court only half the deck of cards – just the cards showing the hardship of the tax," Mr. Stratas said. "The court needed the other half of the deck, which is the fiscal impact of striking down the tax. If you are seeking sweeping relief, you need sweeping evidence in support."

1.0 INTRODUCTION

Nature Of Paper

This anthology summarizes, or excerpts from, judicial decisions, book and journal scholarship, legislation and reports, published primarily from June 2006 to June 2008, which address (i) 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 and endnotes are omitted from excerpted material.)

Previous Papers

Seven previous comparable anthologies have been published: "Scruples" (1987), 2 C.F.L.Q. 151-197 (canvassing the period from the birthdate 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); "Sensitivity" – for the National Family Law Program, 2004 (covering the period June 2002 to June 2004, and "Sincerity" – for the National Family Law Program, 2006 (covering the period June 2004 to June 2006).

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 (at his passing), 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 (especially those practising 'family law') comprises, as of 31 December 2006, 74,483 lawyers; 77% of whom (57,295, including 34% (19,508) who are female lawyers) hold practicing status. (These most recent Federation Of Law Societies Of Canada figures do not include Quebec, and do not include, nationally, such categories of lawyers as "honorary" or "suspended" (for example, 3,293 suspended lawyers in Ontario as of 31 December 2006).)

In 2005, based on Canada Revenue Agency data, the median income of Canada's lawyers and Notaries was $96,527.00 (up from $84,120.00 in 2000). The median income of 'family law' lawyers could not be obtained.

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). In 2004, other substantial alterations and additions were made. A revised *Code of Professional Coduct* was published in August 2006. Later this year, the Code may be amended, or supplemented with guidelines, reference conflicts and practising with the new technologies.

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 provincial and territorial governing bodies, 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 earlier *Model Code.* The *Model Rules* have undergone major revision based on the November 2000 proposals of the ABA Ethics 2000 Commission on the Evaluation of the Rules of

Professional Conduct. (Courts, rather than lawyer governing bodies, are responsible for lawyer discipline in some United States' jurisdictions.)

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 (abanet.org) 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 a higher 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 twelfth 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

"Good-Looking Lawyers Make More Money, Researcher Says"

Weiss, Debra Cassens, *abajournal.com*, 02 January 2008
(*in part*)

A researcher studying the impact of beauty has found that good-looking lawyers—like other professionals—make more money than their colleagues with lesser looks.

Economist Daniel Hamermesh of the University of Texas bases his conclusion on the photographs of graduates of an unnamed law school. Those rated attractive in the photos went on to make more money than less-comely students, the *Economist* reports.

He also found that lawyers in private practice tended to be better looking than those who worked in government jobs.

"Hitting the books"

Chisling, Ava, *National*, January-February 2008, pp. 48-49
(*in part*)

If you're a law student wondering why you have to take a legal ethics course, you can probably thank Richard Nixon.

In the United States, the Watergate investigation in the 1970s turned up widespread lawyer involvement in the scandal, and the profession was motivated to take action in response. The American Bar Association ruled that it would only give accreditation to universities that taught ethics. That's largely why today, ethics is a regular part of the American law school curriculum.

But 30 years later, legal ethics is still not a mandatory course at many Canadian law schools. Why not? "We are still developing our sea legs when it comes to teaching ethics in Canada," says Trevor Farrow, an assistant professor at Osgoode Hall Law School in Toronto. "Schools have been slow because there is an historic divide between the academy and the profession.

"It may have started Watergate," Farrow says. "But events like Enron and Hollinger continue to happen, and the public looks to the involvement of lawyers in these scandals. These events demonstrate that more needs to be done." Alice Wooley, who teaches ethics and other courses at the University of Calgary Faculty of Law, also recognizes the effect of Watergate on ethics coursework. But she also believes that historically, there was an assumption that ethics could not be taught—either a lawyer knew how to be good, or he didn't.

"The good news is that there seems to be a very broad buy-in now," she reports. "In the past ten years, ethics has gone from a subject of concern to maybe less than five people in Canada to meetings two years in a row of everyone teaching ethics in the country."

Not everyone was slow to put ethics in the classrooms. Law schools such as Dalhousie and the University of Alberta have been teaching ethics for years, and some, like the University of Manitoba and the University of Western Ontario, made it mandatory. But at others, the 2007-2008 academic year marked the first time students had to take ethics in order to graduate.

"Profit pursuit imperiling professionalism"

Schmitz, Cristin, *The Lawyers Weekly,* 18 April 2008, pp. 1, 20.

Lawyers' drive to garner high incomes from private practice is making legal services unaffordable to the middle class and undermining lawyers' professionalism.

That uncomfortable proposition was a clear thread woven through the comments of leading lawyers and judges here at a University of Ottawa conference on legal professionalism last month.

Canada's top judge, Beverley McLachlin, set the tone by admonishing the audience of practitioners and law students that "we can't take the business out of law, but we have to put professionalism back in the driver's seat."

"Let's face it, we are falling down on access to justice," the Supreme Court's chief justice remarked.

She noted that the "pressure to earn can push fees higher, and it can also affect access to justice. It can squeeze out work that is good for the public, and sometimes good for lawyers."

"We must remember," she stressed, "with the privilege of self-regulation comes the obligation of professionalism, and we must never forget our vocation and obligation to serve the public good." Ontario's top judge delivered a similar message. Chief Justice Warren Winkler emphasized that access to justice is "the single, fundamental, most important issue to the justice system in this province today."

He contrasted the profession's current high expectations of income and its move in the 1980s to dockets and billable hours with the situation when he started practicing in Toronto 43 years ago. "What it was really like, I guess, was that people thought that it was at once a question of practising a very honourable profession, and making a decent living," he recalled.

"The emphasis certainly, and decidedly, was not on making a lot of money, was not about being in business. It was not about materialism, and it was not about acquiring a lot of assets or a lot of worldly goods. The emphasis was on the professional aspect."

Chief Justice Winkler said no one kept dockets in those days. The amount of time spent on a case "was determined entirely on what the case called for, and how thoroughly you wanted to be prepared. It had nothing to do with how much you could charge," he said. "It was about personal pride, and doing the best for your client ... and it was about doing the best thing you could do for the court that was going to hear that case."

He alluded to a leading employment law case decided years ago which was argued by senior counsel but which involved only a thousand dollars or so. "The fee would have been insignificant," he remarked.

At that time legal entrepreneurialism meant running an efficient law office, not "taking a share in your clients' business and ... making a lot of money out of it," he added.

"People who were lawyers, but thought that their primary interest was either in making a lot of money, or in business issues, left the practice of law and went into business. They didn't mix it up with their legal profession."

Now many lawyers have higher income expectations, he noted. But when they both practice and get involved with the business of their clients, "there is a risk that the public will perceive that the professional lawyer ... is not devoting their entire focus, [their] undivided attention to [the client's] problem if they have this distraction ... of having an involvement in the business aspects of one of their client's businesses."

Senior civil litigator Margaret Ross of Ottawa's Gowling Lafleur Henderson, who was called to the Bar in 1976, said the public no longer has much faith or trust in lawyers who they see as "self-interested, money-obsessed champions of the corporate world and not as the allies of 'the little guy'. In their view, lawyers are somewhat like politicians: not to be believed, fickle and motivated by self-interest."

Ross said the public's jaundiced view is unsurprising given that "we ourselves may have forgotten what a life in the law is supposed to be about." In her keynote address to the conference, entitled "Challenges to the Standards of Professionalism in the Legal Profession," Ross suggested "perhaps we have ourselves to some extent, lost sight of the fact that law is not simply a business. It is a calling. It is no coincidence that the words 'advocate' and vocation' both come from the same Latin root: vocare, meaning 'to call'."

Ross said that in exchange for its self-regulating monopoly, the profession must act with integrity and discretion and put the public's interest ahead of its own. "Without these conditions, we are little more than the purveyors of costly consumer services."

Ross identified economic pressures, and the delays flowing from the present preoccupation with process in civil litigation, as two rising threats to lawyers' professionalism.

The growing cost of legal education, and the fact that many lawyers do not come from privileged backgrounds and are saddled with big debts upon graduation, put financial stress on lawyers, she suggested. "It is trite to say that lawyers should get paid for their work. At the same time, it is disconcerting that a lawyer's worth is increasingly often measured solely in terms of dollars. More and more, financial considerations have become the guiding force behind the modern law firm."

Such pressures can negatively affect the quality of work and advice as lawyers do not have enough time for reflection and analysis, she said.

Ross argued the future of the profession will be imperiled if financial pressures lead lawyers to jettison such non-billable activities as *pro bono* work, mentoring younger lawyers or participating in professional organizations.

Ross said over-emphasis on the billable hour also feeds disillusionment among lawyers, who may not feel a sense of accomplishment from their work. "We need to remember that we chose law school over business school for a reason," she remarked.

She also pointed out that the percentage of lawyers opting for private practice has plummeted from 65 per cent in 1994 to 53 per cent in 2005.

"More and more lawyers, not only female, are making it abundantly clear that they don't want, or need to be, one of the 'Top 40 under 40' or a 'Lexpert'-recommended expert in their field," Ross observed. "More and more lawyers are saying that they don't want or need to make millions, and may not even want to join the partnership."

Ross urged law firms to respond to this phenomenon with options and choices about hours, status and remuneration. Otherwise, she warned, the profession faces the prospect that in 20 years time "there will be no one left to 'run the show'."

"Professionalism Clearly Defined"

Hamilton, Neil, (2008), 18 *the Professional Lawyer* (No. 4) 4, at pp. 4, 14.

A critical question for the legal profession is whether the profession and each individual lawyer can do better than they are doing today in realizing the profession's public purpose, core values, and ideals. Take a moment and answer the question for yourself. The 2007 Carnegie Foundation for the Advancement of Teaching's substantial study, *Educating Lawyers. Preparation for the Practice of Law,* finds that legal education and the profession itself could do substantially better at socializing students into an ethical professional identity.

Since the mid-1980s, the concept of "professionalism" has been the focal point for the organized bar's debate whether the profession is adequately renewing its public purpose, core values, and ideals in each generation of lawyers. A significant theme in the early debates on professionalism was that recent trends in the profession had undermined some of the core values and ideals evident in the practicing bar in earlier periods of the profession's history. The ABA's 1996 Haynsworth Report noted particularly "the loss of an understanding of the practice of law as a calling" and "the loss of civility." "Professionalism" for many lawyers has meant the bench and bar's response to these perceived losses in recent decades and the consequent loss of public standing.

Arguments by generations of lawyers who graduated prior to the 1980s that ethics were higher and lawyer conduct more civil earlier in their careers, while understandable, are subject to the charge that such an "ethical golden age" did not exist, and in fact there were serious ethical problems of scoundrels, discrimination, and lack of diversity in the earlier time period. Claims of more ethical conduct or more civility in earlier periods are difficult to test empirically.

Moreover, debates over the comparative ethics of different generations of lawyers are not useful. The critical question at any point in the legal profession's history is not whether the profession had more civility or a deeper sense of calling at an earlier period. The critical question is whether the profession and each individual lawyer can do better than they are doing today in realizing the profession's public purpose, core values, and ideals?

The concept of "professionalism," separated from any type of argument that an earlier golden-age existed when ethics were better, is extremely useful to answer this question. Professionalism describes the important elements of an ethical professional identity into which the profession should socialize both law students and practicing lawyers. This approach to professionalism connects the public purpose, core values, and ideals of the profession with the goal of fostering an ethical professional identity within each lawyer.

To maintain and strengthen the social contract on a continuing basis in each generation,

the profession must socialize both law students and practicing lawyers into the principles of professionalism — the important elements of an ethical professional identity. This is the critical task for legal education, law firms and departments, bar groups and the bench. It is the mandate of professionalism that keeps self-interest in check and builds both the public trust that the profession is fulfilling both the social contract and each client's trust that the lawyer is restraining self-interest to serve the client's interests.

Professionalism is and must be much more than excellent technical competence and civility. It is the bridge from making a satisfactory living to purpose and meaning in the work of a lawyer. William Sullivan emphasizes "By taking responsibility through one's work for ends of social importance, an individual's skills and aspirations acquire value for others. Professionalism thereby forms a crucial link between the individual's struggle for freedom in a fulfilling existence and the needs of the larger society… ." Professionalism is the bridge from self-interest to a calling where the lawyer's livelihood acquires meaning by serving the public purpose of justice which is central to a highly interdependent society.

It is a paradox that the professional autonomy of each lawyer to employ his or her human capital to substantial advantage and personal satisfaction depends on each individual lawyer's acceptance and internalization of the correlative duties of the social contract—the principles of professionalism. The lawyers who live the principles of professionalism create a public good for the profession as a whole—a type of shared property available to all licensed lawyers. The professionalism of these lawyers creates public trust that the profession is fulfilling the social contract, and the public therefore continues to grant the profession autonomy to self-regulate with substantial influence over the justice system. If too many lawyers become free riders, taking advantage of the shared property created by public trust while solely pursuing self-advantage, the public will lose trust and revise the social contract. Each lawyer will lose some autonomy in that revision.

Current scholarship tells us little about which approaches are most effective in socializing law students and practicing lawyers into the principles of professionalism. We need leadership from both legal education, the practicing profession, and the bench … to emphasize the importance for the profession that this socialization occur and to support efforts to assess which pedagogies are most effective to help adult professionals grow over a career into an ethical professional identity.

"Time escapes me:
Workaholics and time perception"

Keown, Leslie-Anne, Statistics Canada – Catalogue No. 11-008, 2008.

Work, regardless of how we define it and whether we are paid for it or not, is a core element of our lives. It adds structure to our waking hours – we have somewhere to be, something to do and it gives us a sense of identity in the larger world outside the personal circle of family and

friends. However, there are some people for whom we think work occupies an even more central place in their lives. And if we think the importance they give their work has become exaggerated, we often call these individuals workaholics.

Workaholics are a stereotype of modern life, and they are both praised and criticized. On the one hand, working to the exclusion of all else may be seen as an asset in the corporate world, and in some professions it may be the accepted way of earning promotion. On the other hand, workaholics may be viewed as neglecting aspects of life such as family and leisure that are important for maintaining a healthy equilibrium.

But perhaps more important in any discussion of workaholics is how they perceive themselves. Being a workaholic—over-dedicated and perhaps overwhelmed by their jobs—is part of their identity. The perceived demands of the job has become the lens through which they view all their other priorities and the time available to fulfill them.

Using data from [the] 2005 General Social Survey on time use, this article looks at those who identify themselves as workaholics and asks if this self-identification affects their quality of life as measured by the balance between work and family time, time pressure and general life satisfaction.

Almost one-third of working Canadians say they are workaholics

Almost one-third of employed Canadians aged 19 to 64 (31%) identify themselves as workaholics [concludes the 2005 General Social Survey on time use] . This percentage has not changed since the General Social Survey (GSS) first began collecting these data in 1992.

Since they are so numerous, it is not surprising that real workaholics don't match the pop culture presentation of workaholics as an elite group of high octane over-achievers. They are no more likely than non-workaholics to be young, highly educated, city dwellers or high-income earners … . With so little actual socio-demographic difference between workaholics and non-workaholics, we must search somewhere else to find the distinguishing characteristics that separate the two groups.

Workaholics have a different work profile

Although the popular picture of a workaholic may be one of the high-profile professional, this profile appears to be somewhat inaccurate. Only two broad occupational categories showed a higher percentage of self-reported workaholics than the average - management and trades. Professionals and people in technical and clerical occupations had a significantly lower percentage of those who identify as workaholics among their ranks.

The lower level of workaholics amongst those in a professional occupation is somewhat puzzling. Why would managers be workaholics and professionals not be? Perhaps professionals, such as doctors and lawyers, accept that working longer hours are an integral part of their professional role, whereas managers view these conditions as uncompensated but necessary conditions of their position. As for the higher incidence of workaholics in the trades, an

over-abundance of work, coupled with a labour shortage in the skilled trades, might be a contributing factor to this phenomenon.

Workaholics do not enjoy work more but they are less satisfied with life

The perception of the workaholic as always working does distinguish workaholics from non-workaholics … . Workaholics were twice as likely to report they usually worked 50 or more hours per week, at 39% compared with 20% for non-workaholics.

However, they found no more pleasure and satisfaction in their work than non-workaholics. According to the 2005 GSS, self-reported workaholics did not report that they enjoyed work more than non-workaholics … . Nor were they more satisfied with their jobs than other workers. This finding does contradict the results of some previous research.

On the other hand, a key difference between workaholics and non-workaholics is that workaholics are more likely to say that their work and home lives were out of kilter. One-third of workaholics reported that they were dissatisfied with their work-life balance, compared to about one-fifth of non-workaholics.

This perceived imbalance between the demands of home and work reflects itself in related areas. A much higher percentage of workaholics than non-workaholics report worrying that they do not spend enough time with friends and family, and that they feel under stress to accomplish more than they can handle.

A sense of disequilibrium is echoed in other aspects of the workaholic's life. People who self-identified as workaholics are more likely to report that they have fair or poor health than non-workaholics. A higher percentage also have trouble going to or staying asleep, perhaps because they are more likely to cut back on sleep when they do not have enough time to finish their other goals during the day.

Not only do workaholics report more negative health effects than non-workaholics, they also indicate lower levels of satisfaction with their life overall. Workaholics are also more likely to report being unsatisfied with the way they spend their non-work time, implying that they know this aspect of their lives could be improved.

Interestingly, workaholics are not different than non-workaholics in terms of their satisfaction with their financial situation. This suggests that the drive to work as they do may arise from some other factor than the need to earn more income.

Workaholics see time slipping through their fingers

The differences between people who see themselves as workaholics and those who do not carry over into their perceptions of time pressures. Overall, workaholics appear to find the unsatisfactory way that time is divided between the priorities in their lives is a source of concern; specifically, they seem to believe that the way they spend their time is somehow beyond their control … .

A higher proportion of workaholics report that they usually feel rushed trying to get through the day (86% versus 73% of non-workaholics). Over half indicate that they feel trapped in a daily routine. More workaholics than non-workaholics feel that they do not accomplish what they set out to do at the beginning of the day (56% versus 44%). Over one-third of workaholics would like to spend more time alone.

Workaholics seem to recognize that they have a problem using their time effectively. With 56% of workaholics saying they feel they do not have time for fun anymore (much higher than the one-third of non-workaholics), many plan to change their ways. One-third of workaholics reported that they plan to slow down in the coming year, compared to one-fifth of non-workaholics. Whether or not they will be successful in gaining more control over their time is not known.

But given that being a workaholic is now part of their identity, we might guess this is an elusive goal.

Summary

Almost one-third of working adults perceive themselves as workaholics. Yet discovering what differentiates the workaholic from the non-workaholic is more difficult than it may first appear. Workaholics and non-workaholics do not differ from each other in any socio-demographic way. Workaholics work more hours and have a slightly different occupational profile than non-workaholics, but this is not the distinguishing characteristic between the two groups.

Rather, self-reported workaholics and non-workaholics have distinctively different ways in which they view their time and the way they allocate that time to their various priorities. Time appears to slip through the workaholic's fingers. They devote more effort to work, but they derive no more satisfaction or pleasure from it than do non-workaholics. They are dissatisfied with their work-life balance and wish they could spend more time with family and friends. Alternatively, they would like to spend more time alone. Perceived lack of time is a bigger stressor in their everyday lives than it is for non-workaholics. It leaves them feeling rushed, trapped in their daily routines and unable to finish everything they think needs to be done. Overall, time seems to escape them.

"The Ratings Game[:]
Lawyers vie to be 'super' and 'best,' to the consternation of some ethics regulators"

Carter, Terry, ABA Journal, January 2007, pp. 27-28
(in part)

Two years ago, Womble Caryle Sandridge & Rice, an entrepreneurial firm known to sharpen the cutting edge, decided to pay a lawyer ratings company for extra bells and whistles.

The firm spent $100 each to have 64 lawyers promoted beyond a basic, free listing to include links to online biographies from the ratings Web site.

After a year, the firm checked to see how it had done. Of the 64 bios, seven had been accessed, one each. "That's close to a thousand dollars a click," says Press Millen, chair of the Raleigh, N.C., firm's client development committee. "This was not a cheesy, fly-by-night outfit. But I thought that much per click was a bit pricey."

The gold standard is Martindale-Hubbell's ratings, which started in 1887-88. The next splash came 96 years later, with the launch of *The Best Lawyers in America* in 1983. Then came *Super Lawyers* in the early 1990s, starting in Minnesota but beginning its rollout to other states in 2003. That same year, Chambers and Partners, the British ratings concern, launched Chambers USA. More recently, Lawdragon, started by a prominent legal affairs journalist who hired other ink-stained wretches to apply their skills, joined the ratings game.

There are more players to be found—and likely more to come.

Some of the ratings systems have particular appeal for plaintiffs lawyers. "Consumers of legal services can be impressed by this kind of recognition," says Dale K. Perdue, a Columbus, Ohio, lawyer and former president of the Ohio Academy of Trial Lawyers.

"There is some merit to most of them," Persdue says "They're a reflection of your peers' views, even if in some ways a popularity contest."

Not that some lawyers and firms don't try to work the system. Ratings company methodologies vary. Those who use balloting systems for peer review tinker with ways to keep things honest, such as discounting votes by lawyers for people in their firms.

Lawyer ratings came under criticism recently from the New Jersey Supreme Court's Committee on Attorney Advertising, as well as from the New York court system's proposed amendments to the Rules Governing Lawyer Advertising.

In New Jersey, the committee said in Opinion 39, issued last July, that attorneys should not buy ads touting their ratings in surveys done by *The Best Lawyers in America* and *Super Lawyers.*

"The Mayonnaise Jar and 2 Cups of Coffee"

Nichols, Neil, Chancer Chambers Law Corporation, *Lang Michener Supreme Court of Canada Lawletter*, 22 March 2007, pp. 10-11.

When things in your lives seem almost too much to handle, when 24 hours in a day are not enough, remember the mayonnaise jar and 2 cups of coffee.

A professor stood before his philosophy class and had some items in front of him. When the class began, he wordlessly picked up a very large and empty mayonnaise jar and proceeded to fill it with golf balls. He than asked the students if the jar was full. They agreed that it was.

The professor then picked up a box of pebbles and poured them into the jar. He shook the jar lightly. The pebbles rolled into the open areas between the golf balls. He then asked the students again if the jar was full. They agreed it was.

The professor next picked up a box of sand and poured it into the jar. Of course, the sand filled up everything else. He asked once more if the jar was full. The students responded with an unanimous "yes."

The professor then produced two cups of coffee from under the table and poured the entire contents into the jar effectively filling the empty space between the sand. The students laughed.

"Now," said the professor, "I want you to recognize that this jar represents your life. The golf balls are the important things – your family, your children, your health, your friends and your favourite passions – and if everything else was lost and only they remained, your life would still be full.

The pebbles are the other things that matter like your job, your house and your car.

The sand is everything else – the small stuff. "If you put the sand into the jar first," he continued, "there is no room for the pebbles or the golf balls. The same goes for life. If you spend all your time and energy on the small stuff you will never have room for the things that are important to you.

"Pay attention to the things that are critical to your happiness. Play with your children. Take time to get medical checkups. Take your significant other out to dinner. Play another 18. There will always be time to clean the house and fix the disposal. Take care of the golf balls first—the things that really matter. Set your priorities. The rest is just sand."

One of the students raised her hand and inquired what the coffee represented. The professor replied "I'm glad you asked. It just goes to show you that no matter how full your life may seem, there's always room for a couple of cups of coffee with a friend."

"Women lawyers face same challenges as trailblazers"

Fraser, Natalie, *The Lawyers Weekly*, 23 March 2007, pp. 1, 16.

The stories of the first women lawyers provide important links between historical challenges and current issues for women in the legal profession, according to a panel celebrating International Women's Day at the Law Society of Upper Canada's Osgoode Hall in Toronto.

Many women at the turn of the 20th century found it necessary to choose between marriage and a career in law, said Mary Jane Mossman, professor of law at Osgoode Hall Law School and author of *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions*. And according to Mossman, who was one of four speakers at the panel discussion on March 7, this choice continues to challenge women lawyers today.

Mossman explored several historical patterns that emerged based on women's past struggles in her presentation. The first pattern reflected those early women lawyers whose primary focus was the practice of law, Mossman said. Most of them never married, and they worked hard to establish successful practices. Clara Brett Martin, the first woman lawyer in Canada, exemplified this pattern. Called to the Bar in 1897, she overcame tremendous hurdles including having to fight for special legislation to permit the admission of women as solicitors. Thereafter, she established a successful practice, remaining single all her life.

A second pattern included early women lawyers who practiced law for a brief period before choosing to marry. Ethel Benjamin, New Zealand's first woman lawyer, fit this pattern, Mossman said. Benjamin qualified to practice law in 1897, and although she suffered professional discrimination and social ostracism, established a thriving firm. However, after 10 years, Benjamin married and shortly thereafter left the practice of law.

The struggles of these and other early women lawyers may seem quaint in view of the fact that at law schools today, women often form the majority of students. But the difficulty of blending the practice of law with raising a family continues, Mossman said.

The statistics back up this view. A 2004 study by LSUC entitled "Turning Points and Transitions: Women's Careers in the Legal Profession" compiled the data taken from surveys of more than 1,500 lawyers over a number of years. One of the study's conclusions was that "women's advancement in the profession remains seriously hindered by child-rearing responsibilities compared with their male colleagues. Workplace supports and flexibility remain inadequate. The career consequences of children and family responsibilities are borne primarily

by women. The impact can be seen in the gender disparities in earnings, promotions, partnerships, career opportunities and attrition of women from the profession."

Panelist Fiona Sampson, director of litigation at the Women's Legal Education and Action Fund (LEAF), discussed some of the difficulties women face today in practicing law while raising children. She provided an example of a young woman lawyer whose assigned mentor at her law firm became pregnant and went on maternity leave. The mentor came back to practice after only three months of leave instead of taking the full year she was entitled to.

"The young woman feels that now the norm had been set, that three months is the max," Sampson said. "If you take more than three months from the firm, you're not serious about your career and then you get 'mommy tracked'."

Clair L'Heureux–Dube, former justice of the Supreme Court of Canada, discussed the progress she has seen for women lawyers in this area as well as her hopes for the future.

"I see the new generation of young men and women committed to equality. It translates into their families…I see them sharing, I see it in my daughter too, and her husband. They are interchangeable, which didn't happen before," L'Heureux-Dube said.

L'Heureux-Dube noted that the *Charter* and the courts have helped sensitize young people to equality issues such as the ones facing women today.

Joanne St. Lewis, bencher in LSUC and assistant professor of law at the University of Ottawa, discussed the mentoring process as a means of helping young lawyers deal with these issues.

"We have to think about mentoring in a much more sophisticated way…We have to think concretely how to shape [young lawyers'] careers and how to help them navigate some really tough positions."

Mossman believes that studying the lives of the early women lawyers will help in finding answers to the problems facing women lawyers today. "Obviously there are changes – you wouldn't have 55 per cent of law classes being women if something hadn't changes," Mossman said. "But there are still far too many of those students who aren't members of the profession 10 years after their call to the Bar. So it seems to me there is still a need to work on these issues.

[**Editor's Notes**: **(1)** For a comprehensive consideration of this subject, see: Pinker, Susan. *The Sexual Paradox: Extreme Men, Gifted Women and the Real Gender Gap* (Toronto: Random Howe Canada, 2008]. **(2)** Coincidentally, the year in which Clara Brett Martin was admitted to legal practice, Louise Maud Saunders was born in Greenspond, Bonavista Bay, NL. She qualified to practise law on 04 April 1933 (after several years' employment as a law office secretary), and actively continued to practice, at St. John's, NL, until her death on 14 June 1969. The statements attributed to her in the 04 August 1946 edition of *The Evening Telegram*, St. John's, speak volumes about the essence of law practice: "The legal profession is one to which patience, perseverance, and probity must be brought. In return, the lawyer has work that is never monotonous."]

"Barristers may be graded on quality"

Gibb, Frances, *The Times*, London, 10 April 2007
(*in part*)

Incompetent barristers whose courtroom advocacy falls below par will be referred by judges and colleagues to a "remedial" panel to bring them up to scratch, under measures proposed today. The Bar Council is also proposing a grading scheme to grade barristers who do legal aid work according to proficiency and experience.

The measures are part of a package of proposals [in a paper] being put out for consultation by the Bar Council, the body that represents 14,000 barristers in England and Wales.

The proposed Bar quality advisory panel will deal with barristers whose advocacy or advice is regarded as "shoddy" or below par.

The panel will offer help to the barrister to bring his or her service up to standard.

Second, the paper proposes a quality assurance grading scheme for barristers doing legal-aid work which will rate barristers by experience and ability.

Such a scheme was recommended in the recent report on the legal aid service, by Lord Carter of Coles and is to be piloted by the Legal Services Commission, which runs legal aid, in the autumn.

Today's paper also proposes regular "servicing" for qualified barristers, with those who have been qualified for between four to six years doing three hours training a year.

Geoffrey Vos, QC, the Bar chairman, said: "The biggest selling points for the profession are the high quality of service it offers, and the value for money it provides.

"The Bar Council wishes to ensure that barristers aspire to and achieve excellence, so that the future of the profession is assured." He said that the proposed Bar quality assurance panel would provide a mechanism through which judges and fellow professionals can refer a barrister's conduct to a panel, which will act as adviser and helper, rather than as a disciplinary body.

"The panel will not be regulatory in any sense. It will not make formal complaints. It will advise a barrister how to improve, whether by taking advocacy training or by other means." He added: "Quality control is not a threat to our independence. And must not become burdensome or disruptive.

"Access to legal representation remains a pricey proposition"

Beauchamp, Paula, *The Calgary Herald*, 12 August 2007, p. 1

Average Canadians' access to justice is at a low point and something must be done to fix the problem, Canada's chief justice told a lawyers' conference in Calgary on Saturday. [10 August 2007].

Beverley McLachlin, chief justice to the Supreme Court of Canada, said large wealthy corporations can afford the high cost of a good lawyer while those with low-incomes, facing serious criminal charges, will qualify for legal aid.

But middle-income Canadians are "hard hit," she said, often having to put a second mortgage on their home, or use funds set aside for retirement or children's education to ensure they're well represented in court.

"The price of justice should not be so dear," McLachlin told the Canadian Legal Conference & Expo held Saturday at the Telus Convention Centre.

"Today we face an increasingly acute problem.

"We are at one of those points when something must be done."

McLachlin urged lawyers and governments to work together to make it easier for all Canadians to access justice.

Her comments came Saturday as Alberta announced a 10 per cent increase in the income threshold guidelines for legal aid, designed to give more Albertans access to justice.

Approved by Legal Aid Alberta and Alberta Justice, the move is expected to reduce the number of litigants attempting to represent themselves.

Members of the judicial system have repeatedly expressed concern about delays caused by the increasing numbers of unrepresented litigants who cannot afford a lawyer.

It is a concern that is close to McLachlin's heart.

She said self-represented litigants place burdens on the courts and other parties to litigation.

Speaking before about 800 lawyers at the conference, McLachlin also defended the profession, which has come under attack, with accusations lawyers are "rats" who lie and cheat.

"I don't think name calling and exaggeration helps," McLachlin said.

"We should recognize there are hundreds of thousands who work for relatively low salaries and lawyers have always been concerned to provide access to justice."

The comments follow the publication of a Maclean's magazine cover earlier this week that bore the words, "Lawyers are Rats".

Alberta has increased its legal aid funding over the past two years by 46.3 per cent or $14.3 million, but the federal government has not, according to the Alberta government.

"Exile On Bay Street"

Scott, Alec, *Toronto Life,* August 2007
www.torontolife.com/features/exile-bay-street/
(*in part*)

Until an autumn day in 1998, I was headed along a well-travelled path, but, on that day, I was diverted. Three years out of the University of Toronto's storied law faculty, I was employed as a junior associate at a downtown law firm—a civil litigation boutique with an odd mixture of specialties ranging from defamation to maritime law, from insurance to aviation. I was in my office, on the 21st floor of a ziggurat-like tower at Yonge and Queen, sending out e-mails to my colleagues soliciting work. I had just finished assisting a partner in a constitutional case at the Ontario Court of Appeal, and for the first time since joining the firm, I didn't have much on my plate.

The phone rang. Would I come to the interior conference room, the one with the ugly pastels? There, looking sheepish, were two of my favourite partners: a courtly aviation specialist, a Louisiana native who always wore a fedora outside; and one of the firm's few senior female lawyers, a soft-spoken Scottish-Canadian. At once, I knew what was coming, why I had no work. I was about to be fired.

They sat me down and said that after a strong start at the firm, I'd apparently lost my drive. I was billing too few hours. I didn't seem happy. I sometimes didn't give the impression of wanting to learn. The worst of it was that everything they said was true. I had been miserable for at least a year. I hated beginning my day by finding a nasty e-mail in my inbox (sent at 1:28 a.m.) or a vicious phone message from another lawyer (left at 2:25 a.m.). I despised being on my feet in front of rude, overworked judges. I had such bad performance anxiety that quite often, just prior to a court appearance, I'd excuse myself, go to the washroom and vomit.

The summer before my dismissal, I'd taken a three-month unpaid leave of absence to put on a play—what is known in the trade as a CLM, a career-limiting move. On extremely trying days at the office, I'd think of W.B. Yeats's dictum, "Too long a sacrifice can make a stone of the heart," and pray not to turn into the listless drone with "Carpe Diem" as his screen saver. In various

moments of deep despair, I had drafted but not sent multiple incendiary resignation letters. Though the shame of being fired was almost unbearable, deep down I was relieved.

The partners offered me an adequate severance package, decent, if tepid, references, and the promise to help me in any way they could. But this job, this phase of my life, was over. So this is how it feels, I thought, staring dully at an ugly abstract painting on the wall. So this, at last, is failure. Firing happened to other people, not to people like me. I excused myself politely and went home.

My friends and family thought I should try for another job in the field. And I'm sure I could have found one. I had decent marks, solid experience, good connections. But I couldn't stand the idea of interviewing at another firm, trying to convince them that I wanted a job. I didn't. I wanted out.

And so I shifted from the respectable, besuited profession of law into the relatively disreputable, turtlenecked trade of journalism. Some of my friends were bewildered, others filled with pity. But a few seemed envious.

My feelings about the law are not unique. Many of the lawyers of my generation are unhappy with their working lives. At parties, they tend to admit how they gain their livelihoods reluctantly, usually with quick disclosure of other mitigating facts—a taste for jazz, an interest in architecture. You'd think they were in the porn industry, given how little they talk shop, how ashamed they seem of their day jobs.

Here's what you won't read in the glossy law school brochures, what many practising lawyers know, but deny: the practice of law has become a lousy way to make a living; it breaks all but the highest spirits. The profession can no longer lay claim to being a calling; it has become a soul-destroying business. The big downtown Toronto firms, which used to draw some of the country's best and brightest, continue to draw its brightest, but no longer hold on to its best. The cynics flourish, while the idealists lag, jump ship or, unable to beat the cynics, join their ranks.

"The Search For Justice"

Slayton, Philip, *Lawyers Gone Bad [:] Money, Sex And Madness In Canada's Legal Profession* (Toronto: Viking, 2007), chap. 16.

How much justice can the average Canadian afford? None. For financial reasons, he is denied use of the legal system and courts, key institutions of government and democracy. It is as if the right to vote in a general election were given only to those with an income above a certain level. Do not look to the legal profession to solve this problem. The answer will not be found within legal culture.

In 2004, average after-tax earned income for a "non-elderly" male living in Canada (a Statistics Canada category) was $28,300; for a "non-elderly" female, $24,400. If this is how much money you make, you won't get legal aid (available only to those who are really poor), and will almost certainly be denied the *pro bono* legal services that socially concerned lawyers occasionally offer. If you need a lawyer, you'll have to dig into your own pocket. In the cities, even a junior lawyer charges $200 or more for an hour's work. A routine matter can cost as much as a mid-priced car. Fees of this magnitude are beyond almost everybody's ability to pay.

Young people go to law school to improve or consolidate their social and economic position. Horatio Alger told us that hard work and virtue can overcome adversity and lead to great wealth and respect. Law school can put the child of a poor immigrant into a Bay Street bank tower. It can make the son of a Cape Breton coal miner into someone to be reckoned with. It can give a reputation to the child of parents who could barely read and write. It can make the daughter of immigrants from Taiwan into a professional. It can gratify a father who is a pillar of the church and the community. (None of this necessarily prevents eventual disaster and disgrace, as we have seen.)

Law school encourages cosmopolitan desires and pursuits. It reaffirms traditional values. It teaches what the economist Paul Seabright has called "the narrative." Students are encouraged to anticipate wealth and power; they are told how to serve the rich, for it is only the rich who can afford lawyers; they are taught rules, technique, and toughness, and learn to avoid emotional involvement or moral judgment. This is what law students, and those who will eventually employ them, want. Access to justice is not on the agenda. The onetime young idealist who backpacked through Asia and dreamed of a better world becomes a tax lawyer; the youthful environmentalist who once supported the Green Party, general counsel to an auto-parts company. As Michael Gorra has written of characters in Ward Just's novel *Forgetfulness,* "They have discovered that a career creates its own requirements, which are often at odds with the ideals that led to the choice of that career in the first place. At their outer edges, the compromises people make become ... Lebensluge, the lie that allows one to live."

Every year an army of law school graduands disperses into society and the workplace. These new lawyers are clever and educated, ambitious and aggressive. With few exceptions, they seek to participate in what their predecessors have established, not to reform what is there. They will make their way in the world as they find it. They will adopt its ways and eschew change. They will be reluctant to turn away clients, no matter who they are and what they want. They will be helpful, not judgmental. They want to work hard and be successful (although, as I have described [earlier in this book], some will stray). They will serve their rightful masters. Their masters do not include the poor, or even the middle class.

As the stories I have told [earlier in this book] show, a lawyer in practice, whether he is by himself or with a handful of others or in a large firm, has much to contend with. Harsh economic imperatives promote inefficient work habits and even bad behaviour (overbilling, for example, or other forms of cheating). There is no moral compass, for it is not the job of the lawyer to pass moral judgment. Professional mastery of legal rules, and the need to manipulate them on behalf of clients, may encourage disrespect for values that are found in the law. Almost all of its practitioners see law as a business … . And there is extensive psychological baggage. To quote Martin Seligman … "Lawyers are trained to be aggressive, judgmental, intellectual, analytical and emotionally detached. This produces predictable emotional consequences for the legal practitioner: he or she will be depressed, anxious, and angry a lot of the time." Lawyers are also pessimistic. And sometimes, as some of my stories show, a lawyer descends into what can only be called a kind of madness, exhibiting psychopathic and other deviant behaviour. None of this favours justice in the broader community.

Many new lawyers join the great Canadian law firms and stay there for many years, even for their entire careers. In these great firms, which serve the economic elite (corporations, governments, a few rich individuals), a lawyer's work is as challenging as it gets; his prestige, considerable; his income (in due course), huge. Many of these firms are very large, with multiple offices in Canada and overseas. They have enormous overheads. They are businesses. Their need and desire for profit is relentless. Abusive billing practices are common. Oversight of quality and integrity is difficult, if not impossible. The partners and associates hardly, if at all, know each other. Knowing and trusting your partner or colleague is unusual and unnecessary; firm size, geographic spread, and organizational and legal structures (such as the limited liability partnership, creating what David Cay Johnston calls a "moral hazard") ensure that this is the case. A law firm has little concern for access to justice by the man on the street.

Who will give us access to justice? Will the provincial law societies, explicitly charged with regulating the legal profession and protecting the public interest, do it? They have made some attempts to address the issue, principally by permitting contingency fees and class actions. In October 2002, the then treasurer of the Law Society of Upper Canada announced a new 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 *Mclntyre v. Attorney General of Ontario,* which held that contingency fee arrangements are not necessarily illegal.) In 2004, a news release by the Ontario Ministry of the Attorney General announced some technical amendments to the rules governing contingency fees in the Solicitors Act. The treasurer of the Law Society of Upper Canada commended the Attorney General "for moving ahead with contingency fee legislation in Ontario, designed to enhance access

to justice." But the amended rules seem restrictive more than anything else, and few lawyers are ready to give up substantial and largely guaranteed hourly rates to gamble on contingency arrangements.

I have [earlier in this book] described the often ineffective and confused treatment by regulators of lawyers gone bad. Sometimes egregious conduct leads to disbarment; sometimes, to a token reprimand. Sometimes a disbarred lawyer is easily readmitted to legal practice (after cooling his heels for a few years); sometimes he will remain forever beyond the pale. Sometimes sex with a client is regarded as acceptable; sometimes, not. The distinction between one case and the other may be elusive, and the discrepancies from one province to another considerable. Sometimes a law society's disciplinary process is completely ineffective. On some occasions, confronted with a big problem, a law society seems simply baffled.

Law societies are run by lawyers, according to the world view and temperament of lawyers. It is no surprise that they have the same agenda and attitude as their members. Law societies are by nature conservative and protective of the status quo. They nourish their own and are the voice of the establishment. A law society member who is different risks severe criticism and marginalization. It is not the law societies of Canada that will change things. Among lawyers themselves there is growing resistance to the expanding concept of "professional misconduct," and to the idea that law societies should be wide-ranging policemen of lawyers' lives, supplementing, if not supplanting, everything from the teachings of the church to the strictures of the criminal law. This is particularly seen in the way law societies have dealt with sexual transgressions by lawyers.

Sir David Clementi has said, of the current British system of regulating the legal profession and of the radical new system that he has proposed, "The current regulatory system is focused on those who provide legal services: the new framework will place the interests of consumers at its centre." As described earlier [in this book], the 2004 Clementi Report contained four main sets of recommendations. It proposed that the legal profession be overseen by a new legal services board with a lay majority chaired by a non-lawyer and accountable to Parliament. It recommended that the profession lose its powers to investigate complaints against lawyers, and that a new independent office be created for that purpose. It recommended that lawyers should be free to enter into partnerships with non-lawyers. And it proposed what quickly became known as the "Tesco law," allowing outside companies or individuals to own and manage a law practice (named after the British supermarket chain that offers do-it-yourself divorce and will kits, legal forms and agreements, and law books for the layperson, and that is expected to offer traditional legal advice once the Clementi reforms are implemented).

It is time for very similar reforms in Canada. There are no good arguments for the view that only lawyers can regulate lawyers, and many good arguments for the contrary position. Disciplinary action should be in the hands of an independent body; for a law society to investigate, prosecute, and judge violates elementary principles of justice. Above all, it is time to put the interests of the consumer at the centre of the system, making the legal system and the courts available to all. Only the government can do these things.

There will always be lawyers who go bad, no matter what the legal system. But the legal system should have no tendency to create, encourage, or permit transgressions. Those will inevitably come from the vagaries of human nature, which cannot be escaped.

"Victorious court battles: Just the Beginning"

04 February 2006 e-mail from Sophia (address unknown) to "T"

[**Editor's Note:** The following was mistakenly sent to the editor of this anthology, on 04 February 2007.]

Before I joined you I found myself let go from my employment I held for what seemed like forever. Its hard to thank you enough for establishing me in this new enterprise. You have given a bright start on life. Already realizing twice as much as I realized in my old job.

I took delivey of a 2005 Jag. Taking home 150,000US in 18 months. Really having a ball in this career. It's a blast and I am a hero to the judges and to my clientele. What an outstanding career to be in.

Carefully following exactly what your instructions recommends me to do, is working out perfectly. I go to the court house and locate all of the clientele I can handle.

I draw on your advanced reporting services to find all assets. Using your fill in the blank forms I mail them to the appropriate firms. Then the funds arrive to my PO Box. Its like magic. Every day is like Christmas.

I can take a holiday when ever I have the notion to do so. Germany and river cruise up the Rein [sic] this year.

Show this letter to others. This profession is so huge it needs many more of us assisting the courts and the people who have been hurt.

"B.C. lawyer for the poor killed on cycling mission"

Mickleburgh, Rod, *The Globe And Mail*, Vancouver, 02 August 2006
(*in part*)

Lawyers, no matter how rich, were in mourning yesterday over the tragic death of Dugald Christie, a larger-than-life advocate of justice for the poor who might have stepped out of the pages of a Charles Dickens novel.

Mr. Christie died Monday evening on yet another of the many missions that marked his amazing journey from a waterfront home in affluent West Vancouver to a bare-bones existence at the Salvation Army, offering free legal aid to the down and out.

The fit, 65-year-old B.C. lawyer was struck and killed by a van on a dangerous stretch of the Trans-Canada highway east of Sault Ste. Marie, Ont., just days from completing a bicycle trip to Ottawa – his third – to publicize the cause of judicial reform.

. . . .

Even after his death, however, Mr. Christie's biggest case – a legal challenge to the province's 7-per-cent sales tax on lawyers' fees that could cost the government hundreds of millions of dollars – will live on.

Twice, before the B. C. Supreme Court and the B.C. Court of Appeal, Mr. Christie prevailed over government lawyers with his argument that the tax is a barrier for low-income earners to obtain legal help.

The Supreme Court of Canada is scheduled to hear the landmark case next March **[cite]**.

. . . .

Over the years, Mr. Christie's tireless passion for equal justice led him to burn his robes in protest on the steps of the Supreme Court in Ottawa; stage a brief hunger strike outside the same court; and complain to the Canadian Judicial Council about Madam Justice Mary Southin of the B.C. Court of Appeal, who billed the government $19,000 to renovate her office so she could smoke.

But Dugald Christie did more than protest. He wore a path to the offices of the city's highly paid lawyers. With his distinctive Scottish burr, he persuaded scores of them to offer their services to the poor. Free.

Today, his Western Canada Society to Access Justice operates 60 free legal-advice clinics throughout B.C., with more than 400 volunteer lawyers participating.

"Law firms are investing in the finer points of etiquette"

***STLtoday, St. Louis Post-Dispatch*, 24 September 2006**

Joan Newman, a former partner at St. Louis law firm Thompson Coburn LLP, remembers interviewing job candidates on the campus of a prestigious law school. She was expecting to see the usual flow of dark-suited young men and women, but her jaw dropped when one male candidate showed up in shorts, a T-shirt and flip-flops.

The meeting, said Newman, highlighted the casualness that pervades some young lawyers' lives and their idea of the norm, a view that won't cut it in the law profession.

While new graduates may be savvy about law, they may not have a clue about how to dress or act in a profession that serves high-powered, conservative clients.

They might be sporting visible tattoos, for example. Some women don't wear hosiery or bras, and some men don't iron their shirts. Many have no idea which is their bread plate or how to make small talk.

I watched for years as associates came and went, and as bright and competent as they were, they lacked social and strategic skills," Newman said. "If an associate doesn't look and act the part, the likelihood of his or her success is slim."

Newman said a light bulb went off in her head late last year and she decided to leave her law career to start an "associate training and development" business teaching young lawyers everything from where their water glass goes to how to work a room and build relationships.

And while some of Newman's friends questioned her sanity for leaving a lucrative career for such an odd and risky business, she is on to something quite big in the legal industry.

"It's part of a growing trend called lawyer professional development," said James Leipold, executive director of the Washington-based National Association for Law Placement. "Law firms are throwing a lot of resources into it. Rainmaking (the term for bringing in new clients) is an extension of social skills so firms want to develop economic engines with each of these lawyers."

Law firms' interest in teaching associates "soft skills" such as etiquette, proper attire and how to make casual conversation began about 10 years ago, Leipold said.

But there has been much more emphasis on these skills in the last few years, with law firms across the country either hiring management-level people to be directors of in-house lawyer professional development or using consultants.

"Most of these associates are 25 years old and have never worked in a job like this," said Susan Bonnell, director, training and development at Armstrong Teasdale LLP. "Often, you have associates who worked really hard in law school, but they've never worked in the professional world.

"It's the soft-skill stuff that really produces our stellar clients. They really know how to take care of clients."

So why didn't law firms embrace these programs earlier?

Bradley Winters, a St. Louis partner at Sonnenschein Nath & Rosenthal LLP and author of "The 48 Secret Rules of Lawyering," said that when he began his legal career in the 1980s, expectations were much different.

"When I started, I had the luck of tagging along," he said. "That was more of an apprentice-like time, and I got to see extraordinary people just as an observer. …I would watch carefully how everyone handled themselves. I had plenty of times to make mistakes."

But as salaries have risen, and competition has grown stiffer, law firms realize they must make lawyers productive much faster.

Among those firms is Blackwell Sanders Peper Martin LLP, which has had a program for about 10 years.

"It's in our interest to get them trained as early as possible," said Pete Salsich, hiring partner at the firm's St. Louis office. "We simply have an obligation to make sure a new lawyer becomes the best five-year lawyer he or she can be." "If we only train them in legal skills, we aren't doing that."

Teaching the soft skills is "designed to build the competitive edge of law firms," said Tessa Rolufs Trelz, an Armstrong Teasdale partner who runs the firms women's advancement program.

Armstrong Teasdale, for example, recently began offering six months of one-on-one coaching to women who have been out of law school for four years.

"It's an expensive employee benefit," Trelz said. "But the pressure is much more intense to be able to generate business."

In order to provide skill training, firms frequently hire consultants such as Newman or Mary Crane, a lawyer and former White House assistant chef.

"I teach good manners to lawyers," said Crane, who works with more than 125 Fortune 500 companies and law firm clients nationally, including several based in St. Louis.

“The most frequently asked question I receive from women is, ‘Is it absolutely necessary to wear hosiery?’”…”said Crane, who lives in Denver. “My response is, ‘Do you wear socks with shoes?’ Hosiery gives them that professional look.”

Men often ask if a T-shirt can be exposed, she said. Her answer: “Underwear should be worn and it should be worn underneath one’s clothing.”

And as for the No. 1 complaint she gets from law firms about male associates: “They don’t own an iron or don’t know how to use them.”

Another big problem is the number of students who have tattoos.

“Tattoos used to be something sailors got,” said Crane. “They (students) are sitting down with corporate executives in their 50s and 60s who raise their eyebrows when they see a tattoo around a wrist. We recommend they make sure those tattoos are covered up.”

Dining etiquette is another popular subject.

Amie Newman, a Thompson Cobum associate, said she has picked up numerous useful information from these courses.

One “development” program she found particularly useful was a session on wine education.

During the class, the instructor taught associates how New Zealand wine makers were using screw tops on their trendy Sauvignon Blancs to avoid spoilage associated with corks. He said the screw tops were acceptable on these better wines.

At a dinner about two weeks later, the client wanted a white wine and the partner asked Needham to choose. Armed with her recent knowledge she selected a New Zealand Sauvignon Blanc.

The waiter arrived and unscrewed the top.

"The partner looked at me like, 'What have you done?'"…" she said. "I thought he was going to jump across the table."

But Needham explained what she had learned about the problem with cork spoilage and the waiter joined in to explain it was the new rage. Then the client became interested.

"It (the class) really saved my neck," Needham said.

"When does legal advertising cross the line?"

Moulton, donalee, *The Lawyers Weekly*, 17 November 2006, pp. 19-21

Law societies across Canada, and beyond, have attempted to turn down the volume with codes of ethics and professional practice guidelines that limit and direct the type of advertising law firms and individual lawyers can create. However, in a marketplace where branding rules supreme, and where technology is king, the strain on those directives is increasingly apparent.

When it comes to advertisements that stretch both credulity and professional boundaries, eyes often turn south of the border. Lawyers in the U.S. have a reputation, deserved or not, for more blatant and aggressive advertising and promotional activities than their counterparts in Canada. That reputation was tested last year when a number of law firms placed ads in a supplement published by *New Jersey Monthly* magazine. That supplement turned the spotlight on the state's "Super Lawyers". Indeed, it proved so successful, a stand-alone publication of the same name hit newsstands in the state later that year.

The phrasing seemed to catch on, and catch the ire of a Committee on Attorney Advertising appointed by the New Jersey Supreme Court. In an opinion released on the issue, the committee noted that, "'Super Lawyer' designations have spawned a new surge of attorney marketing in the form of advertisements placed in New Jersey lawyer-directed papers, in local newspapers and by distribution to the public through attorney mailers, flyers, brochures, telephone book listings, and on websites, all of which tout the 'Super Lawyer' label and congratulate or promote the so-called 'Super' lawyers."

Their powers did not last long. The court committee concluded that these ads breached the state Bar society's rules of professional conduct. They were found to be misleading because they used superlatives to compare one lawyer with another (or everyone else); they could not be verified; and they could lead potential clients to assume these lawyers had skills superior to others in the same field. Those findings are now being contested by Super Lawyers.

It's likely similar concerns would be echoed if Super Lawyers were to make an appearance north of the 49th parallel. There is a remarkable consistency to the rules governing law firm advertising across Canada and the U.S.

Canadian lawyers must follow… [their] law society codes, and are encouraged to respect the Canadian Bar Association's Code of Ethics. Those codes make it clear what is acceptable and what isn't when it comes to promoting your practice or yourself. The basic tenets are these:

- Lawyers can't undertake any marketing activity that is false, inaccurate, unverifiable, reasonably capable of misleading, or contrary to the best interests of the public or not in good taste.

- An ad should not even hint that a lawyer is aggressive, state an amount of money the lawyer has recovered for a client or refer to the lawyer's degree of success in past cases (at least without a qualifier).

- Advertising should not raise unjustified expectations about the results that a lawyer can achieve, the time in which the result can be achieved or the cost of completing the matter.

- It is taboo to imply that a lawyer can obtain results not achievable by other lawyers or that the lawyer is in a position of influence.

Dignity of self and the profession is paramount. In codes across the country, words such as "respect" and "integrity" are used. In some cases, the lack of dignity seems obvious. In New York, for example, in the wake of the Staten Island ferry crash in which 10 people lost their lives, the New York State Bar Association appealed to lawyers to "adhere to the code of professional responsibility." The appeal fell on deaf ears. Within 48 hours, ads hit the airwaves targeted at the ferry's 1000 passengers and offering legal services. Within a few weeks, 40 lawsuits were in the works.

Preserving the dignity of the profession today means casting a wide net. Advertising is not merely a 30-second clip on a local television station or a display ad in the daily newspaper. Advertising is connected to marketing, and marketing is connected to promotion, and promotion makes law societies nervous.

To reduce the anxiety, law societies across the country often detail not only what can go into, and what must stay out of, paid advertising, but they also dictate the look and approach of common business materials such as business cards and letterhead. What most rules do not deal with is modern technology. Fact is, most rules were written before the Internet was an element of everyday life. In B.C., for example, the last major overhaul of the rules was in 1986.

But the Internet — and its potential for promotion - cannot be ignored. "There are a number of professional regulators, primarily in the U.S., that are struggling with this issue. Lawyer advertising is one of those areas that is hotly contested," said David Fraser, an associate lawyer with Mclnnes Cooper in Halifax who practises in the area of technology.

Take blogs, for instance. A few years ago the word didn't exist; today it is one of the most popular forms of e-communication. "Blogs can be many things. They can be the equivalent of online journals for other lawyers to keep up with the law. But the technology can be turned into a mechanism for very blatant self-promotion," said Fraser.

Such blatancy does not appear to be a concern in Canada, at least yet. There seems to be a comfort level with the conduct of the profession and complaints are not common. "In 2005, we had only 11 complaints relating to advertising (less than one per cent of complaints)," said Brad Daisley, public affairs manager with the Law Society of B.C.

"The statistics I have available don't indicate whether any of those 11 complaints was valid, but none resulted in any disciplinary sanctions that I'm aware of. Nor am I aware of the law society imposing disciplinary sanctions on a lawyer for advertising infractions in the past few years," he added.

The exception to the conformity seems to be Alberta. "We had received expressions of concern from lawyers and the public about a lack of professionalism," said Mona Duckett, president of the Law Society of Alberta.

Aggressive advertising on the part of the personal injury bar had raised red flags. Those flags have now been lowered, and the society has taken a decided shift in its approach to members' advertising and marketing. "We now recognize that the purpose (of advertising) is to inform the public about legal rights and provide information about the firm. Before the goal was primarily marketing. It showed a lack of respect," said Duckett.

Ironically, tightening advertising options and repositioning the approach may be good for business. In the lexicon of new-age marketing, it is brand savvy. There are three key elements to a successful brand (or what lawyers once called a solid reputation), said Mark Gascoigne, managing director with Trampoline, a branding, advertising and design firm based in Halifax.

Those elements are ensuring believability by not over-promising; making the audience the hero by focusing more on them than the firm; and telling the audience something they need to know.

In the 21st century, that's called building a brand. In the practice of law, it's called preserving the dignity of the profession.

"From Bizarre To Ridiculous – That Was 2006"

***The Globe And Mail*, 20 December, 2006, p. B7.**

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[1] **The 'bla bla bla' chronicles**

When Dianna Abdala hit the send button at 9:23 p.m. on Feb. 23 this year, she had no idea that she had started what would become one of the year's most widely read legal e-mail exchanges.

The 24-year-old law graduate was e-mailing Boston lawyer William Korman to decline a job offer she had earlier accepted because "the pay you are offering would neither fulfill me nor support the lifestyle I am living."

Following a few testy e-mail exchanges, Mr. Korman ominously asked Ms. Abdala: "Do you really want to start pissing off more experienced lawyers at this early stage of your career?" Her response? "bla bla bla."

Stunned by the retort, Mr. Korman passed the e-mail exchange on to a few friends, and within days the digital conversation was coursing through inboxes around the world under the subject banner "Lawyers Behaving Badly."

Major media jumped on the story and Ms. Abdala, a self-described trust fund baby, found herself portrayed as a poster girl for the new generation of indulged and arrogant graduates entering the work force.

But 10 months and thousands of blogs and Web chats later, Ms. Abdala's e-mails have come to reflect something else, and that something is a widening generational gulf in the legal profession.

Experienced lawyers who waded into the digital debate were quick to chide the young lawyer as a "bratty" "immature" "unprofessional" "princess" who, in the words of one, typified the "attitude of people entering the work force today."

Many young lawyers and associates, however, rushed to Ms. Abdala's defence, skewering Mr. Korman in blogs as "unprofessional" or a "pompous … windbag" who had violated Ms. Abdala's rights by leaking the confidential e-mails. A number of bloggers argued Ms. Abdala was right to back out of the job because Mr. Korman had reduced the salary he had initially offered the graduate. The last-minute switch, complained one Georgia associate, is a "basic negotiating tactic" in the profession.

The furor went the way of most modern disputes, with Ms. Abdala filing a complaint against Mr. Korman with the Massachusetts state bar board for forwarding her e-mail to outsiders.

Ms. Abdala now practises as a self-employed criminal lawyer.

. . . .

[4] **An animated approach to web marketing**

Overwhelming evidence to the contrary, all law firm websites do not look exactly the same. Standing out against the vain, stodgy cyberlandscape this year was Lax O'Sullivan Scott LLP, a Toronto litigation boutique that clearly takes itself less seriously out of court than it does in.

Click on a partner's name and up pops a cartoon character that robotically enacts one of the partner's favourite hobbies. There's outdoorsman Clifford Lax, capsizing his canoe, Rocco Di Pucchio savouring wine in his cellar, and amateur highland dancer Charles Scott strutting his stuff in his kilt. Most touching of all, though, is Paul Michell in the proud role of dad, pushing two children in a stroller.

Mr. Scott says the unbuttoned marketing approach came from the realization that most of the firm's work comes by way of referrals from other corporate firms conflicted out of litigation files. "So, the people that we're talking to are our friends, and they know what we're like," he

says. "There might as well be truth in advertising." Another well-argued case from an esteemed litigator, if we do say so ourselves.

[6] **In this court, you snooze, you win**

History has spawned many great litigators—Clarence Darrow, Alan Dershowitz, Eddie Greenspan, to name three—but none, we dare say, who has earned the distinction Robert Koppelman did this year. The New York defence lawyer managed to provide what one federal judge described as "skilful, imaginative" assistance to a client despite sleeping through portions of the trial. The judge even noted Mr. Koppelman was so effective that defendant Ljusa Nuculovic, an Albanian gangland figure, should have considered himself lucky for the representation.

Mr. Nuculovic, who was convicted of numerous racketeering and extortion charges in a case that involved the struggle for control of a gambling business, had moved for a new trial on the basis that Mr. Koppelman dozed off "every day." Judge Denise Cote of the Southern District of New York, who had presided over the case, conceded it did appear "Koppelman had been sleeping" during early segments of the proceedings that dealt with mundane matters such as police surveillance and gambling-machine technology. But, she added, "there were others in the courtroom who may also have been tempted to sleep during that time given the tedium associated with this largely uncontroversial proof." The motion for a new trial was dismissed. No word on whether Mr. Koppelman was awake to hear it.

[7] **Now that's alternative dispute resolution**

Our nod for creativity in dispute resolution this year goes to a Florida judge who ordered two pugnacious lawyers to engage in a game of rock, paper, scissors as a way of settling a protracted scheduling conflict.

U.S District Judge Gregory Presnell ran out of patience dealing with the bickering barristers, who had been at odds over mundane issue of a location to take a deposition in an insurance settlement stemming from 2004's hurricane Charley.

His solution?

If they couldn't agree on a location by June 30, they were to appear on the steps of the downtown federal courthouse in Tampa to settle the matter by playing the popular schoolyard hand game often used as an alternative to a coin toss.

"At that time and location, counsel shall engage in one game of rock, paper, scissors. The winner of this engagement shall be entitled to select the location [for the deposition]," Judge Presnell wrote on June 6. The upshot: The manoeuvre was so effective in drawing attention to the absurdity of the dispute that the two men agreed to meet that following day to settle on a location, eventually prompting the judge to drop his order.

"The 48 Secret Rules of Lawyering"

Winters, Bradley A., 2006
(*in part)*

Rule 1.

Return your phone calls and e-mails. *Now!*

Rule 2.

Never forget that you work in a pure service industry.

Rule 3.

The only thing worse than bad news is unexpected bad news.

Rule 4.

There's no news like good news. But share the credit.

Rule 5.

You have 2 clients.[... the client who assigned the work to the firm and the partner who assigned the work to you.]

Rule 6.

There's no such thing as a draft.

Rule 7.

Write with power, clarity and precision.

Rule 8.

There is such a thing as a stupid question.

Rule 9.

Bring value. Give value.
Be value.

Rule 10.

Your timesheets are your life.

Rule 11.

If You Don't Have An Answer, At Least Have A Plan.

Rule 12.

Look the part

Rule 13.

Keep secrets … from everyone.

Rule 14.

You have 2 ears and 1 mouth.
Use them in that ratio.

Rule 15.

People don't have lawyers, but nobody has any sympathy for us either.

Rule 16.

Avoid trouble with conflicts.

Rule 17.

Never send an angry letter today.

Rule 18.

Fighting is expensive.
Any lawyer can fight.
A good lawyer knows when to fight.

Rule 19.

Manage your time effectively.

Rule 20.

You don't have to be a rainmaker, but you do
have to get out in the weather.

Rule 21.

Be organized.

Rule 22.
Don't mess around with originals.

Rule 24.
Your secretary can make you or break you – or both.

Rule 25.
Try not to use the word "secretary."

Rule 26.
Never say "to be honest with you…."

Rule 27.
Your credibility is your currency.

Rule 28.
Spot trouble early.
Get help sooner rather than later.

Rule 29.
Be careful who you bring to firm events.

Rule 30.
Big brother knows which web sites you're visiting so surf cautiously.

Rule 31.
Think and act like an owner.

Rule 32.
Be a positive force.

Rule 33.
Work hard. Play hard.
And make time for both.

Rule 34.
Treat the clients money
like you treat your own—or better.

Rule 35.
That little plate there on your
left is *your* butter plate.

Rule 36.
Let someone else order the wine.

Rule 37.
Learn to drink coffee

Rule 38.
Respect other people's furniture

Rule 39.
Know your audience.

Rule 40.
No one to endure any form of abuse – not for a second.

Rule 41.
In many states it's ok to record conversations.
Assume you're being recorded.

Rule 42.
Don't be intimidated

Rule 43.
Forgiveness of debt is income.

Rule 44.
Personal injury settlements are not taxable.

Rule 45.
Put everybody's name on
the settlement check.

Rule 46.

You can't save the world.

Rule 47.

Learn. Learn. Learn

Rule 48.

Have fun.

[**Editor's Note:** From unpublished paper by Bradley A. Winters, an attorney practising with Sonnenchein Nath & Rosenthal, LLP, 1 Metropolitan Square, Suite 3000, St. Louis, MO 63102 (te.: 1.314.259.5921 / fax: 1.314.259.5959 / bwinters@sonnenschein.com. The paper provides a thoughtful, pragmatic guide to practising law.]

Serial Liars[:]
[Immoral Ethics in an Immoral System]

Whitton, Evan (Glebe [NSW, Australia]: Evan Whitton, 2005), pp. 18-22

In *Objection! How high-priced Defense Attorneys, Celebrity Defendants, and a 24/7 Media Have Hijacked our Criminal Justice System* (Hyperion, 2005), Court TV anchor Nancy Grace said:

> 'I was just doing my job.' That's the tired excuse offered up by every defense attorney whenever they're asked how they do what they do – how they pull the wool over jurors' eyes to make sure the repeat offender they're defending walks free. I'll never know how they can look in the mirror when their client goes out and commits another crime, causing more suffering to innocent victims. I've heard, 'I'm just doing my job – it's in the Constitution,' too many times to count.

Lawyers tend to believe that ethics is a county in south-east England, home of the succulent Colchester oyster. Law professor Lester Brickman, of New York's Cardozo School of Law, wrote in 1997: 'When the ethics rules are written by those whose financial interests are at stake, no one can doubt the outcome.'

Ethics and morals are synonymous, but adversarial ethics are client based rather than morality-based. Law professor Charles Wolfram, of Cornell University, New York, wrote in Modern Legal Ethics (West, 1986):

> [The Lawyer's role is] institutionally schizophrenic. . . a lawyer's objective within the system is to achieve a result favourable to the lawyer's client, possibly despite justice, the law and the facts.

Lawyers' ethics are thus hopelessly self-contradictory. They are not supposed to mislead the court, but claim a 'sacred duty' to do whatever it takes to get the best possible result for the client. If the client is in the wrong, the best result is to win the case; if he is a criminal, the best result is to get him off. Both results necessarily mislead the court and pervert justice.

Their ethics permit other activities which would be criminal as well as immoral in people other than lawyers. For example, Henry Brougham (1778-1868) in effect claimed that lawyers can have a 'sacred duty' to resort to blackmail, which is the crime of theft by extortion. Brougham, whose hugely fertile brain invented *The Edinburgh Review* (1802), London University (1828), a single-steed, four-wheel conveyance (1829), and Cannes (1834), informed their lordships in 1820:

> An advocate, by the sacred duty which he owes his client… must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client's protection.

California State University, indicates in *Reconstructing Justice: An Agenda for Trial Reform* (University of Chicago Press, 1994) that Lord Brougham – as he became when appointed Lord Chancellor in 1830 – later admitted it was blackmail.

The words were a threat, in code, to George IV that unless he dropped his action to divorce Queen Caroline, he would reveal that the king had secretly married a Catholic, Mrs. Maria Fitzherbert. Since the *Act of Settlement* (1701) said a king who married a Catholic must be treated 'as if he were naturally dead', the disclosure would inevitably rob His Most Sacred Majesty of the crown, the palaces, and the money. That was an offer George could not refuse. Today, unscrupulous lawyers routinely use blackmail in negligence and libel cases.

Whatever it takes also includes conspiracy to murder, according to a Dublin lawyer, James Giffard, in 1743. In *Lawyers and Justice,* Professor David Luban relates The Case of the Wicked Uncle. The uncle, the Earl of Anglesea, was an organized criminal; in 1727, he used bribery to steal vast estates in Ireland and the title of Lord Latham from his nephew, James Annesley, 12, and had the boy kidnapped and sent into slavery in America. When Annesley escaped and returned to Dublin in 1741, the earl offered Giffard, £ 10,000 (c. £1 million today) to get him hanged, otherwise, he said, he would have 'to quit this kingdom…and let Jemmy have his right'. Giffard accepted and prosecuted Annesley for murder, but an Old Bailey jury found him not guilty, and the conspiracy emerged when Giffard sued Anglesea for his unpaid bill of £ 800 (c. £ 80,000 today).

Armed with that information, Annesley sued to be declared the rightful Lord Latham, and hence the rightful owner of the estates. The trial began in the Dublin Court of Exchequer on 11 November 1743 and ran for a then record 15 days. When Annesley called Giffard as a witness, Anglesea's new lawyers adopted a strategy that could only hope to work in a system to which reality is a stranger. They argued on the one hand that the attempt to kill Annesley was a perfectly

proper legal proceeding, and on the other that it was so wicked that no one could believe the Earl would be party to it. One of Anglesea's lawyers put the second argument to Giffard:

> Did you suppose from thence that he [Anglesea] would dispose of that £ 10,000 in any shape to bring about the death of the plaintiff? – I did.
>
> Did you not apprehend that to be a most wicked crime? – I did.
>
> If so, how could you…engage in that project, without making any objection to it? – I may as well ask you, how you came to be engaged for the defendant in this suit?

Giffard was saying it was ethically proper for both lawyers to commit crimes, Giffard by conspiring to murder, the other by seeking to pervert justice in the matter of the title and the estates. Annesley won the verdict but the earl's lawyers procured a writ of error to set it aside, and Annesley had no money to pursue his claim in the House of Lords. Anglesea continued in possession of the title and estates until he died in 1761, a year after Annesley. As Justice Sir James Mathew (1830-1908) observed: 'Justice is open to all, like the Ritz Hotel.'

Professor Luban said 'the standard conception [of Lawyers' ethics] simply amounts to an institutionalized immunity from the requirements of conscience,' and that UCLA law professor Murray Schwartz was criticizing their ethics when he wrote in *The Professionalism and Accountability of Lawyers* (California Law Review, 1978):

> When acting as an advocate for a client, a lawyer…is neither legally, professionally, nor morally accountable for the means used or the ends achieved.

I mentioned that to Dr. Elizabeth O'Brien, a Sydney psychiatrist. She said: 'That sounds like psychopathy.' Psychopaths have no conscience.

How do lawyers, sane or psychopathic, justify being unaccountable for what amounts to criminal activity? Their argument essentially is that the adversary system is the best system of justice and it demands advocacy even as zealous as that. Or, the end justifies the means, the end being the best result for the client. The argument collapses in the face of the fact that an anti-truth (and hence immoral) process run by serial liars cannot possibly be a good system of justice, let alone the best.

Professor Luban referred to a statement in which professor Freedman defended two lawyers' dubious behaviour on the ground that they 'had kept faith with their client, and that is essential to the proper working of the adversary system'. Professor Luban commented:

> Everything rides on this argument. Lawyers have to assert legal interests unsupported by moral rights all the time – asserting legal rights is what they do, and everyone can't be in the right on all issues. Unless zealous representation could be justified by relating it to some larger social good, the lawyer's role would be morally impossible. That larger social good is supposed to be the cluster of values

> – procedural justice and the defense of rights – that are associated with the adversary system.

Again, the argument essentially is that the adversary system is a good thing in itself and requires that sort of advocacy. Professor Luban quoted professor Schwartz's response to that kind of argument:

> It might be argued that the law cannot convert an immoral act into a moral one…by simple fiat. Or more fundamentally, the lawyer's non-accountability might be illusory if it depends upon the morality of the adversary system, and if that system is immoral…the justification for the…Principle of Non-accountability …would disappear. Justification for lawyers' claim of non-accountability disappears.

Professor Freedman's three hardest questions, with his answers in brackets, were:

> Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth? [Yes]
>
> Is it proper to put a witness on the stand when you know he will commit perjury? [Yes]
>
> Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury? [Yes]

Professor Luban noted that professor Freedman 'later reversed himself [in *Lawyers' Ethics in an Adversary System,* Bobbs-Merrill, 1975] on the third issue – though a recent study of white-collar defense lawyers indicates that it is Freedman's original advice that is typically followed.' …. Professor Luban continued:

> But he reiterated his position on his first two points, intensifying his exposition of the second with a ghastly hypothetical. According to Freedman, the lawyer defending an accused rapist who claims that the victim consented should be willing to cross-examine the rape victim about her sex life in order to make the case that she is promiscuous enough to solicit strangers – even though the client has privately told the lawyer that he had actually raped her.

In short, even if a client privately admits he is guilty of rape, his lawyer is still ethically obliged to let him go in the box and falsely deny it on oath, and to back up that lie by cross-examining the girl about her sex life to falsely suggest she consented. The technique, at once brutal and pornographic, confirms professor James Elkins reference to lawyers' 'professional malevolence'.

Sydney lawyer John Marsden said in *I Am What I Am* (Viking, 2004) that he was ethically obliged to use the consent defence to get Ivan Milat off rape charges in 1974.

> Then I put to her something that has haunted me to this day … I suggested that her sexuality might have had something to do with what had occurred with Ivan Milat.

> Crying and under stress, she ended up agreeing – and in that moment I knew we had won…we had put into their [jurors'] minds that the sex may indeed have been consensual… I am not proud of my conduct that day, but…I had to act according to the ethics of the profession… I had a job to do and I did it.

In 1996, Milat was found guilty of murdering seven backpackers in circumstances similar to the cases of alleged rape in 1974.

A Sydney barrister, Stuart Littlemore QC, stated client-based ethics accurately when interviewed on television by Andrew Denton in October 1995.

> Denton: 'It's a classic question. If you're in a situation where you are defending someone who you yourself believe not to be innocent – can you continue to defend them?'
>
> Littlemore: 'Well, they're the best cases; I mean, you really feel you've done something when you get the guilty off. Anyone can get an innocent person off; I mean they shouldn't be on trial. But the guilty – that's the challenge.'
>
> Denton: 'Don't you in some sense share in their guilt?'
>
> Littlemore: 'Not at all.'

Advocacy: Simplicity of utterance

Megarry, Rt. Hon. Sir Robert, *A New Miscellany-at-Law[:] Yet Another Diversion for Lawyers and Others* (Oxford: Hart Publishing, 2005), pp. 227-228; 229-231; 232.

…. The "senseless and/or" is a "meaningless symbol," "a kind of verbal teratism that is a linguistic abomination." It is "as devoid of meaning as it is incapable of classification by the rules of grammar and syntax," and it "has no place in pleadings, findings of fact, conclusions of law, judgments or decrees, and least of all instructions to a jury." It is even criminal: "The presiding judge murdered the King's, the Queen's, and everybody's English by using the monstrous linguistic abomination 'and/or' in this portion of the order." The "literary fraction 'and/or'" is one of "the ingenious inventions of scriveners to confuse and befuddle," and it is the "latest and lustiest of these pests." It is "a fractional form of expression" that, as ordinarily used, is "a deliberate amphibology; it is purposely ambiguous. Its sole usefulness lies in its self-evident equivocality." The "baffling symbol" is "a disingenuous modernistic hybrid, inept and irritating," for which draftsmen have a "common and deplorable affection."

Perhaps the most thorough condemnation of the expression is to be found in a Wisconsin judgment:

> We are confronted with the task of first construing "and/or," that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients. We have even observed the "thing" in statutes, in the opinion of courts, and in statements in briefs of counsel, some learned and some not.
>
> . . . .

In South Africa, it was said of one indictment that it "bristles" with the expression "and/or." The defence not surprisingly "complained about the extravagant use of the conjunction 'and/or.' It was suggested that if all the 'and/or's' are added together, the number of combinations possible under paras. 1, 2 and 4 of part B of the main charge is 498,015. While not wishing to condone this type of conjunction, we think it necessary to state that the total number of combinations looks more menacing that it really is." This relaxed approach contrasts with the United States, where a criminal charge was held void for uncertainty because it used the "abominable combination of a conjunctive and a disjunctive" in averring the theft of "money and/or property" to a stated value.

The courts have struggled against their distaste. Two main strands run through the cases: one may be called "selection" and the other "identification." Selection may be taken first. If under a charterparty a shipper is to ship a full and complete cargo of "X, Y and/or Z," what is his range of choice? One view was that the cargo could consist of X, Y, and Z; or of X and Y; or of Z. Another view was that it could consist of X, Y, and Z; of X and Y. Later other views emerged. One was that the cargo could at least consist of X or Y or Z. Another was that it could be X; or X and Y; or X and Z; or X, Y, and Z. Yet another view was that the cargo could consist of X or Y or Z, or any combination of them; and this, the most wide and comprehensive view, is surely the most persuasive. When instead of three categories there are only two, such as a charterparty under which the ship is to proceed to X and/or Y at the charter's option, it is plain that the charterer may send her to X alone, to Y alone, or to both X and Y. The "or" and the stroke may even be expelled, so that "and/or" will mean "nothing more than 'and'."

Identification is a different matter. What is the effect if a will gives the residue of the estate "to W and/or H," a married couple? Farwell J. managed to avoid holding the gift void for uncertainty, and construed it as a gift to the two in joint tenancy, but as a gift to H alone if W failed to survive the testator. Again, bank accounts have stood in the name of "A and/or B"; but in one case the difficulties created by the bank's choice of such a nomenclature were overcome by referring to the instructions given by the depositor. Yet some cases are beyond salvation: a judgment entered in favour of A "and/or" B has been held void for uncertainty. Yet the entire blame cannot be laid on the expression as a whole; a simple "and" may leave doubts. If a testator makes a bequest of "all my black and white horses," and he dies leaving six black, five white, and four piebald horses (coloured only black and white), does the bequest pass the six and the five but not the four, or the four but not the five and the six, or all of them?

. . . .

In 1953 the Georgia House of Representatives passed a Bill "to create a new word to be known as 'andor,' to define its use and meaning, and for other purposes." The four short sections of the Bill may be quoted in full:

Section 1. That there is hereby created a new word to be known and spelled "andor".

Section 2. That the word "andor" shall mean "either," "or," "both"; "and," "and or or"; and "and and or."

Section 3. That the said word "andor" may be used whenever the conjunctive and disjunctive is desired or when the conjunctive or disjunctive is desired to be used in writing or speaking.

Section 4. That all laws or parts of laws in conflict herewith are hereby repealed.

An unsympathetic Senate left the Bill as a mere Bill.

Professional Responsibility

Robertson, Geoffrey, *The Tyrannicide Brief [:] The Story of the Man Who Sent Charles I to the Scaffold* (New York: Pantheon Books, 2005), pp. 8-10.

The law can be a matter of luck - as much for lawyers as for their clients. It is known, well enough, how litigants may draw hostile judges or prejudiced jurors, or lose good cases on a sudden technicality. It is less appreciated, but no less true, that the career of a lawyer may also be governed by chance: the elevation to senior rank, or to a judgeship bestowed by a political patron or through the timely influence of a friend or relative. In the life of an advocate in Britain, fortune most often smiles (or grimaces) in the guise of the delivery of a 'brief - a set of papers, traditionally tied in pink tape, directing an appearance in court on behalf of a particular client. Some briefs can make you or break you at the bar of public opinion - because people will, naturally enough, identify pleaders with the cause for which they plead. As an elementary protection for those who act for unpopular causes or villainous clients, barristers today adopt the professional conceit that they have no choice: just as a cab driver may not turn away an unprepossessing but paying passenger, so an advocate must, once an appropriate fee is proffered, accept any case that is capable of argument. This principle—now called the 'cab-rank rule'—is the kerbstone of the barrister's right to practise, and the guarantee that any party, however unpleasant or unpopular, may have the benefit of a counsel learned in the law. For those who hold fast to this principle it still brings certain dangers, usually in the post—excrement if you defend paedophiles, the prospect of a letter-bomb for prosecuting terrorists. In some place - Belfast and Bogota and Baghdad provide recent examples—vengeance can come to lawyers in the form of an assassin's bullet. This great—if perilous—principle was first

asserted by John Cooke, barrister of Gray's Inn, into whose hands history's most fateful brief was delivered by parliamentary messenger on Wednesday 10 January 1649.

The day itself was ferociously cold. The Thames had frozen, with the consequence of a modem tube-strike, since it immobilised the boats that carried passengers from the pier at Westminster, where the civil courts and Parliament sat, to the Temple and then to the Tower where traitors awaited trial, the easternmost end of this compact and crowded city of half a million citizens. It was not until the dusk had thickened that Parliament's messenger arrived on horseback at Gray's, the northernmost of the Inns of Court which sprawled up from the Temple to provide lodgings and offices for the fastgrowing ranks of lawyers, in chambers which spiraled around compact squares and gardens. A few pinpoints of light from candles and fireplaces punctured the gloom, as the clerk dismounted and asked for directions to the chambers of a barrister of the Inn. The arrival of this brief was not unexpected, and it was indeed the very reason why the Inns on this early evening were eerily quiet: semi-deserted, despite the imminent start of the legal term.

Most lawyers had fled to the country 'purposely to avoid this business' as Bulstrode Whitelocke put it. He was one of the first to flee—and he was Lord Chancellor. He was followed by the chief justice—one of Cromwell's closest friends—and many others. [Oliver Cromwell was instrumental in temporarily abolishing the monarchy, which had disregarded the role of parliament, and was Lord Protector of England, in the absence of the monarchy, from 1653 to 1658.] Those who remained, like John Cooke, argued agonisingly at dinners in their halls and later in the taverns, over both the wisdom and the legality of 'this business, a professional engagement which might spell death and, what was much worse, eternal damnation.' Cooke, turned down offers of a carriage ride to his family home near Leicester. 'I must wait upon God, he replied, a reference to the unshakeable belief, which would remain throughout his life, that nothing happened to him but by the will of his maker. He was waiting, puffing at a long pipe in his smoky chambers, when Parliament's messenger arrived at his door to deliver a parchment. It was a brief, and it had his name on it, 'to prepare and prosecute the charge against the king'.

John Cooke would have felt the thrill that excites every advocate on receiving a portentous retainer. It is a rush of egotistic pleasure that others think you the best (or only) person for this particular job, cooled by a nervousness that your performance might affect your career, for good or ill. But this brief was unlike any other, before or since. It was a set of instructions to formulate a criminal charge against a king widely regarded as ruler by Divine Right, in a credulous age when people believed their skin diseases could be cured by a touch from a monarch who was God's representative on English—and Irish and Scottish—earth. Even to contemplate laying a hand on the Lord's anointed was treason, punished by death if and when the Royalists [monarchy supporters] returned to power. More immediately, it would make Cooke an instant target for assassination, in a city infiltrated by de-plumed but re-pistolled Cavaliers [another term for Royalists].

Apart from this physical danger, there was a looming professional problem: there was simply no basis that legal minds at the time could conceive for prosecuting the King, the source of law, who by definition could do no wrong. That was what the kings and queens of England, and their governments, had always believed, and lawyers had always presumed. Since *Rex* was *lex*, a case *of Rex* v. *Rex* was a contradiction in terms. Besides, since Magna Carta guaranteed every

defendant a jury of his peers, how could the King, who obviously had no peer, be put on trial? These riddles were insoluble, said all the judges and most of the lawyers whose opinions were delivered by their feet as they scurried away from this lethal paradox, and from the Inns of Court.

Cooke could have chosen to leave town at any time in the past few days, as whispers that he might be appointed to prosecute began to reach the Inn. He felt a crippling sense of his own unworthiness: he was not one of the 'great lawyers', either in rank or birth or the size of his practice. He was consumed not with fear but by self-doubt, that one of the lowliest barristers would be chosen for such an awesome task. But this appointment, like everything else that happened to him, was a manifestation of divine will: his very obscurity, he reasoned, would in some way serve God's purpose.

[**Editor's Notes**: **(1)** The "cab rank" rule, which originated in law practice in England, is not respected in Canada. **(2)** This anthology's editor strongly recommends the book from which this excerpt is selected.]

"The Independence Of The Bar: An Unwritten Constitutional Principle"

Millen, Roy, (2005), 84 Can. Bar Rev. 107 at 107; 111-112; 129-130.

The independence of the bar is "one of the hallmarks of a free society." An independent bar provides citizens with access to justice. It is also critical to the independence of the judiciary, the proper functioning of the administration of justice and the maintenance of the rule of law. It is one of the unwritten constitutional principles that create the conditions for the protection of our rights and freedoms.

The Supreme Court of Canada has affirmed the existence of unwritten constitutional principles, declaring them to have "full legal force." Scholars and judges have debated whether the unwritten principles only fill "gaps" in the written constitution or are independently enforceable primary values. On either view, the independence of the bar fits comfortably within our constitution. It is firmly connected with the existing jurisprudence, the written text of the constitution and with numerous international principles. To the extent legislation is inconsistent with the independence of the bar, it may be struck down or declared inoperative.

. . . .

The Independence of the Bar

The legal profession has been autonomous since the thirteenth century. The royal courts of England were being centralized at that time, and there developed a small group of advocates, or "pleaders," who argued their clients' cases before the courts. In time, it became an accepted principle that the judges of the courts should be appointed from within the legal profession, rather than from the civil service, as a way of ensuring the independence of the judiciary from the

monarchy. In addition, it has been recognized that an independent bar is required to provide citizens and others with access to justice and an advocate for their cause.

The Supreme Court has extolled the virtues and necessity of an independent legal profession in a number of judgments. One of the most-cited judicial statements is found in *Canada* (*Attorney General*) *v. Law Society of B.C.* (popularly known as the *Jabour case*). In that case, the law society initiated steps to discipline Jabour, a lawyer whose advertisements of his practice contravened law society rules. Jabour sought a declaration that the rules offended combines legislation. The law society argued that the legislation did not apply to it because of its [the society's] provincial enabling legislation. In considering the merits of the claim, Justice Estey described the reasons a province would enact legislation for the self-regulation of the legal profession:

> The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.

He went on to find that the provincial legislation protected the law society from the federal anti-monopoly provisions.

Justice Estey's statement was quoted by Justice Iacobucci in *Pearlman v. Manitoba Law Society Judicial Committee*. Pearlman challenged a section of the Manitoba *Law Society Act* that provided for the awarding of the costs of an investigation against a lawyer. Pearlman argued that the provision raised a reasonable apprehension of bias because the benchers on the committee had a pecuniary interest in the outcome. The costs award would generate revenue for the law society, slightly reducing the fees charged to all Law Society members, including the benchers making the decision. Justice Iacobucci analysed the claim under section 7 of the *Charter*, holding that the principles of fundamental justice depend on the context in which they are invoked. The context in *Pearlman* was the self-regulation of the legal profession and hence the independence of the bar. He quoted with approval an extract from a report of the Ministry of the Attorney General of Ontario: "Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state." Justice Iacobucci went on to conclude that there was no reasonable apprehension of bias on the part of the benchers. Although he did not explicitly state that the independence of the bar is a principle of fundamental

justice, he did consider the principle an important contextual factor in determining the application of the principles of fundamental justice.

. . . .

Conclusion

The Supreme Court of Canada has confirmed that unwritten constitutional norms inform the written text of the constitution. Some lower courts have been reluctant to apply unwritten rules to impugn government action. The Supreme Court, however, remains committed to the principles it has identified, and open to the possible identification of other principles. The court is not averse to using unwritten principles to test the constitutionality of legislation. There can be no doubt, now, that legislation is susceptible to challenge on the basis of unwritten constitutional norms.

I do not contend that all unwritten constitutional principles are equally authoritative. Some principles have been found to have limited application as independent bases to challenge legislation—the rule of law being the most obvious example. My point is simply that in some cases, unwritten principles have a legitimate role to play, and the independence of the bar is one of those principles enforceable in its own right.

The Supreme Court has continuously affirmed the important role lawyers play in the administration of justice. Recent decisions, including *Neil* and *Lavallee*, confirm that view. These cases provide a strong foundation for concluding that the independence of the bar is an unwritten constitutional principle against which government actions and legislation may be evaluated. Federal legislation that amounted to an unprecedented intrusion into the traditional solicitor-client relationship has already been suspended, in part on the strength of a finding that it threatened to violate the independence of the bar. Put simply, the maintenance of our constitutional values and freedoms requires a bar that is independent from the state.

The Law Society of British Columbia has recently passed a resolution creating a Family Law Task Force to develop guidelines, in collaboration with the Canadian Bar Association, for the practice of family law lawyers in the province.

Collaborative family law lawyer Cori McGuire, of Kellowan, B.C., writing in the 23 May 2008 edition of The Lawyers Weekly (p. 13), argues that "[f]amily law lawyers need a new ethical code to remedy the deficiencies in existiong mandatory codes, which allow family law lawyers to advance their client's interests even when doing so may cause harm to children and other family members." She continues:

Objectionable strategies include using the delays of the court system to deny access to children to gain the upper hand in a custody battle. Similarly, advice to clients to change locks on the family home to gain exclusive occupancy or to withdraw funds from the joint line of credit are also problematic.

Our ethical codes do little to prohibit these practices. For example, B.C.'s Professional Conduct Handbook requires that, "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 canon is reflected through case law such as in *Ross v. Caunters*, [1979] 3 All E.R. 599 (cited by Ministry of Attorney General of B.C. in a 2006 discussion paper):

"In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb 'properly', that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client."

Following the lead of the U.K., Australia, and some American states, Canadian jurisdictions are considering adopting new codes for family law lawyers to balance clients' interests vis-à-vis interests of other family members. A new ethic is required in all practice areas. Society's expectations are changing, as reflected by changes to legislation and court rules making conflict resolution less adversarial in every jurisdiction.

"Divorce: how lawyers make things worse"

Shackleton, Fiona, *The Sunday Times*
(in part)

[**Editor's Note:** The author acted as solicitor for James Paul McCartney in *McCartney v. McCartney* [Heather Anne Mills], [2008] EWHC 401 (Fam).]

There is no doubt that when a marriage breaks down the best possible people to decide who gets the chattels, the children and the money are the couple themselves—without solicitors or a court battle leading to a judgment where both are losers. It is cheaper and quicker, and the healing process can begin sooner.

Of course, very few parting couples do it this way because of the acrimony that develops when a man imposes his wish to leave the marriage on his reluctant wife, or vice versa. By then the couple have often stopped talking altogether. So they call in their lawyers to do the talking for them.

Yet as the number of divorces climbs in Britain (it was 160,000 last year) many of us specializing in family law know that divorce must be made both easier and less costly. We realise we have a duty not only to our client, but to the whole family, too—there must be a financial agreement that leads to a former spouse seeing the children in an atmosphere of peace long after the legal file is closed.

Lawyers are not there to encourage the squandering of the family's money on legal fees. Indeed, when a marriage breaks down it should be the solicitor's job to soothe an angry or vulnerable client, echoing their sentiments to the other side, but not acting as the aggressor who extends the whole sorry business and sends costs spiralling.

Lord Mackay, the Lord Chancellor, … wants radically to reform divorce in this country, with a reduced role for lawyers and more settlements negotiated with independent mediators. He plans to remove the need to prove adultery, unreasonable behaviour, desertion or separation, and allow no-fault divorces to go through after one year … .

However, there are cases where we will still need solicitors. It would be unrealistic to put every sparring couple in a room with a neutral third party and expect a fair settlement to emerge. Take the case of a woman who has always received a limitless allowance from her rich husband—the sort of woman who has never read a bank statement or has no idea what her husband is really worth: she should only go to the negotiating table armed with the advice of a fine divorce lawyer.

One of my cases was resolved at a round-table meeting with both the husband and wife, as well as the solicitors present. They, too, left my offices hand-in-hand and set off together down the street.

A week later I discovered where they had gone when I was lunching with my opponent from the same case. We found that we had both received an identical Liberty scarf from our respective clients, scarfs that they had obviously chosen together.

On another occasion, it was only when the lawyers left the room that an eminent politician, who I was acting against, made an agreement with his wife that resolved all their long-standing differences. Sometimes standing aside is the only route forward, especially if the lawyers are provoking an already tense situation.

Soon after I qualified I took a rich client to an extremely aggressive Queen's Counsel re-

nowned for his expertise in ruthless cross-examination. He was the silk who would, my client hoped, make his wife see sense by lowering her demands for money. But this silk was exceptionally rude, going into graphic detail about how he was going to deal with the wife when she went into the witness box. We left the consultation in silence and on returning to my office my client instructed me to settle almost on any terms.

He thought highly of his wife and wanted to save her the indignity of exposure that he now realised a court hearing would bring. "There are limits," he told me. "That man was unbelievably rude to me and I am paying his bill. Heaven knows what he would do to the woman I once loved."

If a marriage is capable of treatment, or indeed life support, this should be explored first. If it is a corpse it should be buried quickly and discreetly. Yet the court is a barbaric venue to pick over the carcass of a failed marriage. It is also costly and slow.

A good divorce lawyer knows that acting as mediator, instead of hysterical cheerleader, for his side can mean the difference between a £1,500 uncontested divorce settlement and a £100,000 battle in the courts. That may not always be good for the firm's pocket, only its lawyer's reputation. However, it is a salvation for the man and woman trying to pick up the pieces of their lives again, apart.

2.2 Legal Responsibility

755165 Ontario Inc. v. Parsons

(2006), 273 D.L.R. (4th) 11 (NLSC[TD]), Green C.J.T.D. , paras. 1, 67-75

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[1] In a proceeding in which the plaintiff, a client of a now-disbarred lawyer, claims damages against the Law Society of Newfoundland and Labrador for economic loss allegedly caused by the failure of the Law Society properly to supervise, impose practice conditions on, and prevent the improper management and operation by the lawyer of his trust account, the Law Society now applies pursuant to *Rule 14.24(1)(a)* to strike out the claim on the ground that it discloses no reasonable cause of action. The basis of the argument is that the plaintiff has failed to plead material facts which, if proven, could establish the existence of a duty of care owed by the Law Society to the plaintiff.

. . . .

[67] Have sufficient circumstances been pleaded in the instant case from which the court can conclude that it is not plain and obvious that the claim cannot succeed due to lack of proximity? Is this one of those "clearest cases", to use Justice Linden's phrase, which nevertheless justifies driving the plaintiff from the courtroom at this preliminary and early stage?

[68] In this case, the plaintiff, unlike the plaintiffs in *Edwards* [[2001] 3 S.C.R. 562], has pleaded that a solicitor-client relationship was created between it and Parsons (Amended Statement of Claim, para 7). It has also pleaded that the statute regulating the Law Society imposes duties on the Law Society to govern lawyers "in a manner that protects the interests of clients..." (Para 5). The plaintiff is therefore alleging that it belonged to a category of persons that the statute was designed to protect.

[69] As in *Edwards*, I accept that the *Law Society Act*, SNL 1999, c. L-9.1 is "geared for the protection of clients".

[70] In addition, the plaintiff has pleaded, like the situation in *McClelland* [(2004), 245 D.L.R. (4^{th}) 162 (B.C.C.A.)], that Parsons had, to the knowledge of the Law Society and its officers, a "history" of problems (prior incidents of misconduct leading to a letter of caution; prior bankruptcy) which ought to have put them on inquiry about the need to exercise their powers to protect Parson's clients from potential improper behaviour (paras 14, 15, 16, 17, 21, 22, 25).

[71] Unlike *Edwards*, this is not a case of having to search in the regulatory statute for a legislative intent to impose a private duty of care in favour of the public as a whole. In the instant

case, the search is for a private duty in favour of a narrower class (clients), viz., members of a class of persons for whom the statute is designed to protect. Unlike *Cooper* [[2001] 3 S.C.R. 537], there is not the same degree of policy decision-making (as opposed to operational decision-making) that requires a balancing of many competing policy factors involved in the work of the Law Society with respect to regulation of lawyers' relationships with their clients as in the case of the Registrar of Mortgage Brokers. It would be difficult to argue that the Law Society would be entitled not to act in the face of obvious abuse by a lawyer of his or her client's interests on the basis that there were other competing public policy interests at stake. It is not plain and obvious, therefore, that the actions (or failures to act) of the Law Society were not operational decisions.

[72] While it is true that the *Law Society Act* contains, in s. 72, a statutory immunity for benchers and officers of the Society for "anything done ... in good faith" in purporting to act under the Act, the rules or a custodianship order, it does not purport to grant immunity to the Society as an institution. In *Cooper*, the immunity extended to the statutory regulator, the Registrar himself. Its presence was taken by the Court as an indication that the regulatory statute should not be construed to impose a private duty on the registrar specific to investments with mortgage brokers.

[73] In *Edwards*, on the other hand, as in the instant case, the immunity did not extend to the Society itself. In *McCullock* [[2004] 2 S.C.R. 17], the Court concluded, notwithstanding the presence of an immunity provision, that the immunity did not extend to actions of gross carelessness. Accordingly, the applicability of such provisions will depend on the appreciation of the judge at trial as to the extent and seriousness of any negligence that is found to exist. The decision in *McCullock* therefore recognizes that the presence of a statutory immunity is not *necessarily* a signpost of an intent to preclude a private law duty of care on the statutory regulator.

[74] Given the foregoing factors, and reading the decisions in *Cooper* and *Edwards* in the light of *McCullock* and *McClelland* …, I am not satisfied that it is "plain and obvious" that the plaintiff's claim in this case cannot succeed. There is not such a deficiency in pleading on the proximity issue that should preclude the plaintiff from proceeding with its action. Instead, as in *McClelland*, the question as to whether there is sufficient proximity should "turn on the factual underpinning" of the plaintiff's claims.

Disposition

[75] The application of the Law Society to strike out the plaintiff's claim against it is dismissed. Costs of the application shall be in the cause.

[**Editor's Note**: Application for leave to appeal to Newfoundland and Labrador Court of Appeal, refused 26 October 2006: 2006 CarswellNfld 289.]

"Looking to practise elsewhere? National Mobility Agreement to expand and include three territories"

Jaffey, John, *The Lawyers Weekly*, 01 September 2006, p.21

Five years after approving a National Task Force to develop recommendations for inter-provincial and territorial mobility, the Federation of Law Societies of Canada is poised to complete the ambitious project with the signing of the Territorial Mobility Agreement ("TMA") [which occurred 03 November 2006].

The TMA will bring Northwest Territories, Yukon and Nunavut into the existing National Mobility Agreement (which has been in place since December 2002) on a five–year provisional basis to give the territories time and opportunity to evaluate the effect of mobility on a number of concerns that have, up to now, prevented them from getting involved.

At the end of the five–year period, the TMA will expire unless the territories then agree to implement the entire National Mobility Agreement (or reach another agreement).

When the TMA has been signed, Canadian lawyers in good standing will be able to practise anywhere in Canada for up to 100 days per year without obtaining permission of the local bar. They need only certify they have reviewed and understood reading materials required by the jurisdiction.

All signatory law societies to the National Mobility Agreement have indicated their approval of the TMA.

The Law Society of New Brunswick announced that as of July 10, 2006, it had fully implemented the National Mobility Agreement. The Barreau du Quebec has signed but has not adopted the necessary rules as required by provincial legislation to implement the agreement. The Law Society of Prince Edward Island, the last remaining hold-out, has approved acceptance of the National Mobility Agreement and is expected to sign in November. [On 03 November 2006, Prince Edward Island signed the Agreement.]

Joint wills could be minefield for estate lawyers"

Krishna, Vern, *The Financial Post*, 13 April 2005, pp. FP6-FP7.

A lawyer's professional relationship with clients rests on three essential duties: avoidance of conflict of interest; loyalty to the client's cause; and candor in all matters relevant to the retainer. A lawyer who acts on both sides of a transaction — for example, in drafting mirror wills for husband and wife — faces a potential problem even if she discloses the dual retainer and subsequently learns of information from one of the parties that materially affects the other. The Law Society of Upper Canada's Commentary to its Rules of Professional Conduct in respect of joint retainers for spousal wills is a minefield for estate lawyers. The joint retainer of a lawyer who prepares mirror wills for spouses may end when the parties execute their wills, but that does not terminate the lawyer's duty of loyalty to both of his former clients. If, for example, the lawyer later receives instructions from the husband to vary his will to disinherit his wife partially in favour of a child from another woman, it is clear the lawyer cannot act on the matter.

The Commentary states the lawyer must not inform the wife because any such contact would violate his duty of confidentiality to the husband in the new matter. By not advising the wife of the new development, however, the lawyer breaches his duty of loyalty to her. The duty of loyalty, which is separate from the lawyer's duty to protect his client's confidential information, outlives the tenure of the earlier retainer.

In the recent *Strother* decision [of British Columbia Court of Appeal], a tax partner with Davis & Co., who acted for a client in planning for film production tax shelters, was liable for … for not disclosing subsequently acquired information that might have been of considerable interest to his client. The joint liability of the partners of Davis & Co. remains to be resolved.

[**Editor's Note:** The appeal of the decision to Supreme Court of Canada was decided 01 June 2007; see Part 3.2.2. of this anthology.]

In the example of the husband and wife, even after the retainer terminates, the former [wife] client expects her lawyer to disclose information that might be directly pertinent to the husband's position. If the lawyer is in doubt as to her obligation to disclose, she should resolve the doubt on the relevance of the information in favour of her former client, and not by withholding the information. Obviously, the client cannot give informed consent if the lawyer does not disclose all pertinent information to her. Thus, even where a lawyer's retainer expires, she may have a continuing obligation to advise the client in certain circumstances that relates back to the retainer.

3.0 APPLICATIONS OF STANDARD OF RESPONSIBILITY

3.1 Relations with Clients – Retainer and Authority

"So it's come to this: firing a client"

Burley, Craig, CBA *Addendum* (Solo and Small Firm Edition), May, 2007

Every lawyer has at least one client he or she would like to fire—and probably should—but lawyers are usually hesitant to take that major step. Those who don't usually fear either the unpleasant nature of the exchange or the loss of work.

Those who do usually are motivated by one of three factors: unpaid accounts, the refusal to give reasonable instructions or follow advice, and a breakdown of trust in the relationship (often brought on by personality clashes).

Deciding whether to remove a client is never easy. The various professional conduct guidelines impose a duty on lawyers not to withdraw services from a client except for good cause and with appropriate notice. These guidelines are the first step for any lawyer considering firing a client. But there are other steps you can take to protect your practice when it's time to let a client go.

[1] **Act promptly.** It can be wrenching to have to make these decisions early, but it's of paramount importance to give both you and your client enough time to protect everyone's interests. If a trial date is looming, it may be too late to fire a client, no matter what the underlying circumstances, and the lawyer will have to soldier on. As reluctant as you may be to actually do the deed delaying it is worse than doing it.

[2] **Talk to the client about your reasons.** Tensions will be exacerbated if the client doesn't understand the reasons behind the firing. Give clear, written reasons for ending the relationship and set out a roadmap for what needs to be done. Both you and the client will benefit.

[3] **Account for and return the client's property.** This includes not just trust amounts, but papers and other property as well. Papers can sometimes be held under a solicitor's lien if a lawyer is terminated without cause, but if you're firing the client, everything should be returned.

What to turn over? Anything that would be of assistance to a client's new lawyer should be on the list, including legal memos and other information about the case. Don't forgot that an immediate accounting for outstanding fees is also appropriate.

[4] **Co-operate with your successor to ensure a smooth transition.** Rendering papers and memos to the new counsel is crucial, and forms a part of professional conduct guidelines. Take care, however, to preserve a client's confidentiality when co-operating with a successor. The duty of confidentiality extends here as well, unless there is explicit consent from the client.

"Ethical Considerations in Collaborative Law Practice"

American Bar Association [Standing Committee On Ethics And Professional Responsibility], Formal Opinion 07-447, 09 August 2007
(*in part*)

Before representing a client in a collaborative law process, a lawyer must advise the client of the benefits and risks of participation in the process. If the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process. A lawyer who engages in collaborative resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence.

In this opinion, we analyze the implications of the Model Rules on collaborative law practice. Collaborative law is a type of alternative dispute resolution in which the parties and their lawyers commit to work cooperatively to reach a settlement. It had its roots in, and shares many attributes of, the mediation process. Participants focus on the interests of both clients, gather sufficient information to insure that decisions are made with full knowledge, develop a full range of options, and then choose options that best meet the needs of the parties. The parties structure a mutually acceptable written resolution of all issues without court involvement. The product of the process is then submitted to the court as a final decree. The structure creates a problem-solving atmosphere with a focus on interest-based negotiation and client empowerment.

Since its creation in Minnesota in 1990, collaborative practice has spread rapidly throughout the United States and into Canada, Australia, and Western Europe. Numerous established collaborative law organizations develop local practice protocols, train practitioners, reach out to the public, and build referral networks. On its website, the International Academy of Collaborative Professionals describes its mission as "fostering professional excellence in conflict resolution by protecting the essentials of collaborative practice, expanding collaborative practice worldwide, and providing a central resource for education, networking, and standards of practice."

Although there are several models of collaborative practice, all of them share the same core elements that are set out in a contract between the clients and their lawyers (often referred to as a "four-way" agreement). In that agreement, the parties commit to negotiating a mutually acceptable settlement without court intervention, to engaging in open communication and information sharing, and to creating shared solutions that meet the needs of both clients. To ensure the commitment of the lawyers to the collaborative process, the four-way agreement also includes a requirement that, if the process breaks down, the lawyers will withdraw from representing their

respective clients and will not handle any subsequent court proceedings.

When a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer's agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client [collaboratively], but rather is consistent with the client's limited goals for the representation. A client's agreement to a limited scope representation does not exempt the lawyer from the duties of competence and diligence, notwithstanding that the contours of the requisite competence and diligence are limited in accordance with the overall scope of the representation Thus, there is no basis to conclude that the lawyer's representation of the client will be materially limited by the lawyer's obligation to withdraw if settlement cannot be accomplished. In the absence of a significant risk of such a material limitation, no conflict arises between the lawyer and her client under Rule 1.7(a)(2) [of the ABA Model Rules]. Stated differently, there is no foreclosing of alternatives, i.e., consideration and pursuit of litigation, otherwise available to the client [represented by another lawyer] because the client has specifically limited the scope of the lawyer's representation to the collaborative negotiation of a settlement.

"The retaining shield"

Slayton, Philip, *Canadian Lawyer*, July 2006, pp. 46-48

"Be careful," a lawyer will routinely tell a client who seeks advice before entering into a contract. "Be sure you understand the exact nature of your rights and obligations. Think it all through. Get it down on paper. If you don't, you may find yourself in trouble. Don't say I didn't warn you. By the way (a trifle coy here), I can help: I understand what this is all about (and, incidentally, my fees are quite reasonable)."

Ironically, our voluble lawyer might not have a clear understanding of his own contractual relationship with the client getting this helpful advice. What rights and obligations do each of them have? What is it that defines and regulates the relationship between a lawyer and client? The answer is that, without something in writing that spells it all out, we can't be sure. Our lawyer should follow his own advice, agree with his client on respective rights and obligations, set it all down clearly on paper, and avoid the confusion and ambiguity that will result otherwise.

Confusion reigns

Confusion and ambiguity are everywhere, partly because the general rules about lawyers and clients have several confusing sources, ranging from law society bylaws to industry codes of conduct and case law.

The formal regulations or bylaws made by law societies under the statutes that create them tell a lawyer a bit about how to behave around a client, but not very much.

For example, Rule 5-54 of the Law Society of Manitoba tells a lawyer in that province that he must not charge or accept a fee that is not fully disclosed, fair, and reasonable. The Nova Scotia Barristers' Society's Regulation 9.13 says it is "conduct unbecoming" for a Nova Scotia lawyer to take improper advantage "of the youth, inexperience, lack of education, lack of sophistication, or ill health of any person…"

Rather, most of these formal rules across the country are about things like administration of the law society (how you get to be a bencher), who is entitled to practise in the province, and the proper administration of trust accounts.

Codes of conduct no help

So if the answers aren't there, what's next? Every provincial law society (and the Canadian Bar Association) has something with a name like "Code of Professional Conduct," or "Legal Ethics Handbooks," or "Professional Conduct Handbook." In contrast to [law society] regulations or bylaws, these tell you a lot about the duties a lawyer owes a client.

"The lawyer should be wary of bold and confident assurances to the client, especially where the lawyer's employment may depend on such assurances," says the *Professional Conduct Handbook* of the Law Society of British Columbia (Chapter 1).

"The lawyer shall not act for the client where the lawyer's duty to the client and the personal interests of the lawyer or an associate are in conflict," says the *Law Society of Manitoba's Code of Professional Conduct* (Chapter 6).

"A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing useless legal proceedings," the Law Society of Upper Canada's *Rules of Professional Conduct* wisely require (Rule 2.02(2)). *Et cetera, et cetera*. ….

The courts also have an important oar in this patch of water. In *R.v. Neil*, a 2002 Supreme Court of Canada decision, Justice Ian Binnie observed that a lawyer's duty of loyalty to his client incorporates a duty to avoid conflicting interests, a duty of commitment to the client's cause, and a duty of candour. Another important case, currently on appeal to the Supreme Court and likely to establish significant new law about lawyers and clients, is 3464920 *Canada Inc. v. Strother; Davis & Company, et al.*

[**Editor's Note**: This appeal was decided by the Supreme Court of Canada 01 June 2007; see Part 3.2.2 of this anthology.]

It's all quite bewildering—regulations, bylaws, codes and cases, not to mention practise directions, practice tips, decisions of law society disciplinary panels, and other sources of the principles that are supposed to govern the lawyer-client relationship.

The retaining letter protections

Surely it must be better for a lawyer to make his own rules, to devise his own contract with a client, and set out that contract clearly in a retainer letter. But does such a letter deal effectively with the issues that matter, or will it always be trumped by the general rules?

Can a retainer letter, for example, force a client to waive a conflict that might happen in the future, no matter what the circumstances (this is sometimes called an "advance conflict waiver")?

To do so would seem to fly in the face of principles set out in the codes and handbooks, and those found in Binnie's judgment in *Neil*. In *Strother*, Justice Mary Newbury, giving the unanimous judgment of the B.C. Court of Appeal, said of a lawyer's fiduciary duties that they are "implied by law and are unlikely to be validly excluded or diminished by contrast."

Yet, the biggest firms supposedly using retainer letters that contain an advance conflict waiver vigorously argue it is effective provided certain conditions are met. For example, if the client:

- is sophisticated;
- acknowledges that the law firm is typically involved in a multitude of complex disputes;
- explicitly accepts that many of the firm's present or future clients may have commercial or legal interests that are adverse to its own.

Most agree, however, that a waiver cannot affect the most sacred obligation of all: to hold in the strictest confidence all confidential information acquired in the course of an engagement.

Covering off work product

Retainer letters may also address difficult intellectual property issues, such as who owns a lawyer's work product? The general rule seems to be that work product, unless it contains clients' confidential information, belongs to the lawyer who created it, and can be used for future clients.

But what is work product? Does it include precedents prepared for a particular client (who paid for their preparation)? Who owns an innovative deal structure? What about lawyer notes and research memoranda?

Many intricate and subtle arguments, and fine distinctions, encircle this problem. A retainer letter can cut through them, stipulating clearly, for example, that the lawyer has proprietary rights in all materials he has prepared, and it can lay out how the client can use those materials. Such provisions are apparently effective.

It is more difficult when the situation is reversed and the intellectual property used in a transaction belongs to the client who asks his lawyer to sign a confidentiality agreement. In some cases, it may be another law firm, an accounting firm or other professional adviser, that demands a confidentiality agreement in respect of a legal concept or structure that it has created.

Can a lawyer enter into such an agreement? Can he agree not to make knowledge he acquires from one client available to others who may benefit from it? For that matter, it is even ethical for a lawyer to propose such an agreement to another lawyer?

A Law Society of Alberta subcommittee has recently suggested that such an agreement should be enforceable. Although the subcommittee noted that it might create conflicts of interest requiring law firms to send clients to someone else for advice if the lawyer determines the client could benefit from the knowledge that under the agreement cannot be disclosed [by the lawyer].

That is because a lawyer must decline to act when in the possession of confidential client information that is material to the proposed new representation.

What about other limits? Can a retainer letter limit a lawyer's liability to the client, for example, to the amount of fees charged, or to the extent of insurance carried by the lawyer?

English solicitors are allowed to limit liability to the minimum insurance cover required. The position in Canada is uncertain, and considerable nervousness surrounds the issue. If liability cannot be limited in a retainer letter, can it be done in a legal opinion? After all, as one senior lawyer told me, "if opinions are insurance policies, then it should be possible to limit coverage."

So what's a lawyer to do? My advice is: use a retainer letter. Put an advance conflict waiver in it. Assert ownership of your work product. Limit liability to fees charged. Maybe these provisions will work, maybe they won't. Put in a severability provision, so that the entire contract doesn't fail just because one provision is not enforceable. Put in any other clause you want and get the client to accept.

It's a hard world out there. You need all the clarity and protection you can get.

"The Billable Hour Must Die [:]
It Rewards Inefficiency. It Makes Clients Suspicious. And It May Be Unethical"

Turow, Scott, *ABA Journal*, August 2007, pp. 32, 34-37.

Three summers ago, my wife and I were, driving my two older kids to the airport. The academic year was about to resume. The younger child, my son, was returning to college; the older, my daughter, to law school.

"Say," I heard my son ask his sister in the backseat, "what do you think you'll do when you get done with law school?"

My daughter expressed some uncertainty but ended up answering, "I think I'll become a litigator."

I nearly hit the brakes.

"Oh," I heard myself moan, "don't be a litigator."

My advice to my daughter had the usual effect—another demonstration of Newton's third law, the one about equal and opposite reactions, a rule that also applies to parental advice. Before the academic year was over, my daughter had enrolled in a legal clinic and tried her first and second lawsuits. It was those experiences, rather than anything she heard from me, that led her away from the courtroom.

But, candidly, I was shocked by my own reaction. Because for the last 20 years I have chosen to continue my occasional role as a litigator, despite having the option not to do so thanks to my literary career. I have always believed that I've had a charmed life as a courtroom lawyer. When I left law school, I could not imagine becoming anything other than a litigator. The courtroom was where the law was made, where the fundamental struggle to fit the law to facts took place.

The people writing contracts were, in my youthful view, not much different from consultants. Although I have learned to love and appreciate hundreds of transactional lawyers in the years since, I notice, in looking over my novels, that I have not yet had a hero who is any other kind of a lawyer but a litigator. My protagonists have been prosecutors, criminal defense lawyers, a judge, a tort lawyer, a commercial litigator—even journalists. But no deal guys or gals. In the restricted zone of my imagination, it's the litigators who are the real thing.

So why is it—given the satisfaction I've taken from being a litigator—that some piece of my heart shrieked out in opposition to the idea of my child doing the same?

CONTEMPORARY WOES

I believe what motivated my outcry, in a few words, is that I think it would be hard for someone starting today to have it as good as I have had it. The ratio of pain to pride has grown too high. And the contemporary environment has become much less congenial to aspects of the lawyering craft that deeply pleased me. We all hear the complaints from our colleagues, especially those in my age range who've been doing this now for decades. For too many litigators, our life increasingly is a highly paid serfdom—a cage of relentless hours, ruthless opponents, constant deadlines and merciless inefficiencies.

By now it's obvious that the U.S. Supreme Court's 1977 decision in *Bates v. Arizona*, which invalidated on First Amendment grounds the longtime bar on lawyer advertising, was the opening cannon shot that essentially set off the competitive war in our profession. In doing so, it did no favor to lawyers' lifestyles. The free flow of information about who is making what that soon followed—courtesy of *The American Lawyer*—ushered in the big-firm star system, in which rainmakers rule. Because they are the lawyers who can most easily set up shop elsewhere, the threat posed by that mobility in turn has cued the struggle in every firm to ensure that incomes remain high, especially at the top of the pyramid.

Not that we, in the bar, have any right to complain. The fierce competition that now characterizes the business of being a lawyer is exactly what the market requires. No matter how much we'd like it to be otherwise, lawyers can't claim any privilege to live by different rules from everybody else in our economy.

But I still believe that lawyers in general, and litigators in particular, are yet to confront the realistic limits of that competitive environment. And in this regard there is no more vicious culprit than the practice of basing our fees solely on the time spent on a matter.

Dollars times hours sounds like a formula for fairness. What could be more equitable than basing a fee on how long and hard a litigator worked to resolve a matter? But as a system, it's a prison. When you are selling your time, there are only three ways to make more money—higher rates, longer hours and more leverage. As the years have gone on, the push has continued on all three fronts.

HOURS AMOK

Let me be clear: I don't think there is anything wrong with lawyers making money. There is a unique satisfaction in representing somebody well and being rewarded for it in a manner commensurate with the effort and skill required. I am not engaged here in a jeremiad aimed at getting litigators to join in vows of poverty, or even to agree to make less. I believe enough in the free market to know that if what we ask our clients to pay us wasn't worth it to them, they wouldn't continue to do it. My concern is with the external effects of the system we are now following.

Consider, for example, the consequences of dollars times hours for those entering the profession. When I left the government for private practice in 1986, the hours expectation for young lawyers was 1,750-1,800 hours a year in the large Chicago firms. Today it's 2,000-2,100—

even 2,200 hours. And the only real outer boundary is that there arc 24 hours in a day—and 168 in a week. Increasingly, if we allow time for trivialities like eating, sleeping and loving other people, it is clear, as a simple matter of arithmetic, that we are getting close to the absolute limit of how far this system can take us economically.

DIMINISHING RETURNS

More tellingly, the prospects for success for lawyers have markedly diminished over the years. Virtually all firms today make fewer partners and take a longer time to do it. And the smaller you make the eye of the needle, the more young lawyers arrive on the job as uncommitted nomads: at best, acquiring skills they'll take elsewhere; at worst, cynically trying to pile up money before the ax falls. But both states of mind alienate them somewhat from the workplace, the colleagues they work with and the clients they serve.

Worst of all, however, is that when somebody is working 2,200 hours a year, he or she has less chance to pursue the professional experiences that nourish a lawyer's soul. Lawyers of all stripes can and should offer their services for free to the needy, but I find it hard to imagine more satisfying work than pro bono litigation. That is because when you give the poor and powerless access to a just forum, there is a triumph—no matter what the outcome in a case. And the lawyer who is involved in doing that learns an invaluable lesson about the power and goodness that is inherent in being a lawyer.

I don't know many young lawyers who leave law school without dreams of becoming pro bono princes and princesses; nor is there a dream of youth that seems to die faster. In my own firm, we give young lawyers some billable credit for pro bono time and also have a full-time pro bono partner who works hard to engage the firm's lawyers in these projects. And we are hardly alone in the profession; many other firms make similar efforts. These are noble gestures—and ones fully worth undertaking. But it's still a little like King Canute ordering the sea to roll backward. As long as it's dollars times hours times partners, we know that the tide will always rise.

Let me again make it clear that I am not calling for lawyers to band together to abandon hourly billing. The antitrust division of the Justice Department would be likely to have something to say about that, and well it should. But I am hoping that lawyers, especially litigators, will more often be bold enough to consider offering clients alternative billing arrangements. And I hope clients will be bold enough to accept them.

Many years ago now, I went shopping for a lawyer in Hollywood to represent me in the dealings I have been fortunate to have with movie and television producers in connection with my books. Naturally, I asked each of the lawyers I spoke to about his or her hourly rate. One attorney answered, “We don’t bill hourly. We use the fair fee method.”

Then I asked, “Pray tell, what is that?”

“Well,” he said, “we do the work, and at the end we get together and agree about what’s a fair fee." This sounded to me like an invitation to jump without knowing whether there was water

in the pool. "Trust me" is not a persuasive motto. A solid economic relationship ought to start out with both sides understanding the scope of the engagement.

One reason that dollars times hours continues to prevail is because it's hard to devise a fair alternative. Columbus setting out from Spain, destined, in some minds, to sail off the end of the Earth, probably had a better idea what he was headed for than either a lawyer or a client at the inception of a piece of litigation.

Whatever alternative arrangements are made have to be flexible enough to adapt to changing knowledge and the unexpected. It will take some education and experimentation on both sides. But I think we have reached the point where that is virtually required.

The widespread practice of billing by the hours exists almost in defiance of the principles that are supposed to guide our profession. Of the eight guidelines mentioned in Rule 1.5 (Fees) of the ABA Model Rules of Professional Conduct, only one speaks directly to the time spent on the legal task. Yet, despite the fact that our profession's guiding ethical rule encourages lawyers to look to other factors, dollars times hours remains the near universal standard of commercial litigation.

A SORRY SYSTEM

But at the end of the day, my greatest concern is not merely that dollars times hours is bad for the lives of lawyers—even though it demonstrably is—but that it's worse for clients, bad for the attorney-client relationship, and bad for the image of our profession. Simply put, I have never been at ease with the ethical dilemmas that the dollars-times-hours regime poses, especially for litigators. And in this regard, I think my views depart from what is commonly acknowledged (including, I hasten to add, by disciplinary authorities, who of course have not disallowed the current system).

But from the time I entered private practice to today, I have been unable to figure out how our accepted concepts of conflict of interest can possibly accommodate a system in which the lawyer's economic interests and the client's are so diametrically opposed.

Looking again to the Model Rules, Rule 1.7 provides in part that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," which the rule defines as occurring when "there is a significant risk that the representation of one or more clients will be materially limited by ... a personal interest of the lawyer."

I ask you to ponder for just a few minutes whether that rule can really be fulfilled by hourly based fees.

It is fair to assume, of course, that sophisticated clients arc fully aware of the hazards of being billed by the hour. But we all know that conflict waivers require more than fair assumptions.

When was the last time any of us actually and explicitly set forth the problems of this system for a client, the way we do with other conflicts? Who ever says to a client that my billing

system on its face rewards me at your expense for slow problem-solving, duplication of effort, featherbedding the workforce and compulsiveness—not to mention fuzzy math. Does anybody ever tell a client what the rule seemingly requires?

"I want you to understand that I'm going to bill you on a basis in which the frank economic incentives favor prolonging rather than shortening the litigation for which you've hired me." The truth is that even to imagine that conversation would almost necessarily require the lawyer to be prepared to offer the client an alternative.

I understand some of the counterweights to what I've just said. There is more than a little merit to the idea that the market will reward efficient lawyers who labor to hold down their fees in the recognition that this will lead to further engagements. And of course, just like the vast, vast majority of self-respecting practitioners, I can say with conviction that I have never consciously ordered work or labored longer for the sake of increasing my bills. I think that litigators who send out bills are generally as stunned as their clients by the way time piles up.

But let's not assume this is proof the lawyer reasonably believes the representation will not be materially affected. How many times have you heard a lawyer speak mournfully of the case that settled rather than going to trial, with the resulting detrimental impact on that lawyer's economic fortunes?

More tellingly, who among us can say he or she has never accused the lawyer on the other side of "running the meter"—of doing unnecessary discovery, filing frivolous motions or foot-dragging before engaging in meaningful settlement talks—all to pad the fee. And that's not just to make excuses to the client. When we say it, we mean it. Looking at the lawyer on the other side of the *v.*, we can see clearly how the temptation to earn more might impact a representation. If we can see the effects of the dollars-times-hours system so clearly when we look across the courtroom, how can we be so fully confident about ourselves?

Personally, I doubt that greed is the principal motivation for the overwhelming majority in our profession, including my opponents. First and foremost, lawyers want to believe they have done their utmost for their clients—and it would be a rare attorney indeed who took much satisfaction out of thinking of himself as well-paid but incompetent or undedicated. Like every other conflict issue, the problem is one of appearances and temptations. But how can anyone ever know exactly why certain marginal tasks were undertaken? Anybody who has ever investigated a case or prepared to try one knows there is no limit to the potential issues, avenues for investigations, questions to be researched, or variable scenarios that the courtroom might offer. Dollars times hours subtly influences lawyers not to ask themselves what's most probable. It offers scant rewards for discipline.

The more often lawyers find themselves engaged in wheel-spinning, in running out ground balls rather than focusing on the strike zone, the more isolated they feel from the principal goals of the profession, which will always be doing justice. But again, it's the effect on the lawyer-client relationship that is the principal problem.

FEE FIASCO

As a result of hourly billing, the fee collecting process has grown far more fractious. There are now law firms that specialize in disputing other firms' bills—and in-house nudniks who demand copious details and then flyspeck them. Other clients search for means, whether it's strict litigation budgeting or task-value billing, to put a finger in the dike. But what does it do to the environment of our profession, to our perception of ourselves and our clients' perceptions of us, that we are locked into a system in which clients are saying from the start of the relationship: I can't really trust you to be fair to me. If there is even a grain of truth to that characterization, how reasonable is it to believe that our representations have not been materially affected?

America is ambivalent about lawyers. People are impressed with our knowledge and the power that knowledge gives us, and jealous of it as well. They see us as too often self-seeking, manipulative and greedy. We all know that this is not a balanced picture. Every time I hear about a DNA exoneration on radio or TV, I wait vainly to hear what I know is the rest of the story—about the lawyers, usually an army of them, who worked for years, generally for free, to give that prisoner back his liberty. The story of the lawyer doing good because he or she is committed to doing good is not one of the narrative themes American media are fond of presenting because it's not something the public wants to hear.

But recognizing how far behind the eight ball we remain in the eyes of the public, should we really continue to engage in billing practices that even our clients, who know us best, have been telling us inspire distrust?

If I had only one wish for our profession from the proverbial genie, I would want us to move toward something better than dollars times hours. We have created a zero-sum game in which we are selling our lives, not just our time. We are fostering an environment that doesn't provide the right incentives for young lawyers to live out the ideals of the profession. And we are feeding misperceptions of our intentions as lawyers that disrupt our relationships with our clients. Somehow, people as smart and dedicated as we are can do better.

3.2 Relationships with Clients – Conflicts of Duty

3.2.1 Generally

[Editor's Notes: **(1)** In August 2008, at Quebec City, Canadian Bar Association's Task Force on Conflicts of Interest will publish its practitioner-focused report (including recommendations). **(2)** Deborah M. MacNair's *Conflicts of Interest [:] Principles for the Legal Profession* (Aurora, ON: Canada Law Book, 2006) [looseleaf service, updated to May 2008] is a comprehensive and pragmatic treatment of this subject.]

"Lessons Learned: Lawyers' Biggest Career Mistakes and Successes"

Macaulay, Ann, CBA PracticeLink (www.cba.org/cba/PracticeLink), 06 March 2007 (*in part*)

Lawyers share some of the mistakes they've made over the years, as well as their tips on what's worked well.

. . . .

Own up when you're wrong

"Be prepared to admit your mistakes," says Paul Iacono, who practises in insurance, tort and personal injury litigation at Beard Winter LLP in Toronto. He advises lawyers to inform the client right away when something has gone wrong. Not long after he started practising law, Iacono got involved in a case after another lawyer made the mistake of missing an important legal principle. The lawyer called his client in and told him what had happened, then wrote down the names of five other lawyers and told him to choose one of them to consult with about the case. "So the man came to see me and I ended up having to sue this lawyer." What impressed Iacono was the other lawyer's professionalism about the issue.

Some years later, he remembered that lesson after missing a limitation period in one of his own files. He immediately told his client, "I've dropped the ball here, you've got to go and see another lawyer." He reported it to his errors and omissions insurance, the other lawyer started an action and the issue was resolved in the client's favour. As Iacono says, "You can't try to run from a problem. You've got to face it. The worst thing you can do is sweep it under the carpet."

And if you don't deal with the problem right away? "It's messier. The client is madder," says Iacono. He advises lawyers to say, " 'I'm sorry that it happened, I did my best, I made a mistake, I'm human.' You've got to be realistic about these things."

Realize that what goes around, comes around

In the category of potential CLM (career limiting move), one lawyer, who didn't wish to have his name used in this article, describes an experience he had as an articling student on a high-profile, hard-fought trial, which involved a number of senior counsel. His firm was appealing the case and he was given the task of ensuring the case was kept on the list. "My diarization system back then was not what it should have been," he says. He missed the deadline and the appeal was struck off the list. "I had the not very pleasant task as an articling student of walking into the senior partner's office, knees a-shaking, to tell him that by the way, this case, which has been much of the focus of your life for the last few years and which we are appealing, I just got it struck.

"I'm sure he was thinking all sorts of fairly negative thoughts, but he said, 'all right, the thing about litigation is there are very few mistakes that can't be fixed. Let's get around to fixing this one. Let's focus on what we do to get it back on the list.' That involved me having the humbling experience of walking around to about six different lawyers' offices, tail between my legs, asking for consent for the matter to be put on the list. And the other positive coming out of that was that everyone had the good grace to recognize it's an error, not to take advantage." Everyone consented and it was put back on the list.

"In our business, we all make mistakes," he says. "I really took it as a positive the way people responded to that error, both on my team—it would have been easy to jump down my throat—and on the other side of the fence. Everyone was very gracious about it. I've taken that as a good learning experience. I don't seek to take advantage and fully recognize when other people make mistakes that that's the course of the business and we all have to recognize that we'll have our turn in those shoes."

He adds that he has seen more files recently in which lawyers are picking on technicalities, "which are neither here nor there for the end result of the file. If you do that, you have to fully expect that it's coming back at you and it's going to backfire. And it's not just going to backfire on this particular file—the last thing you want to do is get a name out there as someone who's not reasonable to deal with because all of a sudden every other lawyer you're dealing with knows that you've got that reputation and they treat you differently and you don't get the courtesies at the time you require them."

Make connections

"I wish I'd known earlier how important relationships are in the practice of law and to focus on building those connections early on," says Soma Ray-Ellis, a partner and head of the employment group at Paterson, MacDougall LLP in Toronto, who is currently acting as counsel to Air India for the Air India Inquiry.

"When I began practising law, I thought it was just about working hard and producing good results," she says, "but that's the basic minimum. Beyond that, a significant portion of our time is spent managing clients and relationships, both within and outside of the profession, including the legal media, the media at large and the HR community."

For Eamon Hurley, general counsel at Northrock Resources in Calgary, one of the best career moves he made when he left a major law firm was to stay in contact with lawyers he'd met there and to follow up on people's offers. "When people said to me, 'call me, we'll go out and have lunch and play golf,' I did call them."

Hurley adds that far too many young lawyers he sees don't work at building personal relationships with other practitioners. As the past-president of the Calgary Bar Association, he has often wondered why young practitioners aren't taking advantage of opportunities to develop relationships with other lawyers at bar association get-togethers. They meet in collegial, non-adversarial settings, but participants tend to be what he describes as "the same old guard. Our events in Calgary should be overflowing with young lawyers, and it's not the case … if your schedule doesn't allow, if you're too busy, then my advice would be make your schedules allow to come to these events."

Avoid problem clients

Most lawyers have had this experience—clients you had a bad feeling about but you took on anyway. Sometimes there's a gut feeling right from the beginning that something isn't quite right, but often the realization doesn't hit until the file is well underway. Family lawyer Lonny Balbi of Balbi & Company Legal Centre in Calgary tells the story of one client who suddenly made the decision to represent herself. "I got off the file and I was happy to get rid of her," he says. She then came back to him several months later and needed his help right away.

"My sense was I didn't want to take the file on," but he did, and at a higher rate since he had to act quickly and move all his files to accommodate her. Although she agreed to the rate and the issue was resolved, "now she's challenging my bill in court because she's saying she paid too much." He adds, "she was stuck in a bad place and needed help so I did it, and now it's come back to bite me, so it wasn't worth it." When it gets to the point where there's so much conflict and lack of communication between you and the client, refer them to another counsel.

"Not every lawyer is good for every client," says Balbi. "It's not personal. There are people you're just not going to get along with."

Maintain your integrity

Clients may come and go, but your reputation is invaluable. "Your reputation is built in little bits and pieces on every file and every telephone call and every dealing you have with other lawyers," says Betty Johnstone, a partner at Aikins, MacAulay & Thorvaldson LLP in Winnipeg who practises construction law. "And it reaps rewards one way or the other."

Johnstone often gets conflicted out of files, so over the years she's had many opportunities to send work to people, but "my list of people that I send work to gets shorter with bad experiences." She says that many young lawyers don't realize "how much of their territory they burn by being sharp or inappropriately aggressive or doing a little sleight of hand. They have no idea what the impact of that is."

Stay civil, advises Kathleen Peterson, a partner at Balfour Moss LLP in Regina who practises family law. "It's worth it for your self-respect," she says. "Sometimes you lose your temper and sometimes you behave in a way that you wish you hadn't. I've breached this rule more than once…but that's one of the rules I try to live by."

Manage client expectations

Most clients who come to her door are going through a divorce, one of the most stressful times of their entire lives, says Peterson. Often, "you're the closest thing they have to get mad at." While she doesn't advocate putting up with abusive clients, "I forgive a lot of bad behaviour from clients because I know what kind of stress they're under. But if it crosses that line and I find the client starts to treat me like a doormat or a whipping post, then I tell them they need to go see another lawyer. Because that's stress for both of us."

A lawyer should be objective. Stay professional and keep your perspective while you're helping clients deal with their problems. "You can give them objective advice without being swept along with whatever emotional stuff they're going through," says Peterson.

Managing a client's expectations is important. Set them at a reasonable level and be very clear if the case is going to be very difficult. Then, says Balbi, "if we go in and I win, the client thinks I'm the best guy in the world and if we lose they kind of expected it."

Don't bury your head in the sand

Billing clients can be a very difficult part of the practice of law. Balbi says that when he was a young lawyer, "I was afraid to talk about what the legal fees were and I always tried to keep them within reason, thinking if I could keep them low, they would hire me." Invariably the fees were more, "and I didn't have the discussion and the clients always remembered the low number that I talked about." When discussing fees, he recommends to "start at the high end and then quote each category and go down from there. I often would talk about the low amount. Of course we rarely ever achieved that. Stress the higher number. The first few times you say it it's hard because you think that you're going to choke just by saying this.["]

Balbi recommends phoning clients before sending out the bill. He describes it as common courtesy, plus your chances of getting paid are higher. "When you send out your bill to your client, the easiest thing in the world to do is just to simply sign the letter, sign the bill, and pop it in the mail. You kind of bury your head in the sand hoping that when the client gets it they're going to be thrilled with it, they're going to immediately write you a cheque for that exorbitant amount.["]

When he phones clients, Balbi tells them, “I’m going to be sending you a bill, here’s the amount, here’s how much is in trust. I just wanted to let you know it’s coming.” Listen for signals. “Does the guy fall off his feet? Does he have a heart attack? Or is he okay? If there’s a problem at that point you need to have that discussion with a client.”

Cope effectively with stress

If you don’t love what you do, find something else. That’s a hard lesson for a lot of lawyers, because once you spend years studying law and start making good money, it’s hard to think about making a change.

“There are days that I don’t enjoy some of the work I do or some of the people I deal with,” says Balbi, “but I do look forward to my work, I do enjoy it, I have a lot of fun in it. I think it helps me to be a much better lawyer when I love what I do.”

Take care of yourself mentally and physically. Have outside interests, exercise, meet with friends, eat well and get lots of sleep.

The stress of practising law “can cause a lot of problems, like addictions or depression,” says Peterson. “Don’t get so wrapped up in what you’re doing that you ignore the important things in life.” She’s seen lawyers crash and burn. “They literally feel like the weight of the world is on their shoulders and you watch them deteriorate day by day. A lot of them don’t recognize what’s happening to them but they may be falling into a depression.”

Peterson points out that articling students and associates are “being pulled by the partners to bill, bill, bill, it’s money, money, money. And of course you have four other files that have exactly the same stresses and they all have to be taken care of today. So it’s important to maintain a centre for yourself so you know who you are and where you’re going.”

Learn how to handle yourself in the courtroom

Be prepared. Peterson describes a mistake she once made in court. “I got up to talk to the judge and it was a complicated application and I brought the wrong file with me,” she says. “It was really horrible.”

She had to explain to the judge and other counsel why she wasn’t ready, then asked the court to put the case to the bottom of the list. Someone came from the firm with the correct file in a huge panic. “We did get to make our arguments. But of course I had to explain to the judge and other counsel why I wasn’t ready,” says Peterson.

Balbi says one rookie mistake he often sees in the courtroom occurs when “people don’t know how to address the court properly.” He adds that he frequently sees lawyers jump into an argument without explaining the background of the case first. “You can see the judge is really mixed up because he doesn’t know any of the context. You make the judge look bad and you don’t look like a very effective advocate.”

Spend some time in the courtroom. “Watch how other people do things, figure out what’s effective and what’s not,” says Balbi. “You learn a lot just by watching senior people.”

Get good mentors. Find a senior counsel that you can consult with regularly so you can learn from someone who knows what they’re doing. “Mentoring is deficient today,” says Iacono. “Thirty years ago young lawyers got to work with senior counsel, got to go to court with them, got to prepare their briefs. Today most young lawyers just get thrown into it.”

Finally, recognize when to stop asking a witness questions. Iacono gives a classic example. “You’re on your feet cross-examining a witness, you get a good answer out of the witness and you should sit down. But you make the mistake of asking one question too many and it gives the witness a chance to manoeuvre himself out of the answer he gave you.”

How do you know when you’ve said enough? “That comes from instinct and experience. And from being there, doing it, making the mistake the first time, and then knowing when to shut up.”

"Conflicting interests cause interesting conflicts"

McNish, Jacquie, *The Globe And Mail*, 27 June 2007, p. B10

Susan McGrath has been doling out divorce advice to estranged husbands and wives ever since she began practicing family law 28 years ago in Iroquois Falls, a leafy pulp and paper town north of Timmins, Ont.

These days when spouses call or visit, however, a growing number aren’t seeking legal advice. Instead, Ms. McGrath said, some callers briefly consult her and other lawyers in her hometown to prevent them from representing opposing spouses during divorce proceedings.

“It’s all tactical,” said Ms. McGrath, a former president of the Canadian Bar Association. “Some people will pay hundreds of dollars for brief consults so their spouses can’t get proper representation in the region.”

Ms. McGrath is being sidelined because of tightening professional conflict-of-interest rules that restrict lawyers and their firms from pursuing personal interests or clients whose actions may have an adverse affect on other existing or, in some cases, former clients. What is making the devilish issue of managing conflicts so alarming for small-town and big-city lawyers across Canada is aggressive clients who hire law firms as a tactic to disqualify them from representing opponents.

The problem is so acute that the Canadian Bar Association yesterday unveiled a national task force to draft clearer guidelines for a profession that is seeing its business choked off by conflict rules. The task force of 17 lawyers and legal experts is working with the various provincial law

societies that govern the profession to reform the current rules that they say have been muddied by recent court decisions.

"Conflicts have become a management nightmare because the rules are so vague. Clients are using conflicts to gain a tactical advantage over opponents by handicapping or restricting their freedom of legal choice," said Scott Jolliffe, national managing partner of Gowling Lafleur Henderson LLP, who is chairing the task force.

Mr. lolliffe should know. Earlier this year, CenTra Inc., the Michigan-based owner of the cross-border Ambassador Bridge, launched a legal action in the state's district court to disqualify Gowlings from representing the city of Windsor on the grounds that the law firm also acted for CenTra.

"They were essentially trying to bully us," Mr. lolliffe said. According to court documents, Gowlings has periodically advised CenTra about tax, trade-mark and financing issues since 1985. The law firm sent the Michigan company a letter in 2004 advising that it was representing Windsor in its review of CenTra's plans to expand the Ambassador Bridge.

When Windsor began to oppose the expansion of the bridge in late 2006 because it feared the small city couldn't cope with increased traffic from Detroit, Mr. Jolliffe said CenTra's executives demanded Gowlings resign as Windsor's firm because it was conflicted. Gowlings refused and CenTra filed a court motion to disqualify Gowlings, alleging that the law firm's lawyer, David Estrin, had failed to inform it about its business with Windsor.

In April, the Michigan court dismissed CenTra's motion after it found the company's testimony that it was unaware of Gowlings' Windsor assignment was "fatally inconsistent" with evidence that Mr. Estrin had properly informed CenTra in writing. CenTra has appealed the decision and Gowlings is continuing to represent Windsor.

"Our lawyer has been involved in these proceedings with the city for years. We feel that we cannot abandon Windsor at this delicate stage," Mr. Jolliffe said.

Inflaming the conflicts debate are a handful of Supreme Court decisions that have triggered tougher legal interpretations about law firm conflicts. The core case is a 2002 Supreme Court ruling, known as the … [Neil] decision, which found that a lawyer cannot act for one client whose interests hurt another existing client, even though their cases may be unrelated. Some legal experts say that standard has now been extended to former clients as a result of a Supreme Court decision last month, known as the Strother case.

Some law firms are adjusting to the tougher conflict standards by seeking written approval or mandates from clients that give them more freedom to act for potential competitors or opposing parties. Indeed some firms are so adept at obtaining client consents that they set up separate teams of lawyers to represent bidders competing to acquire the company or assets.

But the solution doesn't work for everyone. Many clients won't release law firms to act for competitors and a growing number hire multiple law firms to block rivals from obtaining their advice.

Avoiding conflicts with existing and past clients has become increasingly difficult for specialists and small-town lawyers who inevitably trip over former clients.

"After a period of time, you've acted for everyone if you specialize," said Robert Brun, a Vancouver-based lawyer with Harris & Brun, who ranks as a leading expert in workers' compensation cases involving auto accidents. Mr. Brun has joined the task force on conflicts because of concerns that his and other specialized practices are being endangered by ever tougher standards.

For example, Mr. Brun said, his work invariably involves a limited number of insurance companies and it is not uncommon for him to be working for or against an insurer on different cases.

"When you specialize in a narrow area, you quickly find you've got a conflict. You literally almost have to change your area of practice," he said.

Ms. McGrath says conflicts fights have become so "ludicrous" that one former client recently filed an unsuccessful motion to disqualify her from acting for the man's estranged wife during their divorce because the lawyer had 15 years earlier advised the couple about a mortgage on their first home.

Such conflicts are unavoidable, she said, in a town of 5,200 people.

"At one point or another I've acted for most families in town. If I followed the [court] decisions on conflicts to their fullest extent I would essentially have to move every five years," she said.

"Clear conflicts? [-] The competition for top legal talent continues to intensify, but firms must tread carefully to avoid conflicts"

Arnot, Alison, *National,* June 2007, pp. 48.

Greater business mobility and the growing size of law firms is fueling the rising number of lateral hires of associates, partners—even senior partners—no longer content to stick with the same firm for an entire career.

All this movement is fertile ground for ethical problems involving client confidentiality and potential conflicts for newcomers who bring their clients and past experience to a new firm. As Anne Stewart, a partner at Blake, Cassels & Graydon LLP in Vancouver explains, "Simply being asked to act for a client is in itself confidential." Do transferring lawyers and the firms that hire them have enough guidance to act in their client's best interests?

Chapter 5 of the CBA *Code of Professional Conduct* addresses "Conflicts Arising as a Result of Transfer Between Law Firms" (while the CBA rules are not binding, each province's

code of conduct similarly covers this issue to varying degrees). For example, Chapter 6 of the Law Society of British Columbia's *Professional Conduct Handbook* specifically addresses conflicts arising as a result of transfer between law firms in rules 7.1 to 7.9. Meanwhile, the Law Society of Alberta's Code of Professional Conduct includes a discussion of the issue in Rule 4 and subsequent commentary in Chapter 6, "Conflicts of Interest."

Other provincial codes, including those of the Saskatchewan, Manitoba, and Nova Scotia law societies, have listed guidelines adapted from the Canadian Bar Association's Task Force report titled Conflict of Interest Disqualification: Martin v. Gray and Screening Methods (February 1993). These guidelines, which also appear in the CBA Code, serve as a checklist of relevant factors to consider during a lateral hire.

Because the rules of the various law societies are not uniform, the Federation of Law Societies Committee on Model Code of Conduct recently attempted to formulate a rule that would deal with such conflicts. "We had hoped that the various law societies would adopt that rule," says David Zacks, also a partner at Blakes in Vancouver and a B.C. representative on the Federation's committee. The committee is working on a model code of conduct similar to the CBA code, later to be reviewed by the Federation council, and eventually by each law society.

"It's not clear each of them will pass it," Stewart says, adding, "It would be great if it could be consistent across the country."

"Mobility is not just between law firms—lawyers moving from one law firm to another — there's mobility across the country," Zacks points out. "The rules on conflict are not all that different, but they're different enough that sometimes our partners in other offices have difficulty understanding why we say we can't act for somebody."

"When moving to another firm, how should a lawyer weigh conflicts of interest against client confidentiality?"

Arnot, Alison, *National*, June 2007, p. 49.

Ethical Hypothetical

Question: When moving to another firm, how should a lawyer weigh conflicts of interest against client confidentiality?

Disscussion: Before moving to a new firm, a lawyer's key clients must be checked against the new firm's client base. Should conflicts arise, either some clients will be dropped, the lawyer coming on board will be barred from working on specific files, or the firm itself will disassociate itself from a client.

Take, for example, a lawyer from a small litigation firm who recently joined a large firm with offices across the country. What steps must be taken to avoid conflicts?

Anne Stewart, a partner at Blake, Cassels & Graydon LLP in Vancouver, describes how her firm performs conflict checks when hiring new lawyers. "We sit down with them on a confidential basis, and they will tell one person here about past work that might pose a conflict, and we will do our checks," she explains. Her firm maintains a list of all clients and entities that could be affiliated with clients, and a list of parties possibly linked to a matter on the opposite side.

"These get filed in our central database system and everybody is obliged to keep that up to date," Ms. Stewart says.

But this type of conflict check presents risks compromising client confidentiality. "Unless that's actually allowable for this limited purpose, then you're breaching confidentiality in order to not breach confidentiality," says Anne McGillivray, a law professor at the University of Manitoba.

"There should be some minimum allowance for disclosure of what otherwise should be kept confidential," McGillivray continues. "If you look at any of the codes under conflicts of interest, you'll see the areas where limited disclosure is permitted ... is this disclosure necessary to prevent future breach of professional responsibility?"

What if the conflict check reveals past work on behalf of a client whose interest in … [an ongoing] claim opposes the new firm's clients? "This doesn't mean that we can't hire the lawyer," Stewart says, "but before he comes here, we have to follow the requirements [of the B.C. *Professional Conduct Handbook].”*

The firm will send a memo to all its employees making it clear that work on the specific client's file must be kept separate and the new lawyer must have no involvement with the case. Any materials related to the case must be kept in a secure place, so he doesn't have access to them.

"In certain circumstances, you may have to get the consent of both clients," says David Zacks, also a partner at Blakes in Vancouver and a bencher with the Law Society of British Columbia.

He draws a distinction between a transferring lawyer simply working for another firm, but who isn't involved with … [an ongoing] case, and a lawyer actually working on the [ongoing] file. In the latter scenario, the firm must inform the client and provide assurances that it has taken steps to prevent the lawyer's involvement in the [ongoing] case.

"Conflicts of Interest: The Supreme Court's Ethical Trilogy – MacDonald Estate, Neil, and Strother"

Morrison, Q.C., Harvey L., November 2007 (unpublished) (*in part*)

It is well-settled that a solicitor-client relationship is a fiduciary one: *Brown* v. *Inland Revenue Commissioners.* [1965] A.C. 244. at p. 256; *Strother* v. *3464920 Canada Inc.*, 2007 SCC 24 (hereafter *Strother"),* at para. 34; *R.* v. *Neil,* [2002] 3 S.C.R. 631, at p. 643: *Cordery's Law Relating to Solicitors* (7th ed., 1981), p. 9. It is a proposition that is not in doubt: *Clark Boyce* v. *Mouat,* [1994] 1 A.C. 428, at p. 437. Indeed, a solicitor has been considered to be the fiduciary of his or her client since at least the 18th century: *Nocton* v. *Lord Ashburton,* [1914] A.C. 932, at p. 952, per Viscount Haldane, L.C.

The core duty of a fiduciary is one of undivided loyalty to his client or principal. In *Bristol and West Building Society* v. *Mothew,* [1998] Ch. 1 Millett, L.J. (as he then was) stated at p. 18:

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary

See also *Snell's Equity* (31st ed., 2004), p. 150; *Clark Boyce* v. *Mouat,* [1994] 1 A.C. 428, at p. 436. In *R.* v. *Neil,* Binnie, J. stated at p. 643

> The duty of loyalty is intertwined with the fiduciary nature of the lawyer - client relationship. One of the roots of the word fiduciary is *fides,* or loyalty, and loyalty is often cited as one of the defining characteristics of a fiduciary ... The lawyer fulfills squarely Professor Donovan Waters' definition of a fiduciary…

There are at least three aspects of the duty of loyalty:

(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 ….; and

> (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.

R. v. *Neil,* at p. 645-46; *Strother,* at para. 35.

[Particularly as pertains to the first of the three aspects of the duty of loyalty] [t]he duty to avoid conflicting interests is more stringent than merely avoiding actual conflicts. It is more properly described as a duty on the part of the fiduciary not to "place himself in a position where his duty and his interest may conflict": *Bristol and West Building Society* v. *Mothew,* [1998] Ch. 1, at p. 18 (emphasis added); *Bray* v. *Ford,* [1896] A.C. 44, at p. 51; *Marks & Spencer pic* v. *Freshficlds Bnickhaus Dcringer,* [2004] 1 W.L.R. 2331, at p. 2334. One of the "clearest and most direct statements of the rule" is found in the speech of Lord Cranworth, L.C. in *Aberdeen Railway Co.* v. *Blaikie Bros.* (1854), 1 Macq. 461: *Newgate Stud Co.* v. *Penfold,* [2004] EWHC 2993 (Ch.) at para. 219. There Lord Cranworth, L.C. stated that

> it is a rule of universal application, that no one, having [fiduciary] duties to discharge, shall be allowed to enter engagements in which he has, or can have a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

See also *Bhullar* v. *Bhullar,* [2003] EWCA Civ. 424, at para. 19; *Snell's Equity,* p. 154.

While the rule is of "universal application" and "inflexible" *(Bray v. Ford,* [1896] A.C. 44, at p. 51), it is not absolute. There is "no general rule of law to the effect that a solicitor should never act" where there is a conflict of interest. He may act provided he has obtained the informed consent of those to whom he owes fiduciary duties: *Clark Boyce* v. *Mouat,* [1994] 1 A.C. 428, at p. 435.

. . . .

The Supreme Court's ethical trilogy of *MacDonald Estate, Neil* and *Strother* does not represent an entirely new way of looking at legal practice. The cases are examples of the application of old, well-settled equitable principles. Perhaps, instead of asserting that the sky is falling, if the legal profession and the courts explored more thoroughly the nature and scope of these equitable principles, conflicts of interest problems could be resolved with more light and less heat.

Legal Ethics in Child Custody and Dependency Proceedings

Patton, William Wesley (Cambridge: Cambridge University Press, 2006), pp. 7, 9-22.

It might seem unusual for a book on legal ethics to begin with the complicated issue of conflicts of interest. However, if an attorney waits until after the initial client interview to determine whether a conflict exists or is likely to develop during representation, the attorney might prejudice the client by having to conflict off the case at some later time. Conflicting off the case will not only lengthen the litigation time-line by requiring another attorney to prepare the case but also will increase the client's emotional trauma inherent in contested litigation. Therefore, before an attorney considers the detailed facts inherent in any case, engages in an intake or initial client interview, and even reviews all the available evidence, counsel should consider actual and potential conflicts of interest. Furthermore, it is essential for counsel to continually assess conflicts questions until the completion of the client's representation.

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…. The court in *Carroll v. Superior Court* [124Cal. Rptr. 2d 891 (cal. App. Ct. 2002)] determined that there were numerous actual and several probable conflicts of interest inherent in one attorney representing all of the siblings in this case because termination of parental rights and adoption would end the legal relationship among the siblings and make fulfillment of their desire to continue sibling association unlikely. The court noted that zealously arguing for adoption of the 3-year-old child would, in effect, argue against the other children's desires to have continuing postadoption contact with her. The court also noted that some siblings might forgo their right to argue for their best interests in order to assist a permanent placement of a brother or sister that was in that child's best interest but that would result in a severance of sibling association. Because the attorney had interviewed all the children in the case and had established an attorney-client relationship with each child, the only remedy consistent with the requirements of confidentiality and client loyalty was for the attorney to conflict off the representation of all of the siblings: "[T]he attorney must be relieved from representation of any of the minors … [and] an attorney may not be appointed to represent multiple minors if it is reasonably likely an actual conflict of interest between or among them may arise."

Conflicts of interest in representing multiple siblings also arise in contexts in which one attorney discovers, through interviews, confidential information that will assist one sibling but will harm the others. For instance, assume that an attorney is appointed in a child dependency action to represent three children, ages 14(sister), 11 (brother), and (sister) 6. The petition alleges sexual abuse by the mother's boyfriend of the 14-year-old sister and that the 11-year-old brother once saw the mother's boyfriend lying on top of his 14-year-old sister on the couch. Also assume that the 11-year-old brother informs the attorney that he wants his statements to remain confidential. The 14-year-old sister informs that attorney that she wants to be placed outside the

home, but wants continuing contact with her siblings. The 11- and 6-year-old children want to remain in the home. The attorney is thus faced with an actual conflict of interest because he now possesses data that can assist the 14-year-old in proving the sexual abuse case and make her removal from the home more likely. However, if the attorney uses that confidential information, the attorney would violate the duty of loyalty and confidentiality to the 11-year-old brother. In addition, because the use of that confidential data may inform the court that the 6-year-old sister may also be at risk of sexual abuse by the mother's boyfriend, the use of that data would frustrate her desire to stay at home with her mother rather than being placed in relative or foster care.

Although providing siblings with separate counsel in custody and dependency proceedings will undoubtedly increase the cost of legal representation, there is a sound reason why some courts have held that "any doubt about the existence of a conflict [in representing an abused child] should be resolved in favor of disqualification."[11] The American Bar Association has described an adult client's reaction to conflicts of interest in legal representation as a feeling of betrayal and a "fear that the lawyer will pursue that client's case less effectively out of deference to the other client. . . ." But the effect on abused children is substantially greater: "The abused child, already betrayed by a trusted adult, has finally taken a substantial emotional risk by having faith in her attorney. She has relied upon the attorney to protect and argue her case. What must she think when yet another trusted adult abandons her? The jurogenic effects of the legal system re-victimize the child."

It is thus critical for attorneys to determine whether actual or potential conflicts of interest are inherent and probable in the representation of multiple sibling groups. To calculate the potential for conflicts of interest, the attorney should consider the following factors, first, the greater the age gap between the siblings, the higher the risk for a conflict of interest. This is because young siblings are much more likely to be adoptable and to have their parental rights severed than are older children. For instance, even if a 2-year-old and a 15-year-old have psychologically bonded, many courts have determined that the older child will be placed in long-term foster or relative care while the younger child will be adopted. Second, if one or more siblings have special needs, it increases exponentially the chances that the children will be ordered into different placements. For example, in *Adoption of Hugo* the court refused to place a 2-year-old boy with special needs in the same adoptive home with his 6-year-old sister because it determined that the paternal aunt had the special training needed to care for the special needs child. Although the Massachusetts Supreme Court found that sibling association is important, it held that the best interest of placing the younger child in a home in which a relative could care for his special needs was more important than continuing the sibling relationship.

Third, the strength of sibling bonds among siblings, as well as between siblings and foster parents, will often determine conflicts of interest that might arise because closely bonded siblings are more likely to argue that they should be placed together. For instance, in *In the Interests of David A,* two siblings who had close psychological bonds with one another were placed into different foster homes. At the termination of parental rights hearing, the court rejected placing both siblings into the same placement because, even though they were bonded to each other, the court found that they were also bonded to their separate foster parents and that separation from the foster parents would cause the children substantial psychological harm.

Fourth, the availability of placements with relatives should be considered. Many jurisdiction have a statutory presumption for relative placement if placement cannot be made in one or both parents' homes. If siblings are placed with the same or with different relatives, association issues are less likely to arise, which decreases the probability of conflicts among the siblings. However, a large percentage of out-of-home custody awards do not involve relatives. For instance, "of California's 98,000 children under court supervision, sixty percent had siblings, but 'forty-one percent were not living in the same foster home … [and [f]orty-eight percent of siblings in foster care do not live with relatives.' "

The California Supreme Court in *In re Celine* R. established perhaps the most rigorous standards in the nation regarding conflicts of interest in representing multiple siblings. *Celine R.* is remarkable not only for its heightened tests for conflicts of interests among siblings but also because the Department's attorney attempted to persuade the California Supreme Court that the rules of professional responsibility, and in particular, the prohibition against representation of clients whose interests conflict, should not apply to juvenile clients. The Department's attorney urged that the Supreme Court "hold that the Rules of Professional Responsibility cannot and do not apply strictly to attorneys representing minors in juvenile dependency proceedings … ." The California Supreme Court was, needless to say, hostile to that position at oral argument and rejected the reasoning. Instead, the court established a rule that "an attorney may not represent multiple clients if an actual conflict of interest between clients exists and may not accept representation of multiple clients if there is a reasonable likelihood an actual conflict of interest between them may arise." In addition, the court held that, whenever an actual conflict of interest arises, "the court will have to relieve counsel from multiple representation" and the attorney may not represent any of the siblings.

However, the California Supreme Court further held that the standard for reversible error is identical to the standard of error in cases in which children were erroneously denied representation. The children must prove on appeal that it is "reasonably probable the result would have been more favorable to the appealing party [siblings] but for the error." The California Supreme Court in *In re Celine R.* thus created a rigorous standard for determining whether conflicts of interest exist, but created such a demanding standard of prejudice that rarely will such conflict result in a reversal of the dependency trial court judgment.

Whether the children will have a malpractice action against their dependency court attorney will depend upon the malpractice standard adopted in the jurisdiction. If that standard requires that the plaintiff demonstrate that a more favorable outcome would have occurred absent the malpractice, the children may find themselves in the same dilemma as under the *In re Celine R.* remedy.

The Massachusetts Supreme Court in *Care and Protection of Georgette* reached a similar conclusion in a multiple sibling case in which one attorney represented four sisters (Beth, Judith, Georgette, and Lucy) in a termination of parental rights proceeding. The trial court terminated the father's rights to Beth and Judith, but placed Georgette and Lucy in the permanent custody of the Department of Social Services. Georgette and Lucy appealed based upon a claim of ineffective assistance of counsel because the trial counsel who represented all four sisters argued conflicting interests and refused to zealously argue Georgette's and Lucy's desire to remain in their father's

home. Although the Massachusetts Supreme Court ratified the siblings' rights against conflicts of interest in their legal representation, the court held that the sisters "failed to demonstrate any prejudice based upon the overwhelming proof of the father's unfitness." However, the court was dissatisfied with the current status of professional rules regarding conflicts of interest in representing children and recommended that the "standing advisory committee on the rules of professional conduct" devise new ethical standards for the representation of abused children.

II. CONFLICTS OF INTEREST INVOLVING PARENTS' ATTORNEYS

Parents' counsel have frequently run into ethical problems when representing both a mother and a father in child custody or dependency proceedings, even if the attorney attempted to secure waivers regarding conflicts of interest. For example, in *Oklahoma Bar Association v. Max M. Berry* an attorney represented a wife in a divorce proceeding, but she discharged him and retained new counsel. After the husband and wife remarried, they again divorced three years later, and this time the attorney represented the husband. Even though the wife informed the attorney that it was inappropriate to represent her husband because he had earlier represented her in the prior divorce, the attorney continued to represent her husband. The Oklahoma Supreme Court held that the attorney engaged in a conflict of interest that also breached his duty of loyalty to the wife.

In a more egregious conflict of interest case, *Kentucky Bur Association v. Ronald A. Newcomer,* a mother in an initial interview of a contested custody case disclosed confidential data to an attorney. Because the mother lacked sufficient funds to hire the attorney, she proceeded *in propria persona.* However, at the custody hearing the same attorney represented the father and disclosed confidential information gleaned during his initial interview with the mother. The Kentucky Supreme Court suspended the attorney for three years for violating the rule against conflicts of interest and for divulging confidential information obtained during the initial client interview with the mother.

Although conflicts of interests are quite apparent when an attorney represents two clients with conflicting interests in the same proceeding, it is more difficult to determine whether an attorney can represent parties in separate and/or collateral proceedings. For instance, in *In the Matters of the Commitment of the Guardianship and Custody of Destiny D.,* the New York City Legal Aid Society Criminal Division represented a father in a criminal proceeding based upon child abuse. The New York City Legal Aid Society Juvenile Rights Division was also representing the abused children in a termination of parental rights proceeding based, in part, on the facts underlying the father's criminal case. The father informed the Legal Aid Society that it should not represent the children because of a possible conflict of interest and a potential breach of confidentiality. A family court judge denied the father's conflict motion and held that the father must demonstrate (1) a prior attorney-client relationship with the Legal Aid Society, (2) a substantial relationship between the dual representations, and (3) "that the interests of the children in these proceedings are materially adverse to the matters in which the attorney or firm previously represented." The court determined that there was not a sufficient conflict to require withdrawal because the Juvenile Division of the Legal Aid Society never represented the father, because the issues in the criminal trial and the termination hearing were "sufficiently dissimilar," and because there was merely "speculation" that confidential information from the father's criminal representation would be disclosed. The New York court thus set a very high threshold to prove a

conflict of interest between cases represented by separate divisions of a governmental legal services office. One must wonder whether a narrower test would apply to conflicts of interest within different branches of a private civil or criminal law firm.

In *In the Matter of Glen L. Houston* an attorney was retained by a mother in a divorce action. Subsequently, the mother informed the attorney that the father had sexually molested her daughter, and the attorney advised the mother to file a domestic violence petition. The husband was arrested for sexual abuse and domestic violence. "At the request of the husband, and with the consent of wife," the attorney agreed to represent the husband in the criminal action. The husband was sentenced to three years in prison. The attorney never informed the wife that, if she consented to the representation, she and her daughter might be called as witnesses, and after the conviction the attorney never informed the wife that she could seek a custody modification under the divorce limiting the father's access to the child. Even after the wife said that she did not want the husband to have visitation, the attorney protected the husband's interest to the disadvantage of the wife "by entering a decree containing joint custody and unsupervised visitation" for the husband. The court found that there was a clear conflict of interest even though the attorney represented the two clients in separate proceedings and also held that the wife's consent to the conflict was not valid because the attorney had not properly counseled her regarding the consequences of the conflict waiver. The attorney was suspended for eighteen months.

In a similar case, *Board of Bar Overseers Office of the Bar Counsel Massachusetts Bar Disciplinary Decisions, Admonition* 00-68, a law firm simultaneously represented a mother charged with child abuse and in an unrelated matter also represented the father of the child. Subsequently, a police report made it clear that the father would be an adverse witness against the mother in the child abuse action. 'The Massachusetts Bar Disciplinary Committee found a clear conflict of interest because the state professional responsibility law treated lawyers within an office identically to a single lawyer representing two clients with conflicts of interest: "Mass. R. Prof. C. 1.10(a) provides that, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by the rules on conflict of interest. The attorney received only a private admonition because he "mistakenly believed that since the father did not file the neglect and abuse complaint, he was not adverse" to the mother's interests.

Attorneys should rarely accept dual representation of mothers and fathers in child dependency proceedings in which only one of the parents is alleged to have abused their children because of the high potential for conflicts of interest. It is very common for the nonabusing parent to appear supportive of the abusive parent at an initial client interview based upon (1) a true belief that the abuse allegation is untrue; (2) a sense of duty to one's spouse or lover even if the abuse occurred; (3) fear derived from threats by the abusive spouse; or (4) a fear that cooperation with the Department might lead to loss of the abusing spouse during a period of incarceration in the criminal case, which might reduce the economic vitality of the family. Even if the nonabusing spouse consents to dual representation, the attorney should reluctantly represent both spouses because often, deep into the dependency case, the nonoffending spouse's position may be altered dramatically in two ways. First, the Department may amend the petition to allege that the nonoffending parent knew of the abuse but failed to report it or to protect the children from the abusing parent. And second, the Department may pose a disposition alternative in which the nonoffending

parent will have to elect between the marriage relationship and the relationship with her children. One of the most common disposition alternatives is to require the nonabusing parent to elect between allowing an abusing spouse or boyfriend to live in the children's home or to eject him and retain custody of her children. Because of the inherent conflicts in defending the offending and nonoffending parents or lovers, an attorney should rarely, if ever, represent both parties in child dependency and/or child custody proceedings.

III. THE DEPARTMENT'S ATTORNEY: WHO IS THE CLIENT?

Although historically both the legislature and courts have held that the same attorney could represent both the Department and the child abuse victim, contemporary cases have indicated that such dual representation is at the very least a bad policy and at worst an insoluble conflict of interest. A Department attorney who also represents abused children will be placed in a dilemma of receiving confidential information from the child that the attorney cannot disclose to the Department without the consent of the child. Thus, the attorney will either have to violate his duty of zealousness and competence owed to the Department or violate his duty of confidentiality owed to the child.

Although the Department historically has argued that it represents the best interest of children, internal budgetary pressures often pit the needs of the child against the services available to the Department. "The presence of perverse incentives in the child welfare system is not uncommon. In several areas, the availability of funding, rather than the family's needs, may dictate the service chosen. For instance, in the current era of diminishing public funds and fewer prospective adoptive parents for abused children, the federal government provides states with adoption subsidies that bring in tremendous revenue. The revenue implications of placing a child in an adoptive home with the federal adoption subsidy, rather than placement with a relative or foster parent that is not equally federally subsidized, have a clear and strong influence on the Department's choice of child placement.

Even though California attorneys who represent the Department of Child and Family Services have fought for decades to retain the right to represent both the Department and abused children, an often overlooked comment to *American Bar Association Model Rules of Professional Conduct, Rule 1.7,* which defines conflicts of interest, demonstrates that such dual representation by the Department is ethically problematic. *Comment, paragraph 5* provides the following test to determine whether an attorney should even attempt to obtain clients' consent to dual representation: "[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." One might ask whether knowing the potential and actual conflicts of interest inherent in dual representation of the Department and the abused child could lead any "disinterested lawyer" to conclude that that relationship is truly in the child's best interest, especially because other attorneys without such conflicts are available to represent the child.

In *North Carolina State Bar Opinion RPC 14: County Attorney as Guardian Ad Litem* a county attorney who did not represent the Department of Social Services in any proceedings, but who occasionally answered legal questions concerning the Department as counsel for the five-

member Board of Commissioners, sought to act as a guardian ad litem in dependency court. The North Carolina Bar Association held that there was a sufficient conflict of interest that prohibited the attorney from acting as a guardian ad litem and also held that due to the children's youth, they could not waive that conflict of interest.

In addition to conflicts of interest between the Department and abused children regarding placements, another conflict sometimes develops when the abused child alleges injury while in the custody of the Department or the Department's agent. Although a quick resolution of such legal complaints is clearly in the abused child's best interest, the Department, like most tort defendants, often uses legal strategies that strengthen its case and weaken the child's. For instance, a recent series of newspaper reports have delineated the Los Angeles Department's stalling tactics used against child abuse tort victims. In fact, one study demonstrated that the County Counsel and the county claims adjuster routinely denied every tort claim by abused children in foster care filed against the county. In addition, many attorneys representing foster children suing the Department "accused the county counsel's office of stone-walling court-ordered efforts to investigate the cases," although County Counsel explained that such delays are caused by confidentiality laws. It is uncertain what pressures would develop if County Counsel had dual representation in these cases. If the foster child made any statements to the Department or County Counsel regarding the tort. County Counsel might have to conflict off the case.

In a rather surprising analysis, the South Carolina Bar Ethics Advisory Committee held that an attorney who regularly is hired at $100 per dependency annual review to act as the guardian ad litem for children can, as long as it is not a case in which the attorney represented the child before the court, be hired to represent the Department of Social Services. The Ethics Committee did not find a conflict of interest because the child would have legal representation that would ameliorate any “propensity for conflict and inadequate representation … .” The Ethics Committee did not even discuss the appearance of impropriety or of unfairness that might be created in the minds of parties in the dependency action. The Louisiana Attorney General held that, in the analogous area of criminal law, a district attorney may not serve as a public defender even if the prosecutor has not been involved in the prosecution of defendants in any way because of the appearance of impropriety. One must wonder why in the area of conflicts of interest a similar rule should not apply in child dependency actions that implicate a fundamental right similar to, although not identical to, the liberty interest inherent in criminal trials.

Another common dual representation by County Counsel involves conflicts of interest between the Department and one of its employees. Most ethics codes clearly state that "[i]n representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself … .” However, in some jurisdictions that use a "prosecutorial model" of agency representation, the governmental attorney represents "the people" of the state, rather than the agency itself in which the "attorney may override the views of the agency in court." But the American Bar Association recommends against adoption of prosecutorial models of representation because of the many impediments: (1) caseworkers will not have a legal representative in court, (2) the caseworker's expertise may not be adequately considered, (3) the governmental attorney may he a generalist without sufficient training in child protection cases, (4) political issues may affect the attorney's decision making, (5) the agency may be unaided in its larger policy decisions such as how the case might result in political fallout, and (6) conflicts may

arise if the prosecutor also is involved in a child delinquency proceeding involving the children in the child protection case.

However, under the agency-representation model a conflict often arises in that "caseworkers may believe the attorney represents them personally rather than the agency as a whole." Even if the agency attorney knows that the social worker is not his or her client, a lawyer-client relationship between the Department's counsel and a Department employee often develops inadvertently. Consider the following hypothetical:

> The Department's attorney receives a telephone call from one of the Department's caseworkers who says she needs to talk. When they meet outside courtroom number 281 the children's services worker informs counsel that she has been named in a 42 U. S. C. §1983 action for intentionally sexually abusing a foster child and volunteers that, although she did not commit the abuse, she did put her arm around the boy. When counsel returns to the office he informs his supervisor of the facts of the case, and the supervisor tells the attorney to prepare a points and authorities motion to demonstrate that the children's worker acted outside the scope of her employment and that therefore the county is not responsible. What should the Department's counsel do?

First, attorneys can only represent more than one client if they reasonably believe that they can adequately represent both interests simultaneously and if they gain both clients' consent, unless the clients' interests arc adverse. In this case who is the Department's client? Generally the client is the Department, not employees of the Department. However, some ethics codes and judicial opinions use a subjective standard in determining whether a lawyer-client relationship has been established. If the client reasonably believed that he or she was consulting an attorney for advice, even if the attorney had no intention of creating an attorney-client relationship, a legal and ethical relationship probably was created. If it is determined that this was an initial consultation or that the prospective client reasonably believed that it was an initial consultation, then for all intent and purposes an attorney-client relationship was established. The conclusion could "lead to disqualification of the lawyer involved, disqualification of the lawyer's entire law firm, and restricted access to the lawyer's work product by substitute counsel." Therefore, when a Department attorney is faced with a scenario in which an employee of the Department might think that the meeting is an initial consultation, counsel should immediately inform the employee that he or she represents the Department, not the employee, and that counsel potentially may be placed in an adverse relationship with the employee. This, of course, will probably induce the employee into silence, which may in the long run harm the Department because critical data will be lost and the employee will then have to continue operating on the job without perceived necessary legal advice. Thus, the Department's counsel and the Department are caught in a Catch-22. However, the potential for such conflicts of interest to arise can be diminished by explicitly informing the Department's employees in handbooks and training sessions of the role of the Department's attorneys. The American Bar Association Standards suggest that the agency attorney "must clearly communicate that he or she represents the agency as an entity and should use the conflict resolution system [*American Bar Association Model Rule 1.13*] when the caseworker's opinion varies from the agency policy or the attorney has reason to question the caseworker's decision."

"Who Are 'Clients' (and Why It Matters)"

Hutchinson, Allan C., (2005), 84 Can. Bar Rev. 411, at pp. 412-413; 413-423

In most discussions of legal ethics and professional responsibility, it is taken for granted that the main focus of critical attention is the relationship between lawyers and their clients. While lawyers do owe other duties to other people and institutions, it is the client to whom they have their greatest and most pressing obligations. As such, the lawyer-client relationship is at the dynamic heart of a lawyer's ethical and legal role. However, little close attention has been paid to exactly who "clients" are - when does a person or organisation assume that role and receive the benefits that are presumed to accrue from that identity? Of course, the answers to this question matter greatly. While it is essential to identify who is and who is not a client as the triggering event for most legal and ethical responsibilities, it is also important to emphasise that lawyers' legal and ethical obligations do not start and finish with clients; there are definite obligations to non-clients. Moreover, although the primary relationship is that between lawyers and their clients, the duties to which it gives rise are not absolute; they are foundational and fundamental, but they are not all consuming.

There is a spectrum of differing ethical duties and legal obligations imposed on lawyers which will sometimes vary in weight and effect with the informing and practical context. As recent developments make clear, the identity of a client is far from fast or fixed. The landscape of professional responsibility has become populated by a variety of characters and caricatures, including current clients, former clients, quasi-clients, non-clients and organisational clients. It is a veritable *dramatis personae* who morph in and out of their different identities and occasionally hold more than one personality at a time. Consequently, in thinking about legal ethics and responsibilities, it is prudent to treat the lawyer-client relationship as a shifting and multi-dimensional connection. If it were a light switch, it would be more of the dimmer variety than the traditional on/off kind.

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Rather than begin with a sketch of lawyers' relationship with their clients and its attendant responsibilities, it is instructive to start with the general duties which are imposed on lawyers as one kind of professional in society. Indeed, taking such an approach immediately unearths and challenges a common, unspoken and false assumption in the literature and practice: that lawyers enter into relationships with their clients on a clean slate. The fact is that future clients are already owed a considerable range of duties as non-clients and these are simply added when people become clients. Although often overlooked and ignored, there are many duties which lawyers have independent of their relationship with clients. Like all professionals, they owe a series of duties to the public at large, to individuals with whom they have contact, and to their professional

communities and colleagues. These legal obligations and moral responsibilities provide a backdrop against which the central relationship between lawyers and clients can be better understood.

Apart from any specific contractual obligations that lawyers assume in their commercial dealings with others, there are several tortious and equitable duties that lawyers might owe people and organisations at large, as well as a number of moral responsibilities which lawyers assume as qualified legal professionals. As a general rule, lawyers can owe a duty to a third party (even if that party is represented), but there is understandable reluctance to impose such a duty if the third party is adverse in interest, as this may dilute and/or hamper the lawyers' duties to their own clients. [See *Nelles v.Ontario*, [1989] 2 S.C.R. 170, [1989] S.C.J. No.86.]. Nevertheless, the courts have been prepared to go as far as imposing a fiduciary duty on lawyers to non-clients in some situations. For example, in a real estate transaction, it was held that a purchaser's lawyer could owe a fiduciary duty to the vendors because they were unrepresented and the lawyer knew or ought to have known that the elderly and unrepresented vendors were or might be relying on him to protect their interests. Expressly stating that this decision was not based on the existence of an implied retainer, the judge stated, "though fiduciary responsibilities normally arise from an existing contractual relationship of solicitor and client, the contractual tie is not essential. [*Tracy v. Atkins* (1977), 83 D.L.R. (3d) 46 at para. 27 (B.C.S.C.), Rattan J. This decision was upheld on the narrow ground of negligence in *Tracy et al. v. Atkins* (1979), 195 D.L.R. (3d) 632 (B.C.C.A.).] Again, a lender's solicitor will have a fiduciary duty to a borrower's spouse to ensure that he or she receives independent legal advice where that person is unrepresented and unfamiliar with legal matters. [*Shoppers Trust Co. v. Dynamic Homes Ltd.* (1992), 96 D.L.R. (4^{th}) 267 (O.C.J.).] Accordingly, while there are circumstances in which lawyers will be placed in a fiduciary relation with a non-client, this will usually only arise as corollary of an existing lawyer-client relationship with an associated other.

Nevertheless, it is the potential tortious duties of lawyers which loom largest in any discussions of legal responsibility to non-client others. While it is unlikely that lawyers will be in *Donoghue-like* situations where they will be at risk of causing personal injury or property damage to others, they will frequently be in situations where they might cause economic losses to others in performing their lawyering functions. As with other professionals, like accountants and financial advisers, lawyers have some vulnerability to non-client others as a result of offering negligent advice or misrepresentations. The general rules for negligent misstatements require, among other things (e.g., misleading representation, detrimental and reasonable reliance, etc.) that there exist a "special relationship" between the professional and the affected party. While this will obviously encompass clients, it can also extend to others: foreseeability and proximity are the standard requirements for imposing a duty of care on advice-givers. For instance, in *Hercules*, the Supreme Court of Canada had to decide whether and when accountants who perform an audit of a corporation's financial statements owe a duty of care in tort to shareholders of the corporation who claim to have suffered losses in reliance on the audited statements: the shareholders were not the clients of the accountants. Although it was held that there was no liability on the particular facts, as the actual use of the audit information was not reasonable, the Court was of the view that a "special relationship" can clearly exist between professionals acting for the corporations and its shareholders.[See *Hercules Managements Ltd. v. Ernst & Young,* [1997] 2 S.C.R. 165. See also *Queen v. Cognos*, [1993] 1 S.C.R. 87. In some provinces, the common law has now been extended by legislation in some securities-based situations. Lawyers can be held liable as “experts” for

disclosing false or misleading information in secondary markets "without regard to whether the [investor] relied on the misrepresentation." See, for example, *Securities Act*, R.S.O. 1990, c.S.5 at Part XXIII.1.]

In addition to liability for negligent misstatements, lawyers can also be considered to owe substantial duties of care in regard to the services they offer. This is most apparent in regard to wills and estates, but can also extend to other areas, such as contract. For instance, in *White*, it was held that the children of a testator could recover against their father's lawyers because they negligently failed to act on his instructions to include the children in his will. While the court was at odds over the basis of this liability, there was no doubt that the lawyers did owe a duty of care to the disappointed beneficiaries, even though they had no formal or contractual relation. The extent of that liability to non-clients is far from settled, but the courts do not seem to have been hindered by lack of any particular reliance by the non-clients on the negligence. [See *White v. Jones* [1995] 2 W.L.R. 187 and *Hill trading as RF Hill & Associates v. Van Erp* (1997), 188 C.L.R. 159, 142 ALR 687 (H.C.). On the Canadian position, see *Whittingham v. Crease & Co*. (1978), 88 D.L.R. (3d) 353 (B.C.S.C.).] Accordingly, lawyers cannot assume that, even where there is no knowledge of the possible future benefit, non-clients will have no claim against lawyers. Put more affirmatively, lawyers should be aware that their negligence might well have repercussions beyond the confined ambit of the lawyer-client relationship.

As regards professional duties, lawyers can by no means be said to hold no particular ethical obligations to non-clients. Although the rules leave no doubt that lawyers' function is to be "openly and necessarily partisan" (IX, c.l7), there is the general requirement that "the lawyer's conduct toward all persons with whom the lawyer comes into contact in practice should be characterized by courtesy and good faith" (XVI). [References in the text are to the Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 2006) as adopted by Council, August 2004 and February 2006, online: <http://www.cba.org/CBA/activities/code>.] While the requirement of "good faith" cannot be said to impose a fiduciary duty to "all persons with whom the lawyer comes into contact," it does demand that lawyers do not treat non-clients "as if they were barbarians and enemies." [Charles P. Curtus, "The Ethics of Advocacy" (1951) 4 Stan. L. Rev. 3.] This is no longer, if it ever was, an acceptable or ethical way to proceed. A preferable approach is to note that, although a legal professional should exhibit "a special care for the interests of those accepted as clients, just as his friends, his family, and he himself have a very general claim to his special concern, a lawyer must still show a general care to and for others. [Charles Fried, "Lawyer As Friend: The Moral Fundations of The Lawyer-Client Relation" (1976) 85 Yale L. J. 1060. While Fried's general friendship analogy is sound, Fried's understanding of what it means to be a friend is disturbing because it more resembles prostitution than anything else: continuing friendship is conditional on the receipt of money and implies that friends are those who do whatever is asked of them without comment or question.] Indeed, the professional rules state that a lawyer must, among other things, be "accurate, candid, and comprehensive" with unrepresented adversary (IX, c.l7); not take advantage of "slips or oversights not going to the real merits" (IX, c.7); bring all legal authority "directly in point" to the court's attention (IX, c.2(h)); and not impose on other lawyers "impossible, impractical or manifestly unfair conditions of trust, including those with respect to time restraints and the payment of penalty interest" (XVI, c.4). All in all, it is incumbent on lawyers to deal with everyone with a genuine, if variable, sense of ethical integrity and professional regard.

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A pivotal event in the imposition of ethical obligations and professional responsibility is the occasion on which a person moves into the status of a "client." When the relation between lawyer and others assumes the professional imprimatur of lawyer-client, it establishes a whole set of obligations upon the lawyer toward the client. The primary duties are that lawyers must be zealous partisans on behalf of their clients, they must act with undivided loyalty and avoid conflicts of interest, they must be entirely candid with their clients, and they must give the highest confidentiality to their clients' communications. [See generally A Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999) at 89-105.] Of course, there are limits and exceptions to these general duties]. Because of this crucial shift from general duties to specific professional obligations, it is particularly important to be able to recognise and establish the circumstances and conditions under which such a relationship crystallises. In exploring this process of crystallisation, it is vital that lawyers and commentators appreciate that what counts as a "client" is about language as well as reality. It is not that the label "client" describes some independent reality, but that it brings into play a whole collection of commitments and values, which shape as much as they are shaped by the world. The status of "clients," therefore, is not fixed or objective, but. depends on the objectives and outcomes which the law and its regulators seek to achieve; these normative ambitions will change as a result of the deeper forces and interests at work in sculpting a legal and ethical regime which best matches the conditions, demands and expectations of modern lawyering. [For more on this taxonomic tendency in legal thought and doctrine, see A. Hutchinson, *It's All In The Game: A Non-Foundationalist Account of Law and Adjudication* (Durham: Duke University Press, 2000) at 65-77.]

It is generally assumed that the lawyer-client relationship is tied to the existence of a written retainer. Indeed, the retainer will often stipulate the formal and special terms that are to govern the working relationship between lawyers and their clients. However, while the existence of a retainer will be proof positive that a lawyer-client relationship exists, the absence of such an agreement does not mean that the lawyer-client relationship has not come into existence. In other words, lawyers can owe a host of special responsibilities to persons even when they have not obtained the elevated and singular status of "client." Whether this pre-retainer phase is or is not part of the formal lawyer-client relationship is not the main point. While lawyers will not necessarily have assumed in regard to such persons all the composite duties owed to the client with whom they share a retainer, they will have taken over certain obligations which are not owed to the public at large. This crepuscular and shifting zone offers one of the keenest challenges in mapping the terrain of lawyers' professional duties: the status of "client" is much less settled and uncontroversial than many lawyers and commentators assume.

The preface to the CBA Code defines a client as "a person on whose behalf a lawyer renders or undertakes to render professional services." It is far from clear what "undertakes" might mean, but it should not be treated as only synonymous with a formal acknowledgement by means of a written retainer. In particular, it would surely be imprudent for a lawyer who meets with a prospective client, but determines not to undertake to act as that person's lawyer for a variety of reasons, to consider that they owe no duties to that person over and above what they owe to everyone else with whom they come in contact. By agreeing to meet with persons, they must be

considered to have impliedly assumed certain duties of confidentiality towards them and to "render professional services." While the Code states that "the lawyer owes a duty of secrecy to every client without exception, regardless of whether it is a continuing or casual client" (IV; c.5), this duty should be considered to extend to the "might-be client." Moreover, while this might-be client relationship would certainly occur if the meeting or conversation took place in the lawyer's office, I would suggest that this obligation can arise even in settings which are far less formal or official. The lawyer who chats (unadvisedly) to people about legal matters when those persons know that they are chatting with a lawyer is surely under a duty to keep any information or communication confidential whether that conversation takes place at a party, in public or anywhere else. Of course, the more informal or "casual" the situation is, the easier it will be for lawyers to insist upon and rely on a general disclaimer of liability. [For a waiver to be valid, several conditions must be met - full disclosure by the lawyer to the clients; signed and detailed waivers, preferably after independent legal advice; and a considered decision by the lawyers that they reasonably believe that they are able to represent each client without adversely affecting the other. Accordingly, informal and general waivers are not acceptable; waivers based on incomplete knowledge are not acceptable; and, even if a valid waiver exists, lawyers must be prepared to defend their decision to accept or continue the retainer as circumstances change. Knowledge, no matter how well-informed, is not tantamount to consent. See *Goldberg v. Goldberg* (1982), 141 D.L.R. (3d) 133 (Ont. Div. Ct.) and *Chiefs of Ontario v. Ontario* (2003), 63 O.R. (3d) 335 (Sup. Ct).] In some situations, the duty of confidentiality might extend to keeping the identity of the client confidential. This will only arise in special circumstances where the client goes to the lawyer in order to preserve their anonymity. For example, where a person has committed a criminal offence and wants to seek advice before turning themselves over to the authorities, the lawyer would be under an obligation not to reveal the identity or whereabouts of the person, unless there is a possibility that the client is likely to commit further offences. [See *Thorson v. Jones* (1973), 38 D.L.R. (3d) 312 (B.C.S.C.).]

An important corollary to this question of when a person becomes a client is that any positive answer will have implications for the lawyer's law firm as well as the lawyer personally. It is generally accepted that all members of the law office will be treated as being in a professional relationship with the client and, therefore, will owe them the full range of appropriate professional obligations; office staff will be obliged to respect the clients' claims to confidentiality and the supervising lawyer will be liable for any breaches by such employees. This rule has particular and wide-reaching implications *for* the lawyer's professional colleagues. One lawyer's client is considered to be the client of all the firm's lawyers and, therefore, will be entitled to the same duties and obligations as the circumstances allow: "it is the firm, not just the individual lawyer, that owes a fiduciary duty to its clients. [*R. v. Neil*, [2002] 3 SCR 631 at para. 29, Binnie J.] For instance, clients in a Vancouver office have claims to professional obligation against lawyers in Toronto whom they will never meet and who might not even know of their existence, let alone have any details or information about the clients' business. As such, it is incumbent on law firms to have in place a process and system whereby they can monitor the client base of the firm, and all reasonable steps are taken to ensure that conflicts do not inadvertently arise and that appropriate measures are taken to protect confidential information. [See *Ford Motor Co. of Canada v. Osler, Hoskin & Harcourt* (1996), 24 RL.R. (2d) 217 (O.C.J.) *[Ford]*, and *Chapters Inc. v. Davies, Ward & Beck LLP*, [2000] O.J. No. 4973, 10 B.L.R. (3d) 91 (O.S.C.) *[Chapters]*.]

Nevertheless, it will not always be sufficient for law firms to have such screening processes

in place. In determining who is to count as a current client and what ethical responsibilities are owed to them, the recent decision of the Supreme Court of Canada in *Neil* has set off alarm bells in large law firms. [[2002] 3 S.C.R. 631.] While this was a criminal case, it has definite and genuine implications for the lawyer-client relationship generally. Indeed, *Neil* is accepted by the legal community to have re-ignited the flame of debate, and many now think that it has converted what were previously thought to be "business conflicts" into "legal conflicts." If the force of the *Neil* decision is fully appreciated and followed, law firms would be exposed to greater civil liability for conflicts. Moreover, the *Neil* decision confirms that, while there are several policy factors at work in this area of law, those of client autonomy and the ethical integrity of the legal profession and system are much more important than lawyers' choice and mobility: the latter is only a cautionary limit to the former.

Neil was charged with fabricating divorce documents and defrauding a trust company in his capacity as a paralegal. A firm had a lawyer-client relationship (offering legal advice, not defending him) with Neil. At the same time, it was representing persons who were adverse in interest to Neil, namely a co-accused and one of the parties to the impugned divorce transactions. Neil sought to have his ultimate conviction set aside on the basis of the conflict of interest by the law firm. The Supreme Court of Canada held that the law firm was in conflict and that Neil could proceed against them civilly or through the Law Society. However, it held on the particular facts that there was no abuse of process sufficient to quash Neil's trial and order a re-trial. In his judgement for the Supreme Court, Justice Binnie explored the question of "what are the proper limits of lawyer's duty of loyalty to a current client when there is no issue of confidential information involved?" He was unequivocal that the duty of loyalty is much broader than duty of confidentiality. However, he conceded that an appropriate balance among competing interests is required because "an unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation [*Ibid.* at para. 15].

Justice Binnie (a former Bay Street lawyer) held that there should be no room for doubt about counsel's loyalty and dedication to the client's case. In particular, he cast doubt on whether "ethical screens" will be sufficient in regard to the affairs of current clients by including the aside that "whether this belief [in the efficacy of "ethical screens"] is justified in the absence of informed consent from the clients concerned is an issue for another day." He emphasised that there is a fiduciary relationship between lawyer and client and that, approving of Lord Millett's statement in *Bolkiah*, "a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position - without the consent of both clients, [a firm] cannot act for one client while his partner is acting for another in the opposite interests. [*Ibid.* at para. 27. See *Bolkiah (Prince Jefri) v. KPMG* (*A Firm*), [1999] 2 A.C 222 at para. 37, Lord Millett.] Although Justice Binnie stated that "in exceptional cases, consent of the client may be inferred" (e.g., banks and small unrelated briefs against the bank), he was clear about the basic force of a lawyer's duty of loyalty:

> The general prohibition is undoubtedly a major inconvenience to large law partnerships and especially to national firms with their proliferating offices in major centres across Canada. Conflict searches in the firm's records may belatedly turn up files in another office a lawyer may not have been aware of. Indeed, he or she may not even be acquainted with the partner on the other side of the country who is in charge of the file. Conflict search procedures are often inefficient.

> Nevertheless, it is the firm not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule 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. [At para. 29.]

Accordingly, it is clear that, after *Neil,* there are now two legal regimes for conflicts - one to cover "current clients" of the law firm and one to cover "former clients." While that governing the former is much more exacting than that controlling the latter, there is still a strong case to be made that the fiduciary relationships between lawyers and clients and the corollary duty of loyalty prevent lawyers from accepting or continuing retainers where there are conflicts between the interests of the client and other current and former clients. Indeed, after *Neil,* it appears clear that lawyers should only agree to represent two clients where and when those clients' interests are not directly adverse to each other. This is the case even if the two mandates' are unrelated. There is little guidance as to what amounts to "directly adverse." If the jurisprudence on conflicts generally is a guide, it will be sufficient if there is a possibility, not a probability of there being an adversity of interests [See *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, [1990] S.C.J. No. 41]. However, it is very likely that the burden will be on lawyers to demonstrate that their clients' interests are not directly adverse because the lawyers are the ones who will be in the best position to know all the relevant factors. As Lord Upjohn in an earlier case put it, this means that "the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict. [*Boardman v. Phopps*, [1967] A.C. 46 at 124, [1966] 3 All E.R. 721 [Boardman cited to A.C.].]

In most situations, it is possible for lawyers to represent concurrent clients, even if conflicts exist, provided that there is a valid waiver from the client. For a waiver to be valid, several conditions must be met—full disclosure by the lawyer to the clients; signed and detailed waivers, preferably after independent legal advice; and a considered decision by the lawyers that they reasonably believe that they are able to represent each client without adversely affecting the other [See *Moffat v. Wetstein* (1996), 135 D.L.R. (4th) 289 (Ont. Gen. Div), (sub nom. *Moffat et al. v. Wetstein et al.*), and *Chiefs of Ontario v. Ontario* (2003), 63 R. (3d) 335 (Sup. Ct.).] Accordingly, while lawyers can waive a variety of conflicts, it cannot be done by informal and general waivers (i.e., agreements which waive all future conflicts in all situations) and by waivers based on the provision of incomplete knowledge to the clients. Moreover, even if there is a formally valid waiver, lawyers must be prepared to defend their decision to accept or continue the retainer as meeting a reasonable standard of professional judgement. As regards so called business conflicts between a current client and a former conflict, the law and professional rules are much less clear. Nevertheless, it seems that the reasonable lawyer or law firm should inform clients of any potential business conflicts before the retainer is concluded or after any potential conflict comes to light as the representation progresses. This disclosure should be sufficient to place clients in the best position possible to evaluate whether they wish to retain or continue with

the lawyer or law firm. In such circumstances, it is the general fiduciary duty rather than any particular conflicts doctrine that will be in play; it is unlikely that a formal waiver, following independent legal advice, will be required.

Gone, But Not Forgotten?

That persons are no longer "current clients" does not mean that lawyers have no obligations towards them. Lawyers have a number of continuing and general duties that persist after the. lawyer-client relationship has ended. For instance, it is axiomatic that the duty of confidentiality "continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them" (IV; c.5) and may bind even after the client has died. [See *Guay v. Franco-Manitobaine* (1985), 37 Man. R. (2d) 16 (Q.B.).] However, more contested issues of legal ethics arise in regard to conflicts of interest. For instance, almost all the cases dealing with conflicts involving former clients are concerned with claims by the former client to prevent lawyers acting against them in future transactions or litigation. While clients simply want to have the lawyer disqualified, the claim is framed in terms of confidentiality; it is contended that lawyers should not be permitted to use confidential information and knowledge obtained while the former client was a client in order to benefit a new and present client for whom the lawyer is now acting. If lawyers act against former clients in "related matters," two rebuttable presumptions are considered to be in play—that confidential and relevant information was passed between the lawyer and the former client, and that lawyers in the same firm do share information which might prejudice former clients unless there is "clear and convincing evidence that all reasonable measures were taken to ensure no disclosure will occur" [see *MacDonald Estate v. Marin* [1990] 3 S.C.R. 1235]. In most circumstances, it will be sufficient for lawyers to demonstrate that the law firm has in place "ethical screens" in order to rebut these presumptions. Of course, these devices must be sophisticated, well monitored and effective [see *Ford* and *Chapters*, *supra*].

While there is now general consensus on the appropriate scope of lawyers' duties towards former clients, there remains very real debate about the circumstances in which persons or organisations cross the ethical rubicon separating current clients from former clients. There is little established doctrinal guidance as to when this occurs. However, it will not necessarily be determined by reference to whether a particular transaction or retainer has come to an end. This is especially the case with large corporate or institutional clients who might not have any particular set of files in an active state, but who have a number of law firms working for them and who have not yet given any definitive or final indication of whether they have permanently shifted their business to another law firm. Consequently, even if a law firm is no longer actively doing work for or billing a person or institution, the court might still consider them a current client for the purposes of the professional rules. Of course, as so much hangs on whether a particular client is considered "current" or not, it will be important to establish some instructive guidelines on when that shift in status occurs. Indeed, lawyers would be well-advised to treat clients as current clients unless they have clear and compelling evidence to the contrary.

Brockville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd.

2008 CarswellNS 108 (N.S. C.A.), Cromwell J.A., for the Court, paras. 1, 17-18, 64

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[1] A judge disqualified the appellant's lawyers from continuing to act in a law suit against the respondents who had formerly been clients of the same law firm. The legal principle which the judge applied was that a lawyer should not act against a former client in a matter related to the prior retainer. On the facts, the judge found that this principle applied: at the centre of both the former and the present litigation was the honesty and integrity of the former clients, the respondents, in relation to their employment with the appellant during overlapping time periods.

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[17] In my view, putting aside issues of informed consent, lawyers have a duty not to act against a former client in a related matter whether or not confidential information is at risk. A matter is "related" for this purpose if the new retainer involves the lawyer taking an adversarial position against the former client with respect to the legal work which the lawyer performed for the former client or a matter central to the earlier retainer. Here, although the causes of action pleaded in the two law suits were different, the judge found that they were related because in the Brookville action, the law firm was attacking the honesty of the Jenkins in their employment with Brookville during an overlapping time period in which the firm had previously defended their honesty in the course of the same employment. While this is perhaps at the outer limits of what could be considered "related" retainers, the judge correctly understood the legal principles and he did not make any clear or determinative error in applying them to the facts.

[18] There is no suggestion that the former clients ever gave their consent to the firm acting against them and so I do not need to consider that aspect.

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[64] In my view, the judge made no reviewable error in holding that the firm should not continue to act.

"Advice from former partner turned judge results in firm's removal"

Driver, Deana, *The Lawyers Weekly*, 20 April 2007, p. 3

A Manitoba Queen's Bench justice has ordered removal of the defendants' solicitor of record because of a conflict in the legal advice given to … [the defendants] by a previous law firm partner. Ruling on an application by plaintiff Dr. John Alevizos in *Alevizos v. Manitoba Chiropractors Assn. et al.* [2007] M.J. No. 89, Justice Marc Monnin ordered the removal of Tapper Cuddy LLP of Winnipeg as solicitors of record and counsel at trial.

"This might be the first reported case of such a nature," said Stephen Moreau of Cavalluzzo Hayes Shilton McIntyre & Cornish Barristers & Solicitors in Toronto, counsel for the plaintiff. "The former partner is now a justice on the Court of Queen's Bench, a factor that influenced Justice Monnin to order removal."

Dr. Alevizos was a director of the Manitoba Chiropractors Association, which attempted to remove him from the board. He sued the association and various board members alleging malicious prosecution, misfeasance in public office and conspiracy. The association relied on legal advice they received at the outset and during the course of the [attempted removal] prosecution from Scurfield Tapper Cuddy with Kent Paterson and John Scurfield, now a Queen's Bench judge, being involved in the prosecution for the association. Paterson had provided an "opinion letter" to the board, which has the "possible interpretation" of suggesting the board could secure Dr. Alevizo's removal from the board, possibly through a charge of professional misconduct. Justice Monnin heard that Justice Scurfield was involved to some extent in the drafting of the opinion letter, assumed conduct of the prosecution partway through and will be called by the plaintiff [in his suit against the Association] to testify and contradict the evidence of some of the defendants.

"This is an interesting case because the conflict that is identified by the judge is a conflict that the firm has in evidence it created," Moreau told *The Lawyers Weekly*. "Most of the conflict issues one sees involve firms calling witnesses that are members of the firm or firms attempting to use confidential information they obtained on behalf of someone who is now their opponent. It's more unusual to find this kind of conflict being litigated."

The fact pattern in this case is unusual, added Moreau. "The defendant [Association] is relying on advice within a letter of the firm that is now acting for the defendant. More interesting too is the people that gave the advice are not with the firm anymore. It's a sense that we have the problem for the defendants that the defendant could use the advice to bring an action against the defendant's firm. That's one of the possibilities that could come from this."

The defendants told the court they will not challenge Justice Scurfield's testimony and will engage outside counsel to handle any part of the trial involving Justice Scurfield and their clients have committed to not suing the law firm for advice given.

Justice Monnin ruled those reasons were not sufficient to allow the firm to continue as counsel in the case. Justice Monnin said he was more concerned about the potential conflict of interest in Alexvizos' allegations on the firm's legal advice to the association. "Alevizos argues that counsel for the defendants will be tempted to 'soft peddle' the firm's advice so as to diminish the prospects of the evidence being used to establish liability of the firm in a future action taken by the association … . On this point I do not find it appropriate for me to become involved in the assessment of the strength of such allegations, but only to assess whether they form a potential concern which warrants the court finding that the interests of justice require that the firm not be involved. (See R. v. Kinal, 2007 MBQB 26.)

Justice Monnin ruled that Alexvizos has set out evidence "which cannot be swept aside. The advice given by the firm has also been raised by the defence as the reason why certain actions were taken. It will be an issue at trial."

Also citing *R. v. Gateway Industries Ltd*., [2002] M.J. No. 312's concern for maintaining the fairness of proceedings "because of the potential involvement of one of our colleagues," Justice Monnin ruled the "the likelihood of the firm's advice being an issue at trial requires that the solicitors of record for the defendants should be removed."

Robert McDonald of Filmore Riley LLP in Winnipeg, said he will be meeting with his client, the Manitoba Chiropractors Association, to discuss the ruling and consider a response.

3464920 Canada Inc. v. Strother

2007 SCC 24, 01 June 2007, Binnie J. (Deschamps, Fish, Charron and Rothstein JJ., concurring),
(Headnote; paras. 1 (*in part*), 34-36, 45-77; 113-116)

In the 1990s, Monarch devised and marketed tax shelter investments whereby Canadian taxpayers, through ownership of units in a limited partnership, provided film production services to American studios making films in Canada. In 1996 and 1997, Monarch engaged S and the appellant law firm pursuant to written retainer agreements. The retainer expressly prohibited the firm from acting for clients other than Monarch in relation to the tax-shelter schemes (with limited exceptions). The written retainer terminated at the end of 1997, but Monarch continued thereafter as a firm client. In November 1996, the federal Minister of Finance announced his intention to amend the *Income Tax Act* to defeat the tax shelters. This was done by the introduction of Matchable Expenditures Rules. Subsequently, S advised Monarch that he did not have a "fix" to

avoid the effect of the Rules. By the end of October 1997, Monarch's tax-shelter business was winding down. Several employees were laid off, including D.

In late 1997 or early 1998, D approached S to discuss the potential of revised tax-assisted film production services opportunities. S drafted a proposal that was submitted to Revenue Canada in March of 1998. S and D had agreed in January 1998 that S would receive 55 percent of the first $2 million of profit of the new company Sentinel [,] should the tax ruling be granted [,] and 50 percent thereafter. S did not tell Monarch about the possibility of a revival in the film production services business at any time. A favourable tax ruling was issued by Revenue Canada to Sentinel in October 1998. S did not advise Monarch of the existence of this ruling. A further ruling addressing studio concerns was issued in December. Throughout 1998 and into 1999, the law firm continued to do some work for Monarch on outstanding matters relating to film production services transactions as well as unrelated general corporate work. In August 1998, S wrote a memorandum to the management committee of the firm about a possible conflict of interest with respect to acting simultaneously for Monarch and D/Sentinel. The memo referred, inaccurately, to S only having an option to acquire up to 50 percent of the common shares of Sentinel. The firm's managing partner told S that he would not be permitted to own any interest in Sentinel.

Effective March 31, 1999, S resigned from the law firm and in April joined D as a 50 percent shareholder in Sentinel. After learning of Sentinel's tax ruling, Monarch sued S and the firm for breach of fiduciary duty and breach of confidence. The trial judge dismissed the claim. The Court of Appeal substantially allowed the appeal and ordered S to account for and disgorge to Monarch all benefits and profits received or receivable from Sentinel. It also ordered that the law firm disgorge the profits it earned in the form of legal fees from acting for Sentinel in breach of its duty to Monarch from January 1, 1998 and return to Monarch all fees paid by it from that date. S and the law firm appealed, and Monarch cross-appealed the dismissal of its claims against D and Sentinel.

Held (McLachlin C.J.C. and Bastarache, LeBel and Abella JJ. dissenting in part on the appeals): The appeals should be allowed in part and the cross-appeal dismissed.

[1] [Binnie J. –] A fundamental duty of a lawyer is to act in the best interest of his or her client to the exclusion of all other adverse interests, except those duly disclosed by the lawyer and willingly accepted by the client. The appellant Robert Strother, a successful tax partner with the appellant Davis & Company ("Davis") in Vancouver, was found by the Court of Appeal of British Columbia to have put his own financial interest in one client (Sentinel) ahead of his duty to another client (Monarch) in breach of his fiduciary duty. Fiduciary duties provide the framework (enforced by the courts and by the Law Society of British Columbia) within which a particular contractual mandate is to be carried out. The issue here is whether (as the trial judge held) those responsibilities were sufficiently limited by the scope of the retainer so as to afford Monarch no relief; or whether, on the contrary, the fiduciary duty is broader than the trial judge thought (as held by the Court of Appeal) and was breached either by Strother or Davis or both and, if so, what the appropriate remedy is. For the reasons which follow, I conclude that the trial judge did not correctly construe the scope of Monarch's 1998 retainer of Davis and Strother, and thus did not pursue the analysis of fiduciary duty far enough. In my view, the Court of Appeal correctly analysed the retainer and found a breach of fiduciary duty by Strother. I would allow the appeal by the Davis firm, (which was an innocent party in Strother's misconduct) against any direct

liability for breach of fiduciary duty, but give effect to Monarch's ordered that the law firm account for and disgorge the profits it earned from acting for Sentinel Hill in breach of its duty to Monarch from and after January 1, 1998.

. . . .

[34] When a lawyer is retained by a client, the scope of the retainer is governed by contract. It is for the parties to determine how many, or how few, services the lawyer is to perform, and other contractual terms of the engagement. The solicitor-client relationship thus created is however overlaid with certain fiduciary responsibilities, which are imposed as a matter of law. The Davis [Appellant] factum puts it well:

> The source of the duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence from which flow obligations of loyalty and transparency, [para. 95]
>
> Not every breach of the contract of retainer is a breach of a fiduciary duty. On the other hand, fiduciary duties provide a framework within which the lawyer performs the work and may include obligations that go beyond what the parties expressly bargained for. The foundation of this branch of the law is the need to protect the integrity of the administration of justice: *MacDonald Estate* v. *Martin*, [1990] 3 S.C.R. 1235, at pp. 1243 and 1265. "[I]t is of high public importance that public confidence in that integrity be maintained": R. v. Neil, [2002] 3 S.C.R. 631…(S.C.C.), at para. 12.

[35] Fiduciary responsibilities include the duty of loyalty, of which an element is the avoidance of conflicts of interest, as set out in the jurisprudence and reflected in the *Rules of Practice of The Law Society of British Columbia*. As the late Hon. Michel Proulx and David Layton state, "[t]he leitmotif of conflict of interest is the broader duty of loyalty", *Ethics and Canadian Criminal Law* (2001), at p. 287.

[36] In recent years as law firms have grown in size and shrunk in numbers, the courts have increasingly been required to deal with claims by clients arising out of alleged conflicts of interest on the part of their lawyers. Occasionally, a law firm is caught innocently in crossfire between two or more clients. Sometimes the claim of conflict is asserted for purely tactical reasons, an objectionable practice criticized in *Neil* at paras. 14-15, and a factor to be taken into account by a court in determining what relief if any is to be accorded: *De Beers Canada Inc. v. Shore Gold Inc.*, [2006] S.J. No. 210, 2006 SKQB 101 (Sask. Q.B.); *Dobbin v. Acrohelipro Global Services Inc.* (2005), 246 Nfld. & P.E.I.R. 177, 2005 NLCA 22 (N.L. C.A.). Sometimes, however, the dilemma is of the lawyer's own making. Here the firm's position was compromised by the personal conflict of a lawyer (Strother) who, contrary to the instructions of Davis's managing partner, contracted for a personal financial interest in one client (Sentinel) whose interest he then preferred over another client (Monarch) who now sues for compensation. In that regard, Monarch relies upon the well-known proposition endorsed by Professors Waters that:

> The other (the beneficiary) is entitled to expect that the fiduciary will be concerned solely for the beneficiary's interests, never the fiduciary's own.
>
> (D. W. Waters, "The Development of Fiduciary Obligations", in R. Johnson et al., eds., *Gerald V. La Forest at the Supreme Court of Canada, 1985-1997* (2000), 81, at p. 83)

See, in particular, *Canadian Aero Services Ltd.* v. *O'Malley,* [1974] S.C.R. 592. The point was restated in the context of lawyers in *Neil,* at para. 24: "Loyalty includes putting the client's business ahead of the lawyer's business". It was on this basis that Monarch succeeded in the British Columbia Court of Appeal.

. . . .

[45] The trial judgment, …, was premised on the finding that Monarch did not specifically ask about the possible revival of TAPSF-type shelters in 1998. I agree with the trial judge that *generally* a lawyer does not have a duty to alter a past opinion in light of a subsequent change of circumstances. This was discussed by W. M. Estey in *Legal Opinions in Commercial Transactions* (2nd ed. 1997), at p. 519:

> Thus, where an opinion was correct on the date on which it was given but subsequently becomes erroneous due to a change in the law or in the facts upon which the opinion was based, the opining lawyer is not liable for failing to warn the addressee, at the later date, of the effects resulting from the changed circumstances.

The rationale behind the general rule is that a legal opinion speaks as of its date, and that being the case, a lawyer is only obligated to exercise due care in rendering an opinion based on the legal and factual circumstances existing at that time. A client cannot assume that the lawyer's opinion has an indefinite shelf life.

[46] There are, however, exceptions to the general rule. As Deschamps J. stated in *Côté c. Rancourt*, [2004] 3 S.C.R. 248, 2004 SCC 58 (S.C.C.), the "boundaries of [a lawyer's] duty to advise will depend on the circumstances" (para. 6). The issue here was not so much a duty to alter a past opinion, as it was part of Strother's duty to provide candid advice on all matters relevant to the [oral] *1998* retainer: *Neil*, at para. 19. It appears that Lowry J. turned his mind to this exception to the general rule when he stated that a lawyer is not obligated to "alter advice given under a *concluded* retainer" (para. 121 (emphasis added)). Here Monarch's retainer of Davis was *not* a concluded retainer. The written 1997 retainer had come to an end but the solicitor-client relationship based on a continuing (if more limited) [oral] retainer carried on into 1998 and 1999. As Deschamps J. further observed in *Côté*, "the obligational content of the lawyer-client relationship is not necessarily circumscribed by the object of the mandate" (para. 6). The *Côté* approach is not consistent with the "didn't ask, didn't tell" approach taken by the trial judge. Strother was meeting with Monarch to brainstorm tax schemes and knew perfectly well Monarch would be vitally interested in Strother's re-evaluation of the tax potential of the MER. The duty to advise Monarch required Strother and Davis, as a term of the 1998 retainer, if not expressed (as

claimed by Monarch) then certainly implied, to explain to Monarch that Strother's earlier advice had been overtaken by events and would have to be revisited. Indeed, Strother discussed this concern with another partner at Davis, Rowland K. McLeod who testified in cross-examination as follows:

> A. I did consider whether or not Monarch could be told and I guess that would include should be told ... And my recollection is that Mr. Strother came to me before a meeting that he was going to have with Mr. Knutson [a principal of Monarch] and we discussed and considered whether or not Monarch could be told [that the previous advice about "no fix" had been premature], and my, my recollection was that we didn't reach a consensus on what could be done and he was going to play it by ear .... He was afraid Mr. Knutson was going to ask him.
>
> Q. When was that?
>
> A. It was in, I think it was June of 1998 ... We discussed it, came to no conclusion. He went to the meeting, told me either later that day or the next day, that the issue had not arisen. [Emphasis added.] (Davis's A.R., at p. 196)

McLeod continued:

> A. The nature of the, the nature of the discussion was, he was going to meet with Monarch. He was concerned that Mr. Knutson would raise the question of is there a way around the, whatever the change in the law was. [Emphasis added.] (Davis's A.R., at p. 198)

The fact that Strother and McLeod discussed what should be said if Monarch put the right question ("is there a way around ...?") recognized that Strother appreciated that his modified view about the potential of the s. 18.1(15)(*b*) exception would likely be of continuing interest and importance to Monarch because Monarch was still looking to him for advice in rebuilding its shattered tax-related business. At that point, of course, Strother had every interest in keeping Monarch in the dark. In June of 1998, under the January 1998 agreement, he was entitled to 55 percent of the first $2 million in profits and 50 percent of Sentinel's profits on the revival of tax-assisted film production services deals, which constituted a small and select marketplace. The fewer competitors faced by Sentinel the more money Strother would make and the faster he would pocket it.

[47] Of course, it was not open to Strother to share with Monarch any *confidential* information received from Darc [a Sentinel shareholder]. He could nevertheless have advised Monarch that his earlier view was too emphatic, that there may yet be life in a modified form of syndicating film production services expenses for tax benefits, but that because his change of view was based at least in part on information confidential to another client on a transaction unrelated to Monarch, he could not advise further except to suggest that Monarch consult another law firm. Moreover, there is no excuse at all for Strother not advising Monarch of the successful tax ruling when it was made public in October 1998. As it turned out, Monarch did not find out about it until February or

March 1999. I therefore conclude that Davis (and Strother) failed to provide candid and proper legal advice in breach of the 1998 retainer.

[48] If this were a contract case, I would have had no hesitation in holding both Davis and Strother liable for their failure to provide the timely and candid advice they were contractually obliged to give within the scope of their 1998 [oral] retainer. However, Monarch cannot succeed in a claim for damages for breach of the contract of retainer because (as found by the trial judge) it did not establish any damages flowing from the alleged breach. The issue therefore moves to fiduciary duties.

C. Monarch's Claim for Disgorgement

[49] Monarch's claim is not for the money Monarch itself might have made had Strother given different advice (which the trial judge found was unsupported by the evidence), but for disgorgement by Strother, Darc, Sentinel and Davis of the money they *did* make between 1998 and 2001, which Monarch says was made in breach of Strother's and Davis's fiduciary obligations to it.

[50] An accounting of profits and disgorgement are equitable remedies and relate to Monarch's claim that Strother, Darc and Davis breached their fiduciary obligations in the following respects:

> (1) Davis should have declined to take on Darc and Sentinel as clients. Every dollar earned in consequence of that retainer was therefore in breach of fiduciary duty.
>
> (2) Strother should not have accepted a personal financial interest in Sentinel. He should not benefit from this conflict of interest, and should therefore disgorge consequential profits.

In my view, only the claim related to Strother's personal financial interest has merit. It was that personal interest that came into conflict with Strother's fiduciary duty to avoid conflicts of interest in performing the contractual obligations assumed under the [oral] 1998 retainer.

1. Davis was Free to Take on Darc and Sentinel as New Clients

[51] Monarch claims (and the Court of Appeal agreed) that even after the expiry of the "exclusive" [written] retainer in 1997, Davis was conflicted out of acting for Darc and Sentinel by reason of its ongoing solicitor-client relationship with Monarch. As the House of Lords recently noted in relation to conflicting *contractual* duties, "a solicitor who has conflicting duties to two clients may not prefer one to another. ... the fact that he [the lawyer] has chosen to put himself in an impossible position does not exonerate him from liability" (*Hilton*, at para. 44). The same principle applies to a lawyer getting into a position of conflicting *fiduciary* duties. As Monarch's fiduciary, Strother's duty was to "avoid situations where he has, or potentially may, develop a conflict": *Ramrakha v. Zinner* (1994), 157 A.R. 279 (Alta. C.A.), at para. 73, as cited in *Neil*, at para. 25. The general rule is of long standing but I do not think it applied here to prevent Davis and Strother from acting for Sentinel. As stated in *Neil*, at para. 15:

> ... An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation. The issue is always to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests.

This is not to say that in *Neil* the Court advocated the resolution of conflict issues on a case-by-case basis through a general balancing of interests, the outcome of which would be difficult to predict in advance. In *MacDonald Estate v. Martin*, similarly, the legal rule was arrived at after balancing various interests, including trading off a client's ability to choose counsel against other considerations such as lawyer mobility. Once arrived at, however, the *MacDonald Estate v. Martin* rule protecting against disclosure of confidential information is applied as a "bright line" rule. The client's right to confidentiality trumps the lawyer's desire for mobility. So it is with *Neil*. The "bright line" rule is the product of the balancing of interests not the gateway to further internal balancing. In *Neil*, the Court stated (at para. 29):

> The bright line is provided by the general rule 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 lawyers reasonably believes that he or she is able to represent each client without adversely affecting the other. [Emphasis in original.]

[52] I agree with Strother's counsel when he writes that "[t]he retainer by Sentinel Hill was not 'directly adverse' to any 'immediate interest' of Monarch". On the contrary, as Strother argues, "Sentinel Hill created a business opportunity which Monarch could have sought to exploit" (Strother factum, at para. 66). A Sentinel ruling that revived the TAPSF business even in modified form would indirectly help any firm whose tax syndication business had been ruined by the ITA amendments, including Monarch. Representation of Sentinel was thus not "directly adverse" to representation of Monarch by Davis/Strother even though both mandates related to tax-assisted business opportunities in the film production services field. Strother's problem arose because despite his duty to an existing client, Monarch, he acquired a major personal financial interest (unknown to Davis) in another client, Sentinel, in circumstances where his prospects of personal profit were enhanced by keeping Monarch on the sidelines. In deference to the conclusion reached by the British Columbia Court of Appeal that Davis was *not* free to take on Darc and Sentinel as clients, however, I add the following observations.

(a) Monarch Was a Current Client

[53] I agree with Newbury J.A. that too much was made in argument about the shift from the 1997 written retainer to the 1998 oral retainer. The trial judge in places referred to a *concluded* retainer. However, this is not a case where *a former* client alleges breach of the duty of loyalty, as in *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 (Ont. Gen. Div.); *Credit Suisse First Boston Canada Inc., Re* (2004), 2 B.L.R. (4th) 109 (Ont. Securities Comm.); and *Chiefs of Ontario v. Ontario* (2003), 63 O.R. (3d) 335 (Ont. S.C.J.). The issue of loyalty to a former

client was dealt with in *MacDonald Estate v. Martin* (not *Neil*), and raises complex issues not relevant here. Monarch was a *current* client and was unquestionably entitled to the continuing loyalty of Strother and Davis.

(b) Acting for Clients with Competing Commercial Interests

[54] As recognized by both the trial judge and Newbury J.A., the conflict of interest principles do not generally preclude a law firm or lawyer from acting concurrently for different clients who are in the same line of business, or who compete with each other for business. There was no *legal* dispute between Monarch and Sentinel. Monarch relies on the "bright line" rule set out in *Neil* but (leaving aside, for the moment, Strother's personal financial stake) there is no convincing case for its application here.

[55] The clients' respective "interests" that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity. Here the alleged "adversity" between concurrent clients related to business matters. This is not to say that commercial interests can *never* be relevant. The *American Restatement* offers the example of two business competitors who seek to retain a single law firm in respect of competing applications for a single broadcast licence, i.e. a unique opportunity. The *Restatement* suggests that acting for both without disclosure and consent would be improper because the subject matter of both retainers is the same licence (*Restatement (Third) of the Law Governing Lawyers*, vol. 2, at § 121 (2000)). The lawyer's ability to provide even-handed representation is put in issue. However, commercial conflicts between clients that do *not* impair a lawyer's ability to properly represent the legal interests of both clients will not generally present a conflict problem. Whether or not a real risk of impairment exists will be a question of fact. In my judgment, the risk did not exist here provided the necessary even-handed representation had not been skewed by Strother's personal undisclosed financial interest. Condominium lawyers act with undiminished vigour for numerous entrepreneurs competing in the same housing market; oil and gas lawyers advise without hesitation exploration firms competing in the oil patch, provided, of course, that information confidential to a particular client is kept confidential. There is no reason in general why a tax practitioner such as Strother should not take on different clients syndicating tax schemes to the same investor community, notwithstanding the restricted market for these services in a business in which Sentinel and Monarch competed. In fact, in the case of some areas of high specialization, or in small communities or other situations of scarce legal resources, clients may be taken to have consented to a degree of overlapping representation inherent in such law practices, depending on the evidence: *Bolkiah v. KPMG* (1998), [1999] 2 A.C. 222 (U.K. H.L.), at p. 235; *Kelly v. Cooper* (1992), [1993] A.C. 205 (Bermuda P.C.). The more sophisticated the client, the more readily the inference of implied consent may be drawn. The thing the lawyer must *not* do is keep the client in the dark about matters he or she knows to be relevant to the retainer: *Neil*, at para. 19. As Stoney J. commented almost two centuries ago:

> No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel. When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity.

(*Williams v. Reed*, 29 F. Cas. 1386 (U.S. D. Me. 1824))

The client cannot be taken to have consented to conflicts of which it is ignorant. The prudent practice for the lawyer is to obtain informed consent.

(c) The Duty of Loyalty is Concerned with Client Representation.

[56] While the duty of loyalty is focussed on the lawyer's ability to provide proper client representation, it is not fully exhausted by the obligation to avoid conflicts of interest with other concurrent clients. A "conflict of interest" was defined in *Neil* as an interest that gives rise to 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.
>
> (*Neil*, at para. 31, adopting § 121 of the *Restatement (Third) of the Law Governing Lawyers*, vol. 2, at pp. 244-45)

[57] In *Hilton*, relied on by Davis, failure to disclose to one client prejudicial (but not confidential) information about the other client in a case where the defendant law firm acted for both clients in a joint venture was held to be actionable in contract although the quality of the legal work, as such, was not the subject of criticism. The House of Lords awarded damages as a matter of contract law, but *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (Ont. C.A.) suggests that in this country such a claim could also be brought for breach of fiduciary duty even in the absence of a client- to-client conflict. In that case, an Ontario lawyer was held liable in damages to a client for breach of his fiduciary duty of candour to disclose his knowledge that the client's business adviser had a criminal record.

[58] Exceptional cases should not obscure the primary function of the "bright line" rule, however, which has to do with the lawyer's duty to avoid conflicts that impair the respective representation of the interest of his or her concurrent clients whether in litigation or in other matters, e.g. *Waxman v. Waxman* (2004), 186 O.A.C. 201 (Ont. C.A.).

(d) The Impact on the Representation of Monarch Was "Material and Adverse"

[59] The spectre is flourished of long-dormant files mouldering away in a lawyer's filing cabinet that are suddenly brought to life for purposes of enabling a strategically minded client to assert a conflict for tactical reasons. But a court is well able to withhold relief from a claim clearly brought for tactical reasons. Conflict between concurrent clients where no confidential information is at risk can be handled more flexibly than *MacDonald Estate v. Martin* situations because different options exist at the level of remedy, ranging from disqualification to lesser measures to protect the interest of the complaining client. In each case where no issue of confidential information arises, the court should evaluate whether there is a serious risk that the lawyer's ability to properly represent the complaining client may be adversely affected, and if so, what steps short of disqualification (if any) can be taken to provide an adequate remedy to avoid this result.

[60] There is no doubt that at all material times there was a "current meaningful" solicitor-client relationship between Monarch and Davis/Strother to ground the duty of loyalty (see e.g. *Uniform Custom Countertops Inc. v. Royal Designer Tops Inc.*, [2004] O.J. No. 3090 (Ont. S.C.J.), at para. 54). The availability of Strother's ongoing tax advice was important to Monarch and is the cornerstone of its claim.

[61] Strother is dismissive of the impact his breach had on Monarch's interest (i.e. in obtaining proper legal advice). He is correct that the test requires that the impact must be "material and adverse" (as set out in the definition of conflict adopted in *Neil*, previously cited). While it is sufficient to show a possibility (rather than a probability) of adverse impact, the possibility must be more than speculation (see *de Guzman v. de la Cruz* , [2004] B.C.J. No. 72, 2004 BCSC 36 (B.C. S.C.), at para. 27). That test is met here, for the reasons already discussed. Once the existence of Strother's personal financial interest in Sentinel was established, it was for Strother, not Monarch, to demonstrate the absence of any material adverse effect on Monarch's interest in receiving proper and timely legal advice (*Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, 2006 SCC 36 (S.C.C.))

(e) Sentinel's Desire to Secure the Counsel of its Choice Was Also an Important Consideration

[62] The evidence showed that Strother's special expertise was available from few other firms. Sentinel's Paul Darc had worked successfully with Davis and Strother for years. Our legal system, the complexity of which perhaps reaches its apex in the ITA, depends on people with legal needs obtaining access to what they think is the best legal advice they can get. Sentinel's ability to secure the advice of Davis and Strother as counsel of choice is an important consideration (*MacDonald Estate v. Martin*, at p. 1243; *R. v. Speid* (1983), 43 O.R. (2d) 596 (Ont. C.A.); and *Coutu v. Jorgensen* (2004), 202 B.C.A.C. 67 (B.C. C.A.), at para. 31; *Neil*, at para. 13). It does not trump the requirement to avoid conflicts of interest but it is nevertheless an important consideration.

2. The Difficulty in Representing Monarch Arose from a Strother Conflict not a Davis Conflict

[63] Davis did not appreciate what Strother was up to and had no reason to think the Sentinel retainer would interfere with the proper representation of Monarch.

[64] The Court of Appeal upheld Monarch's claim that Strother/Davis was not free to take on Darc/Sentinel for the following reason:

> In this case, Mr. Strother should have told Mr. Darc that he "could not accept this business". His failure to do so meant that he could not be candid with his existing client, Monarch, regarding a subject on which he had given clear and unequivocal advice. He would have to "hold back" on what he would normally advise Monarch, in order to protect the confidentiality of his other client Mr. Darc (and the Sentinel Hill companies). [BCCA #1, at para. 25]

[65] I believe, with respect, that this draws the prohibition too broadly. In general, Davis and Strother were free to take on Darc and Sentinel as new clients once the "exclusivity" arrangement with Monarch expired at the end of 1997. Issues of confidentiality are routinely dealt with successfully in law firms. Strother could have managed the relationship with the two clients as

other specialist practitioners do, by being candid with their legal advice while protecting from disclosure the confidential details of the other client's business. If the two are so inextricably bound together that legal advice is impossible, then of course the duty to respect confidentiality prevails, but there is nothing here to justify Strother's artful silence. Strother accepted Sentinel as a new client and the Davis firm was given no reason to think that he and his colleagues could not provide proper legal advice to both clients

3. Strother was not Free to Take a Personal Financial Interest in the Darc/Sentinel Venture

[66] The trial judge found that Strother agreed to pursue the tax ruling on behalf of Sentinel in return for an interest in the profits that would be realized by Sentinel if the ruling was granted:

> ... Mr. Strother prepared the request for the ruling without charge in return for Mr. Darc's agreement that Mr. Strother would participate equally (55% on the first $2 million) [and 50% thereafter] in any profit realized through a share option should the desired ruling be granted. Responsibility for expenses associated with the request would be equally borne....
>
> . . . .
>
> ... Mr. Strother agreed to seek for him an advance tax ruling and, as indicated, to prepare the request without charge, in return for an equal share in any success ultimately realized. [paras. 23 and 57]

[67] Strother had *at least* an "option" interest in Sentinel from January 30th until at least August 1998 (when he was told by Davis to give up *any* interest). This was during a critical period when Monarch was looking to Strother for advice about what tax-assisted business opportunities were open. The precise nature of Strother's continuing financial interest in Sentinel between August 1998 and March 31, 1999 (when Strother left Davis) is unclear, but whatever it was it came to highly profitable fruition in the months that followed. The difficulty is not that Sentinel and Monarch were potential competitors. The difficulty is that Strother aligned his personal financial interest with the former's success. By acquiring a substantial and direct financial interest in one client (Sentinel) seeking to enter a very restricted market related to film production services in which another client (Monarch) previously had a major presence, Strother put his personal financial interest into conflict with his duty to Monarch. The conflict compromised Strother's duty to "zealously" represent Monarch's interest (*Neil*, at para. 19), a delinquency compounded by his lack of "candour" with Monarch "on matters relevant to the retainer" (*ibid.*),i.e. his own competing financial interest: *Nocton v. Lord Ashburton* , [1914] A.C. 932 (U.K. H.L.); *R. v. Shamray* (2005), 191 Man. R. (2d) 55, 2005 MBQB 1 (Man. Q.B.), at paras. 42-43; and *Henry c. R.* (1990), 61 C.C.C. (3d) 455 (Que. C.A.), at p. 465. See generally R. F. Devlin and V. Rees, "Beyond Conflicts of Interest to the Duty of Loyalty: from *Martin v. Gray* to *R. v. Neil*" (2005), 84 *Can. Bar Rev.* 433.

[68] As we have seen, the tax-assisted film production services business was very competitive. Monarch's TAPSF market share had been cut by 80 percent when Grosvenor and other competitors entered the field. If his "fix" worked, Strother had every incentive to distance Monarch as a

potential competitor to Sentinel. The bigger Sentinel's market share, the more business it did, the more assured would be the initial $2 million profit and the faster Strother would pocket it.

[69] In these circumstances, taking a direct and significant interest in the potential profits of Monarch's "commercial competito[r]" (as described by Lowry J., at para. 113) created a substantial risk that his representation of Monarch would be materially and adversely affected by consideration of his own interests (*Neil*, at para. 31). As Newbury J.A. stated, "Strother ... *was* 'the competition' " (BCCA #1, at para. 29 (emphasis in original)). It gave Strother a reason to keep the principals of Monarch "in the dark" (*ibid.*), in breach of his duty to provide candid advice on his changing views of the potential for film production services tax shelters. I agree with Newbury J.A. that Monarch was "*entitled* to candid and complete advice from a lawyer who was not in a position of conflict" (*ibid.*, at para. 17 (emphasis in original))

[70] Strother could not with equal loyalty serve Monarch and pursue his own financial interest [with Sentinel] which stood in obvious conflict with Monarch making a quick re-entry into the tax-assisted film financing business. As stated in *Neil*, at para. 24, "[l]oyalty includes putting the client's business ahead of the lawyer's business". It is therefore my view that Strother's failure to revisit his 1997 advice in 1998 at a time when he had a personal, undisclosed financial interest in Sentinel Hill breached his duty of loyalty to Monarch. The duty was further breached when he did not advise Monarch of the successful tax ruling when it became public on October 6, 1998. Why would a rainmaker like Strother not make rain with as many clients (or potential clients) as possible when the opportunity presented itself (whether or not existing retainers required him to do so)? The unfortunate inference is that Strother did not tell Monarch because he did not think it was in his personal financial interest to do so.

4. Davis Did Not Participate in Strother's Disabling Conflict of Interest

[71] As discussed, Strother did not advise Davis of his January 1998 deal with [Sentinel shareholder] Darc until August 1998, and even then he did so inaccurately. On the basis of what Davis was told, Davis's managing partner instructed Strother not to exercise the "option" to acquire an interest in Sentinel. Whatever financial arrangement Strother had with Darc and Sentinel, Davis was not aware of it or a party to it.

[72] The conversation between Strother and McLeod, mentioned earlier [in para. 46], is not sufficient to implicate either McLeod or the firm in that breach. Monarch claims that 28 of the same Davis lawyers and students that worked on Sentinel Hill in 1998-1999 had previously worked on Monarch from 1993-1997; and 11 lawyers worked on both Monarch and Sentinel in 1998. Moreover, Monarch points out that several partners and senior officers at Davis appear to have had some level of knowledge about Sentinel, such as McLeod (the "commercial partner in charge" (BCCA #2, at para. 6)), Mr. Elischer (Davis's managing director (BCCA #2, at para. 8)), and, by the summer of 1998, Mr. Buchanan (Davis's managing partner (BCCA #2, at para. 10)). However, there is no evidence that any of these people were aware of Strother's personal financial interest [in Sentinel] before August 1998, at which point it was forbidden.

[73] Monarch's failure to establish knowledge on the part of other Davis partners of the circumstances giving rise to the conflict is crucial to an assessment of their potential liability as fiduciaries. The Davis firm was as much an innocent victim of Strother's financial conflict as was

Monarch. However, though not party to Strother's breach of fiduciary duty, Davis may still be vicariously liable for Strother's "wrongful act" under s. 12 of the *Partnership Act*, as will be discussed.

D. Fiduciary Remedies

[74] This Court has repeatedly stated that "[e]quitable remedies are always subject to the discretion of the court". See, e.g., *Roberts v. R.*, [2002] 4 S.C.R. 245, 2002 SCC 79 (S.C.C.), at para. 107; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at p. 444; *Canson Enterprises Ltd. v. Boughton & Co.* , [1991] 3 S.C.R. 534 (S.C.C.), at pp. 587-89; and *Côté*, at paras. 9- 14. In *Neil*, the Court stated emphatically: "It is one thing to demonstrate a breach of loyalty. It is quite another to arrive at an appropriate remedy" (para. 36).

[75] Monarch seeks "disgorgement" of profit earned by Strother and Davis. Such a remedy may be directed to either or both of two equitable purposes. Firstly, is a *prophylactic* purpose, aptly described as appropriating

> for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest.
>
> (*Chan v. Zacharia* (1984), 154 C.L.R. 178 (Australia H.C.), *per* Deane J., at p. 198)

[76] The second potential purpose is *restitutionary*, i.e. to restore to the beneficiary profit which properly belongs to the beneficiary, but which has been wrongly appropriated by the fiduciary in breach of its duty. This rationale is applicable, for example, to the wrongful acquisition by a fiduciary of assets that should have been acquired for a beneficiary, or wrongful exploitation by the defendant of the plaintiff's intellectual property. The restitutionary purpose is not at issue in the case of Strother's profit. The trial judge rejected Monarch's claim that Darc usurped a corporate opportunity belonging to Monarch (paras. 128, 179 187). This finding was upheld on appeal (para. 73).

[77] The concept of the *prophylactic* purpose is well summarized in the Davis factum as follows:

> [W]here a conflict or significant possibility of conflict existed between the fiduciary's duty and his or her personal interest in the pursuit or receipt of such profits ... equity requires disgorgement of any profits received even where the beneficiary has suffered no loss because of the need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship. [Emphasis omitted; para. 152.]

Where, as here, disgorgement is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant's gain (not the plaintiff's loss). Denying Strother profit generated by the financial interest that constituted his conflict teaches faithless fiduciaries

that conflicts of interest do not pay. The *prophylactic* purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.

. . . .

V. Disposition

[113] I would dismiss the Strother appeals against the finding that, in 1998, Strother put himself in a position of conflict between his duty to Monarch and his personal financial interest. To further this interest, he failed to provide Monarch in 1998 with the legal advice to which Monarch was entitled. With respect to remedy, the Strother appeals are allowed in part. Strother must account to Monarch for the personal profit gained directly from the Sentinel group and indirectly through his earnings as a Davis partner on account of billings to Monarch, but only for the period January 1, 1998 to March 31, 1999. As agreed by the parties, a reference is directed to determine the appropriate calculation of Strother's profit. Monarch is to have a money judgment against Strother in the sum thus ascertained.

[114] The appeal by Davis against the decision of the Court of Appeal is allowed in part. Davis committed no breach of fiduciary duty to Monarch and is not liable for Strother's breaches of fiduciary duty, of which its partners are innocent, except under the terms of s. 12 of the *Partnership Act*. The liability of Davis is limited to vicarious liability for the sum found to be due by Strother to Monarch under the preceding paragraph.

[115] Monarch's cross-appeal is dismissed with costs.

[116] Except as aforesaid, all parties and the intervener will bear their own costs in light of the divided success.

[**Editor's Note:** In separate reasons, McLachlin C.J.C. (Bastarache, LeBel and Abella JJ., concurring), dissented in part.]

Celanese Canada Inc. v. Murray Demolition Corp.

LawLetter (Lang Michener, LLP), Meehan, Q.C., Eugene, Editor,
S.C.C. 27 July 2006, Binnie J. for the Court, pp 1-4; 38

"Celanese sued Canadian Bearing for alleged industrial espionage. Following an ex parte application, a motions judge granted Celanese an Anton Piller order against Canadian Bearings. The order did not contain a provision dealing with privileged documents. It was executed by an accounting firm. The search was overseen by an independent supervising solicitor. The solicitors for Canadian Bearings, BLG, were also present at the search, but given the volume of electronic materials and the pace at which the search proceeded, BLG later complained that they were not given the time to review the material adequately. Frequently, entire folders would be copied

electronically without examination of individual documents. However, material that could be identified as potentially privileged was segregated into an electronic folder which was labelled "Borden Ladner Gervais". In the course of the search, about 1,400 electronic documents thought to be relevant, but not then screened for potential solicitor-client claims, were downloaded by the accounting firm onto a portable hard drive and copied onto CD ROMs. These were placed in a plastic envelope and sealed. The seal was initialled by a BLG lawyer and by the supervising solicitor. The envelope was then given to the accounting firm. Contrary to the express provision in the Anton Piller order, no complete list of the seized documents was made prior to their removal from the searched premises. A lawyer from the law firm of CBB, representing Celanese, later directed the accounting firm to copy the envelope's contents. The seal was broken without the knowledge or consent of BLG or Canadian Bearings, and the contents copied onto CBB's computer. A copy was also provided to Celanese's U.S. counsel, KBTF. When BLG became aware that privileged documents had been transferred to CBB and KBTF, it dispatched a letter requesting their immediate return. CBB and KBTF, rather than returning the documents as requested, advised BLG that the documents subject to the privilege claim had been deleted from their respective systems. Canadian Bearings then brought this motion to disqualify CBB and KBTF from continuing to act for Celanese, but this was dismissed by the motions judge. The Divisional Court allowed Canadian Bearings' appeal and ordered that CBB and KBTF be removed. The Court of Appeal set aside that decision, finding that neither of the courts below had applied the correct test for removal. In its view, Canadian Bearings bore the onus of demonstrating that there is a real risk that opposing counsel will use information obtained from privileged documents to the prejudice of Canadian Bearings and that such prejudice cannot realistically be overcome by a remedy short of disqualification. The matter was therefore remitted back to the motions judge for further consideration.

The Supreme Court of Canada held (unanimously) that the appeal is allowed.

"An Anton Piller order bears an uncomfortable resemblance to a private search warrant. No notice is given to the party against whom it is issued. Indeed, defendants usually first learn of them when they are served and executed, without having had an opportunity to challenge them or the evidence on which they were granted. The defendant may have no idea a claim is even pending. The order is not placed in the hands of public authority for execution, but authorizes a private party to insist on entrance to the premises of its opponent to conduct a surprise search, the purpose of which is to seize and preserve evidence to further its claim in a private dispute. The only justification for such an extraordinary remedy is that the plaintiff has a strong prima facie case and can demonstrate that on the facts, absent such an order, there is a real possibility relevant evidence will be destroyed or otherwise made to disappear. The protection of the party against whom an Anton Piller order is issued ought to be threefold: a carefully drawn order which identifies the material to be seized and sets out safeguards to deal, amongst other things, with privileged documents; a vigilant court-appointed supervising solicitor who is independent of the parties; and a sense of responsible self-restraint on the part of those executing the order. In this case, unfortunately, none of these protections proved to be adequate to protect against the disclosure of relevant solicitor-client confidences. Inadequate protections had been written into the order. Those which had been provided were not properly respected. The vigilance of the supervising solicitor appears to have fallen short. Celanese's solicitors in the aftermath of the search seem to have lost sight of the fact that the limited purpose of the order was to preserve evidence not to rush

to exploit it. In the result, the party searched (Canadian Bearings) now seeks the removal of Celanese's solicitors (Cassels Brock & Blackwell LLP ('Cassels Brock')) and to bar Celanese from making further use of their U.S. counsel (Kasowitz, Benson, Torres & Friedman LLP ('Kasowitz')).

"This appeal thus presents a clash between two competing values solicitor-client privilege and the right to select counsel of one's choice. The conflict must be resolved, it seems to me, on the basis that no one has the right to be represented by counsel who has had access to relevant solicitor-client confidences in circumstances where such access ought to have been anticipated and, without great difficulty, avoided and where such counsel has failed to rebut the presumption of a resulting risk of prejudice to the party against whom the Anton Piller order was made.

"This Court's decision in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, makes it clear that prejudice will be presumed to flow from an opponent's access to relevant solicitor-client confidences. The major difference between the minority and majority in that case is that while the majority considered the presumption of risk of prejudice open to rebuttal in some circumstances (pp. 1260-61), the minority would not have permitted even the opportunity of rebuttal (p. 1266). In the MacDonald Estate situation, the difficulty of dealing with the moving solicitor was compounded by the fact the precise extent of solicitor-client confidences she acquired over a period of years, was unknown, possibly unknowable, and in any event not something that in fairness to her former client should be revealed. Thus Sopinka J. wrote that 'once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge' (p. 1260).

"The Anton Piller situation is somewhat different because the searching solicitors ought to have a record of exactly what was seized and what material, for which confidentiality is claimed, they subsequently looked at. Here again, rebuttal should be permitted but the rebuttal evidence should require the party who obtained access to disclose to the court what has been learned and the measures taken to avoid the presumed resulting prejudice. While all solicitor confidences are not of the same order of importance, the party who obtained the wrongful access is not entitled to have the court assume in its favour that such disclosure carried no risk of prejudice to its opponent, and therefore does not justify the removal of the solicitors… I conclude, contrary to the view taken by the Court of Appeal, with respect, that Celanese and its lawyers did have the onus to rebut the presumption of a risk of prejudice and they failed to do so …

" … Cassels Brock are removed as solicitors of record for the respondents in these proceedings. They are not to act for or advise the respondents, directly or indirectly, with respect to this proceeding or with respect to any related proceedings arising out of the facts pleaded in the amended statement of claim.

"Neither the respondents or anyone on their behalf is to communicate with or receive advice or information directly or indirectly, from Kasowitz [U.S. counsel for respondents] with respect to this proceeding or any related proceedings in Canada arising out of or related to the facts pleaded in the amended statement of claim."

[**Editor's Note:** An 'Anton Piller' order, so-named since a 1975 English decision, authorizes searches of premises for and seizures of, evidence without warning.]

Paul Fontaine c. Sa Majeste la Reine ET ENTRE Cristina Nedelcu c. Sa Majeste la Reine

***Supreme Court of Canada Bulletin of Proceedings*, 10 November 2006**

Motion for removal by Crown counsel against Applicant['s] lawyer Nedelcu. Nedelcu represents the Applicant accused Paul Fontaine, who is awaiting trial on, inter alia, two charges of first degree murder and a criminal organization charge. The Crown submits that Nedelcu is disqualified from representing Fontaine because she worked in the past with lawyer Roy on the case of Serge Boutin, one of the informer witnesses, who is to testify against Fontaine. Nedelcu was previously removed as the lawyer of Steven Falls, another accused against who Boutin is to testify, because of her past involvement in Boutin's case. The Crown submits that the presumption of disclosure of confidential information applies. Nedelcu asserts, inter alia, that she is not in a conflict of interest, since within her limited mandate in that case, no confidential information relating to Boutin was disclosed to her.

[**Editor's Note:** This Application for leave to appeal to Supreme Court of Canada, from order of Quebec Superior Court which had granted Crown's motion 10 February 2006, was dismissed 09 November 2006.]

Chern v. Chern

(2006), 22 R.F.L (6th) 78 (AB.CA), Conrad, McFadyen, Picard JJ.A.
(Summary of facts, issue, decision; reasons in part, at paras. 14-25)

Facts: Husband was represented by lawyer D in matrimonial action. Legal assistant O worked for D for two years before going to work for lawyer W. Wife retained W three months after W hired O. There was affidavit evidence to support inference that O had worked on husband's matrimonial file when she worked for D. W contacted D after learning that O had worked on file for D. W and D allegedly agreed that O would not work on file. However, D spoke with O and was told that O was assuming conduct of file. Husband applied for order removing W as solicitor of record because O was working for W. Case management judge did not fine conflict of interest and dismissed application but directed that O not work on file. Husband appealed.

Issue: Is W in conflict of interest.

Decision: Yes, Appeal allowed.

. . . .

The Law Concerning Conflict

[14] Counsel agreed that the correct legal test to be used in this matter was the one set out by the Supreme Court of Canada in *MacDonald Estate.* In that case, a lawyer worked on an estate file for one firm, and then joined the firm acting for the other side. At para. 45 of that case, Sopinka J. suggested that two questions should guide a court in assessing whether there is a conflict of interest:

> (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?

[15] In answering the first question, His Lordship held there was a burden on the party making the application to show that a "previous relationship" existed that was "sufficiently related to the retainer from which it was sought to remove the solicitor" (para. 46). Once this obligation was met, a rebuttable presumption arose suggesting that the lawyer who was the subject of the previous relationship – in *MacDonald Estate,* the lawyer who switched firms – possessed relevant confidential information. The burden then shifted to the other side to prove that no confidential information had actually passed to that person relevant to the current retainer.

[16] If this burden was met, there was no potential for conflict and no need to remove the retained solicitor from the file. If the respondent did not satisfy this latter burden, however, the court held that it was necessary to deal with the second question – whether there was a risk the information would be used to the prejudice of the client. Where the previous relationship involved the lawyer who was now acting on the retainer the disqualification was automatic. Where it involved another lawyer at the retained lawyer's firm Sopinka J. noted that, at least with lawyers, an inference should be drawn that any confidential information would be shared. Thus, unless the respondent could show, on the basis of "clear and convincing evidence" that all reasonable measures had been taken to ensure that the confidential information would not pass from the "tainted lawyer" to the member or members of the firm retained to act against his/her former client, the law firm would have to be removed. He suggested that this could be shown by demonstrating the use of institutional screening mechanisms such as "Chinese walls" and/or "cones of silence".

[17] Although *MacDonald Estate* dealt with the situation where a lawyer changed firms, the Ontario Court of Appeal has held that the same considerations apply to "non-professional" employees such as legal assistants: *Hildinger v. Carroll,* [2004] O.J. No. 291 (Ont. C.A.).

The Application of these Principles to the Present Case

[18] Applying these rules to this case, Chern only had to show that [legal assistant] Ottewell had a previous working relationship with Damen, sufficiently related to the retainer (the Chern/Bennett matrimonial file), to raise a rebuttable presumption that Ottewell possessed relevant

confidential information about the retainer when she began working for Wise. In his affidavit supporting the motion, Chern deposed, at para. 10:

> Mr. Wise's current assistant was Mr. Damen's former assistant and worked in his office up until May of this year. I am advised by Mr. Damen that he and Mr. Wise had discussions about his assuming conduct of this file and allowing his new assistant to work on the file. My counsel advises that he was unequivocal in advising Mr. Wise that he, under no circumstances, could accede to his former assistant working on the file.

[19] There is no dispute that Ottewell worked for a time as Damen's legal assistant while he was representing Chern in this matrimonial action. Nor is there any dispute that Ottewell is now working for Wise as his legal assistant. The remaining affidavit evidence is sufficient to support the inference that Ottewell worked on the Chern/Bennett matrimonial file while employed by Damen – as the case management judge found. Damen's insistence that Ottewell not work on the file, and Wise's initial agreement that she should not, confirms that Ottewell worked on the file previously at Damen's office.

[20] That being the case, the onus shifts to Bennett to successfully adduce evidence to show relevant confidential information did not pass to Ottewell while she was Damen's assistant. In this regard we note the comments of Sopinka J. at para. 46 of *MacDonald Estate*:

> This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication.

[21] The respondent did not adduce any evidence on this point. At the December 14th hearing, Wise merely suggested that the nature of this case, and the family law milieu in general, was such that information was generally of a public nature and that little if any confidential information could be passed. He did not provide evidence of that fact. We disagree with this assertion and find that it is unsupported in law (see: *Descoteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.) re solicitor-client privilege; *Goldberg v. Goldberg* (1982), 141 D.L. R. (3rd) 133 (Ont. Div. Ct.) at 135-36; in *MacDonald Estate* at para. 34; *Dalgleish v. Dalgleish*, [2001] O.J. No. 2187 (Ont. S.C.J.) at para. 36). As Ferrier J. stated for the Ontario Supreme Court in *Marinangeli v. Marinangeli*, [2004] O.J. No. 3082 (Ont. S.C. J.) at paras. 17-19:

> The relationship between family lawyers and their clients goes well beyond technical, financial and impersonal information. Clients come to family lawyers when they are at their most vulnerable.
>
> They disclose, whether by direct words or in the very nature of their instructions to counsel, their strengths and weaknesses in the processes of settlement discussions, negotiation tactics and litigation strategies. They disclose to their counsel their perception of the strengths and weaknesses of the opposite party in these matters. They disclose their perception of the opposite party's likely approach to various issues – including which issues are likely to be important to that party and which are not. They disclose to counsel their own preferences in the choices available in

> the process, including which issues are important and which are not. They disclose whether they prefer to "play hardball" or "softball" in respect to the various issues. These matters are directly personal to the client and affect the client directly in the pursuit of an effective realization of a just conclusion of the issues.

[22] We conclude, therefore, that the respondent did possess relevant confidential information, relating to the Chern/Bennett file, when she went to work for Wise. It is necessary to ask, therefore, whether there was a risk this information would be used to Chern's prejudjice – the second question arising under the *MacDonald Estate* test.

[23] In *MacDonald Estate*, Sopinka J. held that the court should infer the passage of confidential information from one lawyer in a firm to another unless it can be shown, using "clear and convincing evidence," that institutional measures had been taken to ensure that it did not. In the present case, counsel drew our attention to the alleged agreement between the parties that Ottewell would not work on the file and submitted this amounted to a "Chinese wall" sufficient to ensure there would be no prejudice to Chern. There are two problems with this submission. First, while we have accepted there was a form of initial agreement between the parties, there is no evidence about the exact nature of that agreement. In *Macdonald Estate*, Sopinka J. noted, at para. 50, the need for stringent evidential requirements:

> *A fortiori* undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used.

[24] Second, and more importantly, the evidence before the case management judge on December 14th was that any agreement that might have existed was breached prior to the application being made to remove the respondent's solicitor. According to para. 11 of Chern's affidavit, filed in support of the application, Ottewell herself contacted Damen [counsel for the appellant husband Chern] and told him she was going to start working on the file and that it was "too bad". No evidence was introduced to suggest Ottewell did not follow through with this plan. The burden to produce evidence that effective institutional screening measures had been put in place, and that they were working, fell to the respondent [wife Chern]. That burden was not satisfied.

[25] In our view, therefore, the respondent has not rebutted the inference that Ottewell passed confidential information on to Wise. This means the case management judge erred by failing to find a conflict of interest. . . . .

Berg v. Bruton

(2005), 23 C.P.C. (6th) 243, Sask. Q.B., McIntyre J.
(*Headnote and paras. 8-22*)

Lawyers M and JD of ML [Law] Group represented wife in matrimonial matter -- JD then joined law firm HM LLP -- Lawyer M of HM LLP represented husband -- M indicated that only he and his legal assistant would work on file -- M stated that all files [reference the wife] in which ML Group represented other party [the husband] were locked in separate office which was kept locked at all times -- Files in that office were removed to be worked on only by lawyer in charge of file and were to be returned on same day -- Electronic files were secured so that they could only be accessed by password which was not disclosed to JD or his secretary -- JD's legal assistant would not have access to this file or any other file involved with ML Group -- JD completed statutory declaration and was provided with letter indicating that he was not to be involved in file -- All lawyers' staff [at HM LLP] were instructed not to discuss any matter with JD that related to file and all other cases involving ML Group -- Any error or deviation from office policy could result in discipline or dismissal to members of support staff - -Wife applied for order removing husband's solicitors of record -- Application dismissed -- JD received confidential information from wife attributable to solicitor-and-client relationship relevant to matter at hand while he worked at ML Group -- However, there was no risk that such information would be used to prejudice of wife -- Reasonable measures and independently verifiable procedures were taken to ensure that there was no disclosure to any members of HM LLP of wife's confidential information – Informed member of public would be satisfied that no use of confidential information would occur -- When JD commenced employment with HM LLP, procedures adopted were in place -- HM LLP was familiar with procedures and had used them in prior circumstances -- Dynamics of smaller law firm and family law file were not specific factor to be considered that might alter burden to show there was no risk of misuse of confidential information.

. . . .

[8] The commentary to Chapter VA of the Code [of Professional Conduct of Saskatchewan] notes the guidelines are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of all of them may not be sufficient in others.

[9] The court in *Magnes*, …, [25 R.F.L. (6th) 168] found that the undertaking provided to the effect that no information had been shared, while necessary to the screening measures, was not enough. The court required there be independently verifiable procedures taken to ensure there was

no prejudice to the applicant. The court found those independently verifiable procedures in the steps taken such as the instructions to staff and segregation of the physical files and computer files.

[10] The court in *Magnes,* …, [(2005)] 25 R.F.L. (6th) 168[:]

> [20] I am satisfied that the screen is sufficient in the circumstances of this case. There is not a risk of real mischief in this case. While Hunter Miller's concerns are legitimate and should be take seriously, on behalf of their clients, on balance I find no real risk to Mr. Magnes nor Ms. L'Heureux that either would be prejudiced if Mr. Zinkhan, Ms. Quaroni and Ms. Krueger of the Olive Waller firm, continue to act, so long as the screen is in place and is adhered to. In my view, having regard to all of the relevant circumstances, including the good faith of the parties, the adequacy of the measures taken to avoid disclosure of any confidential information and the extent of prejudice to the respective parties, Olive Waller has met the legal test enunciated by Mr. Justice Sopinka. A reasonable member of the public, in possession of the facts and aware of the screening procedures set in place, would conclude that no unauthorized disclosure of confidential information had occurred or would occur.

[11] Counsel for the respondent argues that a Chinese Wall does not work and is not appropriate in all cases. In particular, it is said it is not sufficient in the context of a hotly contested family law file involving smaller law firms where the transferring lawyer worked closely with the client prior to transferring firms. It is also suggested that Sopinka J. in *MacDonald Estate,* ... [[1990] 3 S.C.R. 1235] expressed reservations about whether the Chinese Wall would, in fact, be effective.

[12] It is argued the focus should be on public perception in that in the circumstances described herein the public would not have confidence that the respondent's interests could not be compromised. It was suggested that even if confidential information about the respondent was not discussed it is inevitable in a smaller firm that strategies in similar cases would be discussed among members of the firm and the respondent's interest could be compromised as a result.

[13] Counsel for the respondent sought to distinguish *Magnes, supra,* on the basis that … [JD] continued to deal with the respondent on behalf of the … [M] Law Group after he had decided to move. He told the respondent he was leaving the … [M] Law Group but did not tell her he was joining … [HM LLP]. It was suggested the respondent would feel duped in the circumstances.

[14] The test at the second step is a subjective one. It is the scrutiny of a reasonably informed member of the public. The focus is not on the professed reaction of the client. Just as an undertaking and conclusory statement of a lawyer is not enough, a conclusory statement of a client is not terribly helpful.

[15] The issue is whether there is a risk that confidential information attributable to a solicitor/client relationship relevant to the matter at hand will be used to the prejudice of the client. The question is to be answered by reviewing the independently verifiable steps taken and whether the reasonably informed member of the public would be satisfied that no use of confidential information would occur.

[16] Sopinka expressed reservations about the court accepting mechanisms such as a Chinese Wall and Code of Silence until such time as the governing bodies of the legal profession had an opportunity to assess the effectiveness of such devices. The Law Society of Saskatchewan, being the governing body in this jurisdiction, has addressed the issue and adopted the conflict of interest provisions of its Code. They have concluded devices such as a Chinese Wall and Code of Silence can be an effective device. It is also recognized it may not be effective in every instance. I do not read Sopinka J. as questioning the effectiveness of a Chinese Wall or Code of Silence *per se.* The question remains applying the test set out in the *MacDonald Estate, supra,* decision to the facts before the court.

[17] It was suggested the processes instituted by …[HM LLP] ought to have been in place before an offer of employment was made. That was not the case in *Magnes, supra,* and I reject the proposition as any form of blanket statement of policy. The critical time is the date the transferring lawyer commences employment with the new firm. In this instance the procedures adopted were in place. The evidence also says that …[HM LLP] was familiar with the procedures and had used them in prior circumstances.

[18] It was argued that once …[JD] had accepted employment with …[HM LLP] he was obliged to cease any work on the respondent's file. While that would be prudent, the focus of the inquiry is whether there is a risk that confidential information will be used to the prejudice of the client. Mr. …[D] already possessed confidential information when he was approached by Mr. …[H], hence, the need to focus on the risk of the misuse of the confidential information. The nature of that inquiry does not change because Mr. …[D] met with the respondent [wife] after deciding to accept employment with …[HM LLP].

[19] I turn to the question of whether the dynamics of a smaller firm and a family law file are a specific factor to be considered that may alter the burden on …[HM LLP] to demonstrate that there is no risk of the misuse of confidential information. I must observe that *Magnes, supra,* involved a smaller law firm and family law files. I do not see that a smaller firm and a family law file results in any different analysis. The principles are the same. The test is as enunciated in *MacDonald Estate, supra.* I see no difference between a family law file in a smaller firm and a family law file where a lawyer with a family law practice transfers to larger firm to practice as part of the family law group of lawyers of that firm.

[20] As observed in *MacDonald Estate, supra,* there are at least three competing values. The focus of the inquiry here is on the second question. Is there clear and convincing evidence that all reasonable measures have been taken to ensure no disclosure of confidential information will occur. What would a reasonable member of the public in possession of the facts conclude?

[21] I come to the same conclusion as that reached in *Magnes, supra,* at paragraph 20, reproduced earlier. I am satisfied that all reasonable measures have been taken to ensure no disclose of confidential information will occur. I am satisfied that a reasonable member of the public would so conclude.

[22] The application is dismissed. [Parenthetically] [t]here is no doubt that in circumstances such as this that the respondent [wife] would, in the first instance, have concerns. The evidence

here does not indicate that s. 9 of the guidelines to the Code were followed. It does not appear the …[M] Law Group were advised, at the first opportunity, of the measures adopted by …[HM LLP] to ensure there would be no disclosure of confidential information.

3.3 Relationships with Clients – Rendering Services

3.3.1 Generally

"Profiting from divorce"

Van Rhijn, Judy, *Canadian Lawyer*, January 2007, pp. 49-52.

With the traditional cash cow of real estate law struggling along, many law firms are looking to the endless supply of separating couples as the steady earner that high overheads require.

The largest firms are still family-law shy, scared at the prospects that disgruntled clients will take their corporate work elsewhere after the emotional trauma of divorce negotiations or litigation. However, many mid-sized firms report that they are now expanding their family law departments to take advantage of the current family law climate. In some cases, they are replacing areas of law that are becoming more difficult and less lucrative.

"There's no doubt that it is a mushrooming field of law," says Julian Dickson, a partner at Cox Hanson O'Reilly Matheson in Fredericton. "As other areas of law have been severely curtailed, family law has simply blossomed." He points to personal injury law as one such area, following New Brunswick's cap of $2,500 for soft tissue injuries.

Dan Colborne, a family lawyer in Calgary, estimates that 75 per cent of car accidents now fall under similar injury caps in Alberta and that's forcing litigators to look elsewhere. "Because of what's happened, a lot of personal injury lawyers are moving to family law."

In the last five or six years, Vogel & Company LLP of Calgary has got out of real estate and increased its roster of family lawyers from one part-timer to three full-time lawyers. "Real estate law hinges on an organization that allows paralegals to process a lot of transaction," says Victor Vogel. "In family law, you are largely relying on your own time. It's work where you should get close to your hourly rate, where you are not likely to get a premium from a file, and will not make large profits off paralegals and assistants, but earnings are on par with real estate returns." For his firm, he found that family law was a better choice than what lawyer Lonny Balbi, of Balbi & Company Legal Centre in Calgary, calls a "MacDonald's kind of operation" that many real estate lawyers are now forced to run.

Ted Gareau – of Feifel Broadbent Gareau and Gualazzi of Sault Ste. Marie, Ont. – agrees. "There was a time when the real estate practice paid the overheads and the rest was profit. Now you move three files for the return you once got for one. Real estate is not the money maker it was unless you are prepared to do it in volume, which requires a reduction in fees."

So why is family law the alternative? Steady work is one reason. "Unfortunately, with the divorce rate the way it is, there is no shortage of work," says Kristen Bucci of Buset & Partners LLP in Thunder Bay, Ont. "In our area we have huge problems with the pulp and paper industry with mills merging and closing down. Problems beget problems, and soon the workers are in to see me."

Bucci is a former sole practitioner who was head-hunted to fill the gap caused by the appointment of Justice George Patrick Smith to the bench and to beef up the family law department. Bucci says that in her 11-lawyer firm, two are doing family law, and she sees that all the larger firms in Thunder Bay are covering the area, attracted by the very decent fees that a family law file can generate.

"The issues that a family lawyer deals with are far more complex than ever before. In terms of overall litigation, they are just as complex as other areas. That's very attractive to a law firm," she says.

Bucci specifies areas such as determining income when someone is self-employed or child support payable after a child turns 18 but continues their education. "Changes to these areas open up new avenues to explore in terms of legal research."

Another factor pushing up fees is the significant increase in the value of assets that people are fighting over. Dickson points out that pensions can be a substantial part of the pot. "In Fredericton, we deal with a lot civil servants. If they've been working for the government for 25 years on a salary of $85,000, they're going to have one heck of a pension."

The general rise in property values has also had a major effect on marital assets. Nowhere is this more evident than in Calgary, a city of almost one million, that has grown by about 400,000 in the last decade. "In the last four years there has been an exotic increase in the value of the matrimonial home, and the impact on family law has been quite remarkable," says Colborne. "A home that would have sold for $180,000 will now sell for $400,000. If you're the spouse who is the primary caregiver with no work history or credit rating, it's inevitable that there will be forced sale. That spouse cannot buy out the other spouse's interest and is forced into a renters' market of $1,500 to $2,000 monthly."

From a law firm's point of view, there are more assets to fight over and to fund the settlement where property prices are high, but the law firms' own costs are affected as well. "Collateral with the increase in the value of the home is the increase in commercial rents," Colborne points out. "In Calgary they are insane, but you don't need a boom to have the same problem if you practise in a major city."

This has had the most impact on a firm's ability to do legal aid work. "Even if a lawyer would like to help, it's difficult with the overheads you have to meet," says Colborne. So lawyers are charging their usual hourly rates for the work, and less-wealthy clients are finding family members to help them or are taking out loans. "I'm not sure clients have an expectation or willingness to pay higher fees," says Bucci, "but they do, at the very least, want good representation and they know they will have to pay for it."

Dickson believes there is a general understanding that marriage breakdown is expensive. "More and more big earners are going through divorce. These are pretty astute business people who are used to legal fees."

The main brake on the whole movement seems to be the number of lawyers available in the field. Family lawyers are aging, and are not being replaced by young lawyers, who aren't going into family law. "There seems to be a reluctance for young lawyers to enter this area," observes Gareau. "It is not perceived to be as lucrative as other areas, and you don't just provide legal services. There is a lot of emotional support involved."

Meanwhile, cases continue at the same volume with a shrinking number of lawyers doing the work. "As a consequence, the family law bar are all busy and their personal fee structure has increased," says Gareau.

One might have expected that the movement towards ADR would slow fee generation, but many lawyers testify to making as much money as before, if not more. "The experience of the bar is that ADR is more cost-effective to litigants," says Gareau, who often works outside that traditional adversarial role. "You can move files quicker, manage them more efficiently, and so you don't carry clients as long. Clients are generally pleased with the outcome so you're more likely to get paid."

This has also been the experience at Vogel & Company where family lawyers employ four-way meetings, collaborative law, and arbitration in their family law practice. "In a shortsighted way, you may think you would make less money," says Vogel, "but lawyers who are open to alternative options and are good at what they do are busy. Added to which there is money to be made in the mediating role which wasn't available before."

As a result of generating strong returns for the firm, family lawyers are no longer floundering at the lower end of the remuneration scale but are much more likely to be on par with other litigation lawyers. The prestige of the work has also increased, with no more talk of a "pink ghetto," where the female lawyers at the firm got lumped with the work. In fact, it is becoming a respected specialty.

"Family law is so complicated and is changing all the time," says Balbi. "There seems to be a trend towards a more specialized firm" which will give the midsized firms good reason to keep their family law departments strong enough to keep the talent coming in and not going out.

"[L]aw practice has gone to the dogs - and to the kids"

Rendell, Susan, *[St. John's, NL] Independent,* 23-29 March 2007, pp. 17-18 (*in part*)

Divorce has traditionally been an adversarial game, often debilitating to one or both sides, and almost always to the children. When [Shelley] Bryant opened her law practice in 2005, Newfoundlanders were the only Canadians without access to a saner alternative.

Bryant came to Newfoundland from Nova Scotia in the '80s to do a master's degree in psychobiology (animal behaviour) at Memorial, after completing an undergraduate degree in psychology. Her pre-law background undoubtedly accounts for the "greeter" I encounter the moment I walk into the office at 4 Bates Hill: Sally the golden Lab (mostly), one of Bryant's three dogs.

Sally is part of an ambience that makes Bryant's law office feel like anything but. Earth colours, candles, art from Tibet, a round table made of blond wood: it seems like a dining room, especially when the tea is poured and Bryant and I settle down for a talk that ambles well past the scheduled hour. (Sally, whose eyes are decidedly non-lupine, settles down too, after some initial head-nodding, tail-wagging braggadocio over the stuffed lion in her mouth.)

"I've had a lot of clients comment on how comfortable the space feels, and I try hard to keep it that way." Bryant says. "I enjoy having a dog here at the office with me, and the clients like it very much as well. I'll see people, especially if they're really stressed, absentmindedly reaching down and petting the dog."

Sally and Annie (Bryant's black Lab, Sally's mother) are registered therapy dogs who visit local nursing homes and psychiatric facilities with their owner. But they do some of their best work at the office. Bryant tells me about the time an elderly client who was dying of cancer came to sign his will. Annie walked over to him, put her head on his lap and left it there for the entire session. "She never did it before, and she's never done it since."

"I started to realize how incredibly adversarial and litigious family matters are. I had done a lot of mediation training when I was doing the environmental consulting work … I had a really strong interest in that." In trying to put yourself and your fellow lawyers out of business? I ask.

"There will always be a place for litigation," Bryant says. (Her laugh lifts off lightly, like one of the storm petrels she calls "fabulous little birds.") "But it's a very blunt instrument for dealing with family issues. The courtroom is not the place for looking at the subtle but important gives and takes that may have existed within a relationship. You're not able to get that before the court in a way that is satisfying to clients."

Not every splitting couple is a candidate for the collaborative process, Bryant says. She believes, however, that "by far and away the majority of couples have the ability, innate and inherent, to come to a resolution themselves. But in times of emotional and financial stress – and with the fear of losing children – they need guidance."

Bryant tells her clients, most of whom have children, that an adversarial approach "is not going to help. It's just going to fuel animosity, and the child is in the middle of it … They absolutely have to be kept in mind, first and foremost."

Bryant says non-adversarial law is becoming popular in areas other than family law. "Lawyers are trained in the adversarial model, and it truly is a paradigm shift," she says. "It's very forward looking, and litigation is very backward looking. Collaborative law is snowballing globally."

"Using plain language to improve client relations"

***CBA Addendum* (Solo and Small Firm Edition), May, 2007**

Professionals – be they doctors, dentists, lawyers, computer programmers or social workers – have a vocabulary that they learned during their studies and use regularly in their professional lives. Technical terms and expressions become commonplace and are easy for them to understand. However, for people who don't have the same background and training, these terms can be mystifying.

Lawyers need to communicate legal information to their clients in ways that their clients can understand. This means explaining legal terms or finding other words to convey the same meaning.

For instance, an "examination on discovery" is a chance for the other side to ask a person questions to get information before the case goes to court. Once you've explained a technical term, you can use it with greater confidence that you are communicating effectively. Just don't take for granted that your client always understands you.

When you are having a conversation, you can generally tell when the person is not quite grasping what you are saying, either because of body language or because of the questions asked.

When you write to someone, you don't have this instant feedback. Take extra care with your written communications to clients to make sure you have avoided jargon, explained legal terms clearly and expressed your ideas in a way that a non-lawyer can understand.

A 1992 study for the Law Society of Upper Canada found that "When selecting a lawyer to represent them, the public attaches the greatest importance to lawyers' interpersonal skills, especially the ability to communicate with clients."

By following the basic principles of plain language writing, you can improve the quality of your writing dramatically – and make your clients much more comfortable.

The Ten Commandments of plain-language drafting
(from *The Decline and Fall of Gobbledygook*, Report on Plain Language Documentation Canadian Bar Association and the Canadian Bankers Association, 1991)

- Consider your reader and write with that reader's viewpoint in mind.
- Write short sentences.
- Say what you have to say, and no more.
- Use the active voice.
- Use simple, everyday words.
- Use words in a consistent manner.
- Avoid strings of synonyms.
- Avoid unnecessary formality.
- Organize your text:
    1. in a logical sequence
    2. with informative headings, and
    3. with a table of contents for long documents.
- Make the document attractive and designed for easy reading.

Remember:

In a 1993 study, the American Bar Association found that over 50 per cent of clients whose lawyers frequently or occasionally used legalese would not return to or make referrals to those lawyers.

Adapted from *"7 keys to Great Client Service,"* published by the Canadian Bar Association.

"Recording of 'true intent' advised for transfers of jointly held assets"

Sweatman, Jasmine, *The Lawyers Weekly*, 22 June 2007, pp. 14, 16.

The Supreme Court of Canada recently released two decisions dealing with the presumption of advancement in the context of jointly held assets. Three scenarios were covered: gratuitous transfer from parent to minor child; gratuitous transfer from parent to adult child; and gratuitous transfer from parent to dependent adult child.

In *Pecore* v. *Pecore* [2007] S.C.J. No. 17 and *Madsen Estate v. Saylor* [2007] S.CJ. No. 18, the majority of the Supreme Court made a distinction between the type of transfer and abolished the presumption of advancement that formerly applied when a parent made a gratuitous transfer to an adult child, regardless of whether the adult child is a dependent of that parent. The presumption still holds for a gratuitous transfer from parent to minor child.

What does this mean for practitioners?

For litigators, the practical result means a factual inquiry into "true intent," and for planners, the need to inquire and record the "true intent."

In deciding these cases, the court will now need to hear evidence on the "true intent" of the now deceased person as to what he or she intended when the assets were put into joint tenancy. Does the evidence indicate an intention for it to be a gift (i.e. to be received by right of survivorship upon the death of the transferor) or was it not a gift but held on "trust" with the asset "resulting" back to the deceased's estate?

The court will rely on direct and circumstantial evidence to determine "true intent," direct evidence naturally being preferred. Circumstantial evidence would include such factors as any notes, utterances or documentary evidence by the deceased, third party recollections and witness evidence and patterns of behaviour. Without clear documentary proof, the likely result will be a resulting trust with the assets reverting back to the deceased's estate.

For practitioners and financial institutions, do these decisions now require a "papering of the file"? Documentary proof of the true intention will come in various forms and degrees of certainty. The highest and least likely uncontroversial form would be, for example, a deed of gift (or deed of non-gift) executed by the deceased and properly witnessed. But as with a Will or any legal document, even such documents can be challenged on the grounds of invalid execution, undue influence and lack of capacity (although the capacity to give is arguably of a low threshold).

How can advisers avoid these challenges? Those attending to the setting up of joint accounts will need to start protecting the client's intention as they do for Wills and powers of attorney. They should consider, for example, whether an affidavit of execution should be executed; whether the client should sign a declaration of intent; and whether a detailed "memorandum to file" should be prepared.

It is very rare for a person to consult with a lawyer before setting up assets jointly. This means the burden of providing the evidence will fall on the individual and financial institution to properly paper the file. (This of course begs the difficult question as to whether a financial institution has a positive duty or to what extent is there a duty to investigate and record intent.)

For estate planners, taking instructions and recording intention now becomes a necessity. When told an asset is jointly held, they can no longer advise the client that since the asset falls outside the Will, it will pass by right of survivorship. Since it may affect the estate plan, planners will now need to ask more questions to determine and most importantly record this "true intent."

They will need to ask questions such as who the asset is jointly held with, what the client's intention was when creating the joint tenancy, and what the client's intention is should he or she die first.

Not only should notes be taken, but consideration should be given as to whether more formal documentation should be prepared and executed. Will this become the required standard? With time no doubt the answer will be "yes."

Another consideration in light of the Supreme Court decision is whether practitioners should be advising current clients to record their past intention.

Ironically, these suggestions are really defensive evidence building, even though the Supreme Court held that the onus of proving the assets are not held on a resulting trust rests with the surviving joint holder. The question for the courts will be, especially with dealing with assets placed into joint accounts in the past, how high the onus threshold is, and what it will it take to satisfy the onus.

The frequency with which clients are advised to put assets in joint names has resulted in increased confusion, misunderstood expectations and litigation surrounding the ultimate disposition of the assets. Clarity was needed.

And although clarity from the Supreme Court is always welcomed, leaving the determination to a factual case-by-case determination of true intention may not, in the long run, prove effective. It may shift the onus onto the adviser to record true intent.

"Chief Justice defends Supreme Court and legal profession"

Schmitz, Cristin, *The Lawyers Weekly*, 24 August 2007, p. 3
(*in part*)

Canada's top judge has hit back at critics who contend her court is slacking off and that the legal profession is infested with vermin.

. . . .

Chief Justice McLachlin also made it clear, in response to questions at a press conference following her speech [in Calgary], that she took a dim view of a provocative Maclean's magazine article this month which accused the legal profession of failing to protect the public from abuses by lawyers who are crooked, overcharging "rats."

"I don't think that helps personally", she observed. "I think that we should recognize that there are hundreds of thousands of lawyers who work for relatively low salaries and that lawyers have always been concerned to provide access to justice. It's important to recognize, I think, that the legal profession does take its responsibility to the public seriously, on the whole."

She suggested, however, "at the same time it may be necessary to introduce reforms to see how we can make the system work better, to ensure that the system isn't too expensive. That's a complex and long discussion and it has to be held. But I don't think name calling and exaggeration helps."

In a second speech opening the CBA's legal conference …[in Calgary] the next day, the chief justice urged lawyers to reflect on why people hold such negative stereotypes about the Bar. "Why do they not see lawyers for what they are – highly trained professionals devoted to the discharge of important and complex tasks for the good of society and the people who make it up? Why do not more people, when they hear the word 'lawyer', automatically think of decency and justice?," she queried. "We need to do more to send the message that lawyers take it as their primary duty to serve the public, and having sent that message, we must do everything in our power to deliver on it."

Chief Justice McLachlin also returned to a familiar theme, the problem of middle-class Canadians being unable to afford professional legal services. She suggested that a partial solution lies in ensuring that there is congruence between the stakes of a case and the procedure used to get a result.

"The procedure should be proportionate to what's involved and so if you have a $20,000 law suit it should be quickly done, at a minimal kind of cost – you don't have to have months of discovery and all of this kind of thing. I think that with some innovative thinking, and a willingness, and [an] open mind, considerable progress can be made in this regard.

"How to arrange a kinder marriage contract"

Epstein, Philip M., *The Lawyers Weekly*, 30 June 2006, pp. 9-10

The significant rise in the number of requests for cohabitation agreements and marriage contracts is not surprising. Although they generally did not become legal in provinces throughout Canada until the late 1970's and early 1980's, they did not really come into their own until family law reform legislation passed throughout Canada, and that legislation divided non-family assets as well as family assets. There were a growing number of couples that were living common-law. There were increased divorce rates and increasing numbers of parties who wanted to ensure that there was no property division. Many wanted to avoid the same experience that they had lived through at the time of their first divorce and, thus, sought domestic contracts to protect their assets.

However, whatever the underlying reason for the marriage contract or the cohabitation agreement, the problem is how to present it to one's spouse and how to make sure that it is negotiated in a way that does not jeopardize the relationship.

Make no mistake about it, for most parties that are presented with a marriage contract, they understand that it means "I do not trust you and I need to protect myself from you." No matter in what context agreements are presented, there are bound to be hurt or bruised feelings. This piece is about a kindler, gentler and better way to deal with this difficult issue.

The standard practice in negotiating these agreements is to have a lawyer draft the agreement for the person propounding it and then send it to a lawyer for the other party. The lawyer for the other party is placed in a difficult, if not hopeless dilemma. The lawyer wants to protect the client but immediately sees problems in the agreement. The client, on the other hand, wants to get married or maintain the relationship. The client does not see any problems in the agreement because the client believes that the relationship will last forever. Alternatively, the agreement is generated by one of the parties' in-laws and neither party truly understands the agreement and neither party really wants the agreement. The lawyer explains to the client that he or she should negotiate for better terms and looks into his or her crystal ball and decides that the agreement provides grossly insufficient protection if the relationship or marriage were to break down. The person propounding the agreement, when he or she hears the lawyer's complaints, blames the lawyer for inter-meddling and preventing the simple agreement from being signed. The bride-to-be (because it is usually the bride-to-be) wants to get married and cannot understand the problems and, certainly cannot reconcile what her fiancé is telling her and what her own lawyer is telling her.

The lawyers then start to exchange correspondence. The correspondence often becomes increasingly hostile and, in the meanwhile, the wedding date is fast approaching because the parties, as usual, left it too late to allow for a reasonable negotiation time before the wedding.

Eventually the bride-to-be signs the agreement, although her lawyer is dissatisfied. She is throughly upset at the process. She is angry at her fiancé for putting her through it. She is angry at her own lawyer for compounding the problem. She is angry at her father-in-law for forcing the issue and the special time that should have been enjoyed as a lead up to the wedding has been grossly interfered with.

If all of this sounds familiar, it is because lawyers and parties too often engage in this style of negotiation with respect to the agreement.

There is a better way. When lawyers are approached for a marriage contract, they should outline in detail, for the client, the various alternatives available since there are a wide variety of results that may obtain on the breakup of a marriage or death. They need to explain carefully the different results that should obtain if the parties separate and why that should be different from the results if there is a breakdown of the relationship by premature death of one of the parties. The parties need to explore in detail the support provisions of the proposed agreement and understand that in light of *Miglin v. Miglin* [2003] S.C.J. No. 21 they cannot easily contract out of support obligations. If the parties are not to share in property, the parties need to understand what they are giving up and what are the alternatives. At the end of the day, however, in order to prevent any misunderstandings, both between the parties and the lawyers, the parties need to meet face to face in the same room with their lawyers. The collaborative law approach to resolving disputes for parties who are separating has much to offer in terms of the approach that should be used to

negotiate a marriage contract. The parties not only need to understand their legal rights from their own counsel, they need to understand and appreciate the other party's needs and concerns as to why a marriage contract is being asked for in the first place. If these kinds of four-way meetings are approached with the spirit of co-operation and mutual desire to reach a satisfactory agreement, then the adversary process which is so inimical to the successful negotiation of a marriage contract will not play a role.

Negotiations for a marriage contract should never start off with one lawyer presenting the other side with an agreement. Lawyers' instinctive reactions are to make changes to any agreement sent to them by the other side. A lawyer feels that he or she has not done their job unless they do make changes. Once you embark upon this road, it is a downward spiral. Far better to meet and exchange ideas and exchange concerns. Then, at the end of that meeting, someone can undertake to circulate a draft that reflects the concerns raised at the meeting.

This is an approach that I always recommend to clients as soon as I am retained in connection with a marriage contract. I find that it dramatically reduces the chances of misunderstanding and upset. The negotiation and the agreement becomes a collaborative work, designed to lead to an agreement that everyone can live with. There is no question that the adversary process, which is so often utilized to resolve family law cases, has absolutely no place in the negotiation of a marriage contract. We need to understand where the parties are at that time in their lives. We need to appreciate the enormous impact that a marriage contract may have upon separation and death but we need to do so in a sensitive fashion that will not drive the parties apart. That is particularly so since trying to negotiate an agreement when the wedding is weeks or even days away, just heightens the anxiety and will lead to problems later on.

Arnie Becker of "L.A. Law" always said that he never saw a pre-nup that he couldn't break. While Arnie was probably wrong, it is at least apparent that agreements that are negotiated in this fashion will, as a starting point, have a much better chance of standing the test of time.

"The legal opinion jitterbug"

Slayton, Philip, *Canadian Lawyer*, June 2006, pp. 51-52
(*in part*)

Lawyers sell opinions about the law. Most of these opinions are given informally, often while the lawyer is shooting the breeze with a client. "I wouldn't worry about that," the opining lawyer might say with a reassuring and knowledgeable smile, jauntily putting his feet up on his desk, leaning back in his chair.

Or, looking concerned, but secretly anticipating substantial billings with pleasure, he might say: "We've got a problem. The regulators will never buy what you want to do. Let's see if there's a way around this. Might be complicated…. I'll work on it."

After a casual introduction of this sort comes the legal analysis. The analysis might not be careful, or even right, but no matter. It's a relatively easy thing for the lawyer to say later on, if there's trouble, that the client didn't properly understand the advice that was given, or that it was misinterpreted, or deny outright what it is he's supposed to have said.

But sometimes a lawyer is forced to write down what he thinks. The written legal opinion is his hostage to fortune. It sits there, in a file or record book, proclaiming a view that cannot later be denied or qualified, often on an intricate and difficult matter. The written legal opinion functions, among other things, as a kind of insurance policy for the client. *The lawyer might actually be sued, and have to pay up, if he's got it wrong!*

One consequence of this is sort of dance of written opinion, featuring fancy footwork by the writer. There is the "on the one hand, on the other hand" side step, which at first glance appears to exemplify balanced judgment, but really abrogates professional responsibility (legal dithering is exactly what a client shouldn't pay for). There is the "based on the following facts and assumptions" to-step, intended to narrow the scope of the opinion until it almost disappears. This and other jitterbugging are intended, above all, to protect the lawyer.

Despite this dance and its eviscerating effect, there is still demand for the legal opinion. As puny as an opinion may be, it still has a place on the closing agenda; few deals are complete without one. Partly, this is the demand of long-established custom. Partly, it is the insurance function that I have already mentioned. Though lawyers work to dilute their opinion and protect themselves, they may still be seriously exposed.

"Closing Time [:]
The challenges of shutting down a sole practice"

Press, Marlane, *National* (Canadian Bar Association), July/August 2006, p.53

When a sole practitioner decides it's time to close shop, he or she doesn't have the luxury of turning things over to the other partners. Shutting down a solo law practice is a major undertaking. New Brunswick lawyer Marc Richard started to think about closing his Beresford practice in 1996, for instance; but wasn't prepared for all the time it would eventually take.

"Try and complete as much work as you can, and give yourself more time than you think it's going to take," says Richard, who closed his practice to join the Law Society of New Brunswick and currently acts as its executive director. "Some lawyers think that within three months they can be closed, but it can take up to 18 months. It really takes and it took me - a whole lot longer than anticipated."

Client contact

Keeping in mind that law society requirements vary from province to province, the Law Society of British Columbia suggests that lawyers notify each client in writing, says Practice Advisor Barbara Buchanan.

> We also suggest a newspaper notice advising the clients to contact the lawyer to obtain their open or closed files and original papers and, of course, valuables, wills, and funds in trust," she says. The law society's website contains, among other guidelines and requirements, a checklist, a sample newspaper notice, and a sample letter to clients pertaining to the winding up of a sole practice.

Pending matters

When lawyers decide to stop working, they should try to make a smooth transition for the client, says Buchanan. For an active file, she suggests preparing a detailed memo on the nature of the file and the work that remains to be done, highlighting important limitations. "Of course, the lawyer would need to discuss with the client how to proceed," she says, “Obviously, the lawyer cannot prejudice a client's position and simply abandon them last-minute," adds Law Society of Manitoba CEO Allan Fineblit. "The lawyer has a responsibility to ensure that the transition is seamless. In matters before the court" the lawyer will also have obligations to the court and will need to take the appropriate steps to get off the record.

"I always advise sole practitioners to find a colleague who is willing and able to step in and facilitate an unexpected transition, either due to an infirmity or another reason," Fineblit says. "But for those who don't, the law society will usually step in to ensure that the clients are not at risk."

Open files

Should you return open files to the client or transfer them to another lawyer? "It's the client's choice, of course,'" says Richard, adding that his law society has published lengthy guidelines for members regarding file retention and destruction. "It all depends on what type of matter it is," Richard says. "Some files you have to keep for the rest of your life, while others can be partially destroyed after ten years. But in the practice here in New Brunswick, many lawyers who close their offices will just keep files in their home."

Trust money

Trust accounts should be closed – either returned to the client, turned over to the law society, or transferred to a new lawyer – and a final report must be sent to the law society, says Fineblit. "The money may be held pending the fulfillment of trust conditions and, if that is the case, those same conditions should be imposed on the new lawyer when the money is transferred."

If the client can't be located, or the lawyer doesn't know to whom the trust money belongs, then the money can be paid to the law society.

“Client Conundrums”

Kopstein, David M., *Trial* (Journal of the Association of Trial Lawyers of America), August 2006, pp.47-48.

There's an old saying that practicing law would be great fun if it weren't for the clients. While that might be an overstatement, I confess I have found it much easier to deal with defense attorneys, judges, insurance adjusters, and jurors than many of my own clients. I avoid representing obnoxious people and, like most experienced attorneys, have become adept at identifying – and eschewing – prospective clients who have an unstated agenda, a bad attitude, or a shopping bag full of documents.

But if you're like me, the occasional difficult person will still slip in under your professional radar. You may not even know you have a problem until you find yourself confronting an Impossible Client (IC): one who steadfastly refuses to accept a great settlement offer.

Dealing with the IC will be one of the biggest challenges of your career. One key is understanding how his or her thought process differs from yours.

Our objective, as personal injury lawyers, is to get compensation for our injured clients. We identify causes of action, gather evidence, address legal issues, and overcome procedural obstacles, all to make sure our clients have the best possible chance at the best possible, outcome. We evaluate our clients' cases; we research settlements and verdicts in other, similar claims; we form accurate, informed opinions about what these cases might be worth.

The IC does not think in those terms. Some ICs think of the case only in the larger context of their financial problems. These clients refuse to settle for less than what they "need." Others will inform you that law and precedents are no predictor of their case's outcome, because God is on their side. To those clients I point out that God seldom shows up at any of my trials –perhaps He has trouble getting past security – but his Opposite Number always seems to be in the courtroom – sometimes even in the jury box or on the bench.

Some ICs insist that money alone cannot satisfy their desire for revenge. In a malpractice case arising from a botched cataract operation, for example, I had to explain to my client that while the phrase "an eye for an eye" might have a certain Biblical appeal, the court was unlikely to literally grant it as relief. Moreover, that particular recovery would have made getting my contingent fee a gruesome prospect.

For some ICs, the case is an obsession, the primary focus of their lives. They can't bear to end it and be left with nothing to do. These clients need to "get a life," and you should introduce them to the joys of quilting, stamp collecting, or writing letters to the editor.

What the IC usually fails to appreciate is that a trial is inherently a risky proposition. The majority of medical malpractice trials, for example, result in defense verdicts. I have never heard

of a medical malpractice case where liability was contested in which the plaintiff's chance of success was better than 75 percent.

That figure may not seem daunting to a client, however, until you put it in terms he or she can understand. When attempting to convince a reluctant client to accept a reasonable settlement offer, I often succeed by asking the client if he or she would be willing to take hundreds of thousands of dollars to a nearby racetrack and bet it all on a 3-to-l favorite. Few people say yes.

A more difficult situation comes up in cases where there are large, outstanding medical bills and I must recommend a settlement offer that is generous in light of the evidence but will leave little money in my client's pocket after those bills are paid. In such situations, the client must understand that the bills have to be paid regardless of the final verdict. ….

When all else fails, you may have to play hardball with the truly impossible client. I recently reached an impasse when attempting to settle a difficult medical malpractice case. It arose from an alleged surgical error, and the defense had obtained highly qualified experts to argue that my client's poor outcome was not the result of any deviation from applicable standards of care. I estimated the chance of a plaintiff's verdict as better than even, but not a sure victory.

Shortly before trial, the defendant's insurance company made an offer that, according to my research, was much bigger than the largest known verdict in my area for this kind of case. Of course, I recommended to my client in the strongest terms possible that he accept the offer. He refused.

Perhaps I would have viewed his recalcitrance with more sympathy if he had given me a rational reason for his refusal. But he gave no reason whatsoever, rational or otherwise, and with the trial looming, I decided I needed to take extreme measures.

I reviewed my retainer agreement with the client and verified that it did not require me to advance the expenses of litigation (although, as always, I had been doing so). I then called the client and informed him that while I remained willing to take the case to trial, I would henceforth require that he advance all costs. This would include substantial fees and travel expenses for his expert witnesses, who were vital to the case.

Faced with the prospect of having to gamble with his own money, the client finally relented and authorized me to accept the offer, but not until I had spent several sleepless nights wondering if he would call my bluff.

"Family Law"

***ATLA Law News Digest,* 14 September 2006, p. 12.**

When a suicidal doctor blew up a Manhattan townhouse in July [2006,] it was an extreme example of how tensions in a messy divorce can spiral out of control. But even in typical divorce,

the stress can be intense for clients and lawyers alike. Enter the divorce coach. Largely a product of the collaborative-law movement, divorce coaches work with clients to keep them focused on achieving positive results, instead of getting mired in vindictiveness. Their role in the legal team is to help clients navigate the intense emotions and legal frustrations inherent in divorce.

"The Best Case I Never Had: Lessons in Solicitor Client Communications"

Meehan, Q.C., Eugene, *S.C.C. Lawletter* (Lang Michener LLP), 14 September 2006, pp. 11-12.

Several years ago, I represented a young man charged with first-degree murder. At an early juncture in his defence, the prosecutor threatened to use the evidence of a jailhouse informant which would greatly prejudice my client's chances of success at trial. This crisis called for a decisive response; I immediately enlisted the assistance of a colleague with a national reputation for tackling these type of issues and a strategy was soon set in motion. All members of the defence team worked hard, and our efforts were rewarded with a judicial order excluding the evidence.

To my surprise and regret, my client discharged me the very next day. While it is clear to me now, I could not understand at that time why my client would fire me the morning after a substantial legal victory in his favour. The answer was simple – I had not taken the time to communicate to my client what I was doing on his behalf; he may have had a great legal team but he did not know it. As a criminal lawyer, I had always aspired to be learned in the law and compelling advocate, but had I devoted an equal amount of time and energy to being accessible and understandable to my clients? The answer was a resounding – no.

Since that time I have devoted a large part of my practice time to enhancing solicitor-client communications, here is what I have learned:

1. Honesty

All clients desire certainty as to the outcome of their case. In many instances certainty as to outcome is too tall an order, even for the best our profession. The dangerous trap that awaits all counsel is placating clients by telling them what they wish to hear and making promises that we know we might not be able to keep. While this approach may comfort the client in the short term it can, and likely will, spin devastating consequences in the long run. At the core of the honest relationship, is the responsible management of client expectations. That is why I tell new clients, the best I can do is outline all the likely scenarios based upon the law and the facts with which I have been provided, nothing more or nothing less.

2. Accessibility

There is nothing more frightening to a client than to have an impending court appearance and not be able to access counsel. Being accessible to clients in their time of need is essential to a

strong long lasting solicitor-relationship. What I have learned is that being accessible does not mean taking every call or answering every voice/ e-mail message moments after it is received. Being accessible is all about setting out some communication ground rules early in the relationship and sticking to them. Whether it is a combination of monthly meetings and weekly calls, supported with a emergency access plan, does not matter, so long as both the lawyer and client are aware of what these ground rules are and that they are followed.

3. Accountability

Accountability is the engine which drives a healthy solicitor-client relationship. Accountability is all about lawyers doing what we say we are going to do. Here the notions of honesty and accessibility come together: lawyer and client have spoken, options and probable outcomes have been discussed, agreements have been reached and now the time has arrived for the lawyer to execute the strategy. Accountability therefore is all about execution. Nothing is more frustrating for clients to be told that their matter will be proceeding in one way only to have everything change at the last moment. A fully informed client is far more likely survive last minute wrinkles, whereas a client married to a sole outcome, unaware of the potential hazards, will likely discharge counsel who has failed to warn them. Once again my duty is to manage client expectations not to inflate them to unrealistic levels.

4. Respect

Clients deserve respect. No one but the client can know the sting of a criminal charge nor the abject unending humiliation of having your name in the newspaper. In many instances both strangers and friends have pre-judged the situation with the result that the client feels isolated and depressed. As counsel I try to keep this in mind at all times. I have come to recognize that often if a client is treating me poorly, it is simply a venting of fraction of the pain and anguish that is churning away inside them.

Conclusion

As I stated at the beginning, my own personal failures in maintaining strong solicitor-client communications cost me a high-profile client. However, I cannot but feel the lessons I learned from that first mistake have served to benefit all my clients since that time and for that reason I have always considered it the best case I never had."

"Ohio Won't Block Letters to Accident Victims"

Ward, Stephanie Francis, *ABA Journal eReport,* 18 September 2006, p.1.

At a time when personal injury lawyers are under heavy fire from tort reformers, even smaller victories for the plaintiffs bar get noticed.

Especially when some of the "winners" opposed the "victory."

The Ohio Supreme Court last month decided to drop a proposal to prohibit lawyers from contacting accident or disaster victims or their relatives in writing within 30 days of the incident. Instead, the court decided to keep a conduct rule that allows lawyers to contact potential clients in writing provided the solicitation includes a leaflet advising the recipient of his or her legal rights. The court revising its professional conduct rules for Ohio lawyers.

"A Suicidal Client?"

Cohen, Randy, *The New York Times Magazine*, 22 October 2006, p.42

[Q] I am an attorney. While a potential client and I were preparing her will, she asked how it would be affected if she committed suicide. A little flustered, I asked if she was seriously considering suicide. She said no, but did she mean it? I don't want to ignore a cry for help, but is it appropriate to try to be her social worker – she does see a psychiatrist – especially considering the rules governing attorney-client confidentiality? What should I do?

[A] You should do your job. If your potential client has made a reasoned choice for suicide, your task is not to dissuade her (you are, as you suggest, not a trained therapist) but to provide legal advice, to help her get her affairs in order. You can speak to her with compassion. You can urge her to discuss this with her psychiatrist or her family. You can decline to take her on as a client (though you can't prevent her from finding a more pliant attorney). But you may not violate her autonomy and her confidentiality by reporting this to anyone.

If, however, she is clearly deranged and a danger to herself, then you must seek help for her. Of course, in such a case you are forbidden to prepare her will; as you know, she must be of sound mind for that.

The American Bar Association grants lawyers the discretion, but not the obligation, to break confidentiality to report a suicidal client, lucid or not. Some state bar associations – Connecticut, for example – go further and forbid a lawyer to prepare a will if doing so will assist a client's suicide. But the ambiguity of this proscription undercuts its helpfulness. Presumably such a client will find another estate lawyer and keep mum about her dark thoughts. And to whom would you report a suicidal but apparently rational client, anyway? The police? The client can simply smile and say: "I am fine. My lawyer is well-meaning but mistaken."

It should be noted that many psychiatrists discount the idea of rational suicide, except when a person is terminally ill and suffering intolerably. It is, however, beyond your purview to make such sophisticated judgments. If your client seems rational, and she does, you should help draft her will, but I don't envy you the moral burden of doing so.

"[C]ompetency is a legal, not a medical test"

Desveaux, Jeanne, *The Lawyers Weekly*, 03 November 2006, p. 15
(*in part*)

People today are living longer than in the past and our society is therefore facing novel issues associated with this increased longevity. At the outset, the first issue for elder lawyers is the need to determine the identity of our client. Is it the person providing the retainer, the family of the elderly individual, or the elderly individual himself or herself? Throughout our dealings with elderly clients, we also need to ensure that we meet with the client alone, without the influence of family members.

As with all other clients, we must also maintain confidentiality at all times. However, the most perplexing, if not troubling issue for many lawyers in this area of practice is the task of representing a client with *diminished capacity* – an individual with a cognitive deficit in their ability to provide instructions to us and to retain the information we provide to them. Some of us may have the practice of requesting that a physician assess a potential elderly client before that individual meets with us. We thus seek *medical confirmation* that the individual is competent to provide us with instructions. Is this the appropriate approach when working with the older client?

The various law societies across the country provide rules of practice to which we adhere. Some individuals have suggested that we require additional rules to be able to work with the aging population, particularity with clients whose capacity is diminishing. Others argue that we need practical *guidelines* rather than additional rules. I believe that the rules that already govern our practice provide us with adequate direction to guide us in our representation of clients who are experiencing diminished capacity.

. . . .

To provide competent representation to the client experiencing diminishing capacity the lawyer should educate him or herself about the particular disease process involved (e.g. Alzheimer's disease) and not assume immediately that the client is incompetent and cannot provide instructions to the lawyer. The lawyer also needs to identify the possibility that any client, regardless of his/her age, may be experiencing diminished capacity because of the presence of a disease process. Fundamental to identifying *red flags* relating to the representation of *any* client is the communication process.

In essence, to provide competent legal services to the older client it is essential that we establish and maintain effective communication with the client. Suppose that after a thorough intake and interview process during a meeting with a client we determine that, *before* committing to representation, we will require the expertise of a physician to confirm that the client has adequate cognitive capacity to provide and understand instructions. In this instance, we are required to communicate this finding as best we can with the client.

We need to recognize that if the lawyer believes that his/her representation of the client may be compromised by the presence of a particular illness of the client impacting the client's cognitive function, the lawyer has the duty to communicate this determination to the client.

On the other hand, even if we conclude that the client is indeed capable of instructing counsel and does not have diminishing capacity, facts may suggest that someone else may challenge our finding. In such a situation, it may be prudent at the outset to seek medical confirmation of the client's mental status as a future defence to a possible challenge.

We can not however, shift the burden of determining competency to the physician. Competency is a legal test. Interestingly, on p.183 of the book *Capacity to Decide* (Malloy, D.W., Darzhins, P., and Strang, D., 1999), the authors discuss the issue of capacity as it relates to Wills: "The person who is in the best position to determine the testamentary capacity is the lawyer who discusses with the testator and draws up the Will. The lawyer in this case has the most insight into the person's thought processes and reasoning. If the lawyer keeps good notes then others can review them later and determine if the person was thinking clearly, consistently, and rationally."

In conclusion, I would suggest that *the competent lawyer has the obligation of determining whether or not the client is competent.* We need to remember that competency is a legal, not a medical test. Today there is a societal myth that older persons are less capable. This is ageism. As lawyers we need to strive to avoid discriminating against our own clients as we work with them to plan for a time when perhaps they will indeed be incapacitated.

"The Do's and Don'ts of pre-nuptials"

Ostwald, Krysta H., *The Lawyers Weekly,* 10 November 2006, p. 13

It would be of great assistance to family law lawyers if counsel practising in other areas of law were more aware of the intricacies of pre-nuptial agreements and how essential full disclosure is to these agreements. We often run into clients who have been referred by other counsel and are seeking a basic "precedent", but do not want to share their asset information.

There is one universal truth for family law lawyers across Canada: there is no more lightening a task than the drafting of a pre-nuptial agreement. Counsel are put in the untenable situation of crystal-ball gazing to contemplate both the future circumstances of the parties and the future direction of the law. When creating a pre-nuptial agreement you cannot anticipate the time frame when the agreement may be subject to scrutiny nor can you anticipate the extent or nature of the future assets which may be governed by the agreement. We are often faced with clients who are madly in love, unaware of their own end goal and struggling to seriously contemplate the prospect of the breakdown of the upcoming marriage they are happily planning. As an extra kick, the request for a strong, binding, enforceable pre-nuptial agreement inevitably comes with the

added proviso that the client wishes to keep the process inexpensive and avoid extensive disclosure obligations. An impossible task!

The basic Do's and Don'ts of advising clients on the topic of pre-nuptial agreements can be summarized as follows:

DO explain to your client what happens under your provincial matrimonial property legislation in the event of marriage breakdown if a pre-nuptial agreement is not executed. The substantive content of this legislation varies tremendously from province to province. It is essential that clients be made aware of their legal rights and obligations under the existing law before they try to contract around or out of those rights and obligations.

DO negotiate with the fiance(e)'s counsel *prior to* the first draft of the pre-nuptial agreement. Counsel need to collaborate toward the parties' common goals of a successful wedding, and a non-acrimonious agreement and the not-so-common-goal of protecting assets from one another's future claims. Counsel can work together to solve the issues and provide joint solutions to both clients by being creative and avoiding sending letters or e-mails that may be unnecessarily formal and/or be misinterpreted.

DO NOT make any promises regarding the binding nature of spousal support clauses contained in the pre-nuptial agreement. The waiver of spousal support rights in pre-nuptial agreements is controversial. Spousal support waivers in separation agreements are generally binding because the person waiving his or her claim to spousal support is able to assess his or her economic circumstances arising from the marriage and its breakdown. Spousal support waivers in a pre-nuptial agreement, on the other hand, do not allow considerations of future circumstances because the spouse has not yet acquired spousal support rights.

DO NOT pull out a boiler plate precedent and fill in the blanks. Pre-nuptial agreements are extremely individualized. Counsel need to obtain all the information possible to create a tailor fit contract, ascertain decisive objectives of the client and employ clear and concise drafting techniques. It is essential that if the agreement is triggered in the future, it is interpreted in the way the parties intended.

DO disclose assets and liabilities and attach that information as a schedule to the pre-nuptial agreement. The importance of financial disclosure in ensuring the protection of assets in existence at the date of the marriage cannot be overemphasized. In the Ontario Superior Court of Justice decision of *LeVan* v. *LeVan,* [2006] O.J. No. 3584 the court found that the husband had deliberately failed to disclose his assets in the marriage contract and without this information no valid negotiations could take place between counsel. The decision also took into account that the wife had not properly understood the agreement, the terms had been misrepresented to her and the terms as drafted were completely unfair. The marriage contract was set aside. Disclosure of an asset's value is also of utmost importance in the event the intention of the pre-nuptial agreement is not clear to future interpreters. This disclosure will assist in the assessment of the value of pre-marital assets subject to the applicable provincial legislation.

DO NOT destroy closed pre-nuptial agreement files in the regular course as you may need to refer to your notes 20 or even 30 years from the time of drafting. Liability issues for lawyers are significant in relation to pre-nuptial agreements. When the value of the assets are significant, consider increasing your liability insurance.

DO NOT try to contract out of child support or limit claims for child support. The Canadian case law [including interpretation of legislation in some provinces] consistently shows our courts do not find themselves bound by pre-nuptial attempts to deal with children or future children. Instead, declaring an agreed intention may be used as evidence of the parties' meeting of the minds at the time of entering the agreement.

DO test the agreement yourself prior to committing to the final form of the agreement. Go through the document with a fine tooth comb and confer with a partner or associate to test all possible outcomes. After amendments, concessions and re-drafts, the meaning may not be obvious 10 or 20 years from now to a new reader. A fresh look now [and resulting additional emphasis on language clarity] can avoid potential liability later.

DO NOT take shortcuts. Be clear with your client up front that this is a costly endeavour. Pre-nuptial agreements are sophisticated documents fraught with peril, and counsel have significant liability exposure with each individual agreement. You need to take the time to be clear on the client's wishes, negotiate the terms effectively, and ensure full disclosure is scheduled to the agreement. Our firm policy is that each pre-nuptial need be reviewed by at least two lawyers in our firm before the agreement is executed.

"Compassionate Checklist"

Keeva, Steven, *ABA Journal*, November 2006, p. 76

AT THE INITIAL MEETING

WHY HAS THE CLIENT COME? IS HE DRIVEN BY:

- Anger?
- A sense of having been victimized?
- A desire to heal?

What does he expect of me?
What role does he want me to take?
What are my first impressions?
Am I listening as if he is the only other person on earth at the moment?
Have I turned off the phone or made arrangements for someone else to answer?
Am I seeing the whole person or focusing narrowly on the possible legal issues?
Am I saying what I need to say to the client, or am I avoiding something?
Are my words consistent with my values?
Have I made clear what I see as both his and my own role(s) in this relationship?

Have I made clear where my loyalties lie—to him, yes, but perhaps also to minimizing conflict, to the other side or to the community?

Have I been clear about the range of options, both legal and nonlegal, that may be available?

Have I withheld any information that may be relevant? (If so, why? Whose interests am I serving by doing so?)

AFTER THE INITIAL INTERVIEW

HAVE I BEEN CLEAR SO FAR ABOUT WHAT I SEE AS THE MERITS AND DEFICIENCIES IN THE CASE THE CLIENT THINKS HE HAS?

Does the client seem open to striving for a win/win solution?

What might such a solution look like in this case? (Even better, ask the client this.)

Is he willing to take any responsibility for the problem? If he is willing to forego the role of victim, what opportunities does that open up?

Can he admit that there were things he could have done that might have prevented the current problem? If so, can he take an active role in resolving it?

Does the client appear to need permission to let go of his anger, and would he accept that permission from me?

How attached is the client to winning? Would anything short of it be interpreted as success?

What would it mean to me to win this case?

Is the client deluding himself about any aspect of the case?

What would it mean to me to win this case?

Is the client deluding himself about any aspect of the case?

What would it mean to me to win this case?

Is the client deluding himself about any aspect of the case?

What might be the best way to start a dialogue?

What ways of looking at this case might locate deeper meanings and broader implications? For example, are there family implications that may at first not be apparent? Community issues? Spiritual issues for the client? How might these implications matter?

Have I made it clear enough that I consider this relationship:

- Important to me?
- Worthy of my time
- Not only a legal but also a human partnership?
- A collaboration in which we each have much to contribute?

WITH OPPOSING COUNSEL

AM I BEING HONEST AND FORTHRIGHT?

Am I letting his words or behavior:

- Get the better of me?
- Be an excuse for behaving without integrity?
- Make me react unmindfully?

IF IT GOES TO COURT

AM I DOING ALL I CAN TO MINIMIZE HARM TO MY CLIENT?

Am I showing respect for the humanity of the other side, regardless of their brutishness?

Am I striving to help my client maintain the highest degree of consciousness regarding both the legal and the psychological/emotional dimensions of the case?

Am I being sensitive to opportunities to minimize suffering?

This list is not meant to be exhaustive, only to suggest your choices to make, which, in the aggregate, can reflect deeply held spiritual as well as intellectual and ethical values. This can make your relationships much richer and more fulfilling than might have been thought possible.

"The Year in Family Law"

***Family Law Newsletters*, 26 December 2006, Epstein, Philip and Lene Madsen, pp. 11-12, 13. (*in part*)**

Practice Points

Who better to give practice points than the Bench. Some of these may seem obvious to you, but evidently, somebody needed to be "told." The following tips have been distilled from the cases commented upon in the newsletter over the last year:

• Make sure your valuator is in fact independent. Just to be clear: don't tell them you want a lower value than the wife's valuator gave, [FN70. *Poirier v. Poirier*, 19 R.F.L. (6th) 197 (Ont. S.C.J.), per Justice Charbonneau, volume 2005-47.]

• Don't pledge RRSPs as security. Section 146(2) (c.3ii) of the *Income Tax Act* deems an RRSP that has been pledged to be deregistered. The "real" security, when taxes are taken into account, may therefore be significantly less than face value. [FN71, *Taylor v. Taylor*, 21 R.F.L. (6th) 449 (Ont. S.C.J.), per Justice Corbett, volume 2005-48.]

• Provide examples of how specific clauses in your agreements are intended to work. The court must search for an interpretation of the contract that accords with the parties' intentions when they signed the contract. What's the best way to ensure that the court gets it right (or that you don't need to get to court)? Provide examples for anything complicated.[FN72, *MacDougall v. MacDougall*, 2005 CarswellOnt 7257 (Ont. C.A.), per Appeal Justices Armstrong, Lang, and Goudge, volume 2006-04.]

• Favourable assessment report but your client doesn't have *de facto* custody? [FN73, *David v. McCain*, 26 R.F.L. (6th) 405 (Ont. S.C.J.), per Justice Karakatsanis, volume 2006-04.] Use it for a motion to expedite the trial, rather than to change interim custody. In *David v. McCain*, Justice Karakatsanis refused to change interim custody before trial as there was no risk of harm. The case is a reminder that courts are loathe to change the status quo on an interim basis.

• If you intend to rely on an offer, make sure it's signed in compliance with the governing rule.

[FN74 *Irwin v. Irwin*, 2006 CarswellOnt 1076 (Ont. S.C.J.), per Justice Mackenzie, volume 2006-13. Also, *Harkness v. LeBlanc*, 2006 CarswellOnt 4700 (Ont. S.C.J.), per Justice Sheffield, volume 2006-35.]

• Remind clients (we suggest in writing) to change their beneficiary designations. In *Conway v. Conway*, the wife received the life insurance although the parties had entered into a separation agreement.[FN75, *Conway v. Conway Estate*, 25 R.F.L. (6th) 106 (Ont. S.C.J.), per Justice Weekes, volume 2006-09.]

Smells like a lawsuit.

• Migrating lawyers: Make sure, when there is a potential conflict due to the arrival of a new lawyer, that not only are steps taken to ensure no conflict of interest, but that the steps being taken are communicated to the law firm from which the lawyer is coming.[FN76, *Berg v. Bruton*, 25 R.F.L. (6th) 168 (Sask. Q.B.), per Justice McIntyre, volume 2006-08, provides a detailed outline of what needs to be done and what should be communicated. Keep yourself on all fours with this case.]

• Make sure support amounts are differentiated as to child and spousal support. In *Elcich v. R.*, the Tax Court disallowed deductions, pursuant to s. 56.1(4) of the *Income Tax Act*, which deems undifferentiated support amounts to be child support.[FN77, *Elcich v. R.*, 2006 CarswellNat 821 (T.C.C. [Informal Procedure]), per Justice Bowie, volume 2006-19.]

• Advise clients that to keep family debts "alive" beyond the limitation period, they should be acknowledged from time to time. See *Holsworth v. Holsworth*, where debts were past the limitation period, and those debts were disregarded for family law purposes.[FN78, *Holsworth v. Holsworth*, 2006 CarswellBC 1000 (B.C. S.C.), per Justice Shaw, volume 2006-21.]

Quotes of the Year

Last but not least, a few good quotes from the past year:

"At the close of trial, after counsel had made their submissions, I had asked them to tell me why their clients, having chosen to conduct themselves in that way and to hide much of their income from the taxation authorities, should have the right to come before this court, which is maintained at considerable expense to the taxpayers, and expect it to resolve their conflicting claim to assets that they accumulated by perpetrating a fraud on the Canadian taxation system."
[FN79, *Brabant v. Powers*, 2005 CarswellBC 3235 (B.C. S.C.), per Justice Drost, volume 2006-09.]

. . . .

"The Court should not have to be a mind reader to understand a pleading." [FN83, *C. (C.H.) v.*

Alberta, 27 R.F.L. (6th) 136 (Alta. Q.B.), per Justice Slatter, volume 2006-27.]

"Grammarians take heed of telecomma dispute"

Robertson, Grant and Crosariol, Beppi, *The Globe And Mail*, 29 December 2006, p.B4 (*in part*)

It began as an arcane legal dispute between two Canadian companies, but a fight between Rogers Communications Inc. and Aliant Inc. over the placement of a comma in a multimillion-dollar contract has ignited an international debate over the importance of language.

. . . .

The comma quarrel—which threatens to cost Rogers at least $1-million because of a simple grammatical issue in the contract—has been called an English teacher's delight, reinforcing the value of basic punctuation and grammar in the business and legal worlds.

. . . .

At the heart of the issue was a single sentence in the contract, which read: "This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party."

That sentence has since been emailed around the world as academics, legal experts, newspapers, radio commentators and students argue over the true intent of the words. Aliant argues the second comma allows it to scrap the 14-page contract [after giving a one-year notice, if it chooses, at any time] since the termination applied to both the first five years and the subsequent five-year periods.

. . . .

After parsing the words – and calling upon grammar specialists of its own – the Canadian Radio-television and Telecommunications Commission (CRTC) agreed with Aliant. Rogers was incensed, insisting that neither company signed the contract with the intent of canceling in the first five years.

How Ms. [Lynn] Truss interprets it:

Q: What do you think of the sentence in question? How do you interpret it?

Ms. Truss: I think Aliant is within its rights. As I read it, the presence of the second comma does clearly mean that the conditions of cancelling the contract apply to the initial five-year term [as well as the second five year term]. If only the drafters of legal documents would employ the semi-colon, there would be less room for ambiguity. It could have read thus: "This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made; thereafter it shall continue for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party." Which is perfectly clear.

Q: Rogers has gathered its own language experts to argue its side and is not giving any ground to Aliant. What do you think this issue says about the state of language in business and legal affairs?

Ms. Truss: In general, legal minds are encouraged to distrust punctuation – especially the comma. Many legal documents don't use anything except periods. This seems a bit daft to me. Punctuation was developed as a system to help readers mainly with the grouping of words. I say in *Eats, Shoots & Leaves* that the comma is like a sheepdog racing about on the hillside of the written word, herding some words together, keeping other words apart. Legal and business documents require clarity above all and punctuation is the main means of achieving this.

[**Editor's Note**: Four of the numerous books instructive in drafting correspondence, pleadings, and agreements in family law practice are: Kimble, Joseph, *Lifting The Fog Of Legalese [:] Essays On Plain Language* (Durham, North Carolina: Carolina Academic Press, 2006); Truss, Lynne, *Eats, Shoots & Leaves* (New York: Gotham [Penguin Group (USA) Inc.], 2004); Truss, Lynne, *Talk to the Hand* (New York: Gotham [Penguin Group (USA) Inc.], 2005), and Adams, Kenneth A., *A Manual of Style for Contract Drafting* (Chicago: American Bar Association, 2004).]

"Filing Away For Future Reference"

Corbin, Barry S., "Money & Family Law", December 2006, pp. 95-96
(*in part*)

Paragraph 230(4) (b) of the taxing statute [*Income Tax Act*] requires a taxpayer to retain books and records "until the expiration of six years from the end of the last taxation year to which the records and books of account relate."

As family law practitioners and professional tax advisers well know, a deduction for spousal support—or, where permitted, for child support—requires, inter alia, that the payments have been made pursuant to a written agreement or an order of a competent tribunal. The CRA wants to know that the support payments being claimed are not being made voluntarily, but are being made under a legal obligation to do so. What does the records retention policy mean for the taxpayer who is claiming a deduction on an annual basis for spousal or child support payments? The answer became painfully obvious for a taxpayer we recently assisted when his claim for spousal support was questioned by the CRA in a review of his tax returns for each of the 2003 and 2004 taxation years.

The taxpayer was asked to provide a copy of the written agreement or court order pursuant to which he had claimed spousal support in each of the two taxation years under review. When the taxpayer failed to do so, the Minister of National Revenue reassessed him for each of the taxation years in question by adding back to his income the amount of the support deduction claimed. Why, you might ask, should one sympathize with this particular taxpayer? He and his wife had separated in 1980 and had entered into a separation agreement the following year, calling for monthly spousal support payments to be made by him to her. During the next 24 consecutive years, the taxpayer had been faithfully paying spousal support to his former wife and she had been including the amounts received in her income. Although he had once been asked to provide copies of cancelled cheques to prove he had actually made the support payments, the taxpayer had never been otherwise questioned on his claimed deduction.

Now he was being asked for the first time to provide the CRA with a copy of a document that he had signed 25 years earlier. He didn't have a copy. His former wife likewise did not have a copy (although she did provide the CRA with a letter confirming that the taxpayer had been paying support all these years and that she had been including those amounts in her income). The law firm representing the taxpayer in his negotiation of the separation agreement had disbanded at least a dozen years previously and there was no trail to track down the particular lawyer's file. The matrimonial lawyer the former wife had used was dead. The taxpayer had never provided his accountants with a copy of the agreement. All of our gumshoe efforts ultimately failed to turn up a copy of the agreement.

Evidently, this had the potential for being an ongoing problem for the taxpayer, since he was continuing to pay support and could be expected to have the claimed deduction denied for his 2005 taxation year and for every taxation year thereafter while support payments continued. When we intervened with the CRA on the taxpayer's behalf, we argued that it was surely unreasonable for the taxpayer to be denied the deduction because he had not kept a copy of the document signed a couple of decades earlier, a document that the CRA had never before bothered to ask for. We set out all of the efforts we had made in our unsuccessful attempt to track down the separation agreement. The taxpayer was prepared to take the matter to the Tax Court of Canada, arguing the unfairness of the CRA's position. However, a strict reading of the statutory requirement quoted above would suggest that, in the context of a separation agreement pursuant to which support payments were being made and claimed as a deduction, the records retention requirement was a rolling six-year window.

Fortunately, reason prevailed in this case. The CRA agreed to allow the deductions for spousal support if the taxpayer would provide a written agreement, signed by him and his former wife, confirming the existence of the agreement and setting out (i) the date on which the agreement was made; (ii) the quantum of the support payment; and (iii) the conditions under which the support payments were to terminate. Fortunately as well, the taxpayer and his former wife were on good terms and she was quite willing to sign the confirmation agreement. Once the document was submitted, new notices of reassessment were issued for each of the taxation years in question, restoring the previously disallowed deductions. As well, because the confirmation agreement was placed in the CRA's file, it was available to support the taxpayer's deduction for the 2005 taxation year and his return for that year was assessed as filed.

Clearly, the message that every family law practitioner should give to a client who is obligated to pay spousal support pursuant to a written agreement is this: retain a copy of the agreement on file for as long as the support obligation continues, and for six years thereafter. Because the lawyer is not obligated to keep his or her files indefinitely, the client should be warned that if the CRA comes calling many years down the road, he or she should not rely on the lawyer's own records retention policy. (In the case of court ordered support, the court file would be available to the taxpayer as a last resort. That having been said, litigation lawyers know that even court files can be lost.) That warning should also point out that the client should not assume his or her former marital partner will co-operate if a confirmation agreement of the kind that saved our taxpayer is suggested by the CRA.

There is another option for the taxpayer who wishes to guard against the possibility of being unable to find a copy of the separation agreement many years after it was signed. He or she could simply file it with the first – or indeed any—return in which a deduction for spousal support is being claimed. In fact, there is a form available for this purpose: T1158. It is not a prescribed form; nor, despite language on the form that suggests otherwise, is submitting it to the CRA (along with a copy of the separation agreement) a pre-requisite to being entitled to claim the deduction for spousal support paid.

[**Editor's Note**: *Money & Family Law* is a monthly newsletter, edited by Jennifer Marston, editor-in-chief, and by Lorne H. Wolfson and Barry S. Corbin, founding editors, published by Thomson

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Hall v. McLaughlin Estate

(2006), 25 E.T. R. (3d) 198 (Ont, Sup. Ct. J.), H.M. Pierce J.
(*Summary*)

Testatrix and M married when testatrix was 80 years of age and M was 78 years of age. The marriage was the second one for both, and testatrix and M had known each other for decades. The testatrix had two daughters before marrying M, eldest of whom was M's biological daughter. M had two sons from his first marriage. In 1992, testatrix and M instructed their solicitor to prepare mutual wills which provided that the first spouse to die would leave his or her estate to the surviving spouse. The last spouse to die would benefit families of both partners. The testatrix irretrievably lost her testamentary capacity around or before 1997 and M made two further wills, one in 1998 and one in 2000. On her death, the residue of testatrix' estate passed to M pursuant to her will. On the death of M, a substantial amount comprising the residue of M's estate was distributed to his beneficiaries in accordance with the terms of his will (i.e., made after testatrix and M, in 1992, made their mutual wills), save for a comparatively small sum. Testatrix' daughters requested determination that upon marrying, testatrix and M entered into a contract to make mutual wills. M's family opposed alleged existence of a contract to support the making of mutual wills. Clear and satisfactory evidence existed to support the conclusion that the testatrix and M intended to enter into an agreement and did enter a binding agreement that the survivor of them would divide his or her estate into two equal shares to be divided among their beneficiaries as set out in the 1992 wills. Evidence showed that M recognized and felt bound by the agreement he had made with testatrix by his repeated and unprompted assurances made to the testatrix' daughters and members of their families over a period exceeding a decade, including after the testatrix' death. Alternate explanations existed for M making new wills in 1998 and 2000. The remedy for M's breach of this agreement was imposition of a constructive trust on one-half of the net value of the estate of M for the benefit of the testatrix' daughters in equal shares. An order for tracing of proceeds of M's estates was granted and injunction was granted preventing defendants (i.e., beneficiaries under M’s post-1992 will) from dissipating assets attributable to the estate of M pending satisfaction under judgment.

Legal Writing

Kimble, Joseph, *Lifting The Fog Of Legalese[:] Essays On Plain Language* (Durham, North Carolina: Carolina Academic Press, 2006), pp. 9-12.

When the discussion of legal writing turns to concrete examples, we naturally prefer the greater clarity and readability of plain English. As *readers* we prefer it; that is the message – and the moral imperative – for writers. If we expect the other person's writing to be straightforward, we had better demand it of our own. Remember the Golden Rule.

Unfortunately, the myths about plain English persist, and so does legalese. The myths number at least four.

Myth One: Plain-English advocates want first-grade prose or want to reduce writing to the lowest common denominator. Not true. We advocate writing that is as simple, direct, and economical as the circumstances allow. We have encouraged lawyers to at least get started by doing away with obsolete formalisms, archaic terms, doublets and triplets, and some other common affronts to plain style.

In the 1980's and '90's, the Plain English Committee of Michigan's state bar translated hundreds of passages into plain English and helped revise dozens of forms. …. Rarely have we heard that the plain-English versions changed the meaning, or were simpleminded, or were inferior to the originals.

Far from advocating first-grade prose, we have said many times that writing plain English only *looks* easy. As Barbara Child points out, "it requires sophistication to produce documents that are consistently coherent, clear, and readable. By contrast, the 'specialized tongue' of lawyers, 'legalese,' may even be easier to write because it relies on convention instead of thought."

Myth Two: Plain English does not allow for literary effect or recognize the ceremonial value of legal language. Not true. Plain English has nothing against an attractive writing style; or against a rhetorical flourish or strategy in the right context, such as a persuasive brief; or against *the truth, the whole truth, and nothing but the truth* to convey a sense of gravity in the courtroom. These things are matters of context, judgment, effectiveness, and degree.

The trouble is that the successful and legitimate uses of expressive style have been overwhelmed by legalese. Ask the judges or clerks who read briefs for a living how much literature they see. Ask them whether they would settle for writing that clear and concise. Or test the literary hypothesis against a random volume from a case reporter.

At any rate, there is little room for literary effect in the neutral style of contracts, wills, consumer forms, and so on. Yet this seems to be where legalese is thickest.

We have no answer for those who find beauty in *Now comes the plaintiff*. But those who enjoy a fresh metaphor or a rhythmic and well-turned sentence can rest assured: in most contexts, these are quite compatible with the goals of plain English. And in every context, simplicity has a beauty of its own.

Myth Three: Plain English is impossible because legal writing includes so many terms of art. This one dies hard. Of course legal writing and analysis may involve terms of art, such as *hearsay* and *res judicata*. Legitimate terms of art convey in a word or two a fairly specific, settled meaning. They are useful when lawyers write for each other, but when we write for a lay audience, terms of art impose a barrier. If we cannot avoid them, we should at least try to explain them.

Terms of art are limited in another, more important way: they are but a small part of any legal paper. One study of a real-estate sales agreement found that only about 3% of the words had significant legal meaning based on precedent. The rest of a legal paper can be written in plain English, without *hereby* or *in consideration of the premises set forth herein* or *Wherefore, plaintiff prays* or *ordered, adjudged, and decreed* or *due to the fact that* or *in the event of default on the part of the buyer*.

The task for legal writers is to separate real terms of art from all the rubble. The one indispensable guide is Bryan Garner's *Dictionary of Modern Legal Usage* (2d ed. 1995).

Myth Four: Plain English is impossible because the law deals with complicated ideas that require great precision. This notion, like the previous one, contains a kernel of truth, but only a kernel.

First, much of what plain English opposes has nothing to do with precision. The word *hereby* does not add an iota of precision. *Said plaintiff* is no more precise than *the plaintiff*. *In the event of default on the part of the buyer* is no more precise than *if the buyer defaults*.

Second, it's no criticism of plain English that many important legal ideas cannot be made precise. The terms *reasonable doubt* and *good cause* and *gross negligence*, for instance, are *inherently* vague. The best we can do with terms like these is to make them as clear and precise as possible.

Third, plain-English principles can usually make even complicated ideas more clear. This column has yet to find a sentence too complex for plain English. Another columnist points out that "[i]f anything, complex ideas cry out for clear, simple, transparent prose. The substance is challenging enough; don't compound the challenge with a difficult prose style." He suggests that we think of plain English as a means to clear writing, a goal we can all agree on.

Let's abandon these myths. Legalese persists for the same reasons as always – habits, inertia, formbooks, fear of change, and notions of prestige. These reasons are more emotional than intellectual. We may think that clients expect and pay for legalese, but it has prompted endless criticism and ridicule. And besides, since legalese has nothing of substance to recommend it, its dubious prestige value depends on ignorance. We cannot fool people forever. Our main goal should be to communicate, not to impress.

Legalese persists for another, less obvious reason – one that goes more to training and skill. Law schools have neglected legal drafting. More first-year writing courses concentrate on research, analysis, and advocacy; students write office memorandums and appellate briefs. Law schools have been much slower to offer courses in drafting contracts, wills, legislation, and the like. The result: "Many lawyers now in practice have had no formal training in the fundamental principles of drafting such documents, much less techniques to make them readable."

Contracts, real-estate documents, wills and trusts, powers of attorney, consumer forms, administrative rules, legislation—this is the realm of drafting, where legalese is thickest and the need for reform is greatest.

[**Editor's Note**: See, also: Adams, Kenneth A., *A Manuel of Style for Contract Drafting* (Chicago: American Bar Association, 2004).]

Cherneski v. Cherneski

(2005), 33 R.F.L. (6th) 170 (Ont. Sup. Ct. J.), Abbey J.
[*Fact summary; reasons in part, at paras. 42-65*]

Fact summary

Parties entered into written separation agreement which obligated husband to pay spousal support of $300 per month for two years and entitled him to proceeds of sale of matrimonial home. Wife brought application to set aside provision for spousal support in agreement and for unlimited spousal support of $300 per month. Application dismissed. Agreement was not unconscionable. Husband did not take advantage of his stronger financial position. Wife had received legal advice that agreement was possibly unfair and had rejected efforts of counsel to provide more definitive advice. Wife understood concerns expressed by counsel and there was no evidence that she was not thinking clearly. Wife had pressed for execution of agreement because she wanted clean break.

Reasons (in part)

[42] The applicant [wife] had the availability of legal advice pertaining to the terms of the separation agreement and not only from Ms. White-Ducharme.

[43] Paul Enns is a lawyer practicing in Leamington who at the time devoted approximately 25 percent of his practice to family law. Mr. Enns testified at the trial, assisted by notes of discussions with the applicant and transcripts of voice messages left by the applicant.

[44] Enns was contacted by the applicant in May 2000 and was retained. By that time, and in fact by December 1999, the applicant had spent the $10,000 proceeds from cashing her G.I.C.'s as well as the $19,000 spousal R.R.S.P. She had lost over $20,000 at a casino.

[45] On May 12th, Enns received instructions from the applicant by telephone and he made notes of those instructions. He recorded that the applicant told him that she and the respondent had agreed on the terms of the proposed agreement and that she wanted him simply to record the terms in the form of a written agreement. As he put it in his notes, he was requested to be a scribe. While the applicant told Enns some particulars concerning the incomes and assets, he told her that he would require completion of financial statements and that he would forward to her a draft statement for that purpose. Importantly, in the note Enns recorded this: "Agreed to $300 per week for two years support. Not working. Disability. Long marriage. Should be more. We'll look at financial statement."

[46] On May 16th, Enns sent to the applicant, further to the May 12 telephone statement, the draft financial statement asking her to complete it and to return it at her early convenience. The applicant did not return the financial statement but she did leave a telephone message for Enns on May 20, in which she acknowledged receipt of the statement but questioned the necessity of completing the statement. She said that she felt that her instructions had been clear enough and that she wanted things taken care of as soon as possible so the agreement could be signed before the respondent changed his mind.

[47] On May 23rd, Enns returned that telephone message and he kept notes of that conversation. The notes of Enns include reference to the proposed terms of the separation agreement, including the amount of spousal support at $300 per week, and the division of assets with the respondent to receive the proceeds of sale from the matrimonial home. The notes include the following:

> Also discussed concerns re: no financial statement. Unfair deal and timed support. She maintains deal is fair because of personal injury settlement. Notwithstanding my advice re: its exemption, she wants to go with it as agreed.

[48] It was the testimony of Enns that on the limited information which he had received, without the financial statements he thought that the proposed agreement was unfair in respect to both support and equalization.

[49] While the applicant felt the agreement to be fair because she was not to be called upon to account for the distribution of the personal injury settlement, he advised her that the $70,000 settlement amount was probably exempt and should not be considered as a setoff against the respondent receiving the proceeds of sale for the matrimonial home. Nevertheless, he said, although he conveyed that message to the applicant, she instructed him to proceed and to prepare an agreement as she and the respondent had agreed.

[50] Also on May 23, the applicant left a voice mail for Enns in which in part she said this:

> I have decided that I am going to go with the two years, for him to give me $300 per week for two years no matter what way my life should go and I think that is the best way to handle it without causing any problems and giving me the freedom that I need.

[51] That message, according to Enns, was probably left prior to his telephone call the same date.

[52] On May 31, having prepared the separation agreement as instructed by the applicant, Enns forwarded the agreement in draft form to her with a copy to the respondent.

[53] The applicant attended upon Enns at the time that the agreement was signed by her. He reviewed the terms, explained each term to her, and again raised the concerns which he had raised before. She, satisfied that the agreement reflected what she and the respondent had worked out, signed the agreement and he completed a certificate of legal advice.

[54] It was the testimony of Enns and which I accept that the applicant understood the nature and consequences of the agreement and understood the concerns which he expressed in regard to its fairness, both pertaining to support and equalization. Specifically, she understood the two-year limitation pertaining to spousal support and she understood the division of property including, in particular, that the respondent would receive the proceeds of sale from the matrimonial home.

[55] At no time in his dealings with the applicant did Enns see anything suggesting that she was upset or frightened or not thinking clearly. There was nothing to suggest a lack of voluntariness on her part. In fact, it was the testimony of Enns that he distinctly recalled his impression that the applicant was a woman fully in control who was pushing to get an agreement to put it behind her. Her clear motive to him, he said, was to have a clean break. She was, he said, throughout, clear and deliberate answering his concerns by repeatedly saying that the deal was what she had told him and that she was proceeding with it.

[56] Enns made it clear to the respondent [husband] that he was not acting as his lawyer and encouraged the respondent to obtain legal advice. The respondent chose not to but did complete a waiver of independent legal advice. In his reporting letter of July 4, 2000, to the applicant, Enns wrote this in part:

> With respect to the substance of the agreement, we confirm that the same was prepared in accordance with your instructions. In that regard, we confirm that we did not receive full financial disclosure by way of the standard sworn financial statements. We confirm that you had spoken directly with your husband and agreed upon the terms of the separation agreement and ultimately we were retained by you simply to draw up the agreement in accordance with those instructions. As we advised you throughout the process, without fully sworn financial statements we are unable to provide an opinion as to the fairness or reasonableness of the agreement. We do, however, confirm our advice that Gary [the husband] did receive what appears to be preferential treatment in that the matrimonial home is to be sold pursuant to the agreement and ultimately he is to retain the proceeds of this position. Your justification to this was the personal injury settlement you received some time ago and, notwithstanding our advice that the personal injury settlement was likely an excluded asset pursuant to the provisions of the *Family Law Act* pertaining to equalization of net family property, you indicated that you wished to proceed on the basis of the division as set out in the agreement. With respect to the substance of the agreement, please note that Gary is to pay his spousal support pursuant to paragraph eight therein in the amount of $300 per week for a period of two years commencing on the earlier of August 2, 2000 or the Wednesday immediately following the date on which the matrimonial home is transferred. Until that time, payments are to

> continue as they have been on a voluntary basis prior to the execution of the agreement, that being the sum of $200 per week plus the payment towards your weekly premium for automobile insurance.

[57] Later, in August or September 2000, Enns received a telephone call from the applicant with instructions to proceed to obtain an undefended divorce. On September 15, 2000, the applicant signed in front of Enns a petition which at the time he explained to her. Once again, according to Enns, the pattern was the same. She was determined in what she wanted and she clearly instructed him.

[58] In February 2001, Enns met the applicant for the purpose of her signing an affidavit to obtain a divorce.

[59] It was the testimony of the applicant repeatedly that Enns told her that the terms of this separation agreement contained the best deal she could ever get and that she had better grab it. I do not believe her evidence in that regard. Rather, I believe that the applicant was told that, based upon the limited information which she had made available to Enns, the spousal support provision was inadequate. She was asked to supply further information and she refused. She fully understood, in my opinion, her options.

[60] In this regard, reference should be had to particular aspects of the evidence.

[61] Firstly, it was the testimony of Enns that at no time did he make any such statement to her. Secondly, any statement of that kind would have been absolutely inconsistent with the concerns that Enns expressed and which were recorded both in his notes of telephone conversations and again in his reporting letter. Thirdly, in the tapes and transcripts of the recorded conversations between the applicant and the respondent, the respondent herself made it clear that she was aware that she was entitled to more. In the last recorded conversation which took place after the signing of the separation agreement, this exchange is found:

> Lynda: 'You know what? You're damn lucky to be getting off with as little as you are because I could take you for a hell of a lot more.' Gary: 'Well you're the one that wanted the control.' Lynda: 'What did you do with your money? Three hundred dollars a week doesn't even begin to skim your pocket.' Gary: 'You get more than I do after...' Lynda: 'Good.' Gary: 'You know that?' Lynda: 'You know what? If I had my way I would have had more than that yet because if I wanted to I could still go after more. Why? Because I'm disabled.'

[62] I also reject a conclusion that the applicant, as a result of her 1995 injuries, her medication, or the tragedies of the death of her sister and son-in-law, was, related either to the negotiation of the terms of the agreement or the legal advice received, disadvantaged in respect to her thought processes. No medical evidence has been introduced as to the effect of any of these disabilities upon the ability of the applicant to comprehend, analyze, and make reasoned decisions.

[63] Deana Cherneski recalled that her mother spoke quite openly about the terms of the separation agreement and that she saw no indication that her mother was either unhappy about the

terms or upset. In particular, during the year prior to the signing of the separation agreement she was in regular contact with her mother, especially by telephone. While she recalled that her mother was physically slowed a little as a result of her accidents, she remained, according to Deana, an intelligent and talented woman and a person who continued to be able, as she had in the past, to give advice to her daughter on a variety of subjects.

[64] I have already mentioned the testimony of Enns to the effect that he saw no sign that the applicant was not thinking absolutely clearly throughout his dealings with her. To put it another way, he saw no indication of vulnerability on the part of the applicant. The taped telephone conversations certainly did not convey the message that the applicant was suffering from any disability related to comprehension or expression. It was she, as I have said, who explained various terms of the purposed separation agreement to the respondent.

[65] The respondent, therefore, pursuant to the terms of the agreement, continued to pay spousal support in the amount of $300 each week for a two-year period ending in June 2002. By agreement of counsel, the $300 per week continued a further year until June of 2003.

My client, my case:
You can't have one without the other"

Crystal, Michael, 28 *For The Defence* (No. 1) 30.

Years ago as a theology student, I approached a friend who was on the verge of entering the priesthood with the question of how he would handle getting so closely entwined in his parishioners' lives without becoming emotionally invested.

His response was one which I remember to this day: the answer lies in being compassionate without being passionate – you have to strike a balance between our human desire to reach out to those suffering and performing our professional duties. Similar sentiments were echoed by the prophet Micah in the Old Testament when he stated, "What is required of man is to do justice, love mercy and walk humbly with his God." The question I have always had is how this wisdom can be applied to the practice of trial law, where client demands ride high and professional expectations even higher.

As a young lawyer my practice ran the gamut between those clients I came to be too close to and those from whom I hid. I was not aware at the time that a solution lay in striking the right balance. Here is what I have since learned.

1. **Getting too close to a client shakes his/her confidence in counsel.** I remember hearing a tale of woe told to our defence team. At the end of it, there was not a dry eye in the house. As our professional defences were lowered, one of us decided in an attempt to build a bridge to the client, to share her own personal experience. The idea backfired: The client found

this personal non-legal exchange disconcerting. What the client really wanted was the strength of our counsel: a champion, not a cheerleader.

2. **Getting too close to clients obscures judgment.** I once had a young man whom I was representing tell me that until his trial was dealt with he and his wife were putting off having children. Their promising future was frozen in time. Each was in agony. As I had come to befriend the whole family, I too was suffering. This did anything but make me a better advocate. Instead, I found myself constantly losing my temper with the Crown and making rash 'strategy' decisions on the suggestion of my client. I just wanted to win so badly! It was only when I distanced myself from the client that I managed to regain my senses and control of the litigation.

3. **Conversely, distancing yourself from clients so as to work on the case may alienate the clients and leave them with a feeling that you no longer believe in their case.** Prolonged non-communication may result in a loss of the trust relationship and may ultimately manifest itself in a failure to honour accounts, or worse yet, a complaint to the Law Society.

I truly cherish my client interactions especially after a prolonged hiatus. Whether it be a call to rouse me to action or to replenish my inspiration, it is the best part of practice. As I stated at the beginning, you should never have to choose between the client and his or her case. The only choice would seem to be choosing compassion over passion.

"The Chicken or the Client? [:]
Lawyers can't focus on their cases to the exclusion of those who bring them"

Hecht, Gerald, ABA network, < www.abanet.org >

There's an old tale of a poor widow who saves for months to buy a chicken for her family for Sabbath dinner. While preparing to cook the chicken, she accidentally drops it on the floor.

She takes the chicken to the village rabbi and asks him if the chicken is still fit to eat. The rabbi thoroughly inspects the chicken, looking inside it, holding it up to the light, turning it over. After an hour of watching the rabbi do this, the widow exclaims, "Rabbi, I'm the one with the problem, not the chicken."

I repeat this story frequently to clients, friends and family members, because it succinctly summarizes what we do as lawyers. Unlike the rabbi, whose focus was entirely on the chicken to the exclusion of the troubled widow, us attorneys focus exclusively on the widow.

Doctors, dentists and computer consultants, to stretch the analogy, only deal with the chicken and its problem. The person who houses the bad knee or bad tooth is given short shrift in lieu of the professional's target goal to remedy the ailment.

Not for us lawyers. The client is the problem, not the lawsuit, or the indictment or the intended transaction. We have to deal with the client before we can deal with the legal problem.

When I was a young lawyer, I was petrified of saying to a client: "Give me $1,000, and I'll solve your problem for you." No more. Not for the pecuniary aspects of the profession, but for the pas de deux between lawyer and client; one who is troubled and one who is a healer.

People frequently ask, "What kind of lawyer are you?" (I sardonically answer "A good one"), or "What kind of work do you do?" and my initial response is "Forget television and the movies, and I'll tell you." It is a constant battle between what we are perceived as doing and what happened on Court TV last night.

The profession has taught me, or at least after 30 years I like to think I've been taught, that reality is far more "real" and interesting than the law on television. As a general practitioner, I help "real people with real problems," and I have adopted that slogan as my professional credo. And it is a great answer to the inquiry "What kind of law do you practice?

Grappling with the client, and not the chicken, enables the attorney to deal with the divorcing mother of three, the debt-ridden restaurateur and the juvenile offender. Another lawyer once told me, "We all know what the law is—the hard part is finding out what the client is."

The public does understand this: but they just prefer to be entertained by that old razzle-dazzle (like the lawyer in the musical *Chicago)* and ignore the realities of the profession. It is said that people hate lawyers as a group but love their own lawyers.

For me and my practice, the proof of that is in the telephone. It rings. People want advice. People send money for that advice. It's a nice system.

I have learned that the system is geared for the lawyer to assist the client, salve their wounds, remediate the problem and to obtain a goal. It's almost spiritual.

But it only works when we don't confuse the chicken with the client.

"Attorney Struggles Over Case For Years"

St. George, Donna, *The Washington Post,* 21 January 2008, p. BO1
(*in part*)

Yorktown, Va. – Lawyer Leslie P. Smith brooded over what he knew for a decade: information that might spare the life of an inmate on Virginia's death row. He had thought about disclosing it long ago. But back in 1998, he had been told not to jeopardize the interests of his own client [William A. Jones].

The case he could not forget was that of Daryl Atkins, who was convicted in a carjacking murder in York County, Va., and whose appeals spurred the U.S. Supreme Court to a landmark ruling that banned executions of mentally retarded inmates. Ironically, Atkins remained on death row in spite of the historic decision, his own mental limitations still under debate.

All the while, there was Smith, a solo practitioner in Hampton, sometimes pondering his vow of silence. He had been the attorney for Atkins's co-defendant [Jones]. And what he felt he knew was this: His own client [Jones] had been coached in his testimony to help ensure that Atkins got the death penalty.

Last spring, Smith, 64, unexpectedly decided to raise the issue again, writing a letter to the Virginia Bar. This time, he was urged to tell what he knew, he testified in court. And the outcome of that revelation came Thursday evening: Atkins's sentence was commuted to life in prison, bringing apparent finality to a case that has bounced from court to court for a decade.

In the end, it seemed one man's disclosure had changed everything. Many lauded Smith for coming forward, although others asked why he waited so long.

"The court finds that Leslie Smith's evidence was indeed credible," Circuit Court Judge Prentis Smiley Jr. said Thursday as the low-key Hampton lawyer watched quietly in the courtroom. The judge noted that Smith had "absolutely nothing to gain."

Atkins's own [current] counsel told the court, "He comes forward at great personal cost to himself."

. . . .

Atkins and William A. Jones were charged with killing Airman 1st Class Eric Nesbitt, a 21-year-old Air Force mechanic. Their photos were taken by a surveillance camera as they forced Nesbitt to withdraw cash from a bank machine. They both ultimately admitted their roles, but each said the other did the shooting. In Virginia, only the triggerman can be given the death penalty.

The episode that Leslie Smith found so troubling – and kept a secret – goes back to the first interview prosecutors had with his client, Jones, on Aug. 6, 1997. Prosecutors wanted to use Jones's statement to convict Atkins and ask for a death sentence. They offered to drop several charges against Jones if he proved to be a credible witness.

But, according to court testimony, the interview went awry. Jones's statements about what happened were at odds with the forensic evidence in the case. At one point in the interview, someone turned the tape recorder off, Leslie Smith testified in December.

"Les, do you see we've got a problem here? he recalled a prosecutor asking him. "This isn't going to do us any good."

Smith [then] told the prosecutor his client sometimes confused his right with his left. The group created a mock crime scene so Jones could show prosecutors what happened. Smith testified that law enforcement officials then coaxed his client to give answers that would fit the facts.

The tape recorder was turned back on. An audio expert testified that about 16 minutes of tape could not be accounted for.

Smith said he called …[another attorney also involved in defending Jones], soon after the interview to discuss how to proceed. He wrote a memo about the events. [The other Jones defence attorney] then asked a local judge for advice and ultimately called the Virginia Bar.

The bar's advice, he testified, was that an attorney's first obligation was to his client—and he might harm Jones's interests by giving Atkins' attorneys exculpatory evidence.

. . . .

Asked what he did about his concerns, he said: "For nine, 10 years, nothing. I mean, … [the other defence attorney] and I, when we were alone together, would reminisce about this and more or less renew our vow of silence, that we felt there was nothing that could be done.

"Earlier this year, I wanted to get an answer for myself if we rephrased the question, because I wasn't 100 percent sure that the right question got presented to the bar. But I think the answer was correct in '97, '98…. The circumstances have changed."

Several lawyers were impressed that Smith came forward. "I think there's a great deal of respect and admiration for him," said David Lee of Williamsburg. "He could have kept his mouth shut. He didn't have to put himself on the stand to be cross-examined."

. . . .

Others were troubled that Atkins has spent a decade on death row and wondered why Smith had not stepped up after Jones's sentence was made final back in 1998.

Carmen Taylor, president of the Hampton branch of the NAACP, said: "How can you sleep at night for 10 years? It takes 10 years for your conscience to kick in?"

She added: "This is just one case. How many other cases are like this?"

. . . .

Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.

06 March 2008, 2008 SCC 8, Binnie J. (for the Court), paras. 1-6

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[1] The principal issue raised on this appeal is the scope of the "implied undertaking rule" under which evidence compelled during pre-trial discovery from a party to civil litigation can be used by the parties only for the purpose of the litigation in which it was obtained. The issue arises in the context of alleged child abuse, a matter of great importance and concern in our society. The Attorney General of British Columbia rejects the existence of an implied undertaking rule in British Columbia (factum, at para. 4). Alternatively, if there is such a rule, he says it does not extend to *bona fide* disclosures of criminal activity. In his view the parties may, without court order, share with the police any discovery documents or oral testimony that tend to show criminal misconduct.

[2] In the further alternative, the Attorney General argues that the existence of an implied undertaking would not in any way inhibit the ability of the authorities, who are not parties to it, to obtain a subpoena *duces tecum* or to seize documents or a discovery transcript pursuant to a search warrant issued under s. 487 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[3] The British Columbia Court of Appeal held that the implied undertaking rule "does not extend to *bona fide* disclosure of criminal conduct" ((2006), 55 B.C.L.R. (4th) 66, 2006 BCCA 262, at para. 56). This ruling is stated too broadly, in my opinion. The rationale of the implied undertaking rule rests on the statutory compulsion that requires a party to make documentary and oral discovery regardless of privacy concerns and whether or not it tends to self-incriminate. The more serious the criminality, the greater would be the reluctance of a party to make disclosure fully and candidly, and the greater is the need for broad protection to facilitate his or her cooperation in civil litigation. It is true, as the chambers judge acknowledged, that there is an "immediate and serious danger" exception to the usual requirement for a court order prior to disclosure ((2005), 45 B.C.L.R. (4th) 108, 2005 BCSC 400, at paras. 28-29), but the exception is much narrower than is suggested by the *dictum* of the Court of Appeal, and it does not cover the facts of this case. In my view a party is not in general free to go without a court order to the police or any non-party with what it may view as "criminal conduct", which is a label that covers many shades of suspicion or

rumour or belief about many different offences from the mundane to the most serious. The qualification added by the Court of Appeal, namely that the whistle blower must act *bona fides*, does not alleviate the difficulty. Many a tip to the police is tinged with self-interest. At what point does the hope of private advantage rob the communication of its *bona fides*? The lines need to be clear because, as the Court of Appeal itself noted, "non-*bona fide* disclosure of alleged criminal conduct would attract serious civil sanctions for contempt" (para. 56).

[4] Thus the rule is that both documentary and oral information obtained on discovery, including information thought by one of the parties to disclose some sort of criminal conduct, *is* subject to the implied undertaking. It is not to be used *by the other parties* except for the purpose of that litigation, unless and until the scope of the undertaking is varied by a court order or other judicial order or a situation of immediate and serious danger emerges.

[5] Here, because of the facts, much of the appellant's argument focussed on her right to protection against self-incrimination, but the implied undertaking rule is broader than that. It includes the wrongdoing of persons other than the examinee and covers innocuous information that is neither confidential nor discloses any wrongdoing at all. Here, if the parents of the victim or other party wished to disclose the appellant's transcript to the police, he or she or they could have made an application to the B.C. Supreme Court for permission to make disclosure, but none of them did so, and none of them is party to the current proceeding. The applicants are the Vancouver Police Department and the Attorney General of British Columbia supported by the Attorney General of Canada. None of these authorities is party to the undertaking. They have available to them the usual remedies of subpoena *duces tecum* or a search warrant under the *Criminal Code*. If at this stage they do not have the grounds to obtain a search warrant, it is not open to them to build their case on the compelled testimony of the appellant. Further, even if the authorities were thereby to obtain access to this compelled material, it would still be up to the court at the proceedings (if any) where it is sought to be introduced to determine its admissibility.

[6] I agree with the chambers judge that the balance of interests relevant to whether disclosure should be made by a party of alleged criminality is better evaluated by a court than by one of the litigants who will generally be self-interested. Discoveries (both oral and documentary) are likely to run more smoothly if none of the disputants are in a position to go without a court order to the police, or regulators or other authorities with their suspicions of wrongdoing, or to use the material obtained for any other purpose collateral or ulterior to the action in which the discovery is obtained. Of course the implied undertaking does not bind the Attorney General and the police (who are not parties to it) from seeking a search warrant in the ordinary way to obtain the discovery transcripts if they have the grounds to do so. Apparently, no such application has been made. At this stage the matter has proceeded only to the point of determining whether or not the implied undertaking permits "the *bona fide* disclosure of criminal conduct" without court order (B.C.C.A., at para. 56). In my view it does not do so in the circumstances disclosed here. I would allow the appeal.

"Unsolicited Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinion 94-383 (July 5, 1994)"

American Bar Association (Standing Committee On Ethics And Professional Responsibility)
***Formal Opinion 06-440*, 13 May 2006**
(*in part*)

Formal Opinion 94-382 addresses the obligations under the Model Rules of Professional Conduct of a lawyer who is offered or is provided, by a person not authorized to offer them, materials of an adverse party that the lawyer knows to be, or that on their face appear to be, subject to the attorney-client privilege of the adverse party or otherwise confidential within the meaning of Rule 1.6. Notwithstanding[,] several state ethics opinions having considered the subject and having reached a different conclusion, and acknowledging that the unauthorized sending of documents was not inadvertence, the Committee nevertheless reasoned that because the materials in question would not have been sent intentionally by the lawyer or the adverse party, their unauthorized disclosure by others was "no more intended and no more consensual than when disclosure occurs because of an error in transmission."

The opinion found no basis in the Rules for requiring the lawyer to return the materials to their rightful owner or even to forbid their use. However, it applied the same requirements identified in (now withdrawn) Formal Opinion 92-368, stating:

> [A] lawyer receiving such privileged or confidential materials satisfies her professional responsibilities by (a) refraining from reviewing materials which are probably privileged or confidential, any further than is necessary to determine how appropriately to proceed; (b) notifying the adverse party or the party's lawyer that the receiving lawyer possess such documents; (c) following the instructions of the adverse party's lawyer; or (d), in the case of a dispute, refraining from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

Blank v. Canada

Meehan, Q.C., Eugene, *S.C.C. LawLetter* (Lang Michener, LLP), 8 September 2006, pp. 1-4

"In 1995, the Crown laid 13 charges against B and a company for regulatory offences; the charges were quashed, some of them in 1997 and the others in 2001. In 2002, the crown laid new charges by way of indictment, but stayed them prior to trial. B and the company sued the federal government in damages for fraud, conspiracy, perjury and abuse of its prosecutorial powers. In 1997 and again in 1999, B requested all records pertaining to the prosecutions of himself and the company, but only some of the requested documents were furnished. His requests for information in the penal proceedings and under the Access to Information Act were denied by the government on various grounds, including the 'solicitor-client privilege' exemption set out in s.23 of the Act. Additional materials were released after B lodged a complaint with the Information Commissioner. The vast majority of the remaining documents were found to be properly exempted from disclosure under the solicitor-client privilege. On application for review under s. 41 of the Act, the motions judge held that documents excluded from disclosure pursuant to the litigation privilege should be released if the litigation to which the record relates has ended. On appeal, the majority of the Federal Court of Appeal on this issue found that the litigation privilege, unlike the legal advice privilege, expires with the end of the litigation that gave rise to the privilege, subject to the possibility of defining 'litigation' broadly."

The Supreme Court of Canada held that the appeal is dismissed, and the Respondent is awarded disbursements in this Court. Reasons for judgment by Justice Fish, concurred in by the Chief Justice, and Justices Binnie, Deschamps, and Abella. Concurring reasons in result by Justice Bastarache, concurred in by Justice Charron.

Justice Fish wrote the following (at pp. 1-4, 19-21):

"This appeal requires the Court, for the first time, to distinguish between two related but conceptually distinct exemptions from compelled disclosure: the *solicitor-client privilege* and *litigation privilege*. They often co-exist and one is sometimes mistakenly called by the other's name, but they are not coterminous in space, time or meaning.

More particularly, we are concerned in this case with the litigation privilege, with how it is born and when it must be laid to rest. And we need to consider that issue in the narrow context of the Access to Information Act, R.S.C. 1985, c. A-1 ('Access Act'), but with prudent regard for its broader implications on the conduct of legal proceedings generally.

This case has proceeded throughout on the basis that 'solicitor-client privilege' was intended, in s. 23 of the Access Act, to include the litigation privilege which is not elsewhere mentioned in the Act. Both parties and the judges below have all assumed that it does.

…. In short, we are not asked in this case to decide whether the government can invoke litigation privilege. Quite properly, the parties agree that it can. Our task, rather, is to examine the defining characteristics of that privilege and, more particularly, to determine its lifespan.

…. As a matter of substance and not mere terminology, the distinction between litigation privilege and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a 'branch' of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.

The Minister's claim of litigation privilege fails in this case because the privilege claimed, by whatever name, has expired: The files to which the respondent seeks access relate to penal proceedings that have long terminated. By seeking civil redress for the manner in which those proceedings were conducted, the respondent has given them neither fresh life nor a posthumous and parallel existence.

I would therefore dismiss the appeal.

…. The result in this case is dictated by a finding that the litigation privilege expires when the litigation ends. I wish nonetheless to add a few words regarding its birth.

.... I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.

.... While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process. In this context, it would be incongruous to reverse that trend and revert to a substantial purpose test.

A related issue is whether the litigation privilege attaches to documents gathered or copied – but not created – for the purpose of litigation.

…. The conflict of appellate opinion on this issue should be left to be resolved in a case where it is explicitly raised and fully argued. Extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect."

***Blank v. Canada* (Minister of Justice)**

Watt, Mr. Justice David, *Watt's Manual of Criminal Evidence 2006*, 2nd Supp., pp. 5-6

Blank v. Canada (Minister of Justice) …. [[2006] 2 S.C.R. 319]– Litigation privilege may retain its purpose, hence its effect, where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may be reasonably apprehended. The term "litigation" includes, at a minimum, separate proceedings that involve the same or related parties and arise from the same or related causes of action. Proceedings that raise issues common to the initial action and share its essential purpose fall within this extended meaning of "litigation", the boundaries of which are limited by the purpose for which litigation privilege is granted: the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.

Litigation privilege is *not* directed at, still less restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor or unrepresented litigant and third parties. The object of litigation privilege is to ensure the efficacy of the adversarial process, *not* to promote the solicitor/client relationship. To achieve this purpose, parties to the litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

There are at least three important differences between litigation privilege and solicitor-client privilege.

1. Solicitor-client privilege applies only to confidential communications between the client and his or her solicitor. Litigation privilege, for its part, applies to communications of a non-confidential nature between the solicitor and third parties, including material of a non-communicative nature.

2. Solicitor-client privilege exists any time a client seeks legal advice from his or her solicitor whether litigation is involved or not. Litigation privilege applies only in the context of litigation itself.

3. The rationale that underlies each privilege is different. For solicitor-client privilege, the underlying rationale is the interest of all citizens to have full and ready access to legal advice without fear that confidential communications essential to obtain that advice will be revealed to others. For litigation privilege, on the other hand, the underlying rationale relates to the needs of the adversarial trial process, the need for a protected area to facilitate investigation and preparation of the case for trial by the adversarial advocate. Solicitor-client privilege aims to protect a relationship, litigation privilege to facilitate a process.

"Does solicitor-client privilege extend to 'when did you get legal advice?' "

Jaffey, John, *The Lawyers Weekly*, 24 November 2006, pp. 3, 9.

The Ontario Superior Court had occasion to consider whether privilege extends to the question "When did you get legal advice?"

No it doesn't, answered Master Robert Beaudoin, ruling on a motion to compel answers at an examination for discovery. He held, "Communications between a solicitor and his or her client are privileged but that privilege does not extend to the fact of their relationship … Asking the Plaintiff when he first sought legal advice will not allow the Defendants to discern the advice that may have been given at that point in time."

The context of the motion was an action for breach of contract and wrongful dismissal by Ian Gillespie, president of Export Development Canada ("EDC") from 1997 to 2004. Because Gillespie had been employed by EDC for 19 years before being appointed president, he sought termination entitlement for 26 rather than seven years.

At discovery, Gillespie was questioned about his appreciation of the risks of accepting an appointment at the pleasure of the government. It came out that he had not received legal advice in 1997 prior to his appointment as president of the EDC.

The EDC's counsel insisted he was entitled to know when Gillespie did receive legal advice.

Janice Payne of Ottawa's Nelligan O'Brien Payne acts for Gillespie. On the motion, she relied on *Davis v. Newform Television Ltd*. [1995] O.J. No. 3614, which commented on solicitor-client privilege in respect of the questions *whether* and *when* a client received legal advice. Davis states: "There may be cases where the answers to those questions would be tantamount to the disclosure of the advice given."

Payne argued that if Gillespie were forced to answer the question, his answer would allow EDC to argue he had received legal advice during his discussions with them, which would support their argument that he fully understood and accepted the terms of his appointment.

Master Beaudoin disagreed, writing, "When the purpose of the visit is questioned, the courts seem willing to extend solicitor-privilege since the nature of communications might be inferred. That is not the case here. There were many discussions between the Plaintiff and the Defendants over the course of a number of years."

He added, "What's more, the Plaintiff opened the door to this line of questioning at his discovery when he disclosed that he did not have time to obtain legal advice prior to his first appointment … . The Plaintiff put the question of legal advice into issue and he must now answer the question asked."

Payne told *The Lawyers Weekly* that in these circumstances, Master Beaudoin found that privilege did not extend to the question of *whether* and *when* legal advice was obtained. And this is the general rule. But, based on *Davis,* there might be other circumstances where privilege in these questions would exist. "In that small sense, the principle is fact specific."

She also said they are not considering appealing the ruling.

Mark Josselyn of Gowling Lafleur Henderson LLP acted for EDC. He told *The Lawyers Weekly*, "I had always thought the existence of the retainer could never be subject to solicitor-client privilege because the relationship hadn't started. But until we argued this motion, I hadn't looked at all the cases. There are cases that say the question of *when* a client retains a lawyer is not privileged. But *Davis* says where the answer to the question discloses the nature of the advice, privilege does exist."

He said "To me this decision makes the law slightly clearer as to a client's ability to ask the question 'When did you first obtain legal advice?' But I'm not sure you can ask, 'When did you first obtain legal advice with respect to this matter?' The nature of the subject matter of the retainer is really the murky area."

He said Master Beaudoin didn't have to pursue that aspect of the issue because the plaintiff brought it up himself at the discovery. "On another day, another court is going to have to answer that question."

Michael Peirce at the Department of Justice acted for the Attorney General.

Ontario (Ministry of Correctional Services) v. Goodis

[2006] 2 S.C.R. 32
Rothstein J. (McLachlin C.J. C and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)
(*Summary of facts and decision; reasons in part, at paras. 14-25*)

Facts: A judge of the Divisional Court, who was reviewing a decision of the Ontario Information and Privacy Commissioner, granted the requester's counsel access to records notwithstanding a claim of solicitor-client privilege by the Ministry of Correctional Services. The judge treated the motion for access as one by the requester's counsel, and not as one by the requester, in order to enable counsel to argue whether those records should be disclosed under the *Freedom of Information and Protection of Privacy Act.* The order for disclosure was made subject to a confidentiality undertaking. The Divisional Court and … the Ontario Court of Appeal upheld that decision and found that the judge had discretion to order disclosure.

Decision: The appeal should be allowed.

Reasons: In a series of cases, this Court has dealt with the question of the circumstances in which communications between solicitor and client may not be disclosed. In *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875, Lamer J., on behalf of a unanimous Court, formulated a substantive rule to apply when communications between solicitor and client are likely to be disclosed without the client's consent:

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.

2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.

3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that 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. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

The substantive rule laid down in *Descoteaux* is that a judge must not interfere with the confidentiality of communications between solicitor and client "except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation". In *Lavallee, Rackel & Heintz v. Canada* (Attorney General), [2002] 3 S.C.R. 209, 2002 SCC 61, it was found that a provision of the *Criminal Code*, R.S.C. 1985, c. C-46, that authorized the seizure of documents from a law office was unreasonable within the meaning of s. 8 of the *Canadian Charter of Rights and Freedoms* because it permitted the automatic loss of solicitor-client privilege. That decision further emphasized the fundamental nature of the substantive rule. It is, therefore, incumbent on a judge to apply the "absolutely necessary" test when deciding an application for disclosure of such records.

This strict approach had been followed earlier in *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14. At p. 459, Major J. stated:

> In other words, the decision on whether to grant access to the private record is fact specific…A balancing is needed; a balancing between, on the one hand, ensuring that a court operating in an adversarial context has the benefit of full and informed submissions, and, on the other hand, ensuring that highly sensitive information is not improperly accessed, particularly where such access would cause harm to uninvolved third parties. [Emphasis added.]

While a fact-specific balancing may have been appropriate in *Fuda v. Ontario (Information & Privacy Commissioner)* 2003 CarswellOnt 2618 (Ont. Div. Ct.), it cannot, having regard to this Court's categorical jurisprudence, apply where the records involve communications between solicitor and client.

Although raised, it appears from the record that the question of solicitor-client privilege was not the primary focus of argument before the Ontario courts. It is perhaps for that reason that the Ontario courts were of the view that procedural fairness required disclosure of the records to the counsel for the requester. However, in *Pritchard v. Ontario* (*Human Rights Commission)*, [2004] 1 S.C.R. 809, 2004 SCC 31, Major J. explained that privilege and procedural fairness co-exist without being at the expense of each other. As he stated at para. 31:

> Procedural fairness does not require the disclosure of a privileged legal opinion. [Privilege and procedural fairness] may co-exist without being at the expense of the other … . The concept of fairness permeates all aspects of the justice system, and important to it is the principle of solicitor-client privilege.
>
> . . . .

**"Case Comment on LeVan v. LeVan [Trial Dicision]:
Overreaching in the Formation of a Pre-nuptial Contract"**

Bala, Nicholas, (2007), 32 R.F.L. (6th) 374, at pp. 374; 383-386

Introduction: Judicial Scrutiny of Domestic Contract Formation

The Supreme Court of Canada has clearly established that courts should not lightly set aside domestic contracts, whether separation agreements or marriage contracts, but the Ontario Superior Court decision in *LeVan v. LeVan* (2006) 32 R F L (6^{th}) 291, 2006 CarswellOnt 5393 demonstrates that if the conduct of the economically powerful spouse is sufficiently egregious, the agreement may be set aside even if the weaker party has consulted a lawyer before signing. The case illustrates some of the dangers faced by lawyers and their clients when a pre-nuptial contract is being negotiated, but also provides important direction for ensuring that this particularly sensitive type of domestic contract will withstand judicial scrutiny. Those who are negotiating any type of contract understandably want a good deal, but they must also be concerned, especially with a domestic contract, about getting "too good a deal."

Given the focus in the decision on the conduct of lawyers in negotiating a pre-nuptial agreement, it is understandable that decision has already gained significant attention from the Toronto family law bar; it deserves careful attention from all family lawyers in Canada, and indeed has implications for lawyers providing advice on any contract where both parties require independent legal advice, giving guidance for what constitutes *independence.*

. . . .

Notice of appeal has been filed, and the legal community will doubtless be interested in any further appellate decisions in this case. Given the sums involved and the importance of the issues raised, it would not be surprising if this case reached the Supreme Court of Canada; if it does, this would give that court the opportunity to articulate limits to the emphasis on stability of domestic contracts which the Court articulated in *Miglin* v. *Miglin* (2003), 34 R.F.L. (5^{th}) 255, 2003 CarswellOnt 1375 (S.C.C.) and *Hartshorne v. Hartshorne* (2004), 4 R.F.L. (5th) 5, 2004 CarswellBC 603 & 604 (S.C.C.).

. . . .

Negotiating, Drafting & Providing Advice for Domestic Contracts

Implicitly, *LeVan* offers some useful guidance for lawyers in negotiating and drafting a domestic contract.

Do not steer an unrepresented party to a specific lawyer for ILA

Where the other party cannot afford to pay for independent legal advice [ILA], it is common for the wealthier spouse to pay for the ILA to help ensure the validity of the agreement. This is especially true for marriage contracts and cohabitation agreements.

One of the lessons of *LeVan* is that counsel for one spouse, in recommending that ILA is to be obtained, should ensure that they do not appear to be recommending a particular lawyer. As *LeVan* illustrates, if there is any later concern about the fairness of the agreement or the adequacy of the advice of the other lawyer, it can be argued that this advice was not truly independent if one lawyer recommended that the other party consult a specific lawyer. The lawyer (and the spouse whom they are representing) are well advised to simply give the other party a list of all of the family lawyers in the community. If a shorter list of the "good family lawyers" is provided, it should have four or five names on it.

It is understandable that a good family law lawyer representing one party will hope that the other party chooses a lawyer who is also a knowledgeable, competent counsel, as this will facilitate negotiations. Lawyers should, however, be careful not to appear to be steering an unrepresented party to any particular lawyer, or if that party has selected a lawyer, to appear to undermine that party's relationship with their lawyer so that another, "more reasonable or knowledgeable" lawyer can be selected.

Provide adequate disclosure

As indicated in *LeVan* and other decisions, the duty to disclose the nature and value of assets when a domestic contract is being negotiated is a positive duty and does not arise only if the other party requests the information. Furthermore, the duty to disclose includes disclosure of the spouse's income. To avoid an agreement being later challenged for want of proper disclosure, each solicitor should ensure that the other party has received sufficient information to make an informed decision of whether to consent to the agreement.

It is not enough that the other party knows the assets exist; they must at least have a ballpark idea of their value. While it may be acceptable for purposes of a marriage contract to indicate that the value of the husband's assets is "at least $1 million," if the value is $1 million to $2 million, it is very problematic if the value of the assets is $10 million.

Use language the parties can understand

A domestic contract should not be written in language so complex that the spouses cannot, even after getting legal advice, understand what is being agreed to. The agreement in

LeVan was clearly too complex; it confused not only the spouses, but the wife's lawyers, and the valuators called as expert witnesses at trial as well.

Giving ILA is a serious matter: Keep detailed notes and dockets

Whenever independent legal advice is given, counsel providing that advice should ensure that sufficient notes and dockets are kept to show that there was adequate advice.

Good records of any negotiations are also important if an agreement is later challenged. Records of the negotiations may provide vital evidence of the intentions of the parties, particularly important in the case of an alleged misunderstanding or mistake. Good records also protect counsel in the event that their client should later allege malpractice, a claim that sometimes arises out of challenges to the validity of a domestic contract. Keeping of detailed notes and records is even more important with a marriage contract than with a separation agreement, as in all likelihood significantly more time will pass before a marriage contract is challenged than a separation agreement.

Marriage contracts take time to negotiate

Domestic contracts are likely the most important agreements that individuals enter into, and they take time to negotiate. Marriage contracts (and cohabitation agreements) are negotiated in very different circumstances from separation agreements, often in situations in which the relationship of the parties is warm and positive, and in which counsel may feel pressure to conclude the agreement before the wedding. Counsel do a disservice to their clients and themselves if insufficient time is left to negotiate and discuss a marriage contract. It would be a good practice for a lawyer to refuse to meet a client for the first time to provide independent legal advice on a marriage contract in the week before the wedding if the expectation is for execution of the agreement prior to the wedding, and indeed even a week is a very short time to obtain full disclosure, provide advice and have meaningful negotiations. If there is any complexity to a situation or need for significant negotiation or revision, even a month may be a short time. Clients should be encouraged to seek advice as soon as they are considering a marriage contract, and the first counsel consulted should urge the other spouse to retain counsel for independent advice as soon as practicable.

Marriage contracts that waive all claims may be unfair

Marriage contracts (and cohabitation agreements) typically establish some form of separate property regime, with no or limited property claims arising out of the marital (or cohabiting) relationship. If the process of negotiation of the marriage contract includes adequate disclosure and proper independent legal advice, the courts will generally enforce the agreement, even if it involves a total waiver of property rights that would arise under the *F.L.A.*

The acceptance of the validity of these contracts is premised on the understanding that the economically weaker spouse had the option of not entering into the relationship and was prepared to accept the terms offered, while the economically more powerful spouse will have relied on

the agreement to enter into the relationship. If both parties are in the labour force, it may well be reasonable and fair for the parties to adopt a regime that involves a waiver of property rights. To the extent that one spouse stops working in the labour force and assumes the major responsibility for managing child care and the household while the other spouse is in the labour force *and* acquiring assets, a complete waiver of property claims is clearly "unfair," to use the characterization of Backhouse J. in *LeVan,* and may become unconscionable. In *Hartshorne* the Supreme Court accepted that the marriage contract was "not unfair," but that agreement provided the stay-at-home mother with a share in some of the assets of her husband, a share that increased with the length of the marriage, and almost all of his assets were acquired before the marriage.

Marriage contracts should include some provision for recognition of situations where one spouse assumes the major responsibility for domestic and child care duties. While there need not be adoption of the *F.L.A.* property regime, a complete waiver of any claim to compensation for the domestic contribution of one spouse while the other spouse is able to acquire assets is "unfair" and risks being found unconscionable. A property claim that increases with the length of the relationship (and perhaps with the roles assumed), and is perhaps limited to certain assets, may well be regarded as a fair arrangement.

To the extent that a marriage contract deals with spousal support, these provisions are subject to a higher degree of judicial review under the *Miglin* test than is available under the common law doctrine of unconscionability. However, as illustrated by *LeVan,* it is problematic in an agreement made at the start of a relationship to attempt to impose restrictions on possible future spousal support if the relationship ends. It may be very difficult to predict what will be the nature of the contributions to the relationship, the effect of the roles assumed during the relationship, and the needs and circumstances of the parties at the end of the relationship. An attempt to restrict spousal support claims in such an agreement may later tend to give rise to a perception that there was "overreaching."

Professional Liability

One aspect of litigation over the validity of a marriage contract (and other domestic contracts) is the potential liability of counsel who were involved in negotiating the original agreement to their own clients. In a case like *LeVan* there is the potential for the husband to sue his former counsel if the agreement is set aside, and for the wife to sue her counsel if the agreement **is** upheld.

It is clear from *Mantella v. Mantella* (2006), 27 R.F.L. (6th) 57, 2006 Carswell-Ont 2204 (Ont. S.C.J.) that a lawyer who is negotiating a domestic contract owes no duty of care to the opposite side in a family law dispute. However, if the agreement is set aside, there is the potential for the lawyer for the economically stronger party to have liability to their own client for not having taking reasonable steps to ensure that the interests of the weaker party were protected. Of course, the fact an agreement is set aside does not necessarily mean that counsel for the wealthier spouse was negligent. From reading the decision in *LeVan,* one does not know what communication and advice was provided to the husband by his lawyer. Depending on the facts, it may be possible to argue that the lawyer for the husband failed to take reasonable steps to ensure that the wife had

adequate disclosure and truly independent legal advice, and that the agreement was not grossly unfair or unconscionable on its face. It might also be possible that if the agreement is upheld, the wife will be able to claim that her lawyer failed to provide adequate advice or obtain adequate disclosure.

For both tactical and legal reasons, such claims are not common (and likely to be resolved only after litigation about the validity of the agreement is concluded.) The potential for such litigation should, however, make counsel [act] carefully in providing advice about marriage contracts and encourage careful documentation and record keeping.

[**Editor's Note**: Trial decision in *LeVan v. LeVan* affirmed 15 May 2008: 2008 ONCA 388.]

LeVan v. LeVan

2008 ONCA 388, 15 May 2008, S. Borins, J.A. (for the Court), paras. 1, 49-62.

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[1] Richard Bruce LeVan (the "husband") appeals from the judgment of Backhouse J. [(2006), 32 R.F.L. (6th) 291], which set aside a marriage contract that he entered into with the respondent, Erika Margaret LeVan (the "wife") prior to their marriage for failure to comply with s. 56(4) of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*"). The husband was ordered to pay the wife an equalization payment of $5.3 million as well as retroactive spousal support of $163,340. The trial judge ordered that post-judgment interest shall accrue on the entire equalization payment and the lump sum spousal support from the date of the judgment. In addition, the trial judge awarded monthly spousal support of $6,640 based on the husband's yearly income of $370,000 commencing June 1, 2006, to be reduced pursuant to a formula in accordance with receipt of the equalization payment and to be credited against post-judgment interest. The husband was also ordered to pay child support for two children in the amount of $4,544 monthly, and retroactive child support of $43,792. Costs of $646,602.20 were awarded to the wife.

. . . .

[49] …. I will consider whether the trial judge erred in setting aside the marriage contract in accordance with s. 56(4) of the *FLA*. ….

[50] Section 56(4) of the *FLA* was designed to address and codify prior concerns maintained by courts that both parties fully understood their rights under the law when contracting with their spouses. [Stark & MacLise, *Domestic Contracts* 2nd ed. (Toronto: Thomson Carswell, 2006) at p. 1-52.] It has been characterized as the "judicial oversight" provision of marriage agreements: *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550 (S.C.C.) at paragraph 14. The provision is of such significance that, in accordance with s. 56(7), it cannot be waived by the parties.

[Section 56(4) states:

> A court may, on application, set aside a domestic contract or a provision in it,
>
> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
>
> (b) if a party did not understand the nature or consequences of the domestic contract; or
>
> (c) otherwise in accordance with the law of contract.]

[51] The analysis undertaken under s. 56(4) is essentially comprised of a two-part process: *Demchuk v. Demchuk* (1986), 1 R.F.L. (3d) 176 (Ont. H.C.). First, the court must consider whether the party seeking to set aside the agreement can demonstrate that one or more of the circumstances set out within the provision have been engaged. Once that hurdle has been overcome, the court must then consider whether it is appropriate to exercise discretion in favour of setting aside the agreement. This approach was adopted and applied by the trial judge in this case.

[52] …, the issue of focus at trial was whether the husband had complied with his financial disclosure obligation under s. 56(4)(a). In *Patrick v. Patrick* (2002), 112 A.C.W.S. (3d) 302 (Ont. S.C.J.) [2002 CarswellOnt 593 (Ont. S.C.J.)], the husband failed to disclose either the existence or value of his RRSPs prior to entering into a marriage contract. At trial, the husband argued that his failure to disclose was immaterial, since the RRSPs were not to be shared at any time, regardless of their value. Mesbur J. rejected this argument, noting at para. 53 that "parties are not permitted to contract out of the obligation to disclose" and ordered that the contract be set aside for failure to make financial disclosure in accordance with s. 56(4)(a). In reaching this conclusion, at para. 52 the trial judge emphasized the importance of ensuring that parties have a full understanding of their rights before entering into such contracts:

> Marriage contracts are a device by which parties can opt out of most or part of the *Family Law Act*, its property provisions, its support provisions, or both. Fundamental to a choice to opt out of the legislative scheme is a clear understanding of what one's rights and obligations might be if there were no marriage contract. It is in this context that financial disclosure is critical.

[53] This view is reinforced in *Dubin v. Dubin* (2003), 34 R.F.L. (5th) 227 (Ont. S.C.J.) at para. 32:

> ... knowing assets and liabilities at the date of the agreement is fundamental to an eventual calculation of net family property. A party needs to know what asset base might potentially grow, in order to determine what he or she is being asked to give up in the agreement. Coupled with financial disclosure is the notion of understanding legal rights and obligations under the legislative scheme. This second notion carries with it the concept of independent legal advice. Thus, a party must know what assets and liabilities exist at the date of the contract, and must understand the general legislative scheme in order to know what he or she is giving up in the proposed agreement.

[54] In this case, the disclosure provided by the husband was insufficient to enable the wife to have a clear understanding of exactly what rights she was giving up by entering into the contract. The husband failed to disclose that he held shares in Grannyco and RWL, which were found to be of significant value. He failed to provide any financial statements for Grannyco, RWL or the Family Trust. No income tax returns were provided for the husband and there was no disclosure whatsoever of his income. Overall, the information provided by the husband made it impossible to calculate or determine his net worth.

[55] While he disclosed his interest in "significant assets" such as the LeVan Companies and the LeVan Family Trust, he failed to disclose values for these interests. At trial, the husband's interest in the Family Trust was valued at $3.4 million at the date of marriage. The trial judge found that the husband's disclosure obligation required him to disclose the value of these significant assets.

[56] On appeal, the husband argued that the trial judge erred in importing the word "value" into section 56(4)(a), contrary to the plain wording of the section. He noted that the term "value" is used extensively throughout other parts of the statute. Thus, the legislature is presumed to have expressly excluded "value" from s. 56(4). In addition, the husband submitted that it would be onerous and expensive to require valuations for marriage contracts and would often result in parties making estimates of values, thereby creating a risk of misrepresentation, which in itself could be a basis to set aside the agreement.

[57] The trial judge relied on the decision in *Demchuk v. Demchuk* (1986), 1 R.F.L. (3d) 176 (Ont. H.C.) in support of her conclusion that the disclosure obligation under s. 56(4)(a) encompasses an obligation to disclose the *value* of the assets. There is no case law that supports the husband's position that the positive obligation required by s. 56(4)(a) can be met by providing only a list of significant assets without some indication of value being attributed to them. Having said this, I note that the trial judge did not engage in a detailed statutory interpretation of the absence of the term "value" from the provision. As such, I see no reason to engage in such an analysis here. Moreover, the trial judge's findings of fact … fully support her decision to set aside the marriage contract, essentially on the basis of the husband's reprehensible conduct leading to the signing of the marriage contract.

[58] In the circumstances of this case, it is my view that the husband's failure to disclose value for his interests in the LeVan Companies and the Family Trust is not critical to the disclosure analysis. As the trial judge indicated in her findings, there is an abundance of evidence indicating that the husband had failed to comply with his disclosure obligation apart from his failure to disclose value for these assets. As discussed, this failure was compounded by the serious misrepresentations respecting the extent and value of certain of the assets disclosed.

[59] In addition, the marriage contract itself was misleading. Ms. Bales [the husband’s solicitor] incorporated the terms of the model marriage contract under the Voting Trust Agreement which stipulated the method of valuation of the LeVan company shares for the purpose of a property or support claim. As admitted by Ms. Bales, someone reading this agreement might believe that it contemplated a valuation of the shares in the LeVan family companies. These facts coupled with

the wife's misunderstanding about the effect of the contract meant that the wife had no chance whatsoever of understanding what she was giving up when she signed the contract.

[60] Based upon the trial judge's twelve findings of fact that I have outlined, she properly exercised her discretion to set aside the contract for failure to comply with s. 56(4)(a). In deciding how to exercise discretion, the trial judge considered the "fairness" of the contract. The appellant emphasizes that unfairness in a contract is not a proper basis for setting aside marriage contracts in Ontario. [This is in contrast with the approach in British Columbia, where the primary policy objective guiding the courts' role in division of assets on marital breakdown is fairness: *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550 (S.C.C.) at para. 8.] Although there is nothing in the governing legislation that suggests that fairness is a consideration in deciding whether or not to set aside a marriage contract, I do not see why fairness is not an appropriate consideration in the exercise of the court's discretion in the second stage of the s. 56(4)(a) analysis. In my view, once a judge has found one of statutory preconditions to exist, he or she should be entitled to consider the fairness of the contract together with other factors in the exercise of his or her discretion. It seems to me that a judge would be more inclined to set aside a clearly unfair contract than one that treated the parties fairly.

[61] However, this was not the only reason the trial judge articulated in support of her decision to set aside the contract. As I have stated, in exercising her discretion, the trial judge also made the following findings: (i) the husband had interfered the wife's lawyer of choice; (ii) the wife's lawyers were unable to appreciate the consequences of the contract and impart them to the wife due to lack of financial disclosure and misrepresentations; (iii) the wife had not received effective independent legal advice and some advice provided was wrong; and (iv) the wife did not understand the nature or consequences of the contract she signed.

[62] These findings are reasonably supported by the evidence presented at trial. I therefore see no reason to interfere with them in this case. In essence, the trial judge found that the husband failed to make full disclosure of his significant assets, that his disclosure was incomplete and inadequate and that his failure to make full disclosure was a deliberate attempt to mislead his wife. As such, the trial judge's decision to set aside the contract should be upheld.

"Adversarial approach not appropriate when representing clients in mediation"

Acton, Ken, *The Lawyers Weekly*, 15 June 2007, pp. 8-9

Lawyers should prepare and participate differently when representing clients in early, mandated mediations or collaborative processes as compared to trials.

Lawyers who are successful in collaborative processes view the process as a negotiation, not as an adversarial encounter as is generally the case for trials. This results in a very different approach in both preparation and participation.

The exchange of documents in the traditional litigation process can be a time-consuming process that delays meaningful negotiation. In preparation for mediation an early voluntary sharing of relevant documents can have a significant impact on the negotiations. It reduces suspicion, establishes credibility and adds legitimacy to your client's case.

It can also send an underlying message of confidence and strength suggesting that while an early resolution is preferable, litigation remains an option. There is a distinction between the exchange of information to allow for informed decision-making and the formal production of documents necessary for the litigation process.

Experience in preparing for discoveries will be beneficial in preparing clients for how meetings may unfold, as well as what strategies may help or assist the opposing parties to move toward settlement. Convincing clients to listen and to sincerely attempt to understand the opposing party's position can be a powerful step toward reaching an agreement.

This planning phase will generally include an understanding of how counsel and client will work together in the face-to-face negotiation. What points will counsel stress and stand firm on and what issues will the client speak to directly? Will there be an opportunity to acknowledge to the other party the impact the situation has had on them, and how might clients convey that message? How "will you, as counsel, use open ended questions to gather additional information modelling a cooperative, open approach to avoid creating a defensive adversarial response?

This is a style of questioning much different from the traditional examination for discovery approach and is often a real challenge. Both client and counsel would usually prefer to ask questions of "attack." Working with clients prior to the meeting will help them manage their emotions and, hopefully, help them understand the benefits of a conciliatory approach.

One of the most critical shifts results from allowing clients to be the primary spokesperson in these face-to-face negotiations. This requires planning, and at times coaching, to assist the client in articulating the issues and concerns in a manner that opposing parties can hear and understand. A narrow, positional demand will likely escalate the conflict and minimize or eliminate opportunities for settlement. A long, rambling story may cloud the issues and frustrate the opposing party.

Careful planning will allow clients to define the dispute more broadly than it can be set out in a statement of claim or defence. Plaintiffs and defendants often have non-legal issues they want addressed. Creating a forum for these early discussions recognizes that currencies, other than money, may be significant in achieving a resolution.

These non-monetary issues may come in the form of an apology or a simple acknowledgement of how an event may have impacted a person's life. Other examples would include changes to policies or procedures, or a commitment to take a different approach in the future.

Prepartion is the key to success in litigation as well as in an early mandated mediation. The shift required to work effectively in mediation includes:

- recognizing the negotiation as a discussion of interests. It requires a level of cooperation modelled by lawyers for their clients;

- preparing clients by discussing the format of the mediation, the confidentiality of the process, and the negotiation strategy, including agreeing on who will speak to which issues;

- expanding the scope of the discussion to allow for the recognition of currencies other than cash;

- early, voluntary exchange of relevant documents to set the tone for respectful discussions and problem solving;

- listening for the underlying needs/interests of the opposing party to gather valuable settlement clues, especially when searching for alternative currencies; being upfront with clients in conducting a reasonable risk assessment, and looking at the real costs of declining a settlement offer and pushing forward in the litigation.

Maximizing the benefits for both lawyers and clients in mediation or other collaborative processes requires preparation, practice, and a commitment to continual learning.

"Family law lawyers legally obliged to ensure disclosure of client assets"

Rappaport, Michael, *The Lawyers Weekly*, 09 November 2007, p. 13.

Divorce can be devastating. For some couples, parting with their spouse is easy compared to dividing income and assets. While some clients are too distraught to settle, others are dishonest and don't provide accurate financial records. How to handle these two distinct categories of clients was the topic of lively discussion for a panel at a recent colloquium on legal ethics at Osgoode Hall Law School on Oct. 19.

In dealing with distraught clients, it is essential that family law lawyers are versed not only in the law, but also other disciplines, such as psychology, according to Shelley Kierstead, a family law professor at Osgoode Hall Law School. She added that lawyers must have the "ability to know when to refer matters to other professionals."

Justice Craig Perkins of the Ontario Superior Court of Justice said that he's encountered many spouses in his courtroom who want to punish the other side by refusing to reveal assets or income. Some spouses going through a divorce want to "hide the Eiffel Tower," Justice Perkins said. "There is an undisclosed asset or income which they want to conceal."

Kenneth Cole, a partner at the family law boutique Epstein Cole LLP in Toronto, said that it is important to remember when dealing with a client going through a divorce that they are often at the absolute low point in their lives.

"It is necessary to separate clients who are genuinely dishonest, those with an agenda, from those who are genuinely in turmoil and may have unrealistic expectations or aren't emotionally ready to settle," Cole advised.

He elaborated that clients going through a separation go through predictable phases similar to the Kubler-Ross five stages by which people deal with grief and tragedy: denial, anger, bargaining, grieving and finally acceptance. [Rubler-Ross, Elizabeth, *On Death and Dying*, 1969.]

Kierstead and Justice Perkins agreed. "The death of a loved one evokes similar phases to the death of a relationship," Kierstead said. Couples going through a divorce often feel that a "nuclear bomb was dropped on them," Justice Perkins concurred.

Justice Perkins cautioned that when representing clients, lawyers risk losing their detachment and aiding their clients' dishonest designs. "Lawyers sometimes are overwhelmed by loyalty and become as dishonorable as their clients," Justice Perkins warned.

Regardless of the emotional state of the client, he or she is still under a legal obligation to provide full and complete financial disclosure. This can be a "tough pill to swallow," said Kierstead, adding that many clients recoil from the "idea that they have to lay out everything on the table."

In an interview after the panel, Cole expanded on a few points made by participants.

"We have a responsibility as lawyers to persuade our client to the best of their ability to disclose everything," Cole said. "If a client tells you that they won't authorize you to disclose an asset, then your relationship is over and you can't act for that client."

Although lawyers are under a legal obligation to ensure accurate disclosure, Cole believes that it is sometimes necessary to give a client who is emotionally distraught some "breathing room" and time to get over the sense of "being overwhelmed."

"Even though one of the main criticisms of family law is delay, there may be times when delay is necessary to get your client in the right frame of mind to settle a case."

In his view, clients' attempts to conceal assets or income are not effective.

"Generally speaking, lawyers are more sophisticated than the client they are acting for. So ... the attempts to hide (assets or income) are usually less than subtle," Cole explained.

He added, "in a thorough interview ... you usually hear about it at some point, and you are able to bring them back into the fold."

In his experience, clients are more likely to try to conceal sources of income than assets.

"Nondisclosure of income is probably a more prevalent problem than nondisclosure of assets," Cole said.

Domestic Contracts

McLeod, James G. and Mamo, Alfred A., *Annual Review of Family Law*, 2007, (Toronto: Carswell, 2007), pp. 588-591; 607-609

[**Editor's Note**: The *Annual Review of Family Law* is, perhaps, the best calendar-year summary of judicial family law published in Canada. Its publication began in 1992. The above-referenced sections of the publication annually digest lawyer responsibility in the context of domestic agreements.

As indicated in the section entitled "Settlements and Agreements Between Counsel" (2007, edition, p. 588), "[a]s 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."

In *Pastoor v. Pastoor* (2007), 48 R.F.L. (6th) 94 (Ont. Sup. Ct. J.) (released since the 2007 edition of the *Annual Review*), Perell J. decided that the caselaw on this issue should be extended to circumstances where minutes of settlement were negotiated before any court proceedings were commenced (see, espy., paras. 6, 9-10, 18-23).]

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 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.) (counse1 not reaching final agreement on all issues in dispute); *Grant v. Josic*, 2005 CarswellAlta 577, 2005 ABQB 323 (Q.B.) (settlement between counsel in scope of retainer); *Rother v. Rother*, 2005 CarswellNS 152, 17 R.F.L. (6th) 280, 2005 NSCA 63, 231 N.S.R. (2d) 386, 733 A.P.R. 386 (CA.), affirming 2004 CarswellNS 320, [2004] N.S.J. No. 312, 2004 NSSC 161 *(S.C)* (agreement between counsel was upheld in face of allegations by one of the parties that his lawyer had been given limits on his ability to bind the client and the court finding that no such communication had been made to the other side).

In *Majaess v. Majaess*, 2004 NSCA 9, 2004 CarswellNS 12, I R.F.L. (6th) 275 (CA.), the NSCA held that a court could take into account statements made at settlement conferences in deciding whether a settlement had been reached. In *Barter v. Barter*, 2006 CarswellNfld 59, 2006 NLCA 13 (CA.), the court confirmed the validity of an agreement during a trial which was submitted to the court for a consent order when both parties were represented by counsel.

In *Richardson v. Richardson*, 2004 CarswellAlta 1442, 2004 ABQB 771 (Q.B.), the plaintiffs lawyer sent the defendant's lawyer an offer to settle. The defendant's lawyer advised the plaintiff's 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 [which did not entirely reflect the settlement reached] 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 (CA.) (wife held to agreement negotiated with counsel at settlement conference where she subsequently decided property was worth more); *Noonan v. Lis* 2004 CarswellOnt 477 (C.J.) (court upholding reasonable agreement negotiated with assistance of counsel); *Tomkewich v. Tomkewich,* 2006 CarswellMan 231, 2006 MBQB 150 (Q.B.) (where after a settlement meeting involving counsel and the parties an agreement was reached on all issues, the parties were bound by its terms; failure of the parties to execute written document containing some essential terms as agreed upon did not affect the validity of the agreement made).

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 CarswellOnt 2800, [2003] OJ. No. 2938, 44 R.F.L (5th) 56 (S.C.J.) (little weight to self-represented agreement); *Lang v. Lang* (2003), 46 R.FL (5th) 200, 2003 CarswellMan 527, 2003 MBCA 158, [2004] 6 WW.R. 454, 180 Man. R. (2d) 223, 310 W.A.C. 223, 234 D.L.R. (4th) 525 (CA.) (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 CarswellOnt 901, 24 R.F.L. (5th) 327, 157 O.A.C 264 (CA.), additional reasons at 2002 CarswellOnt 1850 (CA.), leave to appeal refused 2002 CarswellOnt 4382, 2002 CarswellOnt 4383, 307 N.R. 199 (note), 180 O.A.C 396 (note) (S.C.C); *MacRae v. Simpson,* 2002 CarswellOnt 4425, [2002] OJ. No. 4931 (S.C.J.), additional reasons at 2003 CarswellOnt 404,36 R.F.L. (5th) 376 (S.CJ.) (substantially complete settlement enforced). Contrast *Goyal v. Singh,* 2003 CarswellOnt 736 (S.CJ.) (settlement not covering all issues not binding); *Deluney v. Deluney,* 2004 CarswellNS 212, 3 R.F.L. (6th) 27, 2004 NSCA 72 (CA.) (no binding settlement where wife's lawyer making clear she did not have client's instructions to settle a significant issue); *Santos v. Santos,* 2006 CarswellOnt 3955 (S.C.J.), additional reasons at 2006 CarswellOnt 5064 (S.C.J.) (although an agreement had been reached on some issues, it was clear that the parties did not intend to settle matters piecemeal and no comprehensive agreement had been reached).

In *Umholtz v. Umholtz,* 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 [except where counsel for each party made the agreement on behalf of the parties]. 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 CarswellOnt 1837, 48 R.F.L. (4th) 388 (CA.), 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 Carswell Man 111, 2002 MBCA 36, 25 R.F.L. (5th) 289, 163 Man. R. (2d) 249, 269 W.A.C 249 (CA.) (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 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 CarswellOnt 128, [2002] OJ. No. 194, 155 O.A.C 96, 57 O.R. (3d) 767, 24 R.F.L. (5th) 179 (CA.) (different effect of counter offers); but see *Grant v. Jovic,* 2005 CarswellAlta 577, [2005] A.I. No. 491, 2005 ABQB 323, [2006] 3 W.W.R. 304, 53 Alta. L.R. (4th) 332, 379 A.R. 286, 23 R.FL (6th) 286 (Q.B.) where an application for summary judgment[,] to enforce an offer accepted so as to settle three different proceedings [,] was granted. See also *Tether v. Tether,* 2005 CarswellSask 324, 2005 SKQB 231, 13 C.P.C. (6th) 94, 263 Sask. R. 241 (Q.B.) (correspondence between counsel deemed not to show clear intention by parties to be bound by the terms and as such was unenforceable as a binding agreement).

. . . .

(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 CarswellOnt 2712, 4 R.F.L. (6th) 120 (S.CJ.) (ILA not precondition to valid contract); *Somerville v. Somerville,* 2005 CarswellOnt 1139 (S.C.J.) (ILA not prerequisite to valid agreement).

Lawyers should be very cautious about providing independent legal advice to clients without having full financial disclosure especially in the context of the negotiation of a marriage contact when the parties are usually more relaxed about the need for full information: see *LeVan v. LeVan,* 2006 CarswellOnt 5393 (S.CJ.) (advice received from lawyer prior to signing of

marriage contract did not overcome lack of financial disclosure and misrepresentation made by husband and agreement was set aside).

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 (CA.) (difficult to prove duress, undue influence, and unconscionability where ILA); *Bowes v. Bowes*, 2005 CarswellBC 945, 2005 BCSC 593, [2005] B.CJ. 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 CarswellOnt 956, 13 R.FL (6th) 128 (S.C.J.) (ILA 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.FL (6th) 266 (CA.) ([the fact] that *wife* satisfied with advice received acceptable reason for no further advice). But see *Simpkins v. Simpkins*, 2004 CarswellOnt 2402, 187 O.A.C 325, I R.FL (6th) 219 (CA.) (wife's, mental problems leaving her vulnerable notwithstanding ILA); *Dhanna v. Dhanna*, 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 Alia. L.R. (4th) 16, 2004 ABCA 90, [2004] AJ. No. 202 (C.A.) (court overriding custody/access agreement where not in child's interests even though parties had ILA).

In *Ruscinski v. Ruscinski*, 2006 CarswellOnt 1957 (S.C.J.), additional reasons at 2006 CarswellOnt 3496 (S.C.J.), the court refused to set aside the property portions of a marriage contract, indicating that the fact that independent legal advice to the wife was given by a lawyer referred by the husband's lawyer and that the husband paid that lawyer's account, did not detract from the fact that the wife had a genuine opportunity to obtain competent legal advice in the matter.

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 *Houley v. Houley*, 2005 CarswellBC 1584, 2005 BCSC 971 (S.C.) (wife upset by virtue of separation … [chose] not to have ILA; agreement upheld); *Hannigan v. Hannigan*, 2005 CarswellBC 1910, 2005 BCCA 408 (C.A. [In Chambers]) (property agreement upheld where both had ILA); *Jones v. Murray*, 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. (CR.) 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 [not to make agreement]); *Irwin v. Irwin*, 2005 CarswellOnt 1152 (S.C.J.) (court refusing to override support agreement where party declined opportunity for advice as unnecessary because understood agreement); *Day v. Day*, 2006 CarswellNS 138, 2006 NSSC 111, 25 R.F.L.

(6th) 356, [2006] N.S.J. No. 135, 242 N.S.R. (2d) 387, 770 A.P.R. 378 (S.C.) (parties had negotiated the agreement and wife received independent legal advice; petition to set aside the agreement was dismissed); *Reischer v. Reischer*, 2006 CarswellBC 1197, 2006 BCSC 772 (S.C.) (no evidence to corroborate the wife's position that she received inadequate legal advice or that the lawyer was too ill to properly advise her).

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 NLTD 95 (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.FL (6th) 266 (C.A.) (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.FL (5th) 200, 234 DLR. (4th) 525, [2003] MJ. No. 463 (C.A.) where Manitoba Court of Appeal suggested that courts would take a long hard look at self-represented 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 payer'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).

Vollmer v. Jones

(2007), 36 R.F.L. (6th) 340 (Ont. Sup. Ct. J.), G.A. Campbell J.
(*Summary*)

Facts: Parties were married in 1998, separated in 1998 and signed separation agreement in 2000. Mother began court proceedings in 2005 for custody of two children of marriage, now aged 14 and 9. Full psychological assessment was done in 2006 and questioning of parents under oath was ordered. At one point, father stormed out of questioning, but later claimed he wanted to settle and hired new lawyer for purpose of settlement negotiations. Parties met and used draft minutes of settlement drafted by mother's lawyer as working document, but made significant changes and compromises over four hour meeting, including last minute changes insisted on by father. Due to constraints of time, resulting minutes of settlement were not signed on that day but mother and her lawyer claimed that parties shook hands when mother's lawyer stated "we have a deal' and no one would "change their mind'. Mother signed minutes next day but father wanted more changes and would not sign, although he would not particularize his objections. Both parties attended trial management conference and neither had prepared briefs so it could not proceed. Father contended that end result of settlement meeting was not settlement agreement but merely agreement to agree. Mother moved for summary judgment in terms of settlement.

Issues: Is there a settlement warranting summary judgment?

Held: Summary judgment in terms of minutes of settlement.

Reasons: Only other person on father's side who was present at settlement meeting was his lawyer and adverse inference was made that his lawyer chose not to, or was instructed not to, swear affidavit on this motion. Accordingly, all recollections of mother and her lawyer regarding meeting were accepted. End result of meeting was not merely agreement to agree since mother's lawyer had already reduced agreement to formal written document and all basic and essential components of creation of contract were achieved. Mother prejudiced her position by not preparing trial management conference brief and fact that neither party did so suggested they both felt settlement had been reached. Common sense suggested that mother and her lawyer effectively communicated clear position that they had contract. Even if father and his lawyer did not verbally agree that deal had been made, in circumstances, father had positive obligation to verbalize at that time that he was unsure. Mother was entitled to rely on father's lack of denial or rejection of deal as acceptance of her offer, as embodied in minutes of settlement, so that silence, in this context, did mean consent.

"Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation … "

American Bar Association [Standing Committee On Ethics And Professional Responsibility], Formal Opinion 06-439, 12 April 2006
(in part)

Truthfulness in Negotiation

It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer's own client. Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law. Still others have suggested that lawyers should strive to balance the apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards. Rule 4.1 (a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate neither fact nor law. Various proposals also have been advanced to change the applicable ethics rules, either by amending Rule 4.1 and its Comments, or by extending Rule 3.3 to negotiation, or by creating a parallel set of ethics rules for negotiating lawyers.

Although this Committee has not addressed the precise question posed herein, we previously have opined on issues relating to lawyer candor in negotiations. For example, we stated in Formal Opinion 93-370 that, although a lawyer may in some circumstances ethically decline to answer a judge's questions concerning the limits of the lawyer's settlement authority in a civil matter, the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry. We observed that:

> [w]hile. . . a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Similarly, in Formal Opinion 94-387, we expressed the view that a lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the clients claim, but cannot make any affirmative misrepresentations about the facts. In contrast, we stated in Formal Opinion 95-397 that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client's death, and must promptly notify opposing counsel and the court of that fact. Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued

communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1 and, with respect to the court, Rule 3.3. Opinions of the few state and local ethics committees that have addressed these issues are to the same effect.

False statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have in some cases also led to professional discipline. For example, in reliance on Formal Opinion 95-397, a Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died. Similarly, in a situation raising issues like those presented in Formal Opinion 93-370, a New York lawyer was disciplined for stating to opposing counsel that, to the best of his knowledge, his client's insurance coverage was limited to $200,000, when documents in his files showed that the clients had $1,000,000 in coverage. Affirmative misrepresentations by lawyers in negotiation also have been the basis for the imposition of litigation sanctions, and the setting aside of settlement agreements, as well as civil lawsuits against the lawyers themselves.

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favourable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

Application of the Governing Principles to Caucused Mediation

Having delineated the requisite standard of truthfulness for a lawyer engaged in the negotiation process, we proceed to consider whether a different standard should apply to a lawyer representing a client in a caucused mediation.

Mediation is a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy. Mediators assist the parties by attempting to fashion creative and integrative solutions to their problems. In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

It has been argued that lawyers involved in caucused mediation should be held to a more exacting standard of truthfulness because a neutral is involved. The theory underlying this position is that, as in a game of "telephone," the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued

retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called "deception synergy," proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is required in face-to-face negotiations.

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation – particularly in a caucused mediation – precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed-upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes.

Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings.

[**Editor's Note:** This commentary is based on the ABA Model Rules of Professional Conduct, as amended August 2003. Model Rule 4.1 provides that:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

A comparable rule under the CBA Code of Professional Conduct is provided by Chapter 1—Integrity: Commentary 5(h):

> Illustrations of conduct that may infringe the Rule (and often other provisions of his Code) include:
>
> . . . .
>
> (h) failing to be absolutely frank and candid in all dealings with the Court or tribunal, fellow lawyers, and other parties to proceedings, subject always to not betraying the client's cause, abandoning the client's legal rights or disclosing the client's confidences; … .]

"Rules Of The Game [:]
Ethics Rules on Truthfulness Give Lawyers a Little Room to Maneuver in Negotiations"

Suppose someone is trying to get a few bucks for his car before leaving it to the scrap heap. A potential buyer offers $1,000 for the beater, but the owner, suddenly emboldened, insists that the car is worth far more and says another prospective buyer already has offered a higher price.

In most circumstances, that kind of posturing and embellishment is an expected part of the horse-trading game.

But what about lawyers – are they allowed to massage the truth when they negotiate on behalf of clients?

In a recent opinion, the ABA Sranding Committee on Ethics and Professional Responsibility indicated that ethics rules give lawyers some leeway in what they say during the course of negotiations. But the committee also cautioned that there is an ethical line a lawyer may not cross.

Formal Opinion 06-439 (April 12) focuses primarily on the application of Rule 4.1 (Truthfulness in Statements to Others) of the ABA Model Rules of Professional Conduct to lawyers negotiating on behalf of clients. Rule 4.1 states that a lawyer may not, in the course of representing a client, knowingly "make a false statement of material fact or law to a third person."

(The ABA Model Rules are the basis for most state professional conduct rules, which directly govern lawyers.) .

But the opinion also recognizes that "it is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming." During negotiations, a party and its counsel "might exaggerate or emphasize the strengths, and minimize or de-emphasize the weaknesses, of its factual or legal position," states the opinion. "Such remarks, often characterized as 'posturing' or 'puffing,' are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact."

Accordingly, statements that downplay a client's willingness to compromise, that present a bargaining position without disclosing the client's "bottom line," or that overstate or understate the strength or weakness of a client's position "are ordinarily not considered 'false statements of material fact' within the meaning of the Model Rules," states the opinion.

DIFFERENT SETTINGS, SAME RULES

This interpretation of Model Rule 4.1 applies in the context of a "caucused mediation" as well as to other negotiation settings, states the ethics committee in its opinion. Unlike basic mediations, where the mediator meets with all the parties together, the mediator in a caucused

mediation goes back and forth between private meetings with each side until an agreement is reached.

"The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts," the opinion states. "Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation."

At the same time, the ethics committee's opinion cautions against stepping over the line during negotiations. It would, for example, be a false statement of material fact if a lawyer representing a company in labor negotiations told the union that a particular employee benefit would cost the employer an additional $100 per employee when the benefit actually would cost only $20 more.

Providing another example, the opinion notes that, in Formal Opinion 95-397 (1995), the committee stated that a lawyer negotiating for a plaintiff in a personal injury case may not conceal the client's death from opposing counsel.

In addition, states the opinion, "Care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements 'of fact,' are not conveyed in language that converts them, even inadvertently, into false factual representations."

"Ex-husband didn't fully disclose"

Schmitz, Cristin, *The Lawyers Weekly*, 08 September 2006 pp. 1-2.

A millionaire [LeVan] who did not sufficiently disclose his net worth or income when he pressed his fiancée to sign a prenuptial agreement that barred her future entitlements to support and property must pay a $5.3-million equalization award, the Ontario Superior Court has ruled.

The contract that was set aside because the husband breached his disclosure obligations would have left the 42-year-old wife with little property or spousal support after nine years as a full-time home-maker, despite the court's finding that the husband had $1.4-million in business assets when the pair married in 1996, and $33 million when they split up in 2003.

A strict equalization of the parties net family properties would have left the husband owing about $10 million to the wife, even though his business assets have declined since the valuation date, leaving him with an roughly estimated net worth at trial of about $15 million. The wife had asked for $5.3 million, an amount the judge held was not "unconscionable."

Philip Epstein of Toronto's Epstein Cole, who represented the wife in her successful bid for an equalization award, called the "very significant" judgement "a primer on how not to do a marriage contract in many respects."

"It's a warning to counsel and to parties about not trying to do marriage contracts on the eve of a wedding when lawyers will not have time to do proper disclosure," said Epstein, who did not represent the wife when she signed the agreement.

Justice Backhouse ruled that the obligation of financial disclosure vis a vis domestic contracts under s. 56(4)(a) of Ontario's *Family Law Act* (FLA) extends to income, by implication, as well as to assets and liabilities, particularly when a spouse purports to give up his or her future claims to support.

Before the agreement was signed, the husband did not disclose his income, which included a substantial dividend income. He disclosed his net worth only as $80,000 comprised of RRSPs and sundry assets, plus the "Le Van Family Companies Interest." According to the judge, he also "misrepresented" some of his assets.

Meanwhile LeVan repeatedly warned his fiancée he would cancel the wedding if she didn't sign beforehand. He also pressed her to get rid of her first lawyer, Paul Ross of Goderich, Ont., who had advised her that she was getting an unfair deal.

Two days before the wedding, the wife went for independent legal advice to Susan Heakes, then of Blake Cassels Graydon LLP. Heakes was recommended by Bales, the husband's counsel. Six months earlier, Heakes had represented Bales in a family law matter – a fact that Justice Backhouse said should have been disclosed to the wife.

Heakes met privately for an hour with the wife. She did not request any changes for the wife's benefit, and the agreement was signed immediately afterward.

Justice Backhouse held the husband breached his obligation to fully disclose his assets under s. 56(4)(a) of the FLA, regardless of whether or not there had been a request for information from the wife or her counsel.

"Mediation – Arbitration: a contentious but often effective compromise"

Thomson, Claude and Annie Finn, *The Lawyers Weekly*, 15 September 2006, p.9.

Mediation-Arbitration ("Med-Arb") is a controversial dispute resolution process. It combines the consensual and flexible nature of mediation and the finality of arbitration, into a single two-step process. A "neutral" attempts to mediate a dispute on the understanding that if the mediation does not result in a settlement, the same neutral will commence an arbitration hearing and deliver an award that finally decides the issues between the parties.

Advantages

Med-Arb can achieve a prompt resolution to a dispute at a minimum of time, expense and inconvenience to the parties far more efficiently than the traditional options of litigation and arbitration. The parties will not have to suffer the costs and delays associated with two reviews of the evidence, one by a mediator and one by an arbitrator or judge.

Med-Arb gives the parties greater control over the management of their dispute. During the mediation, the parties are in complete control of any settlement and are highly motivated to settle in order to avoid losing that control. If mediation does not result in a settlement, the parties can devise a subsequent arbitration process that suits their interests. Finality is ensured because the neutral will deliver a final and binding award.

Disadvantages

Many experienced and highly ethical neutrals remain convinced that mediation and arbitration by the same person are inherently incompatible. A mediator focuses on the interests of the parties and encourages a settlement according to the parties' best interests, not obligations. In contrast, an arbitrator is expected to fairly and impartially decide according to the law and the evidence by delivering an award that finally determines the legal rights of the parties.

The traditional form of Med-Arb can provide a party with an opportunity and perhaps an incentive to undermine the mediation process. There is a risk that a party may take advantage of this process by focusing on persuading the mediator with a view to influencing a final award when the mediation will not result in settlement. There is also a legitimate concern that parties may be disinclined to make the usual disclosures that are common in mediation if they fear that a disclosure will prejudice the arbitration process.

Critics point out that a neutral may not have the skills to function effectively as both a mediator and arbitrator. Critics also strongly object to a process that allows a neutral to use coercive tactics to achieve an early settlement rather than risk an apparently adverse award. Such tactics can cause the parties to lose control over their process.

Interesting questions arise about the acceptance by the neutral of confidential information during the mediation process. A neutral acting as mediator is given sensitive information because of the assurance of confidentiality. If the mediation fails, the neutral is required to either attempt to ignore information that may be highly prejudicial to one party or make a disclosure that violates the assurance of confidentiality. A process in which the neutral meets with the parties only in the presence of one another denies the neutral and the parties the opportunity to achieve a mediated settlement through private meetings with the parties [i.e., caucuses].

Proposals for enhanced use of Med-Arb

There are legitimate concerns about the possible abuse of Med-Arb, and safeguards (such as a written agreement clearly setting out the agreed-to Med-Arb process) should be sought. The fully informed consent of the parties may resolve legal concerns about jurisdiction.

Med-Arb opt out

Parties who fear that the selected neutral may act unfairly or coercively during the mediation process may retain an option to withdraw from the process at any time during the mediation. The comfort from such a reservation has to be weighed against the likelihood that the flexibility, insight and persuasiveness of the neutral will be impaired by the prospect of the opt-out clause lurking in the background. If a party believes that an opt-out clause is required, Med-Arb should probably be rejected.

Med-Arb and final offer selection

In a final-offer selection the parties are encouraged to be reasonable because the neutral must select between the two last offers that have been presented. This process is most useful when the issues are narrow, primarily monetary in nature and when a private, prompt and fair solution is required. Another option is to allow either party to opt out of the process after final offers have been exchanged but before they have been presented to the neutral for consideration. Both parties are then in a position to decide whether an award against them will be within a range that they can tolerate.

Prohibition of private contact and caucuses

Many mediators believe that private contact with the parties and their advisers in the form of caucuses better allows the neutral to understand the interests and expectations of the parties in order to model suitable suggestions for settlement. The mediator will receive information on a confidential basis that is relevant and that might be prejudicial to the position of an opposing party. A legitimate challenge to the process often centres on the effect of such private contacts on the neutrality and appearance of neutrality of the neutral. To address this problem, a clause in a commercial contract can be drafted, stating that any statements in caucusing which might influence the decision of the Mediator/ Arbitrator will be revealed to the other side prior to .the decision of the Mediator/Arbitrator.

This issue is difficult. Some neutrals make extensive use of private communications and will find it difficult to know what to reveal that might influence their decision. Some believe that an impairment of private communications and caucuses will prejudice the prospects of achieving settlement.

Conclusion

Med-Arb will be a very attractive dispute resolution process when administered by a neutral who has excellent mediation and arbitration skills and is trusted by the parties. With the informed consent of the parties, no issue of independence or partiality will arise. It should be understood that information would not be accepted or relied on unless it was disclosed to the other party in the arbitration process. Concerns about the possible contamination of the neutral by receiving information or arguments in private meetings are overstated. Judges regularly rule on the admissibility of evidence, and if that evidence is rejected the judge disregards the information that has been tendered.

In our view, an experienced neutral should and will likely be given the same respect. The challenge is to persuade parties and experienced neutrals to take a fresh look at Med-Arb in the light of modem pressures for prompt resolution of commercial disputes at a minimum of expense and inconvenience to the parties.

Ridout v. Ridout

(2006), 27 R.F.L. (6th) 237 (Man C.A.), R.J. Scott C.J.M. (for the Court), paras 8-15

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[8] The linchpin of the argument on behalf of the wife was that the motions court judge's focus had been much too narrow and technical, frustrating the wife's opportunity to explain how it was that she had been intimidated and coerced on September 18, 2002, into accepting a rushed settlement that was against her interest and not properly explained to her by her counsel.

[9] An examination of the transcript of the proceedings before the motions court judge belies this assertion.

[10] While there can be no doubt that the motions court judge at the commencement of the proceeding advised the wife (quite properly in my view) that he wished her to focus "mainly" on the events of September 18, 2002; notwithstanding, he gave her considerable latitude when testifying or asking questions that went far beyond the events of that day. In addition to her six affidavits, the wife gave extensive evidence during the course of the hearing and was cross-examined at length. At the conclusion of her direct evidence, the motions court judge asked if there was anything else she wished to say; she declined. During cross-examination, the wife conceded that she knew what the issues were with respect to the family's assets and debts.

[11] It is true that during cross-examination of her former counsel, as the motions court judge himself acknowledged, "the Court had to refocus Ms. Ridout on numerous occasions to remind her what the issues before the Court were and not what Ms. Lautt [her former counsel] did not do on her behalf" (at para. 29), but his interventions in an effort to direct her to the issue were entirely appropriate.

[12] As everyone who is involved in court matters knows, more and more litigants, especially in family proceedings, are self-represented. This often creates difficulties not only for them but for court staff and judges. Notwithstanding, it is not accurate to say, as counsel for the wife seemed to be suggesting, that self-represented litigants (SRLs) have some kind of special status. The fact that the wife, during her extensive cross-examination of her former counsel, did not "get anywhere" with her is not a reason to order a new trial. The recent decision of this court in *A. (J.M.) v. Winnipeg Child & Family Services* (2004), 190 Man. R. (2d) 298, 2004 MBCA 184 (Man. C.A.) ([hereinafter] J.A.No.1), makes it clear that while the court should provide assistance to SRLs, this must be done in such a way as to maintain judicial impartiality. Thus in *J.A. No. 1*, the SRL's contention that the trial judge had a duty to assist her to do a better job in developing her case was rejected. As the Ontario Court of Appeal noted in *Davids v. Davids*, [1999] O.J. No.3930 (Ont. C.A.) (at para. 36):

> …Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. …

[13] The result in J.A. No. 1 can be contrasted to that in *Manitoba (Director of Child & Family Services) v. A. (J.)*, [2006] M.J. No. 171, 2006 MBCA 44 (Man. C.A.) ([hereinafter] *J.A. No. 2*), an appeal by coincidence involving the same SRL as in *J.A. No. 1*. In this instance, the court concluded that the SRL had not received a fair hearing because the judge refused to permit her to argue her motion to disqualify him on the basis of judicial bias because, it would appear, he considered the argument to be devoid of merit. As explained by Hamilton J.A., writing for the court (at para. 32):

> … the trial judge cannot become the advocate for the unrepresented litigant, nor can the judge provide legal advice. However, the judge's challenge is to take pains to ensure that a party's lack of legal training does not unduly prejudice his or her ability to participate meaningfully in the proceeding.

[14] It is clear that the motions court judge in this instance was alive to the fact that the wife was self-represented and took pains to ensure that she was not prejudiced. She received a fair and impartial hearing.

[15] The appeal is accordingly dismissed with costs if asked for.

[**Editor's Note**: Application for leave to appeal to Supreme Court of Canada, refused 18 January 2007: 2007 CarswellMan 8.]

"Family Law Releases"

Cass, Fred D., *The Law of Releases in Canada* (Aurora, ON: Canada Law Book, 2006), pp. 305-308.

Often, a release will be given in a situation that is governed by a specialized body of law, as when a release is given in a family law case or in an insurance case. To the extent that the law in the particular field is statute-based, then the impact of that law on releases will vary from one jurisdiction to another. It is beyond the scope of this book to canvass all specialized areas of law in different jurisdictions that may have some bearing on releases. This chapter will, however, address some common situations where the general law of releases must be taken together with specialized laws and legal principles.

FAMILY LAW

The Supreme Court of Canada, in *Miglin v. Miglin*, accepted that separation agreements are entered into in a "unique legal context" and, by extension, the same point can be made about settlement or compromise agreements and other contracts made in a family law setting. The enforceability of such agreements, even when accompanied by expansively worded releases, is affected by legislation (in Canada, at both the federal and the provincial levels) and by the recognition of the courts that special considerations apply to contracts in family law matters.

The Canadian *Divorce Act*, for example, leaves the courts with a broad discretion to grant and vary orders for one spouse to support another and this discretion exists despite a valid agreement between the spouses that deals with support obligations. Under s. 15.2 of the *Divorce Act*, the courts are empowered to make spousal support orders and are directed to consider the condition, means, needs and other circumstances of each spouse, including certain specified factors. The existence of an otherwise valid agreement or arrangement for support is only one of the factors to be considered by a court.

An example of legislation at the provincial level is the Ontario *Family Law Act*, which empowers a court to set aside a provision for support, or a wavier of support, on any one of several grounds. (One of the grounds is if the provision for support or waiver of support results in unconscionable circumstances.) The same statute also sets out grounds upon which a court may set aside a domestic contract or a provision in a domestic contract.

The effect of the statutory regime governing family law matters is that releases given in connection with domestic contracts cannot be assumed to be enforceable in accordance with the general law of releases. Instead, it is necessary to consider the "unique legal context", which includes, in addition to the provisions of the governing statutes, a vast number of cases in which those statutory provisions have been considered.

Another element of the unique legal context is the particular approach that the courts bring to settlements and contracts in this field of law. This special approach reveals itself in the standard of disclosure that may be required of parties to an agreement in a family law matter. It also is revealed in other areas, such as the suggestion that there may be a more lenient test in the family law setting for the common law doctrine of unconscionability. As to the standard of disclosure, some authorities place separation agreements or compromise of family law matters in the category of contracts *uberrimae fidei* [subject to utmost good faith]. When applied, this high standard of disclosure by parties negotiating a family law settlement has a bearing on the enforceability of a release given in connection with such a settlement. The connection between non-disclosure and the enforceability of a release is apparent from the following passage taken from an Ontario case.

> Family settlements and compromises will be set aside unless made in the utmost good faith. Since it can be said in the case at bar that the husband withheld material information…, the general release clause will not operate as a bar to [the wife's] entitlement.

The unique legal context of family law agreements has an impact not only on the enforceability of releases, but also on the drafting of releases. The language of releases in family law matters (both before and after the Supreme Court of Canada decision in *Miglin v. Miglin*) was discussed extensively in *Umholtz v. Umholtz* [(2004), 238 D.L.R. (4th) 736 (Ont. S.C.)]. The judge there remarked on the efforts of the drafters of releases in family law cases to keep up with developments in the law resulting from cases like *Miglin*. This led him to make the following observations:

> This problem with releases in family law cases is that they cannot prevent entirely the exercise of judicial discretion to intervene in future in an appropriate case. When the courts propound a restatement of the test to be applied for such intervention, as surely as night follows day, winter follows autumn, and "forever discharge" follows "remise" and "release", lawyers revise the language of "standard" releases to reflect the restated test.

As far as this book is concerned, the fundamental point is that releases in family law matters are given in a singular context. The context is important when a release is drafted and it is important when advice is provided about the enforceability of a release. In family law cases, reliance should not be placed solely on the general law of releases, for it is necessary to consider the legislative regime and jurisprudence that is specific to this area of law.

3.4 Relationships with Clients – Personal

"Is sex okay with clients?
That depends on a few things"

McNish, Jacquie, *The Globe And Mail*, 07 February 2007, P. B9.

A disciplinary panel of the Law Society of Upper Canada set a tough new ethical standard in July, 2004, when it disbarred Toronto lawyer Gary Neinstein for having sexual relations with a client and sexually harassing his secretary.

The ruling marked the first time that one of Canada's provincial law societies disbarred a lawyer for having sex with a client and it sparked a volley of legal appeals that are still before the courts. The most shocking thing about the case, however, remained a closely guarded secret for more than two years.

Keeping the mystery under wraps was George Hunter, an Ottawa family lawyer with Borden Ladner Gervais LLP who rose in 2005 to become the highest-ranking official of the law society and who also happened to chair the panel that stripped Mr. Neinstein of his right to practise law. Last week, Mr. Hunter admitted to the law society that he, too, was having an affair with a client at the very time he ordered Mr. Neinstein out of practise.

The setting for his dramatic admission was a law society hearing on Friday that was initiated when a former client of Mr. Hunter's filed a complaint about pressure tactics he used in an attempt to whitewash their 2 ½-year affair. After a brief disciplinary hearing, during which letters of support from some of Canada's most prominent lawyers were read, the panel issued a ruling that bore no resemblance to the punishment meted out to Mr. Neinstein, who continues to run a small personal injury practice. Mr. Hunter was suspended for two months from practising law.

"It is extraordinarily different treatment," said Brian Greenspan, a lawyer for Mr. Neinstein, who is currently waiting for the Ontario Divisional Court to rule on an appeal of his disbarment. Mr. Neinstein has been allowed to continue practising law during the appeal. [See Editor's Note (1) at the end of this entry.]

This vast disparity between the two penalties casts a harsh light on the Canadian legal profession's muddled approach to regulating intimate relations between lawyers and clients.

In the U.S., a handful of states have passed laws banning sex between lawyers and clients, and the American Bar Association adopted a rule in 2001 that prohibits lawyers from having sexual relations with clients unless the affair preceded the legal assignment. The no-sex rules are based on the premise that a lawyer's duty to act in a client's best interests may be put in conflict by a

personal relationship. More insidious is that lawyers may exploit their influence to initiate sexual relations with a vulnerable client.

"It's a distinct and unique problem. There are predators in the legal profession. When we know there is a specific problem, we should do something," said Alan Stern, a Halifax-based lawyer with McInnes Cooper LLP, who led a push in 2004 to have the Canadian Bar Association adopt a similar no-sex rule.

The motion, however, was overwhelmingly voted down at the Canadian association's 2004 annual meeting in Winnipeg, after a groundswell of members shouted it down as overly paternalistic.

"I've never understood the resistance," Mr. Stern said. "We need to evolve."

The failed motion left Canadian lawyers with a confusing patchwork quilt of conduct codes and standards applied by provincial law societies that regulate the profession. Only three provinces, Ontario, British Columbia and Nova Scotia, have codes of conduct that address the thorny issue of sexual liaisons between lawyers and clients. But the language of the three provincial codes is so divergent and at times vague that the professional consequences of sexual misconduct with a client can depend on where you live and who you are.

[**Editor's Note**: Nonetheless, other provinces have imposed suspensions and other penalties on lawyers who engaged in sexual relations with clients, based on less specific provincial codes of professional conduct.]

"The law societies have made a mess of the sex issue … .There is a lot of confusion, uncertainty and unfair treatment," said Phillip Slayton, a former Bay Street lawyer and author of the pending book *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession* [since published in 2007].

As a consequence, Mr. Slayton said low-profile lawyers such as Mr. Neinstein are "not treated in the same way as an establishment lawyer. George Hunter was treated with kid gloves."

The Law Society of Upper Canada, which regulates Ontario's 36,000 lawyers, moved to clarify the boundaries by amending its professional code of conduct in 2004 to designate sexual relations with clients as a potential conflict of interest. If a lawyer is intimately involved with a client who is emotionally vulnerable or unsophisticated, the code says, the lawyer "should recommend" that the client's consent to the relationship is "informed, genuine and uncoerced."

In simple English, legal experts say, the code means that clients should get outside legal advice about their rights when they become personally involved with their lawyer.

When Mr. Hunter's complicated personal life, which involved a marriage and three affairs, unravelled in late 2005, he pressured his unidentified client in meetings, e-mails and phone calls to sign a document stating that she had been properly informed about her rights during the

relationship. Mr. Hunter admitted last week that his client, a divorced mother who was feuding with an alcoholic ex-husband, had not in fact been properly informed.

It was this failure to ensure his client was informed, rather than the affair itself, that prompted the disciplinary panel to rule that Mr. Hunter had engaged in professional misconduct.

That ruling, said Gavin MacKenzie, who replaced Mr. Hunter as treasurer of the law society, is a "demonstration of the adequacy of the current rules."

He was leading advocate of the no-sex rule at the Canadian Bar Association in 2004, but now he no longer advocates such a strict code. He said he "doesn't expect" the governing body of the Law Society of Upper Canada "will revisit this in the near future."

In the absence of clearer rules, some law firms are reviewing whether they should set firmer boundaries internally.

Sean Weir, national managing partner of Mr. Hunter's firm Borden Ladner, said the firm currently requires its 700 lawyers to adhere to the law society's rules if they become intimately involved with a client. However, he said, now that the society has reached a ruling on Mr. Hunter's "unacceptable" conduct, the firm plans to review whether tighter rules are necessary.

The law society's rules are "not as clear as they could be," Mr. Weir said. "They are subject to a lot of interpretation and they probably shouldn't be subject to interpretation."

[**Editor's Notes**: **(1)** *Law Society of Upper Canada v. Neinstein* (2007), 280 D.L.R. (4th) 263 (Ont. Sup. Ct. J. [Div. Ct.]): order of the Society's Appeal Panel, setting side the Hearing Panel's finding of professional misconduct and directing new hearing, quashed; Appeal Panel's order that the Hearing Panel's penalty of disbarment and $10,000 fine be set aside, upheld; matter referred back to Appeal Panel to amend its formal order to reflect its decision a 12-month suspension be imposed in substitution for disbarment and $10,000 fine; appellant solicitor granted leave to appeal the 12-month suspension. **(2)** In *Law Society of Upper Canada v. [D.]*, a solicitor admitted to the Bar in 1995, of the Town of Pelham, was found to have engaged in professional misconduct for: acting in a conflict of interest by representing a client in matrimonial/family law matters while having a personal relationship with the client's estranged wife and by assisting the estranged wife in the same matters. By Decision and Order dated October 27, 2006, the Hearing Panel ordered that: "the Member shall be suspended for a period of 2 months. This suspension is to be served within the next 12 months and the commencement date will be worked out between the Member and the Secretary of the Law Society. There is no order as to costs." **(3)** See Part 4.3 of this anthology: "Ex-law society head, firm sued over sex with family law client."]

"Sleeping with clients: the ethical debate continues"

Slayton, Philip, *Canadian Lawyer*, February 2007, pp. 23-24

What's the latest on lawyers sleeping with clients? This has been a tricky ethical issue for some time. Is it OK these days, or what?

Maybe it's not OK. Take a look at the 2004 Neinstein case in Ontario. "The reputation of a lawyer is of paramount importance to clients, to other members of the profession, to the judiciary, and to society as a whole," ponderously declaimed a Law Society of Upper Canada (LSUC) disciplinary panel, as it decided to disbar Toronto lawyer Gary Neinstein for having sex with a women he represented.

"The solicitor-client relationship is premised on the concept of trust between the solicitor and the client," continued the Neinstein panel in full sanctimonious flight. "An integral aspect of that trust is that the lawyer will not abuse his/her position of relative power over the client … . Sexual harassment constitutes a breach of trust and professional misconduct."

The panel accepted evidence from Neinstein's client that she was unable to stop his behaviour because he was her lawyer, because she had come from a dysfunctional family, and because she was raised to believe that lawyers were persons in authority who were there to provide protection. ….

[**Editor's Note:** For subsequent developments, see *Neinstein v. The Law Society of Upper Canada* (2007), 289 D.L.R. (4th) 263 (Ont Sup. Ct. J. [Div. Ct.].]

. . . .

But here's something interesting. The chairman of the Neinstein panel was George Hunter, a senior partner of Borden Ladner Gervais LLP in Ottawa, and apparently a pillar of rectitude. In June 2005, Hunter was elected treasurer of the LSUC and, shortly after that, president of the Federation of Law Societies. Just a few months later, he suddenly resigned both positions, and went on medical leave from his law firm, citing vague family and personal reasons.

In September 2006, the public learned that the law society would be holding a disciplinary hearing into charges of professional misconduct made against Hunter … . There are allegations that he had a lengthy intimate relationship with a woman he was representing in a bitter divorce (this alleged relationship was current when Hunter chaired the Neinstein panel). It is said that Hunter asked the woman to sign a document "acknowledging" that her personal relationship with him had no effect on their professional relationship.

If the charges against Hunter are found to be true, will he be disbarred or severely disciplined in some other way—hoist, so to speak, by his own rhetoric? Not likely. After a very brief period of hearty enthusiasm for "zero tolerance," with the Neinstein case as its apogee, the legal profession and the law societies have retreated in confusion and now appear disinclined to take a stern view of sex with clients. Perhaps sleeping with a client these days is OK after all – in most cases, at any rate.

It was in January 2004 that the LSUC's professional regulation committee recommended an absolute prohibition on sexual relationships between lawyers and clients. But just a few months later, in August 2004, feisty delegates to the Canadian Bar Association's annual meeting overwhelmingly rejected a ban, following what one newspaper described as "a spirited, and oftentimes jocular" debate. The proposal was described at the meeting as "paternalistic," "absolutist," and "stereotypical." In October 2004, the LSUC, I presume chastened by these comments, decided after all that it would be a mistake to have a ban. Instead, in a modest move, it adjusted the official commentary on professional conduct rule 2.04, dealing with conflicts of interest, so that it briefly addressed the issue.

In treating sex with clients as a simple, conflict-of-interest problem, Ontario fell into line behind Nova Scotia and British Columbia, the only other Canadian jurisdictions that explicitly address the issue. Rule 7(a) in the *Legal Ethics* and *Professional Conduct Handbook* of the Nova Scotia Barristers' Society says that "a lawyer has a duty not to act for a client when the interests of the client and the personal interests of the lawyer. . .are in conflict."

Commentary on the rule says that it is intended to prohibit, among other things, sexual exploitation by a lawyer in the course of a professional representation. The *Professional Conduct Handbook* of the Law Society of British Columbia, in a footnote to the general integrity rule, says: "A lawyer must not exploit the relationship between solicitor and client to the lawyer's own advantage. An intimate relationship between a lawyer and a client, such as a sexual one, may constitute exploitation." The other provinces and territories are silent on the matter.

Surely, the conflict-of-interest approach to sex with clients makes a lot more sense than a blanket prohibition. In the tradition of the common law, it is the facts of the individual case that count. A general prohibition fails to distinguish between wildly different situations; for example, between the client who is a vulnerable and poorly educated, juvenile, or a distraught woman in bitter divorce proceedings, and someone who is a sophisticated and well-educated vice-president of a large corporation expecting to be wined and dined.

In the new and more forgiving climate, Hunter may get kinder treatment than the treatment he meted out to Neinstein. It may even be that there was no conflict of interest in the Hunter case; the law society disciplinary committee will let us know in due course. Nevertheless, one thing is certain: if the allegations against him are true, conflict of interest or not, Hunter is a hypocrite. Hypocrisy, however, is not contrary to the Rules of Professional Conduct.

So where are we on this difficult subject? If you want to sleep with a client and practise law in Ontario, Nova Scotia, or British Columbia, watch for a potential conflict of interest. If you practice in one of the other provinces, it seems that all you can do is watch out.

[**Editor's Note**: For outcome of Hunter disciplinary hearing, see next entry in this part.]

"Ex-Law Society Treasurer gets two-month suspension after affair with family law client"

Schmitz, Cristin, *The Lawyers Weekly*, 16 February 2007, pp. 1, 3, 28 (*in part*)

Former Law Society of Upper Canada Treasurer George Hunter has been suspended from practice for 60 days for "conflict of interest" and thereby "failing to maintain the integrity" of the legal profession during a lengthy affair with a family law client Hunter admitted was one of three extra-marital relationships he juggled at one time.

Commenting on the penalty imposed by a Law Society of Upper Canada (LSUC) discipline panel Feb. 2, a female family law practitioner, who was at Osgoode Hall that day, called the 59-year old civil litigator's punishment "a slap on the wrist" that will not deter lawyers from engaging in inappropriate sexual relationships with vulnerable clients.

A lawyer from the federal Justice Department, who made last-minute arrangements to fly in from Ottawa to witness the hearing after the Law Society gave just one-day's notice it was going ahead with the high-profile case, shook his head in disbelief throughout the proceeding. He said he felt that the victim, a relative of his who decided not to attend, was "forgotten" and "has not been represented here today."

Her half-page victim impact statement citing, among other things, feelings of depression, anxiety and a diagnosis of post-traumatic stress disorder that her doctor predicts will require two years of psychotherapy, was filed as "Exhibit 4" with the panel without comment by Doug Hunt, the outside counsel retained by the LSUC to prosecute the case.

The LSUC also conceded that "specific deterrence" should not be an operative consideration in Hunter's sentencing, and that the panel should focus instead on sending a message of general deterrence to other lawyers.

Much of the three-hour hearing was devoted to lauding Hunter's "selfless integrity," "honesty" and other positive attributes, including his contributions as a mentor and hockey coach.

Hunter's "out-of-character" "lapse in judgment" was blamed on his depression stemming from his unhappy marriage.

. . . .

The agreed statement of facts acknowledges that the complainant continues to insist that her "voluntary" participation in the affair, which she viewed as "serious and committed," was obtained by Hunter "using confidential information to take advantage of her", an allegation Hunter "vigorously" denies.

The two-month penalty is half the four-month suspension sought by the LSUC but more than the reprimand sought by Hunter and supporters … who urged the panel that Hunter had already been punished enough by what … [was] described [by his counsel] as the "sharpest and hardest fall from grace for a lawyer of which I am aware."

Spectators remarked on the irony of Benchers urging three fellow Benchers to mete out the mildest possible sentence to a former Bencher guilty of conflict of interest.

After it was all over, Hunter appeared content with the 60-day suspension. He was also ordered to pay the regulator $2,500 in costs for a prosecution that required several months' investigation and the hiring of an outside investigating lawyer as well as an outside prosecutor.

Meanwhile Hunter has continued to draw $15,000 a month while on a leave of absence since Dec. 2005 from Borden Ladner Gervais's (BLG) Ottawa office where he remains a senior partner. According to court records, his total income in 2004 was $475,322. However, he did not participate in firm profit sharing in 2006.

Although … [his counsel] informed the panel that Hunter's firm "is taking him back," BLG national managing partner Sean Weir said a decision has not yet been made. Hunter's status will be reviewed by the partners after the LSUC's panel releases the written reasons they pledged would follow their oral judgment, Weir said.

"I am looking forward to getting this resolved," Hunter told *The Lawyers Weekly* as he strode into the stately law society headquarters he presided over for five months before several of his worlds collided in November 2005.

[In November 2005] two women – his wife and a long-term lover – discovered Hunter was having an intimate relationship with a third woman – client XY whose name is protected by a publication ban. As a result, Hunter's relationship with XY was reported to BLG. Hunter subsequently reported himself to the LSUC.

Before they became intimate, Hunter told XY his marriage was over in all but name, and that he and his wife were living together for the sake of the children.

A psychological report provided by Hunter to the Law Society panel indicates that "his marriage had been in difficulty for more than 10 years" and that by the time of his affair with XY he had been neglecting his insulin-dependant diabetes. "The emptiness of his marriage led … him to seek out other intimate relationships to escape feelings of depression and loneliness," explained Ottawa forensic psychiatrist John Bradford. "There are various potential psychological explanations for his behaviour, one of which can be that his behaviour became increasingly self-destructive, most likely arising from the underlying depressive disorder. Mr. Hunter also had

extreme difficulty accepting the failure of his marriage; his professional and other successes exacerbated this difficulty of failing to accept and manage the deep failings in his personal life."

When Hunter gave notice Dec. 2, 2005 that he was relinquishing his LSUC posts due to "the demise of my marriage and the implications of that on my children" he also told *The Lawyers Weekly* that there was nothing amiss in his professional life. "I do not feel that I violated any rules of professional conduct," he insisted in a subsequent September 2006 interview.

But at the LSUC hearing Feb. 2, 2007, Hunter apologized to XY, his family, his law partners, and to the legal profession as a whole for his failure to meet the "standards and attendant responsibilities" he was charged with upholding as a lawyer, as LSUC Treasurer, and as president of the Federation of Law Societies, the national umbrella body for the 14 regulators who oversee the professional conduct of 88,500 lawyers and 3,500 notaries.

"I recognize that as a former Bencher and Treasurer, my conduct has cast an unfortunate shadow over the important role that lawyers play in promoting and protecting the ideals of justice," Hunter said, his voice breaking as he expressed remorse "most importantly" for hurting and disappointing his family.

**"Lawyers and the media:
why 'no comment' won't do"**

DeLong, Mike, *The Lawyers Weekly*, 26 January 2007, pp. 22, 27

Communication is generally not a problem for an experienced lawyer. A legal professional must appear polished and in control when addressing a packed courtroom or a room full of corporate executives.

As the commercial goes, lawyers must never let anyone see them sweat.

Why then do many legal professionals lose their ability to communicate when speaking to the media?

The answer lies with two words: "no comment."

This phrase, it seems, is the fallback for anyone in the legal community looking to avoid a journalist. However, saying "no comment" will not make a reporter go away. Like a red flag to a bull, "no comment" makes a journalist more eager to pursue a story.

So why do lawyers use it?

The answer is two-fold: first, there is the obvious need to protect their clients. Legal details of a case before the courts are obviously sacrosanct. However, most lawyers may not realize that reporters don't need key names, dates and details to fill out a story. They usually only require something to complete a story.

A smart lawyer provides the media with some information without giving away the farm.

Another reason that lawyers try to avoid answering media questions is a fear of looking bad. Lawyers have been or believe they will be misquoted or taken out of context. They would rather say nothing, than lose face before the public and peers.

However, avoiding a reporter also makes one look bad. A lawyer looks evasive or deceptive to the public when …[s(he) says] "no comment." Automatically, the public thinks that the lawyer is hiding something or even being dishonest.

The bottom line when you take the time to answer reporter's questions: you maintain control of a story. Avoiding the media allows others to take ownership of a story and means that you have lost a chance to manage an interview successfully.

Remember, reporters are only conduits to the public at large. If you answer a journalist's questions effectively, you can direct what kind of information the public gets to see.

The solution is obvious: take charge of a media interview, answer questions in a language that reporters understand, and the media encounter is more likely to go in your favour.

There are several ways that a legal professional can learn to manage the media more effectively and, in effect, make the media work for you.

Media Speaks

As anyone who has tired to speak a foreign language knows, learning a few key words and phrases goes a long way towards getting your message across. It is no different with the media. If you learn to speak the way reporters speak, you will be much more successful doing an interview.

Also, media interviews are a two-way relationship. If you want reporters to quote you accurately then you must respond clearly and concisely. The following tips can help in this regard.

1. Keep your answers short and to the point. Remember, a reporter is often limited by time and space. They might only have room for a one-sentence quote or a 10-second sound byte. So package your answers accordingly. Get to the point immediately, stay focused, and give responses no more than 20 seconds in length. No one will have to edit your words and the chances of you being taken out of context will be greatly reduced.

2. Do not ad lib. Just as you would never ask a question in the courtroom without first knowing the answer, you should never speculate with the media. It may cause reporters to go in new directions and the story to spin out of control. Just give the facts and stay on message.

3. Always be truthful. Reporters will find out if you are not being honest. Lying can turn an issue into a crisis.

The Inverted Pyramid

We all know people who tell long, drawn our stories. Their stories begin slowly, building to a dramatic conclusion. They take what seems like hours to get to the point. By the time they get to the end, we have drifted away.

It is the same way one produces an academic paper. One begins with a thesis statement, before adding supporting facts and details leading to a conclusion.

Successful media communicators use the opposite approach. They start with the conclusion first, before delivering added details. In the media, this style of communicating is called the inverted pyramid.

Journalists use this approach for two reasons: a strong lead grabs their audience right away and putting less-important details at the end leaves room for editing.

How often do we read the entire story in a newspaper anyway? Most people scan the headlines and first few lines of a story, only rarely reading the entire article.

Lawyers should use the inverted pyramid when dealing with the media. Start an interview with the conclusion; the most pressing details of a story. Get to the point right away, and your messages will have greater impact.

Jargon and institutional language

Lawyers, like most professionals, have their own jargon. Such language works in the courtroom, but not for the general public. Jargon muddies the message; avoid it at all times.

Legalese is also frustrating for the average person. It is not an effective method of communicating. Ultimately, your objective with the media should be to simplify the message rather than make it more difficult to understand.

Use positive language

Positive messaging is an effective way of defusing problematic situations. Phrases such as: "I'd be happy to answer that question," or "we are pleased to announce…" are useful to preface bad news and head off negative attacks. They are also helpful in keeping your messages from being received in a negative light.

Substitute for "no comment"

A lawyer does not need to say "no comment" to avoid answering questions in an interview. You can answer a question without giving away pertinent information. The solution lies in the way that you use language to communicate.

For example, instead of "no comment," why not answer a question in the following manner: "Due to the sensitive nature of the case, we are not able to reveal details to the public. However, we can say that we are working to ensure the best possible outcome for everyone involved. We will release details to you as soon as we are legally able."

This type of statement is a perfect alternative to "no comment." It works for a journalist because it is short and concise. It works for the lawyer because it reveals little, yet makes the lawyer look diligent and concerned.

In this sense, answers like this make everyone happy.

Communicating your message

Communicating effectively with the media is not easy. It's a skill that takes practice and focus. However, just as a lawyer must polish …[her or his] courtroom manner, media interviews can be learned and perfected.

Remember that "how" you say something can be as important as "what" you say to the media. Lawyers who communicate clearly, concisely and effectively will limit misrepresentations and get their messages out more effectively. Communicate clearly and the chances of meeting your strategic goals will be enhanced.

"Raising Interests for Mutual Benefit"

Miller, Q.C., Marla S., *LawNow*, Jan.-Feb., 2007, pp. 16-17.

As society and the laws that govern it become more and more complex, so does the litigation that arises when things go wrong. As a result, the litigation process becomes more and more involved, lengthy, and of course, expensive. In response we are seeing a trend away from the courts and toward other methods of resolving disputes. Key among the alternative methods is *mediation* and now, the emerging field of *collaboration*.

Both mediation and collaboration have grown exponentially in response to those searching for a dispute resolution process which is more timely, more private, more respectful, and less expensive. When conducted as an "interest-based" process, the results are by design geared toward "win-win" solutions.

In mediation, a trained neutral third party works with the disputing parties to help them identify the issues that need to be resolved; facilitates the exchange of information so that everyone is satisfied that they have all the knowledge they need to make the decisions necessary; and then assists the parties in reaching agreement. In addition, it is the mediator's job to document the agreement the parties reach. The parties may attend mediation with their lawyers present. But in many areas, especially that of family law, lawyers usually do not attend the mediation meetings. However, at the end of the process, they must provide their clients with independent legal advice and ratify the agreement reached.

In the collaboration process, each party to the dispute is represented by his or her own qualified collaborative lawyer who is specially trained in collaboration and settlement techniques. The focus and commitment of the lawyers and their clients is to reach settlement. The rules governing the collaboration are set out in a written agreement that each of the parties and their lawyers enter into prior to the commencement of the collaboration. Part of that agreement is that there are no threats of litigation. In fact the commitment to resolving the issues outside of the court is so strong that if the process should break down and the parties resort to the court, the [collaboration] lawyers must withdraw from the case and may not represent their clients in court. Like the mediation process, the goal of the collaborative lawyers is to help the parties identify the

issues, obtain all the knowledge required to make decisions, assist in the decision-making, and document the parties' agreement.

In both mediation and collaboration, the disputing parties are present at all meetings where all the negotiations take place. The parties participate in the negotiations, assisted by the mediator or their collaborative lawyers. In the event that expert opinion or advice is required about the values of assets or otherwise to assist the parties, neutral experts are chosen by agreement of the parties, thereby eliminating any battle of the experts. Full disclosure is a hallmark of both processes. Because these processes are designed to be conducted in privacy with respect and dignity as goals, they have especially gained hold in the area of family law where the parties acknowledge that they will need to have a continuing relationship after the legal issues have resolved, especially where there are children involved. These processes also appeal to parties who wish to protect their privacy, have some control over the timing and length of the process, and resolve matters outside the public forum of a courtroom or the litigation process.

One of the major factors driving the success of these processes is that generally they are conducted as an "interest-based" process as opposed to the more conventional "positional bargaining" process. Understanding the differences between these two processes is imperative.

Most negotiations, whether it is something as ordinary as buying or selling a car or as involved as dealing with the issues arising from relationship or family breakdowns, are positional in nature. People usually come to the negotiation with their own position. At its base, a position is nothing more than someone's idea of their solution to a problem. When two or more parties come to negotiate, each with their own position or solution, and nothing more is known about why their proposed solution is important to them, the only way for the parties to reach agreement, short of one of the parties capitulating completely, is to compromise. A compromise is often reached at the point when the parties become equally unhappy. When that balance is achieved an agreement is often reached.

Looking at the car sale example, both the buyer and the seller usually come to the table with their own position or answer. The buyer's position may be that he or she can only pay $5,000. The seller's position may be that he or she can't let the car go for less than $7,000. When nothing more is known, often a sale price is agreed upon somewhere around the middle—perhaps the point where the parties are equally unhappy.

However, if we were to understand more fully why the buyer and seller came up with their positions, we may find out that the buyer could actually afford more overall, but could not afford higher monthly payments. We may also find out that the seller needs to be relieved of a monthly payment and may take less if the buyer could take over his payments. With some investigation into what is important to each person and some creativity in looking for the answer to each person's concerns or needs, a solution can be found that suits everyone's purpose—a win-win solution.

This approach of interest-based [i] [collaborative] negotiation or [ii] mediation [negotiation] is especially successful in family law disputes for many reasons. A person's needs or interests are usually based on his or her particular concern, hope, expectation, assumption, priority, belief, fear, or value. Core needs and interests are non-negotiable. If someone has a

concern or fear that must be looked after before they can agree to anything, it simply cannot be discounted, negotiated away, or ignored. This is often a clear relief for the parties. Often a marriage or relationship breakdown is characterized by a period of intense discussion between the parties where each party tries to explain to the other how he or she feels and what he or she needs. Often this is met by rejection or argument from the other person who similarly is trying to express his or her own feelings and needs. An interest-based process of [collaborative] negotiation or mediation [negotiation] is often the first time a party is allowed to have his or her needs or interests honoured. It matters not if it is rational or logical to the other person.

As an example, a party's concern or fear may be that his or her children will love someone more. That person's former partner cannot, in this process, discount that concern by saying that it would never happen, that he or she would never do anything to interfere with the relationship, or that the relationship between the children and the other person could never be damaged. In an interest-based process the need is explored fully and the goal of providing for that need is acknowledged. Simply put, unless the person so concerned has his or her needs and interests addressed, he or she will not say yes to any solution that does not protect those interests.

The advantage of identifying each party's needs or interests is that the parties have essentially set out the parameters any ideal solution would have to meet. The goal is then for the parties to the negotiation, assisted by the mediator in the mediation process, or the collaborative lawyers in the collaboration process, to collectively brainstorm to find solutions that meet all of the parties' needs and interest. Any and all solutions that meet the needs and interests must be looked at. Some end up being patently unsuitable. Others end up being a springboard for further creativity and ideas. As a collective and creative effort, everyone present at the negotiation works on creating a mutually beneficial solution.

One of the greatest advantages of this process is that creative solutions are reached. Rarely do cookie-cutter answers result. The possibilities for solutions are as limitless as the ideas that the negotiators can come up with and, depending on the needs and interests identified, are unique to each negotiation. Each family and its members deserve answers suited to their particular needs and interests and the interest-based negotiation or mediation process is uniquely geared to respectfully achieve these results.

"Guidance for Lawyers Acting for Survivors of Indian Residential Schools"

Canadian Bar Association, Resolution 07-09-M, February 2007 (*in part*)

BE IT RESOLVED THAT the Canadian Bar Association:

1. renew its call for law societies to adopt model guidelines for lawyers acting for former students of Indian residential schools;

2. urge the law societies to be particularly vigilant in monitoring the conduct of those lawyers, given the imminent release of significant funds for common experience payments to address remaining claims of former students of Indian residential schools; and

3. inform the Assembly of First Nations, the Congress of Aboriginal Peoples, the Inuit Tapirisat of Canada and other national Aboriginal organizations of these initiatives.

"A Contrarian View: When to Fire Your Client"

Poll, Edward, CBA PracticeLink (www.cba,org/cba/PracticeLink), 06 March 2007 (*in part*)

Scenario #1: The Unreasonable Client

It is a fundamental business and professional necessity that lawyers have a signed engagement letter for a new client, stating each party's responsibilities for making the engagement a success. You will have an easier time meeting your client's expectations and collecting your fee if you incorporate all essentials in the engagement letter.

Make sure clients understand that they're entering a two-way relationship. The lawyer agrees to perform to the best of his or her ability in accord with professional standards, and the client agrees to communicate and cooperate fully—which includes paying the bill.

. . . .

Scenario #2: The Client That Is Too Small ... or Too Big

A statistical premise called the Pareto Principle holds that, over time, most results are produced by only a few causes, generally in a proportion of 80 to 20. When applied to law firm marketing, this produces the conventional wisdom that 80% of a typical firm's revenue is produced by 20% of its clients—the large, heavy hitters.

The loss of a large client is such a major risk that you may want to consider one of the most important axioms of business: make sure no single client exceeds 10% of your total revenue. Thus, if any one client "forgets" to pay you, or even leaves, the loss won't be so hard to handle.

I have seen too many firms focus on very few, large clients and be severely damaged when the fees from that client fail to continue—from dissatisfaction, change of billing attorney, merger, recession, or other unanticipated problems.

Some firms believe that having numerous small clients leads to greater revenue stability. However, studies suggest that small clients disproportionately drain the resources of law firms while providing a disproportionately small contribution to firm profits.

I am all in favor of seeking larger clients with more money and more interesting challenges. This effort, however, must be balanced to assure that the firm doesn't wind up with only a few clients, large though they may be, who put the firm at risk if they should leave.

You may be willing to accept this risk for the short-term with the intent of getting more clients so that the percentage allocation to the "larger" client is reduced while maintaining the billings at the same level for the client.

If so, make no long-term technology or other expenditures at the behest of larger clients without some type of assurance that their business will stay with you until at least the amortization for the new expenditure is completed. Otherwise, a long-term strategy based exclusively on fewer, larger clients will almost always lead to disaster.

The Real Lesson on Clients

Firms grow based on their clients. Thus, lawyers must look for clients who have growth potential. In other words, "commodity" work will not result in high and profitable growth.

Highly focused and "high end" work will result in higher revenue and profits. When you choose clients who perceive the work you do as having high value, you will be able to charge more—even a percentage of the value of the work. This will get you out of the time modality of billing and into the value modality of billing, where the profits are significantly higher. It's simple Business 101, but too many law firms ignore the lesson.

"Unfair advantage"

Arnot, Alison, *National,* March 2007, p. 51

Ontario Superior Court Justice Denis Power still remembers the incident, years ago, when he was a practising lawyer. He was representing a fellow lawyer in a professional negligence matter. Opposing counsel, who had just come on to the case, contacted him to make sure his [defendant lawyer] client would be present, because he intended to call … [him] to testify.

"The case was 100% a credibility issue," Justice Power recalled. "I didn't know if I should raise with him the dangers of doing that." After discussing it with his [defendant] client, Justice Power called the [defendant's] lawyer back and asked him if he really wanted his [lawyer] client to testify. The trial judge also explained the pitfalls in doing this, but the lawyer would not change his mind.

"He put my [defendant lawyer] client in the box, who denied the totality of the plaintiff's evidence and was much more credible than the plaintiff, and that was the end of the case," Justice Power says.

Often, lawyers find themselves in court facing an opposing counsel who, for whatever reason, hurts his own cause, doesn't effectively express his client's case, or generally acts in a manner unintentionally helpful to the other side. What should the ethical lawyer do? That was the subject of a "Duties and Dilemmas" panel at the County of Carleton Law Association Civil Litigation Conference in Montebello, Quebec, this past November.

"The judge, the court, and the opposing counsel must seek a balance in the process to help the disadvantaged party," said Bernard Amyot, a partner with Heenan Blaikie LLP in Montreal and first vice-president [now president (2007-2008)] of the CBA. The lawyer has a duty to enlighten the court and should mention anything that is relevant, whether it's helpful to … [his or her] case or not.

Amyot pointed out that this obligation doesn't go so far as having to ask witnesses relevant questions that opposing counsel has not asked. But the lawyer does have a duty to bring to the court's attention caselaw that the opposing counsel may not have found, even if it's favourable to the other side. The goal is to ensure the judge has the full state of the law.

"Our duty as lawyers is to protect and advance the legal rights of our clients," said fellow panelist Gavin Mackenzie, a partner at Heenan Blaikie LLP in Toronto and current treasurer of the Law Society for Upper Canada. "Our clients have no legal right to benefit by reason of a mistake of another party's lawyer."

What about the judge's role in a situation where counsel is doing a poor job? It's a question of exercising judgment, said Justice Power. If really substantial issues come up, and the lawyer doesn't act on them, it's appropriate for a judge to raise [matters involved in those issues, such as] the possible inadmissibility of evidence or Charter implications.

"Look down the line," he advised the audience. "If you don't do something, and the problems then come out on appeal when a new counsel has been retained, then chances are the results that you obtained as a successful counsel are going to be upset in the Court of Appeal. You're going to be back trying the case all over again. So, as a practical matter, we should be aiming to get it right the first time."

"No easy way to dump clients"

Marron, Kevin, *Canadian Lawyer*, April 2007, pp. 19-20

Breaking up is never easy. Yet there comes a time when you have to let go of that old relationship. It may be tempting just to let things slide and keep seeing one another long after you both know it's all over. But this could get you into big trouble once there is someone new in your life.

That's why many law firms are now wondering whether they should discreetly dump their old clients to avoid getting caught in conflict situations if they happen to take on new clients with adverse interests.

It's a dilemma that brings conflict of interest policies in conflict with law firm marketing strategies, according to Simon Chester, Heenan Blaikie LLP's senior conflicts partner for English Canada. He notes that marketers urge lawyers to keep in touch with all their former clients, since you're many times more likely to get work from them than from a complete stranger. He says it's offensive and counterproductive to send clients termination letters. But the risk is that maintaining a relationship – playing golf, meeting for lunch, and, perhaps, even sending Christmas cards – could send the wrong signal and suggest that the firm still owes a duty of loyalty to someone it no longer represents.

"It's very difficult for a lawyer to admit to himself or herself that it's over," says Chester, who observes that law firms may sometimes keep open files on clients for whom they have not done any work for years.

The problem is that lawyers and their firms can easily find themselves burned by old relationships that they thought were over but didn't formally end. They may find that they have to turn down lucrative new work because of a perception of conflict of interest, even though they and their old clients lost interest in one another long ago. Or worse, the law firm may take on the new work only to discover an unforeseen conflict with a long lost client.

It's a problem that seems to be growing almost out of control in today's fast-moving interconnected global economy. Some lawyers may still enjoy lifelong relationships with some of their clients, as was the norm in your grandfather's law firm. But this is an age of promiscuity. Clients are often fickle, spreading their work around by using one law firm for one matter and another for the next.

Lawyers, in turn, tend to be more specialized, thus working with more clients and often with numerous partners, many of whom may be in different practice areas and in different parts of the country. Add to this mix a global business environment rife with interconnections, mergers, takeovers, and multiple partnerships, and you have the makings of a veritable virus of conflicts of interest.

Law firms across Canada are plagued with problems. On the East Coast, plans for a major regional law firm merger last year were complicated by concerns about potential client conflicts that led several lawyers to opt out of the newly formed firm Cox and Palmer.

In Ontario, the Lawyers' Professional Indemnity Company (LAWPRO) reports a significant increase in conflict-related claims and costs over the past three years. Caron Wishart, the company's vice president of claims, says six per cent of all claims arise out of conflicts of interest situations, but costs associated with these claims have increased to about 12 per cent, up from seven per cent four years ago. She says this is largely because of the cost of the complex litigation that can arise in conflict issues.

. . . .

The [*Strother*] case serves as a reminder that firms should be more diligent about ending relationships with clients, says Gary Luftspring, chairman at Goodman and Carr LLP. He says the best way to do this is by defining the scope and term of each piece of work in a retainer letter beforehand. But, he admits, lawyers tend not to do this "because we're not business-like enough. There's a feeling that we don't want to alienate the client; it's all a goodwill relationship; and we're so happy to get the work."

Luftspring and Scott Jolliffe, national managing partner at Gowling Lafleur Henderson LLP, both want law societies to develop guidelines recommending a standard engagement letter for all lawyers to use with clients. "In a perfect situation, it would be better for the courts to approve it. But if at least the law society or bar association would approve it, it would give a level of comfort for lawyers and clients," says Jolliffe.

In the meantime, says Chester, "It's a matter that requires firms to think very carefully, to analyze their relationships, to train their lawyers, and talk to their clients."

“To Keep or to Kill [;]
The evolving ethics of document destruction.

Mann, Michelle, *National*, September 2006, No. 6, p. 49

“It used to be you would keep records forever," observes Stephen Burns, a privacy lawyer with Bennett Jones LLP in Calgary. "That way, you know you have complied with your obligations and can defend yourself in litigation."

But those days are gone – in this era of vast stores of paper and even vaster banks of electronic information, it's just not practical to keep everything for good. "People don't want to pay to store records forever," Burns says. "There are the competing interests of costs and protecting clients. As time moves on, the likelihood of litigation diminishes, and it becomes a calculation. It's a balancing of risk management and the costs of it."

Lawyers seeking guidance on .the issue won't find a nationwide directive, says Burns. "It's a pretty ugly and complex topic [that requires] knitting together common law, statute law, laws of general application, codes of conduct, practice notes, and national reports.

"It comes down to a practical question," he says. "There is no cohesive body of law in Canada that requires you to retain records, but there are certain statutory requirements such as the *Income Tax Act,* and a wide range of requirements under legislation and regulations.

"From a lawyer's perspective," Burns adds, "in addition to corporate rules, law society guidelines and code of conduct responsibilities, there is the ability to manage liability risks. Document retention is really about managing your statutory ethical and regulatory obligations, as well as managing your litigation risk."

For example, in Ontario, says Law Society of Upper Canada Director of Professional Development Diana Miles, lawyers should have a document retention policy that deals with closed client files, including their related financial records, in accordance with by-law 18.

"With respect to the client files themselves, there is no one-size-fits-all answer," she confirms.

Making a choice

If you decide to retain a given record, there are ethical implications in how you do it, says Burns. "The lawyer needs to consider storage not only of paper, but also electronic information that allows it to be accessed and stored in a logical manner, and allows it to be destroyed at the same time, to harmonize destruction." The retention system also needs to protect records needed for litigation or other proceedings from destruction.

In deciding how to manage retained records, "consider their nature, sensitivity and availability, the changing face of technology, and changing standards in industry, while continually managing confidentiality," he advises.

Generally, Miles adds, "lawyers should store closed client files in a secure location, separate from active files, that will allow for easy retrieval." And don't forget the human component, says Burns: "build a retention policy, but build it in a way that the office can comply with it. Remember that people have to administer it."

If you've decided to destroy certain documents, "they must be destroyed in a manner that ensures client confidentiality is maintained," Miles says: shredding and incineration are good options. In particular, "lawyers should ensure that if they're outsourcing the destruction of client files, including electronic files, that they are retaining a reputable company that will preserve client confidentiality."

Burns agrees: "An obligation of confidence applies throughout the period of having a client's information – from the moment you collect it through to final destruction, the obligation continues."

Before destroying a document, Burns says, consider "the nature of the record, the sensitivity of the information, and current standards suggested by reputable organizations." Develop a "destruction methodology" based on what's recommended by your local law society.

"Dealing with the Difficult Client"

Curtis, Carole (2006), 25 CFLQ 291
(*in part*)

Lawyers often act for or deal with clients who are "difficult". Dealing with a difficult client is one of the most challenging parts of legal practice and requires care, attention and planning. This analysis assumes that you have identified the client as a difficult client and that you have decided to act for this client.

Difficult is, of course, a relative term; who is seen as a difficult client may be a function of the area of law you practice in, or the other clients you act for. Often clients are seen as difficult in comparison to the other clients in the lawyer's practice. Also, there is no doubt that the personal traits of the lawyer affect the lawyer's ability to deal with difficult clients. Some of us are just more tolerant than others. Some lawyers have a rescuer fantasy, which may increase the number of difficult clients they represent, and which may affect the way they represent the difficult client.

As well, some lawyers have decision-making authority about the clients they represent, and as a result, have control over which clients they act for. Obviously, this allows a lawyer to act

for fewer difficult clients, or even perhaps no difficult clients. However, that is not the case for more lawyers.

WHY SHOULD YOU BE CONCERNED ABOUT THE DIFFICULT CLIENT?

The difficult client is a very hard customer to satisfy. They can be frustrating, demanding, even upsetting. They can ignore your advice. They can treat you badly, or (even worse) treat your staff badly. They can be unhappy with the progress of the case, no matter how hard you have worked or how good the results are. In short they can be unreasonable.

The difficult client is more likely to do the three things that distress lawyers most:

- The difficult client is more likely to not pay the lawyer.
- The difficult client is more likely to complain to the Law Society about the lawyer.
- The difficult client is more likely to sue the lawyer for negligence.

It is important, in dealing with the difficult client, to protect yourself at all times, and to protect yourself at the same time that you are trying to serve your client.

THE BASIC THREE STEPS OF YOUR INVOLVEMENT WITH THE DIFFICULT CLIENT

(a) Whether or not to Act for the Difficult Client

Lawyers 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. It is also less difficult for lawyers who restrict their practice to certain areas of law.

With experience, the lawyer can tell in the first interview if the client is going to be a difficult client (this is known as trusting your instincts). Often, the lawyer can even tell on the telephone that the client is likely to be a difficult client. This possibility is an added incentive for making your own appointments with new clients (rather than allowing the secretary to make your appointments), so that you have the opportunity to speak to every new client yourself on the telephone before they come in to see you. You should consider not even offering a consultation to a client you assess as a difficult client in the initial telephone contact.

These are some questions to ask early in your contact with the client that will help you to identify a client who may be a difficult client:

- 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)?

(b) How to deal with the Difficult Client during the Retainer: 5 Tips to stay Sane and Stay in Practice

(i) *Understand your role*

Your role as lawyer is usually pretty straightforward, but may appear to be less clear with a difficult client. Your role is to analyze a given situation and offer solutions to the problem presented, or a means of achieving the goal the client has presented. Sometimes, there are several possible solutions or means, all of which should be offered to the client. Don't forget that "do nothing" is always a possible solution (although that solution may have outcomes that are unacceptable to the client). The lawyer's role then is to advise on the consequences of the different courses of action. 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 (dependant clients, for example) are often totally unwilling to make decisions about their legal issues and want the lawyer to do that. 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.

(ii) *Protect Yourself Throughout*

Document everything you possibly can, including telephone calls, voice mail messages and e-mail messages. The verb "document" means "to record in a document; to provide with citations or references to support statements made". Confirm the client's instructions to you in writing, and confirm your instructions 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.

If you deal with this client or their work electronically, save messages and instructions in your usual way as part of the permanent record of the file (which may be electronic or on paper). The difficult client has a way of turning on the lawyer more often and with more damaging consequences than other clients.

Documenting (in this context) means recording sufficient details to assist you in a future disagreement. The record you make is not of any use if there are insufficient details to assist you. This means recording at least the following:

- the client's name;
- the file name;
- who the contact was with;
- the date of the contact;
- the nature of the contact (telephone call, meeting, voice mail, e-mail);

- how long the contact took;
- the details of the contact (who said what, including what the lawyer said); and
- any instructions given (by the client or by the lawyer) during the contact

Practice management software programs can make this task less cumbersome and more reliable than scrapes of paper the lawyer scribbles on.

It may also be wise to discuss the advice you give this client with a colleague, including discussing the fears you have about the client.

In notes of meetings or conversations with the client, be sure to record the information and advice you gave the client, not only the information the client gave you. Where there is a dispute between lawyer and client, this area may, in fact, be the biggest area of disagreement, and is also among the least documented. In litigation between the lawyer and the client, where there is disagreement about the information provided [by] or the legal advice given to the client and that advice is not documented, courts have often preferred the evidence of the client on this issue.

(iii) *Be Calm, Be Patient, 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). It will require more patience than usual to deal with this client. If you find you are becoming the difficult lawyer, perhaps it is time to transfer the file to another lawyer.

Be explicit, and be very clear with the client, about everything. The more information given to the client in writing, the less likely there will be misunderstandings. It is also advisable to give the client this information early on in the retainer. ….

Be clear with the client about the expectations you have of the client regarding the client's treatment of you and treatment of your staff.

Be sure the client understands whom to deal with on which issues (for example, who to call to get certain information, when they need to speak to the lawyer, when they can deal with staff). Many difficult clients want to deal only with lawyers, which is expensive, not very efficient and not often necessary (see Managing Expectations, below).

(iv) *Include your Staff in the Plan for the Client*

Make sure the staff understands the risks of acting for a difficult client, so they can behave in ways that minimize those risks. Usually, the staff will easily be able to identify the difficult client. The staff may have identified this client as a difficult client before the lawyer. Make sure the staff is dealing with this client the same way that the lawyer is, especially in terms of documenting contacts, instructions or information.

Also, difficult clients are often much more difficult with the staff then they are with the lawyers. Trust your staff and believe them when they describe the client's behaviour. Deal directly and promptly with the client about bad or inappropriate treatment of the staff, to ensure that the client understands what the staff's role is in their retainer, and more importantly, to ensure that the behaviour is not repeated. Never let the difficult client treat your staff poorly or abusively. No client is more important than your staff. Institute a zero tolerance policy on abusive behaviour towards staff.

(v) *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 or goals are totally outside the realm of what legal services could ever achieve. 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. Consider asking the client to reduce their expectations to writing, or at least, have a frank, early discussion with the client about their expectations.

Clients' unrealistic expectations take many forms, but fall into the following general categories:

- expectations about service;
- expectations about time to conclude;
- expectations about result;
- expectations about cost.

Many difficult clients have very high service expectations. If the client has service expectations that are impossible to meet (e.g., phone calls always returned by the lawyer within 15 minutes, or performing all of the work for free) be clear from the outset that you cannot provide that level of service or that kind of service, and that perhaps the client should find a lawyer who can (good luck to them). If the client has service expectations that are unrealistic, or very expensive (dealing only with the lawyer, or having all work done only by the most senior lawyer) be clear with the client as to whether or not you can meet that expectation, or whether another kind of service will be provided. It is especially important to bill clients with high service expectations frequently and regularly, so they can understand the cost of those expectations.

Clients who are unlikely to be successful in achieving their goals need to be told that clearly and explicitly from the start of the retainer, or at the earliest possible moment in the retainer. It is far more important to be honest with the client who cannot achieve their goal, than it is with the client who can.

Clients are far more interested in honest and clear information about the cost of legal services … than at any time in the past. The introduction of technology to the billing process has

also changed clients' expectations and their tolerance. The difficult client is also a client who is likely to be unhappy about fees. Again, it is advantageous to ensure this client is billed frequently and regularly, and is provided with as much detail as possible.

(c) Know when to Fold – Ending your relationship with the Difficult Client

It is not possible to satisfy all clients. In some lawyer-client relationships, 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. With the difficult client, this may occur due to the client's unhappiness with the results. Know when to leave the file. If you cannot make the client satisfied with the progress of the work you are doing, or with the service you are giving, it may be time to let another lawyer try. 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 the lawyer money).

4. CATEGORIES OF DIFFICULT CLIENTS

(a) Angry/Hostile

This client is unhappy before they retain a lawyer, and will continue to be unhappy. They usually cannot get at the person who is making them unhappy (the other side of the case), in order to tell them about it, but they can get to their own lawyer. As a result, often the angry/hostile clients will visit this anger on their own lawyer (and on the staff). This is known in psychological circles as transference. This is very unpleasant for the recipient of this anger, and is not an appropriate basis for a professional relationship.

If you could help this client reach the stage where they are not angry, the client may no longer be a difficult client. However, it may not be possible to get the client to the stage where they are not angry. Besides, that is the job of a therapist. And in certain of these situations, recommending the client see a therapist is the right course. But it is possible to get the client to understand that the lawyer is not the proper place for the outlet of this anger, that the lawyer works for the client and that the lawyer will not tolerate that treatment. Be clear about this the first time the client expresses that anger to you, or you will not easily be able to prevent it in the future.

This client requires a clear firm hand from the start. Be clear with the client about what level of expressed anger is acceptable for you (it may be "none"). Be clear about the treatment of your staff. This client seems to particularly visit their anger on those weaker (i.e., your staff). If you tolerate this client's outbursts, they will continue, and likely increase. You cannot change the fact that they are angry or hostile, but you can require that they not visit that behaviour on you or on your staff. Remind this client that this is a business relationship and that you work for them.

(b) Vengeful/with a Mission

This client is a variant of the angry/hostile client. This client has come to you to accomplish a specific purpose, which purpose may have very little to do with the legal issues you were consulted about. They may actually be angry/hostile, but may not show this behaviour at all to the

lawyer. The client is often focused on this purpose and quite tenacious. They have a strong personal sense of justice (and injustice) and will want to feel that your work for them has produced justice. They are also result-oriented in a way that may skew your ability to help them. If the lawyer is unable to achieve the specific result the client seeks, there will be trouble.

Often, they look for a lawyer who will share their definition of justice and the feeling that they have been wronged. This is a dangerous path for a lawyer to follow, even if you agree that the client has been wronged. Lawyers should not be personally invested in the outcome of a client's case. Yet the vengeful/with a mission client will specifically seek a lawyer who is not indifferent about the outcome. They want a lawyer who "believes" in their cause.

Be very cautious in even agreeing to act for this client. This retainer is fraught with problems. Some vengeful/with a mission clients want to take steps that are problematic for the lawyer, highly inappropriate or even illegal. Some vengeful/with a mission clients are also secretive/deceitful/dishonest clients (see below). Remember that lawyers can be taken advantage of by unscrupulous clients. This is another retainer in which it is advisable to commit to writing all instructions given (from both sides).

Also, although this client wants "justice", they are often unwilling to pay for the kind of service required to satisfy their definition of justice. Be sure to bill this client regularly and frequently.

(c) Over-Involved/Obsessed

This client is related to the vengeful/with a mission client. This client may be focusing all their time and energies on the legal matter you are helping them with, often to the exclusion of all other matters in their lives. They are often needy, dependant and want a lot of attention. They want to see and read everything possible about their case. They are obsessed with collecting the paper their case produces, and often have binders or file folders full of material about their case. Ensure that they get copies of everything possible regarding their legal matter. The lawyer might also provide them with the legal research (the actual cases) if there is research done for their matter. This client may do their own research, as well.

The over-involved/obsessed client may be extremely well organized and have all the material regarding their case in an easy to access system. Or, they may be disorganized and the material may be virtually inaccessible. The over-involved/obsessive client will often provide copious written material to the lawyer, with the expectation that the lawyer will read it all. If an unreasonable (or impossible) amount of material is provided, try to get the client to identify what portion of it is essential for the lawyer to read (either by suggesting you can read a fixed percentage of it (40% of it, say) or you can spend a fixed amount of time (for example, 1 hour) reading it). Also, try to get the client to organize the material in whatever format is helpful to you (order of importance, chronological order, pleadings separate from correspondence, lawyers' letters separate from other correspondence). Remind the client that they pay for the time taken by the lawyer to organize material that is not organized, so it is in their interest to organize it first. Also, the over-involved/obsessive client likes it when the lawyer gives them homework related to the case, as it helps them to feel connected to the work that the lawyer is doing.

Like other difficult clients, the over-involved/obsessed client should be billed regularly and frequently, so that they have realistic expectations about the cost of their matter and the affect that their particular style of dealing with it has on that cost.

(d) Dependant

This client has spent much of their life being dependent on others, in one form or another, and intends to continue that level of dependency with the lawyer. In part, this client is unwilling to take responsibility for their own lives and for their own decisions. This client will have surrounded themselves with others who are quite willing to be the decision-maker for them, and as a result, may have become even more dependent, and nearly incapable of making their own decisions.

Often the client merely transfers this dependency from someone else to the lawyer. This is not the right place for the lawyer to be. The lawyer's role is not to be the decision-maker, but rather to be the advisor about the choices available to the client. The dependant client will steadfastly refuse to make a decision, insisting that the lawyer do it.

It may suit some lawyers to be the decision-maker for the client, but it is a path fraught with problems and is not a path the lawyer should follow. When the results of the decision do not please the client, the lawyer will be blamed. A lawyer becoming the decision-maker for a dependant client is a no-win situation.

Encourage the client to involve a trusted advisor (other than the lawyer) in the process. Encourage the dependant client to come to meetings with you accompanied by the trusted advisor. Let the advisor be the person the client depends on. If that person helps the client to reach decisions then the lawyer is better protected and better able to perform the proper role.

The dependant client will be dependant throughout the retainer, and often difficult to advise and keep focused. This client requires a fair bit of patience on the part of the lawyer. Also this client requires that much of the lawyer's dealings with the client, including advice, be reduced to writing so that the client can consider the recommendations in an unhurried atmosphere and in a context where they can consult other trusted advisors. It is also good practice to confirm this client's instructions in writing.

(e) Secretive/Deceitful/Dishonest

This client may run through a spectrum of behaviour, in which the client may exhibit only one aspect of the behaviour, or may move through the various phases. Secretive behaviour may be that which is that is merely suspicious (but unproven). The results of deceitful behaviour may be reparable. However, dishonest behaviour may require the lawyer to end the retainer. Often the lawyer will not identify the behavior or the severity of this behaviour until the client has moved fully into the dishonest category.

The client who is only secretive may have misunderstood the importance of openness and honesty in the lawyer-client relationship. Or, this client may have something to hide. The lawyer's level of concern about secretive behaviour will vary directly with the nature of the retainer. But the lawyer should never allow the client's inclination towards secrecy to prevent the lawyer from asking all the questions needed to properly do the work.

If the client has actually been deceitful or dishonest with the lawyer, this is a good reason to end the retainer. Once the lawyer learns of the deceit or dishonesty, it is unlikely the lawyer can feel confident in the future with that client. The outcome of dishonesty on the part of the client is an easier circumstance to handle than the secretive or deceitful client. It may be that the lawyer can continue to act for the secretive or deceitful client. But the lawyer needs to be very careful about being involved under circumstances where you cannot be confident that the client is telling you everything you need to know in order to properly do your job. Lawyers have run into difficulty when they have been taken advantage of by unscrupulous clients.

(f) Depressed

The client who is depressed is not merely someone who is sad or unhappy; this is someone with clinical depression who has become withdrawn, passive, lethargic, unable to engage, perhaps even paralyzed in their day-today lives. Clinical depression can lead to an inability to perform even the most normal of tasks (e.g., returning phone calls). This client will be difficult because they may not be able to engage with the legal process sufficiently to properly instruct a lawyer. This is most problematic for the client who is involved in litigation, and who must respond to court documents in a time frame. However, the depressed client can also be a problem for lawyers in situations that do not involve litigation.

Similar to the angry/hostile client, the best step is to try to get the client some professional help so that they can move away from being depressed, and become better able to instruct their lawyer. If you could help this client reach the stage where they are not depressed, the client may no longer be a difficult client. However, it may not be possible to get the client to the stage where they are not depressed. And clearly, this is the job of a therapist.

If this client will not get help and wants to continue to be your client, you must document carefully the recommendations and advice you give the client. Put your advice in writing, and ask the client for clear written instructions. If you cannot get written instructions from the client, confirm the client's instructions to you in writing. If you cannot get any instructions, you may need to close the file, telling the client in writing, that you will not take any further steps on their behalf and that you will close the file in 30 days, absent specific instructions to proceed. It is advisable to be specific with the client about the consequences of this step, if there are consequences for the client.

(g) Mentally Ill

The client who may be mentally ill is a particular challenge for the lawyer. Do not confuse a mental illness with the ability to instruct counsel. There are clients with mental illness who are capable of instructing lawyers. Sometimes those instructions are not consistent with the advice

the lawyer might give, but that does not mean that the client is not capable of instructing counsel. The lawyer must be satisfied that the client can properly instruct counsel. But the test for taking those instructions must be broad enough to ensure that clients are not denied access to lawyers merely because they are difficult, change their positions, or are hard to follow. This client may be less predictable than other clients and may change their instructions often, even regularly. As a result, the lawyer should confirm those instructions in writing and should ensure the instructions are fresh and still valid before acting on those instructions.

(h) The Difficult client with the Difficult Case

The difficult client with the difficult case is usually also the client who has totally unrealistic expectations about their case. Those unrealistic expectations may be about the outcome of the case, but this client often has unrealistic expectations that touch every aspect of the case, including the cost, the length of time involved, the importance of their case, and the kind of service the lawyer can provide. This client needs to hear, right from the first meeting, what the likely outcome will be. It is always advisable, also, to put bad news in writing, particularly to this client. This client may also need to hear that information repeatedly.

(i) The Client who is Unwilling to Accept/Follow/Believe the Lawyer's Advice

To some extent, almost all clients fall into this category. In fact, clients often come to lawyers to determine the consequences of actions they have already taken or paths they have already decided to take. Many clients are just unwilling to follow or accept the advice their lawyers give. Sometimes this makes them difficult clients, and sometimes it does not.

Be clear with these clients about exactly what your advice is. Reduce it to writing, including, where possible, the likely outcome of following the advice and the outcome of rejecting the advice. If they choose not to follow it, at least they do so knowing the consequences.

There are lawyers who will refuse to act, or to continue to act for the client who does not follow their advice. This seems too rigid a position to adopt as a general rule. The better path is to use your judgment about that kind of decision, reserving the decision to end the retainer for [the] client who rejects or ignores advice that has consequences that are very serious. Lawyers may see their role as assisting the client with their legal problem, no matter what decisions the client makes about the conduct of that problem. After all, it is the client who will have to live with the consequences (not the lawyer).

3.6 Relationships with Third Parties

"Lawyer chasing man who used his name to slam judge"

Jaffey, John, *The Lawyers Weekly*, 15 June 2007, p. 3

Would the real Christopher Sorley please stand up? The real Sorley, a family law litigator in Aurora, Ont, just north of Toronto, is not the same one who sent inappropriate e-mails to hundreds of Ontario judges and Ministry of Justice officials criticizing an Ontario Court judge and disparaging a Toronto lawyer and a Barrie psychologist.

The bogus Sorley used e-mail accounts with the addresses c.sorley@yahoo.ca and chris.sorley@yahoo.ca. The real Sorley has never had a Yahoo account.

Sorley has obtained an order against Yahoo Canada and John Doe for closure of the two e-mail accounts, and an injunction from using his name and identity.

In one e-mail, the imposter makes highly critical remarks about the senior judge, the lawyer and psychologist, accusing them of abrogating their responsibilities to uphold justice and protect "children and the public." After more inflammatory comments and attacks, the anonymous writer adds, "We feel let down and insulted."

Flyers with similar messages have also been left, without Sorley's name on them, on the windshields of cars in parking lots outside several Ontario courthouses.

. "I find this type if impersonation and fraud to be quite troubling," Sorley told The Lawyers Weekly, "as it is so easy to accomplish in today's 'cyber society' and very hard to solve. I must admit, however, that Yahoo has been extremely co-operative in this motion, but we have yet to learn the true identity of John Doe."

After closing the e-mail accounts, Yahoo gave Sorley the account-opening information used by John Doe. He described himself as C. Sorley, residing on University Avenue (in what turns out to be a large office building). Yahoo also provided a list of all his or her log-ins and the long list of all persons to whom e-mails were sent.

Sorley said the only really useful information provided by Yahoo was the IP addresses, owned by Rogers. "We're bringing a motion against them," he said, "to see whose modem it is. We're making progress tracking him down, and we're not going to give up." He added, "I'm told by our computer guy, we'll be able to find out whose house they came from."

Sorley also advised he's suing for $50,000 for defamation, which should be a significant deterrent to anyone who thinks this is a joke.

In one respect, the joke's on the e-mail impersonator, because it allowed the motion judge to make an order for substitutional service directly to him or her via two known e-mail addresses. This was done before the e-mail accounts were shut down by Yahoo.

"Stalking cost lawyer his job [:]
Employers should prepare for failed romances"

Levitt, Howard, *National Post,* June 20, 2007, pp. WK1, WK4

It was a fatal attraction – at least, to his job.

Robert Menagh, director of labour relations, was a valuable member of the City of Hamilton's management. As an employment lawyer, the Mayor relied on him for his expertise in labour law and human resources. But his value diminished when Menagh engaged in outrageous conduct following a failed office romance.

To complicate matters, the relationship was with Maureen Wilson, the Mayor's chief to staff. When she ended the romance, Menagh refused to accept it.

Menagh relentlessly pursued Wilson and when his attempts were rejected, he began to harass her. He stalked Wilson at work and at home, parked his car beside hers as a constant reminder of his presence, stared at her through her office window and paid unwelcome visits to her home. This vexatious behaviour, Wilson said, made her feel like a "caged animal".

When his plot to win Wilson back failed, Menagh set out to destroy her. He disclosed private details about their relationship to her co-workers. He told his supervisor Wilson would rue the day she declined his proposal. He even abused his power and lied to get access to the Mayor to encourage the Mayor to fire Wilson.

Menagh was furious to learn Wilson was in a new relationship with Terry Cooke, another member of the City. Menagh confided to his supervisor "I felt like killing them both and then myself." He then drove his speeding car at Cooke and yelled obscenities at him.

Menagh was charged with uttering death threats, criminal harassment and dangerous driving. However, the criminal charges were dropped after Menagh entered a peace bond and signed a letter of apology to Wilson and Cooke.

Despite his 13 year unblemished career, he left the City with no option. After an external investigation, Menagh was fired for cause without severance pay. Ironically, his conduct violated the very harassment policies he was charged to uphold. He was insubordinate and abused his power. Unapologetic and undeterred, Menagh responded by suing for wrongful dismissal.

Appalled with Menagh's actions, the trial judge, Justice Joseph Scime of the Superior Court of Ontario, Hanilton district, upheld the termination.

Most surprising was Menagh's cavalier attitude to the justice system. He proved to be untrustworthy in the legal system itself. Menagh candidly admitted he never meant the apology he wrote that freed him from his criminal charges. Menagh's conduct cost him more than his job. The trial judge ordered him to pay the City $200,000 for its costs. He was also ordered to pay another $23,344 when the Court of Appeal dismissed his appeal.

The lessons to employers are clear:

- When office romances go awry, all workplace issues must be promptly addressed.
- Workplace harassment policies should clearly articulate the type of behaviours that will not be tolerated.
- Staff should be made aware of and have easy access to workplace policies.
- Any breaches must be addressed. This includes imposing discipline, up to and including firing for cause.

"Judge criticizes parties for tactical disclosure demands"

Schmitz, Cristin, *The Lawyers Weekly*, 10 November 2006, p. 10

Tactical or "excessive" demands for disclosure in family law cases waste time and money and "ultimately impair a fair trial," an Ontario Superior Court judge has warned.

Family law litigants are frequently criticized for non-disclosure, but Justice Paul Perell of Toronto concluded in late October that when it comes to disclosure, one can sometimes have too much of a good thing.

"Just as non-disclosure can be harmful to a fair trial, so can excessive disclosure be harmful because it can confuse, mislead or distract the trier of fact's attention from the main issues, and unduly occupy the trier of fact's time, and ultimately impair a fair trial," Justice Perell explained in his Oct. 24 endorsement.

The judge was faced with competing allegations of non-disclosure and tactical abuse, respectively, by applicant Phyllis Boyd and respondent Brian Fields, who agree they had a seven-year relationship but disagree over whether they were spouses.

A big bone of contention is 20 luxury condominiums owned by Fields in Mexico.

Boyd wants spousal support, as well as damages for unjust enrichment. In August she sought additional, quite extensive, disclosure before the Nov. 27 trial, including demanding the appraisal and current market value of six representative condos, a request rejected by Justice Perell.

Boyd accused Fields of "devious, evasive, and untruthful" disclosure, while he accused her of making the request only to put him in the position of being in noncompliance with an order at trial since he couldn't possibly come up with the requested information before trial, if ever.

Justice Perell ordered Fields to produce some documents, but dismissed many of Boyds' disclosure requests, characterizing them as "not relevant to material issues" or "overbroad and not fair".

"Full and frank disclosure is a fundamental tenet of the [Ontario] *Family Law Rules*" observed the judge. "However there is also an element of proportionality, common sense, and fairness built into those rules."

He cited Rule 2(3) which stipulates that "dealing justly" with a case involves fair procedure, saving time and expense, handling cases in ways appropriate to their importance and complexity, and devoting appropriate resources to a case, while taking account of the need to give resources to other cases.

"A party's understandable aspiration for the utmost disclosure is not the standard," Justice Perell wrote. "Fairness and some degree of genuine relevance, which is the ability of the evidence to contribute to the fact-finding process, are factors."

Fields's counsel, Gary Joseph of Toronto's MacDonald & Partners, praised the decision, which he hopes "will put a stop to tactical requests for disclosure."

"I think it's finally the other side of the coin being heard from on this issue of disclosure," he elaborated. "In the face of regular and extensive orders for disclosure, this is a judge weighing in, saying that there must be some reasonable limit to requests for disclosure."

According to Joseph, "too often" lawyers use disclosure requests for tactical advantage by moving to strike the opposite side's pleadings when the spouse is unable to comply with impossible disclosure demands.

"I feel fairly certain that it is a problem across Canada," he told *The Lawyers Weekly.* "The issue of full and fair disclosure—and the limit and reasonableness of disclosure requests is an ongoing problem, for cases involving significant assets and significant income."

At press time Boyd's counsel, Deidre Anne Newman of Whitby, Ont., could not be reached for comment.

"A Family Law Practitioner's Guide to Dealing with the Self-Represented Litigant"

[1] INTRODUCTION

Why do we all shudder upon learning that our client's former spouse or partner is self-represented on a family law file? So often we fail to appreciate opposing counsel—until we hear those dreaded words: "My husband [or wife or former partner] won't be getting a lawyer." It is only then that we realize and appreciate the benefit of having opposing counsel working on a file.

On a matrimonial or domestic file, opposing counsel can serve a number of important functions that can make our own roles so much easier. Without opposing counsel there is no one on the other side to:

- give good, solid advice as to what the law is and how it is or can he applied;
- recognize the critical importance of full, complete and timely financial disclosure;
- encourage a negotiated resolution;
- draft concise and legible pleadings. briefs and affidavits;
- screen, or serve as gatekeeper to, the irrelevancies and non-legal issues;
- facilitate compliance with Rule-directed or Court-ordered obligations, such as the provision of income tax returns, the delivery of an updated Financial Statement or the prompt consideration of a draft Order provided for approval;
- conduct trial, properly focused on the issues at hand; and
- discourage protracted proceedings, mindful of the ever-increasing costs of contested litigation.

In earlier literature on this topic, a distinction has been drawn between self-represented litigants and unrepresented litigants. The latter would like to be represented by counsel but are unable to qualify for representation under … [a] Legal Aid Plan, yet have insufficient financial means to retain counsel for what may prove to be a protracted family law proceeding. Conversely, self-represented litigants feel that they are capable of representing themselves, and there is therefore no need to expend funds for someone else to do what they can do personally. (Afterall, if you've watched enough reruns of "L.A. Law" or "Street Legal," have high-speed internet and a library card, that is enough, isn't it ?)

Whatever the reason or cause may be for the self-representation, it becomes your reality to address. Below you will find some general pointers as to how to best deal with the situation of an unrepresented or self-represented litigant (referred to collectively as "SRL") on the other side of your file.

[2] OUTLINE TERMS

Clearly spell out at the outset of your dealings that you will not give advice to the SRL. Your first letter to the SRL must clearly indicate that you represent the adverse party and that you cannot, and will not, provide any advice to him/her.

There is a very fine line between offering information and giving advice. Although it may be tempting to explain to a SRL what a document means or why something should be done a certain way, don't go there! Encourage the SRL to obtain independent legal advice or to attend [in Ontario] at the Family Law Information Centre. When questions are asked of you, refer back to that initial letter of introduction and remind the SRL that he/she will have to obtain advice from someone other than you.

[3] COMMUNICATIONS

Only allow communications between yourself and the SRL to be in writing. Immediately upon being retained, write to the SRL to indicate that you will be limiting your communications with him/her to writing. There will be no meetings; there will be no verbal negotiations; there will be no telephone calls. Although this may sound overly restrictive, it is the only way to avoid misunderstandings. All of your dealings with the SRL should be recorded in writing, either through your written communications or by your discussions being on record in the courtroom.

When you are writing to the SRL, use plain, simple language. This does not mean to insult the SRL's intelligence or to be condescending; simply avoid the "notwithstandings" or "govern yourself accordingly" that come too easily to us as lawyers.

If written communication is electronic, ensure that copies are printed and maintained on your file.

Always make sure that communication received is responded to promptly, or if you cannot respond within a reasonable period of time, send a short note off to the SRL to acknowledge receipt of his/her correspondence and to advise that a considered response will follow shortly.

If for any reason communication cannot be in writing, limit your non-recorded dealings with the SRL, and if possible, have another person join you as witness such as a junior or articling student. Follow up any such oral communications with a letter of confirmation.

[4] MAINTAIN A FAIR TONE

Never treat the SRL with anything less than the utmost of respect. Ensure that your tone is consistently professional and respectful. Our [Ontario] *Rules of Professional Conduct* direct us to treat unrepresented litigants with respect, in the same way you would treat another lawyer. My suggestion is to take that even one step further, as You can rest assured that one or more of your letters will find their way to a judge in a Case Conference Brief, Settlement Conference Brief, or Document Brief at trial, or better yet, as the attachment to a complaint directed to the Law Society! With that foresight, be sure your written communications are prepared and edited in such a way that they cannot be interpreted as overreaching, misleading, disrespectful, unreasonable or coercive.

Although you may be empathetic to the SRL's plight, (particularly those that are "unrepresented" versus those that are self-represented by choice), remain at all times professional

and respectful. One thing I have tried to do to maintain that professional distance is to not address the SRL on a first name basis, but rather to refer to him/her at all times as Ms. X or Mr. Y.

[5] DOCUMENTATION

Take charge of the fact finding and documentary disclosure that is required on the file. The SRL may not know what information is required to allow the equalization issue to be resolved for instance. Compile early on [in Ontario] your Net Family Property Brief, and organize all of the necessary corroborating documents to allow you to outline in writing to the SRL what is required to be produced by him/her.

[6] COSTS

Remind your client that having a SRL on the other side can often drive up the costs. Negotiations with a SRL may not be helpful or result-oriented. Disclosure from a SRL may not be forthcoming. Your time may have to be spent reading numerous e-mails or letters, or you may be facing more case conferences (due to the SRL's desire to bring a number of motions) than if counsel were involved. It may be necessary for you to recommend that Court proceedings be initiated sooner than would otherwise have been the case in order to obtain some Rule-directed time lines, some judicial directives and/or genuine case management.

[7] SECURITY ISSUES

Open your eyes to the warning signs that your own or your client's security may be at risk.

Is the SRL's attitude towards you shifting (becoming suddenly charming or hostile)? Are the SRL's letters to you or to your client becoming blatantly or subtly threatening? Arrange for Court security to be available at any time you will be required to be with the SRL in that setting, and arrange to stay at the Court House until the SRL is well on his/her way after the proceedings have concluded.

[8] AUTHORITY

Limit the SRL's perceived power over the process. Insist that the rules be followed – [in Ontario,] the *Family Law Rules* with respect to pleadings, disclosure and time lines, for instance, as well as the rules of evidence.

Let the SRL know of your intention to seek an Order of costs at each stage of the proceeding, and if successful in obtaining such an order, pursue their enforcement. Further, limit the SRL from taking any fresh steps until such interim determinations are honoured [[in Ontario] Rule 14(23)].

Do not hesitate to rely upon the provisions in the Rules that prevent a SRL from engaging in abusive or vexatious proceedings. [In Ontario] Rule 14(21) of the *Family Law Rules* gives the Court the authority to limit a litigant's ability to bring further motions without leave being obtained in advance.

It is one thing for a presiding justice to de-mystify that Court process to a SRL; it is not appropriate for him/her to over-accommodate to the prejudice of your client. In the courtroom, object where necessary if that line is crossed, and stress as strongly and respectfully as possible that the SRL is required to follow the rules, just like anyone else appearing in that courtroom.

[9] CONCLUSION

If you combine the first letter … [bold-faced and underlined] of each of the "tips" outlined above, you'll see that what they spell out is: **CONTROL**. And it is just that—control—that you want to ensure you maintain when you are required to deal with a self-represented litigant. Only through demonstrating the necessary degree of control will you keep your frustrations at a manageable level, minimize the risks to your client (in both time and costs) and reduce your own exposure to liability.

"Self-Represented Litigants in Family and Civil Law Disputes"

Blishen, Honourable Madam Justice Jennifer, (2006), 25 CFLQ 117, at pp. 125-129

. . . .**Suggestions / Tips**

The suggestions I am about to make come from a number of sources. Some come from published papers, and others from presentations made by judges and lawyers. Some are based on my own observations. I hope they will assist as a guide for counsel who find themselves opposing a self-represented party.

(i) *Prepare Your Client*

The presence of a SRL almost invariably lengthens any proceeding, conference, motion or trial. Your client should be aware that things are going to take longer and may mean extra costs.

(ii) *Judicial Intervention*

Perhaps the most important thing counsel should discuss with a client is judicial intervention. It may seem to your client that the judge is overly lenient and favours the SRL. Lawyers should explain a judge's duty to ensure a fair trial which may require intervention more than your client considers appropriate.

(iii) *Protect Yourself*

Keep in mind the Rules of Professional Conduct, specifically [in Ontario] Rules 2.01(14) and 4.01(2). Rule 2.01 (14) makes three important points.

1) Counsel dealing with a SRL should urge the SRL to seek independent legal representation. Duty counsel are often available at court and assistance can be obtained [in Ontario] from the Family Law Information Centre.

2) Counsel must "take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer". Counsel should continually remind the SRL that he/she cannot protect the SRL's interests. It should be made clear that the lawyer is unable to provide any legal advice to the SRL.

3) Counsel must inform the SRL that they act solely in the interests of their clients and that any comments made may be partisan in nature.

The commentary that follows Rule 2.01 (14) [under Ontario's *Rules of Professional Conduct*] states, "If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers." That being said, accepting a joint retainer in a contested family law matter is inadvisable and can lead to significant problems.

(iv) *Be Careful When Negotiating*

The [Ontario] *Rules of Professional Conduct* encourage negotiation and attempts to settle. In addition, mediation and other forms of alternative dispute resolution should always be considered.

For counsel, negotiating with a SRL can be difficult and sometimes dangerous. Lawyers are bound by a professional code of ethics, SRLs are not. This can make oral communication perilous. Use discretion in deciding whether to speak with a SRL. If you do decide to negotiate orally, it is prudent to follow up with a letter confirming agreement on any issues. Be prepared for the possibility (or even probability) that the SRL will bring up negotiation discussions during subsequent hearings. Therefore it may be a good idea to have a third party present.

In negotiations, be careful not to pressure the SRL. Avoid statements such as "If you do that, we're going to court." Avoid giving an opinion as to the legal validity of a position. This may create the impression that counsel is offering legal advice to the SRL.

Counsel should strongly recommend that the SRL seek independent legal advice any time there are negotiation discussions. It is particularly important to do this before signing a negotiated agreement. If independent legal advice is waived, counsel should be careful with the wording of provisions in an agreement. The precedents prepared, [in Ontario] by the Law Society of Upper Canada are helpful.

(v) *Use Plain Language*

Remember your audience. Use understandable plain language in both verbal and written communication. Think back to your first week of law school. Remember how baffling legal writing seemed then. Write accordingly. Avoid jargon and legalese as much as possible.

Written communications may be referred to by SRLs during a hearing. Write letters professionally, clearly and ensure translation, if necessary.

(vi) *Consider Doing Some Extra Work*

When serving documents on a SRL, write a covering letter explaining in simple language, what is being served. Explain what must be done to respond, with a reminder as to any applicable deadlines.

Making an extra effort may be worthwhile in the long run. A SRL who actually understands what she/he is supposed to do next is more likely to take the appropriate steps, making the entire process more efficient. In addition, a few reminders to a SRL about procedural requirements may protect counsel from later claims of surprise or adjournment requests.

Counsel should also provide the SRL with copies of case law or statutes which will be referred to during a hearing. Always allow for extra time and remain professional and patient.

(vii) *Hearings – Prepare for Perry Mason "wannabes"*

SRLs raised on a steady diet of American television legal dramas will do their best to emulate them. Therefore, counsel should be prepared for trial by ambush. Before a hearing, ask the SRL if there are any documents not previously disclosed or new witnesses.

(viii) *Be Professional*

A SRL may not bring all his/her documents to court; therefore counsel should prepare comprehensive materials to provide to the court. Remember your ethical obligation to draw the court's attention to any relevant authorities that the SRL has not mentioned.

Many SRLs are emotional. Some are abusive. No matter what is said, counsel should strive to remain calm and professional. Be fair and accurate in describing the facts to the court. Be concise in your submissions. Speak in plain language. Do what you can to make the process easier for the judge.

(ix) *Remember Your Role*

Counsel must be vigilant in protecting the interests of their clients. The [Ontario] Family Law Rules apply to both sides, whether represented or not. If you believe the judge is being too lenient in his or her desire to ensure a fair trial, you are within your rights to respectfully request that the Rules be followed.

3.7 Relationships with Other Lawyers

"The Falling-Down Professions [:]
For lawyers and doctors, gold-embossed diplomas
are no longer so golden"

Williams, Alex, *The New York Times*, 06 January 2008
(*in part*)

You can't say law firms aren't trying.

At the Chicago office of Perkins Cole, partners recently unveiled a "happiness committee," offering candy apples and milkshakes to brighten the long and wearying days of its lawyers. Perhaps this will serve as an example to other firms, which studies show lose, on average, nearly a fifth of their associates in any given year, in an industry in which about 20 percent of lawyers over all will suffer depression at some point in their careers.

Last year, Cravath, Swaine & Moore tried a more direct approach, offering associates an added bonus of as much as $50,000, on top of regular annual bonuses that range from $35,000 to $60,000.

At the august Sullivan & Cromwell, partners in 2006 began a program, groundbreaking in white-shoe firms, encouraging the uttering of "thank you" and "good work" to harried underlings, as reported in The Wall Street Journal.

Probably not a bad move at a firm that had been hemorrhaging associates at a rate of about 30 percent a year. (The rate dipped below 25 percent in the year after the program was started, although Fred Rich, a partner, said better etiquette was simply an element in a "very broad agenda" focused on more open communication.)….

"The older professions are great, they're wonderful," said Richard Florida, the author of "The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life" (Basic Books, 2003). "But they've lost their allure, their status. And it isn't about money."

Or at least, it is not all about money. The pay is still good (sometimes very good), and the in-laws aren't exactly complaining. Still, something is missing, say many doctors, lawyers and career experts: the old sense of purpose, of respect, of living at the center of American society and embodying its definition of "success."

In a culture that prizes risk and outsize reward—where professional heroes are college dropouts with billion-dollar Web sites—some doctors and lawyers feel they have slipped a notch in social status, drifting toward the safe-and-staid realm of dentists and accountants. It's not just

because the professions have changed, but also because the standards of what makes a prestigious career have changed.

This decline, Mr. Florida argued, is rooted in a broader shift in definitions of success, essentially, a realignment of the pillars. Especially among young people, professional status is now inextricably linked to ideas of flexibility and creativity, concepts alien to seemingly everyone but art students even a generation ago.

"There used to be this idea of having a separate work self and home self." he said. "Now they just want to be themselves. It's almost as if they're interviewing places to see if they fit them."

Indeed, applications to law schools and medical schools have declined from recent highs. Nationally, the number of law school applicants dropped to 83,500 in 2006 from 98,700 in 2004—representing a 6.7 percent drop between 2006 and 2005, on top of the 5.2 percent slip the previous year, according to the Law School Admission Council.

(Maybe they've been talking to actual lawyers. Forty-four percent of lawyers recently surveyed by the American Bar Association said they would not recommend the profession to a young person.)

The number of applicants to medical school, meanwhile, has dipped to 42,000 from 46,000 in 1997, although it has recovered from a low of 33,000 in 2003.

Students are focusing now on starring in their own creations, their own start-up businesses, said Trudy Steinfeld, the executive director of the Wasserman Center for Career Development at New York University.

"There's a sexiness to starting something cool," she said. "Now we have people trying to start a Facebook or a MySpace. You might be working like a maniac, but it's going to pay off in status. You're going to be famous, providing something people are going to know and use all over the world."

Unquestionably, many doctors and lawyers still find the higher calling of their profession—helping people—as well as the prestige and money, worth the hard work. And the stars in either field are still that: commanding the handsome compensation and social cachet. But to others, the daily trudge serves as a constant reminder that the entrepreneur's autonomy simply can't be found in law or medicine.

"We'd all seen the visions, watching 'L.A. Law; or 'Ally McBeal,'" said Catherine Kersh, 32, a former litigator at a large firm in Los Angeles. "It did seem glamorous."

Reality, she quickly learned, was different. Ms. Kersh recalled a two-week stretch in which she and a team of associates were holed up in a conference room with 50 boxes of documents. Every day, for 12 hours, they fastened Post-it notes to legal briefs.

"You look around at the other associates, trying to remind ourselves, why did we go to law school?" said Ms. Kersh, who now works for a nonprofit group that administers scholarships.

Many young associates, she added, spent their lunch hours making lavish purchases on NeimanMarcus.com, just to remind themselves that what they did counted for something.

Life, in fact, was less like "Ally" and more like "The Practice," where lawyers work like dogs in a thoroughly unglamorous setting.

Nor does hard work guarantee success. "With law firms merging, fewer people are making partner," said Carolyn Elefant, a lawyer in Washington who writes for Law.com, a legal news and information Web site.

In 2005, the number of equity partners at law firms grew by 2.5 percent, compared with 4.5 percent five years earlier, according to a study by Citi Private Bank. And even if you make partner, the work doesn't lessen.

"Partners now are often billing as many hours as the associates, because of the enormous growth of law firms," Ms. Elefant said. "There's a huge overhead. The demand for global practice means many partners having to be available to clients around the clock."

As firms demand ever more billable hours, said Lawrence J. Fox, a partner in the Philadelphia office of Drinker Biddle & Reath, lawyers find less time for pro bono work – the very thing that once gave them a sense of higher calling. Increased competitive pressures also mean that young associates are often locked into arcane sub-specialties, like pharmaceutical product liability.

The professions still largely award income in the traditional sense – a set, orderly progression, over the course of decades. Careers in more entrepreneurial industries like hedge funds and private equity firms follow the sky-is-the-limit model of the entertainment industry, the Web or professional sports.

Kevin J. Delaney, a sociology professor at Temple University who has studied the culture of hedge funds and private equity firms, said executives there "love the idea of being responsible for their own fate."

They're going to make a million or lose a million based on the trades they make," he said.

Many firms are so small, he added, that "you go there, it's one floor, and 10 people sitting around the room, six of them making millions of dollars."

This star-system mentality is particularly attractive to college students, many of whom were reared with the '80s philosophy that every child was a potential superstar, Mr. Coleman said. And they want immediate rewards – not exactly the mentality that will fuel a student through years of medical school, a residency and additional training for a specialty.

"Their attention span, everything, is instant feedback: quick, quick," Mr. Coleman said. "Apprenticeship, these kids don't want to do it."

"Gay lawyers locked in closet [:]
Law school conference told fear of discrimination alive in legal workplace"

Makin, Kirk, *The Globe and Mail*, Toronto, 02 May 2007, p. A7

A chilling atmosphere within many law firms ensures gay and lesbian lawyers who have not made their sexual orientation public will never come out, a University of Toronto law school conference was told yesterday.

Judge Harvey Brownstone, 50, of the Ontario Court of Justice, who came out while a teenager, said that while he has enjoyed only support from his fellow judges since becoming a judge in 1995, gay lawyers today often feel discriminated against at work.

"There is a great fear that it is a career limiting move to come out," he said in an interview. "I know lots and lots of closeted lawyers. Certainly, a number of gay and lesbian lawyers tell me they are in the closet." Earlier, he told the conference: "Sooner or later, you build up a big wall around yourself, or you are going to lie."

Judge Brownstone, who was the first openly gay judge in Canada appointed to the bench, said that if lawyers are inclined to be open about their sexual orientation, they may receive subtle discouragement from their colleagues: "You get the message that they don't want to know," he said.

It is, he said, particularly precarious in law firms where clients – such as churches – are sensitive to such issues or where powerful associates have strong religious views. Judge Brownstone made clear he is not against freedom of religion.

Judge Brownstone gave the example of a case where a gay lawyer in a firm that deals with a construction company was told by a senior partner that if the client suspected the lawyer they would be dealing with was gay they would lose the business.

A black judge who also spoke at the conference – Ontario Superior Court Judge Michael Tulloch – said that outdated stereotypes of blacks persist in the legal profession. "In their interactions and experiences at firms and in the profession, there is not the same level of respect that is given to white lawyers," he said.

Judge Tulloch said black layers at law firms are not mentored and encouraged the way white lawyers are. This leads to them being more likely to move to another firm, to be denied

promising work opportunities, or to miss out on judicial appointments. "It's a continuum," Judge Tulloch said, without giving specific examples.

Queen's University sociologist Fiona Kay told the conference that despite the fact that 56 per cent of new lawyers in 2006 were women, female lawyers are very underrepresented at senior levels of law firms. She said the picture is similarly grim for visible-minority lawyers, who remain "conspicuously absent from higher income levels."

Ms. Kay said the most recent survey of lawyers working in firms showed that 43 per cent of female lawyers were childless; the product of a culture that implicitly punishes women who go on maternity leave by sometimes curtailing their job opportunities and reducing their secretarial help. "Numerous lawyers commented on the stigma associated with maternity leaves," she said.

"Women outpace men in dropout rate"

Pfeiffer, Sacha, *National Post,* 20 June 2007, p. FP8.

For women, the law remains a frustrating profession.

Female lawyers continue to face intractable challenges in their attempts to become partners, causing them to abandon law firm careers—and the legal profession entirely—at a dramatically higher rate than men, according to a recent Massachusetts study.

Of the 1,000 Massachusetts lawyers who provided data for the report, 31% of female associates had left private practice entirely, compared to 18% of male associates. The gap widens among assoiciates with children, to 35% and 15% respectively—reflecting the cultural reality that women remain the primary caregivers of children and are therefore more likely to leave their firms for family reasons.

The dropout rate among women lawyers is overwhelmingly the result of the combination of demanding hours, inflexible schedules, lack of viable part-time options, emphasis on billable hours, and failure by law firms to recognize that female lawyers' career trajectories may alternate between work and family, the report found.

The report, "Women Lawyers and Obstacles to Leadership," which was produced by MIT Workplace Center in conjunction with several of the state's major bar associations, is rife with devastating commentaries on law-firm life, including one female lawyer's remark that "I would not encourage my daughters to enter the legal profession."

Among its findings:

- Women make up only 17% of law firm partners.

- Women leave the partnership track in far greater numbers than men.

- Women stop pursuing partnership mainly because of the difficulty of combining work and child care.

Nearly 40% of women lawyers with children have worked part time, compared to almost no men, even though men in the profession have more children than women, on average.

Many firms have flex-time policies but are "clever in discouraging their uses."

Of women who jump off partnership track, slightly more than half move to legal positions at non-profit groups, government or corporations, where schedules are often less grueling. But 46% leave the law altogether, compared to less than a third of men who leave the partnership track.

Lawyers who step off the partnership track can often stay at firms in other capacities, including so-called income partners. But the hours are often just as grinding, and income partners are essentially salaried employees, unlike "equity partners" whose earning potential is higher.

Mona Harrington, program director of MIT Workplace Center, says based on this and other surveys, "Nothing is changing."

"Injustice Rules"

Melnitzer, Julius, *National Post*, 20 June 2007, p. FP8.

It's only in the past few years that the companies that sew robes for lawyers in court have come out with a maternity version of the barrister's vest. While maternity jumpers have been around for about 15 years, it seems the only size they come in is extra large.

The combination, according to Jean McKenzie Leiper, professor emerita at the Department of Sociology at King's University College at the University of Western Ontario, has reduced many pregnant lawyers to looking for corpulent men and asking to borrow their vests.

Ms. Leiper's observation is one that arises from interviews with 110 Ontario-based women lawyers that she conducted during research for her book, *Bar Codes: Women in the Legal Profession,* a qualitative examination of women lawyers' attempts to reconcile their professional obligations with other aspects of their lives.

"For the most part, studies of women in the legal profession in Canada have been quantitative studies," says Mary Jane Mossman, an Osgoode Hall Law School professor. "This is one of the few qualitative studies available. It is unique because it looks only at women and does so in great detail."

The notion that things would change with more women in the legal profession have proven overly simplistic.

"Some things change and some don't," Ms. Mossman says. "What we need to do now is discover the stories of women who are lawyers because there's no point developing a theory of what's happening out there until you have a rich or thick description of the circumstances.

"Ms. Leiper's work rounds out the research in the sense that we can now take the quantitative and qualitative data and see the picture more clearly," Ms. Mossman says.

Indeed, Ms. Leiper's ultimate conclusion—driven by what are often heart-breaking accounts of the realities of practicing law as a woman and mother—supports the quantitative studies in spades. Advancement in the practice of law is still governed by rules made for men; the almighty docket, an archetypal expression of linear clock time, still drives the success bus.

"Long hours continue to define good legal practice," Ms. Leiper says. "But most women lack the kind of support that made this approach possible—the kind of support men had in the days when women would stay home, manage the household and support their husbands' career ambitions. In fact, many women lawyers remain responsible for family and household organization."

The result, Ms. Leiper's interviews disclose, is that women are to some extent still regarded as imposters in a world where the masculine value of meticulous timekeeping remains a touchstone of success.

"It's about the unstated expectations in the profession, especially the ones relating to the value of linear time as a way of measuring people's performance and the importance of straight, uninterrupted linear time as the model for career advancement," Ms. Leiper says of her study.

Hence the shock experienced by many young women lawyers after announcing their pregnancies to their firms. One individual, who practiced at a small firm after her call to the bar in 1984, had three children. She now finds herself practicing virtually in isolation with very little backing from the rest of the firm.

When she announced her first pregnancy, she was told that she had "inconvenienced the firm." The second time she was told not to expect anyone to "cover her files" in her absence.

"And then … when I told them I was pregnant with my daughter, I remember the look, and it was like – I might as well have told them I had cancer or AIDS," the woman told Ms. Leiper. "Nobody said, 'Congratulations.' "

Four hours after another woman announced her pregnancy, a senior partner walked into her office. "I couldn't fire you for being pregnant because that's illegal but if, on the other hand, I were to … notice a marked decrease in the quality of your work between now and the time you're due, and you were to be let go for those reasons, now that of course wouldn't be against the law, would it?" he said.

The problem, as Ms. Leiper sees it, is that the choices available to male and female partnership aspirants is not equal.

"So long as linear time is the measure of professional success in a society where women bear children and continue to incur a disproportionate burden of family responsibility, they will be disadvantaged."

Meanwhile, there remains the difficulty of robbing for court after the baby starts to make its presence apparent.

"There has been no substantial change in barrister attire for three to four hundred years," says Bert Harkes, general manager of Harcourt's, the venerable Toronto-based robemakers. "So I don't know why there's any expectation that attire for lady barristers would change faster."

Time marches on. So, it seems, does tradition.

"Life and the practice of law after suffering professional burnout"

Moulton, donalee, *The Lawyers Weekly*, 31 August 2007, p. 23.

The demands of the legal profession - and the professionals who thrive in that arena - can sometimes be too much to bear. The result is burnout.

With effective assistance, this state of emotional and physical exhaustion, which is caused by extreme and prolonged stress, is not permanent. For lawyers this means having to return to the workplace—and the work environment—that made them ill in the first place. For law firms and legal organizations, it means welcoming back a colleague in a way that will reassure the individual they are valued without putting them at risk for burnout—again.

The bottom line for a successful return to work after burnout: you're in this together. "My research shows that burnout is not so much an individual problem as it is a relationship problem," said Dr. Michael Leiter, Canada research chair in occupational health & wellness and director of the Centre for Organizational Research and Development at Acadia University in Wolfville, N.S.

"The relationship is that of the individual with the workplace," he added. "In personal relationships, it is difficult for one person to make profound changes without the active cooperation of the other person in that relationship. In the same way, it is very difficult for an individual to change a relationship with work without active cooperation from the organization."

A successful return to work hinges on a number of factors. From the firm's or organization's perspective, there are important approaches and accommodations that need to be made. The key,

said John Starzynski, volunteer executive director with the Ontario Lawyers' Assistance Program and president of the Mood Disorders Society of Canada, "is having someone in the firm who understands what has happened and doesn't judge (the person)."

In that same vein, it is important that the organization not inadvertently fuel speculation or expectations. "Don't give other lawyers in the firm information that will make the lawyer coming back feel like they're under the gun," said Starzynski, who has personally experienced burnout.

But, he added, "questions of reliability and competency will arise."

Preparation is critical, said Melinda Carlisle, president of Right-Hire LLC in San Jose, California. "Develop a transition plan."

Among the successful ingredients in such a plan are flexibility to balance family and job, more control over work schedule, and reduced work load, said Mary-Lou MacDonald, executive director, Atlantic Region, of the National Quality Institute.

"Often the immediate problem is workload, especially the extent to which work disrupts personal life and the capacity to regenerate energy and enthusiasm for work," said Leiter, author of *Banishing Burnout: Six Strategies for Improving Your Relationship With Work.*

The transition plan may call for a lawyer to work half-time initially or focus on particular files without having to worry about bringing in new work. It could even involve getting additional help. What it most certainly must include is recognition that work is not everything. If a lawyer needs time to attend counselling sessions or exercise over lunch, the organization must be willing to accommodate.

But scheduling and workload is not the most significant issue, said Leiter. "The more profound issues have to do with values: the extent to which the individual and the organization agree on what is really important."

"When someone comes back to work after burnout," noted Carlisle, "their values may have changed. This will affect how they make decisions, which can impact behavior."

This change is an opportunity, she added. "You use this as a coaching tool. Help them work out what has changed or shifted for them and what kind of work they want to do as a lawyer."

This help needs to begin before the lawyer comes back to the firm. "It is essential to have an explicit discussion of expectations prior to return to work and to follow these discussions up," said Leiter.

Discussion is essential for the organization and the lawyer. “Lawyers tend to isolate themselves," said Starzynski. "Lawyers think in their heads. They don't live in their feelings. That's how they get burned out."

Preventing a recurrence means that lawyers must have someone they can talk to and be honest with. This could be a spouse, a friend, a relative. It could also be someone affiliated with a Lawyer Assistance Program. "It really helps to talk with another lawyer," said Starzynski.

There are other things a lawyer recovering from burnout and returning to the workplace needs to ensure are done. First, there are the basics. Get eight hours sleep a night, exercise regularly and eat three meals a day.

"The big one is to eat lunch - and not at your desk," said Starzynski, noting that the perfectionist and driven nature of many lawyers means they put the client and the firm ahead of themselves. In the end, no one benefits.

There are deeper issues to probe as well. Lawyers need to take time to reflect. They need to reflect on their career aspirations, their limitations and the rewards they derive from work, said Leiter. "The challenge is to find a work/life pattern that is sustainable for the individual and productive for the organization."

On a larger level, firms and organizations also need to consider ways of increasing the range of work styles in the office, he added. "By accommodating a wider range of working styles, the organization can attract and retain a more diverse range of talent. That diversity may be of value to the organization in the long run."

Starzynski has one more helpful, and fun, piece of advice to help lawyers from barking up the wrong tree—and a recurrence of burnout. "Get a dog," he recommended. "This gives you exercise. And there will be somebody who is glad to see you when you come home at night.'

Kaplun v. Kaplun

45 R.F.L. (6th) 115 (Ontario Superior Court of Justice, 18 September 2007, D.M. Brown, J., paras. 9-10

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[9] How today's motion unfolded prompts me to remind all counsel who appear in motions court—be it on civil motions, estates motions or family motions—of certain basic expectations that a court has of counsel:

> (i) Motions court starts at 10:00 a.m. All counsel are expected to be ready to start at that time. The all-too-frequent practice of some counsel arriving 5 or 10 minutes after court has started, or even later, is completely unacceptable. Tardiness displays a lack of respect for the court, its staff and fellow counsel;
>
> (ii) If, for a legitimate reason, counsel is unable to be at court for 10:00 a.m., he or she should ensure that an associate attends, or opposing counsel is informed of this fact, so someone can advise the court registrar before 10:00 a.m. that the matter may be delayed.

While opposing counsel may represent contending interests in a lawsuit, as officers of the court they are under a duty to the court to communicate accurately and impartially any request by the other counsel to stand a matter down for a short while;

(iii) The brochure, *Principles of Civility for Advocates* published by The Advocates' Society, captures well the primary obligations of counsel:

> 1. Counsel should always be courteous and civil to Counsel engaged on the other side of the lawsuit or dispute… .
>
> 2. All feelings that may exist between clients, particularly during litigation, should not influence Counsel in their conduct and demeanour toward opposing counsel.

(iv) When scheduling a motion, counsel should consult the responding side before setting a date "in a genuine effort to avoid conflicts": *Principles of Civility for Advocates*, No. 11;

(v) Requests for adjournments should be communicated to opposing counsel well in advance of the hearing date. This should permit counsel to work out, if possible, terms of adjournment. The not uncommon practice of "Adjournment by ambush" is unacceptable;

(vi) Counsel should follow two basic rules of courtroom etiquette:

> a. When one counsel is standing to make submissions, the other should sit down. I am amazed at how many lawyers think that success in motions court depends upon "the last person standing"; and,
>
> b. Avoid "jack-in-the-box" advocacy. Courts will hear from the moving party, with a reply afforded to the moving party. Standing up to interject repeatedly during opposing counsel's oral argument on a motion is rude and wastes time. Counsel should deal with any disputed matter in responding or reply argument. As one of the senior members of this court once put it, the only time counsel should interrupt another is to make a concession.

[10] Motions court lists usually are long. For motions court to work efficiently and fairly, the court depends upon counsel observing the "Three Cs" – Courtesy, Civility and Co-operation.

"When a lawyer becomes mentally impaired"

Geraghty, Peter H., *ABAnetwork*, June 2006
(*in part*)

A partner in a law firm believes that another member of his firm has become mentally impaired due to illness, age or substance abuse and is concerned that the lawyer may not be able to provide competent and diligent representation to his clients.

- What are a partner's or supervisory lawyer's obligations with respect to an impaired lawyer?

- What if any disclosures need to be made to the impaired lawyer's clients?

- Does a lawyer have a duty to report a rule violation by an impaired lawyer?

- What are a lawyer's obligations when the impaired lawyer is not a member of the lawyer's firm?

… ABA Ethics Opinions

Two recent ABA ethics opinions, 03-429 [PDF] *Obligations with Respect to Mentally Impaired Lawyer in the Firm* (2003) and 03-431 [PDF] *Lawyer's Duty to Report Rule Violations by Another Lawyer Who may Suffer from Disability or Impairment* (2003) address some of the issues implicated in the above scenario.

Formal Opinion 03-429 addressed these issues in the context of a lawyer's obligations where the impaired lawyer is a member of the lawyer's firm. The headnote of this opinion states:

> If a lawyer's mental impairment is known to partners in a law firm or a lawyer having direct supervisory authority over the impaired lawyer, steps must be taken that are designed to give reasonable assurance that such impairment will not result in breaches of the Model Rules. If the mental impairment of a lawyer has resulted in a violation of the Model Rules, an obligation may exist to report the violation to the appropriate professional authority. If the firm removes the impaired lawyer in a matter, it may have an obligation to discuss with the client the circumstances surrounding the change of responsibility. If the impaired lawyer resigns or is removed from the firm, the firm may have disclosure obligations to clients who are considering whether to continue to use the firm or shift their relationship to the departed lawyer, but must be careful to limit any statements made to ones for which there is a factual foundation. The obligation to report a violation of the Model Rules by an impaired lawyer is not eliminated by departure of the impaired lawyer.
>
> . . . .

Formal Opinion 03-431 addressed a lawyer's obligations to report a rule violation by another lawyer that is not in his firm whom the lawyer believes suffers from a mental condition that materially limits the subject lawyer's ability to represent the client. As in Opinion 03-429, the opinion stated that the lawyer may consider consulting with a mental health care professional in order to determine how to proceed. It also suggested contacting an established lawyer assistance program (LAP). If the impaired lawyer is practicing within a law firm, the lawyer might also consider contacting the subject lawyer's partners or supervisory lawyers regarding the matter. The

opinion concludes that if the subject lawyer's impairment raises a substantial question as to the subject lawyer's fitness to practice, the lawyer may have an obligation to report under Rule 8.3. The opinion cautions that since under most circumstances, the lawyer will learn of the other lawyer's impairment through the representation of a client, he should obtain his client's consent under Rule 1.6 before he makes the report.

"Lawyer takes dispute into cyberspace"

***Canadian Lawyer*, August 2006, pp. 8-9**

When Vancouver lawyer Joseph Briante, 31, felt he was the victim of discrimination at his former firm of Fasken Martineau DuMoulin LLP, he started a blog and aired his laundry on the Internet, including on popular legal gossip message board lawbuzz.ca.

In Briante's mind, he claimed he had been the victim of unprovoked verbal attacks from a senior partner at the firm.

"I am routinely scoffed, hissed, and huffed at by this individual whenever I am near him," he wrote. "These incidents are but the tip of the iceberg – I am well aware of innumerable rumours as regards to my sexual orientation which commensurate with the cold-shouldering staff …. As for my rampant friendliness, I similarly make no apologies: I simply operate as a Corporate Jesus or Office Buddha."

He wrote in his rather lengthy missive that the firm thought he was dressed too snappy and was "too gay" for the firm.

"It's called style, folks, and it's an immutable reflection of my personality, imagination, and a manifestation of my creative expression," he wrote. "My wardrobe is a source of considerable joy because fashion adds beauty and colour to life. Holt Renfrew loves me and the folks who I chat with every day when I'm waiting for the bus or when I'm buying my morning cannoli seem to get a kick out of my wardrobe, too.

"I get daily compliments on my spunky style from complete strangers on the street!"

After circulating the email letter to lawyers in other firms, and posting on lawbuzz, Briante was told to stay away from the office and work from home instead. Briante then created a blog, Hardcore Superstar, and began posting accounts of his dealings with people in the firm.

He also made accusations of employee harassment and suggested the firm adopt an open forum to address the issues, "perhaps something modeled after the truth and reconciliation commission in South Africa."

Shortly thereafter, Briante resigned, ending a seven-month relationship with the firm.

FMD released a brief statement to the media, noting that a full investigation into the allegations is underway. Briante has since removed all references to FMD on his site.

Walker v. Walker

(2006), 27 R.F.L. (6th) 209 Ont. Sup. Ct. J (Comm.List). C. Campbell, J.,
(*Headnote (in part); paras 16-22, 24-33.*)

Settlement agreement was reached between solicitors for all three parties – Plaintiff … [husband's] former solicitor paid … [what was agreed under an agreement based on an exchange of solicitor letters and signed a release] – Wife resiled from agreement on basis that she did not consent to it – Plaintiff applied to enforce terms of agreement – Application granted – Settlement was complete notwithstanding it required agreement to terms of order incorporating agreement - Wife's solicitor had ostensible authority to conclude settlement on her behalf – There was no reason for court to exercise discretion not to enforce agreement – Any prejudice suffered by wife could be redressed by claim against her solicitor – Plaintiff was entitled to any costs or penalties resulting from wife's default in payment.

. . . .

[16] [the wife's present lawyer]…, submits that the correspondence and affidavit evidence before the Court demonstrates that there was no completed settlement agreement, since the form of order had not been finalized.

[17] In particular, he points to a letter from…[the husband's lawyer]… to…[the wife's former lawyer] dated November 24, 2005, when he asked to see the draft consent judgment so "I might see it just to ensure that we are all *ad idem* (although I have absolutely no reason to believe that we are not.)"

[18] Based on the material before me, I have concluded that there was a settlement reached on or about November 9, 2005 among counsel for … [the wife], counsel for … [the husband] and counsel for … [the husband's] former solicitor, each of whom had actual or ostensible authority to complete it on behalf of their respective clients.

[19] The fact that the settlement necessitated agreement to the terms of an order that would deal with the matters in the action does not detract from the basic premise that there was agreement. The comment of … [the husband's former lawyer] above supports rather than detracts from there being a settlement agreement.

[20] The leading case in this Province on the issue of a lawyer's authority to enter into a settlement on behalf of a client has been and remains *Scherer v. Paletta*, [1966] 2 O.R. 524 (Ont. C.A.) at p. 525. Evans J.A. speaking for the Court said:

> The authority of a solicitor arises from his retainer and as far as his client is concerned, is confined to transacting business to which the retainer extends and is subject to the restrictions set out in the retainer... and client, having retained a solicitor in a particular matter, holds that solicitor out as his agent to conduct the matter in which the solicitor is retained.

[21] On the material before me there is no doubt that … [the wife's former lawyer] was retained and …, he had ostensible authority and did conclude a settlement on behalf of his client.

[22] There is no ambiguity in the terms. The only question is to whom the various … financial amounts was to be paid and the seeking of confirmation that it would be paid as well as the formal terms of the order. This is not a case of mistake on the part of the lawyer, as was the case in *Milios v. Zagas* , [1998] O.J. No. 812 (Ont. C.A.) As Borins J. (as he then was) said in *Belanger v. Southwestern Insulation Contractors Ltd.* (1993), 16 O.R. (3d) 457 (Ont. Gen. Div.) at p. 467:

> If litigants were not bound by settlements made by their lawyers acting within the scope of their actual or apparent authority, the legal profession could not function as there could never be certainty that a settlement reached by their lawyers on their behalf was final and unimpeachable.

I agree with that statement.

. . . .

[24] … [the wife's former lawyer] submits and I agree that the Court does have a discretion as to whether or not a settlement agreement should be enforced. The factors to be taken into account are set out in the decision of the Court of Appeal in *Milios v. Zagas*, *supra* at p. 222.

[25] It is urged here that the prejudice to [the wife] is that enforcement of the settlement would burden her with a financial obligation, which she says she never authorized and that this arises from a claim for rectification in a separation agreement as against her. As a result, it is submitted that not only is there a monetary penalty but if the settlement is enforced she will be unable to obtain relief with respect to the Separation Agreement that would have been open to her if she were able to advance her position in the trial that was cancelled.

[26] As against this position, it is argued on behalf of …[the wife] that with the agreement that has been concluded with the insurer of his former solicitor, he is significantly prejudiced since he will not be able to obtain any further contribution should he be required to pursue his rectification claim. Counsel for the former solicitor supports this submission and adds that any attempt to re-open that part of the settlement will be strongly resisted.

[27] I have concluded that any prejudice that may be said to have been suffered by …[the wife] can in fact be redressed. If …[the wife's] version of events is correct, [her lawyer] never had the authority that he ostensibly exercised on her behalf in concluding settlement. She can obtain redress for any lack of authority in a claim against…[her former lawyer]. (That is one issue on which I make no conclusion at all.)

[28] It is submitted that … [the wife] simply does not have the means to make the payment contemplated under the settlement. (I note that she has not paid even the amount she says she authorized her counsel to offer.)

[29] … [the husband] sought rectification of the Separation Agreement since the effect of it is to require greater payment to the tax authorities than he says the parties believed he would have to make. There will be ongoing costs if these payments are not made.

[30] In my view, the settlement should be upheld. Any real prejudice suffered by…[the wife] if she is correct can be redressed in her claim against…[her former lawyer] .

[31] An order will issue in terms of the notice of motion subject to the following condition. If Margaret Walker does not pay the settlement amount agreed to on her behalf by her then counsel, any writ of execution in enforcing the order will not be exercised without further order of the Court.

[32] Margaret Walker is entitled to pursue any claim she may have against …[her former lawyer] if so advised. In addition to the settlement amount herein, there shall be added any additional costs or penalties that … [the husband] may incur by reason of his having to pay Canadian Revenue Agency as a result of default in payment by …[the wife] under the Settlement Agreement.

[33] If … [the wife] does not make payment under the Settlement Agreement, and is unsuccessful in any claim she may make against [her former lawyer], then she shall be responsible for any further costs or penalties that …[the husband] may incur as a result of the settlement not being fulfilled at this time.

3.8 Relationships with Courts

"Immigrant plaintiff gets new trial for 'offensive' remarks by defence counsel"

Claridge, Thomas, *The Lawyers Weekly*, 14 March 2008, p. 2

Ontario's Divisional Court has ordered a new trial for a personal injury plaintiff on grounds inflammatory remarks by an insurer's lawyer may have led the jury to deny the plaintiff any damages and find he was not injured when his car was rear-ended in 2001.

With Justice Dennis Lane concurring, Justice Anne Molloy described the closing remarks of William Evans, an in-house counsel for Aviva Canada Inc., as "irrelevant, inappropriate and offensive."

She said the remarks were "irrelevant to any issue properly before the jury and appear to have been designed to inflame their emotions rather than appeal to their rationality."

In the remarks, he portrayed the plaintiff, Abdallah, as a malingerer who had worked only briefly since coming to Canada from the West Bank in 2000, has sent his family back to the Middle East, and "now [is] here asking for money from my client."

Continuing to portray himself as having the other driver, Aviva policyholder Bozena Snopek, as the client who would have to pay any damages, Evans added: "Ask yourself what you think will happen if you order my client to pay him money … . It's a serious matter to drag someone through a lawsuit and use this court's time. Does Ms. Snopek look happy to be here?"

The lawyer asked the jurors whether they thought Abdallah would "take that money and sit around the house for the next five years and use it for medical treatment, or do you suspect he may find energy and back strength to start his own business, perhaps not even in this country? Which do you think is more likely to happen?"

Declaring that the accident "should not be an opportunity for Mr. Abdallah to get a leg up on everyone else who comes to this country trying to start a new life," or give him a down payment for a house, an early retirement fund or "seed capital for a new business anywhere," Evans said the plaintiff "should get nothing."

Although much of the case law cited dealt with inflammatory remarks by plaintiffs' counsel, Justice Molloy maintained that it should apply equally to defence lawyers.

She said many of the comments "went beyond irrelevant and were just plain offensive. For example, to make the statement, 'sure he loves Canada. Why not? What's not to love?' immediately after a recitation of facts insinuating that Mr. Abdallah is an immigrant ripping off Canada's social welfare system, is offensive in the extreme."

That, and his comment that Ontario's court's "are not an ATM machine," had gone "far beyond the bounds of decorum. They are inflammatory."

Abdallah's appeal counsel, Adam Little of Barrie's Oatley, Vigmond LLP, said the majority's decision should serve "as a warning to insurance companies that our courts will not allow this type of tactic. It was improper for defence counsel to suggest to the jury that nationality, race or dedication to Canada were factors to consider in assessing credibility or the legitimacy of a person's injuries."

Alan Rachlin, of Toronto's Rachlin & Wolfson LLP, acted for the respondent.

"Courtroom uproar continues as lawyer ends up testifying"

Makin, Kirk, *The Globe And Mail*, 10 January 2007

A Toronto defence lawyer ended up in the witness box and an ex-biker admitted to lying under oath, in a bizarre series of events yesterday that has left a controversial criminal trial on the verge of collapse.

Visibly exasperated by the end of the day, Ontario Superior Court Judge Nancy Mossip said she would consider overnight whether to scuttle the trial, which drew headlines last month after a profane yelling match between defence counsel Reid Rusonik and the ex-biker, Todd Kealy, almost turned into a brawl.

"This trial seems to come around and bite me every time I get on the dais," Judge Mossip said, following several hours spent refereeing enraged lawyers and coaching Mr. Kealy to control his anger.

"Simply speaking, this is a disaster zone," prosecutor Stephen Sheriff observed. "This has gone too far. We have to end this. It won't work."

Mr. Rusonik represents Shawn Anthony Vassel, who is charged with attempting to murder Mr. Kealy and a friend, Felix Brito. The Crown alleges that after a brawl outside a Mississauga housing development known as "the Bronx," Mr. Vassel chased after Mr. Kealy and Mr. Brito and fired a shot through the window of their car.

In December, pandemonium broke out in the courtroom after Mr. Kealy responded sarcastically to one of Mr. Rusonik's questions by saying: "If you want to put a noose around your neck, go ahead."

Infuriated, Mr. Rusonik called out: "You're so frigging tough, lets go. You think you're brave, eh? If you want to step outside right now we can do it the way you want to do it. Let's just go hand to hand."

Over the Christmas break, Judge Mossip salvaged the trial by issuing an order that Mr. Rusonik stay outside the courtroom and avoid Mr. Kealy for the duration of his testimony while a defence colleague, Nathan Gorham, took over.

But the truce came unglued yesterday when Mr. Sheriff, the prosecutor, discovered that Mr. Rusonik had approached Mr. Kealy in the courthouse hallway during the lunch hour and spoken to him.

"That's it for me," Mr. Sheriff declared angrily to the judge. "I am aghast that Mr. Rusonik would try to speak to Mr. Kealy. You shouldn't have to take any more of this. This shows unconscionable disrespect for the court.

"We already had the most outrageous display I have ever heard of in a courtroom, let alone witnessed," he said. "We witnessed near violence here, where court staff were in peril…."

Mr. Sheriff said that it was ethically improper for [defence counsel] Mr. Rusonik to approach the witness, particularly in light of the fact that [Crown witness] Mr. Kealy had just been threatened with contempt of court for refusing to identify the man who shot at him on the grounds that his personal code of ethics prevent him from being "a rat."

"This was a critical moment in time, when the witness was making new revelations," Mr. Sheriff said. "I'm not for a moment accepting that this was an innocuous exchange."

By entering the witness box to defend his actions, Mr. Rusonik effectively ended his role in the case. He testified that he approached Mr. Kealy largely as a "human exchange" borne of his concern that Mr. Kealy may want to exact revenge against Mr. Rusonik and his family. Mr. Rusonik said that his fear arose last week after someone damaged his car and some incidents "on the roadway" caused him concern.

Judge Mossip said she intended to decide the mistrial issue prior to deciding what to do about Mr. Kealy's refusal to identify who tried to kill him.

"Legal consultants go hardcore"

***The Globe And Mail*, 10 January 2007, p. B7**

Hell hath no fury like a lawyer scorned. Remember Joseph Briante? He's the intellectual property lawyer who became a global blog sensation last June when he noisily quit the Vancouver

office of Fasken Martineau DuMoulin after declaring in a widely circulated e-mail he was "too gay" for the firm's staid, buttoned-down partnership. Well, Mr. Briante is creating waves again, this time as a legal consultant helping businesses that are being "hosed" by law firms operating "on a model of deliberate inefficiency based on the billable hour."

Not one to shy away from controversy, Mr. Briante and his partner Theresa Holiday James, a former McCarthy Tetrault lawyer, have named their new business Hardcore Superstar Legal Management Corp. and branded their maverick website with gritty street portraits of the duo that could qualify for a punk rock album cover. Since it opened in August, Mr. Briante says Hardcore has attracted a dozen clients in the film and software business who are turning to him for advice about streamlining legal costs. When one client retained him to apply for a patent for a new film special effects technique, Mr. Briante advised him not to apply for a patent because it would cost $25,000 and reveal the invention to competitors. "Sometimes the best advice you can give is to avoid legal services," he said.

"Private talks[:]
Lawyers shouldn't have ex parte communications with judges - except when it's OK"

Thompson, Kathryn A., *ABA Journal*, February 2007, p. 20
(*in part*)

The Ethics Rule Regulating Ex Parte communications with judges sounds simple enough.

In the ABA Model Rules of Professional Conduct, which serve as the basis for most rules of professional conduct for lawyers, Rule 3.5(b) prohibits lawyers from communicating ex parte with judges and other court officials (as well as jurors and prospective jurors) during a proceeding, except as permitted by law or court order.

So far, so good. But determining precisely what constitutes ex parte contacts – and how the rule should be applied in the wider context of statutes, case law and court rules, and separate rules of conduct for judges can be a daunting task.

The prohibition against ex parte communications with judges is designed to protect the opposing party's right to a fair hearing and, ultimately, the impartiality and integrity of the courts. Communications are commonly understood to be ex parte if made by one party outside the record without giving the other party notice or an opportunity to respond. Besides in-person contacts, the rule covers communication by telephone, letter, e-mail and any other modes.

Lawyers should ensure that notice to opposing counsel is made in the same manner and time as the communication with the judge. The Philadelphia Bar Association's Professional Guidance Committee, for example, determined in Ethics Opinion 98-15(1999) that it was improper to fax or e-mail a communication to a judge while sending it to opposing counsel by regular mail.

The most vexing aspect of Rule 3.5(b) is whether a given communication falls within the rule's "authorized by law" exception, which encompasses statutes, case law, court rules, court orders—and sometimes even other ethics rules.

In civil matters, a lawyer's ex parte contacts with a judge sometimes are authorized by state or federal laws of civil procedure. Rule 65(b) of the Federal Rules of Civil Procedure, for instance, sets forth specific procedures for requesting a temporary restraining order from a judge on an ex parte basis. And in *In re Jordan*, 652 P.2d 1268 (1982), the Oregon Supreme Court dropped a disciplinary complaint against a lawyer who had obtained an ex parte restraining order against a spouse in a dissolution proceeding because a state statute specifically allowed judges to enter restraining orders without providing notice to opposing counsel.

"Top judge sounds alarm on trial delays"

Makin, Kirk, *The Globe And Mail*, 09 March 2007, pp. 1, 6.
(*in part*)

The Chief Justice of Canada's Supreme Court warned Thursday that the justice system is increasingly plagued by trials that drag on too long, litigants who cannot afford a lawyer and unjustifiable delays.

The problem of sprawling trials has become "urgent," Chief Justice Beverley McLachlin said in a speech to Toronto's Empire Club. "Not too many years ago, it was not uncommon for murder trials to be over in five to seven days. Now, they last five to seven months."

Civil trials have also ballooned in length, Chief Justice McLachlin said. In just six years, she said, the average length of a trial in Vancouver expanded to 25.7 hours from 12.9 hours.

Delays in simply getting a case to the trial stage come at a tremendous cost to both those caught up in the justice system and to the notion of true justice, she added.

"Not only is there an erosion in the witnesses' memory with the passage of time, but there is an increased risk that a witness may not be available to testify through ordinary occurrences of sickness or death. As the delay increases, swift, unpredictable justice—which is the most powerful deterrent to crime—vanishes. These personal and social costs are incalculable."

In recent years, eroding access to justice has been a concern for the Canadian Bar Association and most other lawyers' groups. Senior judges at every level have expressed alarm about the erosion of the court system. Coming from the country's top judge, yesterday's statement carried particular weight.

In her speech, Chief Justice McLachlin deplored the fact that courtrooms are “filled” with litigants who cannot afford lawyers and instead try to navigate complicated legal procedures and arguments on their own.

“Others simply give up,” she said.

She said that wealthy litigants can generally afford private lawyers, and those at the lowest income levels tend to qualify for legal aid. “Hard-hit are average, middle-class Canadians,” she said. “They have some income. They may have a few assets, perhaps a modest home. This makes them ineligible for legal aid.

“But at the same time, they quite reasonably may be unwilling to put a second mortgage on the house or gamble with their child's education or their retirement savings to pursue justice in the courts.”

Chief Justice McLachlin said that, in many cases, people simply cannot wait years to obtain a resolution to a business dispute or a family matter. The end result is that parents may consume precious family assets fighting for the custody of a child, or they may give up altogether.

“Such outcomes can only with great difficulty be called ‘just,'” she said. “It is not only the self-represented litigants who are prejudiced. Lawyers on the other side may find the difficulty of their task greatly increased, driving up the costs to their clients. Judges are stressed and burned out, putting further pressures on the justice system. And so it goes.”

Chief Justice McLachlin added that the presence of a self-represented litigant has the undesirable effect of forcing a judge to abandon his or her role as impartial arbiter to help the litigant present his case.

The sources of a great many trial delays include increasing complexity of legal motions under the Charter of Rights, the use of expert witnesses and unnecessary adjournments, the chief justice said.

"Not a great body of work"

Pannick, Q.C., David, *The Times*, London, 27 March 2007

Judy Sheindlin was a Manhattan family court judge before she joined the entertainment business to star in Judge Judy, the television programme in which she resolves “real” disputes. *Don’t Pee on My Leg and Tell Me It’s Raining*, the title of her bestselling book, gives a fair indication of her judicial style. Another family court judge, Larry Seidlin, of Broward County circuit court, Florida, would like a television series of his own. The bizarre legal proceedings last

month in which Judge Seidlin determined where Anna Nicole Smith should be buried were a prolonged audition for his talents.

Smith was an "exotic dancer" and *Playboy* pin-up who married Howard Marshall ll, a Texas oil billionaire, in 1994 when he was 89 and she was 26. After his death in 1995 his family and Smith battled over who should inherit what from his fortune. This was a legal dispute about very substantial assets—those of the estate and those of the surgically enhanced Smith. Last year the United States Supreme Court ruled that she was entitled to pursue her claim in a federal court. The case was pending when, on February 8, Smith was found dead in a Florida hotel room.

Judge Seidlin had to decide the fairly routine question of who should have custody of Smith's mortal remains. He heard a week of evidence and argument, all of it broadcast live on cable television. Smith, an aspiring actress whose career never took off, would have been dismayed that in a legal drama about her life and loves she was reduced to a small supporting role in a show that starred the judge.

Judge Seidlin began by referring to the body as "that baby" and claimed that it "belongs to me now". He frequently interrupted the proceedings to talk about his clothes ("When I used to teach tennis, I used to wear white shorts and a white top. It always looked good"), his younger days as a taxi driver in New York, and how his "wife won't let me come home". He referred to those involved in the case by nicknames. Among the lawyers were "Texas", "Houston" and "California". Smith's mother was "Momma". Dr Joshua Perper, the medical examiner, was "Dr Pepper". The judge told one female lawyer that she was beautiful. He took phone calls on his mobile from his wife during the hearing. He carried out his morning exercise routine in front of the cameras. Court orders otherwise unknown in civil procedure were pronounced, including (and I recommend this to our Court of Appeal for use in appropriate cases): "Stay loose. As a goose."

From time to time, Judge Seidlin offered words of legal wisdom to those in the courtroom, and viewers watching at home. "The wheels of justice aren't always round," he mused. "It's a bumpy ride like the Old West." And, he cautioned: "I'm not always going to be on that ride with you." Many of his reflections were banal ("Let's face it. Money is the root of all evil. Am I right?"). But others had a poetic quality that almost made up for their legal irrelevance: "We all come with some broken suitcases." But this was litigation as therapy, for witnesses as well as the judge. When Smith's mother, Virgie Arthur, gave evidence that she had wanted to be a ballerina, Judge Seidlin reassuringly replied: "It's never too late."

Judge Judy decides each case within the allocated 30 minutes. With Smith's embalmed body beginning to decompose at a county mortuary, Judge Seidlin finally brought this extraordinary exercise in legal necrophilia to a close by giving judgment two weeks after the death. He awarded custody of the corpse to the court-appointed guardian for Smith's five-month-old daughter. In announcing his decision, Judge Seidlin shed tears and choked with emotion. "I want her buried with her son [who had died of a drugs overdose last autumn] in the Bahamas," he sobbed. "I want them to be together." His wish was granted.

Judge Seidlin, who has been on the Bench for 29 years, was described by CNN's senior legal analyst, Jeffrey Toobin, as "one of the least competent judges I have ever seen". The highly

competent Toobin understandably added that "this may be the most ridiculous legal proceeding I have ever watched."

The biblical injunction "judge not, that ye be not judged" (Matthew vii, 1) was echoed by Abraham Lincoln in his second inaugural address in 1895 ("let us judge not that we be not judged"), as pointed out in the excellent new *Yale Book of Quotations* (edited by Fred R. Shapiro, Yale University Press, £29.95). The judicial performance of Larry Seidlin has been judged, and found to be abysmal. His wife Belinda told ABC News: "People who know him, and people who meet him on the street all say the same thing, 'You should have your own television show'." The presiding judge of the Broward Country circuit should call in Judge Seidlin and tell him that the public interest demands that the courts don't hold him back.

"Undisclosed Legal Assistance to Pro See Litigants"

American Bar Association [Standing Committee On Ethics And Professional Responsibility], Formal Opinion 07-446, 05 May 2007

A lawyer may provide legal assistance to litigants appearing before tribunals "pro se" and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance.

Litigants appearing before a tribunal "pro se" (representing themselves, without counsel) sometimes engage lawyers to assist them in drafting or reviewing documents to be submitted in the proceeding. This is a form of "unbundling" of legal services, whereby a lawyer performs only specific, limited tasks instead of handling all aspects of a matter. We discuss in this opinion whether the Model Rules of Professional Conduct at any point require a lawyer so engaged to disclose, or ensure the disclosure of, the fact or extent of such assistance to the tribunal or to adverse parties.

State and local ethics committees have reached divergent conclusions on this topic. Some have opined that no disclosure is required. Others, in contrast, have expressed the view that the identity of the lawyer providing assistance must be disclosed on the theory that failure to do so would both be misleading to the court and adversary counsel, and would allow the lawyer to evade responsibility for frivolous litigation under applicable court rules. Interpreting the Model Code of Professional Responsibility, predecessor to the Model Rules, this Committee took a middle ground, stating that disclosure of at least the fact of legal assistance must be made to avoid misleading the court and other parties, but that the lawyer providing the assistance need not be identified.

Whether the lawyer must see to it that the client makes some disclosure to the tribunal (or makes some disclosure independently) depends on whether the fact of assistance is material to the matter, that is, whether the failure to disclose that fact would constitute fraudulent or otherwise

dishonest conduct on the part of the client, thereby involving the lawyer in conduct violative of Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c) [abanet.org]. In our opinion, the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure. Some ethics committees have raised the concern that pro se litigants "are the beneficiaries of special treatment," and that their pleadings are held to "less stringent standards than formal pleadings drafted by lawyers." We do not share that concern, and believe that permitting a litigant to file papers that have been prepared with the assistance of counsel without disclosing the nature and extent of such assistance will not secure unwarranted "special treatment" for that litigant or otherwise unfairly prejudice other parties to the proceeding. Indeed, many authorities studying ghostwriting in this context have concluded that if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage. As stated by one commentator:

> Practically speaking ... ghostwriting is obvious from the face of the legal papers, a fact that prompts objections to ghostwriting in the first place .... . Thus, where the court sees the higher quality of the pleadings, there is no reason to apply any liberality in construction because liberality is, by definition, only necessary where pleadings are obscure. If the pleading can be clearly understood, but an essential fact or element is missing, neither an attorney-drafted nor a pro se-drafted complaint should survive the motion. A court that refuses to dismiss or enter summary judgment against a non-ghostwritten pro se pleading that lacks essential facts or elements commits reversible error in the same manner as if it refuses to deny such dispositive motions against an attorney-drafted complaint.

Because there is no reasonable concern that a litigant appearing pro se will receive an unfair benefit from a tribunal as a result of behind-the-scenes legal assistance, the nature or extent of such assistance is immaterial and need not be disclosed.

Similarly, we do not believe that nondisclosure of the fact of legal assistance is dishonest so as to be prohibited by Rule 8.4(c). Whether it is dishonest for the lawyer to provide undisclosed assistance to a pro se litigant turns on whether the court would be misled by failure to disclose such assistance. The lawyer is making no statement at all to the forum regarding the nature or scope of the representation, and indeed, may be obliged under Rules 1.2 and 1.6 not to reveal the fact of the representation. Absent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Rule 8.4(c). For the same reason, we reject the contention that a lawyer who does not appear in the action circumvents court rules requiring the assumption of responsibility for their pleadings. Such rules apply only if a lawyer signs the pleading and thereby makes an affirmative statement to the tribunal concerning the matter. Where a pro se litigant is assisted, no such duty is assumed.

We conclude that there is no prohibition in the Model Rules of Professional Conduct against undisclosed assistance to pro se litigants, as long as the lawyer does not do so in a manner

that violates rules that otherwise would apply to the lawyer's conduct. Accordingly, ABA Informal Opinion 1414 is superseded.

[**Editor's Note:** Dated 04 April 2008, and published shortly afterwards by The Law Society of British Columbia, is a comprehensive and constructive "Report of the Unbundling of Legal Services Task Force[:] Limited Retainers: Professionalism And Practice." The Report (p. 4) is "intended to encourage reform that will provide guidelines for the delivery of limited scope legal services, and thereby enhance access to justice by providing certainty and structure to their provision for clients, the courts and the overall community."]

"Wigs, gowns stay in British criminal courts, but shucked in civil, family"

***The National Post*, 13 July 2007, p. A3**

Judges and lawyers are to keep their wigs and gowns in criminal courts in England and Wales. Lord Phillips, Britain's Lord Chief Justice, said the 18th–century-style horsehair wigs and flowing gowns would stay, although there would be some seasonal variations to judges' robes in the higher courts. But from Jan. 1 next year, judges and lawyers will ditch their hairpieces in civil and family courts. The changes come as a result of consultations on the reform of legal attire. A survey of 1,600 members of the public and 500 court users suggested more than 64% thought court dress should be modernized. The idea has met with disapproval from some lawyers who feel the wigs give them an air of authority as well as anonymity.

"The self-representation problem"

Slayton, Philip, *Canadian Lawyer*, November/December 2007, pp. 30, 33

There's something new on the Supreme Court of Canada's web site. Now you can get tips on representing yourself in leave to appeal proceedings. But the web site gives a stern warning: "Remember that this is a guide meant to give you helpful information, **not legal advice**. We always recommend that you get a lawyer."

If you click on the button marked "self-represented litigant who wants to apply for leave to appeal," you are offered extensive and helpful questions and answers, forms to fill in, checklists, etc.—plus another warning to consult a lawyer: "It is a good idea that you get a lawyer as the procedure is complicated. ….Even if you end up representing yourself, you should talk to a lawyer about your case." If you click on "self-represented litigant who has been named as a

respondent on an application for leave to appeal," you get the mirror image of the information and advice offered those seeking leave, including the warning to consult a lawyer.

Of course, a person's right to represent himself goes beyond merely seeking leave to appeal or responding to somebody else's application. Should leave be granted, you are free to argue your case in person, although the Supreme Court web site doesn't make this entirely clear. If you represent yourself in seeking leave to appeal, are you less likely to get leave than if a lawyer does the job? The published Supreme Court statistics are silent on this point, although they do tell us that, in most years, only between about 10 to 15 per cent of leave applications are successful.

Self-representation is not an occasional thing. The Ontario Ministry of the Attorney General reports, for example, that on average 46 per cent of litigants were unrepresented litigants in Ontario family courts between 1998 and 2003.

There's a lot of angst surrounding the issue. For a start, judges don't like parties representing themselves because it makes their job much more difficult. When I was a law clerk at the Supreme Court of Canada many years ago, I worked for Justice Wilfred Judson, a patient and polite man. The only time I ever saw him lose his temper was when a husband representing himself in matrimonial proceedings gave a detailed account of what he and his estranged wife used to have for breakfast. "I don't give a damn what you had for breakfast," said Judson. "Get on with it!" You're not likely to get a proficient and economical legal argument from a layperson who is emotionally involved in the case. Someone making a mess of his argument puts the judge on the spot.

In a speech at the 2006 Canadian Bar Association annual conference, Chief Justice Beverley McLachlin said the growing trend of self-representation was putting great strain on the judicial system. The chief justice said of litigants representing themselves, "The judge is faced with telling them what the law is, telling them what procedures are available to them, and try to help that person while remaining an impartial arbiter." Some months later, in her important May 2007 speech to the Empire Club of Toronto, the chief justice said, "Our courtrooms today are filled with litigants who are not represented by counsel, trying to navigate the sometimes complex demands of law and procedure." (McLachlin's Empire Club speech, available on the Supreme Court's web site, *www.scc-csc.gc.ca/aboutcourt/judges/speeches/Challenges_e.asp*, should be read by every Canadian.) To ask a judge to preside over such proceedings does nothing for the integrity and efficiency of the legal system.

Nor are practising lawyers fans of self-representation. That's not because self-representation deprives lawyers of work; litigants appearing in person generally do so because they can't afford to hire anybody. Practising lawyers don't like self-representation because it's difficult to engage with someone who doesn't know the law and doesn't know how cases are prepared and argued.

Finally, from a public-policy point of view, self-representation doesn't seem like a good idea at all. The burden on the court system is already huge. Delays are inordinate. Throwing open the courtroom doors to the uninformed and inexperienced is not going to help. Clogging the court with amateurs is costly.

And so, what are those self-representation buttons doing on the Supreme Court of Canada's web site? Part of it, presumably, is making the best of a bad job, a practical attempt to bring some order into chaos. If litigants are going to show up in person and plead their own case, they should be helped to do it as well as possible—at least the forms should be filled in properly. Part of it, I suppose, is a reluctant recognition of a person's fundamental right, inefficiency be damned, to represent themselves in the courtroom.

The self-representation issue, surrounded by anxiety and apprehension, is an expression of the legal system's biggest problem. How do citizens of Canada get access to justice? McLachlin told the Empire Club, "Unfortunately, many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system. Some of them decide to become their own lawyers. …. Others simply give up." Later in that same speech, the chief justice described the plight of the average middle-class Canadian faced with litigation: "Their options are grim: use up the family assets … become their own lawyer; or give up." Must the words "give up" be inscribed on every courthouse portal in the land?

Various solutions have been suggested. Some say that lawyers should voluntarily lower their fees; this is not likely to happen unless market conditions dictate, and there is no sign of that. It has been suggested that the GST on legal services should be removed, but removal of a six [now five] per-cent tax [HST of 13% in Newfoundland and Labrador] will have no discernible effect on the problem. The answer, I think, is a comprehensive national legal insurance plan, but expect violent opposition and many years to work out the complex details. Failing that, give up.

Kudoba v. Kudoba

(2007), 43 R.F.L. (6th) 98 (Ont. Sup. Ct.), D.J. Gordon J., paras. 72-74.

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[72] In seeking guideline support, applicant's counsel relies, to some extent, on paragraph 8.1(d) of the [2005] separation agreement where the parties are said to have acknowledged the sharing of child expenses. [Paragraph 8.1(d) provided: There shall be no child support payable by one party to the other pursuant to the Child Support Guidelines, for the children of the marriage and step-child, based upon the following. … (d) The parties share all expenses in relation to the children and each have clothing, toys and sports equipment at their respective homes for the children. ….] The question then arises as to whether the application ought to have been for enforcement of this provision. This is of particular importance when the methodology, as established in the authorities as previously discussed, necessitates a careful review of the separation agreement to determine if the negotiated settlement substantially complies with the overall objectives of the *Divorce Act*.

[73] Paragraph 8.1(d), therefore, becomes important in the analysis. What does it mean and how does it apply? This raises another dilemma, as the evidence did not, to any degree, focus on this paragraph.

[74] As a general rule, counsel should not appear on the trial when the agreement is one he or she prepared or negotiated, save for exceptional circumstances. The situation is problematic when, as here, the interpretation of the agreement is in dispute. The solicitor drafting or negotiating the separation agreement is a potential witness. Issues may arise between the solicitor and the client.

[**Editor's Note**: A comprehensive summary of the law reference counsel as witness, indicating "inconsistency of application and the inability of the courts to come to a consistent approach", is included in an unpublished 2007 paper by James E. Lockyer Q.C., professor of law at the Faculte de droit of the Universite de Moncton, as follows:

The issue of counsel testifying as a witness has received considerable judicial comment going back many years. At common law there was no unanimity on prohibiting a lawyer from testifying as a witness while acting as counsel. Some courts refused to allow counsel to testify as a witness, while others allowed the request.

While courts have been inconsistent on prohibition, they have been consistent on condemnation. Courts refusing the request have strongly condemned the practice and courts that permitted counsel to testify found the process highly objectionable. As *Enker* reports:

> The forbidden practice [counsel acting as witness] has been condemned by the courts in especially harsh terms. One court expressed the opinion that
>
> > [n]o attorney having a just conception of his true and proper position will willingly unite the character of counsel and witness in the same case....
>
> And still another has called the forbidden practice "highly indecent," while still a third court has gone so far as to assert that
>
> > Nothing short of actual corruption can more surely discredit the profession.
>
> Yet, despite this unanimously vigorous condemnation of the practise of appearing in dual roles, the literature has shown remarkable uncertainty over the reasons of the rule. Explanations have been extended by some, only to be refuted by others who offer their own rationales, which still others reject in turn. (The original footnotes have been deleted)

The judicial pronouncements on condemnation of the practice are consistent throughout the Anglo-Canadian-American tradition. *Enker,* while indicating American jurisprudence echoes the English view, quotes the judge in the early English case of *Cobbett v. Hudson,* as calling the practice "objectionable", "contrary to good taste and good feeling", and "revolting".

Canadian courts have come to the same conclusion. In the early New Brunswick case of the *Bank of British North America* v. *McElroy,* Chief Justice Ritchie, stated:

> It is the privilege of the party to offer the counsel as a witness; but that <u>it is an indecent proceeding, and should be discouraged, no one can deny. I have always</u>

discountenanced the practice, and think the circumstances must be very exceptional to warrant counsel in offering their evidence.) (Emphasis added)

Mr. Justice Cartwright (as he then was), in the Supreme Court of Canada case of *Stanley* v. *Douglas,* dealt with the matter in the following way:

> While these decisions bring me to the conclusion that the evidence of counsel in the case at bar was legally admissible, each of them contains, as indeed does every case, which I have read in which the matter is discussed, a clear expression of judicial disapproval of counsel following such a course. Nothing would be gained by quoting these expressions at length. An example is that of Ritchie C.J. in *Bank of B.N.A.* v. *McElroy* (1875) 15 NBR 462 at p. 463: 'It is the privilege of the party to offer the counsel as a witness; but that it is an indecent proceeding, and should be discouraged, no one can deny.'
>
> If such expressions of judicial opinion extending over a century, coupled with the repeated pronouncements of the representatives of the Bar to the same effect, have not availed to prevent counsel following such a course it is perhaps idle to hope that a further similar expression will prove effective and I shall only say that 1 am in agreement with the statement of Ritchie C.J. quoted above.

A clear indication of how the courts have dealt with this issue is also outlined in *Sopinka* at page 690:

> [Lawyers] are competent in law to appear as witnesses in an action in which they act as counsel. Nevertheless, courts have been reluctant to allow a lawyer who has sworn an affidavit to appear as counsel in that matter. It would place the court in an untenable position of having to assess the credibility of a counsel who has given evidence. Accordingly the practice has developed of forbidding a lawyer to appear as both counsel and witness in a motion or in an action.

Because of subsequent regulatory intervention, there are no recent cases involving counsel requesting to act as a principal witness on a contentious issue in a trial. But there are still situations that arise where lawyers have prepared affidavits which have brought them before the court as a witness while acting as counsel on a motion. Remarkably this situation seems not to have abated notwithstanding continuing judicial disapproval. Courts condemn the practice" and give very little weight if any, to the testimony.

The New Brunswick Court of Appeal recently went further and clearly showed its displeasure. In the 2004 case of *Walsh* v. *Nicholls,* the Chief Justice of New Brunswick dealt with the issue of a lawyer providing affidavit evidence during a hearing on a motion in which the lawyer was acting as counsel. It is clear from the judgment that the New Brunswick Court of Appeal is becoming impatient with counsel who cross the line. At page 275, Chief Justice Drapeau states:

> In the court below, the respondents strongly objected to the affidavit of counsel for Mr. Walsh. They argued that its contents constituted inadmissible hearsay and

> offended the rule against evidence by counsel directed at establishing matters that are not purely formal or uncontroverted. In my view, the objection was well taken: solicitors should not place themselves in the position of being both witness and counsel in the same case. Courts here and elsewhere have repeatedly discouraged the use of such affidavits: see *Ryan et al. v. Dubois et al.* [1951] 1 D.L.R. 349 (Ont. H.C.; McRuer C.J.H.C); *New Brunswick Milk Dealers Assoc,* v. *N.B. Milk Marketing Bd.* (1984), 56 N.B.R. (2d) 413 (Q.B.; Stevenson J.); *New Brunswick (Board of Management) v. Connor* (1986), 74 N.B.R. (2d) 367 (Q.B.; Ryan J., as he then was) at para. 3; *Savoie* v. *Savoie* (1989), 101 N.B.R. (2d) 431 (Q.B.; Boisvert J.); *Leger* v. *BelUveau and Gauvin,* (1990), 107 N.B.R. (2d) 383 (Q.B.; Richard C.J.Q.B.); *Lloyd's of London v. National Bank of Canada et al,* (1991), 115 N.B.R. (2d) 241 (Q.B.; Creaghan J.); and *Savard Inc.* v. *Stone Container (Canada) Inc. et al.* (1997), 192 N.B.R. (2d) 347 (C.A.; Bastarache J.A., as he then was) at para. 7. Apparently, counsel will just not heed those admonitions. The time has come to signal more forcefully the Court's disapproval. 1 will return to the issue in the assessment of costs. (Emphasis added)

The Chief Justice continues at page 280:

> Costs usually follow the event (see *Merrithew* v. *Dunphy's Poultry Farm Ltd.,* [2004] N.B.J. No. 146 (C.A.) (Q.L.) at para. 4). However, derogating from that general rule is warranted here because of the appellant's reliance in the court below on affidavit evidence by his counsel that pertained to controversial matters of fact, a practice that the Bar knows full well is discouraged by courts. In my view, the appellant's disregard for the courts' repeated admonitions on the subject disentitles him to costs in first instance.

These judgments signal that Courts are now willing to take a more aggressive stance on the matter and are prepared to penalize lawyers who testify on behalf of the client in a case in which they are acting as counsel.

Notwithstanding this warning, the issue surfaced again in the 2006 case *of Hughes* v. *The City of Moncton,* where Mr. Justice Robertson speaking for the Court of Appeal said:

> Once again this court must caution lawyers not to argue cases in which they have submitted affidavit evidence in support of a contentious issue. The common law rule is straightforward: a lawyer cannot act as both counsel and witness in the same proceeding. Moreover, the common law rule has found its way into the Law Society of New Brunswick's "Code of Professional Conduct": see Chapter 8, Commentary 6.

Nonetheless, the common law historically struggled with the question of counsel wanting to testify on behalf of a client at trial. *Wigmore* sums up the frustration that judges in the Anglo-Canadian-American tradition felt:

> As a problem in evidence, the competency of counsel or attorney to testify on behalf of his client has occupied a singular place in our law ... [I]t has presented constant opportunity for objection and discussion ... And yet, in almost every court the final step has failed to be taken, and the judges have halted halfway between prohibition and licence; while the legislators, who have eagerly busied themselves with a re-enactment of the common-law truism that a juror may be a witness, have ignored the troublesome problem of a counsel's testimony.

Zhu v. Li
(2007), 43 R.F.L. (6th) 376 (B.C.S.C.), W.F. Ehrcke J.
(*Summary*)

In matrimonial proceedings, after reasons for judgment were given but before a formal order had been entered, the husband applied to reopen the trial to permit him to adduce additional evidence. The husband wanted to call four new witnesses. He had not filed affidavits from new witnesses, nor had he filed his own affidavit. Instead, the husband was relying on an affidavit of his lawyer's legal assistant in which she described telephone conversations she had with proposed new witnesses in which they spoke about the wife making death threats against them and their families if they gave evidence on the husband's behalf. The husband claimed that the reason he did not call these witnesses at trial was because they refused to testify due to fear of reprisals, that he did not know the whereabouts of one witness and that he was unaware that he could use a subpoena to compel a witness to attend trial.

Application dismissed.

Prior to entry of formal order, the trial judge has wide discretion to reopen the trial to hear new evidence. However, discretion should be used sparingly to prevent fraud and abuse of the court's process and the onus is on an applicant to show that a miscarriage of justice would probably occur if the trial was not reopened, and that new evidence would probably change the result. Also relevant for consideration was credibility of new evidence and whether such evidence could have been presented at trial with due diligence. The husband's new evidence was in the form of hearsay and double hearsay and since witnesses had not filed their own affidavits, there was no way to make the initial assessment of whether evidence should be believed. Moreover, in her own affidavit the wife had denied making any threats and her sworn evidence could not be countered by unsworn statements of new witnesses. Accordingly, it could not be said whether or not new evidence would affect the result. None of the husband's reasons for not calling these witnesses at trial was supported by his own evidence under oath since there was no affidavit in support of his application. Also, one witness, who the husband claimed was not in the province during trial, had returned to the province before trial and could have been subpoenaed, and it was not credible that the husband did not know about being able to subpoena witnesses. In the circumstances, the husband had not shown that a miscarriage of justice would probably occur if the trial was not reopened.

[**Editor's Note**: Application for leave to appeal to British Columbia Court of Appeal, refused 10 June 2008: 2008 BCCA 239.]

Advocacy Misconduct

***ABA Journal eReport,* 16 and 23 June 2006**

Seasoned litigators know that when opposing counsel starts feeling the heat at trial, the bag of dirty tricks can sometimes make an appearance. Your opponent might start asking leading questions or making unnecessary objections. He or she might cast unwarranted aspersions on the admissibility of your evidence. The list goes on.

But when the misconduct includes telling outright lies, perhaps to confuse the jury, a serious response is in order. So here's what we'd like you to tell us: What did you do to set the record straight when, in front of a judge, opposing counsel blatantly and shamelessly misstated a material point in the case?

It was at a motion hearing in Florida, and my anger over the misrepresentation was on the verge of uncontrollable. I responded, angrily, that "what you just heard from opposing counsel is absolute [lips pursed, forming the letter B—then the cerebrum kicked in—and finally, after a noticeable pause] fertilizer!" The courtroom erupted in laughter, and the point was made.

Ken Mann
Scottsdale, Ariz.

In a copyright infringement case, the defendant successfully defended against my summary judgement motion by submitting perjured affidavits from three stating that they were present at the facility and that they observed that the asserted music was at the facility and they observed that the asserted music was not performed. I collected evidence that those people were not at the facility that day and then filed a motion in limine to suppress their testimony. At the hearing on the motion, just before trial, the judge ruled to suppress the testimony and turned to defendant's attorney and said, "Counselor, I have been seriously deceived" into denying the summary judgement motion and taking the case to trial. It was downhill for the defendant after that, culminating in a record-setting verdict for damages, with attorney fees.

Douglas McDonald
Tampa, Fla.

Immediately jump up in obvious high dudgeon and ask the court for a lawyer-judge conference in chambers. In my experience, the judge will have been following closely enough to know that the statement was false and will want to discuss the matter anyway. You'll get a lot of flak from opposing counsel, who will sense that the jury will be getting the message from your immediately asking for a conference. The jury will think that something is wrong with what opposing counsel has just said. Also, go to the reporter and, in a stage whisper, ask for a partial transcript of that part and rebut the lie in closing argument so that it will be fresh in the jurors' minds when they start to deliberate. This sort of thing happens all too frequently. Your "fuss and feathers" when it happens will, I believe, deliver a message to the jury by itself. It will at least wake them up.

John Meadows
San Francisco

"Your honor, counsel cannot avoid summary judgment by arguing a material difference between the genuine facts and his own misstated, misconstrued version of those undisputed facts."

Lee Thomason
Bardstown, KY.

"Your honor, as you are well aware, the interpretation just provided by counsel in this case can only be described as fiction, or wishful thinking. I hope my correct explanation of the case will help opposing counsel understand that decisions in a court of law are based upon facts, not fiction or wishful thinking."

Kevin Young
Livermore, Calif.

If it's done in opening argument, I think it's appropriate to ask for a bench conference to explain the misstatement to the judge. If it goes to the proof, it's a basis for a mistrial. If it is merely misleading as to the material facts, the judge can clarify to the jury. If it happens in closing argument, and you have rebuttal, you can tell the jurors in no uncertain terms that what they heard was not true. It's OK to call your opponent a liar when he or she is one!

If you have no rebuttal, it's back to the judge again. I think I'd object, even though it's not often done, just to make a fuss about it. If it happens during the merits, call for a bench conference and ask the judge to clarify—it's more effective coming from him or her. Afterward, I'd turn my opponent in to the state bar! An unprofessional and unethical lawyer should be cut off at the knees. I'm tired of bad lawyer jokes with some truth to them!

B. Jordan Stuart
New Smyrna Beach, Fla.

Rise, raise your hand and get the judge's attention. Hold both index fingers to the tip of your nose, present your profile to your adversary and slowly extend one finger arm's length away from your nose while pinching your nose with the other index finger. Point extended (index) finger directly at adversary for three full seconds. Use sparingly and reduce time of finger point on repeated uses (but feel free to wag the extended finger when the lie is outrageous), then make a brief and pointed (nasally) record incorporating the lie. Regroup, turn and sit.

Terence O'Leary
Walton, N.Y.

"Federal Judge Slams Lawyer For 'Absurd' Motion' [:]
Don't ask me to Edit Opponent's Brief, He Says"

Filisko, G.M., *ABA Journal eReport,* 10 October 2006, pp.1-2.

Judge Frank Easterbrook says judges aren't supposed to be editors, and lawyers shouldn't file motions that treat them as such.

Specifically, lawyers should not file motions asking Easterbrook, of the Chicago-based 7th U.S. Circuit Court of Appeals, to strike unsupported assertions of fact from written briefs. And he isn't just complaining about the practice. He's doing something about it.

During a recent stint as the circuit's motions judge, Easterbrook decided to start docking lawyers who file such motions twice their length in words from the presumptive maximum allowable length of a reply brief, which is 7,000 words.

He explained the new policy in an unusual – and unusually candid – Sept. 25 published opinion in which he not only denied one such motion, but took the Indiana lawyer who filed it to task for wasting both the lawyer's and the judge's time.

"To show that such absurd motions do not come for free, I deduct twice the length of this motion (which was about 1,200 words) from the permissible length of the offending party's reply brief," the judge wrote. *Custom Vehicles Inc.* v. *Forest River Inc.* No. 06-2009.

"What would lead counsel to think that the court of appeals will redact his adversary's brief?" he wrote. "The way to point out errors in an appellee's brief is to file a reply brief, not to ask a judge to serve as editor."

"Bright-Line Blunder[:]
Client loses after suspended lawyer files notice of appeal"

Dreiling, Geri L., *ABA Journal eReport,* 11 December 2006

If an attorney with a suspended license files a notice of appeal, the [attorney's] client will pay a price, even if neither the lawyer nor the client knew of the suspension, the Virginia Court of Appeals has ruled.

"When an attorney's license to practice law in the commonwealth has been suspended, any pleading filed during that time is a nullity," wrote Judge Robert J. Humphreys in *Jones v. Jones*, No. 2426-05-4 (Oct 24). As a result, the appeal must be dismissed.

"This opinion gives new meaning to the word *formalistic*," says Rory Little, a legal ethics professor at the University of California-Hastings College of the Law in San Francisco.

Little, a former member of the ABA's Standing Committee on Legal Ethics, argues, "To say that a suspension which only lasts 30 days which the lawyer doesn't even know about is sufficient to terminate the rights of plaintiff is just outrageous."

However, Sheila Reynolds, a professor at Washburn University School of Law in Topeka, Kan., says she understands the court's position even though "I think it is natural to feel sympathy for the client terminated through no fault of her own."

"The attorney-client relationship is based on an agency relationship," notes Reynolds, who teaches professional responsibility and legal malpractice and is the former chair of the Kansas Bar Association Professional Ethics Advisory Committee. "Even though the client is innocent, she is bound by what the agent does because she authorized the agent."

The case began when Stephen Jones filed for divorce in Fairfax County Circuit Court on April 21, 2004. While the case was pending, according to the appellate court opinion, his wife, Patricia Jones, violated several discovery orders. The trial court ordered sanctions and barred her from pursuing spousal support and maintenance, and from admitting any documents into evidence that were not produced by the discovery deadline of April 29, 2005.

On June 7, 2005, the trial court held a hearing, and on July 11, 2005, it entered a final decree. The wife's trial lawyer was granted leave to withdraw on July 1, 2005, and her new lawyer filed a notice of appeal on Aug 9, 2005. The husband then moved to dismiss the appeal as improperly perfected. (Neither of Patricia Jones' lawyers is named in the appellate ruling.)

At the time he filed a notice of appeal, the … license [of the wife's second attorney] had been suspended by the Virginia State Bar Disciplinary Board. The suspension was in response to an order entered by the District of Columbia Court of Appeals that had suspended the lawyer's license for failing to cooperate with the District of Columbia Office of Bar Counsel. Ultimately the Virginia State Bar suspended the lawyer's license for 30 days, beginning July 26, 2005, and ending Aug. 25, 2005.

In addressing the question of the effect that the suspended license had on the notice of appeal, the three-judge panel in the case quoted the Virginia Supreme Court decision *Nerri v. Adu-*

gyamfi, 613 S.E.2d 429 (2005), which addressed the question of whether a pleading filed by a foreign attorney not authorized to practice law in Virginia had any legal effect.

In the *Nerri* case, the Virginia Supreme Court stated, "The status of an attorney during the time his or her license is administratively suspended is no different from that of an individual or an attorney who has never been licensed in Virginia—neither is authorized to practice law in this commonwealth, and both are subject to prosecution for practicing law without a license."

In *Jones*, the wife argued that because her lawyer didn't know his license was suspended at the time he filed a notice of appeal, *Nerri* should not apply, and lack of actual notice ought to be a defense. But the court disagreed, referring to the holding in *Nerri* as a "bright-line rule."

Humphreys wrote, "The Virginia Supreme Court did not rest its holding on the fact that counsel admitted he knew his license was suspended, nor does *Nerri* explicitly carve out an exception to the rule for those attorneys who assert they did not 'know' their license has been suspended."

Heather A. Cooper, the Fairfax, Va., attorney who represented the husband, says, "I wasn't surprised. There is a bright-line rule and this court was right on point with earlier decisions of the Virginia Supreme Court."

David E. Fox, the Washington, D.C., lawyer for the wife, did not return calls seeking comment. However, a motion requesting a rehearing is pending.

Dianna Gould-Saltman, a Los Angeles family lawyer and chair of the Ethics, Professionalism and Grievance Committee of the ABA's Section of Family Law, was troubled by the court's response to the argument that the attorney didn't know of the suspension. If that's true, Gould-Saltman says, "I don't know what more the client could have done."

Reynolds is also bothered by the fact that the appellate court didn't delve into the question of actual notice. "It does seem to me that the disciplinary office has some sort of obligation to give the lawyer some advance warning so he can act properly."

The question might also factor into any potential malpractice claim. Reynolds notes malpractice policies typically don't cover intentional torts, so the lawyer's claim he had no actual notice could factor into coverage issues. In addition, Reynolds says that to have a malpractice claim, the client will have to prove "not only breach of duty and negligence, but that she was damaged."

Mamchin v. Mamchin-Burdman

(2006), 29 R.F.L. (6th) 301 (Ont. Sup. Ct. J) Rogers J.
[*Summary*]

A father in a family matter brought a motion to change a final order and H, who was not a lawyer, sought the court's permission to represent the father on the motion. Permission was denied, and the motion dismissed. A court must be assured of competence of a proposed agent so that a case was not impeded by an incompetent agent. Family Law Rules must be given due respect along with legislation and case law. It was difficult to be assured that a non-lawyer would be sufficiently competent given that the nature and complexity of a case is unknown at outset. Competence includes integrity and honesty. A court must know that confidentiality would be honoured. A proposed agent must also show a court how he or she will be governed and since costs can be ordered to be paid personally by a counsel or agent, a court needs evidence as to how compliance could be assured by the agent. An agent must prove insurance coverage, or the client must understand implications of no insurance for errors. In the case at Bar, the motion was initiated with H's name on documents as agent, but without seeking permission under R.4(1)(c) of Family Law Rules; which suggested basic unfamiliarity with the Rules. Familiarity with Family Law Rules is the starting point for demonstrating competence and it was not shown in the case at bar. Nor were there any special circumstances to warrant permission for a non-lawyer to represent a party in this case. Also, proposed agent had not shown how the court could be assured that he was governed by an accountable person or authority.

Advocacy: Simplicity of utterance

Megarry, Rt. Hon. Sir Robert, *A New Miscellany-at-Law[:] Yet Another Diversion for Lawyers and Others* (Oxford: Hart Publishing, 2005), pages 103-104; 107; 110-111.

Today simplicity of utterance is venerated more than flowers of speech: "Praised be he who can state a cause in a clear, simple and succinct manner, and then stop." In this respect, if no other, the Bar is the home of scholars; for the object of a true scholar is to make profound things clear, whereas the object of a German philosopher (and, indeed, of too many others) is to make clear things profound. Yet simplicity cannot conquer all: "The question in the case is made obscure by an attempt at its simplification." Again, "the facts are less complicated than the proceedings that have grown out of them. The old advice still holds: "First settle what the case is, before you argue it.

. . . .

Some plain cases [in which the issue could have been stated with simplicity] are not. In an action for breach of promise of marriage, the defendant had promised to marry the plaintiff, but then had married someone else. There seemed no doubt. Yet defending counsel had two questions to put to the plaintiff:

Q. The defendant's father is still alive, isn't he?
A. Yes.

Q. And the promise was to marry you when his father was dead, wasn't it?
A. Yes.

At that, counsel said, "That is my case, my Lord." "But," said the judge, "how do you get over the fact that the defendant has already married someone else?" Counsel responded, "That was no breach, my Lord. The defendant's wife may die before his father, or there may be a divorce before then, and the defendant can then carry out his contract; while if either the plaintiff or the defendant predeceases the father, the contract will have been frustrated before the time for performance has arrived." And that was that.

. . . .

There are times when the advocate has much to contend with. . . . quite apart from the intractability of the facts and evidence. The Bench may try to cut short his argument, as Jessel M.R. once did with Herschell. But Herschell would not have it, and retorted that "important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it." This pronouncement was, of course, a precursor of Lord Hewart C.J.'s famous statement that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." It is less well-known that there is judicial authority for saying that in this statement the words "be seen" must be a misprint for the word "seem". [*R. v. Essex Justices, exparte Perkins*, [1927 2 K.B. 475, per Avory J. at 488.] However that may be, the statement plainly must not be inverted or perverted: "The continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done." It certainly does not mean that "the appearance of justice is of more importance than the attainment of justice itself," as Herschell in the course of argument seems to have asserted. What it does mean is that "not only must justice appear to be done, it must be done," without any comparatives.

More recent restatements of this approach have appeared. Thus:

> Sometimes I ask students to say whom they consider to be the most important person in a court-room. Many pick the judge; others give a variety of answers. One even opted for the usher, without being able to explain why. My answer, given unhesitatingly, is that it is the litigant who is going to lose. Naturally he will usually not know this until the case is at an end. But when the end comes, will he go away feeling that he has had a fair run and a full hearing? … One of the important duties of the courts is to send away defeated litigants who feel no justifiable sense of injustice in the judicial process … . Justice in full takes time; but often it is time well spent.

[MeGarry, R.E., *Temptations of the Bench,* (1978) 12 U.B.C. L. Rev. 145 at 151,152.]

3.9 Relationship with State

"Draft money laundering bill raises numerous compliance concerns"

Ceballos, Arnold, *The Lawyers Weekly*, 14 September 2007, pp. 24, 27.

Critics say proposed federal money laundering regulations raise myriad practical and privacy concerns, since it will impose stringent record keeping and client identification requirements. Under the draft bill, lawyers will be required to know much more information about their clients before they can act for them.

Currently, the Federation of Law Societies of Canada is spearheading consultations on the *Proceeds of Crime* (*Money Laundering and Terrorist Financing*) *Act* released on June 30.

"The law societies are extremely interested in preventing money laundering, including where lawyers are involved," said Michael Milani, president of the Federation of Law Societies of Canada (FLSC) and a partner at McDougall Gauley LLP in Regina. However, he questioned whether the law societies might not be in a better position to govern lawyers' behaviour. To that end, he noted that the law societies have instituted stringent "no cash" rules that limit the amount of cash that a lawyer can take from a client. "We are also developing a 'know your client' rule to ensure that steps are taken so that the anti-money laundering aims can be met," said Milani, who added that the Federation's rule[s] "should be in place very shortly." The rules created by the Federation serve as models which can be adopted by specific law societies.

[**Editor's Notes: (1)** On 15 March 2008, the Government of Canada, in Volume 142, No. 11 of *Canada Gazette*, published proposed Regulations Amending the Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations. The Regulations, if enacted, will be promulgated, effective 30 December 2008, under s. 73.1(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, and will include imposition of extensive obligations on "legal counsel" and "a legal firm". **(2)** Related to note (1), the Council of the Federation of Law Societies of Canada, on 20 March 2008, adopted its "Model Rule on Client Identification and Verification Requirements"; text of which is published on the Federation's website. **(3)** As reported by Philip Slayton, in the October 2006 issue of *Canadian Lawyer* (p. 37): "the Canadian legal profession was successful in pressuring the federal government to repeal (in 2003) regulations under the ... Act, which required lawyers to report suspicious financial transactions to a government monitoring agency. (A suspicious financial transaction is defined as one where there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence.) **(4)** On 18 August 2006, a Niagara Falls, ON lawyer was sentenced to 2 years less a day of 'house arrest' for accepting $8,400 which he was told, by an undercover RCMP member, had come from sale of cocaine. **(5)** On 06 September 2006, a Toronto lawyer was

sentenced to 15 months' imprisonment for laundering $750,000 in another 'sting' orchestrated by the RCMP.]

The draft legislation is the latest salvo in the government's war against terrorism and organized crime and aims to choke the sources of funding for such groups. The draft regulations seek to bring lawyers under the purview of Canada's anti-money-laundering and terrorist financing regime by imposing client identification and record-keeping requirements.

Interested stakeholders had until the end of August [2007] to provide comments and are now involved in a consultation process with the Department of Finance.

A review of the proposed regulations, meanwhile, discloses some problems, according to Milani. For example, he pointed to Regulation 11.1(1), which requires lawyers, among others, to take "reasonable measures" to obtain such information as the name and occupation of a corporation and the same information for all those who own 25 per cent or more of the corporation. Milani noted that the term "reasonable measures" is not defined, leaving it unclear as to precisely what the lawyer is supposed to do. In addition, "the lawyer is often one or two steps removed from the client", Milani says, who wondered what the obligation is on a lawyer like himself based in Saskatchewan who is working on part of a deal out of Toronto. Determining the identity of shareholders can be difficult to obtain for some companies and impossible for others, he added. He also pointed out that the principal contact for lawyers will often be another lawyer or a lawyer outside Canada.

Milani also pointed to Regulation 33.4, which requires every law firm to keep records, since they do not necessarily include an account number. Complying with this regulation also raises potential privacy concerns, he added.

However, he is hopeful that the Department of Finance will be receptive to the concerns of the law societies, pointing out that there have been productive discussions so far. "It is a respectful process where points of view of both sides are being considered."

In the meantime, lawyers will have to make some adjustments to the way they do business, according to Milani, who said that the "no cash" and upcoming "know your client" rules "enable lawyers to continue their practices as before with some modifications." As for what those modifications will be, Milani said that this will depend on what a lawyer or firm currently does.

It will vary from firm to firm and a 75-lawyer firm like his own may do it differently than a two-person firm. "The rules will be chosen in the public interest, but still be workable," he stated. "Things won't grind to a halt, but there will be different obligations."

The Canadian Bar Association supports the moves made by the Federation of Law Societies, according to Ron Skolrood, chair of the CBA's National Constitutional and Human Rights Law Section and a partner with the Vancouver office of Lawson Lundell LLP.

The "no cash" rule has worked well and the CBA would prefer to see issues of client identification dealt with through the law societies as well, according to Skolrood.

He also pointed out that some of the government's proposed regulations are very broad and can be interpreted to require lawyers to obtain information about all parties to a transaction, while the Federation of Law Societies' rule is more limited.

The proposed regulations also treat all law firms equally, which may be inappropriate, according to Skolrood. "The regulations take a one-size fits all approach and assume that all lawyers practice in firms that have administrative systems in place to comply", according to Skolrood, who noted that most lawyers do not practice in large firms.

"Compliance would be quite onerous for a lot of lawyers."

"Mob Rule"

Slayton, Philip, *Canadian Lawyer*, October 2006, p. 37.

Lawyers have a particular advantage as money launderers. The rule of solicitor-client privilege prevents forced disclosure of what a client tells his lawyer. The international financial community and the Canadian government, including the RCMP, think that solicitor-client privilege can be used by a lawyer to hide money laundering by organized crime and—dare one say it—by terrorists.

. . . .

It's not just about cash. Unwittingly or not, lawyers may be given, not money to be laundered, but information, about past or future crimes, to be guarded. When does the obligation to inform the authorities trump solicitor-client privilege? The basic distinction is clear: information about past crimes is always protected, but knowledge of crimes planned for the future is almost certainly not. What if the lawyer does not have the information himself, but knows that his boardroom and telephones, largely immune from police prying, are being used to plan crimes? (In their book [*The Sixth Family: The Collapse of the New York Mafia and the Rise of Vito Rizzuto*], Lamothe and Humphreys claim that this is one of the legal services provided to the Mafia.) The law here is more uncertain, but the risk to a lawyer is that, in aiding and abetting criminal activity, he loses the status of lawyer and becomes just a crook himself. ….

3.10 Relationships with Technology

"Advertising in an electronic age"

Slayton, Philip, *Canadian Lawyer*, March 2008, pp. 27, 29

Advertising by lawyers has long been a tricky issue in Canada. Once, it couldn't be done at all—stopped by law society rules. Over the past few years, restrictions have been eased, bit by bit, province by province. Recently, the Competition Bureau of Canada suggested the situation still isn't good enough and that almost any rules limiting advertising by professionals go beyond legitimate consumer protection. (More on the Competition Bureau later.)

> We're no longer just talking about that big sign on a building by the airport that has a law firm's name in huge, illuminated red letters; or a personal-injury lawyer's advertisement on the side of a bus; or the logo-included message placed by a Bay Street firm in the financial pages of a national newspaper proclaiming the number of mega-deals it did in 2007. We now live in a wonderful new electronic age. Welcome to advertising by lawyers on Google.
>
> Here's how Google advertising works. Pick a key word or phrase likely to be searched and that relates in some compelling way to the legal services you provide. Create an advertisement for those services that includes a link to your web site. Arrange with Google to have your advertisement appear in the shaded "sponsored links" section next to the search results that pop up when your chosen key words are searched. (It's easy to do all of this online, at *www.adwords.google.com)* Your hope is that potential clients will be directed in this way to your practice.

How do you pay for Google advertising? This is the interesting part. You pay every time someone clicks on your sponsored link. How much do you pay? The price per click is set by an auction of search terms. When I checked the other day (on *www.cwire.org),* I saw that if you want your advertisement to appear next to the search term "personal injury lawyer Michigan' it will cost you US$65.85 every time someone clicks on your link. It's US$47.74 for "automobile accident lawyers" and US$44.52 for "truck accident lawyers."

A cursory survey of search terms and sponsored links shows that Canadian lawyers are starting to play this game. The search terms "province of Ontario personal injury lawyer" and "brain injury Canada" each produces one Canadian law firm. The term "immigration lawyers Canada" generates quite a long Canadian list, although some of the advertisers look to be consultants rather than law firms.

Whether or not a click produces business for the advertiser doesn't matter; the advertiser pays anyway. This creates opportunity for the cyberspace equivalent of sending pizzas at midnight

to the girlfriend who dumped you. Just spend the day clicking on the link of a law firm you don't like and stick it with a big bill for nothing.

Adam Liptak, writing in *The New York Times* ("Competing for Clients and Paying by the Click", Oct. 15, 2007), quotes various experts who believe that sponsored-link advertising results from a baffling economic anomaly: that lawyers tend to charge the same amount as each other for their services. Since lawyers don't compete on price, suggest these experts, they compete in other ways, like bidding for placement on Google. Liptak also notes that Google advertising is narrowly focused. There is a big difference between putting an advertisement in a general circulation newspaper and putting one next to the results of the search term "truck accident lawyer" or "immigration lawyer Canada". (Liptak notes that you can place a sponsored link next to "Britney Spears nude" for a mere 21 cents a click. It is unclear what legal services are relevant to this search term.)

Which brings me back to the Competition Bureau of Canada. Last December, the bureau released a study urging self-regulated professions to re-examine their rules – including those limiting advertising – to ensure those rules serve the public good and do not go too far in restricting competition. ….

The Competition Bureau report gives a variety of examples of current restrictions on lawyer advertising. In Ontario, lawyers may not use words or expressions such as "from …", "minimum", or "… and up" when referring to price. In Nova Scotia, an advertisement may not use the words like "simple" or "complicated". Newfoundland and Quebec do not allow statements of gratitude in lawyers' advertisements. Most law societies do not allow a lawyer to claim to be a specialist or expert in a particular field unless he has specialized certification. (Only Ontario has a system of certification.) Most of the large provinces do not allow lawyers, in their advertisements, to compare their fees or the quality of their services to those of other lawyers.

The bureau report … comments, "When consumers cannot compare the prices for legal services, there is little or no incentive for lawyers to compete on price, thereby raising the costs to consumers."

It may be a new electronic age, with links on Google replacing billboards on highways, but the underlying issues, ethical and economic, remain the same. Why artificially limit advertising, particularly with limitations that help stifle desirable price competition? In particular, why limit comparative advertising about price and quality of services? Click away on sponsored links all you like; the old-fashioned problems remain.

"Guidelines For Practising With New Information Technologies"

Ethics and Professional Issues Committee, Canadian Bar Association (Ottawa: Canadian Bar Association, May 2008)

(*Discussion of draft Guidelines, in part*)

Metadata, in simplest terms, is information about other data. Many computer programs embed information into the program output at the time that the output is created, opened, and saved. Some metadata is stored internally as part of the program's output (such as files, images, presentation slides, documents, spreadsheets, or other output) and, although hidden on normal viewing, the metadata can be revealed and accessed by others when the output is circulated electronically. For ease of reference, the output will generally be referred to here as a "document." "Mining" refers to affirmative actions undertaken to find and uncover hidden metadata that the document creator or document sender did not intend to reveal.

This information in metadata may include: the document author's name, initials, firm name, computer name, or the name of the network server or hard disk where the document was saved; the date the document was created; the identities of other authors; the identities of the reviewers; document revisions, including insertions and deletions, and tracked changes; revisions count; the date of last save, last edit, and last print; the number of times the document has been printed; the distribution of the document; information about the printer that the document was printed on; information about the template used to create the document; document versions; total editing time; location of the stored file (*e.g.* C://desktop/clientname/filenumber); bookmarks and customized styles; and document comments.

Metadata in electronic documents can be useful during the drafting stages of a document, enabling collaboration through comments, tracking revisions, and recording information about the versions. However, metadata may be harmful when the document is distributed electronically to others (for instance, when submitting an electronic file to a court, circulating a draft that is being negotiated to opposing counsel or distributing documents to adverse parties), as it may contain hidden information that the creator does not want to share with the recipients, such as previously redacted portions of a document. The medium of electronic distribution of a document could be through an email attachment; copying the document to a memory stick (also called a "thumb drive," "flash drive," or "USB drive"), a DVD or CD format or to a floppy disk; or uploading the document to a network or extranet. The embedded information, although not visible when normally viewing the document, can easily be accessed in a human-readable form through simple steps such as right-clicking and viewing the properties of a document or using a text-editor. The metadata could reveal confidential information about a client and violate the duty of secrecy. Rule IV, Commentary 4 [of the CBA *Code of Professional Conduct]*, provides as a general rule that a

lawyer should not disclose having been consulted or retained by a person except to the extent that the nature of the matter requires such disclosure.

Lawyers have an ethical obligation when transmitting documents electronically to exercise reasonable care to ensure that clients' confidential information is not disclosed in the metadata. There are practices that minimize the creation of metadata, as well as ways to remove hidden data before distribution or publication so that the information is not unintentionally accessible to people for whom it is not intended to be seen. Before removing metadata, lawyers should ensure that there are no legal obligations to retain the metadata *(e.g.* discovery obligations). ….

Lawyers may wish to guard against metadata "mining" by negotiating confidentiality agreements or seeking protective orders to protect metadata information that is inadvertently disclosed by the document creator or sender from later being used by the recipient against the sending party or from being introduced as evidence in litigation.

"Choose Up Sides[:]
States are split on whether attorneys may take part in
Online legal-match services"

Dreiling, Geri L., [2007] 93 ABA Journal, May 2007, at pp. 28, 29
(*in part*)

After more than two decades, Marilyn Yee's law practice in the wine country north of San Francisco—mostly estate planning, small business and real estate matters—was thriving. But drawn by the warmer climes of Southern California, she relocated in 2004 to Wildomar, in the foothills of the Santa Ana Mountains southeast of Los Angeles.

In need of a new client base, Yee sought help of an online legal-matching service. In January 2006, Yee went online with CasePost, a company based in nearby Irvine. It was a good decision, she says—at least half the income from her relocated practice comes from clients obtained through the service. Meanwhile, she estimates that her display as in the local telephone directory produces about a quarter of her income.

Interest in online legal matching services among both consumers and lawyers is growing. According to the Pew Internet & American Life Project, an estimated 4 million people a month used the Internet to search for law-related services in 2006. That number is projected to hit 7 million per month by the end of this year.

Online legal-matching services are seeking to help lawyers capitalize on that demand. In addition to CasePost, other online legal-matching services include San Francisco-based LegalMatching, Attorney Match from LexisNexis Martindale-Hubbell, LegalConnection from FindLaw, and Chicago-based LegalFish.

Online legal-matching services generally require attorneys to pay an application fee as well as annual or monthly fees to participate. A typical service provides listings that highlight each lawyer's practice areas and experience. Many sites also provide a Web page for each attorney. A prospective client fills out an online questionnaire explaining the legal problem, the amount of experience desired in a lawyer, the geographic area and the fee range. After attorneys post responses, the client chooses which one to hire.

"Online is the wave of the future," says Yee. "People don't pick up the Yellow Pages and they don't refer to the print media anymore. I think the future generation—our children—won't use print for anything."

Many observers, however, are somewhat more cautious in their assessments of the Internet's role in bringing lawyers and clients together.

For at least some people, "the impulse is to go to the Web, which has become the repository of all universal information," says Stephen Gillers, a law professor at New York University who chairs the Joint Committee on Lawyer Regulation in the ABA Center for Professional Responsibility. "The potential to solve a need is great, but it can also be abused." The internet, he says "can have a lot of garbage. People could be steered wrong, which means the need for vetting by some informed service provider is also present."

Another concern for lawyers is the ethical propriety of participating in online legal-matching services.

The sticking point is whether online matching services amount to advertising, which is permitted under the professional conduct rules for lawyers, or referral services which could run afoul of prohibitions against attorneys splitting fees with nonlawyers.

. . . .

"Think about e-mail as a medium as well as a message"

Benetton, Luigi, *The Lawyers Weekly*, 08 June 2007, p. 22

"One of my best clients is in Malaysia," said Paul Niebergall. "We're in contact every week. But when it's 9 a.m. for me, it's 9 p.m. for him. That stifles communication by telephone." Niebergall, principal of Niebergall Grabowski, handles this time difference, unsurprisingly, via e-mail.

The advent of electronic mail spawned a new era for businesses and individuals alike. It also brought about new headaches, like spam, malware and the daily stress of handling floods of new messages.

Lawyers face their own specific e-challenges, but like Niebergall and Donna Neff, most won't look back. "I have clients all over the world who act as executors," said Neff, principal at Neff Law Office. "E-mail has been a wonderful and inexpensive way to clarify details." When those clients need forms and brochures, Neff directs them to specific pages on the Neff website using links in her e-mails.

Niebergall notes the widespread adoption of e-mail over older technologies. "Many of my clients don't have fax machines," he said.

Still, he recognizes the limits of e-mail. While it handles one-way communications well, "when there's a lot of back-and-forth, it can take a week to get to the bottom line," said Niebergall. "In that case, a telephone call is absolutely necessary."

Not every document is meant for electronic transmission. "Extremely sensitive information, such as intellectual property or details about a transaction between public companies that could affect stock prices, should not be sent via e-mail," said Carol Whittome, a partner in the legal research and writing firm Advocate Assist LLP. She added that moderm encryption methods afford good levels of security for confidential messages.

There are also times, such as the delivery of bad news, when e-mail cannot replace face-to-face meetings.

Neff wants to see visual cues when she handles certain matters and laments the fact that some of her European clients don't have webcams. "You can't read their body language, and that's important," she said.

Neff does not use e-mail to confirm a person's identity. Her solution: the person in question must attend before a notary public or lawyer in their hometown who can attest to the identity and signature of the person.

Adding to legal-specific intricacies of e-mail use are the more general headaches that floods of email and spam can inflict upon overwhelmed knowledge workers. "When I had two e-mail addresses," said Niebergall, "I would come in Monday morning and find 180 e-mails. I would then look for the six that came from clients amid the 174 that tried to sell me Viagra."

These circumstances make spam filters as essential as protection from malware (viruses, adware, spyware and other software that disrupts the computing experience). Given the advanced state of widely available Internet security software products, these concerns are minimal today. Problems are more likely to come from people's use of e-mail and the Internet.

"Law firms should develop a general written policy for e-mails," Whittome wrote, "including usage, content, language, confidentiality, defamation, business use, personal use, monitoring and discipline. This should be followed with consistent training and specifically acknowledged with a signed agreement."

"The Law of the Land [:]
'I hate BlackBerrys' "

McMahon, Kirsten, *Canadian Lawyer*, July, 2007, at p. 37
(*in part*)

'I hate BlackBerrys'

"Don't e-mail me. I don't have an e-mail. I don't have a computer. I don't have a cellphone. I don't have a BlackBerry," … says [Alan J. Lenczner]. "I don't have any of those things and I'm more service oriented than all of these guys. I hate BlackBerrys.

"[People] are forever fiddling with their BlackBerrys or their cellphones. You cannot give considered advice when you're responding momentarily. There's nothing in law that can't wait for a few hours. And if you just take the question, think about it, and call your client back, you're much better off.

"All I do is go to meetings and they're not paying attention. They just have an addiction; the fear that they're going to miss something. They're not comfortable with silence."

He says he feels lawyers have lost their ability as professionals to control clients these days.

"We are a profession. You can't get a doctor 24/7. The fact is, yes, you have to be available to a client when he's got a problem, but you don't need to be available constantly, the way we are.

"We've allowed ourselves to be overrun by our clients, and most of their requests, if they had to stop and think about it, they wouldn't put. If they couldn't get you, it would wait."

Partner and long-time colleague Peter Griffin says that while Lenczner isn't "electronically connected, I think is a fair way to express it," when you need him, you can find him.

"So much of the electronic stuff, it's like the more accessible you are the more it begets the need for accessibility, and it sort of feeds itself. If you're somebody in that category who says, 'I'm not going to carry a cellphone. I'm not going to carry a BlackBerry. I don't use e-mail. If you need to find me, call my assistant,' it works and people live with it," says Griffin.

"Does it mean people aren't going to retain Alan Lenczner because he doesn't have a BlackBerry? Not likely. There's a certain forgiveness in how good a lawyer he is and how much in demand he is and remains. It doesn't seem to have caused him to miss a beat."

And Lenczner is a good lawyer who doesn't miss a beat. In fact, he's a great lawyer who's been on practically every major commercial law file and has an amazing career … . He's a lawyer's lawyer, the kind that is well respected by all sides of the bar, and he's a heck of a nice guy to boot.

The storied career of Alan J. Lenczner started out a little different from many other lawyers. His dad wasn't a lawyer, his mother wasn't a lawyer, and up until he attended law school at the University of Toronto, he had never met a lawyer in his life.

"I had no idea what lawyers did other than what I saw on television," he jokes.

"The Too Much Information Age[:]
Authorities seek clarity on unsolicited information from prospective clients"

Thompson, Kathryn A., *ABA Journal,* July, 2007, pp. 28-29

For lawyers, one byproduct of the explosion in electronic communications has been an increase in unsolicited e-mails from people seeking legal services. While such messages occasionally result in new business, in many cases they just lead to ethics headaches for lawyers who find themselves in possession of information they would really rather not have.

Consider the personal injury lawyer in California who received an e-mail from a woman inquiring about possible representation after being involved in a multivehicle collision—who also mentioned that she had been drinking before it happened. Another California lawyer received an e-mail from a woman seeking a divorce lawyer—who revealed information about her secret extramarital affair. And in Arizona, a disgruntled employee sent copies of his letter complaining to the human resources department about alleged company abuses to 11 different outside lawyers in his efforts to obtain legal counsel.

Adding to complications in each of those cases was the fact that the prospective client contacted lawyers who had already been consulted or retained by another party in the case.

In the personal injury matter (San Diego County Bar Association Legal Ethics Committee Opinion 2006-1), the lawyer already had [been] consulted [by] someone else involved in the collision. In the divorce case (State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion 2005-168), the woman's husband already had retained the lawyer to whom she confessed her adultery. And in the employment matter (State Bar of Arizona Committee on the Rules of Professional Conduct Opinion 02-04), the disgruntled employee unwittingly sought representation by a lawyer who served as counsel to the employer.

What are the ethical obligations of a lawyer in those kinds of situations: Is there a duty to protect the confidentiality of the information received, even though the person who sent it isn't

actually a client? Is the lawyer so contacted precluded from representing the client who had already retained him or her? May the lawyer use the information for the benefit of the existing client?

The ABA Model Rules of Professional Conduct did not provide direct guidance on those questions until 2002, when the House of Delegates adopted Model Rule 1.18 at the recommendation of the Ethics 2000 Commission. Since then, Model Rule 1.18 has been adopted in 30 states and the District of Columbia, and it has been proposed for adoption in another eight states. (The ABA Model Rules serve as the basis for most state codes of professional conduct, which directly govern lawyers.)

Rule 1.18 hasn't been in effect long enough for a body of opinions applying it to evolve. In the meantime, opinions issued by ethics committees at the state and local levels on the issue of unsolicited e-mails have relied on existing rules and decisions relating to formation of the client-lawyer relationship, confidentiality, conflicts and obligations to former clients. But the opinions and Rule 1.18 emphasize that the key to a lawyer's obligation is whether a prospective client had a reasonable expectation of being represented by the lawyer.

DIFFERENT ROUTES, SAME DESTINATION

In the opinion arising out of the motor vehicle collision, the San Diego Bar's Legal Ethics Committee concluded that the lawyer was free to continue representing one of the [other] people involved in the incident even after he was contacted by another party involved. Moreover, the lawyer could tell his client that the other party had acknowledged drinking before the collision.

The ethics panel considered it significant that the prospective client had obtained the lawyer's e-mail address from a State Bar of California Web site rather than the lawyer's own advertising. Merely listing contact information on a bar's Web site cannot be construed as an invitation by the lawyer to attract clients. Thus, any expectation by the prospective client that the lawyer had agreed to a consultation was unreasonable.

The Arizona State Bar's committee reached a similar conclusion in the case of the disgruntled employee who e-mailed to 11 different lawyers copies of his letter to the company's human resources department. The committee determined that the prospective client demonstrated no reasonable expectation of confidentiality because he delivered the letter to a number of attorneys—who included, unknowingly, the employer's counsel—without requesting that the information in the letter be kept confidential and without giving the attorneys a chance to reject a client-lawyer relationship.

Significantly, both the Arizona and San Diego ethics panels noted that the outcome might have been different had the prospective clients obtained the lawyers' e-mail addresses from a firm Web site that had no adequate disclaimers explaining that information would not be held in confidence.

The absence of such a disclaimer might suggest that the lawyer implicitly agreed to a client-lawyer relationship, said the Arizona panel. Similarly, the San Diego bar committee stated that an e-mail address appearing in a print advertisement or in a telephone directory might constitute an invitation to communicate confidential information.

The woman who inadvertently revealed her extramarital affair to her husband's divorce lawyer used an electronic form on the firm's Web site to submit information about the case, noted the California State Bar's ethics committee. In order to proceed, she was required to consent electronically to certain terms, including an agreement that no "attorney-client relationship" or "confidential relationship" was formed.

But the committee decided that those disclaimers were inadequate, and that the lawyer could not represent the husband. The committee said they were "not in sufficiently plain terms to defeat the visitor's reasonable belief that the lawyer is consulting confidentially with the visitor."

The committee noted that a disclaimer stating, "I understand and agree that law firm will have no duty to keep confidential the information I am now transmitting to law firm," would have eliminated any reasonable expectation of confidentiality, allowing the lawyer to represent the husband in spite of the wife's admissions of adultery.

At least one ethics authority has held that lawyers cannot be said to invite or solicit information from prospective clients merely because they maintain a firm Web site that links to individual lawyers. Such firms are merely advertising their general availability, rather than making a specific solicitation, concluded the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York (Formal Opinion 2001-1).

The opinion involved a lawyer who received an unsolicited e-mail from a prospective client with confidential information about a potential dispute with one of the firm's existing clients. The committee concluded that the prospective client had a good-faith, though mistaken, belief that the information would be held in confidence. Although it allowed the lawyer to continue representing his current client against the prospective client, it forbade him to reveal the contents of the e-mail or to use it against the prospective client.

"Prospective clients who approach lawyers in good faith for the purpose of seeking legal advice should not suffer even if they labor under the misapprehension that information unilaterally sent will be kept confidential," however "ill-conceived or even careless" that belief, the committee stated.

CLEARER SKIES AHEAD

The adoption of ABA model rule 1.18 by a growing list of states improves the chances for bringing greater clarity and uniformity to opinions on how lawyers should treat unsolicited information from prospective clients.

Rule 1.18 defines a "prospective"[1] client as "a person who discusses with the lawyer the possibility of forming a client-lawyer relationship with respect to a matter." The rule also states that a lawyer who has had "discussions" with a prospective client "shall not use or reveal information learned in the consultation."

But that definition is not meant to be open-ended. "Not all persons who communicate information to a lawyer are entitled to protection under this rule," the comment states. "A person

who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' " within the meaning of the rule.

Rule 1.18 prohibits representation adverse to the prospective client in the same or a substantially related matter—but only if the lawyer receives information from the prospective client that could be "significantly harmful" at some point later in the case.

Representation still may be possible, however, if both the prospective client and the affected client give their informed written consent. The firm of a lawyer who receives information still may represent the affected client if the lawyer took reasonable steps to avoid receiving more information from the prospective client than necessary to consider representation and if the lawyer is then appropriately screened from the case.

The provisions of ABA Model Rule 1.18, along with the comments that accompany them, offer helpful guidance on how to deal with unsolicited information from prospective clients even in jurisdictions that have not adopted the rule.

"E-data dilemmas [-]
The ethics of document retention in an electronic world"

Canton, David, *National*, July-August 2007, pp. 56-57.

Paper, paper everywhere. Law practices generate reams of the stuff — paper is the medium through which information most often flows in a law firm. But even law, the most hard-copy-intensive profession, will start succumbing to the trend towards electronic data. And that raises some ethical concerns.

"A law firm, as does any organization, has an ethical responsibility to the environment," says technology lawyer David Canton of Harrison Pensa LLP in London, Ontario, who blogs at *www.canton.elegal.ca*. "The amount of paper that we generate as a profession is quite frankly alarming." He believes firms should be migrating more of their documents to electronic form. With electronic document management systems, the firm can file documents in a logical and consistent manner and control who can read and/or manipulate certain files.

Another advantage of e-data is the ease with which client information can be retrieved. "A client can call with a question about something you've done for him before," Canton points out. "In a paper world, you'd have to say, 'I'll get someone to pull the file and call you back.' [But in an electronic world,] it's not unusual that while they're on the phone with you discussing the issue, you can find the document and have it at your fingertips immediately."

"Ninety-five percent of the world's information is being generated and stored in digital form," adds Frank Walwyn, a partner with WeirFoulds LLP in Toronto. "About 70% of that

information is never printed. Law firms will end up being paperless, not so much by design, but simply because the world has moved in that direction."

But printed or not, client information comes with certain professional conduct concerns. Lawyers' ethical obligation to protect clients' privacy and property applies to all the documents, paper and otherwise, that belong to a client or relate to its case. As the world moves toward a paperless environment, lawyers must educate themselves about the different electronic media, understand the risks associated with them, and address those risks

There are some guidelines already. Certain legislation, like the *Income Tax Act* and various *Business Corporations Acts,* set out minimum time periods for which lawyers are required to maintain accounting or company records. As well, law society rules require lawyers to maintain financial records and related documents for up to ten years. Various law societies have also produced document retention guidelines for law firms to follow.

For their part, firms can establish certain protocols for the storage of electronic data to ensure consistency. Part of that process is knowing how to store e-data safely. "Electronic information can be lost, for example, by exposure to magnetic fields," says Walwyn. "It can be deleted by a push of a button. Some of the media on which it's stored may degrade under certain conditions. Lawyers have to take steps to ensure that information isn't at risk of getting lost."

Many lawyers still cling to the notion that original paper documents bearing signatures must be kept on file. However, contracts now accommodate signatures that are scanned and placed in an electronic document, Walwyn says. In addition, some provinces have passed legislation (in Ontario, the *Electronic Commerce Act 2000* and the *Electronic Transactions Act, 2001)* that recognize information and records in electronic form.

Electronic records are admissible as documentary evidence in court, Canton points out. "A lot of people are reluctant to destroy originals," he continues, "but the law does say that if you have the proper processes in place and you comply with all the electronic evidence rules, it is theoretically possible to image those originals, destroy the actual original signed ones, and it's perfectly admissible." Canton adds, however, that certain original signed documents, such as wills, should be returned to the client.

With the migration to electronic filing comes the temptation to keep everything indefinitely, since e-files take up much less space. But destruction is a natural step in the life of a document, says Walwyn. "When a document has no legal or business use, it should be destroyed. Every good policy should contemplate this."

A good document retention policy that sets out the thresholds for the length of time documents will be kept on file has another advantage, Canton says. "If something comes up and you don't have the document or the file because you've destroyed it, but you can show you destroyed it as part of a written document management and retention policy that's routinely followed, there's less likely to be a negative inference raised."

"Law firms can maximize efficiency through use of electronic information"

Pinnington, Dan, *The Lawyers Weekly*, 17 August 2007, p. 9.

In the last decade, personal computers, e-mail and the Internet have transformed how the world functions and communicates.

Most people, including lawyers and their clients, are now very comfortable with creating and sharing electronic documents, and use e-mail as a primary communications tool. And this is just the start—almost every day the Internet gives us new ways to share information and collaborate, intentionally and unintentionally, in good ways and bad.

Many lawyers are struggling to keep up. Clients expect (even demand) their lawyers to be accessible and technology savvy (as in 24-7 access via a BlackBerry). For litigators, current court rules and practices, which evolved over hundreds of years in a paper-based world, don't always work in an appropriate manner when it comes to dealing with electronic information or documents.

Technology changes have also had a profound impact on how lawyers operate their offices.

To keep up, and indeed to thrive in an electronic world, lawyers need to embrace electronic information and technology. This involves both looking for ways in which they can work more efficiently and effectively with electronic information, as well as appreciating some of the dangers inherent in using electronic information or documents—for example, accidentally forwarding an e-mail or BlackBerry message to the wrong person.

First things first: let's review and understand the many ways electronic documents are different than their paper counterparts:

- they vastly outnumber paper documents;
- they are often copied or replicated in various ways (for example, cc's of an e-mail message or data on backup tapes);
- multiple copies or access across a network or the Internet potentially give many more people access to any given document or data;
- deleted files (or at least portions of them) can be recovered weeks, months or even years after they supposedly have been deleted;
- electronic documents and data are dynamic and can change or even disappear, even without human intervention, (for example, drafts of an agreement, information in a database or the contents of website);
- special hardware and/or software is required to access electronic information;
- searching, sorting and filtering electronic information can be very time-consuming and expensive; and
- electronic documents contain metadata.

What is metadata? It is "data about data", an extra hidden layer of information not seen on the screen. It is automatically created and embedded in almost every computer file, including e-mail messages. It can include, among many other things, the dates, time and people that created, accessed or edited a file and—of greatest concern to lawyers—text that was supposedly deleted from a document.

Parties exchanging documents electronically on a discovery, and lawyers sending e-mail attachments to clients or opposing counsel, need to appreciate that electronic files include metadata—and how they can strip it out (usually by converting the document to PDF format).

There is some good news: electronic data can often be searched far more quickly and accurately than paper-based information. This can help in finding relevant and privileged documents within vast collections of electronic data, even more accurately than with a manual search.

Another plus is that data in electronic form is far easier to take to discovery or court. A four-drawer filing cabinet full of documents will fit on a single CD-ROM, and once documents are in electronic form, they can be called up on a screen within seconds.

"Electronic documents" raise the specter of electronic discovery. And while this conjures up thoughts of big clients with big litigation matters, make no mistake, e-discovery can be just as important for small clients on small litigation matters (for example: financial data on a matrimonial or commercial file, or e-mails, which have the potential to be pivotal evidence on almost any matter).

In a paper-based world counsel rarely had any dealings with opposing counsel when gathering evidence. However, in the electronic world, in many cases counsel will be obliged to contact opposing counsel almost before the first client meeting is over to ensure that electronic evidence is preserved.

A working group of judges, lawyers and others drawn from right across the country created the Sedona Canada E-Discovery Guidelines. They provide practical help and direction on best practices for handling e-discoveries, and they are available at www.sedonconference.org.

In a law office setting, electronic data also has to be treated with appropriate care. Clients, lawyers and law office staff routinely work with electronic documents and data. Protecting the security and confidentiality of this information is a necessity.

Both the Rules of Professional Conduct and PIPEDA apply equally to paper-based files and electronic documents such as computer files and e-mail messages. A failure to take appropriate steps to protect the electronic data could result in a release of sensitive information, a malpractice claim, a complaint to the law society or the theft of an office member's personal identity.

To minimize the risk of any disclosure or loss of confidential client or practice data, lawyers should understand where the risks are, and implement office management practices and appropriate technology to ensure all data remains confidential and secure.

And not to dwell on the negative, there is more good news when it comes to using technology in a law office. Integrated time and billing software lets lawyers capture more billable time. Practice management software can supercharge both lawyers and staff through central storage and access to all information for every office file in electronic form. This software and a decent scanner means the paperless office is a real and practical option.

Lastly, after many years of waiting, speech recognition software is finally ready for primetime—lawyers can talk to their computers and they will understand.

Technology is changing the practice of law and how lawyers practise. Lawyers should take the time necessary to improve their technology knowledge and skills, to help understand and avoid the dangers inherent in the use of technology. By embracing technology, lawyers can become more effective, efficient and ultimately, more profitable.

[**Editor's Note:** The Ethics and Professional Issues standing committee of Canadian Bar Association is preparing "Guidelines For Practising With New Technologies;" likely to be published by 31 December 2008.]

"Alberta e-discovery order goes well beyond e-communications"

Ceballos, Arnold, *The Lawyers Weekly*, 21 September 2007, p. 2
(*in part*)

Recognizing the nature of today's business communications, an Alberta court has ordered defendants in a lawsuit to produce not only electronic communications, but also hard drives, metadata, passwords, operating systems, and system-related files necessary to view the producible records.

Madam Justice Veit of the Court of Queen's Bench of Alberta recognized that, while the law related to disclosure of electronic electronic records has seen recent developments, "some work remains to be done in this area." Nonetheless, she added that "it is a given, in this context, that electronically stored information is discoverable." However, the court added that this obligation of discovery is limited by the application of proportionality or cost/benefit considerations, meaning that the documents will only be disclosed if they are relevant and material.

Justice Veit was satisfied that not all relevant e-mails had been produced. She also ordered that the defendants list all relevant and material records that had been deleted. Noting that production includes an obligation to provide all technical information necessary to allow the receiving party to access the production, she also ordered that all passwords, systems and software necessary to access the records be produced. She added that the records should be produced electronically, since it is easier to search electronic records than paper records, and such searches also provide critical meta-data such as when and by whom a record was created or amended. In

addition, she ordered all meta-data produced, since the timing of the treatment of the records was potentially at the core of the issues raised in the litigation. Finally, she ordered access to the defendants' hard drives as well.

"Review and Use of Metadata"

American Bar Association (Standing Committee On Ethics And Professional Responsibility),
Formal Opinion 06-442, 05 August 2006

(*Summary*)

The Model Rules of Professional Conduct do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party. A lawyer who is concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata, or who wishes to take some action to reduce or remove the potentially harmful consequences of its dissemination, may be able to limit the likelihood of its transmission by "scrubbing" metadata from documents or by sending a different version of the document without the embedded information.

"E-mail Confidential"
Do those boilerplate confidentiality notices really work?

Faguy, Yves, *National*, October/November 2006, p. 46

You see them every day, but you rarely read them. Originally, those now-ubiquitous confidentiality notices at the end of e-mail messages were meant to guard against lawsuits or discipline charges should the contents of lawyers' e-mails fall into the wrong hands.

But today, hardly anyone notices them—especially since they almost always come at the end of the message, bundled with the virus-scan announcement and the sender's e-signature.

"Lawyers include them because others do it, and they don't know whether there's any downside for doing it or not," says Paul McLaughlin, a partner at Turning Point Law in Sherwood Park, Alberta, and a former practise management advisor at the Law Society of Alberta. But adding a confidentiality notice to an e-mail does not in itself fulfil your confidentiality obligations, he says.

"The steps you have to take depend on the nature of the information," McLaughlin says. "Some information is so sensitive that it should never be transmitted by ordinary mail, let alone e-mail."

Besides, there's no guarantee that identifying the message as confidential and legally privileged will be enforceable against a third party who receives the message in error. By including the statement, the sender is attempting to protect herself from inadvertently waiving any rights. It's not clear that it will work.

"If it has to include a warning at all, the disclaimer should say that if the message is sent unintentionally, the recipient cannot rely on its contents," says Michael Whitt, a partner and IT law expert at Borden Ladner Gervais LLP in Calgary. Whitt worries about the effectiveness of appending the notice at the end of the message—the strict legal view is that notices are best featured up high, so that the recipient actually takes note.

Typically, a notice will remind the reader that the message is the property of the organization—which is likely true, but has little enforceable value against third-party recipients. But at least the sender is on notice that his e-mail messages belong to the firm, which could refuse him copies upon his departure from the organization at a later date.

The important thing, says Whitt, is that lawyers ask clients to agree that by using e-mail, they are waiving any claims arising from the inherent insecurity of online communications. "At least put some onus on the client that they may want to use another channel of communication," he says.

Whitt also has concerns that by including a blanket disclaimer in every message, the disclaimers are weakened. "Can you claim you've exercised scrutiny and diligence when both the grocery list sent to your mother and a confidential enclosure sent to a client have a 'privileged and confidential' statement appended?" says Whitt. "Often, I'll include a notice only when sending a sensitive document."

Blanket notices, if not specific enough, also risk exposing lawyers to the consequences of foreign laws. Take, for example, the requirements imposed by the IRS that limit the types of tax advice lawyers can give in the U.S. To ensure compliance, Whitt occasionally includes a disclaimer that any U.S. federal tax advice cannot be used for the purpose of avoiding penalties under the Internal Revenue Code.

"If you don't include that warning, you may be running sideways of a foreign jurisdiction's regulations," says Whitt. The bottom line: he favours context-sensitive disclaimers to fit the occasion.

"The Curmudgeon on Couth"

Herrmann, Mark, *The Curmudgeon's Guide To Practicing Law* (Chicago: American Bar Association, 2006), pp. 95-99.

Back in the twentieth century, I studied etiquette. Maybe you did, too.

My second-grade class came equipped with plastic telephones, and we rehearsed telephone manners. With one child sitting at each end of the table, and the entire class watching, we took turns making and receiving calls:

"Hello."

"Hello. This is Mrs. Smith. May I please speak to your mother?"

"I'm sorry, but she's not here right now. May I take a message?"

"Yes. Please ask her to call me back."

"May I please have your number?"

"Yes. It's 212-999-9999."

"I'll give her the message."

"Thank you."

"You're welcome."

"Goodbye." "Goodbye."

The advent of caller ID and voice mail have transformed etiquette, but they haven't eliminated it. Treat me with couth. Treat our clients with couth. Here's a refresher course on etiquette, updated for the twenty-first century.

In today's frenetic world, etiquette should embrace more than just being nice. We should also respect others' time and recognize the need for efficiency. Communications among busy people should take into account the value of brevity, the benefit of prompt disclosure of the real purpose of the communication, and the need for later filing and retrieval of the communication.

Voice mail greetings, for example, should be functional. Society has been listening to answering machines for quite some time. Just about everyone knows that when your answering machine picks up a call, you are not available, and the correct thing to do is to leave a message after the tone. There are thus only two essential pieces of information to convey in a voice mail greeting: your name (to confirm that the caller dialed the correct number); and the shortcut, if any, for skipping the rest of your message and going directly to the beep. Unless there is a special message (such as, for example, that no one will be listening to these recordings for a month), the rest of most voice mail greetings is either secondary or superfluous. The courteous greeting therefore gives callers the essential information and an opportunity to avoid the rest.

So the optimal introduction to a voice mail greeting runs along these lines: “Hello. This is Curmudgeon. Please press the pound sign to go directly to the beep." After that, the message can drag on endlessly with details about you, your personal or professional life, why you're not available, and your assistant's extension. A caller who is pressed for time, however, is instantly empowered to skip to the tone and leave a message. Why, then, doesn't your voice mail leave this polite form of greeting? Instead, your voice mail greeting, like everyone else's, goes something like this:

> “Hello. This is Curmudgeon. I might be out the office, or it might be outside of ordinary business hours, or I might be on the other line, or I might just be away from my desk. For whatever reason, I am not here to answer your telephone call. If you leave a message, however, I will return your call as soon as I'm able. If you would like to speak to an operator, please press zero. If you would like to speak to my assistant, her name is Jane Smith, and she can be reached by calling back at extension 9-9999. In the future, if you would like to skip this greeting, please press the pound sign.” *Beep.*

Why save for the end the blessed short-cut to the tape? Some voice mail systems skip directly to the beep when the caller presses the pound sign. For other systems, a caller activates the shortcut by pressing the star key. For yet others, one must press the “1” key. And other systems use yet different shortcuts or have none at all. The long-form telephone greeting, which does not tell how to skip to the tone until a nanosecond before the tone sounds anyway, serves no purpose.

In fact, that standard greeting is not simply useless, but impolite. By concealing the shortcut to the beep until the end of the message, the standard greeting implicitly asks us to remember, for all of the hundreds of people whom we might call, the correct shortcut for each respective voice mail system. A voice mail greeting should not impose that burden. Twenty-first century etiquette dictates that name and shortcut to the beep should be the first items on every voice mail greeting; the rest is optional.

That rule applies with particular force to greetings on cell phones. Some cell phones have painfully long greetings provided by the service provider. The addition of your long greeting turns mere pain into a root canal. Keep the greeting short.

Perhaps enraged by the greetings they have been forced to endure, those who leave voice mail messages are often uncouth, too. Here are five contemporary rules of etiquette for leaving messages on answering machines.

First, leave your name as part of every voice mail message. It is actually rather touching to think of how many people believe that their voices are instantly recognizable and therefore do not bother leaving their names on voice mail messages. (Perhaps they are the same people who, when by some miracle their call is answered by a human instead of a machine, launch happily into their conversation without first identifying themselves.) You may be different, but only a few people—perhaps my wife and kids—reasonably can assume that I will recognize their voices when they leave me a voice mail message. No one else should take that chance. There is nothing more frustrating than to receive a voice mail message and not recognize the voice, which leaves you to wonder who exactly might have said, "Hi, Curmudgeon. Give me a call." Whenever you leave a voice mail message, help your listener; leave your name.

Second, if your voice mail message requests a return call, leave your phone number. If you do not leave your number, you're either assuming the person you call will remember it, or you are forcing her to look it up. We should not impose this burden on others, and the burden may be insurmountable. When I am between planes at the Tulsa airport, and Research in Motion suffers a temporary service outage in its BlackBerry network (or my battery dies), it does me no good to hear this message:

> "Hi, Curmudgeon. This is Jim Smith. I know that you're on the road, but I heard that you will be changing planes soon. We are having an absolute emergency. Please call me as soon as possible."

In the days before smart phones, BlackBerries, and speed dials, I carried many telephone numbers in my head. Today, I carry far fewer. Locating the appropriate phone number to return a call can be difficult, and even impossible, after-hours and on the road. If your voice mail message asks me to return your call, and you actually want a response, leave your number.

Third, when leaving a return telephone number on a voice mail message, state the number slowly and clearly. Of all the information we leave on a message, the most critical item is the return phone number. My caller, of course, has recited her phone number a million times in her life and knows it quite well, so she speeds through it at a rate that is unintelligible to the human ear. I, however, am stranded in the Tulsa airport trying to scribble down the number on the back of a fast-food receipt, which is the only available scrap of paper. At moments like this, the following message does not help me:

> "Hi, Curmudgeon. This is Jane Smith. We are in an absolute emergency. Please call me as soon as possible. My number is two-one-twoninethreesi-flugelmeyer."

If it truly is important that I return the call, state your phone number, not just slowly, but twice. That way, when your cell phone connection to my voice mail garbles your phone number the first time you uttered it, a chance remains that I actually will hear the phone number the second time around.

The fourth rule of voice mail etiquette: If you can advance the ball, then do. Most voice mail messages don't.

You are busy, and I am busy. So, if I leave a substantive message that tries to move us toward a decision, why can't you?

> "Hi, Jim. This is Curmudgeon. As you know, we want to ask for more time to respond to the other side's document request in the *Doe* case. My question is this: Will you have the documents collected in thirty days, or should I ask for forty-five days? Please let me know. My telephone number is. . . ." [Of course, I leave my number because I know proper etiquette commands me to leave my telephone number on a voice mail message that requests a return call.]

> "Hi, Curmudgeon. This is Jim. I got your voice mail. Please give me a call."[Of course, he does *not* leave a phone number, because he is unfamiliar with the twenty-first century rules of etiquette.]

> "Hi, Jim. This is Curmudgeon. Thanks for calling me back. All I really need to know is whether we should ask for thirty or forty-five days on the response to the document request. Please let me know. My telephone number is, . . ."

> "Hi, Curmudgeon. This is Jim. I got your voice mail about the document requests in the *Doe* case. Please give me a call when you have a minute."

What the heck is this? If you'll just say either "thirty" or "forty-five," we'll be done. I don't want to pester you. I just need one simple answer. Leaving it on my voice mail should suffice.

Sure, some issues are so sensitive that they should not be discussed by voice mail. In those circumstances, be discreet. In all other circumstances, callers have the choice between playing endless telephone tag or actually communicating. Whenever possible, communicate. If you have a question that needs answering, leave the question on the voice mail. If you can answer a question by voice mail, leave the answer. This is not only polite, but efficient.

The fifth rule of twenty-first century voice mail etiquette is a corollary of the fourth. When you are advancing the communication, do so briskly. Think before you call, so you can leave a concise message that respects the listener's time. If, for example, you are asked by voice mail whether you are free for a conference call on a particular day at a particular time, the polite answer is "yes" or "no."

Imagine leaving a voice mail asking if a person is available for a call on Wednesday at 4:00 p.m. EST and receiving this type of response:

> "Hi. This is Kathy. I got your message about a conference call. I'm heading to L.A. on Sunday afternoon for Monday meetings. I leave for Seattle Monday night, and I'm in

deposition all day Tuesday. I have meetings in Seattle Wednesday. I'm back in L.A. Thursday and home on Friday. Thanks. Bye."

That is not polite. It does not answer the question posed. Instead, it inflicts a long message, and it suggests that someone should take notes about the work schedule (including location and particular events) for each of the people invited to the conference call. If asked a question by voice mail, just answer the question. Unless there is a reason to do more, don't.

Of course, email did not exist when I was taught etiquette, but back in the twentieth century, we did learn the rules of etiquette for paper mail. People addressed correspondence correctly and formatted letters appropriately. Letters had "re" lines so they could easily be filed correctly. Letters also typically contained some meaningful content.

Polite correspondents avoided one-sentence letters that said only, "Please see enclosure." That letter was impolite because it burdened the recipient unnecessarily. If the enclosure is simply for the recipient's files and there is no reason to read it, the cover letter should say so: "I have enclosed for your files a copy of the stipulation extending time to answer for thirty days as executed by opposing counsel." On the other hand, if the enclosure is important, the cover letter should note the highlights, thus allowing the recipient to judge its importance and read the enclosure at an appropriate time. A letter pointing to an enclosure without explanation was never a polite letter, and most people did not send them.

For some reason, we seem to have taken leave of our senses in the new world of email. As with voice mail, I propose five rules of email etiquette.

First, put the confidentiality disclaimer *after* the text of the email message. Remarkably, unthinking or insensitive information technology staff sometimes impose long boilerplate disclaimers about the confidentiality of emails *before* the message. For the many busy readers who preview email messages automatically on their computer screens (and some of us are dealing with hundreds of messages in a single day), this means that the text of the message will not appear in the preview screen without scrolling down. Even if the reader chooses to double-click and bring the entire message up on the screen, he still is forced to scroll down to see the piece of the message that matters. Do not inflict this inconvenience on your reader. Ensure that the confidentiality disclaimer appears after, rather than before, the text of any new email message.

Second, any email should have a "subject" line. That line serves many purposes. It lets the recipient follow her priorities in what you send to her. I will, for example, read:

"Subject: TRO hearing at 2:00 p.m. today!"

before I read:

"Subject: Our lunch date next Tuesday."

A meaningful subject line always helps.

Moreover, as with hard-copy correspondence, subject lines aid the filing of electronic correspondence. Whether you will print an email and save it in hard copy, or simply move it to a folder in your email system, filing is easier if the email has a subject line on it. I am likely to file the email in a folder that has scores or hundreds of other items in it. Six months from now, when I'm trying to locate that one email on a particular subject, the email should have a subject line that permits me to find it. Emails that lack subject lines may disappear into a file never to be found again.

Polite emails will include not. just words in a "subject" line, but meaningful words. Suppose, for example, that we are working together to defend fifty lawsuits for one company. I will probably create a separate email folder for each case. We will, at some later date, want to locate an email that deals with a particular subject on a particular case. When a polite emailer types out a "subject" line, he bears in mind this future use. Thus, better than nothing at all is this "subject" line:

"Subject: BigCo litigation."

That gives some general sense of what the email discusses, but it does not permit easy storage in a particular case file, and it does not ease the later search when someone is trying to find that particular email.

By contrast, consider this description for exactly the same email message:

"Subject: BigCo/Doe: contract choice of law analysis."

That description is a zillion times more helpful. It tells the recipient whether the email is urgent. It tells the recipient the particular case to which the email relates. It tells the recipient the particular piece of analysis contained in the email, which lets the recipient know the general content and will help others to locate the email six months later. Every email should have a meaningful subject line.

Etiquette may demand that the subject line be revised as an email is replied to or forwarded repeatedly. The first email in a chain, for example, may schedule a call with a potential expert witness. All appropriate subject line might read, "Feb. 2, 4 p.m.: Smith call."

Over the course of the ensuing weeks, the email chain may evolve. The polite correspondent will not unthinkingly "reply" or "forward" without considering whether the subject line remains relevant. After a half-dozen "replies," for example, the email about Dr. Smith might require a revised subject line, such as "HugeCo/.Jones: Smith causation opinion." Think before you "forward."

Third, if an email is to be sent at all, the text of the message should itself have meaningful content. I frequently receive emails that have neither a subject line nor any content added by the sender. Rather, these subject-less messages are blank, but for an attachment or an attached email thread of ten or twelve messages. The contentless cover email invites—actually forces—me to scroll through the host of attached email messages to locate some hidden treasure requiring comprehension and, perhaps, a response. But the sender hasn't told me what the message is about, what

I should be looking for, or why I should even care. A one-sentence description of the attached email thread would go a long way to ease my burden.

Moreover, that one-sentence description should be meaningful. This is particularly important when the attachment is a separate document that must be opened. In the hard-copy world, an impolite cover letter—'The enclosed is for your files"—coerces little effort. It takes only an instant to look at the enclosure and decide what it relates to and whether it requires review. In today's e-world, a meaningless line of text imposes burden and may even create danger.

Consider, for example, the recipient's reaction to this all-too-common email:

"Please see the attached."

The recipient does not know if the attachment contains an application for an emergency hearing scheduled to start in fifteen minutes, evidence of some petty quibble between counsel, or a computer vims. The only way to learn is to open the file. That could waste time, or it could prompt a disaster. The computer system may be slow today, and so the recipient may defer opening the attachment until later. The recipient may be on the road and abandon pursuit of the attachment after a BlackBerry struggles unsuccessfully to open it for ten minutes. Why not save both the effort and the risk? Every email should contain text, and the text should explain concisely the substance of any attachment.

While we're talking about attachments, consider this rule of etiquette, too: Create attached files in a useful size. There are two related acts of incivility here. On the one hand, do not create and send attachments that are too big. It may be convenient for you to send a document in a single 12 million kilobyte file, but think of me when I try to open the *!*!! thing. My computer will either crash instantly or be incapacitated indefinitely as it struggles to open this over-sized file.

On the other hand, do not send attachments that are too small. If you want to transmit twelve one-page documents, put them in a single file that I can conveniently open and view (or print). Do not attach each page as a separate file, forcing me to double-click, wait, click to open, wait again, and so on twelve separate times. Unless there's a good reason to make the recipient's life hard, create email attachments in sizes that make life easier.

My fourth rule of email etiquette is this: If the email message is unnecessary, do not send it. I'm not trying to be curt here, but there are some depths to which we should not sink. I'm not offended to receive an occasional email that's truly funny at some politician's expense. I'm not offended, and am sometimes relieved, to receive an email message that says simply, "I received your message and will do as you requested before noon tomorrow." But do I have to be burdened with messages that serve no purpose at all? I get plenty of junk email; don't add yours to the collection. Let's agree as a rule of twenty-first century etiquette that if an email does not need to be sent, it won't be.

If an email must be sent, keep it as short as possible. A client once told me that "I want to be able to understand your entire email message before I reach the scroll line. Anything that's going to make me scroll should be put in an attachment. And I don't read attachments."

I like that gal.

Fifth, if you're answering a question posed by email, please reply "with history"—or with at least enough "history" to make your answer intelligible. I send and receive hundreds of emails every day. I occasionally puzzle over an email that reads:

"Subject: Re: A question for you."

Text: "Yes."

When I see this, I'm confident that I did pose a question at some time in the past. But, often I do not remember what the question was. Don't strain my failing memory; if you're giving an answer, then please repeat or attach the question.

One other issue of email etiquette concerns a nicety. Roughly half of my email correspondents address their emails with a salutation—"Dear Curmudgeon"—at the beginning, and a closing—"Regards, Jim"—at the end. Obviously, since the computer whisked the email to my in-box and labeled it as being from Jim's email address, one might conclude that was sufficient identification. On the other hand, in the old-fashioned world of paper letters, even properly addressed envelopes and embossed letterheads do not eliminate the need for polite salutations and closings. I really don't know which form should be proper in emails. Perhaps a rule will develop over time.

There is one final rule of old-fashioned etiquette, the importance of which has been magnified in our twenty-first century world: If you are at a meeting, pay attention.

Whenever a group of people meets, two acts of rudeness now routinely occur. First, people not only receive, but take, and talk on, cell-phone calls. Second, BlackBerries buzz and people type responsive messages. We did not tolerate this flagrant disrespect in the past century, and we should not tolerate it in this one. Technology makes you readily available at appropriate times, but technology does not compel you to ignore the other people in a room to tend to different—and, the insulting implication is, more important—affairs.

Incredibly, I have heard people say that they won't buy a BlackBerry because BlackBerries make people rude: BlackBerries make people stop paying attention at meetings. I have news for you: Guns don't kill people; people kill people.

BlackBerries don't make people rude. Jerks who own BlackBerries reveal that they're jerks because the technology makes the revelation easier.

If a meeting is unnecessary, do not schedule it. If the meeting is necessary, then the participants are obliged to participate. If they can legitimately do other business during the

meeting, then the meeting either was unnecessary or ran too long. Moreover, as a matter of simple couth, if I can fly 2,000 miles to attend a meeting, then you can listen to what I say. I promise to listen to you in return.

Let's treat each other with respect. And let's treat our clients with respect. I wasn't born a Curmudgeon. I was changed by years of other people's incivility; maybe it's not too late to change me back.

"Internet Communications with Prospective Clients When Disclaimers May Not Be Enough"

Tuft, Mark L., *The Professional Lawyer*, 2006, pp. 23-28.

We are frequently reminded that the Internet is the tool of the future. When it comes to delivering legal services over the Internet, lawyers employ various means to screen clients and avoid conflicts that could lead to disqualification. One commonly suggested means for avoiding the pesky conflict that can arise from receipt of confidential information from prospective clients is the use of disclaimers. It is thought that an effective notice or advance agreement with viewers utilizing a lawyer's web site [-] that no client-lawyer relationship will arise and no information transmitted by the would-be client will be considered confidential [-] will eliminate the risk of disqualification and avoid any responsibility to the person seeking employment. …[I] suggest … that general disclaimers may not be enough to protect the interests of the public who are invited to seek Internet-based representation and that the more traditional intake process of clearing conflicts first before inviting consumers to reveal information about their legal matter affords better protection for both lawyers and the public.

Web sites have become more than a passive means for advertising and marketing legal services. Technology affords consumers access to high speed and efficient legal services in a dynamic although often more limited way. The Internet is increasingly being used to encourage viewers to submit legal questions for on-line consideration and possible retention. An Internet-based law practice that answers legal questions and provides legal services is not prohibited so long as the protections afforded by professional conduct rules are satisfied.

While the Internet may be the tool of the future, finding the right lawyer continues to be a challenge for most people. Those in search of legal services will still need to consult privately with lawyers willing to consider the matter in making an informed decision whether they need a lawyer and if this is the right lawyer for their matter. Model Rule 1.18(b) mirrors case law and ethics opinions in most jurisdictions that the duty of confidentiality extends to prospective clients seeking an attorney's assistance with a view …[to deciding whether or not to employ] the attorney professionally, even if no employment results. In most jurisdictions, pre-retention communications by those seeking legal representation in good faith with a lawyer who has agreed to consider being retained are also protected by the attorney-client privilege. The rationale for applying the privilege to preliminary communications is equally compelling for consumers who

chose to seek legal help through the Internet. "[N]o person could ever safely consult an attorney for the first time with a view to his employment if the privilege depended on the chance of whether the attorney after hearing his statement of facts decided to accept the employment or decline it [;]" [held *People v. Gionis*, 9 Cal 4th 1196, 1205 (1995)].

There is a distinction between unilateral, unsolicited communications by viewers through an email link to a web site that advertises a lawyer's general availability and a web site that encourages on-line consultations and invites legal questions. It is generally agreed that simply maintaining an e-mail address is not enough to impose a duty of confidentiality with respect to unsolicited emails, particularly transmissions by would-be clients who are attempting to "foist" confidential information upon the unsuspecting attorney. In this context, attorneys are appropriately encouraged to use disclaimers to warn viewers against submitting unsolicited emails with confidential information where the attorney has not agreed to consider the relationship. Maintaining a passive web site that advertises a lawyer's general availability for employment with appropriate limitations on forming an attorney-client relationship and a disclaimer that unsolicited emails requesting representation will not be considered confidential would likewise not create a legitimate expectation of confidentiality on the part of the sender. Hence, the receipt [by a law firm] of unsolicited communications by would-be clients generally will not disqualify a law firm receiving the information from representing a client adverse to the prospective client, even if the receiving law firm could not reveal the information or use it against the prospective client, since the firm would have had no real opportunity to avoid its receipt.

A quite different situation arises if the web site invites the communication or otherwise creates an expectation in advance that the attorney will consider forming a professional relationship with the sender. When this occurs, potential clients have a legitimate expectation that their communications will remain confidential. Where the consumer is invited to communicate electronically with the lawyer, the lawyer has an opportunity to control the content of the information the lawyer receives in considering whether to accept the engagement. Lawyers have a duty to avoid conflicts of interests, particularly with existing clients. It is incumbent on lawyers receiving solicited on-line communications to obtain basic information up front to clear conflicts before responding to the inquiry. In offering Internet-based services in this manner, lawyers should consider apprising viewers of the need for this two stop-intake process and caution that any information the viewer considers confidential should not be imparted until conflicts are cleared and the lawyer has communicated a willingness to proceed.

A two-stop process in this situation offers better protection for both the prospective client and the lawyer than the use of blanket disclaimers. Lawyers are better off utilizing fill in forms, drop down menus and templates that control the information viewers are allowed to reveal until a preliminary determination is made that no conflict exists. Identifying information such as the names of the parties, their addresses, the type of case and other persons and entities involved will usually be sufficient to clear most conflicts through a reliable data base and other intake methods, such as an email alert to lawyers in the firm. If no conflict is found, the lawyer can obtain additional information during the initial period when the matter is under mutual consideration. Conflict problems can still arise during subsequent on line consultations after the initial conflicts check, as in the case of in-person consultations. However, a two-step process will reduce the likelihood of disqualification as well as attempts by savvy viewers to conflict out opposing counsel

by sending emails filled with specific case information. More importantly, it will help protect potential clients who are responding to the on-line invitations for legal advice.

Disclaimers, on the other hand, are not the most effective method of avoiding disqualification or protecting the rights of potential clients. Many people turn to the Internet for legal help without knowing beforehand where to begin. The Internet has the capability of allowing for initial disclosure of information people would not otherwise reveal if they knew the consequences. To be effective, disclaimers must use "plain language" if a potential client's waiver of confidentiality is to be knowing.

In California State Bar Formal Opinion 2005-168, a wife searching the Internet for a law firm that specializes in divorce, finds a law firm web site that describes the firm's family law practice and contains a link entitled: "What are my rights?" The link leads to an electronic form that asks for the inquirer's contact information, for a statement of facts relating to the inquirer's legal problem and for any questions the inquirer wishes to pose to the firm. The inquirer fills out the form explaining that she is interested in seeking a divorce and provides support and employment information. She states that she is looking for an attorney who will achieve her goals in obtaining a property settlement and sole custody of the child of the marriage. She concludes with a question whether an extra-martial affair she had that she wants kept secret will have any effect on achieving her objectives.

Immediately below the text box are terms of use the inquirer is required to accept before submitting the information. The terms include an acknowledgement that "by submitting this inquiry, I understand that I am not forming an attorney-client relationship. I also understand I am not forming a confidential relationship." Upon receiving the transmission, the law firm discovers that the inquirer's spouse had already retained the firm to explore the possibility of obtaining a divorce.

The opinion concludes that the inquirer had a reasonable expectation of confidentiality in transmitting her information to the law firm, because the law firm invited the consultation for the purpose of considering whether to enter into an attorney-client relationship with the inquirer. The law firm did not use sufficient "plain language" in its disclaimer to defeat her reasonable belief that she was consulting the firm for the purpose of possible employment. As a result, the firm could not avoid assuming a duty of confidentiality with respect to the information received by requiring the inquirer's acceptance of the terms of use. Therefore, the firm would be disqualified from representing either party in the divorce.

The opinion suggests that had the law firm used clearer language in its agreement with the inquirer to the effect that "I understand and agree that the law firm will have no duty to keep confidential the information I am now transmitting to the firm," the law firm could have "defeated" the inquirer's reasonable expectation of confidentiality and avoided a duty to not reveal or use any of the information the firm had solicited. However, one wonders whether this is a preferred solution. It is one thing to have a disclaimer that warns consumers not to send unsolicited confidential information and another [to] require … potential clients to enter into a "click wrap" agreement that has the effect of waiving confidentiality as to information the lawyer has encouraged the consumer to send. Use of such disclaimers in this situation would not promote the

strong public policy of encouraging clients to seek legal advice, nor would it seem to promote the Internet as an alternative for traditional in-office consultations. Even if the disclaimer was crafted in sufficient plain language to be effective, it is not clear that the law firm would be able to reveal or use the wife's information in representing the husband.

A better way to proceed that would avoid the confidentiality issue would be to require the inquirer to submit limited information that would allow the law firm to perform a conflicts check. In the situation addressed in California State Bar Formal Opinion 2005-168, the firm would first want to ensure that it does not represent the other spouse. The dialog box drop down form could be limited to identifying the names of the parties, addresses, children, former spouses, relevant maiden names, and the subject area. Most consumers will understand and appreciate an explanation on the web site that the reason for requiring limited information as the first step in considering the potential client's matter is to protect the interests of the law firm's existing clients.

Additional problems can arise when the lawyer seeking on-line information from prospective clients ends up accepting the engagement. Employing disclaimers that require prospective clients to agree that no confidentiality exists with respect to information the client is invited to submit at the outset [before engagement] may have the effect [after engagement] of vitiating the client's claim of privilege and exposing the information to later discovery that could prejudice the client's case.

In *Barton v. U.S. District Court* [410 F.3d 1104 (9th Cir 2005)], a drug company's discovery request for opposing counsel's Internet questionnaires soliciting extensive information from potential class members concerning the company's antidepressant drug was denied on the grounds that the disclaimer at the end of the questionnaire was too ambiguous to constitute a waiver of the attorney-client privilege. The "yes box" disclaimer which each person responding to the questionnaire was required to check before sending the email included the statement: "I agree that the above does not constitute a request for legal advice and that I am not forming an attorney client relationship by submitting this information." In denying the drug company's discovery request, the court found that the law firm's ambiguity in failing to include an express waiver of confidentiality should not result in the loss of the clients' privilege.

No doubt lawyers can come up with better disclaimer language than that used in *Barton* and in California State Bar Formal Opinion 2005-168. However, it remains to be seen whether Internet sites that encourage the transmission of confidential information can effectively avoid any responsibility to potential clients through the use of disclaimers. Comment [5] to [California] Rule 1.18 provides that a lawyer may condition conversations with a prospective client on the person's informed consent that any information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter. The agreement may also expressly provide that the prospective client consents to the lawyer's subsequent use of the information. However, "informed consent" under [California] Rule 1.0(e) denotes agreement after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

A lawyer receiving "disqualifying information" from a prospective client (defined in [California] rule 1.18(c) as information that "could be significantly harmful to that person in the

matter") may nevertheless represent a client with interests materially adverse to those of the prospective client in the same or a substantially related matter if (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or (2) "the lawyer who receives the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the client;" and the lawyer was timely screened from any participation in the matter (and receives no fee therefrom) and the prospective client is given prompt written notice. Lawyers who solicit email communications from prospective clients containing "disqualifying information" with a notice that the information will not be treated as confidential, without first clearing conflicts, may find it difficult to satisfy the requirements of rule 1.18(d)(2).

Requiring potential clients seeking Internet-based legal services to waive confidentiality with respect to their initial communications as a means of avoiding disqualification may not always serve the public interest. The objective should be to adapt technology in a way that maintains the same degree of professionalism and protection of the interests of prospective clients as in the more traditional law office setting.

4.0 PROCEEDINGS DERIVING FROM BREACHES OF STANDARDS OF RESPONSIBILITY

4.1 Administrative: Disciplinary

"Disgraced judge regains licence"

Tyler, Tracey, Toronto Star, 27 March 2007
(*in part*)

A former Ontario judge who resigned from the bench after being found guilty of sexual misconduct with court employees has regained his right to practise as a lawyer.

A Law Society of Upper Canada appeal panel has restored Kerry Evans' membership in the province's self-regulating legal profession, on the condition that he spend the next two years practising as an employee of another lawyer.

Evans, 56, intends to practise criminal law and has been working as a paralegal for [a] law firm in Barrie, where he resides, his lawyer, Chris Paliare, said yesterday.

Evans resigned from the bench on Nov. 14, 2004, before the Ontario Judicial Council sanctioned him for misconduct with co-workers that included several instances of patting their groins and buttocks, French-kissing and … force-feeding them ju-jubes.

The case is believed to be the first in Canada to consider the circumstances in which a former judge can be barred from returning to the practice of law.

Last August, a law society hearing panel rejected Evans' application for reinstatement, saying public confidence in the legal profession would be shaken by the "relatively swift" return of a former judge whose credibility had been impugned by his judicial peers and who admits to an ongoing need for counseling and monitoring.

. . . .

…, Paliare argued the hearing panel engaged in fundamentally flawed reasoning by likening Evans to a disbarred lawyer who was asking for the right to be readmitted to the profession.

Disbarment is presumed to be a permanent obstacle to readmission, while restoration of a judge's legal licence—held in abeyance at the time of their appointment—is automatic unless the law society registrar refers the case to a hearing.

If so, the law society must present "clear, cogent and convincing" evidence to show why the judge should not be able to work as a lawyer, Paliare said.

O'Toole v. Law Society of New Brunswick

(2007), 312 N.B.R. (2d) 258 (C.A.), Deschenes J.A.
(Daigle and Robertson JJ.A. (concurring))

(*Facts at paras. 4-7; 11-14; Issue, Decision and Reasons summarized*)

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[4] The appellant has been practicing law for more than 20 years. In 1995, he did legal work for both the complainant (Mr. Grant) and his wife. In 1996, the couple experienced marital difficulties. Mr. Grant instructed the appellant to prepare a separation agreement on terms the couple had apparently agreed upon. They visited the appellant's office on several occasions, and on the fifth visit, the appellant informed Mr. Grant that in order to protect the separation agreement from any attack as to its validity, Mr. Grant would have to consult another lawyer who would review the terms of the agreement and witness his signature. Mrs. Grant, however, would continue to have the appellant as counsel, and he would take her signature on the separation agreement. The complainant in fact met with another solicitor to sign the separation agreement.

[5] Some three years after the separation agreement was signed, divorce proceedings were commenced and the couple retained the services of other solicitors to represent their interests. Mrs. Grant then sought to re-open the separation agreement on the basis of her husband's failure to make adequate financial disclosure. The issue of the division of marital property was settled, but not before Mr. Grant paid an additional $15,000 not envisaged in the separation agreement, which was supposed to constitute a final resolution of their respective claims for a division of marital property. Mr. Grant contacted the appellant seeking reimbursement of the sum of $30,000. The appellant informed Mr. Grant that he should contact his lawyer if he was unhappy with the separation agreement.

[6] In September 2001, Mr. Grant filed a complaint with the Law Society, and after the usual investigation, and unsuccessful attempts to resolve the complaint, the appellant was informed in October 2002 that the Complaints Committee had reviewed the matter, and referred the complaint to the Discipline Committee. On January 28, 2004, the Notice of Complaint referred two charges of conduct deserving of sanction to the Discipline Committee for hearing. They read as follows:

> a) Between August 1, 1996, and November 30, 1998, [the Appellant] acted in a conflict of interest having been retained by Allison Grant to represent him in the matter of a divorce from his wife, Joanne Marie Grant, received instructions from him pertaining to the preparation of a Separation Agreement and, on September 16, 1996, meeting with Joanne

Marie Grant to provide independent legal advice and taking her signature on the Separation Agreement, contrary to Chapter V (Impartiality and Conflict of Interest Between Clients) of the Code of Professional Conduct of the Canadian Bar Association (1987).

b) On September 16, 1996, [the Appellant] committed an act of dishonesty by failing to disclose to Joanne Marie Grant your representation of Allison Grant and the nature of the instructions and documentation received from him, contrary to Chapter I (Integrity) and Chapter II (Competence and Quality of Service) and Chapter III (Advising Clients), of the Code of Professional Conduct of the Canadian Bar Association (1987).

[7] The appellant was found to have committed the conduct deserving sanction as contained in the first charge. The second was dismissed.

. . . .

[11] At the risk of oversimplifying the appellant's position, it is fair to say that, in his view, the impugned conduct was not deserving of sanction because it did not offend any rule of the Law Society's Code of Professional Conduct. The complainant and his wife had been his clients in the past. The couple was experiencing marital difficulties. The appellant received instructions from Mr. Grant to prepare a separation agreement on the basis that they were separating under agreed terms. They had been informed by the appellant that if any dispute arose, he would have to withdraw from the file entirely. In addition, the appellant informed them that when the time came to sign the agreement, one of them would have to get independent legal advice so as not to jeopardize its validity. In fact, a decision was made to refer Mr. Grant to another lawyer for signature, so Mr. Grant could obtain independent legal advice, while Mrs. Grant consulted with the appellant with respect to the separation agreement. The appellant was never involved in any discussion with her as to financial disclosure because, as he testified, Mrs. Grant did not need to discuss it, nor did she want to, as the parties were in agreement as to the terms of the separation.

[12] The appellant maintained throughout that his handling of the separation agreement was consistent with the long standing practice of the Fredericton Family Law Bar. According to the appellant, "the practice is that the clients reach agreement without legal intervention, their lawyer then advises them of their right to financial disclosure from one another, they waive their right, then the lawyer converts the oral agreement to a formal agreement and sends one to the spouses off to get independent legal advice from another lawyer."

[13] The Committee found that even in cases where a separating couple appears not to be involved in a dispute over the distribution of marital property, the rule referred to in para. 10 herein applies, since the rule applies whenever "there is or is likely to be a conflicting interest" and that where "property division or support obligations are being determined by a separation agreement, the parties are starkly adverse in interest." By taking instructions from them and drafting the agreement, the appellant acted for both parties to the separation agreement, and thus, was in breach of the rule "unless he had adequately disclosed to them the risks of doing so and obtained their consent", guidelines which the appellant had failed to follow. In fact, the Committee was also of the view that the appellant had never ceased to be Mr. Grant's advisor, except for the brief period of time when Mr. Grant attended before another lawyer to sign the separation agreement. In that

context, the Committee found that although the appellant purported to give independent legal advice to Mrs. Grant on the contents of the separation agreement, the appellant was never in a position to give her independent legal advice, and this failure was not cured by the fact that he later sent Mr. Grant to see another lawyer.

[14] After a thorough review of the evidence, the Discipline Committee concluded:

> Although there might be an accepted practice of taking instructions from both parties, a solicitor must make it clear at the outset which party is being represented by that solicitor and which one is not and this choice must be carefully documented. Otherwise, there is a danger that the party not represented by the solicitor will rely on that same solicitor to protect his or her interests. We find that the [appellant] was in breach of Chapter V because he admittedly acted for both parties in a separation matter. The [appellant] then compounded the conflict of interest by purporting to give independent legal advice to one of his clients where, inevitably, the advice given to Mrs. Grant would have to be adverse to the interests of his other client, Mr. Grant. We find that the same conflict of interest would have existed no matter which of his clients the [appellant] chose as the one to receive his "independent" legal advice after conducting himself as if he had been acting for both of them.
>
> . . . .
>
> Issue: Was Appellant's impugned conduct deserving of sanction.
>
> Decision: Appeal dismissed; impugned conduct warranted sanction.
>
> Reasons: The standard of review of the Committee's decision was reasonableness *simpliciter*. The parties to the agreement were adverse in interest because the division of their assets was being determined by the agreement. Appellant had an obligation from the outset to adequately disclose to the parties the risks involved in having appellant act on behalf of both of them.

[**Editor's Note**: Application for leave to appeal to Supreme Court of Canada, refused 20 September 2007: 2007 CarswellNB 462.]

“Activist lawyer disbarred for misconduct”

Tyler, Tracey, *The Toronto Star*, 12 September 2007.

The 22-year career of a prominent Sikh lawyer and member of the Order of Canada was snuffed out in less than 15 minutes yesterday—the time it took a disciplinary panel to find T. Sher Singh guilty of professional misconduct.

The Law Society of Upper Canada committee drummed Singh out of the profession on his 58th birthday. But the Guelph lawyer and long-time race relations advocate was not on hand to witness his disbarment and had no legal representation at the hearing.

"I don't know how to deal with this. I can't deal with it," he said in a telephone interview on Monday.

Singh said he was "burnt out" from more than 20 years of combined stresses, including the litigation process with its seemingly never-ending court battles, his involvement in numerous community organizations and the rigours of being a single parent.

But Kitchener resident Cathleen Adams, a social worker at the Community Care Access Centre in Guelph, had little patience for her former lawyer yesterday.

"I want to do my part to make sure Mr. Singh cannot act in our province as a lawyer," she told the panel convened in Toronto.

Testifying over the telephone from Guelph, Adams said she and her husband each paid Singh $1,500 to mediate their separation issues in 2005, but he never followed through on a promise to draw up a formal separation agreement and ignored subsequent calls.

Leaving them in the lurch has cost them untold dollars and stress, said Adams.

Singh was a member of the Ontario Police Commission and a 1989 provincial task force on race relations and policing.

On Monday, he said he had assumed the misconduct complaints against him were resolved more than a year ago, when he notified the law society by letter that he was resigning his membership. "I tried desperately ... to tell them, for health reasons, they needed to bear with me," he said.

"I asked them not to suspend me, to give me time. They absolutely refused ... and I finally threw up my hands."

But disciplinary panel members James Caskey and Nicholas Pustina, both lawyers, along with Baljit Sikand, a Toronto limo company owner who serves as a law society "lay bencher," were told that Singh was not eligible to resign because the disciplinary process was already underway.

The panel also accepted a book of documents from disciplinary counsel Lisa Freeman, showing the law society sent letters to Singh, at his law office and a post office box for more than a year.

The law society was trying to obtain his response to allegations that he failed to serve clients, mishandled trust funds, misappropriated $2,000 from a client and continued to practise after being suspended in November 2005, the hearing was told.

Six of Singh's former clients testified yesterday, among them Charu Shankar, who hired him in 2005 to draw up a marital separation agreement.

She sought out Singh because he was well regarded and recommended by a friend.

"Mr. Singh was a respected member of the community," Shankar said. "He received the Order of Canada. He seemed to be a public figure. I thought I could trust a lawyer like Mr. Singh."

Shankar said the situation was urgent because she was unemployed and needed financial support from her husband while she looked for a job. But Shankar said that after she gave Singh $3,000 as a retainer, he did no work on her case, except send an introductory letter to her husband. Singh ignored most of her phone messages and emails, failed to return her money and never provided her with an account, she said.

After Singh was suspended by the law society on Nov. 15, he was ordered to repay $4,000 to Virginia Bodendistel, who hired him in connection with a medical malpractice lawsuit.

Testifying by phone from Halifax, where she was vacationing, Bodendistel told the panel yesterday that she's never seen the money.

Singh told the *Star* he represented Bodendistel and her son free of charge in the case for several years. The money was meant to cover only out-of-pocket expenditures, of which there were many, he said on Monday, adding the terms of their "contingency agreement" stipulated that his fees would be paid out of any settlement.

"I personally feel the best work I have done in the last 20 years was on that file," he said. "If anything, and I say this with the utmost humility, if anything, I deserve a medal."

Although the case meant going up against a large downtown law firm, Singh said he won several preliminary motions "despite heavy odds" against him. Singh was invested as a member of the Order of Canada on Aug. 31, 2002. The citation from the Governor General's office said

the honour was in recognition of his "vast record of public service," including his work promoting harmony among people of different races and religions.

The citation, which mentioned his freelance commentaries for the *Star* and other media, called him “a symbol of the importance of mediation and understanding in society. ….

Histed v. Law Society (Manitoba)

[2006] 10 W.W.R. 624 (Man. C.A.), B.M. Hamilton, J.A. for the Court, paras. 16-17, 30, 31, 1-2, 61-62, 64-76

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[16] On May 29, 2003, the complainant (A) complained to the Law Society about the appellant [Histed], who had represented A in opposing the application of Winnipeg Child and Family Services (CFS) for an order of permanent guardianship of her infant child. A is a difficult, yet vulnerable client. She has been diagnosed with schizophrenia, but refuses to cooperate with medical professionals and to take medications for her illness.

[17] A's complaint concerned the fact that the appellant [who had received a legal aid certificate to represent A] withdrew as her counsel for the CFS application in order to pursue a constitutional challenge, based on A's case, concerning the rates of remuneration paid by Legal Aid Manitoba. A was not represented by a lawyer for the trial concerning the CFS application, although Legal Aid had authorized other counsel for the trial after the appellant withdrew [but that other counsel had been unable to obtain instructions from A. After unsuccessful completion of the constitutional challenge, the appellant agreed to resume representing A. By now A had complained to the Law Society of Manitoba]. After a 17-day hearing, the trial judge granted an order of permanent guardianship, which was upheld by this court. See *A. (J.M.) v. Winnipeg Child & Family Services*, 190 Man. R. (2d) 298, 2004 MBCA 184 (Man. C.A.).

. . . .

[30] ….[The Complaints Investigation Committee of The Law Society] resolved to issue a citation against the appellant containing three charges of professional misconduct arising from his representation (or withdrawal of representation) of A:

> **Count 1**
>
> While acting for your client [A] in respect of a guardianship application, you failed to comply with Chapter 6, Rule (c) of the *Code of Professional Conduct* in that your duty to [A] and your own personal interests were in conflict.

Particulars

a) You were consulted by [A] with respect to the apprehension of her child by [CFS] and the related guardianship application. You used the guardianship proceedings as a platform to advance a constitutional challenge to *The Legal Aid Services Society* [*of Manitoba*] *Act* [C.C.S.M., c. L105] in order to secure fees at the rate of $150.00 per hour. In doing so you failed to properly defend [A's] interests in the guardianship proceedings.

Count 2

You failed to serve your client [A] in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation contrary to Chapter 2 of the *Code of Professional Conduct* and Chapter 12, Commentaries 2 and 8 of the *Code of Professional Conduct*.

Particulars

a) After withdrawing as [A's] counsel on March 11, 2003 you failed to do everything reasonably possible to facilitate the expeditious and orderly transfer of the matter to the successor lawyer who Legal Aid had proposed to appoint to represent [A's] interests.

Count 3

You failed to serve your client [A] in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation contrary to Chapter 2 of the *Code of Professional Conduct*.

Particulars

a) After having appeared on behalf of [A] in the Court of Appeal on May 30, 2003 [on the legal fee issue], you then declined to represent her interests at the guardianship proceedings which were scheduled to commence in the Court of Queen's Bench on June 2, [*sic*] 2003.

b) Prior to May 30, 2003, you failed to adequately communicate to your client your intentions with respect to representing her interests at the guardianship proceedings which were scheduled to commence in the Court of Queen's Bench on June 2, [*sic*] 2003.

[31] The panel found the appellant guilty of professional misconduct under Counts 1 and 2 and not guilty of professional misconduct under Count 3.

. . . .

[1] The appellant lawyer appeals his convictions, by …[the] panel of the Discipline Committee of the Law Society of Manitoba (the Law Society), on two charges of professional misconduct. He also appeals the panel's decisions to suspend him from the practice of law for one month and that

he pay $18,000 costs.

[2] The appellant argues, firstly, that these decisions are nullities because there was a reasonable apprehension of bias arising from the participation of several individuals at the meeting of the Complaints Investigation Committee (CIC) of the Law Society, which authorized the charges against the appellant. This argument raises the issue as to whether a reasonable apprehension of bias can be cured by a subsequent hearing in the proceedings. If the decisions are not nullities, the appellant says that they are unreasonable. [Further the appellant contended that the panel which tried the complaints made numerous errors. Further the appellant contested the penalties imposed.]

. . . .

[61] The panel was correct in ruling that the CIC's "proceedings remained entirely investigative throughout" and that any reasonable apprehension of bias could be cured by a full and fair hearing before the panel. Because such a hearing occurred, any reasonable apprehension of bias was cured.

Convictions, Suspension and Costs

[62] …[As for the appellant's contention] that the panel made numerous errors in reaching these decisions, … only a few of these arguments warrant comment.

. . . .

[64] The panel correctly articulated the burden of proof on the Law Society to prove, on the balance of probabilities, the particulars of each charge. After extensive analysis of the findings of fact relevant to each charge and the applicable provisions of the Code of Professional Conduct, the panel found that the particulars of Counts 1 and 2 were proven and constituted professional misconduct.

[65] With respect to Count 1, the panel concluded that the personal interest alleged to be professional misconduct was not as simple as the appellant's interest to obtain an hourly rate of $150 for himself. Rather, the panel found that such hourly rate "was an expression, or natural consequence, of the underlying personal interest of the [appellant], ... to secure funding for legal representation of impoverished citizens facing child guardianship hearings in general, and not for the limited purpose of personal gain in this one case."

[66] The appellant argues that the panel erred in finding a conflict of interest on the basis that the constitutional challenge was not for personal financial gain but for his "public duty" to assist the general public. The panel aptly explains its conclusion to the contrary:

> We find that [the appellant] clearly saw the [constitutional challenge] as a case of general interest and even if offered the requested funding to represent A, he would refuse that funding in order to argue the [constitutional challenge]. Clearly this put A's specific interest, legal representation at the CFS guardianship hearing, in conflict with the [appellant's] personal general objectives, to win the [constitutional challenge] for the benefit of the general public.

[67] The appellant also argues that by defining his personal interest as the panel did, he was found guilty of an offence which does not appear in the citation. Therefore, he says he did not have an opportunity to defend the charge on which he was convicted. In response to this argument the panel stated: "[w]hile the Count may well have been drafted differently, this interpretation of the [appellant's] 'personal interest' could not be a surprise to the [appellant]." I agree. The Law Society is not bound by the strict technical rules of drafting a charge as would be the case in a criminal or quasi-criminal charge. The test is whether the appellant knew with reasonable certainty what conduct of his was alleged to amount to professional misconduct. There can be no doubt about this. See *Bartel v. Manitoba (Securities Commission)*, 173 Man. R. (2d) 43, 2003 MBCA 30 (Man. C.A.).

[68] The appellant says a finding of actual harm to A as a result of proceeding to trial without counsel was the substance of Count 1. Because the panel specifically made no finding of such harm he says that the conviction is unsupportable. As well, he says that the facts demonstrate that A did not provide instructions to transfer the file and that it was A's choice to proceed with the constitutional challenge. Thus, the panel erred in finding guilt on Count 2.

[69] In my view, the following excerpts from the panel's reasons demonstrate why its finding of professional misconduct on Count 2 meets the standard of reasonableness *simpliciter*:

> These are not merely circumstances where a lawyer failed to do what was *reasonably possible to facilitate the expeditious and orderly transfer of the matter to the successor lawyer* (Commentary 2, Chapter 2), but we find the [appellant's] actions were calculated, deliberate steps taken to actively deter any lawyer from taking A's case.
>
> ... [T]he simple point is that it was not his role to make a decision as to what was in A's best interest as to the CFS guardianship trial. He lost any claim to influence such a decision by withdrawing as counsel. He used his continuing role as counsel on the [constitutional challenge] to dominate the overall tactics and strategy respecting the [separate] pending CFS guardianship trial. This was entirely inappropriate.

[70] I turn now to the issues of the suspension and costs.

[71] At the sentencing hearing, the Law Society sought 12 months' suspension and a significant award of costs (costs of the hearing were stated to be $36,000) in light of his actions, prior record of two disciplinary matters with the Law Society, the need to maintain public confidence in the ability of the Law Society to self-regulate and protection of the public by deterring the appellant from similar conduct in the future.

[72] The appellant maintained that he was wrongly convicted and spoke to the devastating impact a suspension and award of costs would have on his practice and on him personally. The panel adjourned the hearing to give the appellant an opportunity to organize a supervisory plan for consideration by the panel, but he did not present a plan when the hearing was reconvened.

[73] …, if a discipline panel finds a member guilty of professional misconduct, it may impose a wide range of penalties, including suspension from the practice of law. It may also order the member to pay "all or any part of the costs incurred by the society in connection with any investigation or proceedings relating to the matter."

[74] The panel rightly viewed the misconduct of the appellant to be very serious. The panel concluded that "a short period of suspension is the only consequence available ... that would clearly signal the Panel's disapproval of the [appellant's] conduct." Notwithstanding the seriousness of the misconduct, the panel considered other relevant factors and chose to "err on the side of leniency":

> ... We have concluded to err on the side of leniency and not impose a longer period due to, the [appellant's] personal circumstances, our not having found the client was compromised by the [appellant's] actions, the [appellant's] rehabilitation potential, and the totality of the sentence disposition which includes the following award of costs.

[75] The panel awarded costs to the Law Society in the amount of $18,000 "primarily because of the [appellant's] financial circumstances, the nature of his practice, the fact that these were not offences of greed, and the totality of the sentence." The costs are to be repaid by way of $500 per month. In my view, it is significant that the *Act* and the Rules contemplate the payment of "all or any part" of the costs of a proceeding.

[76] There is simply no merit to the appellant's appeal of the suspension and the order of costs.

[**Editor's Note**: Application for leave to appeal to Supreme Court of Canada, refused 24 April 2008: 2008 CarswellMan 207.]

[D.] v. Law Society of Newfoundland

(2000), 191 Nfld. & P.E.I. R. 129 (NLSC [TD]), Rowe J., paras. 1-6; 35 (*in part*), 50-54

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[1] [D] appeals the Benchers' decision that she breached the Code of Professional Conduct (conflict of interest) and the Trust Account Rules and was guilty of professional misconduct. [D] acted [on sale of a matrimonial home] for a husband and wife (who had [earlier] been involved in a marital dispute). Ms. [D] used part of the husband's share of the proceeds of sale to pay fees [charged to the Wife by D in the earlier marital dispute, and] owed by the wife to Ms. [D's] firm. Ms. [D] said she had the husband's authorization to do this; he says she did not. The Benchers decided as they did notwithstanding that Ms. [D] believed she had authority to act as she did.

[2] The appellant, [D], acted for Elizabeth Royle in a matrimonial dispute with her husband, William Royle. The account for this work, $1,306.38, went unpaid. When the matrimonial home

was sold, Ms. [D] acted for both Ms. Royle and Mr. Royle. Ms. Royle's outstanding account with Ms. [D] law firm was paid in full from the proceeds of sale of the matrimonial home, half of which were due to Mr. Royle. He objected that he had not agreed to this; Ms. [D] said that he had.

[3] The closing of the real estate transaction and the communication to Mr. Royle concerning payment of his wife's account with Ms. [D]'s law firm were dealt with in a hurried fashion on a Friday afternoon. This was made more difficult as Mr. Royle is blind.

[4] A complaint was laid before the Law Society. The matter was heard by a panel of the Discipline Committee (the Committee). It concluded that Ms. [D] had violated the Code of Professional Conduct as regards conflict of interest and had breached s. 5.05 (a) of the Trust Account Rules. The Committee took the view that Ms. [D] was not [additionally] guilty of professional misconduct. The Committee reported to the Benchers.

[5] The Benchers held a further hearing. They adopted the Committee's findings of fact (including, at p.12, that Ms. [D]'s belief that she had authority to act as she did was "honestly, if mistakenly, held"). They took a similar view to the Committee that Ms. [D] had breached the Code of Professional Conduct and the Trust Account Rules. However, contrary to the Committee's view, the Benchers [additionally] found Ms. [D] guilty of professional misconduct

[6] Based on this, the Benchers ordered:

(1) Ms. [D] to pay to Mr. Royle $653.19, i.e., the amount that was paid from Mr. Royle's share of the proceeds of sale of the matrimonial home to satisfy Ms. Royle's account with the Ms. [D]'s law firm,

(2) [D] to pay $4000 to the Law Society, representing half the costs of the Law Society's investigation of the complaint, and

(3) publication in the Law Society Newsletter of the Benchers' decision.

. . . .

[35] …. As Ms. [D] has not made out her case that the Benchers' decision was unreasonable. I will not disturb their decision in this regard. As well, while it is obiter, in the circumstances of this case, I would have reached the same conclusion as the Benchers, that Ms. [D] breached rule 5.05 of the Trust Account Rules.

. . . .

[50] If the Benchers are saying that failure to adhere to regulatory requirements is professional misconduct per se, then, in my view, they would be "clearly wrong". Otherwise every instance of conflict of interest, for example, would constitute professional misconduct. Even if there does not need to be dishonour or disgrace for a finding of professional misconduct, do not the impugned actions have to be of a serious nature? Are they so in this case? The Benchers do not say.

[51] The position advanced by counsel for the Law Society amounts to this: professional misconduct is whatever the Benchers say that it is and, their having said that Ms. [D]'s actions constitute professional misconduct. The Benchers cannot pull themselves up by their own bootstraps. They must exercise their authority by reference to the relevant legal framework.

[52] In my view, the Benchers have failed to set out any proper legal test and to apply any such test to their findings of fact. That is not reasonable. While I am inclined to show deference by not disturbing the decision of the Benchers in this regard, I cannot.

[53] Under s. 95 of the Law Society Act, I could substitute my view for that of the Benchers as to whether Ms. [D]'s actions constitute professional misconduct. I will not. Rather, I will defer to them by referring the matter back pursuant to s. 95(5) for their "further inquiry", i.e., a rehearing, should they choose to do so. Pending this, the finding of professional misconduct is set aside.

[54] Ms. [D]'s appeal is dismissed as regards the Benchers' findings that she breached the Code of Professional Conduct and the Trust Account Rules. The Benchers' finding that Ms. [D] was guilty of professional misconduct is referred back for their rehearing, should they so choose. Pending this, the finding of professional misconduct is set aside. Each party will bear their own costs in this appeal.

"Lawyer Stole Millions, Indictment Says"

Ward, Stephanie Francis, *ABAnetwork*, 26 March 2007
(*in part*)

A New Orleans lawyer has been indicated on federal charges of stealing tens of millions of dollars from clients and his former law firm, and he faces a maximum prison term of 1,023 years if convicted on all 59 counts [not yet tried].

The Eastern District of Louisiana indictment includes a $30 million money laundering forfeiture if James G. Perdigao is convicted. But his former law firm says Perdigao showed no sign of spending a lot of money.

Perdigao built his practice around representing casinos, and he is alleged to have stolen the money from as early as 1991 through 2004, according to the indictment. The charges also include mail fraud, bank fraud, transportation of stolen funds and tax evasion.

Perdigao is a former partner with Adams and Reese in New Orleans. The firm in September 2004 reached the conclusion that he sent clients fictitious billing statements. Self-addressed envelopes, directed to Perdigao's attention, were included in the mailings, says managing partner Charles P. Adams Jr.

Perdigao deposited the money to the firm's trust account, Adams claims, and then asked the firm's accounting department to write checks from the trust account to businesses he set up and controlled. Those businesses were disguised as transaction participants, Adams says, and Perdigao allegedly created phony paperwork, such as closing documents, to make the transaction appear legitimate.

A month after Perdigao was asked to leave Adams and Reese, he wired $20 million to a Swiss bank account, according to the indictment. He later repaid Adams and Reese $9 million. That money, Adams says, was turned over to the U.S. attorney's office.

In some cases Perdigao was doing actual work for clients, according to Adams, but not reporting the work to the law firm. "Some clients were not on our books. Other clients were sent bills on our books and had matters he was doing on the side."

Before being asked to leave Adams and Reese, Perdigao often worked until 10 p.m. The work was excellent, Adams says, and Perdigao's annual billable hours were always within a 2,000-hour range. According to Adams, Perdigao spent little if any of the money he allegedly stole.

"That's why he still has it all," Adams adds. "He wasn't married, lived in a modest house, drove an old car – he had no conspicuous lifestyle at all."

"Man jailed for cheating some 'pretty sophisticated' law firms"

Glovin, David, *The National Post,* 16 April 2007, p. FP 17
(*in part*)

A Montana man was sentenced to 27 months in prison for cheating lawyers of US$307,103 by offering to sell them damaging evidence about opponents that he didn't have.

The scheme ran from February, 2003 to October, 2006, as [Michael] Lair targeted lawyers in high-profile lawsuits, prosecutors said. The Montanan, holding himself out as an executive with a legal research firm called consumereddefense.com, offered attorneys evidence he claimed would help their cases in exchange for large advance payments, prosecutors said.

Lair, who has a high school equivalency degree, learned about the suits from news reports, prosecutors said. He never provided the promised evidence and continued to demand money.

***R. v. Hyman*,**
19 September 2007, Bristol Crown Court
(*summary*)

Bruce Hyman was a TV and radio producer, in Bristol, England.

He decided to undertake a mid-life career change.

So, he trained as a barrister and was duly admitted to the Bar of England and Wales.

He received, at his London chambers, a brief from a Bristol solicitor to represent a woman in her divorce proceeding. One of the issues in the case was custody of a boy.

One morning—reflecting on the case, and employing the creativeness developed in his previous career—he conceived an idea that he felt would ensure success for his 'wife client.'

As a TV producer, he had worked as a producer for BBC Radio 4. In that role, he had produced a programme about the law, titled Unreliable Evidence.

Now a barrister, he put to work ideas he had conceived as a TV producer.

First, he wrote a High Court judgment. He may have aspired to the Bench, but figuring his prospects were slim, at least he could experience the 'rush' of writing a judicial decision. The decision, of course, was fictitious. In fact, the decision purported to decide a litigated custody dispute, favourable to a father fighting for child custody.

Next, he set about devising a way of employing the decision, to the benefit of his client.

For that purpose, he prepared an e-mail. The e-mail passed itself off as being from a pressure group in England—Families Need Fathers. He attached the self-authored decision to the e-mail.

And, off he went to an internet shop in Tottenham Road, London, from where he sent the message and attachment to his client's estranged husband.

During trial of the divorce proceeding, the father's counsel informed the court that his client had usefully furnished him with an evidently-unpublished decision of compelling assistance to the trier of fact and law, that supported the father's custody claim.

With that, Mr. Hyman leapt to his feet, sprang to the lectern, and with a riveting flourish, denounced the decision as "a fake, a fraud, a fabrication."

The presiding justice informed the father – Simon Eades, a Wall Street banker who had formerly lived in England – that if Mr. Hyman's assertion was correct, as he expected it was, the father, far from obtaining custody, would be placed in custody.

The father was, as 'they' say in Britain, gobsmacked. He strove to inform the court he had not intended the deceive the tribunal.

Be back here at 10 AM tomorrow with cogent proof, said the presiding justice.

Overnight, the father turned digital sleuth. He traced the e-mail to the Tottenham Road internet shop and discovered its sender was Mr. Hyman. Shop security cameras had recorded him despatching the fraudulent e-mail.

Which is why, on 19 September 2007, Mr. Hyman was on the far of the bar of Bristol Crown Court, prosecuted by Michael Meeke, Q.C.

From there he informed the Court, through his counsel Paul Dunkels, he had taken to strong drink and illicit drugs after being turned down for a permanent position in the chambers in London from where he had been practising. His "judgment", he said had become "clouded."

Not so clouded as to preclude you from producing one, responded Crowther J., who imposed 12 months in jail, plus compensation and costs of about CDN $14,000.00.

Mr. Hyman was the first member of the English Bar to be jailed for perverting the course of justice.

"Westmount lawyer, 75, gets 15 months for bilking widows"

Montgomery, Sue, *The Gazette*, Montreal 2007, pp. 1, 6
(*in part*)

As a shaking and thin Gordon McGilton, 75, hunched in the witness box yesterday, complaining of an angina attack and pleading he'd rather die than go to jail, the judge stuck to her guns.

"I'm not going to have any of that in my courtroom," Quebec Court Judge Elizabeth Corte said sternly before sentencing the ex-lawyer to 15 months in prison for defrauding his clients, mostly elderly windows, of $1.7 million.

She ordered that the sentence be followed by two years' probation and that McGilton perform 180 hours of community work, preferably at the Old Brewery Mission, one of the charities that lost a substantial donation because of his fraud.

In sentencing him, the judge took into account that McGilton pleaded guilty to 15 counts of fraud, as well as the fact he's legally blind, feels remorse and had no prior run-ins with the law.

… Corte [also] … took into consideration the lengthy of time over which McGilton's crime was committed, the fact he was a professional, and the psychological and financial effects on his victims.

"He abused his clients' trust and defrauded them of over $1.6 million," Corte said as McGilton sat with his head resting on his folded arms on the table. "He acted deliberately and purposefully in order to maintain his family's lifestyle."

The once upstanding Westmount resident had a spotless reputation as a volunteer at his church and a respected lawyer with 42 years of experience which is why people trusted him with their money. He resigned from the bar in 2000.

Promising returns of between 8 and 10 per cent, McGilton withdrew money from his clients' trust accounts between 1990 and 2001, deposited the funds in his or his wife's personal account, then transferred some of the money to Bebec Investments Inc., a company owned by his cousin William Beattie.

Beattie, who has since died of a heart attack, was pumping the money into a bogus Nigerian oil investment. Even when Beattie told the lawyer 2 ½ years into the scheme that the investments weren't bearing fruit, McGilton continued to send his cousin money.

McGilton kept no proper accounting and gave his clients—eight elderly women—no proper disclosure. The Old Brewery Mission and the Society for the Prevention of Cruelty to Animals each missed out on $22,500 left to them in women's wills because McGilton didn't let them know. McGill University found out five years after one supporter died that she had left the school $64,710.

Even McGilton's own church, the Church of St. Andrew and St. Paul, lost out on $2,950 left to it in one will.

In one case, McGilton withdrew $72,000 from a client's account the day after she died and the bank wasn't notified of her death until 20 months later.

Corte said the court doesn't impose a sentence out of vengeance or retaliation, because the wrong can't be undone and "it doesn't heal the wounds."

"Class action scrutiny at Milberg Weiss"

Slayton, Philip, *Canadian Lawyer*, September 2006, pp. 17, 18

The current legal troubles of Milberg Weiss Bershad & Schulman LLP, a prominent New York law firm, began almost 15 years ago, when two valuable paintings went missing in Los Angeles.

In 1992, Dr. Steven G. Cooperman, a Beverley Hills ophthalmologist, told police that Picasso's Nude Before a Mirror and Monet's Customs Officer's Cabin at Pourville had been stolen from his Brentwood mansion. Cooperman successfully claimed. $12.5 million from his insurers for the loss of these works of art.

Five years later, FBI agents retrieved the missing paintings from a Cleveland area storage locker. Cooperman's lawyer, James Tierney, had stolen them on Cooperman's instructions. Tierney had given them to James Little, his former partner in a Los Angeles entertainment law firm, then living in Cleveland, who had hidden them in the locker. Cleveland police found out about the hidden pictures when they intervened in a violent domestic dispute between Little and his girlfriend: the angry girlfriend spilt the beans.

In 1999, Cooperman was convicted of insurance fraud and interstate transportation of stolen property (among other crimes). He could have gone to prison for 10 years, but Cooperman cut a deal with federal prosecutors: in exchange for a lesser sentence (he got 37 months), he told them about alleged plaintiff-shopping and kickback schemes at Milberg Weiss, a firm specializing in the plaintiff side of class-action litigation, particularly shareholder actions against large corporations. (In this instance, the term class action refers to a type of civil lawsuit in which a court

authorizes a named plaintiff to represent and litigate claims on behalf of unnamed class members who are not before the court).

Singing like a canary, Cooperman told the U.S. Department of Justice that he and various relatives and associates (including his wife and brothers-in-law) had been paid about $6.5 million to act as named plaintiffs in about 70 class actions brought by Milberg Weiss.

These were serious allegations by the disgraced ophthalmologist. Under New York law, it is a criminal offence for a lawyer to promise or give anything of value to induce a person to bring a lawsuit, or to reward a person for having done so. It is a criminal offense to pay a fiduciary, without the consent of those to whom he owes fiduciary duties, with the intent to influence his or her conduct as a fiduciary. And under both New York and California law, lawyers may not share attorneys' fees with persons who are not duly licensed to practise law.

Most important of all, the alleged Milberg Weiss kickback arrangements arguably created a conflict of interest between the named plaintiffs and the class they supposedly represented. The plaintiffs, so one might assume, had a greater interest in maximizing the amount of attorneys' fees awarded to Milberg Weiss than in maximizing the net recovery to the absent class members.

Based on the Cooperman confession, the Department of Justice began an intensive investigation into the activities of Milberg Weiss. Two other unusually active class action plaintiffs in Milberg Weiss cases were identified: Seymour Lazar, a retired California entertainment lawyer, who together with his relatives had served as plaintiff in about 70 lawsuits, and Howard Vogel, a retired mortgage broker who, together with family members (his wife Eugenia and his stepson Emile), had been a plaintiff in about 40 lawsuits. The investigation showed that both Lazar and Vogel had received payments from Milberg Weiss to act as representative plaintiffs.

On May 18, 2006, Milberg Weiss and two senior partners of the firm were indicted on a variety of criminal counts by a federal grand jury in Los Angeles. The indictment alleged an illegal kickback scheme that had begun as early as 1981, and that was concealed by false and misleading statements in documents and under-oath depositions. It alleged a conspiracy to conceal the kickback scheme from courts approving settlements in class action cases and from members of the various classes involved. The *New York Times* commented that the indictment represents "the most prominent confrontation between the government and a law firm in years," noting "no major law firm has faced a criminal indictment in recent memory."

[**Editor's Note:** On 20 March 2008, the Executive Committee of the law firm issued a statement which began: "It is with deep disappointment that we have learned that Melvyn I. Weiss has engaged in misconduct and has agreed to plead guilty to conspiracy charges in the Central District of California. Mr. Weiss is resigning from the Firm, which will change its name to Milburg LLP." Mr. Weiss, 72, pled guilty 02 April 2008 and, on 02 June 2008, was sentenced to 30 months imprisonment, and required to forfeit $9.75-million, and pay a fine of $250,000.]

"Paralegal gets house arrest for practising law"

Claridge, Thomas, *The Lawyers Weekly*, 12 October 2007, p. 1
(*in part*)

A North Bay city councilor has been sentenced to four months of house arrest for flouting a court order to stop practising law.

In imposing the sentence for civil contempt, Superior Court Justice Patricia Hennessy said she was not satisfied that a fine would serve as a deterrent to Maureen Bolt, whom she described as having "profited from flagrant breaches" of an undertaking she made in 1998 to the court and the Law Society of Upper Canada (LSUC) that she would not violate Ontario's *Law Society Act.*

In addition to being required to remain in her house except for medical appointments, religious services, holiday observances and three hours on Saturday to carry out personal business, Bolt was ordered to pay $35,000 of the law society's costs, barred from carrying on her Bolt Paralegal and Mediation or any other commercial business between Oct. 1, 2007 and Feb. 15, 2008, and required to publish, at her own expense, a notice in the *North Bay Nugget* setting out the terms of the finding of contempt and the penalty.

"Former head of law society sued for $1.4M"

Kari, Shannon, *National Post*, 05 January 2008, p.A6

The former head of the governing body for lawyers in Ontario is being sued for $1.4-million in damages by a former client he had an affair with for more than two years.

George Hunter, 59, and his law firm, Borden Ladner Gervais, are named as defendants in the civil action filed in Ontario Superior Court by the woman who can be identified only as A.B., as a result of a court order.

"My client was emotionally devastated by Mr. Hunter's actions," the woman's lawyer, Matthew Wilton, said yesterday. "She placed her trust in him to act in her best interests. He held himself out as a pillar of the legal community?"

"These are just allegations," stressed Sean Weir, national managing partner of Borden Ladner Gervais, which is one of the largest law firms in the country. 'We are satisfied the firm acted appropriately:" he said.

Mr. Hunter was unavailable for comment yesterday.

The prominent Ottawa lawyer stepped down as treasurer of the Law Society of Upper Canada in December, 2005, after disclosing his affair with A.B., whom he had represented in a child custody dispute with her former husband.

Last February, at a Law Society disciplinary hearing, Mr. Hunter pleaded guilty to professional misconduct for acting in a conflict of interest in relation to a client. He was suspended from practising law for 60 days and returned to Borden Ladner Gervais last April.

The lawsuit alleges that Mr. Hunter was negligent and breached his fiduciary duty to A.B. while acting as her lawyer and her lover.

The affair began in April, 2003, after Mr. Hunter assured the woman that he was married "in name only" and was not sexually active with any other individuals, the statement of claim alleges.

To assist A.B. with her family law proceeding, Mr. Hunter had access to a psychological report that the woman was emotionally vulnerable and was aware she had no romantic partner. "Mr. Hunter improperly relied upon this confidential information, imparted to Hunter qua solicitor, to groom her for a sexual and romantic relationship," the documents allege.

None of the allegations has been proven in court.

By February, 2005, the lawsuit alleges that A.B. was not successful in convincing Mr. Hunter to take her legal instructions or "address the merits" of her family law proceeding. "Mr. Hunter scheduled office meetings with A.B. to discuss the file, then turned such meetings into romantic or sexual interludes," says the statement of claim.

Mr. Hunter convinced A.B. to sign a document in November, 2005, that stated he had complied with the Rules of Professional Conduct for lawyers in Ontario [Rule 2.04] during their relationship, according to an agreed statement of facts filed in the disciplinary hearing.

At the same time, Mr. Hunter ended his relationship with A.B. and informed her he had been having simultaneous affairs with two other women who worked at his law firm.

At his disciplinary hearing, Mr. Hunter admitted to trying to contact A.B. over the next several days to sign a statement that misrepresented their relationship.

"A.B. was obliged to undergo testing for AIDS when Mr. Hunter disclosed to her that he had had unprotected sex with her as well as several other female partners," the documents state.

The lawsuit also alleges that Borden Ladner Gervais was negligent for failing to "adequately supervise" Mr. Hunter when "they knew or ought to have known he presented a predatory risk to his vulnerable female clients."

As well, the firm did not discover that Mr. Hunter was "purporting to provide on going legal services to A.B.," without regularly sending her bills, the lawsuit alleges.

It would not be appropriate to comment on specific allegations, said Mr. Weir, but he indicated that the law firm acted appropriately and swiftly once it learned of Mr. Hunter's conduct. "We are confident Borden Ladner Gervais will be found to have acted with integrity?' he said.

Chudy v. Merchant Law Group

2007 CarswellBC 418 (B.C. Sup. Ct.), B.M. Davies J.
(paras. 1-54; 63-64; 74-88; 115-122; 168-176; 188-218; 251-263)

A. Introduction

[1] This litigation is concerned with the enforceability of a personal injury contingency fee agreement.

B. Background

[2] On October 18, 1995, the plaintiff, Clifford Chudy, was involved in a serious motor vehicle accident in Alberta. He was then 56 years old and is now 67.

[3] In late October 2002, Mr. Chudy and his wife, the plaintiff Linda Chudy, entered into a settlement (the "MVA Settlement") of all of their claims arising from the accident for the "all in" sum of $860,000 as well as their assessable costs and disbursements.

[4] After the MVA Settlement was reached the plaintiffs executed … [a] contingency fee agreement with the defendant, Merchant Law Group (the "Merchant Agreement") that is the subject of this litigation. It provided that the Merchant Law Group would receive 30% of the funds paid under the MVA Settlement.

[5] Both before and after the Merchant Agreement was executed the plaintiffs were represented in their litigation and the negotiation of the MVA Settlement by the third party, Earl Shaw. More particularly, however, as to the substance of that representation, and of utmost significance to the issues to be decided in this case are the following facts:

> (1) from 1995 to October 2, 2001, Mr. Shaw's legal services were provided through his personal law corporation, Earl Shaw and Company, Personal Law Corporation ("Shaw, PLC");
>
> (2) from and after October 2, 2001, his services were provided through his association with the Merchant Law Group;
>
> (3) on October 12, 2001, while practising in association with the Merchant Law Group Mr. Shaw filed an assignment in bankruptcy;
>
> (4) as of January 1, 2002, the Law Society of British Columbia (the "Law Society") refused to renew Mr. Shaw's licence to practise law and required that any services provided by him were to be under the supervision of an approved lawyer under conditions imposed by the Law Society; and
>
> (5) Mr. Shaw's licence to practise law has never been renewed.

C. Issues

[6] The plaintiffs submit that in all the circumstances, including alleged breaches of fiduciary duties owed to them by the Merchant Law Group, the Merchant Agreement should be set aside and all monies collected [by the Defendant law firm] pursuant to it (totalling in excess of $250,000) should be returned.

[7] The plaintiffs also claim punitive damages as a consequence of the Merchant Law Group's alleged breaches of its duties owed to them, as well as special costs for its conduct in this litigation.

[8] The Merchant Law Group denies that the Merchant [Contingency Fee] Agreement [executed in November 2002] is in any way unenforceable. In the alternative, it submits that a contingency fee agreement entered into between the plaintiffs and Shaw, PLC in March 1998 (the "Shaw Agreement") is enforceable against the plaintiffs so that the Merchant Law Group [, by reason of

Shaw's professional association with the group,] remains entitled to the fees that it collected from the MVA Settlement.

[9] In the further alternative, the Merchant Law Group submits that if both the Merchant Agreement and the Shaw Agreement are unenforceable, it remains entitled to fees of at least 30% of the MVA Settlement on a *quantum meruit* basis. By way of counterclaim, the Merchant Law Group also seeks "punitive damages in an amount not less than the solicitor-client costs and disbursements incurred to defend this frivolous and mean spirited lawsuit which is a 'dressed up' taxation of a lawyer's bill".

[10] I must decide the following issues:

> (1) Is the Merchant Agreement unenforceable by reason of the defendant law firm's alleged breaches of fiduciary duty?
>
> (2) If the Merchant Agreement is unenforceable, is the Shaw Agreement also unenforceable due to:
>
> > (a) the failure of the defendant law firm [Merchant Law Group] to obtain an assignment of the Shaw Agreement from Shaw, PLC; or
> >
> > (b) Mr. Shaw not being licensed by the Law Society as a lawyer after January of 2002?
>
> (3) If both the Merchant Agreement and the Shaw Agreement are unenforceable, is the Merchant Law Group entitled to compensation on a *quantum meruit* and if so, in what amount?
>
> (4) Does the conduct of either the plaintiffs or the Merchant Law Group warrant an award of punitive damages?
>
> (5) Does the conduct of either the plaintiffs or the Merchant Law Group warrant an award of special costs?

[11] In addition to those issues, discrete issues arise amongst the parties relating to the plaintiffs' payment of $18,663 to Mr. Shaw over and above the [contingency] fees paid to the Merchant Law Group pursuant to the Merchant Agreement. Those issues include whether that additional payment was a wrongful conversion of those funds by Mr. Shaw and, if so, whether the Merchant Law Group is vicariously liable for the plaintiffs' loss.

[12] Third party issues of contribution and indemnity also arise between the Merchant Law Group and Mr. Shaw, concerning not only the $18,663 payment to him but also relating to his conduct of the plaintiffs' litigation in Alberta and British Columbia and the execution of the Merchant Agreement.

D. Chronology

[13] . . . . [the] injuries [suffered by Mr. Chudy] were sufficiently serious that they resulted in an $860,000 settlement. The evidence at this trial also satisfied me that the injuries he suffered continue to affect his medical well-being, his ability to earn any income, and his enjoyment of life.

[14] After Mr. Chudy was injured, he and Mrs. Chudy, determined that they should consult a lawyer. They reached that conclusion because, after making one payment to Mr. Chudy, the Workers' Compensation Board denied responsibility for further compensation.

[15] Mr. and Mrs. Chudy met Mr. Shaw for a "free initial consultation". He had been recommended by Mrs. Chudy's brother and they were also impressed by his prominent advertisement in the Victoria, British Columbia "Yellow Pages" directory.

[16] Some time after that first consultation, Mr. Shaw became involved on the plaintiffs' behalf on an ongoing basis in what turned out to be lengthy liability and insurance coverage disputes amongst (among others) the British Columbia Workers' Compensation Board; its Alberta equivalent; and, the Insurance Corporation of British Columbia ("ICBC"). Those disputes and Mr. Chudy's slow recovery from his injuries as well as the difficulty in assessing the full extent of those injuries led to delays in the litigation process. That delay was exacerbated by delay arising from inter-provincial jurisdictional issues that eventually resulted in Mr. Shaw commencing actions on behalf of the plaintiffs in both British Columbia and Alberta.

[17] The plaintiffs did not enter into any specific fee arrangements for the legal services provided by Mr. Shaw until March 25, 1998 at which time they entered into the Shaw Agreement with Shaw, PLC.

[18] By June of 1999, Mr. Shaw determined that Mr. and Mrs. Chudy's claims should be litigated only in Alberta and to that end made arrangements with Weir Bowen, an Alberta law firm, to act as "counsel of record" for the plaintiffs in Alberta. In a letter dated June 11, 1999, Mr. Shaw advised Mrs. Chudy that the British Columbia Workers' Compensation Board was "out of the picture" so that the Alberta action could proceed with dispatch. He also stated that he intended that Alberta counsel would be brought in "at no expense to you".

[19] The delays in the progress of the litigation, the denials of liability by competing government agencies and the extent and severity of the injuries suffered by Mr. Chudy, including a brain injury, had serious emotional impact upon the plaintiffs and devastating financial consequences.

[20] After a period of trying to make ends meet Mrs. Chudy had to give up work to provide virtually full time attention to Mr. Chudy as he and his professional care givers, assisted by referrals from Mr. Shaw, worked toward his medical rehabilitation to the extent it was achievable. Bills associated with the plaintiffs' daily costs of living as well as losses suffered by the loss of Mr. Chudy's trucking business began to mount and the plaintiffs had extremely limited resources from which to meet the demands of creditors.

[21] In those difficult circumstances, Shaw, PLC:

(1) arranged for the deferral of payment of the fees and disbursements [other than legal

fees] necessary for the prosecution of Mr. Chudy's case or, when that was not possible, itself advanced the necessary funds pending the resolution of the litigation;

(2) made arrangements with some of the plaintiffs' general creditors to defer the collection of debts [,] in excess of $160,000 [,] until the resolution of the litigation; and

(3) advanced $13,883.63 directly to the plaintiffs' creditors or the plaintiffs themselves for living and other expenses between January of 1996 and September of 2000 in anticipation of repayment of those funds from the expected proceeds of the litigation.

[22] In addition, on May 8, 1996, Mr. Shaw personally advanced $1,000 to the plaintiffs to help them with their financial difficulties.

[23] In return for those arrangements, the plaintiffs agreed that all deferred debts of creditors and experts as well as all advances by Shaw, PLC would bear interest at 18% per annum. The plaintiffs also executed assignments or directions to pay when required to allow repayment of all funds, with interest, from the eventual settlement of their claims.

[24] The plaintiffs were extremely grateful for all of Mr. Shaw's efforts on their behalf but continued to be concerned about delay and the net amount that they might ultimately recover from the Alberta action, especially in view of their continually mounting financial obligations relating to any settlement proceeds.

[25] The evidence establishes that after mid-1999 until into 2001, Mr. Shaw's involvement in advancing Mr. Chudy's claim was, for the most part, limited to efforts aimed at Mr. Chudy's rehabilitation and some attempt to quantify the extent of his potential claims for past wage losses, future loss of earning capacity and costs of future care.

[26] The evidence also establishes that Mr. Shaw had little involvement in the actual prosecution of the Alberta litigation which continued to be dominated by issues between the defendants in that action, particularly the coverage issues between the Alberta Workers' Compensation Board and ICBC. I find that Dan Cavanaugh of Weir Bowen, the plaintiffs' Alberta counsel, was the lawyer primarily involved in that substantive litigation while Mr. Shaw maintained what effectively amounted to a "watching brief".

[27] The financial fortunes of Mr. Shaw and those of Shaw, PLC deteriorated badly between 1999 and 2001. Some, but not all of that decline related to Mr. Shaw's involvement only in contingency fee based personal injury litigation with irregular recovery of disbursements [,] and work in progress. Mr. Shaw had, however, also borrowed heavily personally and through Shaw, PLC and even more significantly had borrowed money from a client. He intended to repay that client with substantial interest on the sums advanced from disbursements that Shaw, PLC had funded for other clients when [their] claims were settled but was unable to make the substantial monthly payments as well as maintain his obligations to his other creditors.

[28] Mr. Shaw's financial circumstances eventually became so strained that in early 2001 he began to pursue bankruptcy as an option. To that end he attempted to interest a law firm in

acquiring his practice in return for the opportunity to continue to practise as an associate lawyer. Those efforts eventually led Mr. Shaw to the defendant Merchant Law Group and, more particularly, to one of its senior partners, E.F. Anthony (Tony) Merchant.

[29] After some initial discussions with Mr. Shaw, in the spring of 2001 Mr. Merchant requested Ron Dumonceaux, an associate with the Merchant Law Group, to further explore possibilities concerning an arrangement with Mr. Shaw.

[30] In a report to Mr. Merchant dated May 7, 2001, among other things, Mr. Dumonceaux made the following observations:

> In accordance with your request, I arranged to meet with Earl Shaw. He is a practising lawyer in Victoria. His practice consists primarily of personal injury cases. He claims to have approximately 100 IRS claims, of which 25 are sexual abuse claims. These are all claims in which he has a signed retainer agreement. The remainder of his practise are car accident type of claims. He says that he has about 100 of these files and would like to pare it down to about 60 files, so as to concentrate on the IRS claims. He claims to have incurred about $130,000 worth of disbursements and paid about $80,000.00 of that total.
>
> . . . .
>
> Overall I formed a favourable impression of Earl. He is likeable and appears knowledgeable. His history shows good receipts (in excess of $1,000,000.00 in one year). He thinks about the practise model and believes that improvements could be made. His largest down fall [sic] would appear to be an inability to organize an office and his obvious financial problems. I have not reviewed any files at all and took what he told me to be the truth in this report. He did say at one point that he was looking to join some one for cheap to solve immediate problems and hope that the person he joined with would treat him fairly in the longer run.

[31] Mr. Dumonceaux's reference to "IRS" claims referred to files involving Indian Residential School claims in which the Merchant Law Group had particular interest.

[32] On May 28, 2001, Mr. Merchant reported to the partners of the Merchant Law Group. Amongst other things he stated:

> Earl Shaw is an erudite and apparently capable client-getter and practitioner. He gets a lot of publicity. He communicates well. He tells me he has been on television twice in the last few weeks. He was on television most recently because he acts for the family of the teenage girl who was beaten to death by other teenagers. He is a high profile client-getter. One can see why he has a significant client base. His responsible lawyer collections for 1996 through 1999 ranged from between $700,000.00 and $1.1 million. ...
>
> He has not been paying his accounts. He expects to have Law Society problems. He owes about $1 million dollars now and will be going into bankruptcy. There is $80,000.00 paid out in disbursements.

He claims to have a good relationship with First Nations people. He has 100 residential school files and about 30 are sexual files. He has 80 accident files. He is confident that he will produce fees during the balance of 2001 of at least $200,000.00 or $300,000.00 dollars. Chudy is a case in Alberta where he has associate counsel but we would take over and he expects a fee in the next couple of months of $200,000,000.00 [sic] or $300,000.00. ...

We appear to be getting someone with a very lucrative practice in Victoria. We establish an office for Ron. Ron likes him and thinks he is a good opportunity and a find. Earl Shaw has a gigantic client-getting capacity. He gives us another person with First Nations capacity and an entre [sic] in British Columbia. ...

He would join the firm as an associate. We would pay the expenses. He would cumulatively record what the expenses were and the first money generated would be returned to us by way of expenses. When there is additional money available after he is discharged from bankruptcy, he will get 60% of whatever additional money is generated after his expenses. While he is in bankruptcy I will make an arrangement with him every month on what, if anything he receives depending upon how much trouble, if any, arises. He will receive nothing until we are paid back any money we have put into expenses. We are not signing a lease or agreeing to be responsible for telephone bills or anything. We can go for two months and if things are horrible we can get out.

The clients will immediately be approached by Mr. Shaw to transfer to Ron Dumonceaux of the Merchant Law Group. Files will come over without obligation. ...

As files are concluded we will get 40% of the fees over and above whatever went for expenses so in a sense we pay 40% of the expenses out of our share and Earl pays 60% of the expenses out of his share. We get the disbursements. We get 40% after expenses of future work that is done by Earl but we also get 40% after expenses of the $800,000.00 or $900,000.00 that he estimates is in the files right now in work in progress. He has a residential school file set for trial in October. He is on the brink of settling cases. A lot of work has been done and that is all reflected in the work in progress. This promises to be a wonderful arrangement. ...

Earl was sent by a friend who knows me well who told him that I am loyal and honest and that if he makes a deal with me the deal will be honoured in spirit and reality. He understands that since his remuneration while in bankruptcy is solely in my discretion he is in jeopardy.

[My emphasis]

[33] At some time during the spring or early summer of 2001 and while Mr. Shaw's negotiations with the Merchant Law Group were ongoing, the plaintiffs learned of his financial difficulties and possible bankruptcy. Before confronting Mr. Shaw with those concerns Mrs. Chudy telephoned Mr. Cavanaugh, the plaintiffs' Alberta counsel of record, to determine whether he would be

prepared to take over conduct of their litigation as lead counsel if they decided not to continue with Mr. Shaw. She testified that Mr. Cavanaugh agreed to do so. Mrs. Chudy also testified that the next day she and Mr. Chudy met with Mr. Shaw and told him that they had heard he was declaring or had declared bankruptcy and that they had to have the absolute truth because they were considering having Mr. Cavanaugh take over the file and he had agreed to do so. She testified that Mr. Shaw advised her that his financial problems were purely personal and would not in any way affect the conduct of their litigation and also said "this is my file, I have worked really hard on this file, please don't take this file".

[34] Mrs. Chudy said she agreed to leave the file with Mr. Shaw because he was upset and because he promised her his bankruptcy was purely personal. She testified that Mr. Shaw also told her and Mr. Chudy that he was planning to join a chain law firm with offices across Canada that had asked him to head up their new office in Victoria and that it would be good for him. Mrs. Chudy said that when leaving the office they were happy with Mr. Shaw and felt "very, very comfortable".

[35] Negotiations continued between Mr. Shaw and the Merchant Law Group into the summer and fall of 2001. Mr. Shaw testified that his intention was to file a Proposal in Bankruptcy and that his proposed trustee and major creditors were invited into his office to review his files and accounts and that they were fully advised of the financial risks associated with his practice. To that end he testified that interested parties were provided with a copy of a letter from Mr. Merchant to him dated June 29, 2001 setting forth the basis of a potential relationship. I will not set forth the entirety of that document but it is plain and obvious to me that its intent was to maximize the difficulties and risks associated with the continuation of Mr. Shaw's practice and minimize any potential benefits to the Merchant Law Group. To that extent it is severely inconsistent with the glowing prospects identified by Mr. Merchant in his May 28, 2001 report to his partners.

[36] Between July and September of 2001, Mr. Shaw tried to make arrangements with other lawyers for the takeover of his practice but was unsuccessful in those efforts. He ultimately returned to further discussions with Mr. Merchant.

[37] On September 11, 2001, Mr. Merchant wrote a further letter to Mr. Shaw in which he delineated the particulars of a "notional entitlement" of Mr. Shaw to fees and disbursements from existing and future files from which payments would be made by the Merchant Law Group to enable Mr. Shaw to continue to practise.

[38] On October 2, 2001, Mr. Merchant wrote a letter outlining the terms upon which Mr. Shaw would be engaged as an associate and "joint venturer" of the Merchant Law Group. It was intended that the October 2, 2001, letter like earlier letters, would be disclosed to Mr. Shaw's trustee in bankruptcy and major creditors. I am satisfied that like those earlier letters, the October 2, 2001 letter was intended to minimize the potential value of Mr. Shaw's practice not only to Mr. Shaw and Shaw, PLC (and thus their secured and unsecured creditors), but also to the Merchant Law Group.

[39] I will more fully discuss the importance of the October 2, 2001 letter in considering the issues to be decided in this case.

[40] After Mr. Shaw joined the Merchant Law Group he continued to represent Mr. and Mrs. Chudy in their litigation.

[41] On October 12, 2001, Mr. Shaw filed a personal Assignment in Bankruptcy for the general benefit of his creditors

[42] Mr. Shaw failed to pay his annual British Columbia Law Society dues on January 1, 2002 and subsequent attempts made by the Merchant Law Group to tender those dues to allow Mr. Shaw to continue to practise as a lawyer with the Merchant Law Group were refused by the Law Society.

[43] The evidence establishes the following sequence of events relating to Mr. Shaw's status with the Law Society [of British Columbia] and with the Merchant Law Group after January 1, 2002:

> (1) Mr. Shaw practised as a lawyer with the Merchant Law Group without payment of his dues until he was enjoined from doing so by the Law Society [of British Columbia] in early February, 2002.
>
> (2) The Law Society [of British Columbia] then agreed that Mr. Shaw could be employed by the Merchant Law Group as a paralegal or "legal assistant" under the direct supervision of an approved member of the Law Society.
>
> (3) On February 8, 2002, Mr. Dumonceaux agreed to take on the responsibility of supervising Mr. Shaw's work as a legal assistant with the Merchant Law Group.
>
> (4) On May 2, 2002, the Credentials Committee of the Law Society considered Mr. Shaw's application for reinstatement and ordered that a hearing be held. That hearing was not commenced until January 6, 2003.
>
> (5) Mr Dumonceaux left the Merchant Law Group in early June of 2002 to join a different law firm in the same building. However, at the request of the Merchant Law Group and with the approval of the Law Society he agreed to continue his supervisory role.
>
> (6) In August of 2002, Mr. Dumonceaux asked to be relieved of his supervisory responsibilities and thereafter supervised Mr. Shaw only until early September after which time the Merchant Law Group contracted with Valorie Hemminger, another local Victoria lawyer, to take over the supervisory role. When that occurred, however, Mr. Dumonceaux remained responsible for the signing of trust cheques until November 4, 2002 because, as an undischarged bankrupt, Ms. Hemminger was unable to do so.
>
> (7) After September of 2002, neither Mr. Dumonceaux nor Ms. Hemminger carried on their practices from the offices of the Merchant Law Group so that no qualified British Columbia lawyer was then practising either on a full or part time basis in the same offices [in Victoria] from which Mr. Shaw operated as a legal assistant. Although the Law Society was not in

favour of the arrangement, it acquiesced.

(8) Ms. Hemminger continued her supervisory role until the end of October 2002.

(9) On November 4, 2002, Eric Wagner joined the Merchant Law Group as an associate and took on the responsibility of supervising Mr. Shaw.

(10) On April 8, 2003, after a seven day hearing involving a wide ranging exploration of Mr. Shaw's financial, disciplinary and competency history, the Law Society rejected his reinstatement application.

(11) In September of 2003, the Law Society denied the Merchant Law Group's request to allow it to continue to employ Mr. Shaw as a legal assistant and the Merchant Law Group then terminated its arrangements with him.

(12) As of the date of this trial Mr. Shaw had not been reinstated by the Law Society.

[44] Although there is conflicting evidence concerning when the plaintiffs learned of Mr. Shaw's non-practising status (which I will later discuss when addressing the reliability of the evidence of the various witnesses in this case), I find that Mr. Shaw in fact continued to direct the conduct of the plaintiffs' claims after the Law Society precluded him from practising as a lawyer. He did so primarily with the necessary assistance of Mr. Cavanaugh as qualified Alberta counsel and also, to a far more limited extent, consulted with Mr. Dumonceaux.

[45] While I cannot, based on the evidence adduced by the parties, conclude that any particular actions taken by Mr. Shaw in his representation of the plaintiffs after February 2002 were undertaken without Mr. Dumonceaux, Ms. Hemminger or Mr. Wagner having some knowledge of those actions, I am satisfied by the totality of the evidence that none of the supervising lawyers undertook responsibility for the carriage of the plaintiffs' litigation in the same way that he or she would have done as primary lawyers on the file if the litigation was not in fact still being wholly directed by Mr. Shaw. There was, in reality, no substantive change in his role in his conduct of the plaintiffs' litigation. Although at least some of his correspondence was cosigned by supervising lawyers, he was the author of the letters and, except as to his inability to sign cheques, he acted as if he was still a practising lawyer.

[46] In making those findings I do not criticize the professional or ethical conduct of the three supervising lawyers. They were, in my respectful view, placed in an untenable and impossible position by: the nature of Mr. Shaw's practice; his years of involvement in the plaintiffs' claims; the history of his longstanding and close relationship with the plaintiffs; and, the supervising lawyers' lack of participation in all meetings between Mr. Shaw and the plaintiffs. Those problems were, in my view, exacerbated by the Merchant Law Group's reluctant attitude toward the required supervision of Mr. Shaw.

[47] A review of the correspondence between Mr. Merchant and the Law Society indicates Mr. Merchant's refusal to accept that effective supervision of Mr. Shaw was required. I am satisfied that that refusal and his attitude toward the Law Society's attempts to control Mr. Shaw resulted in

Mr. Merchant's treatment of supervision as an imposition rather than as an appropriate concern for the protection and well-being of the Merchant Law Group's clients and the public.

[48] All of those circumstances lead me to conclude that while each of the three supervising lawyers took their responsibilities seriously, they were not enabled by either Mr. Shaw or the Merchant Law Group to preclude Mr. Shaw from acting in all material ways as a lawyer rather than as a paralegal in relation to the plaintiffs' claims.

[49] The lack of effective supervision of Mr. Shaw in his purported role as a legal assistant is, in my view, most starkly demonstrated by the attendance of Mr. Shaw with the plaintiffs at the mediation in Alberta on October 21, 2002 that resulted in the MVA Settlement that is at the root of the disputes in this litigation.

[50] The totality of the evidence leads me to conclude that although Mr. Cavanaugh attended that mediation as the plaintiffs' Alberta counsel, the mediation was directed by Mr. Shaw. It was Mr. Shaw who not only carried the bulk of the negotiations but who also convinced the plaintiffs to accept what was in their view an improvident settlement. The evidence also establishes that there was no supervision of any of that conduct in Alberta by the Merchant Law Group.

[51] After the settlement of their claims was reached in Alberta on October 21, 2002, the plaintiffs and Mr. Shaw returned to Victoria. The evidence establishes the following sequence of events after their return:

> (1) On October 23, 2002, the mediator who had assisted in the settlement of the plaintiffs' claims in Alberta delivered copies of "Terms and Conditions" of the mediation as well as "Minutes of Settlement" dated October 21, 2002 both of which had been signed by both Mr. Shaw and Mr. Cavanaugh as "Plaintiff's Counsel".
>
> (2) On October 30, 2002:
>
> > (a) the defendants in the Alberta action forwarded $760,000 to the Merchant Law Group in Alberta pursuant to the MVA Settlement;
> >
> > (b) in consideration of a stated payment of compensation in the amount of $913,411.06 "inclusive of all claims for damages, special damages, Part VII Entitlements and taxable Court costs" Mr. and Mrs. Chudy signed a general release in favour of all of the defendants in the Alberta action; and
> >
> > (c) Mr. Shaw witnessed the plaintiffs' signatures on that release and there is no evidence that the Release was reviewed by any lawyer with or on behalf of the Merchant Law Group prior to its execution.
>
> (3) Coincidentally, on October 30, 2002. Mr. Wagner advised the Law Society that he would be commencing full time employment with the Merchant Law Group on November 4, 2002.

(4) On October 31, 2002, Mr. Shaw requested that the Merchant Law Group deliver to him a trust cheque from the settlement proceeds for $300,000 payable to Mr. Chudy as well as eight other trust cheques totalling $160,093.06 payable to various of Mr. and Mrs. Chudy's creditors. All of those cheques were delivered to their payees shortly after their receipt by Mr. Shaw.

(5) On November 5, 2002, Mr. Wagner advised the Law Society that he had commenced employment with the Merchant Law Group on November 4, 2002.

(6) On November 15, 2002, the Merchant Law Group paid the plaintiffs a further $20,000.

(7) On November 21, 2002, the Merchant Law Group issued to the plaintiffs an account for fees in the amount of $112,000 as well as GST in the amount of $7,840 and $5,274.07 in "Non-Taxable Disbursements". That account was at some time deducted from the MVA settlement funds still held in trust.

(8) On November 26, 2002, as I will later discuss in more detail, the Merchant Fee Agreement was signed by the plaintiffs. On that same date, Mr. Shaw delivered a trust cheque from the settlement funds to the plaintiffs in the sum of $24,613.24. He then requested and received $18,662.43 of that amount back from them in circumstances that the plaintiffs say constituted a conversion of those funds.

(9) On December 4, 2002, the Merchant Law Group issued to the plaintiffs an account for fees in the amount of $83,000 as well as GST in the amount of $5,810. That account was at some time deducted from the MVA settlement funds still held in trust.

(10) On March 20, 2003, the Merchant Law Group issued a further "Statement of Account" to the plaintiffs purporting to reconcile the funds received by it in trust for the plaintiffs with its own accounts and disbursements.

[52] Mr. and Mrs. Chudy were very unhappy with the settlement reached at the mediation in Alberta. They believed that Mr. Shaw had failed to adequately represent their interests, failed to properly advise them of the potential cost repercussions they might face if they did not accept what they considered to be an improvident settlement and generally pressured them into signing the settlement. Mr. Shaw himself admitted that when the plaintiffs agreed to the settlement they were "frightened, tired and angry" yet he did not tell them that they did not have to settle that day.

[53] The adequacy of the settlement reached at mediation is not in issue in this litigation. The manner by which the settlement was reached and the plaintiffs' concerns about the settlement are, however, of some significance as a background to the fee dispute now before the Court, the credibility of the various witnesses and the actions of the parties after the settlement was reached.

[54] The plaintiffs' unhappiness with the settlement included the fact that it had failed to address the value of the tractor trailer truck that was owned by Mr. Chudy and destroyed in the accident. They continued to press Mr. Shaw to resolve that claim. Those issues eventually lead to the

plaintiffs seeking legal advice and subsequently resulted in this litigation.

. . . .

Issue # 1: Is the Merchant Agreement Unenforceable?

[63] The circumstances surrounding the execution of the Merchant Agreement are convoluted. There is significant disparity in the evidence of the relevant witnesses not only as to why but also as to when and before whom it was executed.

[64] My assessment of the totality of the evidence has led me to conclude that although the Merchant Agreement was dated November 21, 2002, it was executed by the plaintiffs on November 26, 2002, more than one month after the MVA Settlement was reached in Alberta.

. . . .

[74] Section 64(1) of the *Legal Profession Act*, S.B.C. 198, c. 9 defines a contingent fee agreement to be

> ... an agreement that provides that payment to the lawyer for services provided depends, at least in part, on the happening of an event.

[75] In *Commonwealth Investors Syndicate Ltd. v. Laxton* (1994), 94 B.C.L.R. (2d) 177, 117 D.L.R. (4th) 382 (B.C. C.A.) at ¶ 25, McEachern C.J.B.C. observed that entitlement to contingency fees must

> ...include at least the risk of there being no recovery at all and the expectation of a larger fee based upon results that would be appropriate in non-contingency cases.

[76] I find that there was no risk of no recovery to the Merchant Law Group under the provisions of the Merchant Agreement and no other valid consideration for its execution.

[77] I accordingly conclude that the Merchant Agreement is unenforceable as a contingency fee agreement both as a matter of contract law and under the provisions of the *Legal Profession Act.*

[78] In addition, however, and important to the determination of the remainder of the issues to be determined in this case, is whether in all of the circumstances the Merchant Agreement is also unenforceable in equity by reason of the Merchant Law Group's alleged breaches of fiduciary duty in obtaining its execution.

[79] Mr. Nathanson submitted on behalf of the plaintiffs that the Merchant Agreement should be set aside because the Merchant Law Group breached its fiduciary duty to the plaintiffs by failing to advise them that:

> (1) the Merchant Law Group was not entitled to a contingency fee;

(2) the plaintiffs were not obliged to sign the Merchant Agreement;

(3) the interests of the Merchant Law Group in obtaining the Merchant Agreement was in conflict with the interests of the plaintiffs; and

(4) the Merchant Law Group was entitled only to a fair fee under the *Legal Profession Act*.

[80] In *Tweten v. Nichols* (1985), 61 B.C.L.R. 225 (B.C. S.C.), McLachlin J. (as she then was) determined that:

> 16. The provisions of the Barristers and Solicitors Act do not affect the general power which the court has long exercised in appropriate circumstances to set aside contracts between its members and their clients: *Kong v. Fan*, [1974] 3 W.W.R. 730. The new remedy under the Act is additional to what existed before. It permits the court to alter as well as set aside offending contracts, and widens the basis upon which interference by the court is appropriate: see *Deans v. Armstrong* (1983), 46 B.C.L.R. 273; Re Barnard, 37 B.C.R. 161, per Martin J.A., dissenting.
>
> 17. There are two grounds upon which the court may set aside a contract for a solicitor's fees in the exercise of its general jurisdiction. First, as with any contract, it can be set aside on grounds of fraud or unconscionability. Secondly it may be set aside in the exercise of the court's supervisory jurisdiction over officers of the court.
>
> [My emphasis]

[81] In *Waldock v. Bissett* (1992), 67 B.C.L.R. (2d) 389, 92 D.L.R. (4th) 532 (B.C. C.A.) [*Waldock*] which was considered and applied in *Abel v. Burke* (2000), 75 B.C.L.R. (3d) 297, 2000 BCCA 284 (B.C. C.A.), Southin J.A. speaking for the Court stated (at p. 541):

> In considering whether to cancel the contract for not being fair in its inception, the court, or now the registrar, may apply all the principles of equity which go to whether justice requires that a contract voidable for such things as breach of fiduciary duty or misrepresentation or duress should be rescinded even though it has been fully performed and, thus, *restitution in integrum* in its strict sense is not possible.
>
> [My emphasis]

[82] The findings of fact that I have made establish that Mr. Shaw, acting as a member of the Merchant Law Group and empowered by the Merchant Law Group to negotiate an agreement with the law firm's clients, misrepresented to them that they were legally obligated to sign the Merchant Agreement so that the Merchant Law Group could be paid its fees. In making that representation Mr. Shaw failed to disclose:

(1) that in the circumstances there was no continuing contingency so that there was no

consideration for the obtaining of a fee based upon any contingent possibility that Merchant Law Group would not be paid for its services or disbursements;

(2) the existence of any problems with the continuing enforceability of the earlier Shaw Agreement that arose from his own bankruptcy or the failure of the Merchant Law Group to obtain an assignment of the interest of Shaw, PLC in the Shaw Agreement; or

(3) the existence of any concerns with the enforceability of the Shaw Agreement arising from the refusal of the Law Society to allow Mr. Shaw to practise law as a lawyer.

[83] I find that when Mr. Shaw procured the plaintiffs' execution of the Merchant Agreement he did so with the knowledge that, by reason of his earlier failure to obtain a new contingency agreement when he joined the Merchant Law Group, the Merchant Law Group was not entitled to a percentage of the MVA Settlement.

[84] I also find that in the totality of the circumstances existing at the time (and subject only to issues that I will later discuss concerning the enforceability of the Shaw Agreement), the Merchant Law Group had only an unwritten retainer agreement with the plaintiffs under which any entitlement to a fee would be governed by the provisions of the *Legal Profession Act*, including considerations of fairness and reasonableness.

[85] I am satisfied that in those circumstances Mr. Shaw and the Merchant Law Group were obliged not only to not misrepresent the plaintiffs' obligations related to the Merchant Law Group but also, as fiduciaries whose interests were then in conflict with those of the plaintiffs, to fully and frankly disclose all facts which would enable the plaintiffs to act meaningfully, voluntarily and with independent and informed judgment. See: *Malicki v. Yankovich* (1981), 125 D.L.R. (3d) 411 (Ont. H.C.J.).

[86] In *Waldock*, [*Waldock v. Bissett* (1992), 92 D.L.R. (4th) 532 (B.C. C.A.)] at p. 7, Southin J.A. stated:

There is no rule of law or equity that a solicitor entering into an agreement with his client must advise the client to obtain independent advice. Such advice is often wise for the protection of the solicitor even if not for the client. <u>But the true obligation is to advise the client, if as here the agreement will have the effect of depriving the client of his existing legal right to performance of the earlier contract, of that legal right</u>.

[My emphasis]

[87] Mr. Shaw and the Merchant Law Group owed a fiduciary duty to the plaintiffs to advise them that they had no obligation to sign the Merchant Agreement both because there was no risk to the Merchant Law Group at the time the Merchant Agreement was signed and because signing the Merchant Agreement would deprive them of their existing legal rights. He breached that duty and nothing that may have been done by Mr. Wagner in any way relieves the Merchant Law Group of its responsibility for Mr. Shaw's actions.

Issue #2: Is the Shaw Agreement Enforceable?

[88] My conclusion that the Merchant Fee Agreement is unenforceable as a contingency fee agreement requires that I consider the Merchant Law Group's alternative submission that its accounts to the plaintiffs based upon thirty percent of the MVA Settlement are enforceable by reason of the provisions of the Shaw Agreement.

. . . .

[115] A retainer agreement between solicitor and client is an entire contract. When a solicitor terminates that entire contract without good cause (in other words for reasons within his control) that lawyer is not entitled to any fees, including fees on the basis of *quantum meruit.* See: *Arctic Installations (Victoria) Ltd. v. Campney & Murphy* (1994), 86 B.C.L.R. (2d) 226 (B.C. C.A.) [*Arctic Installation*], at ¶ 46 to 48.

[116] Also, in *Braidwood, MacKenzie, Fujisawa, Brewer & Greyell v. Wight*, [1993] B.C.J. No. 484 (B.C. S.C. [In Chambers]) [*Braidwood*], Harvey J. concluded that a law firm could not rely upon a contingency fee agreement with a client in circumstances where the lawyer had been appointed to the bench since the acceptance of the appointment was a voluntary act that resulted in the termination of the retainer agreement. He stated at 25:

> My review of the authorities leads me to conclude that where a solicitor withdraws from a case due to matters beyond his control, whether those matters relate to the actions of his client or events befalling upon him unexpectedly, he is entitled to recover his fees. I accept the submission of Mr. MacKinlay that an acceptance to a judicial appointment, unlike an accident, is voluntary and is entirely within the control of the solicitor. For those reasons, I find that a judicial appointment is not good cause for withdrawing from an action.
>
> [My emphasis]

[117] In *Maillot v. Murray Lott Law Corp*. (2002), 99 B.C.L.R. (3d) 170, 2002 BCSC 343 (B.C. S.C.) [*Maillot*], Boyd J. also determined that the solicitor's wrongful termination of a contingency fee agreement operated to bar him from claiming fees on a *quantum meruit.*

[118] In its amended statement of defence at paragraph 10, the Merchant Law Group admitted that: "Earl Shaw's status as a member of the Law Society was in his control as was the payment or non-payment of fees to the Law Society".

[119] There could in my view, be no more fundamental breach of a solicitor and client retainer agreement than the loss by the solicitor of the right to practise law by reason of his own failure to comply with his obligations to the Law Society.

[120] I accordingly find that even if the plaintiffs had any obligation to pay a contingency fee to the Merchant Law Group by reason of the Shaw Agreement when Mr. Shaw joined the Merchant

Law Group on October 2, 2001, any such obligation came to an end and the Shaw Agreement was terminated when the Law Society refused to license Mr. Shaw to practise as a lawyer.

Issue #3: Is the Merchant Law Group Entitled to Compensation Based upon a Quantum Meruit and If So, in What Amount?

[121] The Merchant Law Group submitted that if it is not entitled to payment of its accounts on a contingency fee basis under the provisions of either the Merchant Agreement or the Shaw Agreement, it is entitled to remuneration for all services performed for the plaintiffs by Mr. Shaw, Shaw, PLC and the Merchant Law Group in the amount billed based upon a *quantum meruit*

[122] Counsel for the Merchant Law Group submitted that the plaintiffs accepted Mr. Shaw's status as a non-practising lawyer under the supervision of lawyers employed or retained by the Merchant Law Group, took the benefit of those services and received a substantial award as a consequence of the efforts of the Merchant Law Group. Mr. Williams submitted that in those circumstances and considering the risks faced by the Merchant Law Group in funding and continuing to prosecute the litigation, a fair fee would be equal to that charged under the Merchant Agreement.

. . . .

[168] I have, …, concluded that in all of the circumstances of this case equity not only requires but demands that the Merchant Law Group repay all of the funds it collected from the plaintiffs other than the $51,319.96 Weir Bowen account.

[169] I reach that conclusion for the following reasons:

> (1) The entire contract principles enunciated in *Arctic Installation, Braidwood* and *Maillot* deny recovery to the Merchant Law Group on a *quantum meruit* for any services it or Shaw, PLC provided to the plaintiffs.
>
> (2) *Quantum meruit* is an equitable remedy and it is trite law that those who seek equity must come to court with clean hands. See: *Ruwenzori Enterprises Ltd. v. Walji*, 2004 BCSC 741 (B.C. S.C.) at ¶ 334; aff'd *Ruwenzori Enterprises Ltd. v. Walji*, 58 B.C.L.R. (4th) 23, 2006 BCCA 448 (B.C. C.A.) ; *Noakes v. Midence*, 2001 BCSC 1368 (B.C. S.C.) and *Dunlop v. Major*, [1998] O.J. No. 2553 (Ont. C.A.).
>
> (3) I have found that Mr. Shaw induced the plaintiffs to execute the Merchant Agreement by falsely misrepresenting to them that they were legally obligated to sign it so that the Merchant Law Group could be paid. That representation was not only false, but in the circumstances of the obvious conflict of interest out of which it arose, was a breach of the fiduciary duty owed by Mr. Shaw and the Merchant Law Group to their clients. The Merchant Law Group not only put Mr. Shaw in the position to make those misrepresentations but acted upon them to the detriment of the plaintiffs.
>
> (4) To allow the Merchant Law Group to recover in any way for the services or

disbursements provided to the plaintiffs by Shaw, PLC under the Shaw Agreement, or otherwise, before Mr. Shaw joined the Merchant Law Group in October 2001, would sanction the duplicitous actions of Mr. Shaw and Mr. Merchant in obtaining all of the value of Shaw, PLC to their mutual benefit free of the claims of Mr. Shaw's trustee in bankruptcy, his creditors and the creditors of Shaw PLC.

(5) To allow the Merchant Law Group to recover fees on a *quantum meruit* for Mr. Shaw's services as if he were a lawyer would also undermine the restrictions placed upon Mr. Shaw's ability to practise law by the Law Society and countenance the provision of legal advice by him to the plaintiffs in Alberta before, during and after the mediation, contrary to those restrictions.

[170] The Merchant Law Group's counterclaim seeking recovery of its fees and disbursements on a *quantum meruit* is accordingly dismissed with the exception of the Weir Bowen account of $51,319.96 conceded by the plaintiff.

[171] The plaintiffs shall therefore have judgment against the Merchant Law Group in the amount of $231,741.74. That judgment amount is determined from the March 20, 2003 statement delivered by the Merchant Law Group and is comprised of $253,400.54 recorded on that accounting as "Total Fees and Taxes" plus $29,661.16 recorded as "Total Disbursements" less $51,319.96 for the Weir Bowen account.

[172] The plaintiffs shall also have judgment against the Merchant Law Group for interest on the sum of $231,741.74 from and after November 26, 2002.

Issue # 4: Did Shaw Convert $18,662.43 of the MVA Settlement to His Own Use and If So, Is the Merchant Law Group Liable for That Conversion?

[173] These issues arise from the events of November 26, 2002 when Mr. and Mrs. Chudy attended upon Mr. Shaw and executed the Merchant Agreement.

[174] The evidence is not controversial that on that date Mr. Shaw delivered a trust cheque from the settlement funds to Mr. Chudy in the sum of $24,613.24 but then requested and received $18,662.43 of that amount back. In response to that request, Mrs. Chudy delivered a cheque to Mr. Shaw in that amount and deposited the $24,613.24 into the plaintiffs' account.

[175] Later that same day, Mr. Shaw requested that the plaintiffs exchange that cheque for two cheques each under $10,000. Mrs. Chudy testified that when he made that request Mr. Shaw stated that "If I put this other one through my account a big red flag is going to go off". Mr. and Mrs. Chudy then returned to the Merchant Law Group's Victoria office and Mrs. Chudy provided one cheque for $9,000.43 and one for $9,662 both of which were dated November 27, 2002. Mrs. Chudy recorded "Earl's fees" on both cheques and the two cheques were subsequently deposited by Mr. Shaw to his personal account. One cheque was deposited by him on November 27, 2002 while the second was deposited on approximately December 2, 2002.

[176] I have accepted Mrs. Chudy's evidence that the $24,613.24 cheque was delivered to the

plaintiffs on the same day that they signed the Merchant Agreement. I also accept Mrs. Chudy's evidence that Mr. Shaw told the plaintiffs that the cheque had been mistakenly made payable to Mr. Chudy rather than to Mr. Shaw when he requested $18,662.43 of that amount back from them. He also that told them the balance was money he had "saved for them on the P.S.T."

. . . .

[188] Based … those submissions I have determined that the Merchant Law Group is obligated to repay Mr. and Mrs. Chudy the $18,662.43 paid by them to Mr. Shaw. Mr. Shaw had no entitlement to those funds by reason of his own bankruptcy and the fact that any funds owed were owed to Shaw, PLC. Although the plaintiffs have not sought recovery directly from Mr. Shaw, the Merchant Law Group is not only vicariously liable for his acts by putting him in the position of dealing with the plaintiffs' trust funds, but also directly responsible by reason of Mr. Merchant's participation in that conversion in breach of the Merchant Law Group's fiduciary duties to the plaintiffs in respect of those funds.

[189] The plaintiffs will accordingly have judgment against the Merchant Law Group for breach of fiduciary duty in the amount of $18,662.43 together with interest on that amount from and after November 26, 2002.

Issue #5: Does the Conduct of Either the Plaintiffs or the Merchant Law Group Warrant an Award of Punitive Damages?

[190] My findings of fact concerning the conduct of Mr. Shaw and Mr. Merchant make it obvious that there is no evidentiary basis for an award of punitive damages against Mr. or Mrs. Chudy.

[191] Of serious concern, however, is whether the conduct of the Merchant Law Group warrants such an award.

[192] Mr. Nathanson submitted on behalf of the plaintiffs that disentitlement to fees and disbursements is not sufficient to address the seriousness of the Merchant Law Group's breaches of duty. He submitted:

> But for this breach of duty, the defendant would have had a modest fee, probably in the order of $20,000, for work performed largely by Shaw as a legal assistant for a period of 12 months. Dumonceaux testified that the only substantive work done on the file that he was aware of was a settlement letter, organization of a file "matrix", and preparation and attendance at a mediation. For this limited work, the defendant took a fee, and taxes, in excess of $200,000, an amount separate and apart from what was paid to Weir Bowen for its work [on behalf of the plaintiffs].

[193] The plaintiffs urged upon me the following statement in M. Ellis's *Fiduciary Duties in Canada* (Don Mills: Richard DeBoo, 1988) that was cited with approval by McLachlin J. (as she then was) writing for herself and L'Heureux [- Dube] J. in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.) at p. 298:

> Where the actions of the fiduciary are purposefully repugnant to the beneficiary's best interests, punitive damages are a logical award to be made by the court. This award will be particularly applicable where the impugned activity is motivated by the fiduciary's self interest.

[194] The plaintiffs also rely upon *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18 (S.C.C.) and *Ward v. Manufacturers Life Insurance Co.* , [2006] O.J. No. 2284 (Ont. S.C.J.) in support of their submission that the conduct of the Merchant Law Group is so serious that it must be condemned by a punitive damages award that appropriately reflects the Court's disapproval of conduct that was not only abusive of the plaintiffs and a flagrant breach of fiduciary obligations, but also brings the integrity of the legal profession into disrepute.

[195] Mr. Nathanson submitted that in all of the circumstances the appropriate punitive damages award would be in the range of $200,000 to roughly equal the fees charged by the Merchant Law Group to the plaintiffs.

[196] I agree with many of Mr. Nathanson's characterizations of the actions and conduct of Mr. Shaw and Mr. Merchant in their abuse of power in their relationship with their clients as well as in their approach to this litigation.

[197] I also agree that the totality of the conduct of both Mr. Shaw and Mr. Merchant on behalf of the Merchant Law Group establishes the need for an award of punitive damages to express the Court's disapproval of that conduct.

[198] I have, however, concluded that a punitive damage award of $200,000 that would roughly equal the fees charged by the Merchant Law Group in this case would be excessive.

[199] I reach that conclusion because I am satisfied that there is some inherent deterrence in the denial of any fees or disbursements to the Merchant Law Group by reason of their breaches of fiduciary duty. I note that in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.) at p. 453, La Forest J. stated:

> The law of fiduciary duties has always contained within it an element of deterrence.

[200] In addition, I am satisfied that, to some extent, in addressing circumstances that support an award of punitive damages the plaintiff has also raised issues concerning the conduct of this litigation that are more properly the subject of cost considerations.

[201] In all of the circumstances I have concluded that an award of punitive damages in the amount of $50,000 against the Merchant Law Group will appropriately and meaningfully denounce the conduct of Mr. Shaw and Mr. Merchant on behalf of the Merchant Law Group in their dealings with the plaintiffs and serve to deter further such abusive conduct.

[202] I also request counsel for the plaintiffs to direct a copy of these reasons for judgment to

the Law Society, the Superintendent of Bankruptcy and Mr. Shaw's trustee in bankruptcy.

Issue #6: Is the Merchant Law Group Entitled to Contribution or Indemnity from Shaw?

[203] The Merchant Law Group filed a Third Party Notice against Mr. Shaw on June 27, 2006 after an application that required the adjournment of this trial that had been set for June 19, 2006. That trial date had been set and ordered to be peremptory upon the Merchant Law Group due to its delays in responding to the substance of the plaintiffs' allegations.

[204] The adjournment was made necessary because Mr. Shaw represented to the Court that he wanted the third party proceedings heard at the same time as the consideration of the plaintiffs' allegations against the Merchant Law Group in which his role was so important.

[205] It is, however, significant that prior to the commencement of this trial, no defence to the Third Party Notice was required of Mr. Shaw by the Merchant Law Group. When that fact was brought to the attention of the Court by counsel for the plaintiffs, a pro forma defence of denial was filed by Mr. Shaw.

[206] Also, during this trial no evidence was led by the Merchant Law Group to support any of the allegations made by it against Mr. Shaw in its Third Party Notice. Rather, it was obvious that the Merchant Law Group worked hand in hand with Mr. Shaw in the calling of witnesses and in the cross-examination of witnesses.

[207] In addition, in his cross-examination of Mr. Shaw, Mr. Williams did not confront Mr. Shaw with any of the allegations made against him in the Third Party Notice. Further, in his 170 page written closing submissions he made no reference to the Merchant Law Group's allegations or claims against Mr. Shaw.

[208] The only submissions concerning the allegations made against Mr. Shaw by the Merchant Law Group were contained in a "Summary of Points of Written Argument" by which Mr. Williams supplemented his extensive written argument. He stated:

> If Judgment is given against Merchant, judgment should be given against Shaw because, *inter alia*:
>
> > a. Shaw was an independent contractor and owed a duty of care and a duty to act in the best interests of Merchant;
> >
> > b. Merchant had complied with the Law Society's requirements regarding Shaw acting as a legal assistant;
> >
> > c. If Shaw represented to the Chudy's that they had to sign the fee agreement, Shaw did so without the knowledge of Merchant.
> >
> > d. If Shaw intentionally withheld his status as a legal assistant from the Plaintiffs he did so without advising the Defendant of this and despite the Defendant's best efforts

to ensure otherwise through their Law Society accepted supervisors.

[209] I have determined that there is no evidentiary support for the Merchant Law Group's allegations against Mr. Shaw in its Third Party Notice or in the submissions of counsel.

[210] The submission that Mr. Shaw was an "independent contractor" is not only contrary to the totality of the evidence but embarrassing given the Merchant Law Group's obligations to its clients and the Law Society in the circumstances of this case.

[211] I have also found that the Merchant Law Group did not comply with the requirements of the Law Society in allowing Mr. Shaw to attend at the mediation in Alberta without supervision by one of its own lawyers.

[212] The evidence also establishes that the Merchant Law Group was well aware that the Merchant Agreement was contemplated because its Edmonton office provided the draft contingency agreement that Mr. Shaw used as the template for the Merchant Agreement.

[213] Also, as I have previously found, Mr. Merchant approved Mr. Shaw's conversion of $18,662.43 of $24,613.24 from the MVA Settlement on November 26, 2002.

[214] The Merchant Law Group's third party claims against Mr. Shaw are accordingly dismissed but without costs to Mr. Shaw because he mounted no independent defence to those claims.

[215] Mr. Shaw is not entitled to any costs of his defence of the plaintiffs' claims against the Merchant Law Group. The plaintiffs' claims were wholly successful against the Merchant Law Group and the plaintiffs sought no relief from Mr. Shaw.

Issue #7: Costs

[216] After the plaintiffs were unable to obtain satisfaction from Mr. Shaw relating to Mr. Chudy's claims for his trucks and had become disenchanted with his services, they wrote a letter to Mr. Merchant dated October 31, 2003 requesting "immediate release of my (Clifford Chudy) file" as well as all "paperwork that may be in Earl Shaw's possession".

[217] In response, Mr. Merchant had discussions with the Law Society in which he initially disputed any obligations to transfer the file contents. In a letter dated December 2, 2003 to Ian Maclaren of the Law Society, Mr. Merchant stated: "We claim the Solicitor's Lien on the files".

[218] That was at best a surprising position since all monies allegedly owing by the plaintiffs to the Merchant Law Group had been paid from funds held in trust for the plaintiffs by the Merchant Law Group earlier that year.

. . . .

[251] Having considered all of the evidence at trial and the conduct of the Merchant Law Group throughout this litigation, I have determined that the willingness to resort to unethical and

obstreperous conduct that was demonstrated by Mr. Merchant in the preparation of the December 11, 2003 letter and the fictitious fee account persisted and also foreshadowed the way in which the Merchant Law Group was prepared to defend against the plaintiffs' claims.

[252] The conduct of the Merchant Law Group was, in my opinion, calculated to: prevent the hearing of the plaintiffs' claims on their merits; unreasonably increase the costs to their former clients [the plaintiffs] in seeking to obtain redress; and, cover up or minimize the actions of the Merchant Law Group in relation to the obtaining of all of the benefits of Shaw, PLC's files without undertaking its obligations. Also, when and where necessary, it was prepared to offer false evidence to advance its own interests.

[253] It is also not without significance to the question of costs that in its counterclaim against the plaintiffs the Merchant Law Group sought "punitive damages in an amount not less than the solicitor-client costs and disbursements incurred to defend this frivolous and mean spirited lawsuit which is a 'dressed up' taxation of a lawyer's bill".

[254] None of those allegations were established.

[255] In *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (B.C. C.A.) [*Garcia*], the Court of Appeal considered the type of conduct required for an award of special costs under the *Rules of Court*, B.C. Reg. 221/90. After reviewing decided cases and the relationship of "special costs" to the concept of "solicitor-and-client costs", Lambert J.A. (for the Court) stated at ¶ 17:

> Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[256] In *Golden Capital Securities Ltd. v. Holmes* (2003), 22 B.C.L.R. (4th) 171 (B.C. S.C.), E.R.A. Edwards J. held that conduct which has given rise to a cause of action and continues during litigation over the cause may attract both an award of punitive damages and an award of special costs.

[257] I am satisfied that the conduct of the Merchant Law Group in this case was reprehensible within the meaning attributed in *Garcia* . The conduct and actions of the Merchant Law Group would be deserving of rebuke in an ordinary commercial transaction. In the context of litigation

involving its own clients and the integrity which the Court and the public are entitled to expect from those who are privileged to be members of the legal profession, it was both outrageous and scandalous.

[258] I order that the plaintiffs recover special costs from the Merchant Law Group from the commencement of this litigation and throughout, including all costs related to the third party proceedings brought against Mr. Shaw. Those proceedings were, in my view, not only devoid of evidentiary substance but also unnecessarily added to the length of these proceedings.

[259] Any costs that were paid to the plaintiffs pursuant to previous orders of the Court shall, of course, be deductible from the award of special costs.

[260] In making this award of special costs I wish to note that I have considered *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (B.C. S.C.); aff'd (1992), 73 B.C.L.R. (2d) 212 (B.C. C.A.) and more specifically the suggestion that, generally speaking, special costs will be the fees that a reasonable client would have to pay a reasonably competent solicitor to do the work for which the costs are claimed, and are not necessarily the costs that the solicitor for the party entitled to costs could claim from his own client.

[261] While I do not disagree with that general observation, I have concluded that in this case any consideration of "reasonable competence" must be interpreted and assessed to reflect that, in my opinion, the plaintiffs were, in this case, required to retain the services of highly competent counsel such as Mr. Nathanson to not only advance their claims but also to meet the conduct of the Merchant Law Group that resulted in this order for special costs.

F. Summary and Conclusion

[262] The plaintiffs shall recover judgment against the Merchant Law Group as follows:

> (1) damages in the total amount of $231,741.74 for breach of fiduciary duty together with interest on that amount from and after November 26, 2002;
>
> (2) damages in the total amount of $18,662.43 for conversion and breach of fiduciary duty together with interest on that amount from and after November 26, 2002;
>
> (3) punitive damages in the amount of $50,000; and
>
> (4) special costs of this proceeding from and after its commencement including all costs related to third party proceedings in an amount to be assessed.

[263] The defendant's third party proceedings against the third party, Earl Shaw, are dismissed without costs to either of those parties.

"Cost of Lawyer's No-Show Is Climbing"

What started as a missed California Supreme Court hearing turned into more than $3,000 in fines and now has grown to a battle over far more than $265,000 in claimed legal fees.

And, despite a jury verdict in San Francisco County Superior Court 18 days ago, the meter is still ticking.

The roots of the case go back several years to when San Francisco lawyer Raul Aguilar sued the lawyer who represented him in a divorce case. Supreme court proceedings in that case were to have been handled by Allen Kent, a lawyer at Aguilar's firm, Aguilar & Sebastinelli. But Kent left the firm suddenly a week before oral arguments, and he never notified the court he did not intend to argue the case.

No one showed up, and the court was not pleased. It fined Kent $250 for contempt of court. And because Aguilar [the Plaintiff himself] knew of the problem and did nothing, he was fined $1000 and hit later with about twice as much in court costs. Aguilar also received a 30-day license suspension.

Case closed? Not quite.

Kent turned around and sued his old employer. He said it cost him more than $250,000 to defend himself in the supreme court proceeding and in a state bar disciplinary proceeding that the court initiated and that led to his $250 fine. Kent's assertion was backed by three of the seven justices, who dissented, saying his old firm was the attorney of record [for Aguilar] and should have notified the court.

There was a bifurcated trial on liability and damages, and Kent won the liability phase in July under a California statute that makes an employer liable for legal fees for acts that arose out of that employment. In the damages phase, he won $265,000, amounting to about what he said he spent. Nevertheless, the judge granted the defendant a mistrial over a mention of the firm having malpractice insurance.

A second jury saw the damages far differently, awarding Kent just over $11,000.

Kent's lawyer, Roderick Bushnell of San Francisco, thinks he can explain the discrepancy between the verdicts. The case "involved all lawyers. Most of the witnesses were lawyers." So, Bushnell says, "My view is that the first jury got it right, but the second said, 'Oh this is just a bunch of lawyers' suing each other."

Aguilar's lawyer, Tyler Paetkau, also of San Francisco, feels the second jury got it right, but he, too, suspects the jury "might have viewed it as a fight between lawyers" that should have been resolved elsewhere.

Bushnell said Kent, who doesn't buy the second trial's result, will move for additur or a new trial on the grounds of inadequate damages. Meanwhile, the defense plans to move for judgment notwithstanding the verdict on the liability issue, or, if that is denied, to appeal the liability verdict (which it can do because there is no final judgment on either phase of the trial as yet). The battleground there may be whether Kent was acting within the scope of employment when he failed to notify the court clerk.

But unless the verdict is completely reversed, there's at least one more fight to come. Regardless of whether Kent gets $11,000 or $265,000 or something in between, he's entitled, Bushnell says, to reasonable legal fees he spent to win that judgment.

Aguilar's lawyer, Paetkau, isn't so sure. He thinks that bill could approach $1million, but feels his client isn't liable or is liable only minimally if Kent recovers no more than what he has been awarded so far. Someday, the parties may even fight about the fees over litigation to collect the fees.

Stayed tuned.

"Damage Awards for Solicitor's Negligence in Family Law: Quality Control by the Courts vs. Encouragement of Settlement"

Heakes, Susan J., (2006), 25 CFLQ 103

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1. INTRODUCTION

Family law is a high risk practice area. In Ontario, 8 to 10% of the overall claims portfolio of LawPro are family law claims and the amounts involved are increasing. Much of the practice of family law particularly where a matter settles out of court, requires a crystal ball—lawyers are first introduced to the parties at a crisis point in their lives, and are expected to prognosticate about what will happen over the course of the parties' remaining lives. With the passage of time, out of court settlements will often turn out to be better for one spouse than the other.

Not every client wants or can afford "Cadillac" representation and disclosure—many are prepared to accept the best available financial disclosure at the least expense in order to achieve personal closure. That is the case until they discover that they have underestimated their spouse's financial situation. While the lawyer has a professional obligation to advise and encourage the client to compromise or settle on a reasonable basis, the lawyer does so at the risk that a disgruntled client will return to complain about the imperfection of the settlement.

In the case of the inexperienced or overwrought client, the lawyer's personal and professional opinion about settlement options is very influential. There is a continuum of maternalism/paternalism—at one end of the continuum, the lawyer can adopt a *laissez faire*

approach and provide no direction to the client; and on the other end, the lawyer can impose his/her values upon the client.

Knowing the vagrancies of trials, any experienced family law lawyer appreciates that a bird in the hand is worth a flock in the bush. Most cases settle out of court because of the fear of the unknown and because of the increasingly astronomical costs of going to trial. In my experience, the average trial will cost the client approximately $100,000.00—this is not in the budget for most middle class families.

Against this backdrop lies the jurisprudence of professional negligence. Developed over the past two centuries, this body of law sets a high standard when the courts review the services provided by harried family lawyers. While this is a good thing from the public's perspective, it induces sleepless nights for even the best family lawyer.

In three cases that were appealed to the Ontario Court of Appeal this past fall *(McClenahan v. Clarke (c.o.b. Clarke & Wright)* [2004 CarswellOnt 366 (Ont. S.C.J.)], *Ristimaki v. Cooper* [2004 CarswellOnt 2613 (Ont. S.C.J.); reversed: 2006 CarswellOnt 2373 (Ont. C.A.)], and *Lenz v. Broadhurst Main* [2004 CarswellOnt 333 (Ont. S.C.J.; aff'd: 2005 CarswellOnt 4116 (Ont. C.A.)], the trial courts engaged in "armchair quarterbacking" the conduct of three family lawyers whose clients settled their claims against their spouses in interim or final agreements. All of these cases involved experienced family law lawyers who counselled their respective clients about the settlement of their cases. None of the lawyers "screwed up" because they did not understand the law or their professional obligations. The clients consented to the settlements (there was no argument advanced of undue influence or duress), but they later regretted their decisions. They blamed their lawyers and tried to recover what they would have received in a "perfect" settlement with their spouse from their own lawyer.

In each of these cases, the lower courts were critical of the lawyer's advice and/or service to the client. These are detailed and lengthy decisions – clearly the judges who reviewed these matters believed that the situations were worthy of their careful consideration and the profession needed to know the court's views of how the matters might have been handled differently. In *Ristimaki v. Cooper,* the Court of Appeal also took the opportunity to critique the lawyer's conduct.

Despite these findings, however, the lower courts agreed that no damages resulted from the sub-standard advice or service, or they ordered nominal damages (significantly less than the costs of the trial). While the lawyers had their knuckles rapped in varying degrees for not performing up to the standard of care, these were not big "wins" for the clients/plaintiffs.

This article will examine the rationale used by the Ontario courts to limit the damages awarded in these negligence cases. More specifically, it will consider three issues related to the law of negligence and causation. First, what is the test for causation in the context of solicitors' negligence? Second, how have the courts dealt with causation issues? Finally, what evidentiary issues arise in the consideration of causation, including who has the burden of proof, and must the client/plaintiff give direct evidence about what she or he would have done with the correct legal advice?

2. WHAT IS CAUSATION IN THE CONTEXT OF PROFESSIONAL NEGLIGENCE?

Professional negligence involves more than a lawyer's mistake or failure to act. To establish actionable professional negligence, a court must hear evidence and make the following findings:

(a) The client (referred to herein as the "plaintiff") has proven on a balance of probabilities that the advice or conduct of the solicitor fell below the *standard of care*—the advice that would have been given by a reasonably competent and prudent lawyer in the circumstances;

(b) The plaintiff has sustained damages and there is a *causal connection* between the substandard advice defined above and such damages; and

(c) The plaintiff can *quantify the damages* associated with the breach of standard of care.

Absent anyone of these components, a court cannot find that actionable professional negligence has occurred.

A causation test is the link in the chain connecting the lawyer's failure to comply with the standard of care and the loss claimed by the plaintiff. Establishing the solicitor's breach of standard of care and proving loss to the plaintiff are not sufficient to create actionable negligence. The plaintiff is required to link the bad advice or omitted advice *to* the damages that he or she actually experienced, or, as set out below, to a hypothetical lost opportunity.

For example, if a family law lawyer fails to advise the plaintiff of his or her right to have the spouse's pension valued (a breach of the standard of care), and the pension is not valued, thereby making the calculation of the equalization payment too low (damages), the plaintiff does not automatically recover from the lawyer half the value of the spouse's pension. The causation requirement provides that the plaintiff must prove on a balance of probabilities that with the proper advice, he or she would have insisted upon the pension valuation and would then have negotiated a higher equalization. Thus, if the plaintiff was in a huge rush to get the divorce and disregarded the lawyer's advice to have the pension valued, or would not have accepted that advice if it had been provided, there is no actionable negligence.

3. RECENT CASES RELATING TO NEGLIGENCE AND CAUSATION

(a) *McClenahan v. Clarke*

In this case [2004 CarswellOnt 825], the plaintiff (a member of the Billes family) executed a separation agreement after receiving the advice of her Gananoque family lawyer. Ms. Billes later sued the lawyer. While the separation agreement was what Ms. Billes wanted at the time that she executed it, the court held that she had not been given fulsome legal advice about her options respecting spousal support and equalization.

The Court found that the lawyer should have obtained full financial disclosure from the

husband (even though the information about the husband's financial circumstances that the lawyer was given by the plaintiff turned out to be materially accurate). Ms. Billes' father, who had the necessary financial information for full disclosure, provided inaccurate information to the lawyer and generally refused to assist in the disclosure process.

After the separation agreement was executed, the lawyer rendered an account for less than $3,000.00 in respect of his professional services. The plaintiff later sued the lawyer for $3.5 million.

The trial judge, Justice Aitken, found that the lawyer should have given Ms. Billes more advice respecting her claim to spousal support (even though the plaintiff instructed him that she was not interested in support and her father advised the lawyer that he would continue to support his daughter). However, despite her finding that the advice was deficient, Aitken J. applied the "but for" test, discussed below, and concluded that the plaintiff would not have pursued spousal support with this preferred advice. In any event, the Court found that the plaintiff would never have been awarded spousal support by a court in her circumstances.

The same test was applied by Aitken J. to the issue of a constructive trust. The trial judge held that the lawyer should have advised Ms. Billes of her right to make a trust claim against her husband's Canadian Tire franchise. She then found that Ms. Billes would never have advanced that claim, as it would have protracted the litigation and added expense to the process.

The trial judge found damages in respect of the equalization payment, but failed to apply any causation test in arriving at her conclusion on that issue. The damages award in respect of the equalization was approximately $75,000.00; the difference between the settlement made in the separation agreement and what the trial judge considered to be the perfect equalization. After a twelve day trial, this was not a clear victory. The plaintiff appealed the damages award and the lawyer appealed the finding of negligence, but the matter was settled prior to the hearing of the appeal.

(b) *Ristimaki v. Cooper*

In *Ristimaki v. Cooper* [2004 CarswellOnt 2613], a prominent Toronto family lawyer was held to have been negligent in respect of his representation of the plaintiff, but not to have caused the plaintiff's alleged damages. Six weeks into the family law litigation and prior to the hearing of disclosure and preservation motions, the lawyer recommended to the plaintiff that she accept an offer to settle in return for partial settlement of her equalization claim ($2.5 million), transfer of a Florida residence to the plaintiff, and a further $1.5 million held in trust. The plaintiff's husband subsequently left the jurisdiction and the monies in trust were seized by the Canada Revenue Agency.

After reviewing the standard of care issues and finding the defendant's representation to be wanting in some respects, Stinson J. canvassed the law relating to causation. Stinson J. considered *Allied Maples Group Limited v. Simmons and Simmons*, a decision of the English Court of Appeal, which considered three scenarios:

(a) If the negligence consists of a positive act or omission, the test is whether the defendant's act or omission caused the plaintiff's loss;

(b) If the defendant's negligence was an omission, the court should hypothetically ask what would the plaintiff have done to avoid the risk with the proper advice; and

(c) If the plaintiff's loss depends on the hypothetical action of a third party (in addition to the plaintiff's action), the plaintiff must show a substantial chance of success rather than a speculative one.

Stinson J. considered the "lost chance assessment" to be an issue of quantification, not causation. He found that while the "missed" pieces of advice were a consideration, they were ". . . not the only significant factor to consider when assessing what [the client] would have done." Stinson, J. held:

> This is not a case in which it is readily apparent that the client would have made a different decision if different advice had been given. There were clear, significant and tangible benefits to the plaintiff that arose from the settlement Mr. Cooper negotiated on her behalf. In several important respects the settlement achieved benefits for the plaintiff that she could not have obtained until many months into the litigation process, if ever … . While the settlement carried with it some risk, declining the settlement exposed the plaintiff to risk and uncertainty as well. She had no significant assets of her own, and no reliable source of income. The settlement gave her a level of security and certainty.
>
> In all the circumstances. I am not satisfed [sic] on a balance of probabilities that the plaintiff would have acted any differently had Mr. Cooper fully advised her. Put another way, the plaintiff has failed to satisfy me that she would have declined the settlement offer and proceeded with the motions had Mr. Cooper fully explained the risks and benefits of the options available to her.

It was therefore considered vital to evaluate the benefits that accrued to the plaintiff as a result of following her lawyer's advice to enter into the settlement. Stinson J. found that the plaintiff was left with several benefits that, if litigation had been pursued, would have been placed in "*the realm of uncertainty and controversy.*" Ultimately, Stinson J. held that even if the plaintiff had been informed of the risks she claimed were "missing" from her lawyer's advice, she would *not* have acted any differently There was therefore no causal connection to any alleged damages the plaintiff suffered.

The appeal of this matter was argued on November 22, 2005 and the Court of Appeal rendered its judgment on April 21, 2006 [(2006), 268 D.L.R. (4th) 155]. The Court of appeal sent the matter back for a new trial. In doing so, the Court of Appeal found that the trial judge had applied the wrong standard of care to the lawyer's conduct. The Court of Appeal did not make any findings respecting causation or damages.

(c) ***Lenz v. Broadhurst Main***

In *Lenz* [2004 CarswellOnt 333], the plaintiff sought a divorce from his wife after commencing an extra-marital relationship that led to a pregnancy. It was a violation of the tenets of the plaintiff's faith to have a child out of wedlock. Accordingly, the plaintiff sought an immediate divorce so that he could marry his pregnant girlfriend. The plaintiff's wife, no doubt leveraging this unfortunate situation, insisted upon the execution of a separation agreement before the divorce. The terms of the separation agreement were clearly favourable to the wife. The plaintiff was not forthcoming with his lawyer about certain details related to his situation. The plaintiff executed the separation agreement against the advice of his lawyer because he desperately wanted the divorce. He sued his lawyer for damages for professional negligence after he signed the separation agreement. The plaintiff argued that there were options other than signing the separation agreement that the lawyer should have considered (such as a bifurcation motion). The court disagreed that these options were viable, given the plaintiff's goals at the time.

Himel J. applied the "but for" test of causation and held that the plaintiff would have done nothing differently even if he had been provided alternative advice from his lawyer. Himel J. found that causation must be established under one of several tests that she lists in her reasons:

a. ***"But for" Test:*** Under the this test, the plaintiff must establish that his/her loss would not have occurred "but for" the negligent advice of the lawyer. As this approach requires considerable speculation, courts have required plaintiffs to show that the lawyer's advice materially contributed to the loss.

b. ***"Reverse Onus" Test:*** In some situations, a "reverse onus" arises, whereby "the onus has been shifted to the defendant lawyer to prove that no loss was sustained by the plaintiff as a result of the defendant's conduct". This has been applied most consistently in breach of fiduciary duty cases in which there has been material non-disclosure.

c. ***The "Chance" Approach:*** "An award of damages is based on an evaluation of the "chance" that the plaintiff's action would have been successful had the lawyer not failed to conduct the litigation properly. This approach can be applied where the question is what the plaintiff would have done with proper advice, and where there was some probability or substantial chance that a loss suffered by the plaintiff as a result of the solicitor's negligence could have been avoided had the plaintiff been properly advised."

Himel J. found that the plaintiff would have executed the separation agreement *regardless* of the advice received from his lawyer because of the predicament he created due to his need for a "quickie"divorce. Therefore, the plaintiff did not pass the "but for" test.

The Court of Appeal [2005 CarswellOnt 4416] held that there was good support in the evidence for the trial judge's findings.

(d) *Folland v. Reardon*

Although not a family law case, it does provide the most recent from the Court of Appeal on the issue of causation. In this case, Court of Appeal [(2005), 249 D.L.R. (4th) 167] considered the application of the "but for" test in the context of a claim that a criminal lawyer had been negligent in his representation of the plaintiff. The plaintiff was accused of sexual assault. The lawyer failed to obtain a DNA sample from another suspect. At trial, the plaintiff was convicted. The Court of Appeal set aside the conviction and ordered a new trial on the basis that the DNA samples (submitted as fresh evidence) and other evidence at trial would have likely affected the verdict.

After the appeal of the criminal conviction, the lawyer was sued for professional negligence. The judge granted judgment in a motion for summary judgment brought by the lawyer and dismissed the action. The motions judge applied the "but for" test, and found that the plaintiff was obliged to establish, on a balance of probabilities, that he would have been acquitted but for the negligent representation of the lawyer. The plaintiff submitted that the "lost chance" theory of causation should be applied instead—did he lose a *chance* of being acquitted as a result of the lawyer's negligent representation?

Writing the appeal decision, Doherty J.A. held that the plaintiff must prove, on a 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. Doherty J.A. pointed out that in Quebec, the "but for" analysis is also used where the plaintiff alleges he or she has lost an opportunity.

Unlike Himel J. in the *Lenz* decision, the Court of Appeal in this case did not distinguish the "but for" analysis from the "lost chance" approach, but found "lost chance" to be a composite part of the "but for" test. The Court of Appeal did not indicate that the "lost chance" approach was a theory of quantification of damages as opposed to a theory of causation (as per Stinson 1. in *Ristimaki).*

4. EVIDENTIARY ISSUES

(a) Burden of Proof

The courts have *generally* found that the burden of proving damages in these cases lies on the plaintiff. Once the plaintiff discharges this threshold burden, courts will call upon the defendant lawyer to show either that no loss in fact resulted, or that regardless of whether the negligent act occurred, the loss would have resulted in any event.

In 285614 *Alberta Ltd. v. Burnet, Duckworth* & *Palmer,* Russell J. held that a lawyer had breached the standard of care in failing to adequately consider or research the requirements of the relevant legislation; failing to advise the plaintiffs of the potential for tax consequences; and failing to communicate with the plaintiffs in order to clarify their instructions and advise them of their options. The onus was placed on the *lawyer* to show that the plaintiff's loss would have occurred in any event, which he failed to do.

In the lost chance assessment, the plaintiff must establish causation and the value of the lost chance on a balance of probabilities. However, the plaintiff need not prove on a balance of probabilities that the chance would have in fact materialized. Thus, the fact that the chance of avoiding a loss or obtaining a benefit was less than 50 per cent does *not* serve as a bar to the plaintiff s claim for damages, provided that the chance of success is above the *de minimis* range.

(b) Direct Testimony of the Plaintiff:

In *Lawyers' Professional Liability*, Grant and Linda Rothstein comment:

> [A] number of cases seem to require persuasive evidence that the plaintiff would have acted differently if the defendant had not been negligent, and the courts regard suspiciously any direct testimony from the plaintiff to that effect . . . [But] there are cases in which the court appears to have ignored the plaintiffs causative burden, virtually assuming that the plaintiff would have acted differently in the face of prudent advice.

In *Ristimaki*, Stinson J. noted that the plaintiff failed to provide evidence that she would have acted differently had she been given proper advice. Stinson, J. commented:

> > As I have noted, the plaintiff did not testify that she would have refused to accept the settlement had she been properly advised. I find it telling that she did not do so. While that evidence might have been characterized as self-serving, had she testified to that effect, she would undoubtedly have been cross-examined as to the importance to her of the benefits of the settlement.

In *Simon v. Lusis* [2002 CarswellOnt 920 (Ont. C.A.)], the Court of Appeal held that the onus is on the plaintiff to give evidence on the issue of causation.

On the basis of the authorities to date, plaintiff's counsel should ask the plaintiff questions related to causal connection and whether the plaintiff would have acted differently armed with different advice (if the answer is favourable).

5. CONCLUSION

The courts are clearly struggling to develop a consistent theory of causation and damages in solicitor's negligence claims in the family law context. While the courts in recent years have had no difficulty in finding that a lawyer could have better represented his client's interests, there remains a reticence to award damages against the lawyer. That struggle has manifested itself in the causation analysis.

Why is a consistent theory so difficult to formulate? These cases are fact-driven, and I suggest that the contribution and consent of the clients to the "bad" settlements they have entered

into is *indirectly* affecting the causation analysis. If this theory is correct, in defending the lawyer, we should consider the argument of contributory negligence that is, that in failing to provide the lawyer with all pertinent information or refusing to ask the lawyer questions about the settlement and take ownership of the settlement decision, these clients have contributed to their situation and the lawyers should not be left "holding the bag" for the client's decision to accept a poor settlement.

The courts appear to be aware of the difficulty in predicting the outcome of a family law case where short of trial, there is always compromise. Since so many of the disputed issues are subjective in nature, such as spousal support, there are simply no guarantees as to the outcome. Given this reality, courts and lawyers want to encourage out of court settlements.

The courts are also being careful not to punish the lawyers too significantly when they encourage their clients to compromise. The courts are "between a rock and a hard place"—if the courts insist on perfect financial disclosure, require that lawyers never settle and litigate everything aggressively and in a timely fashion, and focus on self-protection rather than assisting the client, several troubling outcomes may result: (a) the cost of retaining counsel will be prohibitive and more family law clients will self-represent; (b) family lawyers will be put out of business if they cannot pass along the "self preservation" costs to the client (i.e. constant memoranda to file, etc.); (c) every family law matter will go to trial and clients will not get early closure and the opportunity to minimize legal expenses; and (d) no one could "dabble" in family law, which may be fine in large urban centres like Toronto, but is not feasible in smaller centres where a law practice must cater to a broader range of needs arising in the local community.

Since the Court of Appeal ruling in *Ristimaki,* on the issue of standard of care referred to in the addendum below, family law lawyers can expect no sympathy from the courts for their difficult predicament in recommending early settlements. There still appears to be an opportunity to reduce exposure in damages using causation arguments. It is unfortunate that the Court of Appeal in *Ristimaki* did not offer further guidance on the causation issue. As more solicitors' negligence cases involving family law lawyers are heard by the courts in the next few years, it will be interesting to see how the courts balance the maintenance of a high standard of care with the encouragement of settlement.

ADDENDUM

Since first writing this paper, the Court of Appeal delivered its decision in *Ristimaki* [(2006), 268 D.L.R. (4^{th}) 155]. Somewhat surprisingly, the Court did not comment on Justice Stinson's thoughtful analysis of the causation issue. Rather, Justice Armstrong found that the trial judge erred in his articulation of the standard of care that should have been applied to the lawyer's advice respecting settlement.

The Court of Appeal reviewed the facts at length in a manner unfavourable to the defendant lawyer. The Court then noted that in the context of the lawyer's recommendation to accept the settlement proposal (which the court acknowledged was a judgement call), the trial judge applied the standard of "egregious error" for a finding of negligence.

While the trial judge articulated the correct principles relating to the standard of care

generally, the Court of Appeal looked to its earlier decision in *Folland v. Reardon.* In that case, Justice Doherty found that there was no justification for departing from the reasonableness standard: "judgment calls made by lawyers are no more difficult than those made by other professionals" [para. 61].

The Court of Appeal found that it was unable to apply the reasonableness standard to the facts and that only a trial judge could make this determination. The Court of Appeal went on to speculate that on the record before it, it appears likely that Mrs. Ristimaki would have accepted advice to reject the settlement proposal if such advice had been proffered. What then would follow, said Justice Armstrong, would be an analysis of causation and the assessment of damages, both of which would be based on the same factors as the analysis of the standard of reasonableness.

Mantella v. Mantella

(2006), 27 R.F.L. (6th) 37 (Ont. Sup. Ct. J.), Corbett, J.
[*Fact summary; reasons in part, at para. 24.*]

Fact summary

Parties separated in 2003 after 10-year marriage. Parties entered into separation agreement to settle all matters between them. Agreement provided for joint custody of both children of marriage. Pursuant to agreement, wife received house debt-free and cash worth in total about $850,000 and tax-free support of $15,000 per month for life. In 2004 wife applied to set aside separation agreement on basis of undue influence, unconscionability and inadequate financial disclosure. Husband made third party claim against wife's lawyer, M, who advised wife in respect of separation agreement and stated in agreement that she had explained meaning and implications of law of each provision of agreement. Paragraph 30 of the Separation Agreement, under the heading "Solicitors Attestation", states: "Each solicitor signs this Agreement not only in his or her capacity as witness but also to attest that he or she explained to the client the meaning and implications at law of each provision of this agreement." M moved to dismiss husband's third party claim. Motion granted. Lawyer's duty is to her own client and, absent fraud, lawyer has no duty to opposite party in family law dispute. Lawyer's certification is despositive evidence of comprehension on part of signatory and not representation from lawyer herself to opposite party. Certification does not make lawyer party to agreement even where, as in case at Bar, it was in body of separation agreement. Lawyer does not warrant competence of advice to people to whom she makes certification; that remains matter between lawyer and her client. However, if lawyer's factual assertion is simply false, then lawyer may be liable in deceit. M never undertook duties on behalf of husband; rather, she undertook duties on behalf of wife and certified that she had done so. In circumstances, there was insufficient proximity between M and husband to give rise to duty of care, and it would not be reasonable to impose such duty. Accordingly, absent fraud, which was not alleged, there was no cause of action against M by husband.

Reasons

[24] Family law presents unique challenges. The household remains a core institution, and a domestic relationship is at once an emotional, social and financial partnership. And, like people, families are infinitely various, and their inner workings reflect this broad variety.

[**Editor's Note**: In *Mantella v. Mantella* (2006), 27 R.F.L. (6th) 76 (Ont. Sup. Ct. J.), per Corbett J., at para. 1: "The third party [solicitor M] shall have her costs throughout, on a complete indemnity basis, fixed in the amount of $22,334.67, inclusive of disbursements and GST, plus costs of the costs submissions fixed in the amount of $1,000.00, inclusive of GST and disbursements, all payable within fourteen days."]

Earl v. Wilhelm

[2000] S.J. No. 45 (Sask. C.A.), Sherstobitoff, J.A. (for the Court) (*Headnote*).

Appeal by Wilhelm, the lawyer who drafted the will in question, and by several of the intended beneficiaries from a trial judgment which found that several of the gifts purportedly made under the will failed and fell to the residuary beneficiaries. The failed gifts were of real property which the testator had in fact transferred to a corporate entity several years prior to drafting the will and which he no longer had the power to devise under the will. Wilhelm was found liable to the disappointed beneficiaries to the extent of their loss of gift on the grounds that he should have made further inquiry as to the testator's title to the property. The trial judge found the testator himself 25 per cent responsible for the error. Wilhelm did not raise the issue of negligence on appeal, but claimed that he owed no duty of care to the intended beneficiaries under the will. He also claimed that the trial judge erred in his finding joint liability between him and the testator under the Contributory Negligence Act. The testator was held 25 per cent contributorily liable for the damages. Of the intended beneficiaries, two were the spouses of the residual beneficiaries with whom all property was held jointly, so that they were found not to have sustained a loss by reason of the error. They realized more property with the failure of the gifts than if they received the gifts under the will. One of those intended beneficiaries appealed the dismissal of his claim. The testator's niece and hired hand, who received nothing under the will once the gifts to them failed, appealed the quantum of damages awarded against Wilhelm.

HELD: Appeals allowed in part. Wilhelm's appeal was dismissed. Although there was no contract between a lawyer who prepared a will and the intended beneficiaries, it was well-established that the lawyer could be held liable to the intended beneficiaries if the intended gifts failed through the lawyer's negligence. There was also no error in finding that the value of the gift was the value of the land intended to be bequeathed, and not the proceeds of sale or net value. That finding depended upon an earlier decision of the Surrogate Court in favour of the disappointed beneficiaries and was binding upon the trial judge. The Contributory Negligence Act did not apply. The trial judge's findings of fact did not support any contributory negligence. Wilhelm was 100 per cent liable for the damages. The appeal of the disappointed beneficiary who was the spouse of one of the residuary beneficiaries also failed. He sustained no loss by reason of the greater share received by his wife and the fact that they held their property jointly. The judge did err in failing to include the value of the standing crop as part of the value of the loss sustained by the disappointed beneficiaries who were successful in this litigation. The value was determined by reference to the date of death, at which time the crop was ready to be harvested. He also erred in fixing the value at nine times the assessed value rather than 11 times the assessed value and the damages were increased accordingly.

[**Editor's Note**: Application for leave to appeal to Supreme Court of Canada, refused 12 October 2000: 2000 CarswellSask 628.]

5.0 FEES AND COSTS

5.1 Fees

"Ferlinger v. Maurice J. Neirinck & Associates"

[2008] O.J. 88 (Ont. S.C.J.), Himel J., 11 January 2008
(*Summary*)

Facts: Applicant retained respondent law firm to commence legal proceedings in 2000. Over the years, accounts were rendered totalling $1,014,373.00. The last two accounts were for more than $850,000.00, including a final account on Nov. 07, 2007. Applicant instructed his new counsel to commence assessment proceedings. The new counsel received the earlier accounts from the client after the order for assessment was obtained. The accounts spanned seven years from 2000. Respondent objected to the inclusion in the assessment of 12 accounts rendered up to April 2003 and already paid.

Decision and Reasons: Application granted. All accounts were to be assessed. While payment of an account signified implied acceptance of its reasonableness, that presumption may be rebutted. The evidence demonstrated that special circumstances existed. There was no retainer agreement to govern the arrangement between the client and the solicitor. The twelve accounts were interrelated and there was overlap in the time frame of the services provided. It could not be expected that the client should have objected and taken out orders of assessment after each account was rendered. The services of the solicitor related to one piece of litigation. None of the accounts were marked as final accounts. The earlier accounts were interim accounts and should not be excluded because of the time limits provided in the *Solicitors Act* (Ont).

Walker v. Schober

2008 CarswellBC 87 (January 18, 2008), B.C.C.A. (Hall, Levine and Rowles, JJ.A.), paras. 1-16; 18-23; 30-55).

[1] This is a dispute between a lawyer (the respondent, Kathleen Walker) and her client (the appellant, Bernhard Schober) over the lawyer's legal fees for her work representing the client in a matrimonial dispute. The client initiated a review of the fees under s. 70 of the *Legal Profession Act*, S.B.C. 1998, c. 9. The registrar reduced the lawyer's fees from $21,055 to $6,000. The lawyer appealed, and the Supreme Court chambers judge allowed the appeal, finding that the registrar had

exceeded his jurisdiction in finding the lawyer's conduct "most discreditable", and that he had made palpable and overriding errors in his findings of fact. The client appealed to this Court.

[2] It is my opinion that the chambers judge erred in finding that the registrar exceeded his jurisdiction and made factual errors. It follows that I would allow the appeal, set aside the order of the chambers judge, and restore the Certificate of Fees of the registrar.

Background Facts

[3] The appellant and his wife separated in 1997. The appellant [husband] retained counsel and commenced divorce proceedings in December 2000. He served the pleadings on his wife in January 2001.

[4] The appellant's wife retained counsel, who filed an appearance on January 17, 2001. On February 2, 2001, the wife's lawyer wrote to the appellant's then-lawyer (not the respondent), stating that she was preparing a statement of defence and counterclaim, and requesting that he not take default proceedings.

[5] The appellant's lawyer wrote to the wife's lawyer three times in March 2001, suggesting mediation and requesting the wife's statement of defence and financial information. He received no response.

[6] In May 2001, the appellant retained the respondent [lawyer] to replace his previous lawyer.

[7] The appellant's main objective in the matrimonial proceedings was to obtain overnight access to his two daughters. He had regular daytime weekend access, but wanted to extend his access to overnight visits. He wanted his [respondent] lawyer to take a more aggressive approach to obtaining some movement on the file.

[8] The respondent [lawyer] reviewed the appellant's file and noted that he was in a position to file for judgment in default of pleadings. The respondent [lawyer] explained to the appellant [husband] the process of proceeding *ex parte* by way of an application for a desk order divorce. The parties [the appellant husband and his respondent lawyer] gave conflicting evidence as to whether she also informed him of other options.

[9] The respondent [lawyer] filed an application for a desk order for divorce and corollary relief, which was granted on September 5, 2001. The order provided for joint custody and guardianship of the children, and gave the appellant [husband] overnight access on weekends and holidays. On September 10, 2001, the respondent was informed the order was available and picked it up from the Court Registry.

[10] The respondent [lawyer for the appellant husband] told the appellant about the order, and counselled him not to tell his wife about it until she had done some research on the obligation to provide the order to opposing counsel. On September 25, 2005, the respondent posted a query on a web board run by the Trial Lawyers Association of British Columbia, asking:

> What is my legal, ethical, moral etc. obligations [*sic*] to my client and to opposing counsel to provide them with a copy of the Order before the appeal period is up or at all?

[11] She received a response the same day, informing her that under Rule 60(32) of the Supreme Court Rules, a party who has entered a divorce order must promptly deliver a copy of the order to the other party.

[12] On September 27, 2001, the respondent mailed a copy of the order to the wife's lawyer.

[13] On October 9, 2001, the appellant informed his wife that he had "already won". Her lawyer had not yet received the order from the respondent.

[14] The wife retained a new lawyer, who immediately applied to have the order set aside and filed a statement of defence. The respondent filed a cross-application for interim relief for the appellant with respect to custody and access. The parties filed a total of 39 affidavits in the course of the ensuing proceedings. Due to limitations on judicial time and a number of adjournments, it took six court appearances before the [desk] order was set aside and the issues were settled by an interim order of Master Patterson on December 14, 2001, granting relief more or less in the form it had been granted in the desk order. That interim order has remained in place since.

[15] The respondent issued 23 accounts for services to the appellant, totalling $21,055. All the accounts were paid.

[16] The review of the respondent's accounts proceeded over five days in September and October 2004. Both parties testified, and each called an experienced family law practitioner as an expert. The registrar reserved, and in written reasons for decision released November 23, 2004 (2004 BCSC 1542 (B.C. S.C.)), he reduced the respondent's fees to $6,000.

. . . .

[18] After a detailed review of the evidence, the registrar commenced his discussion with the following comment (at para. 62):

> While it is true that this is not the forum for deciding matters of alleged professional misconduct or unethical behaviour, in appropriate circumstances alleged misconduct must be considered in order to come to conclusions about the necessity and propriety of the work (see s. 71 of the *Legal Profession Act*), as well as the quality of the work, and to consider, in a global sense, the value of the services that have been rendered on the client's behalf. [Emphasis added.]

[19] The registrar found, "leaving aside the issue of the propriety of taking proceedings in default", that the strategy was "risky", and that the only evidence of a discussion of risk was the [respondent] lawyer's testimony that she told the client that the other party might apply to set aside the desk order. He found there was no evidence that the lawyer had told the client about the specific risk of what actually ensued: that taking default proceedings might prompt more court proceedings with more expense (at paras. 63-64).

[20] The registrar concluded (at paras. 65-67, 70):

> These risks could have been reasonably identified prior to the implementation of the strategy. It was at least likely that the obtaining of a desk order would result in an application to set it aside -- indeed, in my view it was almost inevitable that this would occur since the other side was represented by counsel -- but it was at least probable. Given that the default order involved a substantial change to the custody of and access to children, it also seems likely that the order would be set aside. Thus proceeding by default was probably going to double the legal expense because there would now be two court applications instead of one, although there was also a chance that the desk order would not be challenged. If the client had known the risks and attendant costs and approved them then the consequent expense might be defensible. But he did not.
>
> As well, there were aspects of the solicitor's already risky strategy which added to the risks and costs in the case. For example, the great urgency under which the solicitor did some of her work was largely a consequence of her having proceeded by default. The aggressive position taken by opposing counsel may well have been another consequence of that strategy.
>
> There was also a risk that proceeding in this manner would erode or perhaps even poison the relationship between the parties. I conclude, as well, that the element of subterfuge to the solicitor's actions concerning the delivery of the order, which I find to be most discreditable, exacerbated the risk inherent in the strategy as a whole that trust between the parties would be undermined.
>
> . . . .
>
> I am satisfied that the issue of access for the client was a relatively straightforward matter that would be well within the competence of any family law practitioner. It ought to have been resolved by a contested court application. Though I do not doubt the great industry brought to bear by the solicitor, the question in this matter is whether the client made an informed choice about the path taken. I have found that he did not.
>
> [Emphasis added.]

Appeal from the Registrar's Order

[21] The lawyer appealed from the registrar's order. She claimed that the registrar exceeded his jurisdiction in assessing her conduct as "most discreditable", and that he made palpable and overriding errors of fact.

[22] The chambers judge found that the registrar had exceeded his jurisdiction, and referred the matter for re-hearing (2005 BCSC 1648 (B.C. S.C.)). The client applied for and was granted leave to appeal to this Court; however, the appeal was stayed pending the determination by the chambers judge of the alleged factual errors (to avoid the possibility of two appeals).

[23] The chambers judge then addressed the alleged factual errors, and found that the registrar had made three factual errors (2006 BCSC 1691 (B.C. S.C.)).

. . . .

Grounds of Appeal

[30] The appellant client appeals from the chambers judge's order on the grounds that the chambers judge erred:

> (a) in holding that the registrar's finding that the lawyer's conduct was "most discreditable" amounted to a finding of professional misconduct and thereby exceeded the registrar's jurisdiction; and
>
> (b) in holding that it was not possible to determine from the registrar's reasons what fee he might have allowed had he not made the finding of professional misconduct.

[31] The appellant also claims that the chambers judge erred in finding that the registrar made palpable and overriding errors of fact.

Discussion

[32] The crux of this appeal is the damage to the lawyer's reputation from the strong language used by the registrar to describe her conduct. The legal basis for her appeal from the registrar's order was that only the Law Society may make a finding of "professional misconduct", that the registrar's description of her conduct as "discreditable" amounts to a finding of professional misconduct, and that the registrar therefore exceeded his jurisdiction. The chambers judge agreed with the lawyer's argument on this point, and the client says that the chambers judge erred in doing so.

[33] The chambers judge also agreed with the lawyer that the registrar erred in making findings of fact, and the client says that the chambers judge erred in so finding. As those facts were the basis for the registrar's conclusions about whether the lawyer's fees were "necessary and proper", I will deal at the outset with that part of the chambers judge's decision.

Errors in Findings of Fact

[34] The standard of review of an appellate court of a registrar's findings of fact made on a review of a lawyer's account is that of an appeal court generally: the court will not interfere with the findings of fact unless there was some palpable or overriding error which affected the assessment of the facts or, in other words, the findings of fact appear to be clearly wrong: see *Pamela S. Boles Law Corp. v. Mathisen* (1998), 19 C.P.C. (4th) 78, [1998] B.C.J. No. 976 (B.C. S.C.), at paras. 4-5, where Baker J. said:

> An appeal from the decision of the Registrar on a review of a bill under the *Legal Profession Act* is not a new trial, or a rehearing. It is a true appeal, in the sense that the court may not interfere with the Registrar's decision in the absence of an error in principle.

See *Frost v. Frost*, 56 B.C.R. 30, [1941] 3 W.W.R. 273, [1941] 1 D.L.R. 774, and *Godbout v. Lisson* (1988), 33 B.C.L.R. (2d) 334, (C.A.). Justice Davies of this court elaborated upon this point in his decision in *Klein v. Allin, Anderson and Mullen*, (20 March 1997) [April 10, 1997], Nanaimo 007758, (S.C.B.C.) [1997] B.C.J. No. 949. In that case he stated:

> The function of the appellate court is to review the record of the proceedings below and to ascertain whether there has been an error in principle. It can make an order that could have been made by the tribunal from which the appeal is taken, or set aside the decision below, and direct a new hearing. It should not interfere with the findings of fact made below unless it be established that there was some palpable and overriding error which affected the tribunal's assessment of the facts. In short, the rule is that an appellate court will not interfere with the findings of the tribunal of fact unless they appear to be clearly wrong.

In particular, the Court of Appeal has emphasized that it is not the role of the court on an appeal from a review of bills for legal services to:

> ....review and reweigh the evidence and to substitute our view of the evidence and the findings of credibility for that of the Registrar.

Morton v. Harper Grey Easton, [1996] B.C.J. No. 1144, (9 May 1996), Vancouver CA019125 (B.C.C.A.)

[35] In my opinion, the chambers judge engaged in reweighing and reassessing the evidence, which was not within his powers as an appellate judge. Having done so, he concluded that the registrar had not adequately set out his reasons for accepting or rejecting certain evidence (2006 BCSC 1691 (B.C. S.C.) at para. 25), and did not make a "necessary and specific finding on the credibility of the explanation offered by the appellant solicitor" for delaying in providing the desk order to the wife's lawyer (at para. 26).

[36] The failure of the registrar to address every item of evidence, and to expressly state which of two witnesses he believes, does not make his findings of fact "clearly wrong". The chambers judge's criticisms of the registrar's reasoning and conclusions simply do not reveal palpable and overriding, or any, errors of fact.

[37] For example, the chambers judge found that the registrar failed to consider matters that were not in evidence (such as the likelihood that the client's first lawyer had advised him of the consequences of proceeding on an uncontested basis (at para. 12)), and matters that the registrar clearly addressed ("the other dynamic and inchoate factors that could always come into play, including the possibility that the other side would concede" (at para. 13), addressed by the registrar at para. 65 of his reasons for decision).

[38] The chambers judge found (at para. 16) that the registrar failed to address the tests under the *Legal Profession Act* in finding that the services were not specifically authorized. The chambers judge stated that the registrar took the view "that his task was simply to decide what was *necessary and proper*" (at para. 17) [emphasis in original]. In fact, the registrar's reasons deal at

length with the specific question of whether the client had been fully informed and therefore could have authorized the services, concluding (at para. 70) that "the client had [not] made an informed choice about the path taken".

[39] The chambers judge criticized the registrar (at para. 19) for failing to "meaningfully address" the conflicts in the evidence of the two experts, and (at para. 20) suggested that he "speculated" about the consequences of taking default judgment. It is manifest from his reasons, however, that the registrar accepted the opinion of the client's expert, which he summarized (at paras. 54-56):

> Mr. Schuman, for the client, opined that it was both unwise and inappropriate for the solicitor to apply for a desk order in the circumstances of the case and, in so doing, "she did a disservice to both parties and the process". Mr. Schuman felt that the solicitor ought to have informed opposing counsel that she was about to apply for a default order or, alternatively, that the solicitor should have proceeded by notice of motion and supporting materials served on opposing counsel. Mr. Schuman said:
>
> > Proceeding as she did, not only increased the financial cost, it potentially and seriously compromised whatever goodwill existed. It might well have impeded the access variance Mr. Schober was seeking.
>
> Mr. Schuman said that Ms. Walker's conduct was "contrary to her client's best interests as well as inappropriate".
>
> Mr. Schuman was of the opinion that there was no doubt that the desk order would be set aside on application by opposing counsel, given that there had been four years of *status quo* between the parties and the desk order represented a "sea change" in that situation. Mr. Schuman was of the view that had this matter taken the normal course (that is, by way of a chambers application on notice to opposing counsel), variation of access in Mr. Schober's favour would have been achieved for total fees in the range of $6,000 to $8,000.

[40] The chambers judge found, finally, that the registrar's finding of "subterfuge" was made without a clear finding on the lawyer's credibility. He fails to mention, however, the lawyer's admission on cross-examination that her strategy was "surreptitious".

[41] In short, the chambers judge's assessment of the registrar's factual findings proceeded on a wrong principle. He failed to apply the proper standard of review, which entails a deferential approach to findings of fact by a taxation officer, and he engaged in new fact finding, including drawing new inferences. In doing so, he seemingly misapprehended some of the evidence.

[42] I agree with the appellant on this ground of appeal. The chambers judge erred in finding that the registrar made palpable and overriding errors in his findings of fact.

The Jurisdiction of the Registrar

[43] The cases cited in support of the "exclusive jurisdiction" of the Law Society make it clear that the regulation and discipline of members is solely within its domain: see *Hoem* at 40-43;

Wilson v. Law Society (British Columbia) (1986), 9 B.C.L.R. (2d) 260 (B.C. C.A.), at 263-64; *A Solicitor, Re* (1995), 14 B.C.L.R. (3d) 100 (B.C. C.A.), at 106. As noted by the chambers judge (at para. 16), however, citing *Hoem* at 44, the Benchers' jurisdiction over the legal profession is tempered by the powers of the registrar as the taxation officer under ss. 70 and 71 of the *Legal Profession Act*.

[44] Under s. 71(2) of the *Act*, two questions arise: whether the services were "reasonably necessary and proper" (s. 71(2)(a)), and whether they were "authorized by the client". In the latter case, it is not necessary to show that they were "necessary and proper" (s. 71(2)(b)).

[45] There was conflicting evidence concerning whether the client's consent to the steps taken was "informed consent", and thus whether the services were approved or "authorized". The lawyer maintained that the client was fully advised by her of the options and the consequences of the strategy undertaken. The client said he understood neither that he had an option nor that the consequences could include multiple court appearances and increased legal fees. The registrar found that the client was not fully informed, and could not therefore give informed consent.

[46] Having found that the client had not authorized the services, the registrar had to determine whether the services were "reasonably necessary and proper". He found they were not necessary, because the same result could have been obtained through an ordinary contested application, and they were not proper, because the strategy implemented by the lawyer created a significant risk of more court proceedings and more costs than would have been the case had the desk order not been obtained.

[47] The registrar's comment about the lawyer's conduct was directed to her delay in providing the desk order to the wife's lawyer, contrary to, at least, the Rules of Court. The reference to "subterfuge" was not inconsistent with the lawyer's admission that her strategy not to disclose the order to the wife and her counsel was "surreptitious". These were part of "all of the circumstances", which the registrar was required to consider in accordance with s. 71(4) of the *Act*.

[48] Although the registrar's language was strong in tone, all of his findings were made within the context of deciding whether the client had "authorized" the services and whether they were "necessary and proper". I do not agree with the chambers judge that there is a meaningful difference, in this context, between "proper" and "propriety". The registrar's use of the phrase "necessity and propriety" does not indicate that he ventured into an inquiry he did not have the jurisdiction to undertake.

[49] Counsel for the respondent raised a similar argument in *Access Law Center v. Ferriman*, 2006 BCSC 661 (B.C. S.C.). In that case, in assessing the parties' credibility, the registrar commented that certain evidence "reflected poorly on the credibility of the solicitor, 'not to mention his professional ethics' " (at para. 16). I agree with Melvin J.'s comments (at para. 18):

> I agree with Mr. Turriff that the matter of disciplining solicitors (subject to a residual power that may rest with the court in dealing with officers of the court) is a matter within the jurisdiction of the Law Society. However, in the context of determining credibility, in my view, the registrar or any other tribunal of fact is entitled to take into consideration conduct; namely, a person's acts and declarations in determining the credibility of the individual as

> a witness. In this respect, I do not find that the registrar's comment concerning professional ethics is inappropriate. She did not make a disciplinary finding.

[50] Similarly, in this case, the registrar did not purport to decide matters of professional misconduct. He made findings of fact relevant to the question of whether the services provided by the lawyer were "necessary and proper", as required by s. 71 of the *Legal Profession Act*.

[51] I agree with the appellant on this ground of appeal. The registrar did not exceed his jurisdiction in commenting on the lawyer's conduct.

The Ex Parte Proceedings

[52] Before concluding, it is worth commenting, in my opinion, on the unfortunate outcome of the strategy adopted by the [appellant's] lawyer, in terms of expense and timeliness, to resolve the narrow issue of overnight access. The client's frustration with the lack of progress on the matter appears to have overwhelmed the lawyer's consideration of the obvious alternative of a contested chambers application. That would have provided notice to the wife and her lawyer that the client was serious about pursuing the matter, and would have brought the matter before the court where it could have been resolved, hopefully without numerous hearings and delay and with a better chance of avoiding the rancour that developed between the parties.

[53] It seems to me that in matters of custody and access, where the best interests of the child is the question for the court, *ex parte* proceedings should be reserved for cases where there is some real urgency. And if *ex parte* proceedings are taken in matters of custody and access, as in any *ex parte* proceedings, the applicant must inform the court of all of the material facts. The facts that there is a dispute concerning the relief claimed, and that the other party has communicated that he or she intends to file a statement of defence, are material. Where material facts are not disclosed, the order is likely to be set aside on that basis, no matter what substantive relief may have been granted. The failure to consider these principles were factors that led to the additional time and expense involved in this case.

Conclusion

[54] The registrar made no errors of fact, and did not exceed his jurisdiction in commenting on the conduct of the lawyer in the context of a review of the lawyer's accounts.

[55] It follows that I would allow the appeal, set aside the order of the chambers judge, and restore the Certificate of Fees of the registrar.

"Let's Be Reasonable[:]
Client consent to fee agreement doesn't mean it's ethical"

Thompson, Kathryn A., *ABA Journal*, March 2008, pp. 26-27
(in part)

The widely accepted ethics standard for lawyer fees is deceptively simple. Rule 1.5 of the ABA Model Rules of Professional Conduct prohibits fees that are "unreasonable." In other words, lawyers may only charge fees—or recover expenses—that are "reasonable." Disciplinary bodies, courts and other tribunals generally apply that standard when they evaluate fees and expenses.

But the simplicity pretty much ends there, primarily because there is no bright-line test for what is reasonable.

Model Rule 1.5 requires that the lawyer communicate with the client regarding the scope of the representation, and the basis or rate of fees and expenses. The only exception to that requirement is when the lawyer regularly represents the client and they have an ongoing understanding about fee arrangements. The rule prefers that lawyers communicate with clients in writing regarding fees and expenses, but it mandates a written agreement only in contingent fee cases. (The ABA Model Rules are the basis for most state professional conduct rules, which directly govern lawyers.)

A meeting of the minds between lawyer and client does not necessarily mean, however, that a fee agreement [even where in writing, whether or not a contingency is involved] is reasonable in the eyes of disciplinary tribunals or courts. A case in point is *In re Slimort,* 845 A.Zd 373 (2004), where the Vermont Supreme Court affirmed a disciplinary panel's finding that a fee was unreasonable even though it was based on a valid contract knowingly signed by the client. The court said it is unethical for lawyers to charge unreasonable fees "even if they are able to find clients who will pay whatever a lawyer's contract demands."

Lawyers seeking guidance on what constitutes a Reasonable fee should start by reviewing eight factors listed in Model Rule 1.5(a):

1. The time and labor required for the matter, the novelty and difficulty of the questions involved, and the skill necessary to handle the matter properly.

2. The likelihood, if apparent to the client, that taking on this matter will preclude other employment by the lawyer.

3. The fee customarily charged in the locality for similar legal services.

4. The amount involved and the results obtained.

5. Time limitations imposed by the client or by the circumstances of the case.

6. The nature and length of the professional relationship with the client.

7. The lawyer's experience, reputation and ability.

8. Whether the fee is fixed or contingent.

EACH CASE IS DIFFERENT

The factors enumerated in Model Rule 1.5 are not exclusive, however, nor arc they all pertinent to every case. Moreover, other considerations may come into play depending on the particular circumstances of a case.

Courts have held that it is unreasonable for lawyers to charge clients for time spent earning the basic substantive law relating to a case.

. . . .

Courts also have held that it is unreasonable for lawyers to charge their own rates for services provided by nonlawyers or for their own law-related tasks that do not constitute the practice of law such as [the acts of] sending faxes or delivering documents to opposing counsel.

Lawyers should similarly avoid charging clients for services that fall outside the confines of traditional law practice. In *Cincinnati Bar Association v. Aisfelder;* 816 N.E.2d 218 (2004), the Ohio Supreme Court affirmed the finding of a disciplinary board that it was unreasonable under Ohio's version of Rule 1.5 for an attorney to charge a client for "friendly advice" unrelated to the client's legal needs. Often meeting over lunch or dinner, the client consulted the attorney about personal relationships, finances and restaurants, among other things. Despite the attorney's assertions to the client that he had only "attorney's time" to give, the result was "allowing the client to consult him as a friend while charging for his time as a lawyer," the court concluded.

DON'T ASK THE CLIENT TO PAY

A breakdown in the lawyer-client relationship that culminates in the lawyer withdrawing or being discharged frequently sets the stage for violations of Rule 1.5. Lawyers often run afoul of the rule's reasonableness requirement in the process of terminating the relationship or when defending against disciplinary complaints by the client; in both situations, lawyers sometimes fall into the trap of improperly billing for activities that advance their own interests rather than fulfill their obligation to the client.

The North Carolina State Bar recently determined that it is improper for a lawyer to charge a client for preparing and presenting a motion to withdraw—regardless of who is responsible for ending the relationship. In its opinion, the committee states that the cost of withdrawing from a

case may be shifted to the client only in the unusual circumstance in which the lawyer's withdrawal advances the client's objectives at the same time that it fulfills the lawyer's professional obligations. 2007 Formal Ethics Opinion 8.

In an earlier opinion, the North Carolina State Bar held that it is improper for a lawyer to charge a client for time expended in preparing a response to a fee dispute petition or participating in the state's fee resolution program. The opinion reasons that since North Carolina's version of Rule 1.5 mandates participation in the program, participation is not a legal service that the lawyer provides to the client hut a professional responsibility that advances the interests of the public and the bar. 2000 Formal Ethics Opinion 7.

In a case prompted by a client's discharge of a lawyer, the Indiana Supreme Court upheld the lawyer's suspension for billing violations. Among other things, the lawyer billed the client for time spent reading the letter informing him of his discharge and then billed the client for work performed after the termination of their relationship. *In re Comstock,* 664 N.E.2d 1165 (1996).

Some courts have thwarted efforts by lawyers to incorporate provisions into fee agreements that shift their costs of collecting unpaid fees to the clients. In *Lusting v. Horn,* 732 N.E.2d 613 (2000), the Illinois Appellate Court voided such a provision because it "gives rise to substantial fees for vigorous prosecution of the attorney's own client" and "very well could be used to silence a client's complaint about fees."

Ethics authorities overwhelmingly agree that charging clients for time spent responding to the client's disciplinary complaint is impermissible under Rule 1.5, and often under Rule 8.4 (Misconduct) as well, since lawyers have a professional obligation to respond to grievances against them.

In a 1996 decision, the Minnesota Supreme Court stated that such actions would have a "chilling effect on the public's right to bring ethics charges." *In re Lawyers Responsibility Board Panel No. 94-17,* 546 N.W.2d 744.

OPPOSING PARTY INCLUDED

An ethics opinion issued by the Maine state bar Association concluded that a lawyer violates the reasonableness standard if he or she bills a client to defend an ethics complaint, even if the complaint was filed by the opposing party in the underlying case rather than the client. In Ethics Opinion 139 (1994), the bar found that a violation occurs even if the opposing party filed the complaint as a tactical and frivolous maneuver designed to pressure the attorney into withdrawing from representation, the attorney incurred considerable costs in fighting it, and the client gave informed consent to the fee agreement. The bar's ethics commission emphasized that defending against a professional conduct complaint cannot "be construed, under any circumstances, as the rendition of legal services to a client."

(In contrast, a Connecticut ethics panel determined in 2003 that a lawyer may bill a client for defending a grievance brought by an opposing party if the original fee agreement so provided, or the lawyer and client reached a new agreement with respect to the grievance. Informal Ethics

Opinion 03-05.)

Even though ABA Model Rule 1.5 generally doesn't require written fee agreements, lawyers are much better situated to meet the rule's reasonableness standard when they have entered into written, fully informed fee agreements with their clients at the inception of representation.

But lawyers also must assure that fees (along with expenses) are inherently reasonable within the context of the representation. And lawyers should think twice before charging clients for fees associated with withdrawing from the representation, resolving fee disputes or responding to disciplinary complaints.

Doing that may just make the adage about jumping from the frying pan into the fire seem all too real.

"Income Tax Act allows deduction of legal fees incurred for the purpose of producing income"

Brown, Catherine, *The Lawyers Weekly*, 16 March 2007, pp. 8-9

Many taxpayers will be delighted to know that the Income Tax Act (Act) specifically permits the deduction of legal fees to institute or prosecute an objection [to] or an appeal of a tax assessment. However the Act does not permit the deduction of legal fees in relation to a criminal charge of tax evasion. This presents an interesting question as to when legal fees are deductible.

The most important rule is that unless there is a specific provision in the Act allowing a deduction, legal fees are deductible only to the extent that they are incurred for the purpose of gaining or producing income from a business or property. According to *Symes* v *Canada* [1993] S.C.J. No. 131 the purpose of a particular expenditure is ultimately a question of fact to be decided with due regard for all the circumstances. It follows that legal fees may be claimed in connection with a broad range of routine business functions such as preparing contracts, obtaining security for and collecting trade debts owing, preparing financial records and minutes of shareholders' and directors' meetings, and in respect of financing costs. Legal fees that meet the threshold requirement but are outlays of a capital nature, are generally not fully deductible in the year [incurred] but rather over a period of years. Legal fees incurred on the acquisition of capital property for example, are added to the cost base of the property and can be expensed through the capital cost allowance rules. Legal fees considered to be an eligible capital expenditure may also be claimed over several years. Such is the case for legal fees incurred on the purchase of good-will or, according to the Canada Revenue Agency (CRA), by a proprietor in the cattle hauling business to defend against the loss of his driver's licence.

The second rule is that personal and living expenses are generally not deductible. That is the reason that legal fees incurred, for example, for a division of matrimonial property, to get a separation or divorce, establish custody or visitation arrangements of a child, or to get a discharge

from bankruptcy, are not deductible. The same logic applies if a small business corporation became bankrupt and the sole shareholder is sued by the bank for the corporation's debts. The legal fees incurred by the shareholder to defend are not deductible unless the shareholder was, for example, defending a personal guarantee and the legal fees were incurred to protect the shareholder's income earning assets.

Once one progresses past these general rules, exactly which amounts are deductible under the Act? The following provides some specific and perhaps surprising examples.

Employees

Employees may deduct legal fees incurred to collect or establish a right to salary or wages, or to a retirement allowance. The test to be met for an employee seeking to deduct legal fees in respect of salary or wages is whether, if received by the employee, the amount would be included in his or her employment income. The amount need not come directly from the employer, for example, legal expenses incurred by an employee to collect insurance benefits under a sickness or accident insurance policy provided through an employer are deductible. However, legal fees incurred to save a job after an employer advises that employment is to be terminated may not be deductible, particularly if a settlement is reached and the employee retains his or her employment.

Legal expenses paid to collect or establish a right to a retiring allowance are deductible. …. The deductibility of legal fees in this situation is limited to the amount of the retiring allowance. A taxpayer may also deduct eligible legal expenses paid to collect or establish a right to a pension benefit [or to establish entitlement to damages for wrongful dismissal].

Matrimonial breakdown

In a well received about-face in 2001 the CRA now permits the deduction of legal costs incurred to obtain spousal support under the *Divorce Act*, or under the applicable provincial legislation in a separation agreement, as well as legal costs to obtain an increase in [spousal] support or to make child support non-taxable under the federal child support guidelines. Legal fees incurred to collect late support payments, to establish the amount of support payments from a current or former spouse or common-law partner, and to establish the amount of support payments from the legal parent of a child where the support is payable under the terms of an order are also deductible, at least while the person paying child support is alive. According to the CRA legal fees incurred to secure payment from the estate of the person previously paying child support, (dependant's relief) are not.

Capital assets

Legal fees may also be deducted from the proceeds of disposition when capital assets are disposed of. Specifically, outlays and expenses including finder's fees, commissions, broker's fees, legal fees, and advertising costs may be deducted in calculating the capital gain or loss. According to the CRA, this may include legal fees incurred to litigate a right to amounts in respect of the share proceeds under an oppression remedy. The reasoning is that the amount awarded constitutes proceeds of disposition of a capital property and the legal fees were incurred to establish

the right to compensation. Further, as there is often the expectation of an interest award in litigation, the legal fees can be prorated between the amount awarded in respect of the shares and the amount awarded for interest related to that award.

Other deductible legal fees

A number of other useful deductions are sprinkled throughout the Act. For example, deductible medical expenses include an amount paid on behalf of the patient who requires a bone marrow or organ transplant, for reasonable expenses including legal fees, to locate a compatible donor and to arrange for the transplant. Deductible moving expenses include selling costs relating to the sale of the taxpayer's old residence, including advertising, legal fees, real estate commissions, and legal fees relating to the purchase of the taxpayer's new residence. A new adoption expense credit allows a parent to claim a credit up to $10,220 for eligible adoption expenses related to the adoption of a child who is under 18, and can include related legal fees.

In a recent request to the CRA, a taxpayer asked whether legal fees incurred to defend against his involuntary commitment were deductible. The answer: no. Perhaps if he had … [informed CRA] that he was trying to stay out of an institution to preserve his income earning, he would have received a more favourable response.

"Access to justice tough topic for top court"

Slayton, Philip, *Canadian Lawyer*, May 2007, pp. 26-27

In a recent speech to Toronto's Empire Club, Chief Justice of Canada Beverley McLachlin bemoaned the plight of members of Canada's middle class who seek "justice" through the court system. (See Kirk Makin, "Top judge sounds alarm on trial delays," *The Globe and Mail*, March 9, 2007.)

She deplored the fact that courtrooms are filled with ordinary Canadians appearing by themselves because they can't afford lawyers. These Canadians, she said, are not prepared to put a second mortgage on their home to pay for legal representation.

Some members of the middle class, noted the chief justice, faced with the extraordinary costs of litigation, just give up completely on the court system. All this is very bad for Canadians and very bad for the legal system.

How much justice can the average Canadian afford? The answer is little or none. As I have written elsewhere (and in the book *Lawyers Gone bad*, … [published in August 2007)], the average Canadian, for financial reasons, is denied use of the legal system. It is as if the right to vote in a general election were given only to those with an income above a certain level. This is a grave crisis in our democratic system of government.

Ironically, a way of fixing part of the problem was rejected by the Supreme Court of Canada itself just a few weeks before McLachlin gave her speech. This was in the case of *Little Sisters Book and Art Emporium v. Canada* (known as *Little Sisters No. 2*, to distinguish it from earlier and related litigation).

Little Sisters Book and Art Emporium, a bookstore for Vancouver's gay and lesbian community, has had a long and bitter struggle with Canada Customs. On several occasions, customs has prevented importation of books by Little Sisters, finding them obscene. In *Little Sisters No. 2*, the store sought an advance costs order, mostly to finance an attempt to get the release of four titles seized at the border (the store also sought a broad inquiry into customs' practices). Without an advance costs order, Little Sisters argued it could not afford to pursue its case.

The effect of such an order would have been that Canada Customs – and ultimately the Canadian taxpayer – would pay some or all of Little Sisters' legal expenses. The trial judge gave the order, but British Columbia Court of Appeal unanimously reversed this decision.

At the Supreme Court of Canada, justices Michel Bastarache and Louis LeBel, giving judgment for themselves and justices Marie Deschamps, Rosalie Abella, and Marshall Rothstein, anticipated the language of the chief justice's later Toronto speech. They wrote, "Quite unfortunately, financial constraints put potentially meritorious claims at risk everyday. . . . Legal aid programs remain underfunded and overwhelmed. Self-representation in courts is a growing phenomenon." They referred to "the idea that costs awards can be used as a powerful tool for ensuring that the justice system functions fairly and efficiently…."

Nonetheless, these five judges rejected the application for an advance costs order. Little Sisters, they said, had not demonstrated that the issues in its case were of public importance, one of the three requirements for such an order laid down in the 2003 Supreme Court of Canada case of *British Columbia v Okanagan Indian Band* (the other two are impecuniosity of the applicant and *prima facie* merit of the case). The judges added, "As compelling as access to justice concerns may be, they cannot justify this court unilaterally authorizing a revolution in how litigation is conceived and conducted."

McLachlin delivered separate concurring reasons for herself and Justice Louise Charron, and – perhaps surprisingly, considering what she later said in Toronto – applied an even tougher test for an advance costs order. The public interest, she said, is not enough; there must also be "special circumstances making this extraordinary exercise of the court's power appropriate." Such special circumstances, she said, will be rare.

Justices Ian Binnie and Morris Fish dissented, holding that the trial judge, who had appeared to find rare and exceptional circumstances, exercised her discretion properly in giving an advanced costs order. Noted Binnie in passing, perhaps hinting at the heart of the matter so far as he was concerned: "Book censorship has long been considered particularly offensive to civil liberties…"

It's a pity these judgments, on such an important issue, are so murky. For example, what exactly are "rare and exceptional circumstances?" (Perhaps the answer is what Justice Potter

Stewart, of the United States Supreme Court, said about pornography in *Jacobellis v. Ohio* (1964): "I know it when I see it ….") It doesn't help that in Little Sisters No. 2 there are two different judgments from the majority, disagreeing in part. For all our sakes, the court should try to avoid this result (perhaps it did).

That said, it's hard to disagree with the decision in this case. As justices Bastarache and LeBel put it, "The justice system must not become a proxy for the public inquiry process, swamped with actions launched by test plaintiffs and public interest groups."

Whose problem is it, anyway? The Supreme Court justices may feel badly about the state of access to justice, but it's not up to them to try to fix it by tinkering with costs. The *Okanagan* case, said justices Bastarache and LeBel, "did not seek to create a parallel system of legal aid or a court-managed comprehensive program to supplement any of the other programs designed to assist various groups in taking legal action…." And later, "Courts should not seek on their own to bring an alternative and extensive legal aid system into being." These judges are right.

Somebody do something, which may have been the message of the chief justice's Toronto speech. There is a grave problem that the judiciary cannot solve. There will be more decisions like Little Sisters No. 2. When it comes to the crisis of access to justice, judges can only look on with dismay.

"Overcoming clients' aversion to paying fees"

Marron, Kevin, *Canadian Lawyer*, October 2007, pp. 20-21

Whenever Nancy Shapiro meets a prospective client for the first time, she is always on the lookout for early warning signs of a problem that is the bane of any legal practice: an aversion to paying fees.

A litigation lawyer with the Toronto firm Koskie Minsky LLP, Shapiro well understands what grief a fee-averse client can cause, not only from her own occasional experience with uncollectible bills, but because she often defends other lawyers against spurious negligence suits arising from disputes over fees.

An outsider might assume that lawyers are the last people you should stiff for their fees, because they can turn round and sue you. But, in fact, it is a carefully guarded secret within the profession that lawyers are the last people to sue anybody on their own account, since they well understand what aggravation it can cause. And what can be more frustrating than wasting unbillable hour after unbilable hour chasing unpaid bills?

"It's a big challenge for law firms large and small," says consultant Ed Poll, who has written a book on the topic called, *Collecting Your Fee: Getting Paid From Intake to Invoice,*

published by the American Bar Association. It's also a major source of stress for many lawyers, according to Ron Profit, a partner in the Charlottetown, P.E.I., office of Cox & Palmer. The former chair of the Canadian Bar Association's national family law section has compiled a list of stress-busting and sanity-saving tips for lawyers that he has picked up over the years. And close to the top of the list is the simple advice, "Get paid."

Profit admits that he should have heeded such advice himself when he was first called to the bar 24 years ago. Early in his career, he reckons he had difficulty getting paid on about one out of every six files and didn't get paid at all on about one out of every 12. "Some lawyers have a hard time making a living, sometimes because you find yourself working for free. I was one of those people who did suffer" he says.

And the most frustrating and potentially stressful aspect of this is that the files on which you have problems collecting the fee are often the most litigious and adversarial, where the lawyer has put in long hours. In some such situations, says Profit, the client genuinely can't afford the cost of the litigation and "the lawyer's empathy can get in the way" while other clients may feel wronged by the process or the results and say, "Why should I have to pay?"

Of course, lawyers may sometimes choose to waive their fees and work *pro bono* However, as Poll suggests, that's a decision for you to make, not one that you should let your client force upon you when you find you can't collect your fees.

So what should lawyers and law firms do to make sure they get paid?

As most experts agree, the first and most essential step is to try to weed out deadbeat clients as soon as they come through your door. That's where Shapiro's early warning signals are invaluable. The first sign is when they start debating with you about the advice you're offering. Shapiro says her own experience is that such clients tend to "spend a lot of their own time and money debating these things, drive the bills up, and then want to debate with you later about the bills themselves."

Shapiro's second early warning signal is when a client asks her if she can work on a contingency fee and says something like, "We can't really afford your fees, but we'll find the money if we need to?'

Douglas Levitt, a partner with the Toronto firm Horlick Levitt, suggests you can avoid a lot of trouble down the line by getting to know your clients and their business right away, explaining very clearly to them all the potential legal costs they might incur and then getting a signed retainer for a sum that is substantial enough to cover at least the initial legal work and all your disbursements. "I make this a policy and I don't break it. If my brother walked in the door, I'd get a signed retainer' he says.

Levitt says the percentage of fees that his firm successfully collects is "in the high 90s." He stresses the importance of sending monthly reminders to clients who are slow to pay, then following up with phone calls, initially from an assistant, but eventually from the lawyer himself. "Usually at 90 days I tend to get involved and speak with the client to find out if there are any

financial issues, if they require a little bit more time or if they have any issues with the quality of the service?'

Shapiro says letting people pay by credit card is a good strategy, since it can ease their financial burden and "makes it easier to put them on the spot by saying 'we can send you a credit card authorization right away.' "

But, when Shapiro's early warning system works, she never has to deal with these problems, since she is able to ditch potentially troublesome clients before they can cause her any trouble. And how does she get rid of them? Where do they go? The answer to these questions should raise the antennae of all other lawyers: she refers them to someone else.

T. (D.M.C.) v. S. (L.K.)

(2007), 43 R.F.L. (6th) 188 (N.S. Fam. Ct.), B. Levy, J.
(*Summary*)

Mother's application for child support variation was granted. It was determined that father had unfettered assets worth over $27,000,000, and annual income of $1,111,160 was attributed to him. Mother was awarded increase from $5,000 per month in child support for parties' one child to $8,125.35 per month, retroactive maintenance in amount of $71,883.05, and s. 7 expenses were divided. Parties made submissions as to costs and court determined that mother was to be reimbursed for all of her reasonable, actual costs for legal fees and disbursements, with some exceptions where parties were to bear own costs. Exceptions were costs associated with mobility issue, with s. 7 expenses and with appeal and cross-appeal of interim orders. Mother's counsel was directed to forward detailed accounting of his fees and disbursements and each counsel was given opportunity to make further representations regarding costs. Mother's solicitor put his total fees at $140,305.50. Court decided counsel's hourly rate of $250 did seem to be on high end but there were contingencies in that counsel took risk of not being paid since wife was desperately in debt, had no equity in any property, and her only income was child support . Also, time spent did seem overly high although counsel said it was because of adversarial strategy employed by father. In circumstances, items dealing with matters other than child support such as with mobility issue and s. 7 expenses should be deducted. Remainder of counsel's work done since July 2007 related to question of costs and total claim for this was $14,875, which was extraordinarily high and should be reduced to $3,000. Accordingly, total fees were reduced to $97,088. Given that counsel's initial lack of familiarly with family law and practice seemed to have caused him to take longer and pursue unproductive leads and given that his hourly rate was high, this figure was to be further reduced by 10 per cent.

"Time For Change: Unethical Hourly Billing In The Canadian Profession And What Should Be Done About It"

Woolley, Alice, 2007, unpublished
(*in part*)

In 1969 Stanford psychologist Philip Zimbardo left a car on a street in Palo Alta with the hood up and no license plates. The car stood unharmed for a week. Zimbardo then broke the car's window. It was immediately vandalized— "[w]ithin a few hours, the car had been turned upside down and utterly destroyed." In their 1982 article "Broken Windows: The Police and Neighborhood Safety," sociologists James Q. Wilson and George L. Kelling took Zimbardo's experiment with the car and applied its central insight—that vandalism will take place even in the most property respecting communities where "communal barriers...[of] mutual regard and the obligations of civility are lowered by actions that seem to signal that 'no one cares' "—to policing. Wilson and Kelling argued that the failure to direct policing to matters of public order as well as to the prevention and detection of more serious crime—to fix broken windows as well as to seek out the person who broke them—results in both a perceived and real increase in the incidence of more serious lawlessness.

Unethical hourly billing is the broken window of the Canadian legal profession. Like Americans, a number of Canadian lawyers do work which provides little benefit to clients, do not record their time appropriately and bill dishonestly. And when lawyers are able to bill unethically, and when they observe unethical billing by others, the message they receive is that honesty and respect for the interests of others do not matter. It is submitted that once that message has been received the likelihood increases that lawyers will be dishonest in their dealings with others more generally:

> ***Let me tell you how you will start acting unethically: It will start with your time sheets.*** One day, not too long after you start practicing law, you will sit down at the end of a long, tiring day, and you just won't have much to show for your efforts in terms of billable hours. It will be near the end of the month. You will know that all of the partners will be looking at your monthly time report in a few days, so what you'll do is pad your time sheet just a bit. Maybe you will bill a client for ninety minutes for a task that really took you only sixty minutes to perform. However, you will promise yourself that you will repay the client at the first opportunity by doing thirty minutes of work for the client for "free." In this way, you will be "borrowing" not "stealing."
>
> And then what will happen is that it will become easier and easier to take these little loans against future work. And then, after a while, you will stop paying back these little loans. You will convince yourself that, although you billed ninety minutes and spent only sixty minutes on the project, you did such good work that your client should pay a bit more for it. After all, your billing rate is awfully low, and your client is awfully rich. …

The legal profession must not rely on the operation of the market and freedom of contract to avoid addressing the unethical hourly billing problem. Rather, the profession must replace its

current ineffective system of regulating the ethics of hourly billing with a system designed to prevent and correct the specific forms which unethical hourly billing takes and its causes.

"Legal and Accounting Costs"

Rashkis, Morton W. and Benotto, Madam Justice Mary Lou,
Income Tax and Family Law Handbook **(Toronto: LexisNexis/Butterworth, 2007), c. 8 (*in part*)**

18(1) General limitations. In computing the income of a taxpayer from business or property no deduction shall be made in respect of

(a) **general limitation.** an outlay or expense except to the extent that was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;

[R.S.C. 1985, c. 1(5th Supp.)]

Legal and accounting costs are deductible only to the extent that they are incurred for the purpose of gaining or producing income, from a business or property. Legal costs which are spent for the purpose of acquiring capital are not deductible. Common costs for acquiring capital include fees for the purchase of a home and, litigation to protect or acquire capital property. Some costs of matrimonial disputes are deductible, some are not.

§38 OBTAINING SUPPORT ORDERS

1. *CRA's new position based on Gallien*

Prior to October 10, 2002, the CRA's position was that legal cost incurred to establish a right to support amounts (spousal or child) were non-deductible capital outlays or personal or living expense whereas legal costs incurred to enforce a pre-existing right to either interim or permanent support (spousal or child) were deductible. Its position was based on the decision of the Federal Court-Trial Division in the case of R. *v. Burgess* … . The last sentence of paragraph 17 of the IT-99R5 (see §41.3) provides that legal costs of seeking to obtain an increase in spousal or child support or to make child support non-taxable under the Federal Child Support Guidelines (the "Guidelines"), are non-deductible.

However, in *Gallien v. R.,* the Tax Court of Canada held the view that the right to support in divorce proceedings is not created by the judge. In its view, a right to support exists between divorced spouses but such a right has a different basis than the right that exists between spouses who are not divorced. During marriage, that basis is the presumption of mutual support. After divorce, the obligation to provide support is governed by the *Divorce Act* and the applicable

provincial statutes. The judge does not create the right. It was created by legislators. The judge's role is to determine whether the spouses' circumstances justify payment of support and what the amount of the support must be. Since there is a pre-existing right to support between divorced spouses, the legal expenses laid out by a taxpayer to obtain a maintenance order in divorce proceedings were deductible as expenses incurred to obtain income to which she was entitled.

Following the decision in *Gallien,* the CRA has reconsidered the above positions. As a result, it now considers legal costs incurred to obtain *spousal* support (as distinct from *child* support) under the *Divorce Act,* or under the applicable provincial legislation in a separation agreement, to have been incurred to enforce a pre-existing right to support. Consequently, these costs are deductible pursuant to the comments in paragraph 18 of IT-99R5 (see §41.3). It also now accepts that legal costs of seeking to obtain an increase in support or to make child support non-taxable under the Guidelines are also deductible.

The CRA's change of position was announced in the *Income Tax Technical News* no. 24, dated October 10, 2002. The change is effective for assessments and reassessments made after October 10, 2002 and will not apply retroactively (unless a notice of objection was filed and is still outstanding, or can still be filed).

. . . .

§38(1) OBTAINING CHILD SUPPORT

Even before October 10, 2002, the CRA recognized that since children have a pre-existing right to support or maintenance under the *Divorce Act,* legal costs incurred in respect of a child support order under the *Divorce Act* would generally be deductible *(Technical Interpretation,* March 31, 1999, Document No. 9828805). Its position was based on the decision of the Tax Court of Canada in *Wakeman* (discussed below) and it remains unchanged after October 10, 2002.

In *Wakeman v.* R., the Tax Court of Canada allowed a taxpayer to claim legal fees paid by a mother in order to obtain a permanent order for child support against her divorced husband. The minister had disallowed the claim because the expense was not incurred for the purpose of enforcing payment. An appeal was allowed on the basis that the father had a legal duty to support the children which was not extinguished by divorce. The expense in issue related to the enforcement of a pre-existing right and not the creation of a new right. The court went on to note that the mother was required to include the support amount in income. While this might suggest that the inclusion of child support is the corollary to the deduction of legal fees, this does not seem to be the case. Legal fees incurred in connection with child support guideline amounts, which are not taxable, still may de deducted. Moreover, in a situation of split custody under section 8 of the Guidelines, a father was allowed to claim a deduction for legal fees even though the net result was that he was the payor[,] not the recipient[,] of support.

In *Rabb v. Canada*, the Tax court considered such a case. There, the parents of two children entered into a separation which stipulated that they would have split custody of the children. One child would live with the father and one with the mother. It was agreed that the support payment

would be the difference between the support payable by the father and the amount he should receive from the mother. The Tax Court held that the legal fees were incurred by the father to recover an amount owing under a pre-existing right, that is, support for the child of whom he had custody. Thus, even though the set off resulted in the father paying support, he was entitled to deduct the legal fees.

The reasoning that a pre-existing right to child support is a property right was followed in *McColl v. R.* where the Tax Court of Canada held that legal costs incurred to enforce this right (in this case to determine the quantum and sources of the supporting person's income) were deductible and the prohibition in s.18(1)(a) did not apply.

§39 COSTS OF SEPARATION AGREEMENT

Lawyers often advise their clients to deduct the legal and accounting costs incurred in the negotiation of a separation agreement, particularly the portion referable to support. This was justified before October 10, 2002 since the CRA then considered that the cost of obtaining a separation agreement or a divorce were not deductible as expenses incurred on account of capital (see paragraph 17 of IT -99R5 at § 41.3). However, on October 10, 2002, the CRA announced in *Income Tax Technical News* no. 24 that it would accept the conclusions reached in the *Gallien* decision (see §38).

Despite the wording of the Interpretation Bulletin, the courts seemed to be leaning in a different direction. In *McColl v.* R. the Tax Court considered the legal fees incurred in the preparation of the separation agreement. The Minister had disallowed the fees. The Court allowed the taxpayer's appeal.

The Court held that the legal fees were spent to enforce a pre-existing right and thus they were not on account of capital. The taxpayer's pre-existing right to support resulted from the Part III Ontario *Family Law Act,* embodied in a separation agreement.

In *Gallien v. R.,* legal costs incurred to obtain spousal support under federal or provincial legislation in a separation agreement were considered to have been incurred to enforce a pre-existing right to support and are deductible. One Tax Court case [*Poitras v Canada*, 2004 D.T.C.2273] has affirmed that "there is nothing in section 60" that would permit the deduction of legal fees for the purpose of obtaining support.

§40 DEFENDING A SUPPORT APPLICATION

The legal costs incurred in defending an application for support are not deductible whether the application is brought under provincial legislation or on divorce. The courts have held that the expenses are incurred "to bring a future right into existence" and are thus a capital outlay. The future right spoken of is the right to eliminate the maintenance payment. As summarized by the Tax Court of Canada in *McCombe v. M.N.R.:*

> The expenses claimed by the appellant were incurred in order to bring into being a future or potential right of exemption to which he had, at the time, no legal entitlement whatever. The expenses cannot be said to have been incurred for the purposes of gaining or producing income from a property and they do not come within the meaning and intent of paragraph 18(1)(a) and subsection 248(1) and are therefore not deductible.

However, as of October 10, 2002, the CRA recognizes a pre-existing right to support or maintenance under the *Divorce Act* or other legislation. While one might think that this leads to the conclusion that legal fees in connection with defending an application for support will be deductible, the situation is far from clear. In *Leclerc v. R.*, the Tax Court held that legal fees incurred to oppose a motion to change custody and fix support were not deductible. Following the Federal Court of Appeal decision in *Nadeau v. Canada*, [2003] A.C.F. no 1611, 2007 DTC 5736 the Court held that such expenses are not incurred to earn income from property.

§40.1 DEFENDING A VARIATION APPLICATION

It has been held that legal fees incurred to defend a variation application were not allowable as a deduction. In *Raymond v. R.*, the taxpayer wife sought to deduct her travel and legal expenses incurred to oppose her former husband's application to reduce support payments pursuant to s. 17 of the *Divorce Act.* The expenses were disallowed. The Court held that the travel expenses were personal and the legal expenses were incurred to protect a capital asset, namely, her right to support. Because the application was under s. 17 the husband, according to the Tax Court, was challenging the very existence of the support order. Thus the costs were necessary not to ensure performance of an existing order but to establish the wife's "prospective right" to support. This, is seems, is a hair splitting exercise. In practical terms the wife was enforcing the payment already ordered and the result to her seems unduly harsh.

The costs of defending a child support application are not deductible. In *Bergeron v. R.* the mother brought a motion to increase child support. She was not successful. The father said he incurred legal fees to earn income because his income is now higher than it would have been if he had not been successful. The Court disagreed and disallowed the deduction.

The costs incurred to reduce child support obligations are not deductible. However, the CRA now accepts that legal costs of seeking to obtain an increase in support or to make child support non-taxable under the Guidelines are deductible (see *Income Tax Technical News* no. 24 at §38).

§ 40.2 PAYING ORDER FOR COSTS

It would appear that an order for costs may, in some circumstances, be deductible. In *Gal v. Canada*, the taxpayer was ordered to pay $15,000 in costs to his former spouse. He had responded to her claim for support with a counter-claim for the child living with him. He was not successful because the mother was not working. Subsequently, income was imputed to her and a small amount was ordered payable. Relying on IT 99R5, the Tax Court held that he was entitled to deduct the costs that he was ordered to pay. The Tax Court stated:

> … I have concluded that the assessing policy of the CRA has changed and that legal costs incurred to obtain spousal support or child support are deductible.

§41 ENFORCING ARREARS

Legal costs incurred in enforcing an existing order for support are deductible. This is consistent with both the case-law (because the right to support has already been established) and the department's position (IT-99R5).

Where, however, the evidence presented by the taxpayer does not support the fact that the expenses were to collect arrears, the fees may be disallowed. In *Meisels v. R.,* the taxpayer alleged that a divorce action was commenced to collect arrears of support. The Court found, after listening to her evidence, that the action involved the establishment of a right to support. The deduction was therefore disallowed.

Amount must be paid

Legal fees paid by Legal Aid and secured by a lien are not deductible until the lien is enforced by the Legal Aid Plan.

Cost of recovering overpayments in support

There will be no deduction of legal fees incurred in recovering support payments which had been overpaid.

§41.1 SUMMARY

In practical terms, this means that costs incurred:

- in obtaining a support order during marriage are deductible. It is reasonable to assume that all interim motions for support even in a divorce action would qualify;
- in obtaining a support order under provincial legislation are deductible. This points to the advantage of joining a claim under the *Family Law Act* in a petition for divorce.
- in obtaining a support order as corollary relief in a divorce action are deductible. This CRA's position is effective for assessments and reassessments made after October 10, 2002 and will not apply retroactively (unless a notice of objection was filed and is still outstanding, or can still be filed). Before October 10, 2002, such costs were held not to be deductible on the basis that they were held to be on account of capital.
- in enforcing support pursuant to an order or an agreement are deductible. This is due to the original reasoning that costs incurred to enforce a right are deductible while costs incurred to create the right are not.
- in recovering an overpayment of support are not deductible.

§41.2 OBTAINING A PROPERTY SETTLEMENT

Under certain circumstances, some of the fees in connection with property transfers can be deducted from the proceeds of disposition of the transfer. However, only the costs in connection with the actual transfer, not the negotiations of the transfer, are deductible.

Legal costs in connection with the transfer of property on settlement of matrimonial rights can be deducted from proceeds of disposition. If there is a rollover, legal fees incurred are added to the cost base of the property.

Legal and accounting costs incurred on the acquisition of capital property are included as part of the cost of the property and added to the capital cost of the property.

Where an owner of property retains a lawyer and a valuator to resolve the wife's claim to a 50 per cent interest in his property, the resulting fees will not be deductible. In *Muggli v.* R. the taxpayer argued that he should be entitled to deduct these fees because they were necessary to preserve the family farm. This position was fatal to his case since an expense to preserve capital as opposed to producing income is not deductible. Furthermore, it could be said that the predominant reason for the expenditure was personal in that it was the result of his separation.

In *Penner v. R.,* the Minister disallowed the deduction of legal fees the taxpayer had paid to three separate lawyers. These fees related to some combination of fees for divorce proceedings, fees for protecting personal and business assets, and fees for protecting the confidentiality agreements. There was no evidence that any of the legal fees incurred in this case were to obtain child support, or to protect or enhance the taxpayer's flow of income. One amount ($25,000) had been paid out to one lawyer, but it related to the various property appraisals and settlement negotiations in respect of ultimate disposition of the division of the taxpayer's matrimonial assets. This amount was not deductible, since it had been laid out primarily to preserve capital assets or to protect personal assets.

§41.3 INTERPRETATION BULLETIN

[paras. 17-21]

. . . .

No. IT-99R5 (Consolidated)

. . . .

Support Amounts

¶ 17. Legal costs incurred in establishing the right to spousal support amounts, such as the costs of obtaining a divorce, a support order for spousal support under the *Divorce Act* or a separation agreement, are not deductible as these costs are on account of capital or are personal or living expenses. However, since children have a pre-existing right, arising from legislation, to support or maintenance, legal costs to obtain an order for child support are deductible. Legal costs of seeking to obtain an increase in spousal or child support, or to make child support non taxable under the *Federal Child Support Guidelines,* are non-deductible.

¶ 18. Legal costs incurred to enforce pre-existing rights to interim or permanent support amounts are deductible. A pre-existing right to a support amount can arise from a written agreement, a court order or legislation such as sections 11 and 15.1 of the *Divorce Act* with respect to child support, or Part III of the *Family Law Act* of Ontario, and enforcing such a right does not create or establish a new right; see *The Queen v. Burgess*, [1981] CTC 258, 81 DTC 5192 (F.C.T.D.). In addition, legal expenses incurred to defend against the reduction of support payments are deductible since the expenses do not create any new rights to income; see *The Attorney General of Canada v. Norma McCready Sembinelli*, [1994] 2 CTC 378, 94 DTC 6636 (FCA.).

¶ 19. The legal costs described in ¶ 18 above are deductible even though an amount received as a "child support amount," as described in subsection 56.1(4), is not included in the income of the receipent. While "exempt income" in subsection 248(1) is defined as property received or acquired that is not included in income, the definition excludes "support amounts"; therefore, the deduction of costs incurred in respect of support amounts is not denied by virtue of paragraph 18(1)(c) as being exempt income. For a discussion of "support amount" and "child support amount", see the current version of IT-530, *Support Payments*.

¶ 20. A person who incurs legal expenses is not entitled to deduct them when they are incurred in connection with the receipt of a lump sum payment which cannot be identified as being a payment in respect of a number of periodic payments of support amounts that were in arrears. The lump sum payment however is generally not required to be included in income.

¶ 21. From the payer's standpoint, legal costs incurred in negotiating or contesting an application for support payments are not deductible since these costs are personal or living expenses. Similarly, legal costs incurred for the purpose of terminating or reducing the amount of support payments are not deductible since success in such an action does not produce income from a business or property. Legal expenses relating to obtaining custody of or visitation rights to children are also non-deductible.

Legal Costs to Obtain Support Amounts

***Income Tax Technical News*, No. 24, 10 October 2002**

Paragraph 17 of Interpretation Bulletin IT-99R5 (Consolidated), *Legal and Accounting Fees*, provides that legal costs incurred in establishing the right to spousal support amounts, such as the costs of obtaining a divorce, a support order for spousal support under the *Divorce Act* or a separation agreement, are not deductible as these costs are on account of capital or are personal or living expenses. This position is based on the decision of the Federal Court-Trial Division in the case of *The Queen v. Burgess*, [1981] CTC 258,81 DTC 5192. The last sentence of paragraph 17 of the interpretation bulletin also provides that legal costs of seeking to obtain an increase in spousal or child support, or to make child support non-taxable under the *Federal Child Support Guidelines* (the "Guidelines"), are non-deductible.

Following the decision in the case of *Gallien v. The Queen*, [2001] 2 CTC 2676, 2000 DTC 2514 (T.C.C.Informal Procedure), the Canada Customs and Revenue Agency (CCRA) has reconsidered the above positions. As a result, we now consider legal costs incurred to obtain spousal support under the *Divorce Act*, or under the applicable provincial legislation in a separation agreement, to have been incurred to enforce a pre-existing right to support. Consequently, these costs are deductible pursuant to the comments in paragraph 18 of Interpretation Bulletin IT-99R5 (Consolidated). We also now accept that legal costs of seeking to obtain an increase in support or to make child support non-taxable under the Guidelines are also deductible.

This change in position will be effective for future assessments and reassessments and will not apply retroactively (unless a notice of objection was filed and is still outstanding, or can still be filed).

"When two plus two doesn't equal four"

Geraghty, Peter H., *ABAnetwork*, July 2006
[*in part*]

I. You are taking a two hour plane trip from Chicago to New York to conduct a deposition in a matter involving client A. While on the plane, you review materials for a brief you will be filing

for client B the following week. You normally bill clients for your time spent traveling on their behalf.

- Can you bill client A and B for two hours each for a total of 4 hours?

II. Your firm concentrates in real estate transactions, and frequently uses a messenger service to deliver time sensitive documents. The service charges $10.00 per mile for deliveries.

- Can the firm add a $2.50 surcharge to this amount and bill the client for $12.50 per mile?

I. ABA Ethics Opinions

In 1993, the ABA standing Committee on Ethics and Professional Responsibility issued Formal Opinion 93-379 [PDF] *Billing for Professional Fees, Disbursements and Other Expenses* (1979). This opinion discussed a number of billing related issues, including double billing and the appropriateness of adding surcharges on to out of pocket disbursements for services purchased on behalf of clients. With regard to the double billing issue, Opinion 93-379 stated:

> … In addressing the hypotheticals regarding (a) simultaneous appearance on behalf of three clients, (b) the airplane flight on behalf of one client while working on another client's matters and (c) recycled work product, it is helpful to consider these questions, not from the perspective of what a client could be forced to pay, but rather from the perspective of what the lawyer actually earned. A lawyer who spends four hours of time on behalf of three clients has not earned twelve billable hours. A lawyer who flies for six hours for one client, while working for five hours on behalf of another, has not earned eleven billable hours. A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated. Rather than looking to profit from the fortuity of coincidental scheduling, the desire to get work done rather than watch a movie, or the luck of being asked the identical question twice, the lawyer who has agreed to bill solely on the basis of time spent is obligated to pass the benefits of these economies on to the client. The practice of billing several clients for the same time or work product, since it results in the earning of an unreasonable fee, therefore is contrary to the mandate of the Model Rules. Model Rule 1.5. ABA Formal Opinion 93-379 at 7.
>
> . . . .
>
> Both …Oregon and Alaska opinions recognize that clients can be billed on an other than hourly basis that might exceed the lawyer's normal hourly rate. The Oregon opinion made note of this, stating:
>
> The answer to this question depends on the nature of the fee agreements between the firm and the clients. Some firms have fee agreements that allow for "value billing," flat fee billing or other arrangements. If so, it would be appropriate to bill the clients pursuant to those agreements rather than simply by the hour. Oregon State Bar Legal Ethics Committee Op. 2005-170 (2005) at page 1.

There is caselaw on point. See, e.g., *Disciplinary Counsel v. Johnson,* 835 N.E. 2d 354 (2005) (Attorney's pattern of double-billing juvenile court for her time as appointed counsel, resulting in claims for compensation for as many as 33 and a half hours of work in single day, warranted one-year suspension from practice of law, with six months stayed on conditions.) The court stated:

> "Padding client bills with hours not worked is tantamount to misappropriation. Toledo Bar Assn. v. Batt (1997), 78 Ohio St. 3d 189, 677 N.E. 2d 349. And when professional misconduct involves misappropriation, disbarment is the presumptive sanction…"

With regard to adding surcharges to disbursements, Formal Opinion 93-379 states:

> … Perhaps the most difficult issue is the handling of charges to clients for the provision of in-house services. In this connection the Committee has in view charges for photocopying, computer research, on-site meals, deliveries and other similar items. Like professional fees, it seems clear that lawyers may pass on reasonable charges for these services. Thus, in the view of the Committee, the lawyer and the client may agree in advance that, for example, photocopying will be charged at $.15 per page, or messenger services will be provided at $5.00 per mile. However, the question arises what may be charged to the client, in the absence of a specific agreement to the contrary, when the client has simply been told that costs for these items will be charged to the client. We conclude that under those circumstances the lawyer is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of a photocopy machine operator). ABA Formal Opinion 93-379 at page 9.

"McLachlin calls on lawyers, Tabor calls on government"

Schmitz, Cristin, *The Lawyers Weekly*, 25 August 2006, pp. 1, 7.

Lawyers should rethink their fees in order to help quell "the epidemic lack of representation" in civil courts that is denying justice to average Canadians, advises the Chief Justice of Canada.

"People seeking justice need not only judges, they need lawyers – competent, independent, affordable lawyers," Supreme Court of Canada Chief Justice Beverley McLachlin told the Canadian Bar Association's annual council meeting Aug 12.

"I think we need to consider the long-term implications on the development of the law in the civil context if fewer matters go to trial – if only criminal, family and large commercial cases make it into court," she said.

She queried, "Does the typical law firm's fee structure have anything to do with this? Can more creative ways be found to bill clients proportionately to the complexity and value of the proceedings? Can junior lawyers get needed trial experience by being permitted to take on files at reduced rates?"

Chief Justice McLachlin suggested those questions are worth thinking about as the profession and governments work together in the coming months to try to devise and implement reforms to make the civil justice system more responsive and understandable to the public.

Reacting to her remarks, CBA president Brian Tabor told *The Lawyers Weekly* the legal profession has already done much to enhance access to justice, but that governments must step in to pick up the slack. "Society has said we are going to have a publicly funded medicare system, but where we are at now is that we have got a legal system that requires some public investment," he said. "Lawyers have adopted a number of strategies to try to respond to the access to justice issue – fees are just one part of that. We brought a CBA legal aid test case forward to compel governments to ensure an adequately funded legal aid system. Our lawyers now provide *pro bono* service across the country – some of our studies say approximately 50 hours a year [per lawyer] are being done. Alternate delivery models, legal clinics ... are an expression of support by lawyers to try to improve access to the justice system. We have alternative billing models, like contingency fees, now to improve access. We have been involved in efforts to streamline the court process, to reduce costs associated with that."

But he noted that legal fees reflect the increased costs of providing legal services in a day and age where lawyers are held to a very high standard. "There is a need for immediate services so law firms are maintaining computer systems and online research tools and all of these things cost money," Tabor said. "And if we are going to provide the level of service that our clients expect from us, we need to invest. And to be able to invest, we need to be compensated."

"It's a challenging question that the chief justice raised," added Ontario Bar Association president James Morton, who practises civil litigation with Steinberg Morton Hope & Israel in Toronto.

"My personal view is that it is difficult for lawyers to cut back their fees," Morton explained in an interview. "Law is a business. Lawyers have been squeezed on a number of fronts. The median income for a lawyer in Ontario is $60,000, which shows that there isn't a lot of fat to cut, particularly with some of the smaller firms and the solo practitioners. Our view is that the best way to make justice more accessible is to speed up the court process, which means appointing more judges, providing more legal aid and generally resources to the legal system, because most of the cost comes in because of delay."

"Looking beyond the billable hour"

Faguy, Yves, *National Magazine's Addendum* [Solo and Small Firm Edition], cba.org, November 2006

In most law firms, more toil means more money. And while that may suit lawyers anxious about meeting their annual billing targets, many small firms and solo practitioners are finding that clients want something different: a solution to their problems at a cost they can budget.

Catering to more consumer-oriented clients—and unburdened by bureaucracy and high overhead—these small practices are embracing alternative fee structures as a way to gain an advantage over competitors still beholden to the billable hour.

That structure—whether involving flat fees, capped fees, blended fees, or success fess—usually depends on the nature of the file and the client's needs.

Bill MacQuarrie, a partner at MacQuarrie Whyte Killoran, a small firm in Gloucester, Ont., says 90 per cent of his firm's billing is now on a fixed-fee basis.

"Clients today are shopping around on the Internet and comparing prices," he says. "To attract and maintain those clients, you have to offer a reasonably competitive fixed price."

But the billable hour—so attractive in its simplicity and lucrative in its flexibility—is a hard habit to kick. The temptation to hike rates in the face of dwindling profits can be hard for many firms to resist.

Although adopting new methods makes good business sense, embracing alternative billing involves close examination of a lawyer's past habits and how to organize a legal practice more efficiently.

To successfully introduce new fee structures requires organizing your practice and improving your project planning skills. This benefits not just the client, but also the firm, because the system encourages and rewards efficiency. A specific matter may appear to be worth, say, 10 hours of work. But by fine-tuning and improving the system, a lawyer may discover he can significantly reduce time spent on the file.

"We're always looking at ways in our office to improve the efficiency of our workflow," says Cory Furman, a partner at Regina intellectual property law firm Furman & Kallio. The four-lawyer firm does a lot of fixed-fee billing for routine, predictable work. "Those who leverage their system properly can do far better than by billing hourly," he says.

Flat fees—for specific services, such as wills, patents, or the incorporation of businesses—are the most common type of alternative fee. But they're not always appropriate, particularly as the firm has to assume cost overruns if the file drags on.

There is also a danger that the lawyer will be tempted to rush through a file. "There are problems with block fees," says Eric Polten, a partner at the Toronto firm Polten & Hodder. "It can lead to slipshod work."

- Emphasizing value instead of time expended, contingent fees offer a results-based approach, where fees depend on the outcome of the file and the lawyer's performance.

- With the blended fee—a method that encourages delegation—a client is billed the same hourly rate whether the work is performed by a senior partner or junior associate.

- Project billing involves a concept anathema to many lawyers: naming a price up front for managing a specific project from beginning to end. Again, the client can budget the cost with greater certainty. For the firm, however, it is important to carefully evaluate the project and plan for possible contingencies that could occur along the way. The lawyer may also charge a premium to cover some of his risk.

And the list goes on: capped fees, project billing, and ongoing retainers all represent different approaches to managing a firm and keeping its clients happy, by emphasizing value and timeliness.

Polten, however, warns that lawyers must nevertheless keep an eye on the money coming into the firm, particularly with contingency fees in matters involving complex litigation. Indeed, services provided on a contingency-fee basis often cost clients more than those billed hourly. "The real possibility of a lawyer incurring losses must be offset by bigger gains in another case," he says. "In many ways, the certainty sought by clients is not always the fairest."

According to Polten, some hybrid fee structures at least have the merit of forcing both the client and the lawyer to share the risk of unforeseen developments. Examples of these include a reduced hourly fee combined with a success premium, or contingency fees where the client pays disbursements, no matter the outcome of litigation.

"If the lawyer assumes alone all the risk, it can lead to excesses on his part," Polten cautions. "The more contentious the work is, the more difficult it is to fix a fee and do a proper job."

"How To Enter Time So That Clients Will Pay For It"

Herrmann, Mark, *The Curmudgeon's Guide To Practicing Law* (Chicago: American Bar Association, 2006), pp. 95-99.

[Law firm partner to junior lawyer in the firm:]

I'm not just stopping by to see how things are going. I spent the afternoon finalizing this month's bill in the case that you and I are working on.

We have to talk.

It took nearly an hour to revise your time entries into an acceptable form. I don't blame you for this. Lawyers are taught to write persuasive briefs and letters. No one teaches them how to write persuasive bills.

But when a client sees a bill, the client will either want to pay it or want to dispute it. As a general matter, a client is more likely to pay a bill that is written persuasively—a self-justifying bill. A self-justifying bill consists of a series of self-justifying daily time entries.

A self-justifying bill is not a dishonest bill. It is a bill that accurately describes work performed in a meaningful way.

In addition to being honest, the bill must show that lawyers have been doing appropriate work. If senior partners are doing basic legal research, and junior associates are running photocopies, there is no way to draft a bill that justifies that expense.

But a bill must do more than reflect appropriate work. The bill should describe tasks in a way that helps the reader understand why the work was necessary. You recorded your time for five consecutive days last month with a single, recurring description: "Work on summary judgment papers." When a client sees five eight-hour entries for "work on summary judgment papers," the client naturally thinks that forty hours is an awfully long time to spend working on a single brief.

You could have made that bill self-justifying simply by breaking down the tasks involved. For example, your first day working on the brief might have involved:

- Research choice of law issues—three hours
- Research statue of limitations and tolling of that statute—three hours
- Begin research on need for expert testimony to support design defect claim – two hours

If you had broken down every day's work into bite-sized pieces, each of which corresponded to a time entry that seemed to fit the work that was performed, then your time entries, and the resulting bill, would begin to justify themselves.

When recording those bite-size pieces, record them all. If you researched six separate issues, identify all six. That detail conveys the effort that you spent working on the client's behalf and thus encourages payment.

There are a very few times when you will affirmatively want your time entries to be vague. When we're working on a bankruptcy case, for example, we'll ultimately submit our time records for court approval, and our litigation opponents can review our records. A clever opponent might gain an advantage if your time entries were too detailed. In those situations, where you must conceal what you've done, do so. If not, meticulously detailed time entries best reveal the true value of your work.

While we're talking about bills, let's talk about some other ideas. First, block billing—"did X,Y, and Z tasks in a combined total of four hours." Billing for blocks of time may occasionally be entirely appropriate (unless the client's billing policies forbid it) and persuasive. For example, a bill that records two hours for a series of ten telephone calls to multiple parties relating to settling a complex case may be a self-justifying entry. The same time records may actually be less persuasive if broken down into a series of twelve-minute time entries, one for each phone call. If our client's guidelines for drafting bills give us the choice, we should record our time in the way that most naturally justifies itself.

Second, word choice. Think carefully about the words that you use to describe your work. Generally use verbs: "Summary judgment brief" is not persuasive; "Researched, wrote, and revised summary judgment brief" is persuasive. Moreover, use effective verbs. Recording that you spent 1.5 hours "attending to brief" is non-persuasive, Record instead that you spent the same ninety minutes "researching and revising brief."

So, too, with entries for time spent "reading" the other side's brief. If you are simply passing your eyes over the piece of paper for no reason whatsoever, then you might record your time as simply reading a brief. If, on the other hand, you were actually "analyzing" the brief, then use that more persuasive verb.

Similarly, a time entry recording that you "talked to" or "conferred with" another lawyer at the firm suggests that two lawyers are charging for having chatted about last night's ball game. At a minimum, any time entry for "conferring with" another lawyer should reflect the topic of the conversation. "Confer with J. Smith re tactical choices in appellate brief" persuades more effectively than "confer with J. Smith." Better still, if you were not merely "conferring with" the other lawyer, but were in fact "working with" him or her on a particular task, then use that description, again identifying the nature of the work.

Time entries are also an appropriate way to remind clients of your successes. Fifteen minutes spent "reviewing decision" may well have been wasted. The same fifteen minutes, however, were invested wisely if spent "analyzing decision granting summary judgment and

considering plaintiff's possible appellate remedies." When you have achieved a good result, let your time entries echo your deeds.

You should also organize and record your time to avoid inflicting on the client death by a thousand cuts. Almost no one makes headway on a project by spending six minutes on the task on Monday, six minutes on Tuesday, twelve minutes on Wednesday, eighteen minutes on Thursday, and six minutes on Friday. Almost everyone, however, can make progress on a task by sitting down on a Wednesday afternoon, closing the door and not answering the telephone or reading e-mails, and working intensively for an uninterrupted hour. If you organize your work schedule to create concentrated blocks of time, you will be far more efficient. And when you then record the time that you spent, the time entry will naturally be self-justifying: It will show that you gave serious attention to a task.

Finally, record your time promptly. You are more likely to remember what you did, and to remember the details required to draft persuasive time entries, if you record your time on the day you worked it. Moreover, clients are naturally reluctant to pay for time that does not appear on a bill until months after the fact, when the memory of your effort is long lost.

In a sense, it is foolish to worry about how we record our time; I'm sorry to have burdened you with this conversation. Recording time is, after all, just an administrative task that permits us to be paid. But, by pausing only briefly to think about how we record time, we can generate bills that increase the likelihood both that we will be paid and that our clients will be satisfied. That matters to us, so you should think about it.

Next month, I expect to spend much less time finalizing this bill.

"Costs awarded against law firm personally"

Jaffey, John, *The Lawyers Weekly*, 30 March 2007, p. 1
(*in part*)

The Thunder Bay firm of Carrel & Partners LLP has been ordered to pay costs of $63,150 (including disbursements and GST) pursuant to Ontario's Rule 57.07, which gives a court jurisdiction to require solicitors to personally pay costs when the solicitor "has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default."

The authority to make such an order does not require a finding that the solicitor acted in bad faith.

Ontario Superior Court Justice John McGarry found that Carrel qualified for the "rare circumstances warranting an order pursuant to Rule 57.07".

Justice McGarry wrote: "On an ongoing basis, Carrel engaged in a pattern of inappropriate conduct including:

- Being responsible for inordinate and unnecessary delays
- Bringing numerous and unnecessary motions
- Being inadequately prepared
- Failing to appear
- Disregarding their professional obligation to be civil and courteous to others
- Presenting arguments that had no merit
- Acting for the Respondents despite having a clear conflict of interest, and failing to do anything to resolve that conflict
- Disregarding several court orders
- Continuing contempt of a court order to product documents

"I find that the ongoing unprofessional conduct of Carrel resulted in the Applicants incurring wasted legal costs. I have reviewed costs submissions of both parties as well as

individual memoranda of costs for the Applicants' solicitor to determine the costs attributable to the misconduct of Carrel. In the circumstances, I find that it is appropriate to award costs on a substantial indemnity basis to address the costs thrown away by the Applicants as a result of the misconduct of Carrel."

Dan Newton of Carrel of Carrel & Partners spoke to *The Lawyers Weekly* on behalf of the firm. He said, "All counsel who act for parties who become bankrupt have to be concerned. In essence the court made the solicitors responsible for the bankrupt's prior costs orders. The firm intends to seek leave to appeal the decision." Newton will be handling the appeal.

"Judge rejects $243,314 claim for half day"

Makin, Kirk, *The Globe And Mail*, 28 June 2007, p. A15

Even when he wins, Conrad Black loses.

An Ontario Superior Court judge has taken a poleaxe to the $243,314 the media magnate requested recently in legal costs after winning a half-day legal motion.

The motion involved a summons that Sun-Times Media Group Inc. had served on Lord Black and his wife, Barbara Amiel Black, in an attempt to compel them to testify at an injunction proceeding.

In his costs ruling, Mr. Justice Colin Campbell said the discrepancy between what Lord Black had asked for and, what the Sun-Times proposed was nothing less than "astounding."

Leaning heavily toward the Sun-Times's estimate of between $15,000 and $30,000, Judge Campbell awarded Lord Black a total of $65,000.

Examining the specifics, Judge Campbell was particularly critical of a claim by Lord Black's lawyers for $32,433.63 for expert fees. He said that experts had been neither authorized, necessary, nor helpful in the proceeding.

Judge Campbell also looked askance at an "excessive" request for $9,616.96 to cover photocopying costs, in an era when, he said, evidence can be easily submitted on CDs.

"I find it astounding that our cost regime could give rise to a 'reasonable' expectation on the part of two sides, in a motion that took less than half a day to argue, which would differ by over a quarter of a million dollars," Judge Campbell observed.

He said the dispute "illustrates acutely the problems associated with the disposition of costs in our civil justice system."

The motion was an offshoot of Lord Black's continuing troubles within his financial empire. Lawyers for the Sun-Times were seeking a rarely granted injunction under which a defendant's assets are frozen to prevent his moving them out of reach prior to the conclusion of larger legal proceeding.

To further its case, the Sun-Times had served a summons on Lord Black and Lady Black. Judge Campbell quashed both the summons and the entire application for the injunction.

In their written submission on costs, lawyers for the Sun-Times described Lord Black's quarter-million-dollar request as being out of proportion, "incredible" and the equivalent of 92 days of full-time preparation.

"If our system is to respond in a formulaic way such that a half-day motion can result in a cost award of $243,314, then there is little doubt that the critics who claim the civil justice system fails to meet the needs of the vast majority of citizens are correct," Judge Campbell said.

Burry v. Healey

(2007), 15 Newfoundland and Labrador Case Digest, No. 22, p. 5,
28 May 2007, Cook U.F.C.J.
(Summary)

The parties are the parents of a six year old son. The mother sought sole custody of the child and the father sought joint custody. They also disagreed on how the child should be parented when the father (who worked in the North West Territories) returned to Newfoundland for 10 days monthly, as well as on other ancillary parenting issues. At trial, the father was the more successful party.

Counsel for the father filed two offers to settle. Counsel for the mother filed one offer to settle five days prior to trial. Neither offer to settle was accepted. Counsel for the father submitted that because her client was substantially successful on his application, the Rules of Court supported costs being awarded to her client on a party and party basis prior to the day of the last offer to settle and on a solicitor and client basis following the date of the offer. Cook J. agreed with this submission and awarded costs on this basis.

Cook J. compared the final result at trial to the settlement offers of the parties and found that the father had obtained results at trial that were clearly more favourable than his final unaccepted offer to settle. While agreeing with counsel for the mother that the court should not "micro analyze every aspect of custody and access decision", Cook J. did state as follows at paragraph 23:

…[W] here specific access arrangements have not been agreed to by the parties, I have concluded that it is incumbent on me to analyze what I consider to be the most relevant components of the parties' positions, in conjunction with the resulting findings, as part of a 'costs' application. This is especially so if there are comprehensive offers to settle. Not to do so would, in my view, be abrogating my responsibility to exercise my discretion judicially.

Debora v. Debora

2006 CarswellOnt 7633 (Ont. C.A.), Docket C42809, 06 December 2006 (Weiler, Rosenberg and Laforme JJ.A., paras. 4, 81; 85-86.)

On appeal from the Orders of Justice Nancy L. Backhouse of the Superior Court of Justice dated November 24, 2004, with reasons reported at 8 R.F.L. (6th) 32, and February 7, 2005, with reasons reported at 14 R.F.L. (6th) 245.

. . . .

[4] …. the appellant appeals….costs, fixed in the amount of $2.25-million, inclusive of a premium of $150,000, awarded against him. …

. . . .

[81] The trial judge awarded the respondent $2,250,000 in costs. The appellant's offers were all significantly less than the trial judgment. The appellant withdrew all offers minutes before the trial started. ….

. . . .

[85] The trial judge concluded that this was an appropriate case in which to [also] award a premium to reflect the exceptional skill of the respondent's solicitors, the result achieved at trial, the enormous difficulties caused by the appellant's bad-faith litigation, and the financial risk if the proceedings failed. She concluded that a premium of $150,000 was warranted.

[86] Following the trial judge's award of a premium and the argument of this appeal, the Supreme Court of Canada released its decision in *Walker v. Ritchie*, 2006 SCC 45, on October 13, 2006, in which it held that unsuccessful defendants did not have to pay the premium charged by counsel for a successful plaintiff. The rationale for the court's decision was that unsuccessful defendants should expect to pay similar amounts by way of costs across similar pieces of litigation. Since a defendant has no knowledge of the fee arrangement made by the plaintiff, the defendant would have no means of measuring the risk of engaging in litigation insofar as costs were concerned. The [Supreme] Court also held that the application of Rule 49 and the award of substantial indemnity costs, did not warrant a difference in approach. Finally, the opportunity for counsel to charge his or her own client a risk premium, or (as the law now allows) a contingency

fee, encourages competent counsel to take on the cases of impecunious persons and disallowing a premium would not impede access to justice. …. Accordingly, I would allow the appeal with respect to the premium imposed and set it aside.

Kloosterman v. Kloosterman

(2006), 33 R.F.L. (6th) 459 (Ont.Sup.Ct.J.), Turnbull, J.

(*Fact summary; decision in part, at paras. 1-4; 9; 28-30*)

Parties separated and divorce proceedings were intiated. Mother hired solicitor to as represent her in proceedings. Matter proceeded through several conferences and motions prior to ultimate judgment at trial. Mother was granted favourable ruling at trial. Trial judge held that father was liable for one-third of mother's costs throughout proceedings.

. . . .

Costs Endorsement

[1] … I asked that Ms. Saunders [counsel for the mother] provide detailed records of times and services provided to her client plus disbursements that were actually charged to her client.

[2] Ms. Saunders argues that her client is entitled to her costs of the proceeding, with an offset for any costs ordered at any steps prior to the trial.

[3] Ms. Saunders has billed her client $45,018.29 inclusive of disbursements and Goods and Services taxes for all services rendered by her to her client to this stage, excluding submissions as to costs and the submissions I have received with respect to the present issue to be determined.

[4] …. I ruled … [previously] that the Applicant shall pay one third of the Respondent's costs which relate to the trial of the action and the necessary steps to get the matter to trial. However, I indicated in my reasons that costs will not be payable for any step in the proceeding where the judge dealing with that particular step did not either fix the costs, reserve them to the trial judge or otherwise take any action required under Rule 24 (10) of the Family Law Rules. ….

. . . .

[9] [To determine the Respondent's costs] I will deal with the accounts rendered by Ms. Saunders in the chronological date they were rendered to the client.

. . . .

[28] It is therefore ordered that the Applicant shall pay to the Respondent the sum of $5766.94 as ordered in the earlier costs judgment in this matter [i.e., one-third of the Respondent's accounts

from her solicitor; being one-third of the solicitor's accounts totalling $45,018.29 reduced by the Court, for determining costs, to $17,300.82; one-third of which was $5,766.94].

[**Editor's Note:** The court then proceeded, of its own motion, to address the reasonableness of the accounts, totalling $45,018.29, rendered to the Respondent by her counsel who, presumably, was claiming the accounts, less costs of $5,766.94 payable by the husband, from her 'wife client'.]

[29] Under Rule 24 (9) of the Family Law Rules, the court may on its own initiative order that a lawyer not charge a client for certain work that may be specified in an order. In reviewing this matter, I have serious concerns that the complexity of the issues warranted a legal bill being rendered to Mrs. Kloosterman in the sum of $45,000.00. In a case where the parties do not have a lot of money, the family home is valued at no more than $100,000.00 and they have two children to support, the costs have to bear some relationship to the issues and the assets in dispute. In the end, the result attained by the client is clearly relevant to a bill rendered to a client. The amount of time spent on a matter is only one of the factors to be taken into account in determining what constitutes a reasonable sum for services rendered.

[30] In the circumstances, I direct Ms. Saunders to attend before this court to clearly explain the basis of all billing rendered to her client in this matter, including all time charged to the date of such a hearing. I direct that Ms. Kloosterman shall attend the hearing and be given a written copy of these reasons.