STABILITY:

PRINCIPLES AND PRACTICE OF PROFESSIONAL, ETHICAL AND LEGAL RESPONSIBILITY

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SYNOPSIS

Summaries of, and excerpts from judicial decisions, book and journal scholarship, legislation, reports, and media cuttings (usually omitting footnotes or endnotes) on principles and practice of professional, ethical, and legal responsibility; primarily from June 2008 to June 2010

(The eight 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 2010, are at: www.lewisday.ca>ethics.)

15 June 2010

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1.0 INTRODUCTION

Overview

This anthology summarizes, or excerpts from, judicial decisions, book and journal scholarship, legislation, reports, and media cuttings, published primarily from June 2008 to June 2010, 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, and minor editing has been performed to enhance clarity of, excerpted material.)

Previous Papers

Eight previous comparable anthologies have been published:

(1) "Scruples" (1987), 2 C.F.L.Q. 151-197 (canvassing the period from the birthdate of legal memory to 1986);

(2) "Scrutiny" – for the National Family Law Program, 1996 (covering the period 1986 to 1996);

(3) "Security" – for the National Family Law Program, 1998 (covering the period 1996 to 1998);

(4) "Sanity" – for the National Family Law Program, 2000 (covering the period June 1998 to June 2000);

(5) "Sagacity" – for the National Family Law Program, 2002 (covering the period June 2000 to June 2002);

(6) "Sensitivity" – for the National Family Law Program, 2004 (covering the period June 2002 to June 2004;

(7) "Sincerity" – for the National Family Law Program, 2006 (covering the period June 2004 to June 2006), and

(8) "Sacrosanctity"—for the National Family Law Program, 2008 (covering the period June 2006 to June 2008).

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* – perhaps 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 2007, 99,617 lawyers. Of these 99,617 lawyers, 79%—78,658—had practicing status. Of the 78,658 lawyers who enjoy practicing status, 36.9%—29,088—are female lawyers. Only in Quebec do female (11,597) out-number male (11,501) practicing lawyers. (These most recent Federation Of Law Societies Of Canada figures do not include, nationally, such categories of lawyers as "honorary" or "suspended"; for example, 3,380 suspended lawyers in Ontario as of 31 December 2007.)

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.

By 03 November 2006, the 01 July 2003 National Mobility Agreement had been implemented by all provinces, other than Quebec. The Agreement provides for (i) temporary mobility (i.e., up to 100 days practise, annually, without writing qualifying examinations or obtaining a licence) and (ii) permanent mobility (i.e., to permanently practice, without writing qualifying examinations, provided a license is obtained). The Agreement applies to mobile lawyers licensed to practise in at least one common law province; enabling them to practice in another or other common law provinces.

By 03 November 2006, a Territorial Mobility Agreement had also been signed by all common law provinces as well as by the three territories—effective until 01 January 2012—under which mobile lawyers licensed to practice in at least one common law province are entitled to permanent mobility, but not temporary mobility, in each or all of the three territories.

Since June 2008, under the National Mobility Agreement, mobile lawyers licensed to practice in a common law province are entitled to become a member of the Barreau du Quebec—

therefore, licensed to practice, in Quebec, the law of his or her home (i.e., common law) province, federal law, and public international law. Efforts are underway to create, under the Agreement, reciprocal arrangements for Quebec lawyers in common law provinces.

Neither of the two Agreements creates any rights. Rather, they provide a framework that each signatory to each of the Agreements will employ to create its own rules of implementation.

Further details of the two Agreements are available at: http://flsc.ca/en/committees/mobility.asap [.]

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 the 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, ...” 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". Together with scholarship in books and journals, and other sources, they "constitute the legal culture that frames and influences" responsibility (Proulx, Michel and Layton, David, 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

(i) Codes of 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 Canadian Bar Association on 02 September 1920; materially influenced by comparable Canons that had been 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 which, in turn, in August 1987, was substantially revised and, in August 1995, was amended by addition of Chapter XX (non-discrimination). In 2004, other substantial alterations and additions were made. An entirely-revised *Code of Professional Conduct* was published in August 2006.

As a result of the "*Conflicts of Interest*: Final Report, Recommendations & Toolkit" by a Task Force of Canadian Bar Association in August 2008, a further, entirely-revised version of the *Code of Professional Conduct* was published in 2009.

In addition, two sets of Guidelines have been published by Canadian Bar Association: (i) Guidelines for Practicing Ethically with New Information Technologies, in 2008, and (ii) Guidelines for Ethical Marketing Practices Using New Information Technologies, in 2009. Both sets of Guidelines were authored by Canadian Bar Association's Standing Committee on Ethics and Professional Responsibility (so re-named in 2009; having formerly been called the Ethics and Professional Issues Standing Committee).

The Federation of Law Societies of Canada, in October 2009, approved a draft National Model Code of professional responsibility; except for possible changes reference the conflicts provisions and reference the 'future harms' exception to confidentiality. When the code is completed and approved, the Federation optimistically aspires to having it adopted by each of the Federation's member provincial and territorial societies; to whom the draft has been sent for consideration.

Historically, the C.B.A. Code was largely or entirely adopted by law societies of the provinces and territories. Some of the societies currently continue to rely principally on the C.B.A. Code. The recent trend among other provincial and the territorial governing bodies, Justice Proulx and Mr. Layton determined, has been "to create [their own] codes of conduct that are more detailed, comprehensive, and contemporary …. [which] translate … into rules that bear diminishing resemblance to the CBA Code, ... [Proulx, Michael and Layton, David, 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 rules governing discipline). 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 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 (as is the case throughout Canada), 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 (www.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.

(ii) Distinction between professional and ethical responsibility

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 that such behavior will be 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 adds that "I have never lost to a Rambo style litigator."

A civility report by Law Society of Upper Canada—subject of comment by Jeff Gray of *The Globe And Mail* on 09 June 2010—recaps testimony at a series of 'civility forums' held, recently, across Ontario. The forums, writes Mr. Gray, evidence "what some see as a rising tide of rudeness in the courtroom" in Ontario: lawyers being late; failing to stand when the judge enters court; making faces; rolling eyes; displaying "an attitude of truculence when rulings are made"; use of "dismissive body language"; slamming doors or books; gripping about having to wear black gowns; punching a client in the face; and threatening a mediator to be "10 times a bigger asshole than you."

(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.

Whatever the code of professional conduct applicable in a particular province or territory (i.e., Canadian Bar Association *Code of Professional Conduct* [2009], or a code generated by a province or territory), rules enacted by each province and territory create professional misconduct offences. An offence may involve a breach of whatever code of professional conduct applies in a particular province or territory or a breach of an offence created by the rules of the particular province or territory.

Note that Canadian Bar Association describes itself as the "ally and advocate of all members of the [legal] profession [in Canada]; … the voice for all members of the profession … [whose] primary purpose is … [to serve as] premier provider of personal and professional development and support to all members of the legal profession; … promoting fair justice systems,

… [facilitating] effective law reform, … [promoting] equality in the legal profession and … [devoted] to the elimination of discrimination."

In contrast, the Federation promotes itself as "the national coordinating body of the Canada's 14 law societies mandated to regulate Canada's 95,000 lawyers and Quebec's 3,500 notaries."

Program History

This is the thirteenth National Family Law Program. The first Program was presented in Toronto in 1978. Since its second presentation, in 1988, in Montreal, the Program has been conducted in alternate years.

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2.0 SOURCES AND STANDARDS OF RESPONSIBILITY

2.1 Professional and Ethical Responsibility

"Self-regulation takes a beating abroad—is Canada different"

Paton, Paul, *The Lawyers Weekly*, 08 August 2008, p. 5
[*in part*]

England, … offers lessons for Canadian lawyers: the key to preserving some self-regulation by and for the legal profession lies in a broader conception of service in the public interest, separation of disciplinary from regulatory functions, openness to competition, and greater accountability and transparency.

In England, more than a decade of discussion and debate resulted in legislation adopted on October 30, 2007, effectively ending the authority of the legal profession's self-regulatory bodies. The *Legal Services Act, 2007* implemented structures more closely tied to government than ever before. A new Legal Services Board serves as a "single, independent and publicly accountable regulator with the power to enforce high standards in the legal sector." An Office of Legal Complaints would "remove complaints handling from the legal professions and restore consumer confidence." The Act also included an even more radical step: specific authorization for the establishment of "Alternative Business Structures" for the delivery of legal services by lawyers and nonlawyers together.

There were other important signals about the government's priorities. Section 1 of the Act entrenches "protecting and promoting the interest of consumers" and "promoting competition in the provision of services" as specific "regulatory objectives".

Over the years, the Law Society of England and Wales came to be seen by both Conservative and Labour MPs as having abandoned its mandate to regulate the public interest in favour of acting as a lobbying group for lawyers. During the Thatcher years, traditional practice fiefdoms like conveyancing and appearances in court were broken down in the name of greater competition and consumer protection. A 2001 report by the Office of Fair Trading, England's Competition Bureau, concluded that many of the regulatory restrictions on the provision of legal services were not justified by professional rules but were essentially anti-competitive in nature. A July 2003 report concluded that the market needed to be opened to new business entities such as multidisciplinary practices, and that regulation needed to be changed to meet consumer expectations about complaints handling, accountability and transparency.

Together, the 2007 English reforms constituted nothing less than a radical overhaul of a regulatory model a 2003 Parliamentary report had labeled "outdated, inflexible, over-complex and insufficiently accountable or transparent." While the structures themselves merit attention as possible templates for Canadian reform, the political deliberations leading up to the adoption of the Act are of equal if not greater importance. They confirm that government will and can step in

to end self-regulation of the legal profession when it perceives that the legal profession no longer exercises self-regulatory authority to serve the public interest.

"A new Code of Conduct for family law lawyers"

McGuire, Cori, *The Family Way* (Ottawa: Canadian Bar Association [Family Law Section], August 2008)

Law societies and family law lawyers across Canada are contemplating the need for a new ethical code. Existing mandatory codes allow family law lawyers to advance their client's interests even when doing so may cause harm to children and other family members. Objectionable strategies include abusing court delays to deny the other parent access to children, frustrating financial disclosure and giving clients advice such as to change locks on the family home to gain exclusive occupancy or to withdraw funds from joint credit.

Our mandatory 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 clients may be hostile and injurious to …. [the] interests [of those not his clients]; and sometimes the greater the injuries the better he will have served his client."

An adversarial system in need of remedy

Following the lead of the U. K., Australia, and some American states, Canadian jurisdictions are considering adopting new codes for family law lawyers. Society's expectations are changing, as reflected by changes to legislation and court rules making conflict resolution less adversarial in every jurisdiction. Although problematic in all practice areas, the overly partisan ethic causes the greatest problems in a family law context. The no fault Divorce Act, RSC 1985 has made competitive adversarial skills to prove fault in divorce obsolete. Section 9 now requires lawyers to discuss reconciliation, counseling and the "advisability of negotiating the matters that may be the subject of a support order or a custody order" even when the best financial course of action for a client may be divorce.

A new ethic should begin in family law, since the clients are much more likely than others to have intimate personal knowledge of the weaknesses of the opposing party, which can be used viciously in advocacy, justifiable through the partisan ethic. Even if society is not yet prepared to shield adults, there is a general consensus that innocent children should be protected. We now

know from abundant research that highly contested, bitter divorces hurt children, and thus society. The new code would not prevent arduous litigation, but increase the integrity of litigation by requiring some consideration of other family members.

A new code could take one of the three forms: voluntary, mandatory, or a hybrid of the two as a model code or best practices guide.

Voluntary codes allow for a wide range of practice models; they unite lawyers of similar philosophical approaches or belief systems. A voluntary code is a form of branding, or advertising to communicate realistic expectations of conduct from the lawyer. The code is given to clients with a retainer letter in the hopes that better communication will result in fewer misunderstandings and conflicts with clients. However, the problem with numerous voluntary codes is that the partisan model is itself a voluntary code, thus legitimizing and strengthening it, resulting in the opposite of the intention behind drafting a model code.

A new mandatory code could force overly partisan lawyers to change their practice style by amending our existing codes either as footnotes or a separate chapter for family law lawyers. Law societies are hopeful that by setting out ethical duties, fewer complaints against family law lawyers will result. Unfortunately, adding to the existing code could provide a new menu of complaints, as currently failure to consider the needs of other family members is not an ethical breach.

Laying the ground for a 'model code'

Family lawyers have a difficult job with highly emotional clients, and will likely not support another layer of expectations or policing by law societies. Thus, a hybrid of the voluntary and mandatory codes, called a model code or best practices guide, should be developed. In order to be accepted by the profession, lawyers themselves must draft the new code through a representative group such as the Canadian Bar Association. It will be challenging to draft a code that is not so general as to be useless and not so specific as to endorse only one belief system. Study of the model codes in other jurisdictions such as in the U. K., Australia, and some American states, and drafting one national code, would avoid redundant efforts.

The new voluntary code should be drafted with specific examples in difficult ethical scenarios. For example, the code could guide ethical advice to give a pregnant woman who wants to move far away to avoid having to deal with the father of her child. Family lawyers need to know if they are obliged to advise her of the child's right to have a relationship with the father and the father's family, and the father and his family's right to a relationship with the child.

A model code, although voluntary, still carries some law society enforceability. The norm of "do no harm" has spread through the profession and is accepted by the majority. By codifying the practice style, the norm is made tangible, and the practice style is then the norm or standard of the profession. The model code becomes institutionalized as the measuring stick of the reasonable standard by which the conduct of all lawyers can be compared.

In the event of a professional conduct review for an error, omission, or breach of the mandatory code, the model code would be applied to determine if the lawyer practiced within the reasonable standard of other family law lawyers. Breach of the model code would not in itself

amount to misconduct, but it would be applied in professional conduct reviews to prove a marked departure from the reasonable standard of conduct.

A model code or best practices guide will discourage overly partisan advocacy and encourage less adversarial conflict resolution for the benefit of families. The model code must be voluntary, and drafted by family law lawyers themselves to offer specific guidance for ethical issues. The model code will institutionalization a higher standard of practice for family law, and set an example for other practice areas to follow.

[**Note:** *Cori McGuire is a collaborative family law lawyer, mediator, parenting coordinator and child interviewer, practicing in Kelowna, B.C. This article originally appeared in the May 23, 2008 issue of The Lawyers Weekly published by LexisNexis Canada Inc.*]

"Are there too many lawyers out there?"

Krishna, Vern, *The Lawyers Weekly*, 26 September 2008, p. 18

Are 40,000 lawyers too many for Ontario? Depending upon whom one asks: politicians, prospective law students or practicing lawyers, the answer is "yes," "no" and "maybe." What is certain is that there are too few willing to participate in legal aid; not enough to lower the cost of civil trials; but too many to justify opening new law schools. It is time to reconsider government tax policies that impinge on legal services that exacerbate the problem.

Legal services are "luxury goods" beyond the reach of average Canadians. A three-day civil trial costs about $60,000. That is about equal to the net annual after-tax income of an individual who earns $90,000. Since only five percent of the population earns more than that annually, the financial stress of a civil trial can seriously damage your health.

On July 26, Michael Trebilcock, distinguished Professor Emeritus at the University of Toronto Law School, reported to the Ontario government and confirmed what most people know: middle class individuals cannot afford lawyers. The Attorney General, Chris Bentley, praised the report, but did not commit to the suggested solutions.

Clearly, the demand for legal services far outstrips the supply and funding of such services. Demand will escalate as governments—federal, provincial and municipal—enact complex laws, rules regulations, bylaws, processes and reporting requirements. The volume and complexity of laws requires citizens to seek legal counsel in routine matters.

There are also problems on the supply side of legal services. Although some argue that there are too many lawyers in Ontario, clearly there are not enough to reduce the price of such services to an affordable level for individuals.

But supply is not simply a question of raw numbers. The distribution of lawyers—particularly in smaller communities and in northern Ontario—is skewed. We need to increase the number of lawyers *and* improve their distribution across the province. We cannot do that by fiat

in a free and democratic country. Hence, we must look to market solutions and incentives to increase the supply of lawyers in the lesser-serviced area of the province.

The perspective on the number of lawyers changes, however, when you walk down the hall from the attorney general's office to the offices of the minister of training, colleges & universities, MPP John Milloy. Lakehead University in Thunder Bay, for example, applied for permission from the MTCU to establish a new law school that would serve the local community and attract aboriginals to become lawyers and service their communities. Waterloo and Wilfrid Laurier also expressed interest in establishing law schools at their universities.

On Friday, July 25, the MTCU quashed the dreams of all three universities to establish new law schools. The ministry said they would not receive any government funding at this time. The ministry said: "We haven't seen increased demand for law schools, and we're looking at a study [by the Law Society of Upper Canada] that shows a number of law students aren't able to find articling jobs." Implication: Too many lawyers already!

The numbers suggest the contrary. Canada sends about 300 students to study law in foreign countries—particularly in Australia, England and the U.S.

These students go abroad at substantial expense, pay exorbitant foreign student fees and live in high-cost countries because they want to become lawyers and pursue their professional dreams. Most of these Canadians return home and hope to enter the legal profession. Clearly, the demand to become a lawyer is not waning.

To be sure, Canada benefits from having foreign countries partly subsidize the legal education of its citizens. However, foreign law school opportunities are available only to those with substantial means and assets. Lakehead could have opened the door for students in lower socio-economic group to pursue their dreams in Canada.

There are no quick fixes to the high cost and inaccessibility of legal services for low and middle-income individuals. However, tax law is a powerful instrument of public policy. We use tax law to assist with home ownership, education, medical expenses, disabilities, sports, arts and charities. We even exempt lottery winnings and gambling gains as advancing social causes!

We can reduce the costs of legal services by allowing individuals to deduct legal fees for tax purposes. Deductibility of legal fees would reduce the net cost of legal services for consumers. The amount of the deduction (or tax credit) could be worked out to be reasonable and fair. A deduction might shave 30 percent off the cost of legal fees for a mid-income taxpayer. We could also eliminate the GST and shave a further five percent off personal legal fees.

A tax deduction would make legal fees a socio-economic cost of society in much the same way as we fund medical services, education, welfare, housing and other social programs. The revenue loss would be a small price for society to pay to allow its citizens to access legal services.

Clearly, the federal and provincial governments will need to rethink their policies on numbers—the number of lawyers, the funding of legal aid services, the funding of law schools and the taxation of legal fees. Ultimately, the hallmark of a civilized society is how it treats its

vulnerable. The vulnerability threshold in Canada is dropping too fast for the well-being of a free and democratic society.

"Law societies' advertising rules inhibit competition"

Moulton, Donalee, *The Lawyers Weekly*, 27 June 2008, p. B1
[*in part*]

The legal profession in this country needs to do more to make the legal landscape competitive, according to the Competition Bureau of Canada. One area of concern: advertising rules and regulations that inhibit—rather than promote—a competitive environment.

"Advertising helps inform consumers about what is available to them while at the same time challenging the competition," said Eric Ferron, senior competition law officer with the Competition Bureau in Gatineau, Quebec.

"Empirical studies that address the effect of advertising restrictions on the price and quality of professional services have found, generally, that restrictions on advertising increase the price of professionals' … [services] and reduce the entry of certain types of firms," he added.

The Competition Bureau conducted a study of its own, *Self-regulated professions—Balancing competition and regulation*. A number of advertising restrictions—unnecessary restrictions as far as the Bureau was concerned—were found in several law societies. These included restrictions on the size, style and content of advertising; restrictions on calling a lawyer a specialist or certified expert; and restrictions on the use of comparative advertising.

"These restrictions go above and beyond what is needed to protect consumers from false and misleading advertising," said Ferron.

"Is the language of English law in need of fundamental reform?"

Fennell, Edward, *The Times*, 15 October 2009
[*in part*]

The proposal that legal language with its elaborate circumlocutions and Latin tags should be abolished in favour of plain English received a knockback this week at a Times-sponsored debate, hosted by Taylor Wessing, on the motion *The Language of English Law is in Need of Fundamental Reform*.

The pre-debate vote conducted by Lord Justice Jacob, the debate chairman, showed a probable walkover by the advocates of reform, Stephen Gerlis, the radical district judge, and Anne Atkins, the broadcaster. But their arguments were progressively derailed by Richard Gordon, QC,

and Shaun Ley, the Radio 4 broadcaster. The pair unsettled the audience about the wisdom of "throwing the baby out with the bath water" in a naive rush to a simplistic solution. What the reformers portrayed as the bright sun of clarity could prove to be a fog of imprecision, they said.

The debate, organized by the English Project to mark the anniversary of the Statute of Pleading in 1362 — which decried the use of French in English legal cases — was timely against the background of the opening-up of the Supreme Court, in Parliament Square, to the public.

For the reformers it was an open and shut case. As Gerlis put it, the traditional conventions — from the use of expressions such as "My learned friend" to Latin expressions such as lis mota and praecipe — were out of place when communication, through texting, was moving towards shorter words and expressions. Traditional legal language did not serve the public who were entitled to understand the rules and regulations that governed their lives, he said.

"Governing Barreau in Quebec adopts mandatory continuing legal education"

Millian, Luis, *The Lawyers Weekly*, 24 April 2009, p. 2
[*in part*]

Following in the footsteps of the Law Society of British Columbia, the Barreau du Québec is compelling all of its 23,000 practising lawyers to go back to school as of this month and complete no fewer than 30 hours of approved continuing legal education courses every two calendar years to remain in good standing.

The subject of debate over the past three years, the mandatory educational requirement is a "preventative" measure aimed at establishing, promoting and improving the standards of legal practice in the province to help ensure the protection of the public, according to a motion that was approved by the General Council of the Bar.

"I have 40 years of practice under my belt, and it is not a natural reflex for me to contemplate sitting behind a school desk," admitted Gérald Tremblay, the Barreau's batonnier, in an interview with *The Lawyers Weekly*. "But the more one thinks about it, the more one realizes that things are changing so quickly that it seems to me to be absolutely normal that all lawyers should maintain and bolster their intellect as much as possible. And when I saw that other bars … demand continuing professional development, I embarked on the project with enthusiasm."

Like similar requirements in England, Wales, Australia and 42 American states, the Law Society of British Columbia (LSBC) introduced a continuing professional development program in January. The LSBC now requires its 11,000 members to complete at least 12 hours of accredited educational activities per year, with no less than two of the hours pertaining to any combination of professional responsibility and ethics, client care and relations, and practice management. Nova Scotia is the other Canadian jurisdiction that has compulsory legal education requirements, but it is limited to lawyers engaging in land registration work.

Unlike in B.C. where failure to meet the continuing education requirements can lead to suspension, the Barreau has taken it one step further—disbarment.

Chudy v. Merchant Law Group

(2008), 300 D.L.R. (4th) 56 (B.C.C.A.), Law J.A. (Smith, Lowry JJ.A. concurring), [*Headnote, in part*]

Plaintiff husband was injured in motor vehicle accident in Alberta and hired third party lawyer S to conduct litigation in BC—Plaintiff and company through which S practised law (S company) executed contingency fee agreement based on fee of 30 per cent of recovery (S agreement)—After S company ceased operating, S joined defendant law firm M as associate—S filed for bankruptcy and arranged with law firm M to continue working under supervision—S failed to pay Law Society fees and was restricted to working as legal assistant—S advised plaintiff to execute mediated settlement agreement [for $760,000.00]—Plaintiff were later persuaded to sign contingent fee agreement with law firm M (M agreement), based on which it disbursed settlement funds of $760,000 to Plaintiff, retaining $250,000 as fees—Plaintiffs [husband and his wife] brought successful action against law firm M and were awarded $300,404.17 plus interest for fees wrongfully taken from settlement proceeds—Trial judge found S fundamentally breached S agreement by failing to pay Law Society dues, leading to his loss of status as lawyer [and, consequently, his entitlement to perform or be paid for legal services], and there had been no assignment of agreement to law firm M—Trial judge also found no contingency existed when M agreement was signed, as settlement had already occurred [under mediated settlement agreement]––Trial judge found M agreement was unenforceable under contract law and under Legal Profession Act as law firm M obtained it as result of breach of fiduciary duty [for example, to be candid] it owed to plaintiff—Law firm M appealed.

Appeal allowed in part—Major grounds of appeal were dismissed, but certain minor grounds were allowed, resulting in reduction of judgment by sum of $27,413.58—Trial judge did not err in finding that M and S agreements were unenforceable—Any legal professional would find conduct of law firm M to be disquieting—Law firm M took substantial legal fees after deceiving plaintiffs and without addressing position of conflict it was in—It placed its own interests ahead of those of its unsophisticated clients, and provided inadequate supervision of S with full knowledge of requirements of Law Society—Law firm M was vicariously liable for conduct of S and was directly liable for its own failure to take remedial action when such action was obviously called for—It was implicit in his reasons that trial judge based his award of punitive damages on breach of fiduciary duty and breach of contractual duty of good faith owed by law firm M to plaintiffs.

"To Avoid Libel Litigation, Lawyer Advises, Don't Tank Up and Tweet"

Neil, Martha, *abajournal.com*, 20 August 2009

Following recent news that a woman is being sued by an Illinois landlord over a tweet she posted on Twitter about her apartment, a California lawyer is offering 10 suggestions to help other users of the popular micro-blog avoid being a defendant in defamation litigation.

At least some of the 10 tips offered by attorney Adrianos Fachetti in a TwiTip post may seem like common sense. For example, tanking up on alcohol and posting a tweet is not a good idea.

However, for those who don't pay sufficient attention to this issue and other potential litigation pitfalls, a horrible fate may await, the lawyer writes—losing the privilege of posting on Twitter.

A little legal learning can be dangerous, Fachetti notes: While defamation claims are filed over false statements of fact, and opinion is generally not a basis for a libel lawsuit, for instance, simply labeling a factual statement as "opinion" isn't a sufficient safety net for those interested in avoiding litigation.

Fachetti offers more information on the subject on his California Defamation Law Blog.

Galambos v. Perez

2009 SCC 48, Cromwell J. for the full Court
[*paras. 6-8; 9; 24-25; 28-33*]

6 Ms. Perez was hired in May 2001 as the [law] firm's part-time bookkeeper. She did excellent work and in October 2001 she started to work full-time, effectively becoming the office manager. As part of her duties, she oversaw all of the firm's income, expenses and accounting and had unlimited signing authority on firm bank accounts, except trust accounts.

7 In January 2002 the firm experienced a cash flow problem. To resolve it, Ms. Perez obtained a personal loan and deposited $40,000 into the firm's account. The trial judge found that Mr. Galambos did not ask her to advance this money and that he did not even know about the advance until several days later (para. 61). It is common ground that Mr. Galambos instructed Ms. Perez to reimburse herself with interest, an instruction she did not follow other than by repaying herself $15,000.

8 During and after 2002, the firm's financial situation deteriorated [and the firm eventually ceased to operate]. Ms. Perez made several more deposits of her own funds into the firm's account and

covered some firm expenses with her personal credit card. The trial judge found that Ms. Perez made several of the advances without informing Mr. Galambos beforehand and that she extended the loans voluntarily, much on her own initiative and without undue influence by Mr. Galambos (paras. 62-63).

. . . .

9 During the time she worked for the firm, it handled the preparation and execution of new wills for Ms. Perez and her husband as well as two mortgage transactions, with respect to at least one of which the firm also acted for the lender. The firm did not expect to be and was not paid for these services.

. . . .

24 [the trial judge] … found [that] Ms. Perez did not ask for or receive advice about the advances, that she did not rely on anything Mr. Galambos told her when she decided to make the advances and that, even if she had so relied, that reliance would have been unreasonable in the particular circumstances of the case (paras. 47-53).

. . . .

25 In light of these findings, Ms. Perez's submissions about negligence cannot succeed. The solicitor-client relationship between Ms. Perez and the appellants was very limited and there is no plausible suggestion that the firm's preparation of the wills and the mortgages breached the standard of care owed to her. As the trial judge put it, "Mrs. Perez has no complaint relating to any of the legal services or advice that the firm provided. Those transactions did not leave her disadvantaged in any way" (para. 40).

. . . .

28 I would not wish to be thought as saying that the firm complied with all of the applicable rules of professional conduct. The fact that these advances were made outside the confines of this particular solicitor-client relationship [i.e., when the law firm prepared wills and acted on mortgage transactions] does not circumvent the nearly absolute professional standard not to borrow from clients. As provided in rule 4 of Chapter 7 of the Law Society of British Columbia *Professional Conduct Handbook* (1993): "Unless the transaction is of a routine nature to and in the ordinary course of business of the client, a lawyer must not borrow money or obtain credit from a client of the lawyer's firm, or obtain a benefit from any security or guarantee given by such a client."

29 However, two points must be made with respect to this rule of conduct. The first is that there is an important distinction between the rules of professional conduct and the law of negligence. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but not breach rules of professional conduct, and breaching the rules of professional conduct is not necessarily negligence. Codes of professional conduct, while they are important statements of public policy with respect to the conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in determining the nature and extent of duties flowing from a professional relationship: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at p. 425. They are not, however, binding on the courts and do not

necessarily describe the applicable duty or standard of care in negligence: see, e.g., *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.), at pp. 1244-45; *Meadwell Enterprises Ltd. v. Clay & Co.* (1983), 44 B.C.L.R. 188 (B.C. S.C.); S. M. Grant and L. R. Rothstein, *Lawyers' Professional Liability* (2nd ed. 1998), at pp. 8-10.

30 The second point relates to the concerns underlying the rules of conduct in relation to borrowing from clients. The rule is a specific application of the general rules about conflict of interest. There is concern that a lawyer's legal skill and training, coupled with the relationship of trust that arises between a solicitor and a client, creates the possibility of overreaching by the lawyer. A further concern is that the lawyer is in a position to arrange the form of the transaction and may therefore further his or her own interests instead of those of the client: see *Restatement (Third) of the Law Governing Lawyers*, § 126 Cmt. b (2000). However, given the trial judge's factual findings in this unusual case, the concerns giving rise to the rule are not in play here.

31 A situation of conflict of interest occurs when there is 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": *Restatement (Third), of the Law Governing Lawyers*, § 121, cited with approval in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 (S.C.C.), at para. 31. On this point, Rice J. [the trial judge] effectively found that there was no risk that the firm's representation of Ms. Perez in connection with the wills or mortgages could be affected by the firm's interest in receiving the cash advances from her. Similarly, the trial judge found no reliance and therefore certainly no overreaching and no effort on the part of the lawyers to structure the advances to their advantage. As the trial judge found, "although it is truly strange, [Ms. Perez] appears to have extended the loans voluntarily and much on her own initiative" (para. 62). He concluded that there was "no evidence of undue influence, or unconscionability" (para. 63).

32 I cannot fault the judge for reaching this conclusion on the admittedly unusual facts which confronted him. These [the wills and mortgages preparation] were routine legal services, wholly unrelated, as the judge found, to the advances and they were provided without fee to an employee. The cash advances were unusual and far-removed from the sorts of loans from clients envisaged by the professional conduct rule. The advances were not requested by the firm or Mr. Galambos, they were sometimes made without Ms. Perez advising the firm that they had been, Ms. Perez, the bookkeeper and employee of the firm, did not obey her employer's instructions to repay the advances even when the firm's finances would have permitted it and she did not provide an accounting to the firm of what it owed to her. This situation is as about as far removed as one can imagine from the typical case of a lawyer improperly borrowing money from a client. In short, there was no conflict between the firm's duties to her in connection with the wills and mortgages and the advances, and the firm did not in any way trade upon its position as her lawyer to obtain them.

33 I conclude that given the limited nature of the retainers [relating to the wills and mortgages] and the unusual nature of the advances, the trial judge did not err in finding that the appellants did not breach their duty of care arising from the solicitor-client relationship between them and Ms. Perez. There was no actual conflict of interest between the firm's duties to her in connection with the limited retainers and its interest in receiving the advances. Similarly, there could not be in these unusual facts any reasonable apprehension of conflict. Given the very limited nature of those retainers and the manner in which the advances were made — unsolicited and frequently without

advance notice — there was no duty on the firm under negligence principles to give Ms. Perez advice about those advances or to insist that she obtain independent legal advice about them.

"Supreme Court of Canada clarifies law of fiduciary duty"

Schmitz, Cristin, *The Lawyers Weekly*, 06 November 2009, p. 3
[*in part*]

The Supreme Court has overturned a far-reaching B.C. Court of Appeal ruling that would have sparked unforeseen new *ad hoc* fiduciary obligations for lawyers and other persons deemed to have the upper hand in so-called "power-dependency" relationships.

In a 9-0 judgment that clarifies the law of fiduciary duty, Justice Tom Cromwell put a stop to a legal development that had the potential to extend unanticipated new fiduciary obligations into myriad situations.

"The Court of Appeal exceeded the limits of appellate review and unduly extended the scope of fiduciary obligations," Justice Cromwell wrote in dismissing respondent Estela Perez's claim that her ex-employer, friend and solicitor, Vancouver's Michael Galambos, owed her a fiduciary duty in respect of $200,000 in unsolicited loans she made to his financially troubled, now-defunct law firm from 2002 to 2004.

Galambos v. Perez clarifies that not all "power dependency" relationships are fiduciary. Moreover in order for any type of fiduciary relationship to arise, there must be an express or implied undertaking by the fiduciary to act with loyalty, and the fiduciary must have discretionary power to affect the other party's legal or practical interests.

The Court of Appeal should not have interfered with the trial judge's clear and reasonable findings that Galambos neither had such power over Perez's interests nor gave her any express or implied undertakings to protect her interests, the Supreme Court ruled.

Notably Justice Cromwell rejected the novel proposition endorsed by the appeal court last year that in the context of power-dependency relationships, *ad hoc* fiduciary obligations may arise if the weaker party reasonably expects that the stronger party will act solely in the former's best interests — i.e. in the absence of the usual prerequisite that a would-be fiduciary must first agree to ignore his or her own interests and to act solely in the best interests of the other party.

Justice Cromwell held that all fiduciary relationships — whether *ad hoc* or *per se* — are always dependant on the fiduciary agreeing to act in the beneficiary's interests — although the fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement, or simply an undertaking to act in this way.

The top court's restoration and elaboration of what had been well-established law prior to *Galambos* is salutary for lawyers, insurers and the law itself, suggested George Macintosh of

Vancouver's Farris & Co., who represented the successful appellants and their legal liability insurer.

"Fiduciary obligations would have run amuck if the appeal had not been allowed in the Supreme Court of Canada," Macintosh remarked. "The fiduciary relationship is very important because it obligates someone to drop, or sacrifice, or postpone their own interests for those of the beneficiary, and that cannot be something that is reasonable to find unless the fiduciary does so knowingly."

Respondent's counsel Robert Holmes of Vancouver's Holmes & King suggested the case is a cautionary tale for lawyers with ongoing diverse relationships with one person — for example, solicitor-client, employer-employee, debtor-creditor, business owner-investor.

"You have to be very careful to ensure that the other person is quite clear as to what the limits of your responsibilities to them may be," Holmes advised. "Anything less than that is a perilous position to put yourself in as a lawyer."

The Supreme Court held that the Court of Appeal erred in creating special rules for recognizing *ad hoc* fiduciary duties in the case of "power-dependency" relationships.

Justice Cromwell explained that fiduciary relationships are actually a species of power-dependency relationships. Moreover not all power-dependency relationships are fiduciary in nature. Thus identifying a power-dependency relationship does not, by itself, assist materially in deciding whether a relationship is fiduciary.

"'Power dependency' relationships are not a special category of fiduciary relationships and the law is, in my view, clear that fiduciary duties will only be imposed on those who have expressly or impliedly undertaken them," Justice Cromwell wrote. "What is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed in him or her."

The Supreme Court overturned the appeal court's award of $200,000 to Perez, the former bookkeeper and office manager for Galambos and Michael Z. Galambos Law Corp. The pair were friends and when the law firm encountered cash flow problems, Perez placed a total of about $200,000 into the firm's bank account — without security and at her own behest. Perez had also been a client of the firm which prepared wills for her and her spouse, and handled two mortgage transactions, at no charge. When Galambos went bankrupt, and his company went into receivership in 2004, no money was left over to repay Perez after the secured creditors were paid. She then sued Galambos and his firm for negligence, breach of contract and breach of fiduciary duty, thus putting his professional liability insurer in jeopardy of having to repay her the $200,000. A B.C. Supreme Court judge dismissed Perez's action, finding no solicitor-client relationship that gave rise to any *per se* fiduciary duty. The unsolicited loans were voluntarily supplied in the context of the employment relationship "or otherwise between friends." The trial judge also held that no *ad hoc* fiduciary relationship arose because there was no mutual understanding between the parties that Galambos would relinquish his own self-interest and act only in her interests. Nor was Perez "vulnerable" vis-à-vis Galambos since their relationship was a "friendship between employer and employee which gave rise only to a creditor-debtor relationship."

Hanson v. Hanson

2009 ABCA 222, 15 June 2009, Hunt J. for the Court
[*paras. 3-5 [in part]; 6; 10-17*]

3 The Husband[,] and wife (who is not a party to the appeal) had a prenuptial agreement. The respondents and proposed third parties are the lawyer and his professional corporation (collectively, "Lawyer") who advised the wife before she signed the prenuptial agreement, and who oversaw her acknowledgment as required by section 38(2) of the *Matrimonial Property Act*, R.S.A. 2000, c. M-8 ("*MPA*"). The *MPA* contemplates that parties can avoid its application by agreement, so long as each spouse signs the necessary acknowledgment apart from the other party and before an independent lawyer: ss. 37 and 38.

4 Following the breakdown of the marriage, the wife commenced proceedings that included a claim under the *MPA*. In his defence the Husband pleaded the existence of a prenuptial agreement pursuant to sections 37 and 38 of the *MPA*. He then issued the contentious third party notice, in which he denied that the wife had any interest in his property.

5 Paragraph 2 of the third party notice states:

… The Defendant [husband] claims contribution and indemnity from the Third Parties, with respect to any matrimonial property judgment which the Plaintiff [wife] may recover against him.

. . . .

6 The Lawyer [who had advised the Plaintiff wife when she signed the prenuptial agreement] applied to strike the notice pursuant to r. 129(1)(a) of the *Alberta Rules of Court*, Alta. Reg. 390/68, arguing that it disclosed no cause of action against him. The master struck the notice on the basis that the Lawyer did not owe a duty to the Husband.

. . . .

10 There is no suggestion that the chambers judge applied the wrong legal test as regards r. 129. Rather, it is alleged that he wrongly concluded that the notice did not contain the necessary material facts to show negligence, namely, a duty of care, a breach of the duty and damages. The Husband also contends that there exists a serious question about whether the Lawyer owed him a duty of care and therefore the notice should not be struck at this point. Alternatively, he says he should be permitted to provide further particulars or amend the notice. Because on these facts I consider there is no possible duty arising between the Lawyer and the Husband, I will not comment on the other arguments.

11 Section 37 of the *MPA* permits parties to avoid its operation if they have entered into an enforceable contract. In order for the contract to be enforceable, section 38 requires each spouse to acknowledge certain things in writing, apart from the other spouse, before an independent lawyer.

12 "The purpose of the statutory formalities of execution is to offer some protection to spouses from agreements that are not the result of free and informed consent.": *Corbeil v. Bebris* (1993), 141 A.R. 215, 105 D.L.R. (4th) 759 (Alta. C.A.), at para. 32. However, "[e]ven if the statutory formalities of execution are met, the contract may be invalid or unenforceable for a reason sounding in contract law ... ": *ibid* at para. 15. In other words, a contract under the *MPA* will *not* be enforceable absent the statutory formalities. But it may be unenforceable for reasons that have nothing to do with statutory formalities, including factors such as [common law] duress or undue influence (see e.g., *Radhakrishnan v. University of Calgary Faculty Assn.*, 2002 ABCA 182, 312 A.R. 143 (Alta. C.A.) at paras. 30-31) as modified by the statutory formality requiring the executing spouse to acknowledge he or she is free from "compulsion on the part of the other spouse or person": s. 38(1)(c). As observed by Slatter J. (as he then was) in *Hearn v. Hearn*, 2004 ABQB 75, 352 A.R. 260 (Alta. Q.B.) at para. 61, this [statutory] provision "[a]t the very least ... should create a common law estoppel in cases where the alleged duress does not arise from any deliberate or direct action of the other spouse.".

13 In *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 S.C.R. 550 (S.C.C.) at paras. 60-61, the Court discussed independent legal advice in the context of a claim by a woman who received such advice before signing a marriage contract which purported to limit her future claims against her prospective husband's assets. The lawyer giving her independent legal advice told her that the marriage contract had numerous shortcomings such that a court would find it "unfair and would intervene to redistribute the property on a more equitable basis": para. 60. The woman signed the contract "[d]espite this advice, or because of it": para. 61. The Court concluded the woman could not escape her contractual obligations. There was no suggestion that the lawyer's views might have created a duty on the lawyer's part to so inform the prospective husband [that the agreement was defective].

14 The purpose of a certificate signed by an independent lawyer in the context of section 38 of the *MPA* is to indicate that the statutory formalities have been met and nothing more. If in fact the statutory formalities have *not* been met, and the acknowledging spouse suffers a resulting loss, he or she may have a claim against the independent lawyer. For example, if the certifying lawyer did not in fact give independent advice and the agreement is nevertheless found binding, the acknowledging spouse may argue that the independent lawyer was negligent and liable in damages.

15 The Lawyer's duty was to the wife. He owed no duty to the Husband. This is not to say there are *no* situations where a professional (such as a lawyer or auditor) may be liable to a non-client for the professional's negligence. For example, a lawyer who delayed making a will has been found liable to those who would have benefited from it: *White v. Jones*, [1995] A.C. 207 (U.K. H.L.). However, "the duties that a lawyer owes to the opposing party are viewed very restrictively .... If it were otherwise, the conflicting duties owed by a lawyer would make the adversarial system impossible": *Martel v. Spitz*, 2005 ABCA 63, 40 Alta. L.R. (4th) 199 (Alta. C.A.), at para. 12. See also, *McPhail's Equipment Co. v. "Roxanne III" (The)* (1995), 56 B.C.A.C. 217, 2 B.C.L.R. (3d) 393 (B.C. C.A.), *Kamahap Enterprises Ltd. v. Chu's Central Market Ltd.* (1989), 40 B.C.L.R. (2d) 288, 64 D.L.R. (4th) 167 (B.C. C.A.) and *McAteer v. Devoncroft Developments Ltd.*, 2001 ABQB 917, 307 A.R. 1 (Alta. Q.B.).

16 Any other result in this case would be contrary to the purpose of independent legal advice in the context of the *MPA*. The language of section 38(1)(b) (which is not properly reflected in the

third party notice) speaks to the acknowledging spouse's intention to give up her *MPA* claims "to the extent necessary to give effect to the agreement". What an independent lawyer may tell an acknowledging spouse about an agreement is generally subject to solicitor-client privilege. Suppose a lawyer concludes that an agreement or parts of it may be unenforceable as was the case in *Hartshorne*. The lawyer may advise signing it simply because of that fact. The suggestion that a lawyer has an obligation to tell the other party about potential deficiencies in the agreement would negate the very object of independent legal advice.

17 Given this conclusion, there is no reason to permit the Husband to file further particulars or amend the third party notice. His claim is bound to fail.

Jourdain v. Ontario

(2008), 91 O.R. (3d) 506 (Ont. Sup. Ct. J.), D.C. Shaw, J.
[*Headnote, in part*]

Charges against Plaintiff LJ for sexual assault were withdrawn—he and his family brought action against police officers and Crown attorneys for damages for negligence, malicious prosecution, defamation, and breach of his rights under s. 7 of Canadian Charter of Rights and Freedoms—Regional meeting of Crown attorneys occurred to review case against Plaintiff LJ and Crown did not claim litigation privilege, which expires, but claimed that consultations were protected by solicitor-client privilege of permanent duration—Plaintiffs brought motion seeking declaration that such solicitor-client privilege as may have existed in consultations between Defendant police officers and Defendant Crown attorneys was waived.

Motion dismissed—Crown did not claim litigation privilege and discussions at regional meeting were protected by solicitor-client privilege so that information relating to meeting would not be produced.

"Assessing *Rick v. Brandsema*'s impact on disclosure"

Boyd, Susan and Fateh, Eiad El, *The Lawyers Weekly*, 13 November 2009, p. 15

The Supreme Court of Canada unanimously affirmed in February that a duty to make full and honest disclosure of all relevant financial information exists when negotiating separation agreements. Failure to do so can result in an agreement being set aside, especially if exploitation of the vulnerability of the other party occurred and the settlement substantially deviates from the objectives of the governing legislation.

Risk v. Brandsema, [2009] S.C.J. No. 10 dealt with a matrimonial property settlement. Some interesting trends are evident from 18 recent judgments that invoked *Rick*.

Deference to the trial judge

Rick emphasized the importance of deference to the trial Judge's findings on exploitation and vulnerability. Rick is being cited on this point (*Wei v. Cao,* [2009] B.C.J. No. 1182; *Zhu v. Li,* [2009] B.C.J. No. 562), including a case unrelated to separation agreements (*S.L.W. v. P.D.O.*, [2009] P.E.I.J. No. 29; *D.P. v. R.B.*, [2009] P.E.I.J. No. 28).

Property and support citations

The duty to disclose is being cited in decisions on support as well as property, and judges may go to some lengths to determine the actual income of the parties in order to assess whether full disclosure has been made: *A.M.B. v. M.A.T.*, [2009] B.C.J. No. 1871.

Vulnerability

The duty to disclose is being taken seriously, particularly if the non-owning party is vulnerable to pressure. For instance, in *Studerus v. Studerus*, the Ontario Superior Court of Justice held that the husband's non-disclosure of his pension's value was grounds for setting aside the agreement, even through the wife was aware of its existence. The court also found that the wife was emotionally distraught by the circumstances surrounding the marriage's dissolution and that the husband took advantage of her distress.

Similarly, in *Armani v. Lovin*, [2009] B.C.J. No. 297, the B.C. Supreme Court would have found an agreement unconscionable based on unequal bargaining power, weeks of pressure and threats from the husband, an absence of legal advice and the husband's lack of full disclosure of his business income.

In *Brown v. Silvera*, [2009] A.J. No. 990, the Court of Queen's Bench of Alberta rejected any notion that a spouse has the responsibility to enquire into information they need before signing an agreement, in circumstances where the husband deceived the wife about the value of his business. The separation agreement, signed shortly after the separation at a time when the wife was under severe emotional strain, was set aside and a constructive trust was declared over the portion of the business to which the wife was entitled.

High threshold

Non-disclosure alone will not necessarily lay the basis for a remedy, and parties who wish to establish non-disclosure must meet a high threshold. For instance, if both parties agree in good faith on the value of an asset that turns out to be incorrect, the agreement will not be set aside (*Dewling v. Dewling*, [2009] N.J. No. 188).

Nor did the wife in *Dewling* have a duty to disclose her intentions to return to work because the matter was not an item on which the agreement was based.

If evidence on non-disclosure is unclear, agreements will likely stand. Moreover, a party was not permitted to use his own non-disclosure to set aside a separation agreement: *Calnen v. Gamble*, [2009] N.S.J. No. 320.

Legal advice

It may be easier post-*Rick* to set aside agreements even when each party obtained legal advice. In *Rockwell v. Fay*, [2009] B.C.J. No. 372, a decision involving a trust agreement signed after an intimate relationship ended, the B.C. Supreme Court suggested that a brief meeting with a lawyer may not suffice to overcome a party's vulnerabilities. The trust agreement was found unconscionable.

That said, the fact that one party did not obtain legal advice (*Zhu*), or ignored legal advice that an agreement was unfair (*Wei*), is not sufficient to set aside a separation agreement, even if the agreement is favourable to the party (in these two decisions, the wife) whose lawyer drafted the agreement.

Pressure or exploitative conduct on the part of the other party appears also to be necessary. In *Studerus*, the wife was advised to seek independent legal advice, but did not. However, other facts related to the husband's exploitation of her emotional distress weighed more heavily in the decision to set aside the contract (contrast *Dewling*).In *Maclean v. Maclean*, [2009] N.S.J. No. 328, the Nova Scotia Supreme Court set aside an agreement made in circumstances where neither party had legal advice or properly negotiated the settlement. Yet in *Covriga v. Covriga*, [2009] O.J. No. 3359, a separation agreement was upheld because both parties understood their actions and made informed decisions not to obtain legal counsel.

The key appears to be whether both parties participated fully in the negotiations, with legal advice being only one factor.

Validity of agreement

Courts tend not to distinguish clearly in judging the validity of a separation agreement on the basis of the relevant family law statute versus the common law doctrine of unconscionability. In part, this reflects the ambiguity in the Supreme Court judgment itself.

Decisions often emphasize both substantive unfairness of the outcome and unequal bargaining power. However, the usual remedy is to set aside the agreement rather than give it reduced weight under the statute, in a *Miglin* approach. It will be interesting to track the advice given by lawyers in the wake of this decision.

[**Note:** *Also see, at pp. 118-119 below.*]

3.0 APPLICATION OF STANDARDS OF RESPONSIBILITY

3.1 Relationships with Clients – Retainer and Authority

Davis & Co., A Partnership v. Jiwan

2008 CarswellBC 2560, B. C. C. A., 01 December 2008, Bauman JJ.A. for the Court
[*Headnote, in part*]

Where party to retainer agreement alleges that allegation of negligence has been made against [client's] solicitors, it is question of fact whether allegation was in fact made—In present case, client conduct led to reasonable conclusion by Registrar and Supreme Court judge that retainer was terminated due to allegation of negligence—Termination of retainer is reasonable action in face of allegation of negligence where to proceed could constitute conflict of interest—In present case, Registrar [during a 40-day taxation of bills of fees totalling about $991,000.00 and disbursements] and court below reasonably held that client's communication with solicitors amounted to allegation of negligence—Retainer was accordingly reasonably terminated and solicitors were entitled to fees [reduced on taxation to about $700,000.00 and disbursements], after assessment.

"Capacity and Capacity Assessment in Ontario"

Wahl, Judith (Ottawa, Canadian Bar Association 2007 Elder Law Conference)
[*in part*]

Introduction - Older Clients and Capacity

A common theme in the client work at the Advocacy Centre for the Elderly [ACE], an Ontario community legal clinic, is that of decisional capacity. Capacity may not always be the primary legal issue in the client case, such as in a guardianship application or a hearing to review a finding of incapacity before the Consent and Capacity Board, but often the capacity of an older client to make decisions is questioned by someone as part of the problem or conflict on which the client is seeking help. Some clients of ACE have asked us if they can make a particular decision or whether they need to "consult" or get authority from a son or daughter to do something, particularly if they have given that son or daughter a Power of Attorney. Although the older client is mentally capable, he or she reports that others question his or her authority to act independently. In some instances, the client has been told that his or her son or daughter is the decision maker, not him or herself. The [client's] family member directs the service provider when in fact the capable client should have been the one the service provider turned to for authorization or consent.

Just because a person has passed some magic age that now places them in the category of "senior" or "older adult", it doesn't mean that that person has lost decisional capacity or that his or her capacity should necessarily be put in question. This approach is ageist and based on a wrong assumption. The vast majority of older adults retain decisional capacity and the right to make decision about their own lives, even when their physical abilities may have declined or they become frail and in need of assistance with activities of daily living.

In our legal practice at ACE, we have observed lawyers, acting on these wrong assumptions about capacity, asking older clients to obtain capacity assessments of some type, before those lawyers will act for the client in the preparation of a will or power of attorney, or act for them in litigation or in other legal matters. Unfortunately, some of these "assessments" are ultimately meaningless as there is no specific context for the assessment. Mental capacity is always measured in a context, in relation to a particular decision. An assessment that states that the person is "globally capable" or simply "incapable" doesn't mean much and doesn't help the lawyer determine if the client is capable to instruct for a particular task on which the lawyer is being retained.

We have also been told by lawyers that they may do a version of the Mini Mental Status Exam (MMSE) on their older clients before being retained. This does not make sense for a number of reasons. The MMSE is not a test of decisional capacity in the legal context. The MMSE is a short screening test that is designed to evaluate basic mental function in a number of areas such as orientation, ability to recall facts, ability to write and to calculate numbers. However this clinical test does not shed much light on capacity to instruct in a motor vehicle case or to prepare a power of attorney for property. The results of that test may not identify if a client has the "ability to understand" and the "ability to appreciate" information relevant to making a decision. This ability to understand and ability to appreciate is the legal test of capacity in Ontario, Some persons with high scores may lack capacity to instruct on particular issues. It should not be presumed that a high score equates with capacity or lack of impaired cognitive function. The reverse may also be true, that a person with a low score, may have capacity to instruct on the particular legal issue.

Even from the clinical perspective, this test has some identified "flaws". Persons that have higher education usually score higher on the test even if they have some cognitive impairment. That test also does not reliably measure executive function or insight, an element of the "ability to appreciate" side of the legal test of capacity. Literature describing this common test and critiquing it may be found in various journals and publications.

Lawyers are not ordinarily trained in this test or in interpreting its results appropriately. Had the drafters of the Ontario capacity legislation—the *Substitute Decisions Act* and the *Health Care Consent Act*—and the legislators decided that the MMSE would be the standardized test used to determine decisional capacity, the legislation would have reflected that. In fact, extensive discussions were held at the meetings of the Fram Committee about whether there was a specific gold standard "test" of capacity. The Fram Committee, more properly known as the Attorney-General's Advisory Committee on Substitute Decision Making for Mentally Incapable Persons prepared the report that resulted in the present Ontario legislation. With input from many sectors, including health professionals, the legal community, and the advocacy community, it was determined that there was no such gold standard test or clinical test that appropriately and reliably measured mental capacity, therefore no such test was included as the standard in the legislation.

Although this legislation was drafted and proclaimed over ten years ago, it is still believed that no such gold standard test yet exists.

In some cases, third party assessments of capacity are appropriate as evidence in a proceeding, or as evidence to be kept on the lawyer's file as a "defense" assessment in the event someone challenges the validity of a will or Power of Attorney. However in other instances the request for the assessment is not appropriate because capacity is not at issue in the case and the client is capable to instruct on the matter on which they seek assistance.

It is the lawyer's obligation to determine any client's capacity to instruct before being retained. There are some exceptions to this rule, such as when retained by a client who challenges a finding of incapacity in a Consent and Capacity Hearing. In any proceedings under the *Substitute Decisions Act* and *Health Care Consent Act* where capacity is at issue, the lawyer may presume capacity of the client to instruct. This is practical as capacity is the issue.

Acting for a client in these circumstances in a proceeding under the *Substitute Decisions Act* or *Health Care Consent Act* does poses challenges for the lawyer. The lawyer is obligated to maintain a professional relationship with that client and advocate for the client. This means not falling into a "best interests" type of representation. The lawyer has to be careful not to make a judgment of the client's best interests and to fail to take directions from the client if the lawyer believes that the client is incapable or is acting against his or her best interests, despite this direction to presume capacity in the statute.

In *Banton v. Banton et al.* the court stated:

> The position of lawyers retained to represent a client whose capacity is an issue in proceedings under the *Substitute Decisions Act, 1992* is potentially one of considerable difficulty. Even in cases where the client is deemed to have capacity to retain and instruct counsel pursuant to section 3 (1) of the *Act,* I do not believe that counsel is in the position of a litigation guardian with authority to make decisions in the client's interests. Counsel must take instructions from the client and must not, in my view, act as if satisfied that capacity to give instructions is lacking. A very high degree of professionalism may be required in borderline cases where it is possible that the client's wishes may be in conflict with his or her best interests and counsel's duties to the Court.

This obligation to determine capacity to instruct is not limited to only older clients but applies to all clients. Older clients should not be the only ones targeted for additional scrutiny of capacity. For the purpose of good practice, it is important that lawyers first meet with clients and make their own determination of capacity of the client to instruct before seeking some form of assessment. Lawyers should specifically look at the capacity of the client to "make decisions about his or her legal affairs" as described in the Rules of Professional Conduct. This capacity may be different for giving instructions about a complex business transaction as opposed to asking the lawyer to advocate about his or her rights to have visitors or to take a temporary leave from a long term care home in which he or she resides.

By seeking out an assessment first before making his or her own determination of capacity to instruct, the lawyer assumes that a health professional or some other person from whom he seeks the assessment is more knowledgeable than him or her about capacity to instruct on the particular matter on which the client wants help. This is ironic considering that the capacity that we are talking about is not a clinical assessment but is a legal determination based on legal definitions of capacity. "Clinical assessments underlie diagnosis, treatment recommendations and identify or mobilize social supports. Legal assessments remove from that person the right to make autonomous decisions in specified areas."

It is also unlikely that the health professional knows the specific legal criteria for capacity for that particular purpose unless the lawyer details the definition of the decisional capacity before seeking the assessment. A report that a client "lacks testamentary capacity" or "has testamentary capacity" is not going to be helpful to the lawyer if the physician that did this assessment did not know the statutory definition of capacity or criteria from the case law about the specific type of capacity.

This is exactly where the opposing party in the action challenging the will document should attack the assessment—cross-examining the physician on what is his or her understanding of testamentary capacity. If the physician does not know the tests of capacity in the legal context, the report should not be given much weight. Likewise a report that states that the client "is capable for all purposes" is of little assistance when the lawyer needs to take instructions for litigation. There is questionable value added from these types of assessments to the lawyer's own determination of capacity to instruct based on his or her own exchange with the client about the case to be pursued.

If a third party assessment is needed as evidence in a proceeding, or if it is appropriate to obtain a "defense" [i.e., 'comfort'] assessment for the benefit of the client in the event that capacity to instruct or to prepare a particular instrument such as a power of attorney or a will, may be challenged, then what should lawyers be doing to ensure a proper and fair assessment, appropriate to the need, is done? If capacity is at issue in a proceeding, how can a lawyer "assess the assessment"—either the one he or she obtained for the client or assessments submitted as evidence by the opposite side in the action?

The only way a lawyer is going to be able to do this, is if the lawyer understands the applicable law on capacity. This may seem obvious yet, our experience in Ontario is that there remains a learning curve for many lawyers, as well as health professionals and service providers dealing with seniors in respect to capacity issues.

Although the *Substitute Decisions Act* and the *Health Care Consent Act*, have been in effect in Ontario since 1995, there is still a great deal of confusion about the definitions of capacity, who assesses capacity under what circumstances, and how capacity is assessed. This paper will outline the legislative framework in Ontario, examine the definitions of capacity, discuss who assesses capacity for what purposes, and review how capacity is assessed. It will also discuss the consequences of assessment and the need to "assess the assessors" if we intend to protect the rights of persons that get caught in the processes and procedures under the legislation.

. . . .

As stated by Mr. Justice Major, for the majority, commenting on the test of capacity in respect to treatment in the case of *Starson v. Swayze*, [2004] 1 S.C.R. 722,

> "… the Act (*Health Care Consent Act*) requires a patient to have the ability to appreciate the consequences of a decision. It does not require actual appreciation of those consequences. The distinction is subtle but important: see L. H. Roth, A. Meisel and C. W. Lidz, "Tests of Competency to Consent to Treatment" (1977), 134 *Am. J. Psychiatry* 279, at pp. 281-82, and Weisstub Report, *supra*, at p. 249 . In practice, the determination of capacity should begin with an inquiry into the patient's actual appreciation of the parameters of the decision being made: the nature and purpose of the proposed treatment; the foreseeable benefits and risks of treatment; the alternative courses of action available; and the expected consequences of not having the treatment. If the patient shows an appreciation of these parameters—regardless of whether he weighs or values the information differently than the attending physician and disagrees with the treatment recommendation—he has the ability to appreciate the decision he makes: see Roth, Meisel and Lidz, *supra*, at p. 281.
>
> However, a patient's failure to demonstrate actual appreciation does not inexorably lead to a conclusion of incapacity. The patient's lack of appreciation may derive from causes that do not undermine his ability to appreciate consequences. For instance, a lack of appreciation may reflect the attending physician's failure to adequately inform the patient of the decision's consequences: see the Weisstub Report, *supra*, at p. 249. Accordingly, it is imperative that the Board inquire into the reasons for the patient's failure to appreciate consequences. A finding of incapacity is justified only if those reasons demonstrate that the patient's mental disorder prevents him [page763] from having the ability to appreciate the foreseeable consequences of the decision."

[**Note:** *Especially instructive is the dissenting judgment of McLachlin C.J. C.*]

. . . .

Assessing the Assessments

What should a lawyer do to ensure that a good assessment is done?

First determine why an assessment is needed? Will it be used as evidence in a hearing and what type of hearing? For applications for guardianship, to proceed by summary application, assessments by capacity assessors are required. If not applying for a summary order, then other evidence of incapacity, such as reports by other health providers, affidavits from family and other evidence may be presented instead of a report from a capacity assessor. To trigger a statutory guardianship for property, an assessment by a capacity assessor must be obtained. Make certain that the right type of assessment is obtained from the right party that will be useful for the purpose intended.

Is the assessment going to be used as additional evidence of capacity for a particular purpose, to paper the file in the event that capacity to execute a particular document [arises]? For this purpose, is an assessment the best evidence or should other evidence also be obtained, such as affidavit evidence from other persons that know the client and have observed the client's actions and behaviours and could attest to the client's capacity?

Defence assessments should not be used to "prove" to the lawyer that the client is capable for the purpose he or she is retaining the lawyer. The lawyer should first be satisfied that the client has capacity to instruct and then obtain additional assessments as supplemental to his or her own opinion of capacity.

It is the responsibility of the lawyer to make a good request for an assessment. That would include detailing to the assessor the type of assessment required, the legal tests of capacity, and information from case law as to the criteria in respect to capacity and the process of assessment. Include information on the requirement to "probe and verify", or the requirement that the assessment must follow the Guidelines for Capacity Assessment if the assessment is being done by a capacity assessor and the assessment is one in which the statute requires capacity assessors to be used.

Be specific as to the capacity to be assessed, be it property, or capacity to do a POA, or testamentary capacity etc.

Explain the purpose of the assessment—as to whether it is for defence purposes or to trigger a statutory guardianship. Lawyers have advised us that they were surprised when their client's property suddenly was being managed by the Public Guardian and Trustee when the lawyer was only looking for an opinion on the client's capacity to manage property to assist the lawyer in discussions with the client on possible options for property management.

If the lawyer is given an assessment about his or her client alleging incapacity, how does the lawyer assess the assessment?

Has the assessment been done by the right type of assessor for the purpose the assessment is to be used? Did that assessor follow the proper process of assessment? Is it clear what "test" of capacity was used—did the assessor assess the person in relation to the legal test of capacity or is it a functional assessment or an assessment based on the MMSE or other type of test.

Did the assessor follow any statutory requirements of process, such as the … requirements [under Ontario legislation] to inform the person that he or she could refuse the assessment? Did the client receive the proper rights advice information if required by statute?

Did the assessor accommodate for the client's needs in respect to hearing, language, education level? Did the assessor inform the person that he or she could have others present during the assessment, such as family, friends, his or her lawyer?

Did the assessor "probe and verify"? In one case, an evaluator concluded that a woman was incapable in respect to admission. She based this opinion on a number of factors including her observations on the state of disorder of the woman's home and on the woman's behaviours during

the assessment. The woman had been ironing her husband's shirts when the evaluator met with her. The evaluator knew that the woman's husband had died nearly ten years before. The evaluator did not ask the woman why she was ironing these shirts but concluded that the woman was delusional and thought her husband was alive. In fact, if asked, the woman would have explained that she was ironing the shirts because she was planning to give the shirts to the Salvation Army for use by other people. The evaluator had failed to "probe and verify'.

Is the written report complete? Does the report properly detail the person's own words used when questioned and the questions asked by the assessor to determine the person's ability to understand and the ability to appreciate the information relevant to the particular decision to be made?

Impact of Assessments

An assessment on incapacity can have a profound effect on a person's life. The assessment can be used in proceedings that could result in the person losing authority to make decisions in major portions of his or her life. In guardianship applications, the judge ultimately makes the decision whether the person is incapable or not for particular purposes and the assessments are only part of the evidence. Other assessments, such as the assessment to trigger a statutory guardianship of property or the determination by a health practitioner that a person is incapable in respect to treatment, can have an almost immediate impact even though [in Ontario] the person has the right to have a review of these assessments by the Consent and Capacity Board. That right of review is almost wholly dependent on that person receiving the proper required rights advice and information on how to apply to the Board. This rights advice, although required, may not be given or the person may not fully understand that process or be able to get through that process without assistance.

The assessment process is a major intrusion in a person's life, and should not be undertaken without appreciation of the possible consequences as well as the impact on the individual. It cannot be easy to know that others are questioning your capacity to make decisions for yourself! Lawyers play a major role in ensuring that capacity assessments are used properly, obtained only when necessary for a particular purpose, and are done in a fair manner.

[**Note**: *Among publications, useful to law practitioners, on the subject of capacity are: (i) Silberfeld, Michel and Fish, Arthur. When the mind fails [:] A Guide to Dealing With Incompetency (Toronto: University of Toronto Press, 1994), and (ii) Whaley, Kimberly; Silberfeld, Michel; McGee, Heather, and Likwornik, Helena. Capacity to Marry (Aurora, ON: Canada Law Book, 2010).*]

"Defendant Gets New Lawyer and Trial After Smearing Feces on PD"

Cassens Weiss, Debra, *abajournal.com*, 27 January 2009

A defendant who wanted his public defender removed from the case will get his wish after smearing feces on his lawyer's face and flinging the material at jurors.

Weusi McGowan was on trial in San Diego for a home invasion and robbery when he brought in a plastic bag filled with excrement during a midmorning break, City Wire reports in a story posted on 10News.com and SanDiego6.com. McGowan smeared the feces on the face and in the hair of Deputy Alternate Public Defender Jeffrey Martin, then flung the material toward the jurors, the story says.

The excrement missed Juror No. 9 but hit his briefcase.

Judge Jeffrey Fraser had denied McGowan's request to represent himself, the story says. The judge declared a mistrial and said McGowan would have to get a new lawyer.

Martin called the attack "a very unfortunate incident" in an interview with the Daily Journal (sub. req.). "Mr. McGowan is seriously mentally ill, he is retarded and has brain damage," he said.

"Clients, Law Firm 'Get Savage' As Legal Malpractice Claims Increase"

Zahorsky, Rachael M., *abajournal.com*, 17 February 2009

"The first thing we do," said the character in Shakespeare's *Henry VI*, is "kill all the lawyers."

Attorney malpractice claims are escalating in numbers and intensity, making us wonder if clients, anxiously looking to recoup the hefty sums of money lost because of the struggling economy, are recalling the literal interpretation of Shakespeare's well-known verse.

"Over the past several months, we have seen a dramatic increase in legal malpractice filings, a trend that would never been seen in a better economic environment," Fisher, Rushmer, Werrenrath, Dickson, Talley & Dunlap shareholder John E. Fisher told the ABA Journal. "Now, more than ever, attorneys need to be mindful of their actions when dealing with clients."

In Florida, the depressed real estate market is driving many distressed buyers to look for any way out of housing contracts, including blaming their lawyers for their financial issues, said Mike Downey, a partner at Hinshaw & Culbertson.

"People are feeling a bit more desperate," Downey said. Lawyers are delving into unfamiliar practice areas, and some clients are being less honest, putting attorneys at risk for professional liability issues, he added.

It's not only clients who are spiteful. Downey said his phone is ringing with phone calls from lawyers complaining about malicious conduct from opposing counsel.

Chicago-based lawyer George B. Collins of Collins, Bargione & Vuckovich, agrees there is a meaner spirit to the recent spate of malpractice suits—and it's aimed at unexpected targets. "The nastiness is hitting lawyers in substantial law firms, not the type of people you would expect to be in a malpractice suit," Collins said. "It's savage the way big firms are attacking each other."

"The new 'Know Your Client' rule is coming into force"

Bell, Karen, *The Lawyers Weekly*, 24 October 2008, p. 22
[*in part*]

The penny has dropped. As the in force date set by each provincial regulator to implement the Federation of Law Societies of Canada's "Know Your Client" rule draws nearer, lawyers across the country are waking up to the fact that some advance preparations should be undertaken now.

First and foremost is the need for lawyers and firms to gain a clear understanding of the new obligations under the new rule. That means reviewing the particular rule, by law or regulation adopted by your law society that implements the KYC rule so that:

- You are able to determine the degree of identification required for every client;
- You do not represent a client who does not provide the information required for the identification obligation;
- You are reasonable in assessing the need for and credibility of source documents that are appropriate to verify client identification;
- You understand when verification of identification is and is not required;
- You keep track of and secure all of the information and documentation gathered;
- You ensure compliance with the relevant privacy laws; and
- You do not act in situations where you reasonably suspect that money laundering and other illegal activity may be involved.

"The 'Know Your Client' rule: how to comply"

Bell, Karen, *The Lawyers Weekly*, 10 October 2008, pp. 23, 26

It's coming into force soon: the new "Know Your Client" rule. Where did it come from? Who must comply? What does it require? Here is the story.

In 2000, the Canadian government passed *The Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. This was in response to a call from the Financial Action Task Force (FAFT), an inter-governmental organization of 34 countries around the world, to create mechanisms to help investigate and prosecute money laundering and terrorist financing. The Act required financial institutions and nonfinancial businesses and professionals, including lawyers and accountants, to report transactions involving large amounts of cash as well as suspicious transactions. An injunction obtained in 2002 along with subsequent negotiations resulted in an amendment to the Act exempting legal professionals.

But lawyers were required to do something. Working through the Federation of Law Societies of Canada, the "No Cash" model rule was developed in October 2004 and implemented by individual law societies.

Meanwhile, FAFT pressure to do more mounted and the federal government promulgated new regulations to come into effect in December 2008 vis-à-vis all Canadian legal professionals. They required the identification and verification of client information upon receipt of $3,000 or more in funds, impose record-keeping requirements, including the "receipt of funds record," and require implementation of a firm-wide compliance regime.

Yet again, the Federation of Law Societies took steps to avoid the federal regime by adopting a second model rule dubbed the "Know Your Client" rule. The purpose of this rule is to ensure that legal professionals conduct appropriate due diligence on their clients and do their part not only to combat money laundering and related illegal activities but also to stem fraud, which has become a significant risk in many of our practices.

Law societies in all provinces and territories as well as the Barreau du Quebec and the Chambre des notaries du Quebec agreed in March 2008 to implement the "Know Your Client" rule by the end of … [2008], and they are in different stages of doing so. The intention is to create a national uniform standard for client identification and verification by all legal professionals in Canada and to avoid the federal regime.

That said, some legal professionals are exempted from the identification and verification obligations. The underlying theme of the exempted group is that the obligations have already been fulfilled by someone else or in another manner.

So what does the rule require us to do? Here is a summary of the four key obligations:

1. Identification

First, you must identify every one of your clients at the start of a new engagement according to specific criteria. Only very basic information needs to be collected except in the case of organizations of a private nature. The obligation to "identify" is absolute. If the client is not prepared to provide you with the required information, leaving you unable to comply, you are not permitted to act for the client.

2. Verification of identify

In addition, in certain circumstances, you must take reasonable steps to confirm that clients are who or what they say they are by taking copies of credible supporting documentation. How you verify the identity of the client involves exercising reasonable efforts. It also depends on whether the client is an individual or an organization, whether you are being instructed in person by the client and whether the client is inside or outside Canada.

The circumstances that trigger the duty to "verify" are defined as "engaging in or giving instructions in respect of the receiving, paying or transferring of funds." The term "funds" is broadly defined. The good news is that there are a number of defined circumstances where, depending on the source or recipient of the funds or the purpose of the funds there is no need to

verify the identity of the client. Generally, these include situations where funds are paid to or by a financial institution or public body or a client company that is not a private company, or in respect of some element of legal process or received for professional fees, disbursements and expenses. So as long as the payment or receipt or transfer of funds is on account of one of those purposes, there is no need to verify the identity of the client.

3. Record keeping

It will come as no surprise that you must create and maintain a record of the information and copies of the documents relied on in the identification and verification processes. These records must be retained for at least six years. A word of caution: be alert to the need to balance this retention stipulation with the requirements of the privacy compliance regime.

4. Withdrawal of services

Finally, you must withdraw from representing a client if either during the initial identification process or at any time through the course of an engagement you become aware of or are suspicious that you would be assisting the client in dishonesty, fraud, crime or any illegal conduct, including money laundering or terrorist financing. This is not new to the legal profession. A similar obligation to withdraw is already included in most provincial and territorial codes or rules of professional conduct.

Parting words

Reactions to the new client identification regime vary from "quiet acceptance" to "firm resistance." As we move up the learning curve, it is important to keep in mind a couple of things. First, some form of identification compliance is inevitable given the pressure on the federal government to fulfill its international commitments. Second, legal professionals around the world are already subject to similar obligations. Third, many of our clients have already been exposed to requests for the information by other professionals here and by lawyers in other jurisdictions.

While there is room for some further fine-tuning, the "Know Your Client" the rule developed through our Federation of Law Societies takes our professional requirements into account and gives us the opportunity to better manage the many risks present in what is now a very global-oriented practice environment. Understanding these new obligations is the first step. The next is preparing to comply.

"The lowdown on lawyer referral services"

Ceballos, Arnold, *The Lawyers Weekly*, 27 June 2008, pp. B3, B6

Bringing clients to the door is vital for all lawyers, whether one is a solo practitioner or a part of a large national firm. Marketing efforts to attract such new potential clients also run the gamut, and lawyer referral services are one form of marketing that continues to be used

extensively. These services are offered by both private companies as well as law societies, and range from simple consumer referral services to larger operations with a worldwide reach.

Boasting that it has been matching lawyers with potential clients since 1970, the Lawyer Referral Service run by The Law Society of Upper Canada is one such provider and assisted almost 50,000 callers last year, according to Susan Tonkin, communications advisor for the law society. For $250 per year, participating Ontario lawyers can be in the pool of lawyers whose names are provided to those thousands of callers who are looking for a lawyer.

"Referrals are made on a rotational basis, based on geographic location and area of law, as well as any other specifics" such as French language services or wheelchair access, according to Tonkin.

Participating lawyers agree to provide an initial free consultation of up to half an hour in order to determine if there is a legal issue requiring a lawyer. The parties can then decide if the lawyer will be retained to deal with the situation. Participating lawyers are required to report back to the LRS after the initial contract.

The service appeals to smaller practices and Tonkin noted that 89 percent of LRS members are in firms of one to five lawyers. Between 1,400 to 1,600 lawyers per year subscribe to the service which covers a wide range of practice areas, although the most popular types of referrals are for family law and civil litigation, followed by labour and employment law, according to Tonkin.

Toronto lawyer Peter Salah found the Lawyers Referral Service helpful, particularly at the beginning of his career. "It was quite fruitful as a general practitioner and I was getting a fair bit of actual work from it," said Salah, of Hills Salah LLP, who added that he felt good that he was also "giving back to those that can't afford legal advice." Pointing to the "phenomenon" of unrepresented litigants in the family law area, Salah said that a large number of the calls he took were in that area.

However, offering a free initial consultation also comes with its drawbacks, according to Salah. "There were times where a lot of calls were just a nuisance," he said, noting that many involved grievances that were not actionable. "I felt like it was a bit of a waste of time," he added, observing that it sometimes seemed like he was more a counselor to the caller than a lawyer.

After approximately six years using the LRS, Salah himself is no longer a participating lawyer, but not because of any dissatisfaction with it. According to Salah, his own practice has become so busy that his time is spent trying to service his existing clients and other referrals, such that it is difficult to take on "walk off the street clients." However, he added that his partner still generates work from the Lawyer Referral Service.

Dissatisfaction with what she considered a negative experience with the Lawyer Referral Service as a client led Natalie Waddel to launch www.lawyerlocate.ca, an on-line Canadian referral service. According to Waddel, the lawyer she was referred to appeared to be trying to make money by encouraging litigation for her matter at a time when this was not a direction she wanted to go. Launched in 2002, her service has made over 50,000 referrals from around the world, according to Waddell. Participating lawyers pay $750 per year and are listed on the website, which

breaks down the lawyers into eight main categories and 180 subcategories of law. Participating lawyers are not required to report back to Waddell's service, nor are they obligated to provide a free consultation.

Waddell said that all participating lawyers are treated equally on the site and it operates by a randomized order each time the web page loads. "If they don't have a website, it's a great way to test out the market," said Waddell of participating lawyers.

St. John's sole practitioner Bob Buckingham has used Waddell's service for several years and said he finds it very useful for his general practice. "It has certainly paid for itself every year and more so," said Buckingham, who in addition to fielding many calls from people in Newfoundland, also gets inquires from across Canada as well as from around the world. It has resulted in work ranging from collections for European clients to criminal and family law matters closer to home, according to Buckingham, who credited www.lawyerlocate.ca for contributing to the almost 1,000 hits his firm website received last year.

Other major players in the area include legal publisher LexisNexis Canada Inc. which publishes *The Lawyers Weekly*. It runs Laweyers.com, which is targeted more towards in-house counsel. Describing them as more "self-serve" than referral services, product manager Jacqui Hurd said that they provide sufficient information to allow a potential client to get an idea of what the participating law firm is about.

Prospective clients can search by such categories as practice area, firm, lawyer, and language spoken. According to Hurd, Lawyers.com sees inquiries for a wide range of practice areas, including family law, real estate, criminal, personal injury, and wills and estates, while Martindale.com will tend to receive inquires for such things as intellectual property law and corporate law. Hurd noted that the two sites, which use the same data-base, receive over 1,500 searches a day for Canadian lawyers. The cost to be listed varies depending on geography and number of lawyers, according to Hurd. For example, a firm in a small market may pay $60 per month, while large firms may pay thousands of dollars a year, depending on what additional services they order, such as banner advertisements and sponsored results.

While providing a helpful resource, Hurd pointed out that a referral service is only part of the equation and alone does not build a strong relationship. "Referrals and all of these things are great but they still have to make that personal connection with the lawyer," she noted.

3.2 Relationships with Clients – Conflicts Of Duty

3.2.1 Generally

"Who's your client?"

Stauffer, Julie, *National*, September 2009, pp. 41-42

When Allan Fineblit's phone rings, chances are good someone's about to hit him with another sticky conflict-of-interest question. "It's one of the areas where we get perhaps the greatest number of requests for advice," says the Law Society of Manitoba's CEO.

Over the past two decades, a trilogy of Supreme Court cases—*MacDonald Estate v. Martin, R. v. Neil*, and *Strother v. 3464920 Canada Inc*.—broadened the definition of conflicts of interest. In doing so, they introduced a host of new considerations into the day-to-day practice of Canadian law—and more than a few complications.

A lawyer's traditional duty of loyalty has expanded and standards around protecting confidential information have been raised. Now you can't act against an existing client without informed consent, for example, even on an unrelated matter. Nor can you act if there's a possibility of misusing confidential information, rather than a probability.

"The rules have become complicated," says Malcolm Mercer, litigation partner and general counsel at McCarthy Tetrault LLP in Toronto.

Complicated or not, you need to understand them, and not just because ignoring potential conflicts can cost you time, money and cases. "We have both a legal and a moral obligation to act like professionals," says Mercer. "It's fundamental to the system of justice that we participate in, and to the rule of law in our society."

It's been just over a year since the CBA Task Force on Conflicts of Interest released [in 2008] its final report and toolkit. (A revised version of the CBA Code of Professional Conduct, incorporating the task force's recommendations, … [became] available on the CBA website … [in the autumn of 2009].) Here's what task force members Fineblit and Mercer advise with regard to how recent lower court rulings are clarifying the picture, what still needs to be elucidated, and how savvy lawyers can navigate the conflicts minefield.

1. Pay attention

The first step is to put systems in place to flag possible conflicts before any confidential information hits your desk. Take the 2008 case of *1964 Bay Inc.*, where a law firm involved in a significant litigation belatedly discovered that a newly hired associate used to work for the firm representing the opposing party.

The timing wasn't an issue, the Ontario Superior Court ruled, since the associate hadn't begun working on any files. The big mistake was having lawyers involved in the litigation

administer the screen, thus becoming party to confidential information. The lesson? Make sure someone independent administers the confidentiality screens: your firm's general counsel, for example, or a member of the firm who is far removed from the potential conflict. If that's impossible, you may need to consider dropping the case in question.

2. Be clear who your client is

According to the so-called "bright line" test laid down in *Neil*, lawyers can't act against existing clients. But who, precisely, is considered a client?

In the recent *McKenna v. Gammon Gold* case, Ontario Superior Court Justice Joan Lax narrowed the definition, ruling that subsidiaries of one's corporate client aren't automatically one's clients as well. Similarly, in the *Alberta Operative Plasterers' and Cement Masons' International Association* case, the court held that a union local is a separate entity from the national union.

And in an interesting twist, the 2009 Ontario Court of Appeal ruling in *Change v. Shopcast Television Inc.* found that a lawyer could cross-examine a client who happened to appear as a witness in a litigation case. "The court was in effect saying, 'If we're going to give very strong protections in favour of clients, we're not going to expand what "client" means,' " explains Mercer.

To clarify upfront everyone's expectations regarding who is and isn't a client and what the exact parameters of the retainer are, engagement letters are highly recommended.

3. Get waivers

The most straightforward route to avoiding potential conflicts from unrelated matters is to obtain an advance waiver from your clients. But does that constitute the full disclosure that the *Neil* ruling demands?

According to the recent Alberta Court of Appeal decision *Alberta Union of Provincial Employees*, the answer is yes—if the document is clear and if the client is sophisticated enough to understand the implications of signing it.

4. Trust your gut

What about cases where the rules simply aren't clear? You have to weigh a number of factors, says Fineblit, from the sophistication of the client to how much is at stake. A higher conflict-of-interest standard should be required in cases where life, liberty, or child custody hang in the balance, for example. If another member of your firm is acting against your client, consider how big the firm is and how closely you work with your colleague.

Ultimately, if you have doubts about a matter, don't take it on. "It's remarkable what good judgment people have when they listen to their gut," says Fineblit.

5. Watch out for new developments

The Supreme Court trilogy left the legal profession to grapple with practical questions of how to simultaneously avoid conflicts of interest and guarantee access to legal services, especially in small communities and specialized areas of law.

To date, there has been some progress. Lower court rulings over the past year have begun to tackle some of those issues, in many cases incorporating reasoning from the CBA's Conflicts Report. At the same time, the Federation of Law Societies of Canada has been hard at work preparing a Model Code of Conduct (as part of that process, the Federation is taking the CBA report into consideration).

But consensus on conflicts of interest won't be achieved until lower court cases wind their way up to the Supreme Court and law societies across the country overhaul their provincial and territorial codes of conduct. "I think we're in the early stages of the dialogue," says Mercer.

Even when the discussion wraps up, don't expect complete clarity, Fineblit cautions. "I'm very confident that we're not going to be able to answer every question," he says. "I'm just looking for progress."

"Lawyer can't act on property issue where family law conflict exists"

Moulton, Donalee, *The Lawyers Weekly*, 07 November 2008, p. 17
[*Greening v. Greening*, [2008] N.J. No. 273]

The ties that bind lawyers and their firms to their clients cannot be easily broken, the Supreme Court of Newfoundland and Labrador Trial Division has ruled.

The court's decision in *Greening v. Greening* brought the Supreme Court's finding in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 into the family law context, said Ernest Gittens, a founding partner with Gittens & Associates in St. John's, NL, who represented the applicant Daniel Greening.

"It reminds us of how careful lawyers must be to ensure that they not only avoid conflict but also even the suggestion of conflict which arises often in a family law context as usually one of the parties will seek out a lawyer who has acted for him or her in the past and may very well have acted for both parties," he noted.

The key legal issue in this case involved conflict of the interest. The wife, Julie Greening, claimed that the house where she and her husband resided was held in trust for them by her husband's parents. The husband's parents denied that the house was held in trust and wanted to be added as parties to the action so they could defend themselves against the wife's claim to the property held in their name. The question of a possible conflict arose because the lawyer who acted for the wife had also acted for the husband's parents when they purchased the house in question.

"The lawyer never disputed the conflict with regard to the house," said Gittens. "However, he suggested that the property issues could be severed from the other issues of custody, access, child support and spousal support and that he could still act for the wife on these matters without being in conflict."

The court disagreed. "After considering the standard set by the Supreme Court of Canada in *MacDonald Estate v. Martin* to avoid even an appearance of conflict and recognizing the reality that all issues in this action are still intertwined, I do find that Miller & Hearn should be excluded from acting for Julie Greening on all aspects of this action," said Justice William Goodridge said in his oral decision.

The *Martin* case, one of two Supreme Court of Canada decisions Gittens relied on, was particularly relevant as the court held that "even an appearance of impropriety should be avoided," he noted.

The other case was *R. v. Neil*, [2002] 3 S.C.R. 631 in which Supreme Court recognized the general rule that a lawyer may not represent a client whose interests are directly adverse to the immediate interests of another current client, even if the two mandates are unrelated.

The current case certainly has relevance for lawyers in other provinces, particularly those practicing in smaller cities and towns, Gittens noted. "When there are only a small number of lawyers providing legal services to a region they will often encounter the same clients on different matters. It is not unusual for a family lawyer to have acted for one or both of the parties in the past, especially in real estate transactions and the house that was purchased may ultimately become the subject of a dispute in a matrimonial breakdown."

The right to choose a lawyer was a very important one, the Newfoundland and Labrador Supreme Court acknowledged. "Allowing parties the freedom to choose their lawyer is an important value to protect," said Justice Goodridge. "Public confidence in the justice system might well be undermined by interfering with a party's selection of counsel of his or her choice."

"This freedom is balanced against principles laid down by the Supreme Court of Canada which are designed to prevent lawyers from accepting files that could give rise to a conflict of interest," he added.

The issue in the current case involved balancing these competing interests. It may also give rise to further considerations on the issue. "While Mr. Justice Goodridge indicated that should the husband's parent's consent to the wife's lawyer acting for her with regard to the issues unrelated to the matrimonial home … it would solve any conflict" said Gittens, "it remains to be seen as to whether courts will take the next step and sever family law issues in case where a conflict arises on only one issue."

"Resolving conflicts"

Macaulay, Ann, *National*, October-November 2008, pp. 16; 17-18
[*in part*]

[Task Force of Canadian Bar Association. *Conflicts of Interest:* Final Report, Recommendations & Toolkit (Ottawa: Canadian Bar Association, August 2008]

An evolving issue

Two competing philosophies regarding conflicts have collided head-first in recent years: Clients have the right to continuing confidentiality of their information and fiduciary treatment from their lawyers, but at the same time, lawyers need to be able to conduct business and grow their practices in the real world.

As a result, there has been growing concern within the legal profession—and more recently among client, particularly in-house counsel—about the current state of confusion that swirls around conflicts of interest rules, which have evolved through caselaw (especially three major cases from the Supreme Court of Canada—… and codes of conduct.

Lawyers have struggled for years to correctly apply the law in this complex area, and there has been growing concern that the rules are unclear, if not confusing. But the report's authors believe the changes they suggest can provide Canadian lawyers and their clients with clarity, consistency, practicality and harmony.

Recommendation highlights

The duty of loyalty is perhaps the most important category of the task force's recommendations. The most significant recommendation in that category likely will be that the "substantial risk principle" be applied and followed in determining whether or not a lawyer has a conflicting interest.

That principle states that a conflicting interest should mean one that gives rise to a "substantial risk of material and adverse impact on representation." The task force [chairperson Scott] Jolliffe says, believes that the application of the principle is sufficient to protect the public from any adverse representation that might be caused by a lawyer representing a client on an unrelated matter.

The recommendations also include a statement that the duty of loyalty and the duty of confidentiality are two separate duties and must be regarded as such. "Over the course of the past few years, courts have come to confuse the two," says Jolliffe, but they are quite different in their application and the timing of their application.

Another confidentiality issue regards the use of screens. Even if there is a delay in establishing a screen to protect confidential information, the task force says that fact should not be the end of the investigation or inquiry. If it's clear that confidential information has not been misused or otherwise disclosed, then the delay in the creation of the conflict screen should not automatically lead to disqualification of the lawyer.

Some courts have taken the view that once two law firms agree to merge, a screen must be erected right away. "In our view, that just doesn't make any sense," says Jolliffe. "The important

point for the erection of conflict screens is before the law firms actually merge, because that's the point at which there is some risk that confidential information might be shared."

The report also recommends that a definition of who the client is be adopted, to clarify the issue for everyone involved. Concern has been expressed, for example, when a person is representing the client but is not the client himself—perhaps the parent of a minor child, or the child of an elderly parent, or the officer or director or shareholder of a corporation.

Another recommendation involves situations in which individuals or corporations approach a lawyer but don't end up hiring that lawyer. Some cases "seemed to indicate that that person ought to be treated as if he or she was a client," says Jolliffe. "Our view is that that is really not appropriate, unless there was a reasonable expectation on the part of the client, based on objective evidence, that the lawyer was assuming the role of lawyer in a solicitor-client relationship."

Regarding retainer letters, the task force strongly recommends that lawyers enter into a written understanding with clients regarding a number of important aspects of the relationship. That includes answering practical questions, such as: Who is the client? What is the nature of the service or work that the client expects of the lawyer? When is work done for another considered to be a conflict? When does the relationship end?

"The Collapse Of Contracts"

Slayton, Philip, *Canadian Lawyer Magazine*, June 2009
[in part]

Contracts are sacrosanct. This principle has been pounded into law students' heads since legal education began. Professors pontificate as follows: provided certain formalities are met, and public policy is not offended, individuals (including juridical persons, corporations being the most important of these) are free to create private law between themselves. If necessary, courts will enforce this private law. Our freedom, our economy—gosh, our very way of life—depend upon this being so. (Full disclosure: I taught the law of contracts over many years in several law schools, and always toed this traditional line.)

Until fairly recently, law graduates have reverently carried the principle of pacta sunt servanda into the practice of law. Clients beyond count have been told that the terms of a contract are mighty important. Sign nothing, they have been instructed, until you have read and agreed with every word. Once you have agreed, you will be bound to do what you have promised; you'll be punished if you don't. In my two decades of legal practice, I always dutifully said all of this. After all, we advocates intoned dolefully, respect for contracts is the rock upon which our society is built. It was only after I left the law that I decided the whole contract thing was overrated, and was prepared to sign just about anything if I liked and trusted the person on the other side. But that's another story.

. . . .

Now, we are suffering a sea change. Prompted by the corrosive effect of the current economic climate, traditional ethical precepts about the law of contract are being tossed out the window. *The New York Times* lately published an article with the headline, "Contracts now seen as being rewritable." The article began, "Contracts everywhere are under assault." Employment contracts are thought to be particularly vulnerable, but other types of agreements may also be in doubt. For example, U.S. Treasury Secretary Timothy Geitner is apparently working on an initiative to give the federal government wide power to modify the contracts of financial institutions it takes over.

The flashpoint for the collapse of contracts seems to have been the controversy over $165 million in bonuses for senior executives of AIG, the insurance giant that was run into the ground by the very same executives who collected the bonus money. The AIG collapse famously almost took down the world financial system, and the company had to be rescued by the American government to the tune of $170 billion. President Barack Obama said the employment contracts in question should be torn up. "This isn't just a matter of dollars and cents," the president said. "It's about our fundamental values."

. . . .

And so, the old-fashioned view that, as an ethical matter, lawyers should not advise clients to break contracts, and shouldn't figure out good ways for them to ignore commitments presumed binding, is just that—an old-fashioned view, no longer relevant, out of tune with the times. Now, a contract may or may not be respected and performed by the parties—it all depends. That's the correct legal advice. This is another example of morally neutral lawyering, the belief that lawyers are there to serve clients and it's not their business to protect society or promote particular values at a client's expense. (I have recently argued in this column that a lawyer's moral neutrality, desirable as it may be in some ways, doesn't mean that he is free to subvert the values of his society, or be blind to its best interests. Even law society rules make this clear. Not everyone agrees.)

Back to those pontificating law professors. I think the time has come for them to rejig the basic law of contract course, taught everywhere in first year. Students should now be told that a contract is just one tentative way of organizing your affairs. You may think you have enforceable private law rights, but don't count on it; they can disappear as do the snows of winter (except a lot faster). And, if you're on the other side, don't worry too much about obligations that have become burdensome; there are plenty of ways out.

As for lawyers? We're here to help.

"Playboy Sues Lawyer Who Posed for Mag, Claims She Can't Be 'Lawyer of Love'"

Cassens Weiss, Debra*, abajournal.com*, 11 November 2009

Playboy magazine has sued a Chicago divorce lawyer who posed nude for the magazine and once wrote its “Lawyer of Love” advice column, claiming she has no right to the column’s name.

Playboy claims lawyer Corri Fetman waived any rights to the "Lawyer of Love" phrase in her freelance agreement with magazine, according to *The Chicago Tribune's* Chicago Law blog. Fetman sought to register “Lawyer of Love” as her trademark in August, nearly a year after her Playboy column was pulled. She also writes a blog called Love Lawyer for Tribune-affiliated ChicagoNow.

The suit, filed in federal court in Chicago, also claims Fetman still uses the “Lawyer of Love” moniker on her website, the *Chicago Sun-Times* reports.

Fetman claims in her own lawsuit against Playboy that she lost the column because she turned down sexual advances by digital executive Thomas Hagopian.

Fetman first made news when she posed in racy attire on a billboard promoting her divorce law firm. The billboard's message read: "Life's Short, Get a Divorce."

"Joint retainers for wills"

Popovic-Montag, Suzana, *The Lawyers Weekly*, 04 December 2009, pp. 9, 12.

Life partners often engage in joint estate planning, whether they are in common law, first-time or subsequent marriages. Given the generally non-contentious nature of joint estate planning and the partners’ belief in the permanency of their relationship, lawyers can easily be lulled into a false sense of comfort. But when joint retainer situations go bad, issues of solicitor’s negligence, discipline, rules of practice and moral and ethical considerations arise.

The nature, scope and duration of the retainer itself are often overlooked and may give rise to negligence issues. A formal retainer is not required for a solicitor-client relationship to exist; a client’s offer to employ, and a solicitor’s express or implied undertaking to do certain things, is sufficient. To be certain that clients know you are no longer acting for them or looking out for their interests, you should confirm in writing that the work has been completed and the retainer is at an end.

'Mirror wills' are commonly requested by a husband and wife. They provide for all assets of one to pass to the other and are identical in all respects. But what if one spouse comes back and requests changes that adversely affect the other? Do solicitors have an obligation to tell the other spouse? This is clearly a position of conflict and, unless there are prior instructions on how to deal with it, you have a difficult decision to make.

Ontario’s *Rules of Professional Conduct* create an ongoing obligation to examine whether a conflict of interest exists throughout the retainer as new circumstances or information may reveal a conflicting interest (R. 2.04(3)).

Faced with the ethical dilemma of making changes to a mirror will but not advising the other spouse, lawyers can, of course, refuse to draw the new will. This is neither practical nor satisfactory because the client will get another solicitor to draw the will; this may jeopardize the business relationship. Moreover, it does not solve the problem of whether to inform the other spouse. If you do, you risk being sued for breach of trust and negligence or for acting in conflict of interest.

To address such situations, commentary accompanying R. 2.04(6) provides that a lawyer who receives instructions from spouses or partners to prepare wills based on a shared understanding of what is in them should treat the matter as a joint retainer.

The lawyer should advise at the outset that if one of them were to subsequently communicate new instructions to change or revoke a will: 1) it would be treated as a request for a new retainer; 2) the lawyer would be obliged to hold the subsequent communication in strict confidence; and 3) the lawyer would have a duty to decline the new retainer unless the spouses had permanently ended their relationship, one had died, or the other spouse agreed to the lawyer acting on the new instructions. This commentary brings much-needed clarity and direction to the estates and trusts Bar.

The following checklist provides some best practices when drawing up mirror wills for spouses under a joint retainer. These should be recorded in notes and referred to in a reporting letter:

- Advise spouses that they should consider entering into an agreement not to change their wills without the consent of the other;

- Advise them that you are acting jointly for both, the information between them is not confidential and, if a conflict arises, you may be obliged to advise the other; and

- Remind them that if one dies the other may want to change his or her will and review some second marriage scenarios.

In considering whether to act for both husband and wife, ask the following questions:

- Did they ask you jointly to prepare their estate plans, or did one say 'I would like you to prepare wills and trusts for me and my spouse?'

- Have you represented either in another capacity?

- Is either a relative of another client whose interest may be affected?

- Is there any fiduciary duty that may arise to some third party to whom you may owe a duty of care or disclosure?

Accepting joint retainers requires some advance planning by the solicitor. By recognizing conflicts and fiduciary duties, considering their implications and dealing with them in a reasoned way, lawyers can avoid claims arising out of breach of fiduciary duty.

3.2.2 Conflict found

British Columbia (Director of Child, Family & Community Service) v. T. (T.)

2008 CarswellBC 883, B.C. Prov. Ct., 21 April 2008, D. Pothecary Prov. J.
[*Headnote, in part; paras. 14-30*]

Children were in joint custody and guardianship of mother and father and lived primarily with father—Director of Child, Family and Community Service sought supervision order—Father resisted Director's involvement and wanted to maintain unsupervised care of children—Lawyer acted as counsel for father and children which, director alleged, was conflict of interest—Director brought application for removal of lawyer as counsel for both father and children—Application granted in part—Children were found to not have been made "party to proceedings"—Children's interests, moreover, were different from father's and could not be met if children and father had same counsel—Lawyer was authorised to continue to act for father only, provided he did not engage in behaviour that could exacerbate relationship between children and Ministry.

Observations:

14 The decision of *R. v. C. (J.)*, [1998] B.C.J. No. 3277 (B.C. Prov. Ct.), Stansfield J., makes it clear that the Provincial Court has, within its jurisdiction to control its own process, the jurisdiction to direct that a lawyer be disqualified from continuing to act. Accordingly I am satisfied that the Director has standing to bring this application in this Court.

15 In reviewing the legislation, it is clear that the Children can only be named as "parties to a proceeding" pursuant to section 39(4) of the *Children, Families and Community Services Act*. That has not been done in this case. In ordinary practice, that is a discretionary order and only made where the child is at least 12 years of age. In the event that a child is named as a party and that it is desirable that the child have his or her own counsel, the arrangement is made with the assistance of the office of the Director. Previously in British Columbia, it was possible for the Court to order the appointment of a Child Advocate to represent children where appropriate. Unfortunately that capability was discontinued a number of years ago leaving this less formal procedure as the only method of which I am aware for ensuring the children can have counsel appointed on their behalf.

16 Even when counsel is provided for children, their role is not clearly defined. In *Dormer v. Thomas*, [1999] B.C.J. No. 1463 (B.C. S.C. [In Chambers]), in a *Family Relations Act* proceeding, Justice Martinson noted that, "Three models are frequently referred to in the literature and cases dealing with legal representation for children: the *amicus curiae*, the litigation guardian and the child advocate." She added that the British Columbia legislation of that time, that allowed the Attorney General to appoint a "family advocate", was a fourth approach that was closest to the litigation guardian and provided that the lawyer appointed "may intervene at any stage in the proceeding to act as counsel for the interests and welfare of the child." (s.2 (2) *Family Relations Act* as it was). The role of such counsel was considered to be "fluid" and seemingly ordinarily not that of a conventional solicitor-client relationship where instructions are given by the client which the solicitor must follow.

17 The issue of the role of counsel for children in child protection matters continues to provoke discussion and is defined statutorily in some provinces such as in Ontario. In *Wilson on Children and the Law*, by Jeffery Wilson and Maryellen Symons, Issue 40 - 5/06, the authors suggest that some consensus has developed, (even where the children themselves are not parties such as in divorce proceedings), [para. 6.22]. This includes, *inter alia*, (1) ensuring "that independent and complete information is before the courts" that might not otherwise be presented by the party litigants, and (2) being independent, both actually and apparently, of the party litigants. It also appears that there is no consensus as to what counsel should do where the child's wishes are not in accord with what the child's counsel believes to be in that child's best interest.

18 I am not going to comment on the allegations contained within the Report to Court and other documentation that has been filed with the various affidavits other than to observe that there seem to be numerous examples where it could be interpreted that the Children, in their dealings with the Ministry, are far more protective of their father than he is of them. Of course, a decision as to whether or not the Children are in fact in need of protection cannot be made until a hearing of the matter.

19 However, I have noted in the contents of the Affidavits of the Children a certain attitude as well as naiveté. For example, they each seem to think that it is their responsibility, not their father's, to keep their house clean. The older child, in reference to the Report to Court, states, "I consider it a whole lot of bull. I don't think my father has a drinking problem - to me, he would have a drinking problem if he drank every day, but he doesn't do that." The 11-year old swears, "My father drinks every so often, but I don't think he has a drinking problem. He usually drinks six packs every time, and, sometimes he gets eight pints, when he wants to celebrate. When he gets the 18 pack, he doesn't drink it all at once. He may drink five to eight beers in a night and save the rest for some other time."

Conclusion:

20 The Children herein have not been made "parties to the proceedings". As such, they do not have standing that would enable them to have counsel appear on their behalf. Accordingly, I find that neither Mr. Foo nor any other counsel can appear for them on this matter.

21 Even if I were to name one or both of them as parties, which I am not currently inclined to do, I am satisfied that although their wishes might coincide with their father's, I am not satisfied that their interests similarly coincide. In fact, I have reached the conclusion that their interests under the legislation, "to be protected from abuse, neglect and harm or threat of harm", among others, are materially different from the interests of their father, which in this case includes resisting the Director's involvement with his family and maintaining his unsupervised care of his children. These interests are so substantially different from each other that I am satisfied that they cannot be met by the Children and their father having the same counsel.

22 The much more difficult question, given the previous relationship that has existed between Mr. Foo and the father with respect to his matrimonial matters, is whether or not to disqualify Mr. Foo as counsel for the father in this case. I am troubled by the actions taken by Mr. Foo in furthering his intention to act as counsel for the Children, during the adjournment period of March 13th and April 8th. During that time, he had the Children interviewed by Dr. Elterman to obtain a

Views of the Child Report, and he had them consult other counsel to receive advice as to conflict of interest and divided loyalties, then to sign waivers of any conflict. This was done without consultation with the Children's mother, who shares joint custody and joint guardianship with their father, and without advising the Director or Social Worker.

23 Dr. Elterman expressly made no evaluation of the children's circumstances and offered no opinion. He was apparently advised that the Director was seeking a supervision order and was also told by the father that he had sole custody and guardianship of the children. This was clearly untrue.

24 The Children spoke separately with the other counsel who advised them of the possibility of their having their own lawyer. They each told him that they did not want to have their own lawyer because they wanted the same things as their father and knew and were comfortable with Mr. Foo. The younger child also told him that the Ministry wants them to live with their mother. This is not true; however that belief has arisen from somewhere.

25 In addition, I am deeply concerned that this was all undertaken by Mr. Foo notwithstanding the Application before the Court to have him removed as counsel.

26 I am further troubled by Mr. Foo's comportment in the Children's presence toward the social worker at the March court appearance. This is detailed in Mr. Gurr's Affidavit and included apparently challenging the social worker to remove them, laughing while saying this, and commenting about how many children die in care. He also commented that the Children would not cooperate with the social worker, and would simply run away. At a later point while arranging a continuation date in the presence of a court official, he engaged in a conversation with the younger girl suggesting that the social worker would not do anything to her if she entered the office as long as he was there, and then laughed. For the purpose of this application, I am accepting this as true, because the initial remarks were also stated in court before me.

27 As a result of these remarks, this behaviour and the contents of the Children's Affidavits, I am very worried that Counsel has so closely aligned himself with the attitude of the father against the Director, that he may be unable to be effective as counsel for the father given the requirements of the legislation, and Counsel's responsibilities as an officer of the court.

28 The relationship between solicitor and client is one that the courts must respect providing that it does not violate either the law or the rules of professional conduct. Freedom of choice of counsel is a very important principle at both common law and, inferentially, under the *Charter of Rights and Freedoms*, that must not lightly be interfered with. In seeking to have Mr. Foo removed as counsel for the father in addition to the Children, this must be a "clearest" case.

29 Although I find that this comes perilously close to meeting that test, I am prepared to allow Mr. Foo to remain as counsel for the father. However, I want to make it very clear that this behaviour on the part of Mr. Foo is unacceptable and must not continue. Children are highly vulnerable to influence and it is the position of the Director that these Children have been unduly influenced to a highly inappropriate degree against the Director whose only task is to ensure their protection. If there is reason for me to believe that this behaviour does continue past today, I am inviting the Director to reapply for Mr. Foo's disqualification.

30 Accordingly the Application is allowed in part in that I find that Mr. Foo may not appear at

this hearing on behalf of the Children. He may continue to act for the father providing that he engages in no behaviour that could be seen as exacerbating the relationship between the Children and the Ministry.

Melnyk v. Melnyk

2008 CarswellMan 474, Man.Q.B., 11 September 2008, Carr J.

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1 The Respondent (hereafter, "the husband") moves to have the firm of Cassidy Ramsay removed as counsel of record for the Petitioner wife (hereafter, "the wife"). Ms. Ryzniczuk is a member of the Cassidy Ramsay firm, and on behalf of the wife she appeared to oppose the application to have her firm disqualified.

Brief Background

2 The wife in the case before me is the husband's second wife, he having been previously married to a woman I will refer to as "Lisa". Cassidy Ramsay acted for the husband in the prior divorce proceedings against Lisa.

3 It has only recently become clear that though the date of this second marriage is (obviously) ascertainable, the date on which cohabitation began is unclear and in issue. Indeed, the date seems to be a moving target and has just recently, due to changes in the wife's position, become an even more important issue in the proceedings now pending.

4 There exists an affidavit of the husband, sworn in the first divorce proceeding, that I am told will shed light on the date-of-cohabitation issue that is in issue before the court in the present action. Indeed, a subpoena has been served on Mr. Ramsay by husband's counsel and it will almost certainly be the case that Mr. Ramsay will be asked to comment on the affidavit that he drew, and his client swore, some years ago.

The Husband's Position

5 The first proceeding was not a house deal. It did not involve a commercial transaction. As indicated, it was a family law file. In such cases, the exchange of information between lawyer and client often includes discussions of a highly personal and, of course, confidential nature. Though the husband's two divorce files are not both before the court at the same time, because there may be evidence from divorce number one that sheds light on the length of the present parties' cohabitation, in this sense the files are, to use the term referred to in the case law, "related".

6 Determining the date a relationship commenced or terminated cannot only be difficult to establish factually, but it can also be difficult to determine legally. Often lawyers will be presented with the facts and will then, legitimately, be asked by their client in words like: "You tell me. On the facts I have given you, were we cohabiting within the legal definition of that term on May 1st or not?" Thus, though the client is responsible for relating the facts, often the lawyer gives advice that results in the client swearing to a date of commencement or cessation of

cohabitation that is a direct result flowing from counsel's answer to their question. This can make the advice given by counsel highly relevant when a party is asked why they swore to a particular date.

7 On behalf of the husband, Mr. King says that his client should not be put in a position where opposing counsel in the instant case is cross examining her partner, potentially to the detriment of the husband. Further, Mr. King argues that though the first file is long closed, there was an overlap between the dates during which the present parties cohabited and the period of time during which Cassidy Ramsay acted for the husband. And finally, will counsel for the wife, or indeed outside counsel hired to do the cross-examination only, be reluctant to cast Mr. Ramsay in a bad light, thereby compromising the wife's representation?

The Wife's Position

8 The wife's position can be summarized in point form:

> 1. The husband ought to have raised the conflict issue much earlier. Delay prejudices the wife.
>
> 2. There is no conflict. Mr. Ramsay was the husband's lawyer, not Ms Ryzniczuk, and Mr. Ramsay "cannot recall" having discussed the old divorce file with his partner.
>
> 3. If need be, Ms. Ryzniczuk will have a lawyer from another firm cross-examine her partner.
>
> 4. If the husband is worried that evidence from divorce number one places him in a bad light, this problem will come out regardless of who is acting for the present Petitioner.
>
> 5. Mr. King ought to have cross-examined Mr. Ramsay on his affidavit if he disputed the averments therein. The sworn evidence of Mr. Ramsay that no conflict exists remains uncontradicted.

The Law

9 Dealing with the last point raised by the wife, when a conflict of interest is alleged, lawyers do not decide the issue, judges do.

10 Whether a law firm ought to be removed from the record often requires the court to consider multiple factors. The instant case, however, can be decided once a conclusion is reached as to whether the firm of Cassidy Ramsay has access to confidential information from a related matter. From *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.) at 46 and following:

> 46 In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the

> solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge.
>
> 47 The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship.

Conclusion

11 I need not come to the conclusion that Mr. Ramsay's averment that he "does not recall" he and his partner having discussed divorce number 1, is false. A discussion may well have taken place and Mr. Ramsay, an honorable gentleman, might have declined to be more sure of himself because of the volume of work he is known to carry. Further, he neither admits nor denies discussing divorce number two with his partner.

12 Cassidy Ramsay is a small firm and Mr. Ramsay and Ms. Ryzniczuk practice family law more or less exclusively. Mr. Ramsay is well known to have hundreds of active files on the go at any given time. I am simply not able to conclude that discussions have not taken place. I want to be absolutely clear, however, that I am not for a moment suggesting that either counsel from the Cassidy Ramsay firm has intentionally misled the court.

13 I am satisfied that because Cassidy Ramsay acted for the husband on his first divorce and because of the particular and somewhat peculiar facts of this case, the firm cannot act for the wife on the matter presently before the court. Though it is not always the case that two divorces involving the same party are "related", here the two are. And the conflict is exacerbated by the decision that the husband has made to call Mr. Ramsay as a witness. As previously stated, the contentious issue in divorce number two involves determination of the date cohabitation commenced and Mr. Ramsay is expected to have information as to how it came about that the husband swore to a particular date of commencement of or termination of a relationship.

14 And finally, though it is regrettable that the issue of conflict was not raised sooner thereby avoiding the cost occasioned by a forced change in counsel, the delay, as earlier explained, was not avoidable.

15 The firm of Cassidy Ramsay is removed from the record as counsel for the wife. Having said that the delay in bringing this motion is understandable, unless counsel feel it essential

to argue the point, I would be inclined to leave costs in the cause. Though the husband has prevailed, the wife will have an additional burden, through no fault of her own, resulting from having to brief new counsel.

3.2.3 Conflict not found

Seigel v. Seigel

2008 CarswellOnt 6164, Ont.Sup. Ct. J., 23 June 2008, Perkins J.
(*Headnote, in part*)

Lawyer was retained by PW for her separation issues in 2001—Same lawyer was retained by mother [S] for separation issues in 2003—Shortly after mother [S] and father [husband of S] separated, father began dating PW—PW [whose separation issues not yet resolved] asked lawyer if there was conflict of interest problem, and lawyer advised that there was not—PW and her husband signed separation agreement in 2006, and lawyer continued to act for mother [S]—Mother [S] and father had three case conferences, two consent court orders, several rounds of documentary disclosure, oral questioning, one contested motion, and partial separation agreement regarding parenting issues—Father and PW began cohabiting in 2006 and became engaged—Father brought motion for removal of mother's lawyer as solicitor of record based on conflict of interest [because he was continuing to represent PW whom father was dating and to whom father later became engaged].

Motion dismissed—Engagement in disclosure process and argument of motions before taking steps to remove lawyer for conflict of interest tipped balance against party seeking to remove lawyer—When lawyer acting for PW began acting for mother, there was no way he could have guessed that potential conflict situation would develop, and there was no real potential for conflict until PW and father began to cohabit in 2006—Father did not take steps to deal with alleged conflict issue until mentioning it in letter in 2006, but disclosure continued after letter—Given how situation developed and nature and extent of knowledge in question, reasonable person fully informed of circumstances would not think that mother's lawyer had sufficiently relevant confidential information, or that there was any real risk that information would be used to detriment of PW, father or mother.

"A motion judge erred in removing plaintiff's counsel as solicitor of record."

***The Lawyers Weekly,* 21 November 2008, p. 16**

Application by Plaintiffs, to set aside an interlocutory order dated April 7, 2008 removing C, a plaintiff's nephew, as solicitor of record for plaintiffs. The Application was denied. The court concluded it was imprudent and improper for C to have contacted corporate counsel of a non-party in the circumstances, and that he was in breach of the *Rules of Professional Conduct*. In the underlying claim, plaintiff sought damages for injuries sustained in a slip and fall in defendant's movie theatre. There were also third-party and fourth-party claims. Leave had been granted to appeal the order on the grounds that there was good reason to doubt its correctness.

Appeal of Application Order, allowed. C was reinstated as counsel. Before asking the questions, C had ensured that the non-party was not involved in any way in the proceeding and that it was not represented by defendant's counsel. There was no conflict of interest, and the Rules had no relevance or application to the case. Parties were entitled to their choice of counsel, and that right ought not to be lightly interfered with unless there were compelling reasons to do so. There was no conduct by C, when considered objectively, that brought into question public confidence in the justice system. This was a tactical motion that brought into question the professional integrity of defendant's counsel, resulting in aborted mediation and three separate court appearances, and significant costs were justified in the circumstances. Applicant was awarded $27, 500 in costs.

Gardner v. Gardner

(2007), 54 R.F.L. (6th) 267 (Alta. Q.B.), A.B. Moen J.
[*Headnote*]

Spouses were involved in dispute over matrimonial property. Counsel B for defendant husband objected to counsel C appearing on behalf of plaintiff wife. Objection stemmed from fact that legal assistant at C's firm previously worked for B's firm and had been involved with matter. Counsel B brought application to dismiss C's firm from file.

Application dismissed. C's firm had complied with *Code of Professional Conduct* concerning conflicts of interest and adequate institutional measures were put in place. Application of two-part test set out in 1990 decision by Supreme Court of Canada. [C's] assistant received confidential information [while employed by B's law firm]. However, risk that it would be used to prejudice [B's] defendant [client] was minimized. Inference that confidential information had been imparted was rebutted by institutional measures in place and assurances from lawyers at C's firm. Institutional barriers included: assistant was not permitted to work on file or discuss it with anyone at C's firm, memorandum was circulated setting out circumstances and admonishing everyone at firm not to discuss file with assistant, stating that violation of this would result in sanctions. Affidavit from lawyer at C's firm indicated that, other than seeing parties' names on statement of claim, assistant received no further information about file. No unreasonable delay in implementing institutional measures, and no confidential information was transferred during delay. C's firm first became aware of assistant's previous involvement when she was asked to work on file, and within days, institutional measures were put in place.

Robertson v. Slater Vecchio (A partnership)

(2008), 295 D.L.R. (4th) 472 (B.C. C. A.), Newbury J.A. (for the Court)
[*Headnote*]

Plaintiffs in various personal injury lawsuits were represented by law firm S, and defendants were represented by law firm H. Lawyer at firm H accepted employment offer at firm S. Appendix to Law Society's Professional Conduct handbook contained guidelines for avoiding conflicts of interest in transfers of lawyers between firms (Guidelines). Implementation by firm S of some firewall measures described in Guidelines was delayed, and some of Guidelines were not followed. Defendants in lawsuits (applicants) brought unsuccessful application to restrain firm S from acting for plaintiffs based on alleged breach of confidentiality or unacceptable risk of disclosure. Chambers judge held that there was substantial compliance with Guidelines. Chambers judge concluded that knowledgeable and reasonable client, witnessing firm S's good faith efforts to protect against disclosure, would conclude that no unauthorized disclosure had or was likely to occur as result of lawyer's transfer. Applicants appealed.

Appeal dismissed. Court must determine whether, on facts of case, lawyer and firm have met burden of "reasonable member of the public" test set out in seminal Supreme Court of Canada decision. Chambers judge correctly applied formulations provided by Supreme Court of Canada. Chambers judge did not err in not regarding non-compliance with certain Guidelines as fatal to firm S's position.

"Conflict suit against Jehovah's Witness Lawyers tossed"

Schmitz, Cristin, *The Lawyers Weekly*, 18 July 2008, pp. 1, 28
[*in part*]

An Alberta Queen's Beach judge has thrown out a novel civil action for misrepresentation and conflict of interest against two Jehovah's Witness lawyers who represented a leukemia-stricken teen and her mother in opposing blood transfusion treatment.

On June 27, Justice Allan Macleod granted summary judgment to Shane Brady and David Gnam of W. Glen How and Associates in Georgetown, Ont., which does the legal work of the Watch Tower Bible and Tract Society of Canada.

The judge held there was no chance of success for the suit launched by Lawrence Hughes, as administrator *ad litem* of the estate of his daughter Bethany, a 16-year-old Jehovah's Witness who died in 2002 of a virulent cancer that was not arrested by court-ordered chemotherapy and blood transfusions.

Gnam [was among lawyers who] represented Bethany, and Brady represented her mother, Arliss, in the clients' unsuccessful appeal of 2002 court order that made Bethany a temporary ward of the state on the basis that her religiously-motivated refusal of the blood transfusions risked her life and thus demonstrated that she was incapable of exercising independent judgment about her medical care.

Justice Macleod found, however, that Bethany was indeed competent to give legal instructions, had received independent legal advice from several lawyers, including some who weren't Jehovah's Witnesses, and that she had a sincerely held religious belief against blood transfusions.

In the circumstances W. Glen How and Associates was not precluded from acting for Bethany or her mother, Justice Macleod held.

However the judge also pointed to Alberta's *Code of Professional Conduct* which he said tells lawyers they must not act in matters where their objectivity would be impaired such that they would be unable to represent their client properly and competently.

"There is little question that had Bethany been willing to accede to blood transfusions, Mr. Gnam would [because of his Jehovah's Witnesses religious beliefs] have been in a hopeless conflict," Justice Macleod commented.

. . . .

In addition to conflict of interest, the Hughes estate alleged "misrepresentation and deceit" against the two lawyers. The judge also dismissed those claims. Gnam said the plaintiff did not produce any evidence against himself, Brady or Bethany's church.

. . . .

According to Justice Macleod, "what Mr. Hughes is really saying is that Mr. Gnam and Mr. Brady cannot advise their clients objectively because they too are bound by the religious teachings and the instructions of the church, their client, and they are incapable of objective representation on the issue of blood transfusions."

However, he noted that Bethany received advice from four other lawyers, including David Day and Eugene Meehan, who are not Jehovah's Witnesses.

Justice Macleod concluded the youth understood her situation and was competent to give instructions. "No doubt the amount of independent advice that she did receive was due to the fact that Mssrs. Brady and Gnam were persuaded as to the wisdom of such advice and were alive to" criticism that she was being pressured by family or officials of her church to refuse the blood transfusions, he remarked.

Justice Macleod said he was confident that Bethany was aware of medical advice that the transfusions were essential to her survival. "I am satisfied that there is no [conflict] claim against Mr. Gnam and Mr. Brandy because of the independent advice she received from other lawyers,

and in particular Mr. Day," he concluded. The fact that court-ordered treatment didn't save her "cannot be laid at the feet of Bethany's legal advice."

Turning to the allegation that the lawyers' alleged deceit and misrepresentations caused Bethany to refuse transfusions and thus contributed to her death, Justice Macleod held the claim stood no chance of success. "It is abundantly clear to me on the evidence that Bethany refused blood transfusions out of a deep and abiding conviction that these were contrary to the teaching of her faith," he said. Moreover, he noted that Bethany did in fact receive the court-ordered blood transfusions, but died anyway.

Implicit in the estate's claims is the idea that the religious opposition of Jehovah's Witnesses to blood transfusions is misguided and that the result of those teachings developed in Bethany a conscience that prevented her from responding positively to the recommendations of her doctors, said Justice Macleod.

However, the Charter protects freely held religious beliefs, he stressed.

3.3 Relationships with Clients – Rendering Services

3.3.1 Generally

Coates v. Coates

(2009), 63 R.F.L. (6th) 130 (Man. Q.B.), Duval J.
[*Headnote, in part*]

Parties were involved in matrimonial litigation and husband attended examination for discovery in January 2004—Order of November 19, 2004 required husband to comply with all undertakings given at discovery and husband's lawyer suggested compliance date of December 7, 2004—Wife's lawyer sent numerous letters to husband's lawyer for compliance with outstanding undertakings and husband provided some answers sporadically over years—Wife filed summary of assets and liabilities in February 2002 and husband provided summary in November 2007—Wife alleged that husband failed to comply with 2004 order to provide all information, including up-to-date affidavit of documents, response to wife's summary of assets and liabilities within two weeks, appraisals, complete listing of crop and livestock inventory and income tax returns for years 1997-2002—Wife brought motion in 2007 for order of contempt against husband and for order requiring compliance with outstanding undertakings—Husband explained he made substantial efforts to comply, that some undertaking were not answered because third parties failed to provide information and that he had refused, not undertaken, to provide up-to-date affidavit of documents.

Application granted—Evidence of husband's contempt was clear and unequivocal—Several years elapsed between compliance order and time of contempt hearing and husband had ample opportunity to comply with outstanding undertakings—Ample evidence supported conclusion that husband willfully disregarded terms of order and husband's conduct unnecessarily prolonged proceedings—Failure to provide up-to-date affidavit of documents was not result of alleged refusal at discovery as husband's lawyer made no such refusal—Appropriate penalty for contempt was order of costs against husband related to wife's efforts to obtain full compliance based on solicitor client costs—Penalty of costs award was appropriate in view of husband's attempts to comply by filing substantial book of answers to undertaking in December 2004 and sporadically thereafter.

"Speaker's Corner: The duty to represent even the unpleasant client"

Morton, James, *Law Times*, 15 June 2009

Imagine two potential civil litigation clients. Both present you with problems well within your expertise and both satisfy your financial retainer requirements. Neither asks you to do anything unethical or underhanded.

The first is a quiet, respectful person who appreciates the limits of the law and wants you to pursue a clearly valid claim. The other is an unpleasant, extreme individual with a warped view of justice and a claim that is marginal.

You explain the law to both clients together with the likely results of litigation. Both ask you to go ahead and issue a claim. What do you do?

The new lawyer's oath to be taken by lawyers in Ontario says: "I shall neglect no one's interest and shall faithfully serve and diligently represent the best interests of my client." The new oath is, in this regard, the same as the barrister's oath and mandates that a lawyer accept any non-frivolous case. On the surface you are ethically obliged to assist [both] the pleasant and the unpleasant client.

As Lord Edward Pearce said in *Rondel v. Worsley*: "It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case.

Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter. And that would be the inevitable result of allowing barristers to pick and choose their clients. It not infrequently happens that the unpleasant, the unreasonable, the disreputable and those who have apparently hopeless cases turn out after a full hearing to be in the right."

Everyone is entitled to justice. It is easy to see that when representing, say, an accused charged with a brutal crime. Memories of *To Kill a Mockingbird* and *Atticus Finch* spring to mind. It is less obvious when dealing with a civil client who is claiming something that seems unjust or excess. But civil clients are entitled to access to the courts as much as any other clients.

Especially in a time when the self-represented client is commonplace, the need for a lawyer to represent that unpleasant civil litigant is even more important. The unpleasant litigant will go ahead and litigate whether represented or not—at least when a lawyer is involved there is some hope the case will be decided on its merits.

This last point is of considerable importance—the unrepresented client will often lose because of procedural errors and for cases to be decided on process rather than merit is a scandal

to justice. Fairly put and honestly argued, even the unpleasant client's case may have merits the lawyer does not see.

The lawyer's job is not to judge but to advocate, and to advocate on behalf of all who properly seek the lawyer's service. It is the client's case and not the lawyer's case. There are not two judges in Canadian courts—our [appointed] judges are well able to decide the merits of cases and that is their role.

If all lawyers subscribed to the ethic that they would only represent "causes that contribute to the common good" (as some have said is the proper ethical position) our system would collapse.

A judge is to judge; that is not the lawyer's job.

All that said, the unpleasant client will bring you no glory. You will probably lose and you will probably be blamed for losing. Some will think you lack "common sense" for bringing a problematic claim. The money from fees will not redeem the heartache and sorrow. You will spend hours on the telephone explaining why the process is as it is. Your task will be thankless.

But it is your duty. Being a lawyer comes with privileges but also responsibilities; the duty to take the unpleasant client is one of those duties.

"Why Thinking Like a Lawyer Is Bad For Your Career"

Melcher, Michael, *abajournal.com*, 15 April 2009

The legal field doesn't constrain people's potential. But it tends to constrain their way of thinking about potential. Lawyers sometimes don't see the possibilities before them and they therefore don't act in ways that take advantage of those possibilities. At the extreme, lawyers become the keeper of their own cells, walled off from new ideas and energies. The reason? It has a lot to do with issue-spotting.

When we spot issues—when we "think like a lawyer"—we take things apart, compare possibilities against evidence, anticipate cracks in arguments and contemplate risks. Lawyers who work for the ExxonMobil do this, and so do lawyers with the American Civil Liberties Union. The practice cuts across immigration law, tax law and any other kind of law. It's a default method of legal analysis.

A lawyer who correctly spots issues can get people out of jail, or put other people in. Good issue-spotting ensures that mergers work, that business is compliant, and that pesky relatives can't mess with the estate. But thinking like a lawyer doesn't work so well when you apply it to your own career.

When you apply thinking-like-a-lawyer to your own career—whether your objective is to build your business, develop a new specialty, or contemplate alternative paths—there's a good chance you will:

- Analyze rather than explore.
- Focus on flaws and potential problems.
- Look for clear precedent.
- Require solutions of general applicability ("what would work for lawyers") rather than specific applicability ("what would work for me").
- Defer action in situations of uncertainty.
- Be skeptical about possibilities.
- Avoid taking risks.

What works for legal analysis doesn't work for personal growth. That's because the processes of attaining career fulfillment and growing as a professional are not all that susceptible to logic.

When it comes to careers, it's only through action that we acquire relevant information. It's the doing that builds skills and provides reliable data. It's the exploration that leads to certainty. (For a compelling description of this process, read Herminia Ibarra's modern classic, *Working Identity*.) We imagine we can think our way to insight, but insight is something that frequently shows up only after action has been taken.

The bottom line is that when you apply thinking-like-a-lawyer to your career, there's a good chance you'll conclude that future possibilities or unfamiliar behaviors probably won't work. So you probably won't try, or try hard enough. You will be mostly content you are doing the logical, prudent thing, but in fact you will be foreclosing possibilities before they have a chance to develop.

If you don't want to be overly stuck in thinking like a lawyer, what should you do instead? …. You can try innovative ways of evaluating your progress or assessing your true interests. ….

But, basically, not thinking like a lawyer in your career comes down to considering that the path from here to there is a zigzag, not a straight line, and that you are better off exploring and experimenting than assessing things through detached analysis. Not thinking like a lawyer asks you to give your hopes some room to grow.

"A nightmare in family court"

Cline, Bev, *National*, June 2008, pp. 27-28
[*in part*]

So what can be done to ease the problems created by self-represented litigants in family law? To begin with, family law practitioners want to make it extremely clear that the answer is not, repeat, not, to ask them to do mere *pro bono* work.

In family law, many say, there's already a *de facto pro bono* system at work anyway. "Many family lawyers actually do part of their work for free," says Jennifer Cooper, Winnipeg Lawyer. "Lawyers are human; you begin to care about your client in what are often very difficult emotional situations."

And it can be a struggle for family lawyers to collect from clients in any event. "We're talking about individuals, as opposed to corporations who have budgets for legal matters," says Cooper. "In family law, every client is, and feels, poorer than before their divorce." Legal services that are billed but not paid end up as effectively *pro bono*.

Part of the answer might lie in bolstering the family bar itself. Family law hasn't always enjoyed the same aura or cachet as other practice areas, says Elaine Keenan Bengts, Yellowknife lawyer. "Most of us do family law because we're passionate about it. Family law is not a glory area—it can be depressing and emotionally draining. We've got to find some ways to bring young lawyers into this field."

In Ontario, adds Gerry Sadvari, Toronto lawyer, the family law bar is aging. At the same time, "There's a shortage of opportunities for young litigation lawyers to get on their feet in court. Is there a way that we can bring these lawyers and self-represented litigants together?"

Cooper has thought a lot about access to justice issues for the middle class in general, and sees the insurance model as one possible solution. "In the U.S., people buy insurance for legal costs [of all kinds]," says Cooper. Life insurance, pet insurance, home insurance—why couldn't legal insurance become an accepted form of protection?

But none of these potential solutions, useful as they might be, focuses on the fundamental issue, which is clients: a growing number of them simply choose to do without a lawyer. One potential inference that can be drawn from that fact is that the standard family law system—two lawyers, judge, and a lot of time and money—isn't working very well for them.

It isn't as if family law cases with full legal representation tend to proceed quickly and quietly, providing rapid resolution for parties at minimal cost and trauma. That suggests that any real solutions to self-representation are going to have to be more structural, affecting court rules, the role of judges and lawyers, and the costs in time and money of addressing marital breakdowns.

Clients are making clear that they can't or won't use the family law system we've created. Perhaps the real question is: How will the system respond?

Hickey Estate, Re

2002 CarswellNfld 228, NLSC[TD], 03 September 2002, Handrigan J.
[*Headnote*]

Testatrix died in 1997, leaving will which appointed her son-in-law, M, as executor—Testatrix was predeceased by husband and survived by four sons and one daughter—M was lawyer and testatrix had been living with him and her daughter during last years of her life—Will left all of residue of estate to son, W— Main asset of estate was testatrix's house which W claimed as part of residue of mother's estate—However, daughter also claimed house on basis of alleged agreement amongst brothers that she should have it for looking after mother for many years—W asked M to probate will on several occasions but M had not done so—W applied to court for order removing M as executor and directing him to produce original will so that W could apply for letters of administration,

Application granted—W was not able to make legal claim to testatrix's property while it was suspended in her estate—M had not put forward any formal response to explain why he had not probated estate, although more than five years had passed since testatrix's death—M was obliged to follow instructions in will when he distributed estate regardless of how he was affected by distribution personally—M's refusal or neglect to probate will was attempt to frustrate W's efforts to solidify his claim to family home—M as executor was therefore in conflict with W as beneficiary and on that basis should not be permitted to assume role as executor—Furthermore, as it was reasonable to assume that M had original will in his possession, he was ordered to deliver it up to court.

"Burned-Out Lawyer Plans to Opt out, One Among Many on 'Dark Side' of Law"

Neil, Martin, *abajournal.com*, 17 February 2009

When Glen Rosenberg realized he'd let the statute of limitations expire in a personal injury case for the first time in nearly 20 years of practice, he did the right thing.

First, he notified his malpractice carrier. Then he told his client, reports the Connecticut Law Tribune. At a grievance hearing last month in Hartford Superior Court, the 46-year-old solo practitioner was given a 30-day suspension.

But he's going to find something else to do, period, Rosenberg told Judge James Graham at the Jan. 22 hearing, explaining that he made the decision to stop practicing on the spot, as soon as he realized he'd missed the filing deadline.

"I burned out," he told the judge. "It just seemed like endless, endless, endless problems. You put out one fire or flame and another one erupts, and for the last year of my practice I did it making virtually no money at the practice of law. I suppose I was near to depression."

Rosenberg is far from the only lawyer to feel this way after many years of hard work. And it seems that attorneys who work in small firms are often the hardest-hit by the difficulties of their jobs—which have been exacerbated by the current economic crisis, the Law Tribune recounts in an article about what it characterizes as "the dark side of law."

Complaints to the Office of Chief Disciplinary Counsel were up 30 percent last year, totaling 430 at the end of 2008. And, while some involve intentional malfeasance, a significant number simply concern lawyers who can't keep up any longer with the pressure of daily practice, Chief Disciplinary Counsel Mark Dubois tells the legal publication.

His own job, these days, is "almost like social work," he says, and often involves "spending time on the phone with doctors for lawyers who are coming apart."

"The New white knight: divorce lawyers"

Hampson, Sarah, *The Globe And Mail*, 05 March 2009, pp. L1—L2

I have a confession to make. Several years ago, when I was in the midst of my divorce, I had a mild case of transference.

I began to think of my divorce lawyer as I once thought about my obstetrician. I adored him, in a platonic sort of way, because I trusted him to deliver me from a painful situation I could no longer avoid.

A divorce proceeding makes you needy, angst-ridden and emotionally fragile.

The person you once thought was going to love you forever becomes someone you barely recognize.

Most people can't go through a divorce by themselves, and often those who think they can shouldn't. You need help.

That vulnerability—the most acute I have ever felt—is worth noting, however embarrassing, because it points to the power that family lawyers wield and how divorcing spouses need to educate themselves about how to manage that relationship.

It also helps to know what to expect from the whole process.

Phil Epstein, a noted family lawyer in Toronto, once asked attendees at a workshop about divorce what they thought their most important decision would be when they were about to embark upon a legal separation.

"When to tell the kids?" one woman suggested.

Mr. Epstein shook his head.

"Who is going to move out of the marital home?" a man asked.

Another shake of the head. There were several attempts at the right answer before Mr. Epstein told them what no one had mentioned. "The most important decision you will make is your choice of lawyer," he said.

That choice of counsel sends a signal to the opposing side. "Knowing who the counsel is tells me an immense amount about the case," Mr. Epstein explains. "It tells me whether the lawyer is going to simply accept instruction and push the client's agenda or whether the lawyer will take a more holistic view of the matter and encourage the client to be flexible and reasonable."

In other words, who is on your side and who is on the other will determine the kind of legal exchange you will have and how cost-efficiently a settlement will be reached.

Each side needs to realize that there is no such thing as absolute victory or even justice, which is difficult to accept when emotions are running high.

Mr. Justice Harvey Brownstone has seen many divorce cases end up in court because the estranged spouses expect justice for the emotional injury they feel they have suffered. "They think that they're going to come out of this with some sort of satisfaction. They are looking for power or control and vengeance. ... The satisfaction level is rock bottom. Family court is not in the vengeance business," says the author of the recent book *Tug of War: A Judge's Verdict on Separation, Custody Battles and the Bitter Realities of Family Court*.

Interestingly, family lawyers are often ill-equipped to practise the art of negotiation, says Victoria Smith, a collaborative lawyer in Toronto. "Ninety-eight per cent of cases settle prior to trial—very few cases, less than 3 per cent, have final trial—and yet most legal training continues to be focused on developing courtroom and advocacy skills," she points out.

The lesson: Shop around for your lawyer. "Ask them if they have had additional training in negotiation," Ms. Smith advises. "Do they understand non-defensive questioning skills and empathetic listening? Clients need to know how often they go to trial. And they should ask, 'Are you going to negotiate on my behalf? Is this a case that will be based on my rights and obligations or on what my goals and interests are?' "

Still, the selection of the right lawyer doesn't eliminate the dependency a client often feels in the professional relationship. The lawyer becomes a confidant. You are divulging emotional information to him that you may not even have told your mother. You explain your fears. You

have to strip naked financially. And with the future uncertain, he seems to be the only person who can somehow secure it.

More than once, my lawyer pushed a box of tissues across his big, wooden desk in my direction. He listened and understood my personality—enough so he could effectively negotiate on my behalf—but he also knew when to draw the line. "I am not your therapist," he told me once in the kindest possible way.

At the end, when a separation agreement was reached, he and I went to lunch, and I told him that my only complaint was that he should have explained, early on, how and when I should communicate my concerns. In my high-anxiety state, I had been in the habit of sending him e-mails about every issue as they arose. His e-mail response, typically, was just a brief acknowledgment when I think I was expecting some kind of reassurance. It would have been more efficient, I told him, if he had simply told me to save up my list of concerns for one of our $400-an-hour meetings rather than send e-mails for which I was charged a nominal fee for him to read.

It's hard to accept the fact that your precarious future is not your lawyer's only concern. I later realized that I was not alone among the damsels in distress who look to their lawyer to rescue them. He paraphrased an e-mail to me from a female client who was terribly upset that he was going on holiday when she was worrying about how she was going to manage. The tone of her note was "How dare you leave now?"

Why does he do family law, I wondered. "Because you feel that you are helping people through one of the most difficult life transitions," he said.

Mr. Epstein was more direct: "One of the most common characteristics of family lawyers is that they have rescuer personalities."

Which is good news, I guess, because it means that as much as we need to be rescued, they want to rescue us. Willingly, my lawyer was my fireman fantasy. It was just too bad the city wouldn't pick up the tab for getting me out of my burning house.

"Law Firm Recipe for Disaster: High Debt, Low Productivity, Weak Leaders"

Cassens Weiss, Debra, *abajournal.com*, 20 November 2008

A legal consulting firm's analysis of law firm failures suggests that "poor financial hygiene," including high debt and low productivity, are danger signs of a possible failure.

Other problems are weak leadership and an unrealistic or nonexistent long-term strategy, according to the report by Hildebrandt International. The consulting firm urges law firms to diagnose and tackle problems early to prevent them from deteriorating into full-blown dissolutions, according to a summary of the report in the National Law Journal.

Hildebrandt analyzed why more than 80 law firms failed, and found that the problems often snowballed after events such as partner defections, failed mergers or overexpansion. Outside events—such as the recent Wall Street meltdown—can also expose and worsen existing problems.

The report concludes that Heller Ehrman and Thelen probably won't be the only law firm to fail. "Recognizing that the legal market is continuing to segment, we expect that we will continue to see a steady number of both mergers and dissolutions, even after the recovery from the current economic downturn," it said.

"Transition to retirement difficult for many lawyers"

Mutton, Valerie, *The Lawyers Weekly*, 28 November 2008, p.24
[*in part*]

When Irwin Hamilton, a sole real estate practitioner in an east central Ontario town, decided four years ago that he wanted to retire, he didn't just close the door of his practice and transfer his files. Instead, he made a five-year plan, recognizing the importance of a gradual transition to retirement.

"It is not easy to retire, to let go of the contacts and knowledge you've built up, he said. But Hamilton, now sixty, says "I realized I was not exempt from the aging process and wanted to retire while I was in high demand."

According to Statistics Canada, there are 7.2 million Canadians between the ages of 45 and 59—and they'll all be thinking about retirement within the next ten to fifteen years. Planning—for both finances and lifestyle—is crucial to ensure an emotionally satisfying and prosperous exit from the work-force.

Hamilton's solution for an orderly retirement was to bring another lawyer in to train to replace him as he gradually phased himself out of the practice. He remained in the office for the

first year or so after the new lawyer came on board, but decided it would be fairer to his replacement if he wasn't on-site all the time.

Now, he lives in both Squamish and Kelowna, B.C., and works remotely by telephone and Internet, answering questions for the Bowmanville, Ont.-based office.

Technology provides him the opportunity to live the retirement lifestyle he wants, but also allows him pass on his knowledge from a distance. He says it is working well, but cautions lawyers that when you are thinking about retirement, it is no time to have an ego.

"You have to recognize that you must give the replacement lawyer responsibility for your files and the opportunity to achieve the income that goes with it—you can't be jealous. You have to be okay with becoming more and more of a bystander as your replacement learns your job."

Lisa Vogt, regional managing partner of McCarthy Tetrault in Vancouver, said that the principal issues of importance to any firm are managing clients to other members of the team. She said that her firm recognizing that an abrupt retirement is hard on both the lawyer and the firm. Her firm has a mandatory retirement age 65, and she said "we have the managing partner initiate discussions about retirement and personal planning to manage the transition several years in advance."

She agreed that one of the biggest issues for upcoming partner retirement is encouraging the partner to relinquish responsibility and allowing other members of the team to have a bigger role—especially if income will be affected.

Vogt said: "Lawyers must start thinking about retirement when they are juniors in their thirties. It's part of taking ownership of their careers."

"The Law Explored: the lawyer-client relationship"

Slapper, Gary, *The Times*, London, 09 January 2008

"I don't want this maniac as my lawyer," a man named Victor Martinez said to a judge in a case in New York in 2006. He was referring to his defence lawyer, Mark Brenner. According to a complaint against Brenner to be heard by a board that monitors court-appointed lawyers, when Martinez tried to sack him in court, wondering out loud if he "smokes crack", Brenner allegedly kicked him. "Mr. Brenner, come on," Justice Troy Webber said, "what's wrong with you?"

Kicking clients, it goes without saying, is against the professional rules in all jurisdictions. But what are the rules that govern the advocate-client relationship? In England and Wales, barristers are governed by a code of conduct. A barrister has an overriding duty to the court to act with independence in the interests of justice; this duty has statutory force for everyone who exercises a right of audience in any court (Courts and Legal Services Act 1990 as amended in 1999).

The code doesn't deal specifically with prohibiting violence against clients. It does, though, say that the barrister must "promote and protect fearlessly" and by "all proper and lawful means" the best interests of his client. In a case in 1967, Lord Denning said that the barrister's obligation was to represent his client "no matter how great a rascal the man might be". It would be difficult to argue that there are any situations in which a client's interests would ever be advanced by his being kicked.

Not surprisingly for a learned profession famed globally for the high quality of its advocacy, the Bar's code is very thorough and comprehensive. For example, barristers mustn't adduce evidence obtained other than "from or through" the client, and a barrister mustn't make a submission that he does not consider to be properly arguable.

Additionally, a barrister mustn't make statements or ask questions that are "merely scandalous" or intended only "to vilify, insult or annoy" anyone; and mustn't impugn a witness unless in cross-examination he has given the witness an opportunity to answer the allegation.

In general, any ordinary misjudgement by an advocate about how he's conducting a case won't be enough to allow an appeal if the client loses. However, a criminal conviction may be quashed as unsafe when the accused seems to have been prejudiced by "flagrantly incompetent advocacy".

While clients mustn't be kicked, neither must lawyers be assaulted. In 1979, the Supreme Court Appellate Division in New York held that a defence lawyer can withdraw from a case if intimidated by the threat of violence from a client. The court held that a legal aid counsel was allowed to withdraw after her client, who'd already assaulted another legal aid counsel, threatened her with bodily harm.

Lawyers, though, don't enjoy total protection from clients. When he was a young barrister in 1806, Lord Campbell took on a client accused of a crime. After consulting with the prisoner in the dock, he successfully represented him, won his acquittal and his freedom. But when the victorious barrister put his hand in his pocket after the case he found his wallet had gone.

"High-Functioning Alcoholic Lawyers May Defy Stereotypes"

Cassens Weiss, Debra *abajournal.com*, 14 April 2009

Lawyers and other professionals who are high-functioning alcoholics may defy the stereotypes—that alcoholics can't maintain a career or care for their families, or that alcoholics always drink alone.

Personality traits such as perfectionism, overachiever tendencies and a workaholic nature may help high-functioning alcoholics succeed professionally despite their disease, according to mental health counselor Sarah Allen Benton, writing in the Complete Lawyer.

She writes that it's important for alcoholic lawyers to reach out for help, even though they may appear successful.

Benton cites statistics from a study in the International Journal of Law and Psychiatry that found problem drinking in 18 percent of lawyers who practiced for 2 to 20 years and in 25 percent of lawyers who practiced for 20 years or more.

High-functioning alcoholics may be well-respected, but they experience a craving to drink more after one alcoholic drink, they obsess about their next drinking opportunity, they display personality changes when intoxicated, and they repeat unwanted drinking patterns and behaviors, according to the story.

"Unethical Practices by Family Law Lawyers and Flaws in the Legal System"

Proceedings of the Special Joint Committee of House of Commons and Senate on Child Custody and Access, Issue No. 37, 25 November and 01 December 1998, pp. 16-17.

Many witnesses, including several lawyers, alleged that some family law lawyers make a practice of escalating the fight between divorcing parents. These practices include encouraging their clients to make false claims of abuse and encouraging women to invoke violence as a way to ensure an advantage in parenting and property disputes. [From testimony to the Special Joint Committee:]

> President Lincoln said that there is nothing more dangerous to society than a hungry lawyer. Okay, we now have 25,000 lawyers practicing in Ontario, whereas when I started there were 5000. The legal problems the public faces have not increased fivefold. So what we have here is 25,000 hungry lawyers. (Richard Gaasenbeek, Lawyer, Meeting #12, Toronto)
>
> They go into a lawyer's office, though, when they're in a custody access dispute or a divorce situation, they hand over a blank cheque to someone they've never met

> before, and off they go on this merry ride through the justice system that drains their bank account. That moment, for Canadians, as consumers in our justice system, is a real disgrace. (Michael Cochrane, Lawyer, Meeting #13, Toronto)

> I told the lawyer I didn't know what my rights were, that I wanted to end my marriage, and I wanted to know, if I left the house, would I lose my entitlement to the property. His response shocked me. … He said to me, and I quote, … 'get him to hit you'. This is what a lawyer said to me. In 17 years of marriage, my husband never raised a hand to me. But he went on to say, 'If you get him to hit you, you can have him forcibly removed from your home; you'll get spousal support.' (Heidi Nabert, National Shared Parenting Association, Meeting #7)

> Then we have what I would term the barracuda lawyers, and they do inflame the system. I would say they probably do so for financial gain. There are those kind of lawyers. They're pretty few and far between, but they certainly are there. They take advantage of an emotionally vulnerable client and they can influence that client to do of unnecessary and costly things—the things they are doing are legal—to advance their case. (Susan Baragar, Lawyer, Meeting #22, Winnipeg)

> False allegations continue to enter divorce proceeding by way of lawyers who place allegations of criminal behaviour in affidavit material, without substantiation from child welfare or police authorities and without consequence to the accusing parent or lawyer involved. (Louise Malenfant, Parents Helping Parents, Meeting #22, Winnipeg)

Several witnesses also commented on perceived flaws in the family law system, which allow affidavit material to be submitted in court without the challenge of proof. These witnesses were concerned that the same standards of proof required in criminal and civil law do not seem to operate in family courts.

> As a criminal lawyer I deal with accused people who, when they come before the court, have the protection of the Charter of Rights and Freedoms and the whole common law. It is stunning to me that in the family law process, the future relationship between parents and children and grandparents is decided without even minimal attention being paid to due process and propriety… Perjury is common, but how can we put the custodial parent in jail for lying? As a result, the family law process ricochets behind closed doors or even in open court without a transcript and without any of the basic sanctions our courts have traditionally used to control the process. (Walter Fox, Lawyer, Meeting #13, Toronto).

"Maintaining your balance[:] Family law practitioners have to find a middle ground between becoming too emotionally involved and not caring at all about their clients."

Burnett, Helen, *Canadian Lawyer*, June 2008, pp. 41-44

With few exceptions, all family law issues have the potential to be highly emotional for the client, everything from matters involving children and parenting to finances. As a result, counsel have to find a way to manage these types of situations, which some say calls for a delicate balance between staying removed and maintaining a level of empathy.

While emotional situations are not unique to family law, they are more common in this area, says Halifax family law practitioner Lynn Reierson. "The nature of family practice is your client is highly emotional," she says. "I don't know of another area of law where your client is virtually always highly emotional and then it's just a question of how they deal with that. The extent to which it impacts your day-to-day practice depends from client to client on how they deal with their own emotional stress."

Nancy Cameron, a family law lawyer in Vancouver agrees, adding that she would guess that wills and estates and employment law would often have the same type of emotional dynamic as family law. "Anything that strikes at the core of our being and … if you have a dispute that involves your basic sense of identity and it's hauled into the legal arena, that's going to be pretty devastating, and certainly family matters fall into that," she says.

For Reierson, a balance between over-empathizing with the client and failing to care is key, as she says that a lawyer is not much use to the client if they are wholly in their shoes, nor, conversely, if they don't care at all about how the client is feeling. Finding the balance is not something that comes naturally at the beginning of your career. "I don't think that you can start in a family law practice, do a really good job, and not have to learn the hard way how to keep yourself to some degree removed from your client's ups and downs. I don't think it's something that you come to the practice of law just knowing how to do," says Reierson.

"The trick is to remove yourself to the degree required to maintain objectivity, but not so much that you don't really care about their situation," she says.

Neil Turcotte, a partner with MacPherson Leslie & Tyerman LLP in Saskatoon, says he likes to keep a light banter, which doesn't mean that he doesn't take his client's issue seriously, just that he doesn't adopt them as his own issue. "Where my clients have a significant emotional tie or need that arises out of an issue, then I usually refer them to an appropriate counselor to deal with that issue," he says.

Part of his approach to the practice of law is that he sees himself as a legal adviser: the client is there for legal advice, not for emotional or counseling advice. In litigation, clients are usually presenting with one of their biggest worries and are looking for advice on how to deal with that, he says. "I don't take on the client's problem, but I do assist the client in assessing that

problem and advising the client on the ways on which we can work towards a resolution of the problem, as opposed to just simply focusing on 'that's a problem,'" he says.

While he is direct about the fact that he is not a counselor, Turcotte says he realizes the emotions at play. "I do appreciate that in many ways it's very emotional and in some ways it's very difficult. And, in family files, the first-time interview with the lawyer … can be quite emotional because there's a certain finality in coming to see the lawyer to deal with the issues." Turcotte, who does primarily litigation work, has training in collaborative law and mediation and has adapted those skills somewhat to his practice, he says.

In not taking on the emotions of clients, "I think what clients are paying the family law lawyer for is objective legal advising on their issues and working towards a solution that's meaningful," he says. "So I don't ignore the emotions, but I don't focus on them other than to sort through what's going on behind that."

While Reierson says she has close relationships with many of her clients, which helps them through the process, she still needs to "find a way to make sure that my intimate involvement with that client doesn't turn into 'I'm them,' lose my objectivity, and go through every up and down to the extreme that they do," she says.

Indeed, the opportunity to have an intimacy with your clients that she doesn't imagine you can have in other areas of law is one of the things that Cameron finds so compelling about working in this field. "People come at a real time of need with their emotions kind of really out front and all around them," she says. "Of course, my role isn't the same as the best friend or the sister or the hairdresser who hops onto the emotional roller-coaster."

In a sense, she says, her role is to be both dispassionate and compassionate in giving clients support. "Certainly you don't want to say, 'I'll take on all your stuff and then take all your stuff home with me.' No one would ever survive in this work."

"I think there's a certain thought that, yes, in order to work professionally, you do need to keep people at arm's length and you do actually need to try to stay away from the emotional piece," she says. "I think the danger, actually, of doing that, is the emotional piece is still going to run the settlement attempts, and until you have started to really have conversation with clients that take that into account, your opportunities for settlement are going to be hampered."

As soon as you can manage some of your clients' reactions, it becomes easier to manage your own emotional ups and downs as you go along with your client, says Reierson. "I don't think you can do an effective job as a family law lawyer if you're completely removed from the ups and downs of your client's feelings about the process," she says.

The first level of dealing with a client's emotional issues is in fully understanding that you, as counsel, do not control the outcomes, she says, as other factors, such as the client and the court, can impact this. "There's a lot more to a family law practice than the outcome," she says. "In family law, there are many, many process issues that affect how your client feels about the outcome, as much, in many ways, as the outcome," she says.

At the same time, there are certain things that family law lawyers have to do to manage the ups and downs, including setting clear boundaries, says Reierson. She doesn't have a listed telephone number, for example, and doesn't give clients her home number, as she feels not taking calls after hours is important. Similarly, she chooses not to carry a BlackBerry. Clients must also speak to Reierson's assistant first when they call.

One of the most important factors, she says, is setting clear expectations of your clients, including sending them a letter detailing processes, a retainer agreement, and other general information.

Personal balance is also critical, says Reierson, such as maintaining your health, eating properly, spending time with family, and taking vacations.

Cameron says she deals with the situations by staying centered in herself. "If I don't give myself a time to at least have a breath and really be committed to the time that I have with clients, then it's disastrous," she says. This means having enough time with clients, not thinking about numerous other things or being interrupted all the time and staying generally in tune with them.

Stu Webb, who started the collaborative law movement, says he checks to see if he's relaxed in the room, says Cameron, and she carries that in her head as well. "If I'm not relaxed in the room, nobody's going to be relaxed in the room," she says. Exercise, enough sleep, and eating enough are also essential, she notes.

Oftentimes, says Cameron, the legal issues are very simple, but it's the emotional aspect that makes it more difficult. "The concept of keeping that emotional piece at arms' length says to me that the real issues don't get addressed," she says.

Cameron, who specializes in collaborative practice and mediation, says it used to be more difficult when she was litigating, and part of the litigation paradigm asks lawyers to "take the client's emotional frame of the world and frame the case in that manner, which means really having to wear it at some point. Because I don't litigate anymore, I don't have to sit on one side of the emotional equation," she says.

There are several resources available to family law lawyers for dealing with this issue, says Cameron, including new books, training on vicarious trauma, and courses on "mediator compassion burnout." Other important skills learned in workshop include de-escalating conflict, she says. An important part of a lawyer's role in the annual family law update is usually a coping lecture on these types of issues.

For clients, says Turcotte, there are many resources available, but there is a waiting list for many of them, which is part of the frustration. "You can't always meet the need in terms of the immediacy," he says, which can add to the emotion involved.

"Going into solo practice is not for the faint of heart"

Jaremko Bromwich, Rebecca, *The Lawyers Weekly*, 10 July 2009, p. 23
[*in part*]

On March 4, 2005, the late billionaire adventurer Steve Fossett successfully completed the first solo, non-stop, round the clock, world airplane circumnavigation. Asked what he thought of the trip, he said: "I am a very lucky guy. This is a dream I have had for a long time."

In the 2005 book *Flying Solo*, M. Joe Crosthwait Jr. writes that lawyers are "Like stunt pilots. To be successful, we must amuse the crowds and defy death." Considered in this way, solo practitioners are replicating Fossett's historic 2005 flight in their practices, flying alone.

Although the economy might be turning around, the ground on which we practice remains shaky. Since the economic crash became painfully evident in September 2008, hundreds if not thousands of Canadian lawyers have been laid off. At the same time, hundreds more new calls [to the Bar] are entering the job market. The job market for lawyers does not look good whole, simultaneously, there remains what Chief Justice Beverly MacLachlin in 2007 characterized as a crisis in access to justice. There may not be available law jobs, but people still need lawyers. A consequence of this situation is that many lawyers are now contemplating starting off in solo practice.

I am currently a solo practitioner and have been so listed for almost three years. (I practiced with firms for the first four years after my call.) Sometimes I feel like Fossett: practicing law by taking only clients and files I want can feel like a dream. However, I am no billionaire, and wading through procedural minutiae doesn't make one feel like an adventurer. Solo practice is no panacea but for some, it may be a prudent idea.

"Workers thriving at 70, 80, and even 100"

Hanna, Jason, *CNN*, 28 September 2009
[*in part*]

Jack Borden would like you to consider working well past retirement age. As a 101-year-old attorney, he has the credibility to encourage it.

Borden, who has been practicing law for the better part of 70 years, still spends about 40 hours a week at his office in Weatherford, Texas, handling estate planning, probate and real estate matters.

Retire? Not while he's able to help folks.

"As long as you are capable, you ought to use what God gave you. He left me here for a reason, and with enough of a mind to do what it is I'm supposed to be doing," said Borden, who also has been a district attorney and Weatherford's mayor.

He arrives at the practice he shares with his nephew at 6:30 a.m. He goes home for lunch at 10:45 a.m., rests in bed for 45 minutes—doctor's orders after pneumonia a few years back—returns to work by 12:45 p.m. and stays until at least 4.

Not everyone who works past 65 does so because they want to. In a survey completed last month, 38 percent of respondents working past the age of 62 said they may have to delay retirement even further because of the recession, according to the Pew Research Center's Social and Demographic Trends project.

But in answer to another question in the same survey, 54 percent of workers 65 or older said they're working now mainly because they want to. Seventeen percent said their main reason was money, and 27 percent said both factors motivated them.

"Some of them enjoy it, and some of them need the money. But even if they need the money, they also enjoy the work," said Cynthia Metzler, president of Experience Works, a nonprofit that helps low-income workers ages 55 and older acquire new job skills.

The group, which operates in 30 states and also uses federal funds to pay participants a minimum wage to work community service jobs while they look for other work, last month named Borden as America's Outstanding Oldest Worker—a title it bestows annually to a worker over 100.

Last week, Borden was in Washington to participate in events the group was holding to mark National Employ Older Workers Week.

Note on p. 73

[**Note**: *The editor of this paper has, since 1968, been in a law partnership with a senior partner, Hon. P. Derek Lewis, who, in his 85th year, continues to practise law. He was admitted to the Newfoundland and Labrador Bar in 1947.*]

"Dealing with aging lawyers"

Bertin, Oliver, *The Lawyers Weekly*, 25 September 2009, pp. 22, 24
[*in part*]

If anyone doubts that the legal profession is aging—and aging fast—they should take a sharp eye to the following figures:

- 40.5 percent of all working lawyers in Ontario are 50 or older;

- 8.9 percent of Ontario lawyers are more than 65, but only 5.7 percent of Ontario lawyers are under 30.

These statistics, provided by the Law Society of Upper Canada (LSUC), bare as they are, tell a clear, unambiguous story—the legal profession will change markedly within 10 to 15 years when the baby boomer cohort retires.

The numbers are huge. In Ontario—and the numbers are similar across Canada—3,582 lawyers have already reached the normal retirement age of 65. Another 12,575 lawyers are over 55 and would normally retire within 10 years.

The crunch will come when the older cohort—the most senior, most experienced and most respected leaders in the firms where they work—start to retire, leaving a lot of empty desks, unserved clients and a huge demand for lawyers with specialized knowledge.

That is a lot of jobs, and a huge turnover of expertise. Any way you look at it, a profession that is now run by older men will soon be dominated by young women.

The departure of so many senior people will inevitably impact the profession. It will open the gates to thousands of eager young lawyers, many of them tech-savvy, young women who will soon become a force in what some see as a hide-bound, traditional, male-dominated profession.

Terence Yuen is a research economist with Watson Wyatt Worldwide Inc. in Toronto. His numbers show that the legal profession in Ontario, and across Canada, has a skewed demographic profile. Lawyers are, on average, older than the normal Canadian worker, they are also largely white and most-likely male.

In the over-65 group, fully 94 percent of lawyers are men, while in the 50 to 65 age bracket, men account for three-quarters of the total cohort. Women do catch up in the under-40 group, and especially under 30, where they account for 58 percent of all 20-something lawyers.

It hasn't always been this way. The gap between lawyers and the average Canadian worker has widened in recent years, according to Statistics Canada. In 1996, only 10 percent of lawyers were over 55, the same ratio as the general population. But 10 years later, older lawyers accounted for nearly one-quarter of the profession.

"Old lawyers do not retire," Yuen said. "Lawyers are hanging on. They are staying a lot longer in the workforce."

Yuen offered many reasons why lawyers should keep working past the normal retirement age of 65. They have valuable experience, the expertise that comes with a long career and loyal clients who like their work and continue to demand their services. After all, aged lawyers wouldn't work very long if their clients didn't like them.

Many older lawyers keep working because they have nobody to take over their practices. In large urban centres, there is a shortage of some specialized lawyers, while in small towns and rural practices, it can be difficult to attract young lawyers who are willing to take over an established practice.

"How to go from a good to great lawyer"

Rappaport, Michael, *The Lawyers Weekly*, 04 September 2009, p. 27

[Note: *Report on The Essential Little Book of Great Lawyering, by Jim Durham, available at www.great-lawyeringbook.com*]

What distinguishes a great lawyer from a good lawyer? Too many lawyers operate under the misconception that great lawyers are characterized by the sophistication of their arguments, their negotiation and organization skills and the quality of their research, writing and drafting, according to Jim Durham, the author of *The Essential Little Book of Great Lawyering*. But these core competencies are shared by virtually all good lawyers, says Durham in an interview with *The Lawyers Weekly*. To go from good to great takes something extra.

Durhman, a lawyer and legal marketing guru based in Boston, has interviewed over 100 clients of law firms and he has worked with hundreds of lawyers and law firms as a coach, trainer and consultant. The inspiration for his book sprung from a comment he received at one his workshops. After a workshop at a law firm, a partner said that he wished that he had a booklet that he could carry around and refer to frequently for guidance on how to provide excellent client service. *The Essential Little Book of Great Lawyering* distils the essence of what it takes to be a great lawyer into a 53 page-booklet that can be stuffed in a pocket.

So what is the 'something extra' that separates good from great lawyers? Great lawyering is ultimately about the relationship a lawyer builds with his or her clients. "You are a great lawyer when, in addition to knowing the law, you have become a lawyer that people trust above all others, and you are the person to whom they turn when they (or the people they know) have any kind of legal problem," Durham writes.

To become a great lawyer one must learn to think like clients think, according to Durham. Thinking like your clients involves first understanding the level of importance a client places on a given matter, whether for instance they perceive it as routine legal work or bet-the-company litigation. For commodity legal work, clients want satisfactory results at the lowest price. At the other end of the spectrum, for the most critical legal matters, clients want results, and are willing to pay a significant premium for greater expertise.

How does one determine the level of importance a client places on a legal matter? It comes down to communication with the client and having a thorough understanding of the client's business, according to Durham. "Communication involves engaging in meaningful conversations with your client on a regular basis," Durham explains. He adds, "understanding your clients' business means knowing their organization structure, how they make money, who their major competitors are, even reading their strategic plan."

Great lawyers exhibit eight common traits: First, they are responsive and accessible: "This used to mean returning phone calls promptly, now it means being available 24/7 and always delivering work when promised," Durham says. Second, they know their client's business. Third, they are good at initiating and maintain communication. Fourth, they provide value: "Providing value means always giving clients more than they asked for," Durham says. He elaborates,

"providing value means ensuring that everything you do either helps the client make money, helps the client save money, helps the client sleep better at night or makes the client look good." Fifth, they are personable: "This doesn't mean being the client's best friend, but showing a genuine interest in the client as a person," Durham explains. Sixth, they deliver: "If they tell a client that they will have someone call them by Friday, they make sure the person calls by Friday," Durham writes. Seventh, they are loyal to the client: "The client wants to know that you have taken ownership of their problems, and are committed unequivocally to doing everything that needs to be done to solve those problems," Durham writes. Finally, great lawyers exude confidence: "Lawyers have to protect confidence, if they want their clients to entrust their most important matters to them," Durham says. But he cautions that sometimes lawyer are overly confident and can appear arrogant.

Beyond mastering these eight attributes, another way a lawyer can go from good to great is by becoming a resource for their clients. Being a resource for your clients involves cultivating your network and making connections between members in your network. Lawyers who routinely refer people to others in their network get more referrals in return, said Durham.

Associates who aspire to be partners, partners who want to be rainmakers and lawyers who just want to serve their clients better should learn and live the principles in *The Essential Little Book of Great Lawyering*.

"Lawyer who Badmouthed His Client Gave a 'Brilliant' Argument"

Cassens Weiss, Debra, *abajournal.com*, 14 October 2009

U.S. Supreme Court justices differed Tuesday over the trial strategy of a criminal defense lawyer who called his neo-Nazi client "demented" and invited jurors to "smell the death" of the murder scene.

The defendant, Frank Spisak, "celebrated his killings in court and openly discussed his hateful views," the Associated Press reports. "He even grew a Hitler-style mustache, carried a copy of Hitler's book, *Mein Kampf*, during the proceedings and gave the Nazi salute to the jury." He was convicted of three murders, but a federal appeals court reversed, partly on the ground that Spisak's lawyer provided ineffective assistance.

Ohio Attorney General Richard Cordray told the justices that the lawyer's argument in 1983 on behalf of defendant Spisak was part of a "coherent strategy," the National Law Journal reports. The idea was to appeal to jurors' humanity and to argue they could spare Spisak's life even if he was demented, according to the stories.

Justice Antonin Scalia appeared to agree. "I thought it was a brilliant closing argument," he said. "The technique that counsel used to try to get mercy for this fellow was the best that could have been done."

But Justice Ruth Bader Ginsburg expressed qualms, according to *The Cleveland Plain Dealer*. She said the closing argument of the lawyer, who has since died, was "disjointed," went "off on tangents," and appeared to be "stream of consciousness," the *Plain Dealer* reports.

3.3.2 Confidentiality and Privilege

"Empty And Worthless"

Slayton, Philip, *Canadian Lawyer Magazine*, December 2008, pp. 28-29

It's bewildering. We hear about the importance of privacy all the time, and there are a lot of rules supposed to protect personal information. Meanwhile, with modern technology, it has become easy to find out just about anything about just about anybody. Nothing seems safe anymore. What's a lawyer, sitting on a mound of interesting and supposedly confidential information about his client and others, supposed to do in this complicated environment? What's the point of being discreet if anyone with an Internet connection can, legally or illicitly, find out what you know?

In the old days, the basic rules were straightforward enough and their application seemed simple. A lawyer could not divulge information acquired in the course of the professional relationship unless disclosure was authorized by the client or require by law. A lawyer wasn't even supposed to tell anyone the name of a client. Not even pillow talk was permissible. Human nature being what it is, there were—of course—egregious breaches of these old-fashioned strictures (particularly, one suspects, when it came to pillow talk).

Once I was in an elevator with two lawyers from the same firm who went on and on about a file they were working on. Between street level and the seventh floor they pretty much gave their client's store away to a bunch of strangers. And not long ago, my wife and I were having dinner in a restaurant next to a party of lawyers loudly discussing litigation strategy in an important trial that I'd read about in the newspapers that morning. Oh, the frailty of human nature, particularly after a martini or two!

Anyway, it's a new world now. In a speech at last August's Canadian Bar Association annual meeting, Jennifer Stoddart, Canada's privacy commissioner, portentously described what she called the "radical transformation of the privacy landscape." Stoddart pointed out that Canadian law firms are subject to the Personal Information Protection and Electronic Documents Act. She told the CBA there was "a clear need for more practical guidance for lawyers" on privacy issues. The privacy commissioner's web site (www.privcom.gc.ca) gives some help in its "legal corner." It all seems so complicated and confusing.

In her CBA speech, Stoddart also suggested the "broad public" may not need to know the names and intimate personal details of individuals involved in litigation. The Internet, said Stoddart, spelled the end of "the concept of practical obscurity" which protected privacy *de facto*. Maybe, she mused, initials could replace names in reporting cases. But this, like so much current chatter about privacy, is whistling past the graveyard. It is already widely accepted that the principle of open courts trumps privacy rights. The Supreme Court of Canada, and courts in several provinces, actively post court documents online (with some thought to minimal privacy considerations, such as removing the names of minors).

In September 2005, the Canadian Judicial Council, following a broad consultative process, published a model policy for access to court records. The policy endorsed the principle of openness and retained the presumption that all court records are available to the public at the court-house. When technically feasible, said the CJC model policy, the public is also entitled to remote access to judgments and most docket information. And, increasingly, there are cameras in the courtroom. In a 2007 pilot project, the Ontario Court of Appeal posted videos of more than 20 cases. Since 1997, CPAC has carried regular broadcasts of Supreme Court of Canada hearings.

As usual, Canada is following the lead of the United States. In the September 2008 *Washington Lawyer*, Sarah Kellogg reports that the U.S. Court of Appeals for the Seventh Circuit has a wiki, a web site that allows users to add or edit content, for its practitioner's handbook. "The court also uses RSS feeds, a messaging technology that notifies users when a blog or web site has been updated, for audio postings of court arguments." A numbers of U.S. federal courts have similar programs. And take a look at www.oyez.org, devoted to the U.S. Supreme Court; it will even tell you where your favourite judge is buried. Kellogg argues that, faced with these and other rapid developments traditional legal journalism is rapidly disappearing. The same can also be said about traditional notions of privacy and confidentiality.

The basic rules now appear, well, hopelessly old-fashioned. They just don't seem to have much to do with reality. They don't respond to the avalanche of easily available information about everything. And, likewise, much contemporary rhetoric about privacy is beside the point. These days, anything goes. In September, a computer hacker broke into the e-mail account of Sarah Palin and posted her messages and a list of her contacts on the Internet. The culprit turned out to be a 20-year-old student at the University of Tennessee, who said the whole thing was easy. He simply reset Palin's password using her birthdate, ZIP code, information about where she met her spouse and the security question on her Yahoo account, which he found on Google. Take a look at Wikileaks (www.wikileaks.org) whose motto is "Have documents the world needs to see? We help you get the truth out." It has a section devoted to Canada.

Canute the Great, a Viking king revered by his followers who thought him omnipotent, tried to demonstrate the limits of his authority by sitting on the beach and ordering the tide not to come in. "Let all men know how empty and worthless is the power of kings," he said following this experiment. Today one might say, let all men know how empty and worthless are the traditional notions of privacy and confidentiality.

"The Law Explored: lawyer-client privilege"

Slapper, Gary, *The Times*, London, 13 February 2008

The recent scandal of secretly recorded conversations between the lawyer Simon Creighton and his client raises the question: why do we have the principle of "professional privilege" protecting the lawyer-client relationship?

In essence, it means that communications between a lawyer and client are confidential and can only be revealed to a court or the police if the client wants them to be. It is a protection greater than that given to doctors and patients, priests and penitents [except in a few jurisdictions, such as Newfoundland and Labrador, by evidence statute] or accountants and their clients. The word "privilege" comes from the Latin (privilegium) for "private law", a law applying to an individual or small group. Under general law, what citizens say to each other can be used in evidence in court. A "private law", though, applies to lawyers, and gives lawyer-client communications a specially guarded confidentiality.

The justification is simple and compelling. You don't want to live in anarchy, you want to live in a society of laws and rules. As there are thousands of laws, you don't want to have to become an expert yourself on them all, anymore than you want to learn medicine just so you can be your own doctor. You want experts on the laws: lawyers. Society should encourage citizens to go to its lawyers for advice whenever they are in difficulties. To ensure the lawyer-client relationship works well, there must be complete trust, and, in order for that to happen, the client must feel assured that client-lawyer communications are completely private and confidential.

It isn't a question of "if a client has done nothing wrong, they've got nothing to worry about if their chats with their lawyer are recorded". To be full and frank with lawyers in criminal, family, civil, and commercial cases, many clients have to mention secret, embarrassing or compromising things that are incidental to their main stories. But more good is served by those things remaining confidential, and the law taking its proper course guided by lawyers, than if clients were deterred from telling the big truths to lawyers for fear of the incidental compromising facts being open to be made public.

The rule of privilege is long established. In *Greenough v Gaskell* (1833), Lord Brougham, the Lord Chancellor, said that the rule was important to uphold "the interests of justice". He said if the rule didn't exist, people would be mistrustful of consulting legal experts and so would end up worsening their own positions with do-it-yourself law. As he put it, "everyone would be thrown upon his own legal resources".

More recently, in 2003, the Privy Council (the highest appeal court for many [eleven] Commonwealth countries) ruled that lawyer-client privilege is fundamental to the operation of justice and shouldn't be overridden unless the law has specifically said so in that particular circumstance. The privilege is also protected under European law and European human rights law.

The privilege against disclosure doesn't, however, cover all communications. In a case in 1884, an English appeal court confirmed that if a client asks a lawyer for information in order to be guided on how to commit a crime, the lawyer can testify about that despite the client's protests.

Henry Munster, who'd been libeled in *The Brightonian*, was awarded damages. But the publisher of the paper, Richard Railton, conspired with a business partner to make a property transaction in order to avoid paying the damages. Railton had asked his solicitor some questions in preparation to do something unlawful. Informed, for example, that he wasn't allowed to sell property to his own business partner, Railton asked the solicitor "Does anyone know about the partnership except for you?" After the scam was exposed, the solicitor was called as a prosecution witness and Railton and his partner were convicted.

Allowing client-lawyer privilege doesn't, as is sometimes said, amount to allowing criminals to thrive. A lawyer cannot assist in the commission of a crime or say to a court anything he knows is untrue—those are very serious offences. Plus, it's a lawyer's positive duty to disclose information that he knows or suspects relates to particular crimes such as terrorism (under the Terrorism Act 2000) or money laundering (under the Proceeds of Crime Act 2002).

Sometimes, of course, that puts lawyers in a difficult position. The barrister Rayner Goddard (who became Lord Chief Justice in 1946) asked his first client, during their initial cell interview at the Old Bailey: "Now, my man, what is your story?" The client replied "Well, that's rather up to you, guv'nor."

It might be that the privilege rule means that lawyers get to hear some immoral or shocking things about the lives of some clients, and that those remain secret. But that's a small price to pay for a population knowing that the state doesn't have its eye and an ear in the very offices where citizens go when they need help.

"Without prejudice: what does it actually mean?"

Lampert, Gemma, *The Times*, London, 24 September 2009

Despite being in use in British courts for more than a 100 years, the "without prejudice" rule is well known but not necessarily well understood.

Opinions and case law on it have changed, so perhaps this is not surprising. However, it is worth knowing the logic and the basics behind the rule.

The chief goal is to encourage parties in dispute to settle out of court—the idea being that one party can make concessions safe in the knowledge that they cannot be relied on as evidence by the other side should the dispute end up in court.

Which concessions are protected depends on a number of things but the overall legal requirement is that there must be a dispute and the without prejudice communication (which can

be anything from written and oral negotiation to e-mails) must be genuinely related to settling the dispute.

To ascertain what constitutes a dispute, ask if the case would be likely to have progressed to litigation if agreement was not reached? It's by no means essential that litigation has started, or even been considered, for "without prejudice" to apply. There have been cases where communications predating litigation by more than two years have been afforded without prejudice protection.

Whether or not the communication genuinely relates to the settlement of a dispute and so falls within the scope of the rule is more complex. An objective review of the case will determine the intention of the author and how the communication would be understood by a reasonable recipient.

However, simply labelling a document or communication "without prejudice" does not of itself attract the legal privilege. Conversely, a communication can attract without prejudice privilege despite not having been labelled as such.

Despite its wide scope, the without prejudice rule is not absolute and even communications made in an attempt to settle a dispute may be admissible if the case requires it.

For example, the court may look at without prejudice communications if one party says a settlement agreement has been reached and the other party disagrees. Similarly, if there is a claim that an agreement has been compromised by fraud or other deception, the without prejudice rule may be overturned. The rule may not apply when assessing legal costs after litigation and there is a risk that it does not apply to all admissions of fact.

While invoking the rule can help to reduce time and money spent taking cases through the courts, anyone seeking to rely on it should be aware that a careful approach is essential.

Mantella v. Mantella

(2009), 65 R.F.L. (6th) 441 (Ont. Sup. Ct. J. [Div. Ct.]), J. Wilson, J.
[*paras. 1-12*]

[1] The ex-husband appellant appeals from the order of Master Hawkins, dated January 25, 2008. The Master denied the ex-husband's request to add further allegations of defamation to an outstanding defamation claim advanced by him against his ex-wife.

[2] The alleged defamatory comments were made by the respondent ex-wife to a psychologist conducting a custody assessment for the parties in the context of outstanding custody litigation. The psychologist was appointed to conduct the assessment pursuant to s. 30 of the *Children's Law Reform Act*, R.R.O. 1990, c. 18.

[3] The alleged defamatory comments are as follows:

> "Robert is like Tony Soprano"
>
> "I do not think Robert makes his money through legal ways … he bullies, threatens and intimidates people."

[4] The Master concluded, correctly, that the requested amendment was without merit in law and refused the ex-husband's request.

[5] The Master relied upon well-established principles with respect to absolute privilege for communications taking place in the context of litigation. He adopted the accepted principles with respect to absolute privilege, which are outlined in Raymond E. Brown, *Defamation Law: A Primer*, 2nd ed. at Chapter 12, page 5:

> "There is an absolute privilege for communications which take place during, incidental to, and in the processing and furtherance of, judicial or quasi-judicial proceedings. The privilege applies to all participants in the proceeding including the judge, counsel, parties, witnesses, jurors and court personnel."

[6] The appellant relies upon the decision of *Reynolds v. Kingston* 2007 ONCA 166 (CanLII), (2007), 84 O.R. (3d) 738 (C.A.) (*Smith*, the *Smith* Decision). He argues that the law of absolute privilege is unsettled in the context of a court appointed custody assessment. He suggests that in accordance with the *Smith* Decision the question of whether absolute privilege applies to statements made during a custody assessment should be determined in the context of a trial with a full factual base.

[7] I disagree.

[8] Counsel for the appellant have misinterpreted the *Smith* Decision in a significant way. The law of absolute privilege is clearly established. The issue in *Smith* was whether the doctrine of absolute privilege applied given Dr. Smith's role as a public coroner performing an autopsy when

he may later be called to testify in court at the preliminary hearing. Smith was not preparing a report in the context of outstanding litigation. He was performing a public function investigating a death under the *Coroner's Act*, R.S.O. 1990, c. C.37. The discussion and issues in the *Smith* decision have no application whatsoever to the facts of this case.

[9] To the contrary, this motion illustrates cogently the need for strict adherence to the principle of absolute privilege in the context of litigation. As stated in *Smith*, the rationale behind absolute privilege is that "the proper administration of justice requires full and free disclosure" (at para. 14) without fear of retaliation. Clients participating in a custody assessment must be able to speak freely with the assessor without fear of consequences. The assessor in turn must be free to report to the court what occurs.

[10] The limit of absolute privilege is particularly important in family law matters. Imagine the chaos if parties in family law litigation could be sued for defamatory comments made during emotionally charged family law proceedings.

[11] Contrary to the suggestion from the appellant's counsel, there is no need to clarify the law on this issue.

[12] The allegations of defamation in the Statement of Claim which are outstanding, relate to the ex-wife's public assertions to third parties that her ex-husband is a member of the mafia, that there had been a history of violence during the marriage and the she has concerns about her safety.

"Navigating the intricacies of legal privilege issues"

Krishna, Vern, *The Lawyers Weekly*, 23 October 2009, pp. 19-20

The doctrine of legal privilege generally allows persons to obtain legal advice from their lawyers in confidence. Privilege flows from the right of the person to obtain skilled advice about the law. A person cannot properly obtain legal advice if she does not have confidence in the sanctity of communications, untrammeled by any apprehension of disclosure, with her legal advisor. Although privilege flows from the lawyer's duty of confidence and the client's right of privacy, it is a substantive legal right and a rule of fundamental justice.

The law presumes a solicitor-client privilege to exist in communication between a lawyer and his or her client. The onus is on the person who wishes to dislodge the privilege to show that it no longer applies in the particular circumstances. However, a person can lose solicitor-client privilege by waiving it or disclosing the privileged document to third parties. For example, disclosure of privileged documents to an accountant may result in loss of the solicitor-client privilege.

Whether or not a person loses privilege depends upon the expectations of the parties and the nature of the disclosure. The *Income Tax Act*, for example, recognizes a lesser form of privilege for taxpayers. The statute specifically excludes a lawyer's accounting records, including supporting vouchers and cheques, from privileged communications.

This seemingly innocent exclusion of records is, in fact, very broad because it includes accounts, agreements, books, charts, tables, diagrams, invoices, letters, memoranda, statements "and any other thing containing information" The only restriction is that the record must pertain to "accounting."

Thus, tax lawyers are squeezed between their professional conduct rules, which require them to justify their accounts, and their obligation to protect their client's confidentiality. They need to justify their accounts, but, by doing so, they can inadvertently disclose information in their accounting records that waives or discloses the privilege to the detriment of their clients.

Solicitor-client privilege extends to all documents that litigants prepare and share with other persons who, while not parties to the litigation, have interests in common with each other. For example, suppose that owners of two adjoining houses complain of a nuisance that affects them both equally. Both of the owners may take legal advice and exchange relevant documents. If only one of the owners sues in a in a subsequent action in the nuisance claim, the law considers both persons as if they were partners in a single firm and each can claim the privilege in aid of litigation.

Besides litigation privilege, the law also recognizes another kind of privilege—the common interest in the successful completion of commercial transactions. Common interest privilege in commercial transactions promotes a common understanding of legal aspects of the transaction that, once understood, will facilitate the completion of the transaction. This form of privilege rests on the economic and social values inherent in fostering commercial transactions where business people and corporations share legal advice.

For example, in the purchase and sale of a business, the vendor may develop a legal opinion and show it to the purchaser, who may choose to act upon it. Despite the sharing of the opinion between the parties, the document retains its privilege because its purpose was to promote the common interest of the parties to the transaction. As such, the parties do not automatically waive solicitor-client privilege.

Parties to multilateral commercial transactions sometimes obtain legal opinions that they share with other persons with common interests in facilitating the transaction. For example, a lawyer acting for a purchaser of property may, with consent, disclose the opinion to the seller so that both sides can understand the tax implications of the transaction. In a subsequent audit, the Canada Revenue Agency may demand to see all documents, including the legal opinion, relating to the particular transaction on the premise that the purchaser's disclosure waived his solicitor-client privilege.

The issue with common interest legal documents is not whether the legal opinion is privileged, but whether, by sharing the opinion with a person who has a common interest, the parties lose their privilege. The privilege remains intact if the persons who share the opinion have common interests. Obviously, the party with legal privilege loses it if he or she shares the opinion with parties with adverse interests.

The essential element in preserving privilege is that the parties intend the document to remain confidential as against outsiders. The parties may expressly state their expectations that the

opinion is for the benefit of all parties to the transaction. The law may also imply expectations from the conduct of the parties.

There is, however, no bright line test to determine when persons waive privilege in a common interest transaction through disclosure. Each case depends upon its own facts. For example, corporations to a potential merger or acquisition may have a common interest to complete the transaction, but they also may have other interests that are adverse to each other. It is a question of fact whether the common interest privilege applies to disclosure in these circumstances.

Of course, the most prudent course of conduct is to clearly specify and claim the privilege at the time that the advisor prepares the document and state the expectation of the parties to the transactions that they do not intend to waive the privilege by disclosing the opinion to common interests. All the more so in Internet and e-mail communications, which may pass through multiple channels and third parties may intercept. Take care before you hit the "Reply all" button.

"Court clarifies application of solicitor-client privilege"

Schindelka, Dana and Saunders, Kate, *The Lawyers Weekly*, 04 September 2009, pp. 10, 13

For years it has not been clear whether solicitor-client privilege applies only to communications. The Alberta Court of Appeal recently answered this long-standing question by finding that the privilege may also apply to information and acts.

Wyoming Machinery Company v. Roch, [2008] A.J. No. 1418, involved a master's order to disclose certain entries in the trust records of the defendant's former solicitors on the basis that they were not privileged. The master's order was appealed to a chambers judge where it was upheld.

The Court of Appeal considered the matter and ultimately upheld the matter's order, although in a slightly varied form. However, the appeal court did not agree with the chambers judge's reasons for finding that the information in question was not privileged.

The plaintiff in *Wyoming Machinery* claimed that it paid the defendant for machinery that it did not receive. The defendant alleged that it was acting as an agent for the plaintiff regarding the purchase of the machinery and that the vendor was at fault for the non-delivery of the equipment. The plaintiff claimed that it wired the funds for the machinery to the defendant's former solicitors.

Justice Cote determined that the trust records of the defendant's former solicitors were not privileged since the defendant's pleadings contained affirmative statements regarding the movement of the trust funds in and out of its former solicitors' trust account. These pleas effectively waived any privilege that may have existed.

The defendant also pleaded that it was acting as agent for the plaintiff. If that was the case, the defendant's former solicitors were also acting as agents for the plaintiff when they received the

funds. Therefore, the plaintiff was able to test that allegation with discovery and, since an agent is a fiduciary of information held for the principal, the information must be disclosed on request.

The Court of Appeal explained in *obiter* that, while it upheld the master's order, it did not endorse the reasons of the chambers judge.

In fact, the Court of Appeal overruled the reasons of the chambers judge and made two clear findings with respect to the law of privilege.

First, the court ruled that the Wigmore policy tests should only be applied to new heads or types of privilege (although the Wigmore policy tests have, on occasion, been used by the judiciary to determine whether communications fall within an already-established head of privilege). Second, the court ruled that solicitor-client privilege does not apply only to communications. It may also apply to information and acts.

Justice Cote concluded that solicitor-client privilege may apply to information on the basis that excluding uncommunicated information from privilege would "eat up the entire doctrine of privilege. The danger in revealing solicitor-client communications is not in revealing who said it or when or how; it is revealing the contents of the secrets."

Justice Cote was less clear with regard to "acts." Although he recognized that the distinction between acts and communications for the purposes of determining the application of solicitor-client privilege made more sense than the distinction between information and communications, he held that, in the circumstances, the distinction had two limitations. First, what was sought in the case at bar was lawyer's bookkeeping records or accounts to the client, which constituted communications.

Second, Justice Cote explained that lawyers usually get money for purposes ancillary to their retainer, stating: "If legal advice, or running or defending litigation or potential litigation is the dominant purpose of the retainer, then a solicitor's accounting records ancillary to that may well be privileged. And if litigation or legal advice is a distinct part of the retainer, then the solicitor's accounting records ancillary to that distinct part may well be privileged. Conversely, if the retainer at the time of receipt of funds is merely to act as a paying agent, there might be no privilege."

Therefore, in some circumstances, "information" may be protected by solicitor-client privilege.

While the Alberta Court of Appeal's decision in *Wyoming Machinery* clarifies a previously vague aspect of solicitor-client privilege, it also further complicates the determination of what falls under the protection of privilege. As Justice Cote himself recognized, "[t]he precise limits of that will have to be worked out through the case law." Surprisingly, the decision has gone, for the most part, unnoticed by the Bar and has received no judicial consideration. Nonetheless, it has important implications for most lawyers in that they cannot short-circuit the whole discussion concerning privilege by saying that it applies only to communications.

Canada (Privacy Commissioner) v. Blood Tribe Department of Health

[2008] 2 S.C.R. 574, Binnie J. (for seven-member panel of Court)
(Shogiley, Matthew, *The Court,* Osgoode Hall Law School, 21 July 2008

Last week, the Supreme Court released its judgment in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44. Under the banner of access to justice, Binnie J., speaking for a unanimous court, ruled that section 12 of the *Personal Information Protection and Electronic Documents Act* (2005 c. 5) ("PIPEDA") does not furnish the Privacy Commissioner with the statutory authority to "pierce" solicitor client privilege. In the process of reaffirming the primacy of solicitor-client privilege, however, the Supreme Court may have imperiled the ability of the Privacy Commissioner to fulfill her mandate of "protect[ing] and promot[ing] the privacy rights of individuals."

Facts and Procedural History

Upon her dismissal from the Blood Tribe Department of Health, Annette Soup filed a complaint with the Privacy Commissioner seeking the production of her personal employment file. Soup suspected that her former employer had relied on improperly obtained and inaccurate information to justify her dismissal. The Privacy Commissioner in turn requested Ms. Soup's complete employment file from the Blood Tribe, who complied with the Commissioner's request but claimed solicitor-client privilege with respect to certain documents. In response, the Commissioner ordered production of the privileged documents on the basis of s. 12 of *PIPEDA*, which, among other things, allows the Commissioner to compel production both of any documents that could be comparably obtained by a superior court of record (s. 12(1)(a)), and of any "evidence and other information . . . whether or not it is or would be admissible in a court of law" (s. 12(1)(c)).

The Blood Tribe applied for judicial review of the Commissioner's decision. Although the trial division of the Federal Court sided with the Privacy Commissioner, the Federal Court of Appeal overturned the trial judge's decision, vacating the Privacy Commissioner's order for production of the impugned privileged documents. The Privacy Commissioner appealed, and the matter proceeded to the Supreme Court.

Solicitor-Client Privilege and PIPEDA

Writing for a unanimous court, Justice Binnie upheld the decision of the Federal Court of Appeal, finding that the Privacy Commissioner's authority to compel information under section 12 of *PIPEDA* does not extend to information protected under solicitor-client privilege. Broadly speaking, Binnie J. relied on two related arguments, first that principles of statutory interpretation militated against finding that s. 12 of *PIPEDA* superseded solicitor-client privilege, and second, that the Privacy Commissioner`s post is an administrative as opposed to adjudicative one.

At the outset, Binnie J. identified the fundamental importance of a robust conception of solicitor-client privilege to a well-functioning legal system. "While solicitor-client privilege may have started life as a rule of evidence", he explained, "it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in

some other non-legal capacity: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at pp. 885-87; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 S.C.R. 456, 2004 SCC 18, at paras. 40-47; *McClure*, at paras. 23-27; *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39, at para. 26; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31, at paras. 5 and 31; *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, 2006 SCC 36; *Juman v. Doucette*, [2008] 1 S.C.R. 157, 2008 SCC 8."

In light of this, Binnie J. continued, drawing in particular on *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, and *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, "open-textured language governing production of documents will be read not to include solicitor-client documents."

The importance of preserving the sanctity of solicitor-client privilege was amplified in the present case by the sweeping nature of the statutory grant of authority claimed by the Privacy Commissioner:

> The only reason the Privacy Commissioner gave for compelling the production and inspection of the documents in this case is that the employer indicated that such documents existed. She does not claim any necessity arising from the circumstances of this particular inquiry. The Privacy Commissioner is therefore demanding routine access to such documents in any case she investigates where solicitor-client privilege is invoked.

Such a broad authority was especially inconsistent with the Privacy Commissioner's role as "an administrative investigator not an adjudicator." Binnie J. explained:

> Client confidence is the underlying basis for the privilege, and infringement must be assessed through the eyes of the client. To a client, compelled disclosure to an administrative officer, even if not disclosed further, would constitute an infringement of the confidentiality.

Moreover, Binnie J. rejected the Privacy Commissioner's argument that either s. 12(1)(a) or 12(1)(c) of *PIPEDA* disclosed the authority to override solicitor-client privilege. On a general level, he argued that:

> … a court's power to review a privileged document in order to determine a disputed claim for privilege does not flow from its power to compel production. Rather, the court's power to review a document in such circumstances derives from its power to adjudicate disputed claims over legal rights. The Privacy Commissioner has no such power.

Binnie J. also looked at the language of the impugned sections. S[ection] 12(1)(a), he argued, amounted to a "general production provision" which, in light of the prerogative to read statutes restrictively as relates to solicitor-client privilege was insufficient to compel production of information protected under solicitor-client privilege.

With respect to s. 12(1)(c), Binnie J. found that the authority to "*receive* and accept evidence" (emphasis added) fell short of providing the right to *compel* evidence. Therefore, Binnie J. concluded that s. 12(1) (c) did not furnish the Privacy Commissioner with the authority to obtain documents protected under solicitor-client privilege.

Eisenshtein v. Eisenshtein

2008 CarswellOnt 3822, Ont.Sup.Ct. J., 26 June 2008, R.A. Wildman, J.

[*Headnote, in part; paras. 41-43*]

Husband and wife separated in 2004. They had been engaged in acrimonious litigation since early 2005. Husband dated a girlfriend after separation until early in 2006. Husband's girlfriend had used his computer while at his house, and, when they broke off, the now-former girlfriend provided, the wife, copies of emails between husband and his solicitor concerning the husband's divorce strategies. Wife did not ask for copies of emails, and girlfriend did not provide wife explanation as to how she came into possession of emails. Husband claimed that emails were sent and received from private, password-protected email account that girlfriend did not have access to, but that had assisted him in printing emails from time to time, from that account. Wife brought motion to admit emails as evidence.

Motion dismissed. Emails did not disclose intent to commit fraud or mislead court, nor did they show that husband sought advice on doing anything improper or criminal, therefore criminal intent exception to solicitor-client privilege did not apply. There was no evidence that husband solicited information in furtherance of criminal act, and client would not be penalized with loss of privilege due to unsolicited advice. Third party disclosure exception to solicitor-client privilege also did not apply since it was never husband's intention to waive privilege, and although wife did nothing improper herself, she could not use exception to admit information that had been obtained by improper means. If husband had let girlfriend see emails as she had claimed, disclosure would have been advertent, but husband would have reasonably assumed that emails would not have been disclosed to anyone else. For solicitor-client privilege to be waived, husband would have had to be aware of, or at least reckless to, fact that privilege could be lost. Furthermore, documents did not contain any factual information that was unavailable to court by other means and prime purpose for admitting emails would have been to impugn husband's credibility, therefore threshold relevance was extremely low.

. . . .

[41] We live in an interesting time. The electronic age creates communication problems never contemplated when the law of solicitor-client privilege was first developed. Identity theft, electronic fraud and computer "hacking" are ever-present concerns. More and more information is prepared and communicated electronically, often with no security protection, sometimes only with the protection of an often used or easily guessed password. Information from one computer can be accessed from computers at another location, even on the other side of the world. Much of a person's private information is now stored on a computer, often with a right of access to the

computer by other members of the person's household or business, who also have need to use the same machine.

[42] The law must evolve to protect solicitor-client communication in an electronic world. It is important to take a firm stand on this issue. Solicitor-client privilege is important to our justice system.

[43] It is also important to respect family relationships and other relationships of trust. To allow the admission of evidence, even if disclosed to others with whom a person has a close business, family or intimate relationship, would encourage troubling scenarios, such as was suspected initially in this case, when the child of the marriage was considered the "prime suspect" for the leak. The message would be "if you can get your hands on it, we'll take a look at it". That is not what our courts should be saying about solicitor-client communications. Instead, the message should be "Hands off — it's private!"

"Solicitor Client Privilege – How to Protect it in the Electronic Age"

Rosen, Avra and Cohen, Dana (2009), 28 C.F.L.Q. 175
[*in part*]

The Law of Privilege

The law of privilege is well developed in Canada, there having been a number of Supreme Court of Canada decisions setting out the almost absolute rule of privilege when the communications are between solicitor and client (as differing from litigation privilege, or communications "commensurate" to a solicitor-client relationship, etc.).

In the leading case on the subject of solicitor-client privilege, *R. v. Lavallee, Rackel &Heintz*, the Honourable Madam Justice Arbour, writing on behalf of the majority in the Supreme Court of Canada, states that solicitor-client privilege "*must remain as absolute as possible if it is to retain relevance. Accordingly, this Court is compelled in my view to adopt stringent norms to ensure its protection.*" The Honourable Justice then goes on to state that "*it bears repeating that the privilege belongs to the client and can only be asserted or waived by the client or through his or her informed consent.*"

The Supreme Court of Canada cases are clear that privilege is not determined by balancing interests on a case-by-case basis. Rather, pursuant to case law, the only exceptions to the almost absolute rule of solicitor-client privilege are as follows:

a. Where the communications between solicitor and client are in themselves criminal or are made with a view to obtaining legal advice to facilitate the commission of a crime;

b. Where there is a concern for public safety;

c. Where there is innocence at stake (i.e. criminal cases);

d. Where the privileged communications have come into the hands of a third party inadvertently or advertently (i.e. a third party overhears privileged communications, a third party photocopies the privileged document or pens the email). In this circumstance, however, before permitting such evidence to be introduced and in determining to what extent to allow it, the Judge must satisfy himself/herself that what is being sought to be proved by the privileged communications is important to the outcome of the case and that there is no reasonable alternative form of evidence that could be used for that purpose. Moreover, when the privileged communications are obtained by improper means, Courts have held that the privileged information ought not to be disclosed.

The Premedy Where Privileged Communications Are Included In A Court Record

Once determined that the emails in question were solicitor-client privileged, the next step is to ascertain the appropriate remedy. The first and obvious remedy is that the privileged communications be removed from the Court Record.

In conjunction with the removal of the privileged communications from the Court Record, the Court may also remove the solicitor of record who has been privy to the privileged communications, or has included, on behalf of his or her client, the privileged communications in a Court Record. Oftentimes, this may be the only remedy which will suffice to cure the prejudice as a result of the privileged documents coming into the "wrong" hands.

The law with respect to the removal of a solicitor of record is very clearly set out in the Supreme Court of Canada decision of *Celanese Canada Inc. v. Murray Demolition Corp.* In that case, solicitor-client privileged materials were inadvertently taken from the Defendant in the course of execution of an Anton Pillar order to enter Defendant's premises to search and remove certain documents. The privileged materials, which were in a sealed envelope with the Defendant's counsel's initials on the envelope were then viewed by Plaintiff's counsel and downloaded to Plaintiff's counsel's work computer. The Plaintiff's counsel then declined to return the privileged materials. The Plaintiff's counsel were then removed as solicitors of record, with the Court holding that the Plaintiff's counsel took too few measures and produced too little evidence to satisfy the test "that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur,"

The Court further went on to state, as relevant to the case at bar, that "*Whether through advertence or inadvertence the problem is that solicitor-client information has wound up in the wrong hands. Even granting that solicitor-client privilege is an umbrella that covers confidences of differing centrality and importance, such possession by the opposing party affects the integrity of the administration of justice. Parties should be free to litigate their disputes without fear that their opponent has obtained an unfair insight into secrets disclosed in confidence to their legal advisors. The defendant's witnesses ought not to have to worry in the course of being cross-examined that the cross-examiner's questions are prompted by information that earlier been passed in confidence to the defendant's solicitors. Such a possibility destroys the level playing field and creates a serious risk to the integrity of the administration of justice.*"

The case of Celanese further set out the factors relevant to consider in determining whether solicitors should be removed. Such factors include:

a. how the documents came into the possession of the client or his/her counsel;

b. what the client and counsel did upon recognition that the documents were potentially subject to solicitor-client privilege;

c. the extent of the review made of the privileged material;

d. contents of the solicitor client communications and the degree to which they are prejudicial;

e. the potential effectiveness of a firewall or other precautionary steps to avoid mischief.

. . . .

(a) How to Protect Your Email Communication with Your Client

It is very important to review the impact of Eizenshtein decision with your clients and impress upon them that all communication between you and them is privileged so long as such communication is not disclosed nor reviewed with any third party not retained for purposes of assisting in the litigation.

Recently separated spouses should be encouraged to open a new email account, password protected so that there is no possibility that their spouse has access to the new e-mail account. It is recommended that that new e-mail account be solely for the purpose of communicating with you and that they check that account regularly.

Clients with Blackberrys or other similar devices should also be instructed to create a new password, and all e-mails between you and he/she be password protected.

While it is not recommended that your client retain hard copies of e-mails between the client and you, the reality is that most of our clients cannot help themselves and they will retain these records, even against your advice. That being said, instruct your clients to keep these hard copies under lock and key, so that no third-party, including any family member or employee has access to them. There is nothing worse than a child reading an e-mail between his/her parent and their counsel, not fully understanding the context of the e-mail, but somehow having access to information concerning the dispute between the parents or even details about the litigation.

(b) What Happens When Those Communications are Copied to Third Parties

Family law clients often need emotional and financial support. It is very common for parents and partners to be supportive in such regard, such that the client fees obliged to include his/her parent or new partner in the details of the dispute with their spouse, which details often includes copying your communication, be it correspondence or e-mail, to these third parties. Moreover, other clients such as executives have a tendency to copy all e-mail communication to their assistants.

Clients need to be educated and reminded that a solicitor-client privilege is only between a solicitor and that client. When a client invites a third party into the communication, whether they are copied on a communication or by extension, attend at your office at a meeting between the client and you, by allowing that party to be privy to the discussions between you and your client, the solicitor-client privilege is waived.

In *Eizenshtein*, there was a dispute between the parties as to how the e-mail communication came into the possession of the husband's former girlfriend. While it was the husband's position that he had never provided her with any hard copies of the e-mails between he and his counsel, he had in fact provided his girlfriend with the password to his e-mail server or had his girlfriend typed his email to his counsel, the solicitor-client privilege with respect to the e-mail communication with his counsel would have been lost.

(c) What to Do When Your Client Provides You with Communications Between his/her Spouse and his/her Spouse's Counsel

Clients have an uncanny ability to secure information and/or documentation which should not be properly available to them. While we are often presented with original documents belonging

to the other spouse by our client, such as bank statements, life insurance policies and other similar documentation, most counsel do not return those original documents to the other party but provide such disclosure in the ordinary course of the action. These documents are not privileged, so that while original documentation not belonging to your client ought to be returned, to a large degree, that practice is not followed unless the other spouse requests the return of his original documentation.

The delivery of copies of any form of communication between a solicitor and his/her client clearly does not fall within the same sphere of receiving original documentation belonging to the other spouse. By reviewing those e-mails or other communication, the right to confidentiality of a solicitor-client communication is infringed, and respectfully, it is only the Court that can determine whether the solicitor-client privilege has been waived and falls within one of the exceptions as discussed earlier in this paper.

In the criminal law context, where police have searched a lawyer's file by warrant and have secured communication between the accused and his counsel, that communication is ordinarily submitted to a Judge in a sealed envelope for his or her determination as to whether the solicitor-client privilege has been waived. In the family law setting, and particularly in the jurisdiction with a case management system, if counsel believe that the communication is so critical as to require a determination as to whether the privilege has been waived, and without first having reviewed such communication, he/she could submit such communication to the case management Judge by way of Motion on notice, and which communication would be delivered to the case management judge in a sealed envelope.

By reviewing the e-mail or text communication first, there is a presumption of prejudice to the other spouse, and as noted in the decision of *Appleton v. Hawes*, "*counsel cannot purge from their minds the privileged information that they have obtained. It would be extremely difficult, if not impossible, to conduct a trial in which these counsel were involved as at every turn there would be a problem with the scope of cross-examination of witnesses under oral evidence and relating to documents … a trial requires a perception by the parties and the public that it is fair. To allow these counsel to continue to act would inevitably lead to a feeling that the trial process might not have been fair. It would be a dangerous precedent to allow for others to follow.*"

(d) What Happens When Solicitor-client Communication is Inadvertently Received by You or Your Client

It has happened to all of us. Inadvertently, you or your staff send over communication directed to your client to opposing counsel by fax. You have also received those faxes inadvertently from opposing counsel. Your obligation is to immediately return or destroy the communication you received without keeping any copies, and if destroyed, to advise counsel that you have done so. You are not to forward the communication to your client. Chapter XVI of the *Rules of Professional Conduct* set out our responsibilities to lawyers and others, and specifically, that lawyers are not to take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving any sacrifice of the client's rights.

In *Aviaco International Leasing Inc. v. Boeing Canada Inc*., letters between lawyers were inadvertently sent to a contractor's lawyer and the contractor's lawyer did not inform the other

business lawyers of the mistake. Mr. Justice Nordheimer found that "*once Plaintiff's counsel realized that the letters had been sent to them by mistake—something that ought to have been obvious to them as soon as they saw the letters—they were under a positive duty to advise both counsel of the mistake. They then should have returned the letters without keeping any copies of them or, if they reasonable thought that there was an issue as to whether they were entitled to retain the letters, then they ought to have taken immediate steps to seek a ruling from the court on that issue*".

By analogy, if an e-mail, text message or other such communication comes into yours or your client's possession, and it is determined that the client did not intend to waive the solicitor-client privilege, we must respect the confidentiality of such communication and destroy it or return it immediately for as Madam Justice Wildman noted in *Eizenshtein* the "*solicitor-client privilege is important to our justice system*"

. . . .

We do live in an interesting time, and the electronic age has and will continue to create communication problems our predecessor never contemplated when they practiced law in an era without computers yet alone fax machines. Then again, in those days, "an early response is expected in a few hours or less."

That which has not wavered is the importance of solicitor-client privilege and while not absolute, it is subject to exceptions in very specific circumstances so that, as noted by Mr. Justice Steele in the Appleton decision, there is a perception as to the fairness by both the parties and the public. The challenge in this electronic age is to ensure that our communication with our clients remain sacrosanct.

3.3.3 Negotiations

Heath v. Heath

2009 CarswellNfld 112, NLSC [TD], 11 May 2009, Harrington J.
[*paras. 1; 22-39*]

Introduction

1 This Application seeks to have a signed consent order, filed with the Court on June 16, 2008, ("Consent Order") outlining the terms of settlement of a property dispute, set aside. The Applicant contends that her former counsel did not properly discharge his mandate in dealing with the concerns she had with the proposed terms of settlement that were negotiated between counsel on May 1, 2008. She contends that the terms of the proposed settlement read into the record before the presiding judge were not fully approved by her. The Applicant further seeks to have the minutes of settlement read into the record on May 1, 2008, declared unenforceable. She also seeks to have the Consent Order set aside on the basis it was not reviewed and finally approved by her prior to the signing and filing by her former counsel.

2 For the reasons which follow, the Court is granting the application.

. . . .

Law and Analysis

22 The mandate of legal counsel from a client and the supervisory powers of the Court in relation to settlement of litigation were discussed at some length by Evans, J.A. in *Scherer v. Paletta*, [1966] O.J. No. 1017 (Ont. C.A.), at paragraph 11 as follows:

> A solicitor whose retainer is established in the particular proceedings may bind his client by a compromise of these proceedings unless his client has limited his authority and the opposing side has knowledge of the limitation, subject always to the discretionary power of the Court, if its intervention by the making of an order is required, to inquire into the circumstances and grant or withhold its intervention if it sees fit; and, subject also to the disability of the client. It follows accordingly, that while a solicitor or counsel may have apparent authority to bind and contract his client to a particular compromise, neither solicitor nor counsel have power to bind the Court to act in a particular way, so that, if the compromise is one that involves the Court in making an order, the want of authority may be brought to the notice of the Court at any time before the grant of its intervention is perfected and the Court may refuse to permit the order to be perfected. If, however, the parties are of full age and capacity, the Court, in practice, where there is no dispute as to the fact that a retainer exists, and no dispute as to the terms agreed upon between the solicitors, does not embark upon any inquiry as to the limitation of authority imposed by the client upon the solicitor.

(emphasis added)

23 It is clear that when counsel holds out his or her authority to negotiate on behalf of his client and there is no indication that there has been a revocation of that mandate, the Court will feel obliged to enforce a compromise resulting from such negotiations. However, the jurisprudence also recognizes that the Court has an inherent jurisdiction to refuse to permit an order to be perfected where doubt exists as to what that counsel's mandate was, especially if concerns about the discharge of that mandate were known to the opposite party. The situation becomes more complicated if there is no evidence that the opposite party was aware of the reservations of the other side regarding the proposed settlement.

24 In the case of *Geropoulos v. Geropoulos*, [1982] O.J. No. 3179 (Ont. C.A.), Robins, J.A. of the Ontario Court of Appeal discussed the considerations affecting the Court's jurisdiction to confirm or set aside a compromise allegedly entered into between respective counsel at paragraph 15:

> ... it is conceded that the agreement in question was complete, definite and intended to be binding; there is no suggestion of any lack of authority on the part of the solicitor or of any mistake, misrepresentation, duress or other circumstances which might impair the settlement or render it unenforceable; nor is it suggested that the agreement was tentative or contingent upon the execution of any further document, ...

At paragraph 18, Robins, J.A. wrote that notwithstanding that the key prerequisites for the determination of whether a final and binding agreement had been reached by the parties, it is nevertheless subject to the intervention of the Court. He wrote:

> The court's jurisdiction to enforce settlements or refuse to do so, notwithstanding any agreement between solicitors or counsel, is well established; whether they should be enforced or not, in the final analysis, is a matter for the discretion of the court ...

The Court qualified its statement by indicating that the exercise of jurisdiction should not permit parties to withdraw at will from settlements that had been properly entered into by their counsel.

Was the Settlement Agreement Complete, Definite and Intended to be Binding?

25 There are a number of concerns that have been raised about the issue of whether the purported agreement was complete, definite and intended to be binding. When Counsel for the Respondent addressed the presiding trial judge as Plaintiff's counsel with regard to the purported agreement, he said:

> <u>The easement will generally follow</u> the easement identified on the survey of October 12, 1990.

(emphasis added)

26 Mr. Wetzel went on to state:

> In addition, the easement will include use of additional land near the wharf that is required for vehicles to maneuver to launch or remove boats into and from the water, turn vehicles parked on the easement around to leave the area and for vehicles visiting the wharf for maintenance, repairs and renovations of the wharf, slipway or stage.

(emphasis added)

27 After this general outline of the principal terms by Mr. Wetzel, the Applicant's former counsel made a number of rather vague comments to the Court, which appear to have been intended to address concerns that the Applicant had with what was being reported to the Court by Mr. Wetzel as settlement terms.

28 A transcript indicates that the former counsel for the Applicant advised the presiding judge:

> I just want to make a couple, sort of quick couple of comments for the purposes of putting it on the record with respect to the easement, and I guess that, you know, the intent is that there's sort of two stages to the easement, and one is basically the actual, sort of I guess for lack of a better term, everyday access, and then what we refer to as the additional land, and Mr. Wetzel and I, we had some further discussions on terminology there because it's a bit of a gray area in terms of how much that would be, other than to say that it's got to be whatever is required for the purposes, but the intent is that the additional land is not meant to be a parking lot or, you know, part of, that's something distinct and actual just going to and from the wharf in the normal course of events (sic). That's sort of an add on for a specific purpose which would be basically turning a vehicle around, or, you know, launching boats or what have you.

(emphasis added)

29 It is the Court's conclusion that these vague comments by the Applicant's former counsel are reflective of the fact that there was a considerable amount of refinement of this settlement yet to take place for the terms to be "complete, definite and intended to be binding" in the context of the reasons of Robins, J.A. in *Geropoulos*.

30 The fact that the minutes of settlement and the Consent Order contemplated that a "conveyance of the easement" would be prepared by the Applicant's former counsel and provided within sixty days, is reflective of the degree to which more flesh needed to be put on the bones of what was supposed to be the final terms for settlement of the litigation.

Settlement Contingent on Execution of Further Document

31 The fact that the draft minutes of settlement read in Court and the terms of the Consent Order contemplated the execution of a "conveyance of the easement" also confirms that the settlement was "tentative or contingent upon the execution of a further document", as described by the Ontario Court of Appeal in *Geropoulos*. This is a second factor for consideration as to whether settlement of this litigation had been achieved.

32 Also in play was the existence of the Applicant's apprehension about the terms of settlement during the settlement negotiations, which was acknowledged by her former counsel and supported by her sisters who were present at the courthouse.

33 It is clear that the extent of any right of access over the Applicant's property adjacent to the wharf and shed was a major concern. Its intended scope and operation was very vague when one reads the transcript of the comments of Mr. Wetzel and the Applicant's former counsel.

34 There is also clear evidence that the Applicant, on a timely basis, following May 1, 2008, advised her solicitor's office that she did not wish to take any other steps to confirm the settlement. Her solicitor did not consult with her regarding to the terms of the Consent Order. He also executed the Consent Order prior to forwarding an unsigned draft to her. He did not advise his client when the Consent Order was mailed to her on May 23, 2008, that he had in fact mailed the signed Consent Order to the Respondent's counsel a week before his letter of transmittal to her. I am satisfied that this is not a case where the litigant is simply attempting to renege on a clear and binding settlement after the fact.

35 The Court has to consider the predicament of the Respondent and her counsel. Unfortunately, the Respondent's counsel was not aware that the execution of the Consent Order by the Applicant's counsel had not been authorized. The Respondent and her counsel, in good faith, participated in settlement negotiations with the Applicant through her counsel and now find themselves being told that the matter has not been concluded. They face the prospect of the matter returning to court for trial.

36 Where the opposing party is lead to believe that there is no limitation on the instructions of counsel for the opposing party and there is an absence of fraud or collusion, the Court will be leery of setting aside a consent judgment or order which is clear in its terms and unambiguous (see *Thomson v. Gough*, [1977] O.J. No. 2416 (Ont. H.C.). The Court, however, does conclude that the comments of the Applicant's former counsel before the trial judge represented an indication that the terms of settlement were still evolving.

37 The Court is mindful that the settlement was contingent on a "conveyance of the easement". This document had not been tendered in draft form by the Respondent's counsel before the Application was brought January 15, 2009. It is clear from the comments made by the Applicant's former counsel before the presiding trial judge that there were important reservations and questions in existence on the manner in which the proposed easement would operate. It ought to have been obvious to the Respondent and her counsel that this settlement was far from being complete and definite as of May 1, 2008, and that the Applicant had serious misgivings. There is nothing in the Consent Order that further clarified what was read in Court on that date. In fact, a careful comparison of what was said by Mr. Wetzel before the presiding trial judge and what is contained in the Consent Order would lead one to conclude that the contents are virtually identical and added nothing to clarify the proposed terms of settlement.

38 The Court is satisfied that the Applicant had *bona fide* reservations about the terms of settlement on the second day of trial. She was diligent in advising her counsel that the proposed terms of settlement were not acceptable. She aggressively followed up with her former counsel with regard to his lack of a mandate to execute the Consent Order. The contacts made by her as

outlined in her affidavit are not contradicted by her former counsel. It is the Court's conclusion that it would be manifestly unjust to enforce rather vague terms of a settlement contained in the Consent Order signed by the Applicant's trial counsel on behalf of his client when the document was not seen and approved by her before its execution.

Summary and Disposition

39 For these reasons, the Court finds that a clear and binding settlement was not achieved for this proceeding. The circumstances require that the Court exercise its discretion to order that the purported settlement terms reported upon by counsel of record of May 1, 2008, to the presiding trial judge, together with the Consent Order signed and filed June 16, 2008, be set aside and that the proceeding be remitted back to the trial judge for directions. It is further ordered that costs of this application shall be costs in the cause.

Tether v. Tether

(2008), 56 R.F.L. (6th) 250, Wilkinson J.A. for Sask. C.A.
[*Headnote, in part*]

Parties were married for 24 years and then separated—Parties engaged in negotiations over matters associated with marriage breakdown for many months—Judge determined that parties had not reached settlement, and directed that parties proceed to trial—Husband appealed.

Appeal dismissed on this ground—Trial judge's finding that parties were never ad idem on division of personal and household belongings was correct—Trial judge was correct in concluding that agreement was conditional upon, and subject to, execution of formal documentation.

"Alternate Dispute Resolution in Family Law: What's Not to Like"

Grant, L.S.M., Stephen, (2008), 27 CFLQ 235-243

At a dinner party not too long ago, a judge asked me why there is such a strong movement to Alternate Dispute Resolution ("ADR" as we know it)—whether arbitration, collaborative law, mediation or the hybrid process, mediation/arbitration—in family law. While this judge seemed to take this trend personally as an affront or rejection, she tried to rationalize that it seemed to be prevalent in, if not limited to, the senior family bar, especially in Toronto. She asked me if I thought that the judges weren't sufficiently open-minded or were pre-disposed, agenda-driven, perhaps, to a certain result in most of the cases brought before the court.

I assured her that any slight to the Bench by the Bar was unintentional. Few, if any, lawyers think that his or her client will receive anything but a fair, impartial, objective hearing and result in court. And, as we all know, contrary to this judge's believe, the movement away from the courts is not limited to the senior bar, the less senior members of the Bar now offering ADR services for clients of lesser economic means.

I told her, however, that there is a compelling answer to her question. In contrast to the current family law judicial system, ADR works.

. . . .

No doubt there are concerns I am missing. Perhaps ADR is elitist, only cost-effective for more substantial financial cases? Having spent my entire practice in the courts, however, I don't see it, particularly as many people cannot afford to spend their after-tax incomes on lawyers themselves, let alone a contested proceeding. Moreover, collaborative law has taken hold in any number of jurisdictions with apparently positive results.

To be fair, many cases don't require ADR at all; then, again, they don't require courts either, the issue being relatively straightforward to resolve. And although I have only touched on the mediation aspect of ADR, child-related matters, for instance, are better deal with by the child-focused psychologists and social workers rather than lawyers but this just frees the parties to spend their resources for those services that truly require dispute resolution in the appropriate place.

In some respects, I am sad about this development as really harkening the end of an era. The courts have always held a certain majesty for me and, no doubt, countless litigants who value … [their] imprimatur and objectivity. But surely this development is part of the inevitable move away from litigation altogether to a faster, more economical, private form of resolving civil disputes. This certainly makes family law, not an aberration but rather part of a new mainstream and that is, on balance, a very good thing.

Lambert v. Lambert

2008 CarswellOnt 2663, Ont. Sup. Ct. J., 21 April 2008, T.A. Platana J.
[*Headnote, in part*]

Parties began cohabiting in 1992, married in 1995, and separated in 2004—Each party had previous marriage—Parties entered into written domestic contract in January 1993, with husband retaining lawyer to act on his behalf and parties signing contract in husband lawyer's office before lawyer's secretary—With respect to ownership and division of property, contract provided that neither party acquired interest in specified property referred to as "One Party Property" and that all property acquired during cohabitation would be equally divided on dissolution of relationship––With respect to support, contract provided that each party was responsible for maintaining self during and after cohabitation—Contract included acknowledgement that each party received independent legal advice and made full disclosure of significant assets, debts, and liabilities—Parties made no formal disclosure and personal and real property listed on separate schedules attached to contract did not show value of asset—During relationship, parties had traditional relationship and wife gave up nursing job at husband's request—At time of separation, wife had modest business which, together with pension, provided monthly income of $1,320—One month following separation, husband sold car dealership and scrap yard, retired and lived solely on investment income and in matrimonial home—Husband brought application for enforcement of domestic contract—At hearing on matter, husband testified that total value of assets were approximately $1.3 million—Parties disagreed whether husband advised wife to obtain independent legal advice, and wife did not have independent legal advice—Wife testified that she had no knowledge of value of husband's listed assets or completeness of list, but believed that once married, property would be evenly divided.

Application dismissed—Domestic contract did not provide for alternative "One Party Property" regime, excluding property pursuant to s. 4(2)(6) of Family Law Act from equalization of net family property and did not provide mutual release from equalization of net family property pursuant to s. 5 of Act—Husband failed to provide full and frank disclosure either as to assets at time of entering into contract—Evidence did not support that wife was ever advised to seek independent legal advice or that wife fully understood nature of agreement she was signing—Wording of contract was clear that relevant property was to be divided equally on dissolution of relationship.

"**Vanishing trials[:] Out-of-court settlements on the rise"**

Moulton, Donalee, *The Lawyers Weekly*, 17 October 2009, pp. 22, 27

Going off to court is being replaced — and significantly — by settling out of court. It's a widespread trend that is affecting how lawyers practise their profession and serve their clients.

"Settlement has become more common. There are fewer trials today than there were 10 years ago," said Dr. Julie Macfarlane, a professor in the faculty of law at the University of Windsor and author of *The New Lawyer: How Settlement is Transforming the Practice of Law*.

Figures out of the U.S. indicate that 98.2 percent of civil matters are settled before trial, she noted, and in Ontario the rate is almost as high, approximately 95 to 96 percent.

David Elliott, a commercial litigation partner with Fraser Milner Casgrain in Ottawa, estimates that the number of cases in this area settled before trial is as high as 90 percent.

"The 'vanishing trial' concept is certainly the case," he said.

The disappearing act can be traced back to several key factors. Foremost among those, said Macfarlane, is "how long, slow and expensive civil litigation" is. "There are very few private domestic clients who can afford to go through trial," she noted. "Even corporate clients don't want to do this."

Indeed, said Philip Bryden, dean of law at the University of New Brunswick in Fredericton: "My impression is that there has been an escalation in the cost of litigation that has outstripped the rate of inflation, so there is probably more financial pressure on clients to settle litigation than there was a generation ago."

The courts themselves are also promoting settlement. For example, noted Elliott, mandatory mediation is in place in many court processes. "In part, that is a response to the higher cost of litigation."

In addition, he said, courts will schedule pre-trial conferences in the hopes of getting parties together.

"We know from evaluations that that is going to have an effect on settlement," said Macfarlane. "A lot of litigators would say it is encouraging settlement."

The courts are not alone in their support of settlement.

"I think that academics and legal practitioners have developed a more elaborate understanding of settlement techniques," said Bryden. "And lawyers are educating themselves about a range of approaches to solving their client's problems that may be more cost effective, or effective in addressing the client's real concerns, than recourse to traditional litigation."

Clients are also pro-settlement, and not just because it reduces cost and risk.

"My experience is that clients are all demanding a problem-solving approach," said Elliott.

This demand is linked to the demise of professional deference. "We're a more questioning generation generally. People want to be part of the discussion," Macfarlane said.

That means their lawyers need a new way of thinking and a new way of practising law, Macfarlane emphasizes in her book.

"The new lawyer will conceive of her advocacy role more deeply and broadly than simply fighting on her clients' behalf," she stated.

"This role comprehends both a different relationship with the client ... and a different orientation toward conflict," noted Macfarlane, who calls this new role "advocacy as conflict resolution."

"You take on a different role when you're in mediation," Elliott said. "When in arbitration or at trial, you're 100 percent behind one position. In meditation/negotiation, you can take advantage of that situation and tell the mediator things you wouldn't necessarily be telling the other side."

Of course, it's not a question of throwing the old lawyer out with the bathwater. Many of the same skills are required whether the goal is settlement or trial, but there may be a shift in perception, approach or attitude. In her book, Macfarlane noted that advocacy as conflict resolution "challenges the automatic and 'obvious' primacy of rights-based dispute resolution, preferring a more nuanced, multi-pronged strategic approach to both fighting and settling."

For many lawyers, that new approach is a natural fit with the way they practise their profession.

"Successful lawyers (and law firms) are developing broader sets of dispute resolution skills in order to meet the needs of their clients," noted Bryden. "Lawyers who have a more sophisticated understanding of the range of options that might be helpful to their clients in addressing their problems will offer better service, generally speaking, than lawyers whose approach is narrower or more limited.

"Conversely," he added, "some lawyers may work best by deliberately limiting themselves to a narrow range of dispute resolution approaches and concentrating their efforts on the clients who want that type of service. An example of this is the collaborative law approach in family law."

There are concerns that in an era where settlement rules supreme, lawyers will lose their trial advocacy skills and that public values will have less opportunity to be formally established. But that presumes a virtual dearth of trials — a scenario that is unlikely to happen.

"There will always be cases that warrant a traditional litigation approach, and there will always be a demand for lawyers who have the traditional litigation skill set," said Bryden.

"Some lawyers," he added, "have always done very well through specialization and I suspect that will continue, whether the lawyer has specialized litigation skills or mediation advocacy skills or negotiation skills."

Those skills — at both ends of the spectrum — are incorporated into the training Canada's law students receive.

"Some law schools have more sophisticated skills development programs than others, but I would expect it would be an unusual law school in Canada that did not offer at least some skills-development courses," noted Bryden.

At UNB, he pointed out, in addition to a compulsory legal research, writing and appellate advocacy course in the first year, a number of competitive mooting options in both trial and appellate advocacy are offered, and optional upper-year courses in trial advocacy, dispute resolution and negotiation are available.

In the end, it may be a world where trials are vanishing. But lawyers are not.

"The new lawyer—How settlement is transforming the practice of law"

Huddart, Judith L., *The Family Way (Ottawa: Canadian Bar Association, Family Law Section*, August 2008)

The latest book from mediation specialist Julie Macfarlane starts by providing perspective on the practice of law over the past 30 years. She provides a thought-provoking analysis of the impact of the adversarial approach on both lawyers and clients. Macfarlane tells it like it is: the legal system is a system of status and hierarchy—slow to change, often following changes within society rather than initiating them; a system where rights-based claims occupy the moral high ground—an adversarial system where lawyers and judges are in charge and clients may become an after-thought.

Macfarlane, a professor of law at the University of Windsor, warns that if lawyers are to survive in the 21st century, they must start now to retool the adversarial skills learned in law school and provide a more settlement-focused approach for clients.

Family law lawyers should resist the temptation to assume that because most family law cases are ultimately settled rather than litigated, there is nothing to learn from this book. Settling cases outside court will not automatically qualify lawyers as "new lawyers"; to become truly deserving of that label, they must become conflict resolution specialists.

While Macfarlane acknowledges an increase in continuing legal education programs offering problem-solving and principled negotiation, she points out that this education contrasts starkly with the reality of what has been happening within the legal profession—a marked decline in civility and a rise in adversarial behaviour.

Macfarlane argues that different skills are needed for lawyers who want to advocate for clients in a settlement-oriented process, noting that over her 25 years of teaching, she has seen little change in the law school curriculum to provide these skills. The focus remains: "… the teaching of substantive knowledge, an adversarial normative framework, and the dominance of adjudicative decision-making… the 'client' is purely a metaphysical concept to most law students." She hypothesizes that "law students graduate with few skills to advocate for their clients outside court, at least without retreating to the threat of court in settlement negotiations."

Why is it so necessary to retool legal skills?

Firstly, Macfarlane notes, increasing numbers of lawyers now want their professional values to correspond with their personal values. This became evident from her earlier research into why family lawyers are drawn to Collaborative Practice. Many family lawyers reported reduced professional satisfaction when confronted with the harm a traditional adversarial approach had on their clients' children.

Secondary, and even more important, Macfarlane points out that clients are becoming more informed consumers. They are no longer content to unquestioningly hand over control of their lives to lawyers. The internet allows them to access information previously only accessible by professionals. Clients want more value for the money they spend on legal services and they want to participate with their lawyers in an expeditious resolution.

Macfarlane is candid in canvassing the ethical challenges and the balancing act lawyers will need to master as the lawyer-client relationship changes. Some family lawyers such as mediators and collaborative practitioners have already taken training to start developing the skills they need to assume their new role, including working in a team approach with mental health and financial professionals in order to add more value to client settlements. As Macfarlane points out, learning new skills and settlement approaches is win-win—it provides lawyers a great opportunity to continue to grow professionally while providing clients more and better settlement options. Welcome to the exciting world of a 21st century family law practice!

"Legal profession not sorry to see apology legislation"

Moulton, Donalee, *The Lawyers Weekly*, 17 July 2009, pp. 1, 6
[*in part*]

Sorry no longer seems to be the hardest word, thanks to apology legislation that is being put in place across Canada.

"Increasingly, jurisdictions in North America and elsewhere have realized the value of an apology in the resolution of disputes," said Janis Robertson, public affairs officer with the B.C. Ministry of Attorney General and Minister Responsible for Multiculturalism in Victoria.

"Past laws," she noted, "discouraged people from apologizing."

New legislation does the reverse—and more. "Being able to offer a sincere apology can take away hard feelings, help resolve disputes and reduce the number of lengthy, costly lawsuits," said Brendan Crawley, spokesperson for the Ministry of the Attorney General in Ontario.

"For a victim," he added, "an apology is often key to the healing process and can help them by recognizing the harm that has been done to them."

Legislation in Canada and the United States, as well as other countries around the world, helps the healing process while taking the legal string out of a public apology. In this country, "the legislation says an apology is not an admission [of guilt] and it has no impact on insurance coverage," said Crawford Smith, a partner with Torys LLP in Toronto.

"The idea," he added, "is to promote out-of-court expressions of apology. In-court admissions, at least in Ontario, can be used against you."

At present, six provinces—B.C., Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia—have passed apology legislation. The Yukon and Newfoundland and Labrador have introduced this legislation. The Government of the Northwest Territories is exploring the issue.

The Alberta Evidence Act, for example, was amended last year to allow apologies in the context of civil litigation without fear of legal liability. "This amendment is consistent with policies to broaden and improve the means for resolving civil disputes through alternatives to litigation, and to encourage less adversarial modes, such as mediation and dialogue between parties," said Carla Kolke, public affairs officer with Alberta Justice and Attorney General in Edmonton.

In B.C., the broader form of apology legislation is in place, as is the trend in Canada. The Act, which was passed in 2006, prevents liability arising out of an apology by making the apology inadmissible for the purpose of proving liability and by providing that an apology does not constitute an admission of liability. "The stronger form of protected apology in B.C.'s Act includes admission of fault, as distinct from being limited to expressions of sympathy," noted Robertson.

That strength holds strong appeal in this country. In Australia, a uniform standard has been adopted but it only includes protection for benevolent statements. "Canada has moved towards the more generous and broader type of protection—potentially including admissions of fault," said Mary Jane Stitt, a litigation partner with Blake, Cassels & Graydon LLP in Toronto.

Rick v. Brandsema

[2009] 1 S.C.R. 295, Abella J. for the Court
[*Headnote*]

The parties married in 1973 and separated in 2000. During their 29 years together, they had five children and acquired a dairy farm in which they were equal shareholders, as well as other real property, vehicles and RRSPs. The parties were intermittently represented by lawyers and also used the services of mediators during their negotiation of a separation agreement. Approximately a year after their divorce, the wife sought to set aside the agreement on the grounds of unconscionability or, in the alternative, a reapportionment order under s. 65 of British Columbia's *Family Relations Act*. The trial judge found that the agreement was unconscionable because the husband had exploited the wife's mental instability during negotiations and had deliberately concealed or under-valued assets. This resulted in the wife receiving significantly less than her entitlement under the Act, despite the fact that it was the parties' express intention to divide their assets equally. As a result, the trial judge made an order awarding the wife an amount representing the difference between the negotiated equalization payment and the amount she was entitled to under the Act. The Court of Appeal disagreed with the trial judge's conclusions about the extent of the wife's vulnerabilities and concluded that, in any event, they were effectively compensated for by the availability of counsel.

The appeal should be allowed.

The singularly emotional environment that follows the disintegration of a spousal relationship means that the negotiation of separation agreements takes place in a uniquely difficult and vulnerable context. Special care must therefore be taken to ensure that the assets of the former relationship are distributed through a process that is, to the extent possible, free from informational and psychological exploitation. Where exploitation results in an agreement that deviates substantially from the objectives of the governing legislation, the resulting agreement may be found to be unconscionable and, as a result, unenforceable. [1] [44] [47]

While parties are generally free to decide for themselves what bargain they are prepared to make, decisions about what constitutes an acceptable settlement can only authoritatively be made if both parties come to the negotiating table with the information they need to consider what concessions to accept or offer. This requires that there be a duty on separating spouses to provide full and honest disclosure of all relevant financial information in order to help protect the integrity of the negotiating process. This duty not only anchors the ability of separating spouses to genuinely decide for themselves what constitutes an acceptable bargain, it helps ensure the finality of agreements. An agreement negotiated with full and honest disclosure and without exploitative tactics will likely survive judicial scrutiny. [45-49]

Whether defective disclosure will justify judicial intervention, however, will depend on the circumstances of each case, including the extent of the misinformation and the degree to which it may have been deliberately generated. [49]

There is no reason to disturb the trial judge's conclusion that the separation agreement was unconscionable. His findings about the husband's defective disclosure and exploitation of his wife's known mental vulnerabilities, support the conclusion. Although in some cases professional assistance will effectively compensate for vulnerabilities, in this case the trial judge concluded that the wife's mental instability left her unable to make use of such assistance. [2] [6] [27-28] [31] [36] [58-60] [62]

The husband's failure to make full and honest disclosure, his knowledge that the negotiations were based on erroneous financial information, as well as his exploitation of what he knew to be his wife's profound mental instability, resulted in a negotiated equalization payment that was $649,680 less than the wife's entitlement under the *Family Relations Act*. In these circumstances, the trial judge was entitled to award this amount to compensate the wife for the loss caused by the unconscionable bargain. [6] [27-28] [31] [53] [63] [69]

[**Note:** *Also see, at pp. 25-27 above.*]

Verkaik v. Verkaik

(2009), 68 R.F.L. (6th) 298 (Ont. Sup. Ct. J.), Seppi J.
[paras. 1-3; 65-70]

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1 Marriage is a very private relationship. It is also a personal and financial risk. It engages mutual rights and obligations couples approach and manage in many different ways. The parties in this case signed a marriage contract on June 8, 2001, two days before their wedding. They separated in 2006. The issue at trial is the validity and enforceability of their marriage contract.

2 The applicant, Ann Verkaik, submits the contract should be set aside. She raises several grounds pursuant to subsection 56(4) of the *Family Law Act*. In particular she alleges:

(1) Insufficient financial disclosure from the respondent;

(2) No independent legal advice (ILA);

(3) Unconscionability and inherent unfairness of the contract terms; and

(4) Coercion and duress resulting from the circumstances in which the contract was signed.

3 The respondent, Douglas Verkaik, submits the contract is fair and legally enforceable. It was important for him to have a contract to protect his pre-acquired assets and their potential increase in value. He refers to the fact of their pre-marriage cohabitation during which the importance of a marriage contract had been discussed, the extent of the applicant's personal knowledge of his

financial affairs which supplemented his detailed written financial disclosure, the applicant's personal choice of obtaining ILA from a lawyer [Mr. Weir] they both had dealt with before, and the changes specifically made to the contract in the applicant's favour at her request. The contract is in compliance with the formalities required by section 55 (1) of the *Family Law Act*.

. . . .

65 Section 56(4)(b) of the *Family Law Act* provides a court may set aside a domestic contract if a party did not understand the nature or consequences of the domestic contract. Provision of independent legal advice is an important factor in ensuring the parties understand the nature and consequences of the contract they are signing.

66 The applicant admits she willingly accepted legal advice from Mr. Weir before signing the contract but claims this was because she had no other choice. She also submits the quality of the ILA was deficient because the entire arrangement was orchestrated by the respondent. The lawyer, having represented the respondent in the past on his real estate properties, was not in a position to advise her not to sign the agreement if she had had any concerns about it. The evidence, however, is to the contrary.

67 Mr. Weir was very clear in his evidence about the advice he gave the applicant. The applicant was advised to have another lawyer provide ILA but she declined, preferring to deal with Mr. Weir whom she knew. She was also not truthful in her evidence that she had not dealt with Mr. Weir before, as there were real estate documents filed in which Mr. Weir had commissioned her oath. Mr. Weir was emphatic in his testimony about his appropriate legal advice and explanations to the applicant before she signed. He said he would not have signed and sworn the certificate of solicitor attesting to his assurance of her understanding about the nature and consequences of the agreement and her voluntariness in signing the contract, had he not been confident of those facts.

68 The applicant was not uninformed in financial and legal matters when the contract was signed. She had education and experience in business affairs and would have understood the implications of signing the contract as it was explained to her by Mr. Weir. She understood she was giving up her rights to property equalization. The concept of net family property equalization was fully explained to her by the lawyer before she signed the contract.

69 It is also probable the applicant had received advice from another lawyer on the terms of the draft contract ... . This conclusion is evidenced by the changes she requested that were made to the draft [before she took legal advice from Mr. Weir], which fairly and reasonably protect her rights to support and an interest in the matrimonial home. The applicant knew and fully understood she was signing a marriage contract that protected each party's property from equalization or division. She understood the respondent needed this protection of his assets if they were to marry.

70 In all the circumstances the ILA received by the applicant fulfilled her need to have the agreement explained to her. The advice she received was to her complete satisfaction at the time. She completely understood the nature and consequences of the marriage contract she signed. This ground on which the applicant seeks to set aside the marriage contract does not succeed.

Voll v. Voll

(2008), 89 Alta. L.R. (4th) 354 (Alta. Q.B.), M.B. Bielby J.
[*Headnote*]

Wife commenced proceeding seeking division of matrimonial property and proceeding was set down for trial but did not proceed because parties and their counsel all signed letter containing terms resolving all matters between parties. However, draft minutes of settlement were never signed by parties and neither party executed matrimonial property acknowledgement pursuant to s. 38 of Matrimonial Property Act ("MPA"). Wife attempted to have further matters included in draft but ultimately decided to abandon her claim for relief over and above that contained in original letter and applied to enforce terms of letter. Wife contended that parties implicitly complied with s. 38 of MPA in letter notwithstanding absence of express matrimonial property acknowledgements. Husband cross-applied for declaration that there was no binding settlement agreement between parties and for release of his RRSPs.

Wife's application for summary judgment dismissed; husband's cross-application granted in part. Neither MPA nor regulations thereunder established specific form to be used to comply with s. 38. However, nowhere did letter expressly state, as required by s. 38, that parties signing letter were aware of nature and effect of agreement and that spouses were each aware of future claims to property of other spouse and acknowledged intent to give up those claims. Also, nowhere did letter state that parties were executing agreement freely and voluntarily without compulsion on part of other spouse. Fact that both parties when signing letter were represented by able counsel and both intended to settle matters between them did not mean that s. 38 prerequisites were implicit in letter since there was no evidence as to what each counsel told each of parties when letter was signed. Even if such evidence did exist, finding implicit compliance with mandatory statutory requirement opened door to uncertainty with resulting risk of increased litigation. It was therefore not possible to conclude that there was no genuine issue to be tried. Therefore this was not case in which summary judgment could be granted. Since court was not court of appeal it had no jurisdiction to sit in review of unconditional order of another judge of court who had made order regarding husband's RRSPs.

Goedecke v. Goedecke

2008 CanLII 64381 (Ont. Sup. Ct. J.), 25 November 2008, P.B. Hambly, J.
[*paras. 1; 16-18*]

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1 The wife has brought an application for an order setting aside a separation agreement, current and retroactive child support to the date of separation and current and retroactive spousal support to the date of separation. The husband has brought a motion for an order that he be permitted to attend at the questioning of the wife.

. . . .

16 The wife has presented evidence that the husband was emotionally and physically abusive to her during the marriage. The evidence from her therapists and from the police of what she told them, however, is entitled to some weight because these persons are professionals who regarded her allegations as credible. The allegations that she made to Dr. Theresa Castells [the wife's registered psychologist] were of substantial assaults. This contrasts with the allegations that she made to others which were primarily that the husband was very controlling and emotionally abusive. The statements of Mary Howley [the wife's shiatsu therapist] and Maureen Gillin [friend of the wife] are of observations made of the wife contemporaneous with alleged abusive conduct of the husband. Mr. Neeb [the wife's previous lawyer] reported that following a lengthy discussion between the husband and his lawyer and the wife and him that he warned the wife that she should be careful not to submit to the husband's pressure. Immediately after that Mr. Neeb received a joint letter from the husband and wife instructing their lawyers to draft a separation agreement, which the wife now seeks to set aside, with terms which Mr. Neeb regarded as both "grossly unfair" and "unconscionable" and which he could not endorse [prompting him to resign as the wife's lawyer]. This is strong independent evidence that the wife is subject to intimidation by the husband.

Conclusion

17 The husband's motion is dismissed. There will be an order excluding the husband from the questioning of the wife. The wife will also be excluded from the questioning of the husband.

18 It must be recognized that the husband has an entirely different perspective on his relationship with the wife. He alleges that the wife was manipulative during the course of the marriage and that she is not credible. He states that she is making allegations now which she threatened to make if she could not get what she wanted. I, of course, make no findings of fact. A court could only do this after a trial with oral evidence where each party had full opportunity to present his and her case.

3.4 Relationships with Clients – Personal

"Lawyer Must Pay $1.5M Verdict for Affair With Client's Wife"

Cassens Weiss, Debra, *abajournal.com*, 19 August 2008

Solo practitioner Ronald Henry Pierce of Mississippi will have to pay a $1.5 million verdict against him for having an affair with a client's wife, the Mississippi Supreme Court has ruled.

The court affirmed the verdict for intentional infliction of emotional distress, breach of contract and alienation of affection in an Aug. 14 opinion, the National Law Journal reports.

Ernest Allan Cook and his wife, Kathleen, had hired Pierce to represent them and their son in a medical malpractice case in 1997. ....

Pierce had an affair with Kathleen after her husband moved to California in 2000, the opinion says. The Cooks later divorced, and Pierce married Kathleen. Ernest Cook sued Pierce in 2002.

Pierce told the National Law Journal he expected to lose the case because he wasn't allowed to present oral argument on appeal. "I knew I was going to get screwed," he said. He plans to file a motion to reconsider.

"Cardiologist must pay patient $100,000 for sexual relations"

Millan, Luis, *The Lawyers Weekly*, 31 October 2008, p. 3
[*in part*]

A cardiologist who had sexual relations with a patient was condemned by the Quebec Court of Appeal to pay $100,000 in damages to a former patient after it was determined that he had unlawfully interfered with her right to dignity and physical well-being contrary to the *Quebec Charter of Human Rights and Freedoms*.

In a majority decision, the appeal court held that Dr. Jean Hamel took advantage of his [now] ex-patient's vulnerability and the power he exercised over her to carry out actions that demonstrated "total insensitivity" toward her condition.

"This is not merely a lover's breakup as the appellant pleads, but rather a case in which a professional, with full knowledge of the facts, sexually abused a vulnerable patient," wrote Justice Julie Dutil in a ruling that upheld a lower court ruling but lowered the damages from $247,628 to

$100,000 because … [the patient] was receiving indemnities from a provincial crime victim compensation program.

"Fraud against lawyers expected to grow"

Moulton, Donalee, *The Lawyers Weekly*, 28 November 2008, p. 27
[*in part*]

Lawyers in Canada are being taken, and the incidence of scams, fraud, cons and thefts, is only likely to increase as the health of the economy decreases.

"Over the last few years there has been an epidemic of frauds targeting lawyers, both in Ontario and in other provinces right across Canada," said Dan Pinnington, director of practice PRO at the Lawyers' Professional Indemnity Company (LAWPRO) in Toronto.

"Law PRO had seen a significant number of very costly fraud-related claims. We are also aware of many lawyers who have narrowly avoided being victims—sometimes thanks to their own due diligence, sometimes only by good luck," he added.

"We used to think law firms were insulated. We don't think that way anymore," noted Igor Ellyn, a founding partner of Ellyn Law LLP in Toronto.

The numbers spell out why. "In 2007, we had 107 fraud claims that cost the program about $7.4 million. By the end of October this year, we already had 89 fraud claims reported to us. We estimate these fraud claims will cost us about $5.7 million," Pinnington said.

"Based on past years' trends," he noted, "we expect both of these numbers to go up in the coming months."

. . . .

Two of the most common scams pulled on lawyers these days are business loan fraud and debt collection fraud. The former involves a new client who is sitting up a business and is borrowing money to buy inventory or materials. "The loan documentation will look legitimate. The lawyer will complete the work required and deposit the certified cheque [for the investory or materials] into a trust account. Funds will then be disbursed from the trust account as directed. Several days later there will be a call from the bank advising that the cheque was counterfeit and that there is a shortfall in the trust account," Pennington explained.

The second common fraud type targets litigators. Enter new client with a debt-collection problem. On a contingency basis there will be a promise of a large-than-usual portion of the recovered proceeds, 10 to 15 percent or even higher. As with the business loan fraud, all of the documentation will look legitimate, and it will be complete. Phone calls to the creditor will be answered and messages returned.

"It will be the easiest collection ever," said Pennington. "After just a single call or letter, a certified cheque will be delivered to your firm. The cheque will look authentic and have all the normal security features. The instructions from the client will be to send the fund, minus legal fees, to an offshore account. And a few days after doing so, the bank will call advising that the cheque was counterfeit and that there is a shortfall in the firm trust account."

Lawyers need to pay close attention to new clients, but the threat of fraud also comes from within. According to the Association of Certified Fraud Examiners' 2004 and 2006 Reports to the Nations, the average organization loses about six percent of its total annual revenue to fraud and abuse committed by its own employees. Thirty percent of that fraud comes from the accounting department; 20 percent from upper level management, noted Malamed.

"Lawyers and intimacy"

Starzynski, John, *The Lawyers Weekly*, 08 May 2009, p. 21
[*in part*[

I suspect what some of you may be thinking and, no, this column is not about sex. It is about how we, as lawyers, have characteristics that stand us in good stead for our profession but, at the same time, these same attributes can interfere with our emotional relationships.

In researching this article, I read a book titled *Should you Marry a Lawyer?, A Couple's Guide to Balancing Work, Love & Ambition* by Fiona Travis. Before I hear the chorus of yeas and nays, I want to talk about what makes us lawyers and what we can do to make us relationship-sensitive.

Lawyers are perfectionists. We spend a great deal of our time in lawyering tasks—drafting documents, checking out land titles, cross-examining, docketing, etc. We want it done right. These tasks are measures of our competence and self-worth.

We need control. It is sometimes hard to delegate and trust that the work will be to our high standard when our name and reputation are on it. We think we can control how others do our work, at what pace and according to our priorities.

We are conscientious. We return phone calls within a day. We organize our files according to our personal system. We do things according to our private logic to make our world less stressful.

We are used to delaying gratification. We started in law school trying to read everything assigned even through that was impossible. In practice, we rise to the challenge of emergencies by working late or on weekends. We defer or cut out completely time for ourselves.

We need approval. The payment of fees is great but that thank you call, pat on the back or letter of appreciation is really welcome. We are ready to justify our actions and try hard to achieve what we need internally to give ourselves our own self-approval.

All these things make us good if not great lawyers. But can you see how these traits might be relationship killers? Doing everything perfect at home is impossible. Not putting our skills away when we get home might have you cross-examining your partner or kids. Constant lists of tasks to be done take away spontaneity. Trying to control how your family acts can lead to tension and conflict when you tell them you know best how to do things. Expecting your partner or family to conduct their lives as you do is unrealistic. To delay gratification by missing holidays or taking your laptop, CrackBerry and files on holidays kills the mood (that's an understatement!). Expecting constant praise or affirmation from your partner or family is a one-way emotional street and will just not happen.

So, I've beat us up pretty badly, but I've tried to be realistic about what happens sometimes to our relationship in our busy, fast-paced lives.

. . . .

There were two lessons I got from that book *Should you Marry a Lawyer?* The first was that, before entering into a relationship with a lawyer, do your due diligence about where they are with intimacy. The second lesson was to always buy travel insurance!

"Suing For Equity's Sake"

Raymer, Elizabeth, *Canadian Lawyer*, October 2008, pp. 38-39

It's an irony that a law firm hailed as "the most thoughtful and progressive" on the issue of advancing and retaining its female lawyers has been hit with a sex-discrimination lawsuit. Yet in April, Diane LaCalamita, a onetime lawyer with McCarthy Tétrault LLP in Toronto, launched a lawsuit against the firm, claiming it "artificially restricted and isolated" her practice and failed on its commitment to advance her to equity partnership, instead dismissing her after three years of employment with the firm "without reason or explanation."

McCarthys denies the allegations of sex discrimination, claiming LaCalamita could not be promoted or ultimately accommodated in the firm because her performance was substandard.

LaCalamita's counsel—employment lawyer Malcolm MacKillop, of Shields O'Donnell MacKillop LLP, and equity lawyer Mary Eberts—are basing their claim on rule 5.04 of the Law Society of Upper Canada's Rules of Professional Conduct, which notes a lawyer's "special responsibility . . . to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the Ontario Human Rights Code). . . ."

MacKillop says: "Rule 5 particularly applies to the legal profession, and has never been litigated. Is a court willing to enforce the implied term in the Rules of Professional Conduct?"

This is not the first charge of sex discrimination at a major Canadian law firm; at least two other large Bay Street firms are reported to have had complaints made against them but quietly settled out of court. And the issue of retention of women in the practice of law has become increasingly prominent in the last decade, with law societies striking task forces to study the issue, and releasing reports and recommendations.

"In my opinion, this type of litigation is going to advance the interests of women lawyers across the country," says MacKillop, in demonstrating "the failure to break down systemic barriers."

. . . .

LaCalamita excelled academically, and after studying life sciences at the University of Toronto she discovered intellectual property in law school. Following graduation and completion of her articles at then-IP firm Sim Hughes Dimock, she earned an LLM from the University of London, England, specializing in IP and information technology law. Her career then led to another IP boutique, Deeth Williams Wall LLP, then to Aird & Berlis LLP. Around 2002, McCarthy Tétrault was starting to build an IP sub-litigation group and invited her to join. "I had a good reputation in the bar and in the field for at least 10 years," says LaCalamita. "I was a solid performer and I had the senior-level skills and expertise [in IP, pharmaceuticals, and biotechnology] that they wanted to build their profile in these practice areas." She chose McCarthys over other firms for the opportunity "to be in on the ground floor" of this IP sub-litigation group.

But her expectations weren't met at the new firm. Hired as counsel in March 2003, LaCalamita says she understood she would be allowed to continue a combined solicitor/litigation practice, and that she would be recommended and considered for equity partnership commencing January 2004. Neither, she claims, turned out to be the case. Three years later, having been promoted to income but not equity partner, she was let go. McCarthy Tétrault paid her $200,000 in severance. LaCalamita, who is currently not working but looking for a new position, had been earning $300,000 a year and is now seeking $12 million in damages.

In its statement of defence, McCarthys denies LaCalamita was promised she would be able to practise law as both a solicitor and a barrister, or that she would be made an equity partner within one year of being made an income partner. "Admission to equity partnership requires 'enthusiastic reception' by the partners of the firm," and the plaintiff "never performed at the level required for admission to equity partnership," says the statement of defence, citing the plaintiff's inability to meet deadlines or the minimum expectation for billable hours, and her poor judgment as a litigator. McCarthys is represented by Terrence O'Sullivan and Michael Sims of Lax O'Sullivan Scott LLP.

Neither side's allegations have been proven in court. MacKillop says he expects the case will go to trial sometime in 2009. "We're going to be pressing the case fairly hard in terms of getting this in front of a judge in a timely way," he says. The next step will be the document production process.

"The Rules[:] Office Romance"

Mutton, Valerie, *The Lawyers Weekly*, 13 November 2009, pp. 22, 25
[*in part*]

Before you finally work up the nerve to hit on that cute associate from down the hall, consider the recent spate of office romance horror stories in the press lately.

The most prominent case as of late has been that of CBS late-night show host David Letterman. Letterman admitted on-air to a long history of affairs with subordinates after he was unsuccessfully blackmailed by a man who was aware of the office affairs. While Letterman is presumably in the doghouse with his wife and suffered some embarrassment, the revelations have not seemed to negatively impacted him much. In fact, his ratings have skyrocketed since the midwesterner's dirty laundry has been publicly aired.

Others have not been so lucky.

Recently, ESPN baseball analyst Steve Phillips was fired from the sports network in the wake of a messy short-lived affair with a young intern. The intern was also fired. And Philips' wife and the mother of his four children is now seeking a divorce. This is not Philips' first foray into office liaisons gone awry. In 1998, when he was the general manager of the New York Mets, he took a leave of absence after he was sued for sexual harassment by a co-worker. At the time he admitted to multiple affairs. The suit was later settled out of court.

As lawyers spend a sizeable amount of time at work, a by-product of the need for billable hours—and the corresponding lack of time for hobbies—workplace romances are bound to bloom from time-to-time. Forget Lavalife: The office is the new dating service.

Some Canadian law firms have policies about dating within the office; others say they have none. Still others frown upon liaisons between employer and employee.

Even if there's no potential blackmailer lurking in the wings a la Letterman, the office romance/affair/liaison is a minefield that needs to be carefully navigated. If it goes wrong, it can damage your reputation with your peers and even affect you opportunities for advancement. Then again, your soulmate may be working in the office next to you—and who wants to pass up that kind of opportunity?

Before you consider jumping into the murky waters of office dating, find out first if your firm or company has any policy against it. Better to know beforehand what you're getting into. As well, it's important to consider whether you and your potential date are on an equal footing at the office or whether one of you could be seen as receiving preferential treatment as a result of the relationship. Even if everything is above board, according to Simon Kent, senior partner at Kent Employment Law in Vancouver, you want to avoid the appearance of impropriety. "Most of the time, it's an issue of optics, but where the problem lies is when there is clear evidence of favouritism." Consider the situation of a City of Toronto employee who was head of the municipal

standards department. She had an affair with one of her employees. His subsequent promotions were called into question, and both of them were suspended from their jobs.

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It may be hard to consider when you are in the throes of passion/romance/lust (depending on the situation) but you should think about what happens if your soulmate/colleague turns out to be a dud. What will the end of the relationship mean to your ability to work together? Will deals be affected? Will you be the subject of office gossip? Will any clients you both work with suffer from a strained working relationship? Such situations happen regularly. …. [There have been] situations where the office romance has gone awry and they have had to discipline the employee for poor behaviour.

Kent concurred, with this cautionary tale. "I have seen extreme situations that become an employer's nightmare, when the breakup is messy and plays out in the workplace. The worst-case scenario is when the police become involved—there are restraining orders in place and yet the people work together. How does the employer police that? Who stays home and who gets paid? It becomes very impractical." Clearly, the employer doesn't want to be seen as taking sides in a break-up.

3.7 Relationships with Other Lawyers

"How a Jones Day Associate Dealt with an 'Ornery Senior Partner'"

Cassens Weiss, Debra, *abajournal.com*, 19 May 2009

Sometimes you have to change your own mindset before you can deal with an office bully or a crabby boss.

It worked for Chelsea Grayson, who was an associate at Jones Day in Los Angeles when she was assigned to work on a series of deals with "an ornery senior partner," the Wall Street Journal reports.

"He was very intimidating," Grayson told the newspaper. "He'd give me these unrealistic deadlines, saying sarcastically that there were 24 hours in a day. He never smiled, and I just thought he didn't like me."

Grayson decided to look at the situation through the senior partner's eyes, according to the story. She deducted that he was nearing retirement and facing pressure to train young lawyers. "Once I understood his motivation, I decided to take responsibility for changing the dynamic," she said. "I demonstrated interest and enthusiasm whenever we'd interact, and eventually he became my mentor."

Stanford University management professor Bob Sutton told the *Wall Street Journal* that Grayson's approach is best. He says difficult relationships at the office may be caused by a cycle of offense and revenge in which first one person, and then the other, tries to best the other. His recommendation: Assume the best about the other person's motivation.

"Stop trying to win, and treat it as a problem-solving exercise," he told the newspaper. "Sometimes it also helps to have a sincere conversation, in person rather than over e-mail."

If that doesn't work, he adds, then seek ways to stay away from the negative person.

"Reportedly laid-off Lawyer is an Apparent Suicide…"

Cassens Weiss, Debra, *abajournal.com*, 30 April 2009; 04 May 2009
[*in part*]

A lawyer who reportedly was laid off earlier this week at Kilpatrick Stockton apparently committed suicide this morning at the firm's Washington, D.C., office.

Mark Levy, a 59-year-old Yale Law School graduate who headed the firm's Supreme Court and appellate advocacy practice group, died this morning at the firm's office, according to an e-mailed statement from the firm's co-managing partner and a report in *Legal Times*. Levy also worked in the U.S. Department of Justice as a senior political appointee during the Clinton administration.

The firm doesn't address Levy's cause of death, but *Legal Times* indicates that he committed suicide, citing a metropolitan police report that a male committed suicide this morning in the same Washington, D.C., block. According to *Above the Law*, the cause of death was a gunshot wound to the head.

In a recent update, *Above the Law*, citing unidentified sources, also says Levy, who served as counsel at the firm, was among 24 Kilpatrick Stockton attorneys whose pending layoffs were announced by the firm earlier this week. A subsequent *Washington Post* article, citing an unidentified law enforcement official, confirms that Levy had been told he would be let go.

An e-mail sent to Levy this morning produced this auto-reply message: "As of April 30, 2009, I can no longer be reached. If your message relates to a firm matter, please contact my secretary ... . If it concerns a personal matter, please contact my wife ... Thanks."

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John Briggs, who worked with Levy at Howrey, told the *National Law Journal* that Levy had some difficulty establishing a practice there. "He wasn't getting as much work as he wanted to get, and he left because he felt he would be more appreciated, and get more work, at Kilpatrick," Briggs told the NLJ.

Briggs says Levy was a "hardworking and brilliant" lawyer who often got to work before dawn. He won a Supreme Court case last October, but before that, the last time he argued a high court case was in 1989, the story says.

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"I think he put himself under more pressure than perhaps others put themselves under," Briggs says. "This is a man of enormous background, talent and ability."

"With fairness towards all"

White, Emily, *National,* June 2009, p. 41

The CBA's Rules of Professional Conduct make the matter very clear. Rule XX ("Non-Discrimination") states that every lawyer has a duty to treat all persons equally.

But the rule—so precise on the page—might get murkier in practice. Women are still hugely under-represented in the more senior and leadership roles of law firms, people of colour are often not represented at all, and persons with disabilities have barely made their way into either

the law schools or the practice of law. If discrimination isn't the problem, what is? And can it be addressed?

"There's an obligation on lawyers to treat people with dignity and respect," says Beth Bilson, dean of the University of Saskatchewan College of Law and chair of the CBA's Standing Committee on Equity. Abiding by the heart of the rule, she notes, "requires paying attention to the kinds of barriers people might face in either accessing legal services or pursuing a legal career."

Trying to make one's practice reflect Rule XX simply makes sense, adds Level Chan, an associate with Stewart McKelvey in Halifax. "An employer should reflect the diversity of our country and our clients, and be sure there's no discrimination internally among employees, so that we can live by the values we advise our clients on."

Non-discrimination has received a lot of attention when it comes to "gate-keeper" issues, such as the composition of law schools or the selection of students for articling positions. But the issue runs much deeper than that.

Bilson, identifying some of the matters that firms should be aware of, stresses that discrimination can range from simple things—such as the physical layout of a firm—to extremely complex matters like the criteria used to gauge professional advancement, or the subtle sort of stereotyping that might see some lawyers being given less demanding files while others are encouraged towards the courts and the big deals.

"It's not enough to let people through the door," emphasizes Bilson, referring to issues such as law school admissions and articling. "There are things that go on once people get in place that require attention to what would be useful in terms of accommodation."

The much-noted tendency of women in particular to leave private firms (or to leave the practice of law altogether) suggests that not enough is being done to promote non-discrimination within the legal workplace. "It's very inconsistent how much firms will do to promote diversity," says Chan. "There's not a lot of diversity training, for instance, within law firms to make lawyers more knowledgeable of the issues, and make sure they conduct their practices in such a way that promotes diversity."

"For some reason," says Bilson, "and I don't think anybody's quite got the answer yet, the private practice of law still seems to be an area where—unlike government or in-house practice or law school—there's still a long way for firms to go. The private firm is still not a comfortable culture for some reason—particularly for women, but also, I think, for others."

In order to help firms put Rule XX into practice, the CBA's Standing Committee on Equity has created The Equity and Diversity Guide for Law Firm. The committee created the guide, says Bilson, partly because non-discrimination is the law and lawyers need to respect their statutory duties.

But the need for equity is even more significant than that. "It's a matter of creating a situation in which people with all kinds of differences can function well," she says. "The kind of the world that lawyers operate in creates barriers for certain constituencies in Canadian society,

and our premise is that lawyers and law firms need some assistance and strategies to examine those issues and think of ways to deal with them."

"Small firm strategies for support staff[:] maternity leaves"

Fraser, Natalie, *The Lawyers Weekly*, 31 October 2007, pp.22, 25
[*in part*]

Lawyers worry about description to their practices when support staff break the news that they need to take a maternity leave—particularly those in small firms. But while a certain amount of upheaval goes with the turf, lawyers can use placement agencies, community contacts and tactics such as shifting staff to tackle the problem.

Sherwin Shapiro, a sole practitioner about 20 kilometers north of Toronto in Concord, Ont., with two full-time support staff and one on contract, has a junior secretary who recently went on maternity leave.

"Big firms can mix and match their employees, get people to cover for each other and hire from their secretarial pool," Shapiro said. "But from the little guy's point of view it's a very difficult situation."

When Shapiro's ads for a replacement met with little response, he turned to Robert Half Legal (RHL), a placement agency, for help. He hadn't used their services before, and their advertisements caught his attention.

"Robert Half Legal is the largest and oldest specialized staffing company in the world and has been in business since 1948," said Charles Volkert, executive director of RHL in Canada and the U.S. "[Small law firms represent] a large portion of our business."

RHL has legal placement offices in Toronto, Ottawa and Calgary and can also make legal placements in other cities throughout Canada through its offices in other lines of businesses, Volkert said.

RHL gets requests to fill maternity leaves regularly. To fill them, the company has a list of candidates who have been interviewed and tested to determine their skill sets.

"We test (candidates) and we talk with them about their area of specialization. We conduct reference checks…and we test them on relevant software," Volkert said. "Based on all of these skill-matching requirements, we get a good handle on what area of law they can handle, what kind of firm that they're going to be a good fit in."

From there, RHL matches up placement candidates with law firm-clients who need them.

Shapiro contacted RHL the month before the date his secretary planned on beginning her maternity leave.

"They had several candidates. None except the last one worked out," Shapiro said. One became ill and another went to work somewhere else—and the secretary that accepted the position was reluctant at first to travel to north Toronto.

"She had always worked downtown and was fearful of traveling highways and the cost," Shapiro said

He agreed to pay her highway tolls and she came out on a one-day basis. Once she realized that she didn't mind the travel, "both sides decided to give it a try," Shapiro said. It's been several weeks and the situation is working out.

But Robert Half Legal is expensive, Shapiro said.

"The premium they charge allows them to make a good buck," he said.

"Given my situation, I didn't have much choice. I needed somebody. But you bite the bullet and absorb it, and… reduce your bottom line. It's worth it because I can keep on doing business."

RHL lets lawyers practice law instead of spending time interviewing and trying to find staff, Volkert said.

"Our job … is finding quality people. That's the benefit for law firms," Volkert said. "We present them with immediate qualified candidates."

Robert Mann, managing partner of Mann McCracken Bebee &Ross, a four-lawyer firm with three offices about 100 km east of Toronto in Port Hope, Ont, and the surrounding area, has 14 support staff at his firm and five have taken maternity leaves in the last five years.

Mann found that he has often been able to bump up part-time staff to full time to fill in for maternity leaves. He also usually has a list of applicants on file.

"In a typical month, I probably get two letters from experienced secretaries looking for work," Mann said.

"We can hire somebody from these for three or six months or twelve months."

Because he works in a smaller geographical area, Mann knows "who's out there, even if they're not working right now."

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Liza Belcourt, a partner with Ferguson Barristers, a five-lawyer firm about 150 km north of Toronto in Midland Ont., that focuses on personal injury, has had several staff members take maternity leaves in recent years.

'We're from a very small community, but we have close proximity to Georgian College, which offers a very intense practical legal administration course," Belcourt said. "We've taken

advantage of hiring co-op students from time to time and often those students are very interested in coming back to work with us.

"It gives us a pool of people we can think about if we need somebody due to… maternity leaves. That's one resource we've really tapped into regularly and we've had a lot of success doing it."

Belcourt sees a positive aspect of maternity leaves—it can allow legal assistants an opportunity to "move up" into a law clerk position.

"It gives the opportunity to other staff members to fill that role and see whether it's a good fit," Belcourt said. They get a new challenge and an opportunity to expand their knowledge base and skill level. If the move doesn't work out, they can go back to their former role once the maternity leave ends, Belcourt said.

Moving legal assistants into law clerk positions for maternity leaves has other benefits.

"The nice thing about having the secretarial staff move into the clerk position (for mat leaves) is that they've been working on the files all along," Belcourt said. The new people needing training are at "the bottom of the totem pole…and their involvement is making phone calls, scheduling examinations for discovery, filing documents, those kinds of things that aren't really file-specific." It makes the transition much easier.

"**Law firms can help lawyers deal with depression**"

Moutlon, donalee, *The Lawyers Weekly*, 18 July 2008, pp. 23-24

The issue of lawyers and depression is, quite frankly, depressing. The *California Bar Journal* tackled the subject in its May issue and noted that a Johns Hopkins University study discovered that lawyers suffer the highest rate of depression among workers in 104 occupations. Another study, this one from the University of Washington, found that 19 percent of lawyers suffered depression. The rate for the general population is only three to nine percent.

In Canada, where it is estimated that one in five Canadians suffers from a mental health illness, the economic impact of depression and other mental health problems is significant: more than $14 billion each year in absence-related costs alone.

But the news is not all disheartening. There is much that law firms can do to help lawyers deal with problems, often before they become debilitating.

The one thing a firm can't do is nothing, said John Starzynski, volunteer executive director with the Ontario Lawyers' Assistance Program.

Despite the fact that most people know someone who has a mental illness, most people are not familiar with the signs and symptoms of mental illness, he noted. “There should be somebody in the firm who understands mental illness and can identify there is a problem.”

Education is needed, agrees Sue Philchuk, vice president of Banyan Work Health Solutions Inc., which has its head office in Toronto. It’s important, she noted, that key individuals in the firm understand the prevalence of depression and what to do if colleagues are having trouble coping. “If we recognize that there might be a problem, someone needs to reach out if an individual is struggling.”

One of the precipitating factors is often work/life balance, an issue for many lawyers. “[Lawyers] are highly stressed. They work long hours. They deal with not only the stress of getting work done but the stress of clients. There’s constant billing pressures. Where do you find time for yourself?” asks Starzynski, who has bipolar disorder.

When there is a conflict or problem attaining a work/life balance, this contributes to a person’s sense of well-being, noted Philchuk.

According to The Conference Board of Canada, individuals who reported a high degree of stress balancing their work and family life missed 7.2 days of work each year — double the absentee rate of those who reported very little stress.

It is not a question of one or the other. Indeed, work plays a major role in most people’s sense of well being. “Working is healthy, and working should make people thrive,” said Philchuk, “so setting a plan to reactivate people and have them return to work is often an essential component of their recovery from depression.”

Philchuk’s firm has a program, aptly called Reactivation, to help do just that — and it relies on many of the tried and true approaches to assisting people with depression and addresses issues head on. The program focuses on redeveloping a routine and structure to a person’s day; reclaiming their mental and physical stamina; and resuming a better quality of life.

A reactivation consultant assists the individual to set realistic goals like improving eating habits, sleep, hygiene, physical activity and reconnecting with others. The employee’s progress is monitored by the consultant, who recommends strategies that a person can use to meet their individual goals. These strategies may include exercise programs, community volunteering, or plans on how to simply take better care of themselves as it relates to their specific needs.

Sleep, for example, is a critical issue for most depressed people.

“We know that people with depression, seasonal affective disorders, anxiety disorders, alcoholism, and many more conditions suffer terrible disruptions to their sleep patterns, and that in turn, a lack of good-quality sleep worsens their conditions,” said Roseanne Armitage, a professor of psychiatry at the University of Michigan Medical School and director of the The U-M Sleep & Chronophysiology Laboratory, one of the world’s first laboratories devoted solely to research on how sleep and biological rhythms influence depression and other mental illnesses.

In all, about 80 percent of adults and teens with depression report that they have severe sleep disturbances, and those with prolonged sleep problems also tend to have worse depression over time, and a higher risk of committing suicide.

Another area that is addressed as part of the reactivation program, which works one-on-one with affected individuals, is socialization. There is a tendency to withdraw when individuals are depressed. “We gradually expose them to social stimuli,” said Philchuk.

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According to Stephen Hinshaw in his book *The Mark of Shame: Stigma of Mental Illness and an Agenda for Change*, the public perception of serious mental illness is more negative today than it was a half century ago, despite significant advances in education, medication and psychological therapies. Moving forward requires moving beyond this outdated perception.

Indeed, it is central to getting an individual back to good health — and back to work. “To prevent progression of the disease, partners or trusted colleagues or friends must watch for the classic signs of depression. These persons must be able to speak openly with (their) colleague about what they see is going on, support seeking medical advice, help follow through with counselling and offer continual moral support usually on a daily basis for a period of time,” said Starzynski.

"Shedding the locum stigma"

Van Rhijn, Judy, *Canadian Lawyer*, August 2009, pp. 14-17
[*in part*]

When exhausted small-firm lawyers, pregnant professionals, and overworked departments in cash-strapped firms are looking for a hero, calling on a legal locum can be the answer to their prayers.

Although the use of locums has never been part of the Canadian legal culture, in countries like Britain, the United States, and Australia it is a long-established and completely unremarkable practice. With the creation of locum registries in two provinces, the time has come for a change of attitude towards the legal equivalent of guns for hire.

Christopher Sweeney, president of ZSA Legal Recruitment, is aware that legal locums are a large and thriving segment of the legal profession in many foreign jurisdictions but has seen very little interest in the concept at home. "It's the chicken and the egg," he says. "Law firms traditionally haven't used them so there is a limited demand. As a result, lawyers are not drawn to doing that sort of work." He believes there is a stigma attached to locum work in Canada. "There has been a perception that lawyers who are doing short-term contracts are not good enough to get a permanent job. As a result, lawyers are desperate to get a permanent position. They think they will not be taken seriously as lawyers otherwise."

Sweeney points out that if you don't have top talent going into the positions, then people's experience of hiring locums is not as good. "They would rather muddle through and make do. It is a vicious circle and that is why it has been a very low-key and low-profile practice in Canada." Sweeney believes that attitude is short-sighted. "If there are exciting jobs we can fill them with high-quality lawyers. At the moment, we have a few dozen at any one time but there is not a groundswell of demand."

In other countries, there is a large demand and good quantity and quality of supply. Kelly Wadkins, managing consultant at Sacco Mann, a British legal recruitment firm, says it is usual to hire a locum when there is sickness, maternity leave, or other reasons for being absent, as well as when there is an influx of work into the firm. "It is a solution that is used across the profession," she says.

The law societies in British Columbia and Ontario are trying to improve the perception of the practice with locum registries. They are primarily intended to relieve the pressures on small firm lawyers who currently have no way of taking time off and keeping their practices going. The Law Society of British Columbia presented its small firm task force report two years ago and launched its registry a year later, while the Law Society of Upper Canada launched its registry in April 2009 in response to the report on the retention of women in private practice delivered in May 2008.

So far, the response has been modest because only a handful of people have volunteered. "Everyone wants locum relief but no one wants to volunteer," says Michael Bernard, manager of communications and public affairs at LSBC. "Lawyers are really concerned about establishing a proper work/life balance. Finding a way to get away is a continual challenge."

The LSBC is now working on promoting awareness that lawyers can use locums as a resource. This may be bolstered by the society's "business case for the retention of women" which was presented in July. In Ontario, the Justicia Project has been canvassing medium and larger firms across the province as part of a three-year pilot project to advance and retain women in the profession. Tom Conway, who is co-chairman of the retention of women working group, has been hearing a lot of interest expressed in the locum idea, but so far there are no volunteers listed on the web site. "There are some obstacles to overcome in the professional culture," he confirms.

In Britain there is a professional market of people who choose to become locums. "Often they are quite senior," explains Wadkins. "They may have reached retirement level but don't want to give up work or they may have been involved in the management side of a larger firm and now want to work without the politics. Some lawyers choose locum work for the mobility and flexibility. They may work through the school term and take summer holidays off to be with their children. Others use it as an interim measure between jobs or to stave off boredom. There is always a new challenge." The volunteers on the LSBC registry include a female lawyer with an administrative tribunal background and a male lawyer currently doing doctoral work.

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In the event something does go wrong, hiring firms and locums should always make sure their insurance coverage is appropriate for the situation. "People should realize that as the locum is standing in for another person, they are really working in a replacement capacity and are considered to be a member of the firm," says Gosnell. "That's how they are viewed by the clients and others. Lawyers must consider coverage and options in that light. Innocent party coverage should reflect that the locum is working as a member of a firm."

If the locum is maintaining insurance coverage for his or her own practice and does some locum work, the insurance will still be valid but it is important that locums turn their minds to whether their coverage is consistent with the work they will be doing. "If the locum work changes the size of the practice, or if it had previously been restricted to criminal and/or immigration law where there is a discount, there has to be an adjustment to the policy," advises Gosnell. "Similarly, if the locum will now be doing real estate practice, it is important that the policy coverage reflects that."

Gosnell notes that there may also be a problem with excess insurance. "LawPRO automatically extends coverage to a locum under the practice of a hiring firm, but there is no standard excess policy coverage wording out there in the insurance industry. It is important that the locum and the law firm obtain confirmation from the excess insurer that the firm is covered. They should also find out whether the locum is covered individually."

"Judge Reprimanded for Friending Lawyer and Googling Litigant"

Cassens Weiss, Debra, *abajournal.com*, 01 June 2009

A North Carolina judge has been reprimanded for "friending" a lawyer in a pending case, posting and reading messages about the litigation, and accessing the website of the opposing party.

Judge B. Carlton Terry Jr. and lawyer Charles Shieck both posted messages about the child custody and support case heard last September, the Lexington Dispatch reports. Terry also accessed the website of the opposing litigant and cited a poem she had posted there, according to the April 1 public reprimand by the North Carolina Judicial Standards Commission.

The opinion says Terry and Shieck first discussed Facebook in chambers in the presence of the opposing lawyer in the case, Jessie Conley, who said she didn't know what Facebook was and didn't have time for it. After the discussion, Terry and Shieck friended each other. Shieck later posted a Facebook reference to the issue of whether his client had had an affair, saying "How do I prove a negative?" according to the opinion. Shieck also wrote, "I have a wise judge."

Terry told Conley about Shieck's posts the day after he read them. The same day during court proceedings he referenced the poem he found and posted a Facebook message that the case was in its last day of trial. After the hearing concluded, Terry disclosed to both parties that he had visited the website of Conley's client, where he found the poem, and then disqualified himself at the request of Conley.

Terry told investigators the poem had suggested that Conley's client was not as bitter as he first thought and had given him hope for the litigants' children. He also cooperated in the investigation, the opinion says.

The opinion says the *ex parte* communications and the independent gathering of information indicated a disregard of the principles of judicial conduct.

"A fond farewell for Humphrey"

***The Globe And Mail*, 02 June 2009, p. B.3**

There wasn't a damp eye in the house last Friday as the legal community delivered the kind of sendoff that Toronto criminal law legend David Humphrey would have appreciated.

As the late-afternoon sun poured through the windows of the Great Hall in historic Osgoode Hall, a crowd of about 300 did what Mr. Humphrey had insisted that they do—drink, be merry and retell every Humphrey story in existence.

Truly fresh anecdotes about the motorcycle-riding, wisecracking lawyer, who died in his sleep May 17 at the age of 83, are hard to come by. Yet grandson David Hainey managed the feat when describing how his grandfather's prodigious hunger extended to more than just the law and good times.

"He once ate a Plasticine nativity scene, thinking that it was a gingerbread house," Mr. Hainey said.

Every level of the legal community was well represented. Roy McMurtry, former chief justice of the Ontario Court of Appeal was there, as were judges David Doherty, Robert Armstrong, Michael Moldaver, and Stephen Goudge and retired judge Horace Krever. From the Ontario Superior Court, the entourage included judges Michael Brown and Frank Marrocco. Senior Crown prosecutors Ken Campbell and Frank Armstrong traded anecdotes with defence counsel Austin Cooper, John Rosen and Brian Greenspan.

Hugh Locke, Mr. Humphrey's former law partner, ended his speech with a piece of stock advice from his late colleague: "If you have your fee in full, in your pocket, and you did your best for your client, then everybody knows you're a winner."

"Male Judges Advise Women Lawyers to Lose the Distracting 'Ally McBeal' Look"

Cassens Weiss, Debra, *abajournal.com*, 21 May 2009

Women lawyers tempted to go to court looking like Ally McBeal should take note: Male judges find the look distracting.

At a panel session during the Seventh Circuit Bar Association, two male judges confessed that they can't help but look. A *National Law Journal* reporter attended the session and reported on the remarks.

The discussion got started with a comment by U.S. District Judge Joan Lefkow of Chicago, who complained that one lawyer came to a court hearing looking as if she was "on her way home from the gym," the story says.

That prompted Judge Michael McCuskey, chief judge of the U.S. District Court for the Central District of Illinois, to raise another concern. Some women come to court wearing "skirts so short that there's no way they can sit down and blouses so short there's no way the judges wouldn't look," he said.

After laughter erupted, Bankruptcy Judge Benjamin Goldgar of Chicago offered that the matter needs to be addressed because it is "a huge problem." He said sometimes he wishes he could tell the female lawyer before him, "I'd really like to pay attention to your argument."

Asked how to solve the problem, some called for law firms to raise the issue and others said law schools need to educate students on appropriate attire.

Lefkow, described in the article as "a smart dresser à la Brooks Brothers," had a different bit of advice. She said women lawyers should take a look at the fashion blog Corporette. Recent blog posts highlighted "a lovely Albert Nipon pique dress and jacket, currently on sale at Neiman Marcus" and the great debate over ponytails at the office.

"When lawyers try to make the case for the other side disappear"

Pannick, Q.C., David, *The Times,* London, 23 April 2009

Sit in any courtroom for a while and you will be amazed by the incredible things you see and hear. The prosecutor may cast a spell on the proceedings, the defence counsel may make incriminating evidence disappear or the judge may defy the laws of jurisprudential gravity. But in a personal injuries case in the Philadelphia County Court of Common Pleas earlier this year, the plaintiff, Martin Blash, tried to take special steps to prevent the lawyer for the defendant, ABA Construction Group Inc, from working miracles. Mr. Blash filed a motion asking the judge to prohibit defence counsel, Steve Leventhal, from performing any magic tricks for the jury or even referring to him[self] being a professional magician.

During his submissions, Mr. Leventhal often folds a dollar bill while explaining to the jury that the plaintiff's case does not add up: then, as he unfolds the note, the jury sees that it has changed into a $100 bill. Mr. Blash contended that for Mr. Leventhal to open his box of magic tricks would be "highly prejudicial, confusing, misleading for the jury and have absolutely nothing to do with the substantive issues in this matter." Such tricks were "intended by defence counsel to ultimately mislead the jury and take their eyes off his client's negligence."

Mr. Leventhal responded that his use of magic during opening and closing submissions was a permissible means of "getting one's point across to an underpaid, extremely bored jury panel." To ban his method of arguing cases would, he contended, "be as ridiculous as ordering the plaintiff's counsel to refrain from wearing pants at time of trial." Mr. Leventhal, whose nameplate outside his office identifies him simply as "Magic," asked the court "to make the plaintiff's motion disappear."

Unfortunately, the United States Supreme Court will not have an opportunity to decide this important issue. The personal injuries case was settled by the defendant agreeing to pay $1.2 million damages to the plaintiff and so the judge did not rule on whether Mr. Leventhal's sleight of hand would be slightly outside the rules of professional conduct.

Counsel are not required to stick rigidly to the point. They are allowed to illustrate their case by the use of literature, fable and even the lyrics of pop songs. At the Soham murder trial in 2003, Maxine Carr's defence counsel, Michael Hubbard, QC, quoted to the jury Engelbert Humperdinck's song *Please Release Me, Let Me Go*, to make the point on behalf of Ian Huntley's former fiancée: "For I don't love him anymore."

Many successful advocates have pulled large rabbits out of the smallest of hats. Travers Humphreys recalled counsel in one criminal case at the beginning of the 20th century focusing the defence on the room; where his client had been arrested, …. [which was accessed] by a swing door. After one of the prosecution witnesses accepted under cross-examination that it was not possible to see through the door, a matter wholly irrelevant to the alleged crime, counsel addressed the jury "on the assumption that the issue in the case centres round that swing door". When he began "waving his hands and swaying his body to and fro, and some of the jury began to do the same", it was obvious that the jury would acquit his client.

As the smooth defence lawyer Billy Flynn sings in *Chicago,* the John Kander and Fred Ebb musical, "give 'em the old Razzle Dazzle" or "the old hocus pocus" for "How can they see with sequins in their eyes?" There is considerable substance in the suggestion made to Alan M. Dershowitz, the prominent US lawyer, by his son, a professional magician, that "you and I both do the same thing," that is "making things appear to be what they're not." Prominent law firms like to refer to themselves as members of the "Magic Circle" of solicitors.

…. many leading lawyers perform all sorts of tricks in court. Mr. Leventhal should be allowed to make his points with the use of such illustrative material as he sees fit. So long as he does not try to saw the court usher in half.

Earlier this year Lord Justice Ward gave judgment for the Court of Appeal in a commercial case. He noted that "riding two horses at the same time is always difficult enough: riding them when they are charging in opposite directions is an altogether remarkable feat." He praised the skills of the successful advocate, David Wolfson, whose wizardry made it look as if he had accomplished this astonishing trick on behalf of his client, American Express, appearing "to stay in the saddle notwithstanding some hostile fire from at least this incredulous member of the court". Magic!

Children's Aid Society of Toronto v. W. (J)

2008 CarswellOnt 3153, Ont. Ct. J., 29 May 2008, R.J. Spence J.
[*paras. 1; 5-9*]

1 The society's motion for summary judgment was brought returnable today at 2:00 p.m. The date and time were agreed upon by all parties on the prior court attendance, including Mr. Kary, the lawyer for the mother.

. . . .

5 At 3:30 p.m., Mr. Kary arrived at court. He was very apologetic. He advised the court that he was held up at a Human Rights hearing that he had scheduled for the morning, and had not expected to go over into the afternoon.

6 It has become an increasingly common phenomenon in this court for counsel of record either simply not to attend on a date to which they have previously agreed or to appear late.

7 Lawyers owe a duty to the court to be in court and be ready to proceed on the date to which they have agreed and at the time the case has been scheduled to be heard. Equally as important, the lawyer owes a duty to his or her client to represent that client with diligence and conscientiousness. That duty is relegated to the back burner when counsel either fails to attend court or appears late—in this case, 90 minutes late.

8 It is the experience of this court that the society often enables or fosters this practise by refusing to take a firm position before the court. Instead of insisting that the court impose sanctions for this type of behaviour, the society takes what can only be characterized as a *laissez-faire* approach.

9 The court can well understand that emergencies sometimes arise, emergencies that are completely beyond the control of counsel. But the kinds of excuses that this court often hears pertain to being held up in another court, or tribunal, or mis-diarizing the court date. In my view, these excuses are not acceptable. Indeed, absent a true emergency, there is no excuse for failing to attend court in a timely manner.

10 In this case, what counsel has engaged in is a form of "double-booking", by scheduling a morning hearing and an afternoon hearing in two different court locations. I understand that this is a practice in which some lawyers do engage. I expect that, in most cases, lawyers who do double-book manage to finesse their way out of any difficulty or consequences, either because they are able to get to the second court on time, or because they are able to persuade the second court to be "understanding".

11 True double-booking is scheduling two cases at the same time, in two different court locations. Clearly that is not acceptable. Nevertheless, all experienced counsel know that any case scheduled for a morning attendance may well run over into the afternoon. Lawyers owe it to both

courts, and to both sets of clients, to ensure that they do not place themselves in this potentially untenable position.

12 In making this ruling, I wish to distinguish between a lawyer who books something in the morning in one court location which is merely to be "spoken to", together with a 2:00 p.m. matter in another court location. That will generally not be problematic.

13 However, that is not what occurred here. The lawyer booked an actual hearing before another tribunal, in another location, knowing full well that he was required to be before this court at 2:00 p.m.

14 Subrule 24(9) of the *Family Law Rules*, O. Reg. 114/99 [as amended], provides (my emphasis):

> (9) *Costs caused by fault of lawyer or agent.* -- If a party's lawyer or agent has run up costs without reasonable cause or has wasted costs, the court may, on motion or ***on its own initiative***, after giving the lawyer or agent an opportunity to be heard,
>
> . . . .
>
> (*c*) order the lawyer or agent personally to pay the costs of any party; and
>
> . . . .

15 The society is a party in this proceeding. And, once again, the society is not asking for costs. In my view, the society approach, while doubtless intended to be collegial, courteous and non-confrontational to the opposing lawyer, instead helps to foster a climate in which everyone believes that no one is really interested in enforcing obligations with respect to diligence and timeliness.

16 In my respectful opinion, the society needs to rethink its position in this regard.

17 Nevertheless and notwithstanding how the society decides to deal with this kind of behaviour, the court must be able to control its process. It is not in the public interest, the interest of the administration of justice or the interest of individual litigants to promote this kind of conduct, or be cavalier about it. At least one of my colleagues on the bench has said: "What we permit, we promote". I agree entirely with that view.

18 In the result, I am making a costs order, payable by Mr. Kary to the society, in the amount of $200, payable within 30 days. It is of little consequence to this court that the society may not seek to enforce this order as I expect the order to be complied with. Within 30 days, the society is to provide written confirmation to this court, by way of a Form 14B motion (under clause 14(6)(*e.2*) [procedural, uncomplicated or unopposed matters] of the *Family Law Rules*) that the costs have been paid.

19 In making this order, I do accept that Mr. Kary is genuinely remorseful and sincerely apologetic. I also accept his submission that this is the first time in which he has engaged in this

conduct before this court. I have taken these factors into account in deciding the amount of costs to be paid, but not the liability to pay those costs.

"Your Honour, my client"

Stauffer, Julie, *National*, December 2008, pp. 28-29

Like any other citizen, judges need legal services from time to time. They may sell property, get divorced, change a will, or be a party to civil or criminal litigation.

For the lawyers who meet those needs, however, taking on a judicial client may create complications down the line. Can a lawyer represent a judge in one case and appear in front of her in another? What if another member of the lawyer's firm has dealings with the judge? Do those issues extend to family members?

The principles

The key principle at stake is the impartiality of the judiciary. Anything that creates a conflict of interest, or simply the perception of one, is bad news.

"Justice must not only be done, but be seen to be done," says Justice Brian Midwinter of the Court of Queen's Bench of Manitoba. "If who's judging [a case] now becomes the issue, rather than the factual or legal situation, that's not good for the system, it's not good for any of the parties, and it's not good for the bench, in my respectful view."

According to the Canadian Judicial Council's Ethical Principles for Judges, a judge should disqualify herself in a situation where her impartiality is open to question. "It all comes down to a reasonable apprehension of bias," says Justice Adele Kent of the Court Of Queen's Bench of Alberta. "Would a reasonable well-informed person with all the facts consider that there could be bias?"

While there are no hard and fast rules about how strong a relationship must be to create bias, most judges will err on the side of caution——especially because the result of not doing so can be costly appeals, delays and retrials.

The protocols

For the most part, a lawyer won't need to face this kind of ethical dilemma, because the onus lies on the judge to determine whether to excuse herself if there's a possibility of bias, a step that generally happens long before a case actually goes to trial.

"Certainly, in this jurisdiction, there are so many safeguards," says Kent. "I get memos of the cases for the next term and who the lawyers are and who the parties are, specifically to indicate cases that I don't feel comfortable sitting on."

What happens when a judge may not be aware that a connection exists? "Situations arise in the oddest ways sometimes," says Vancouver lawyer Felicia Folk, a former law society practice advisor.

She cites an example brought to the Law Society of B.C.'s ethics committee several years ago involving a lawyer who had a judge as a client. When a member of the lawyer's family was scheduled to appear in front of that judge as an accused, the lawyer planned to attend court in the role of a relative.

"The ethics committee said it would be proper for the lawyer to advise the court clerk that he has a personal relationship with the judge, and to request the court clerk to transfer the file to another court," Folk recounts.

The practicalities

In a major centre such as Edmonton or Vancouver, it's easy enough to reassign a case if a relationship exists between judge and counsel. It also a simple matter for a judge who needs legal services to find a member of the bar unlikely to appear in front of her in future.

It's a different picture in smaller communities, where everybody knows everybody else, lawyers are in short supply, and bringing in another judge to hear a case can create serious logistical headaches.

In Midwinter's experience in small-town Manitoba, lawyers are careful to weigh the pros and cons of bringing a recusal application. "In a small bar, counsel and the judges who are involved know that there's a difference between a thin perception of conflict and situations where it's central to an issue," he says. "Most people would prefer to keep their powder dry until there is what I'm going to call a 'real issue.'"

That's not due to a fear of any retribution, he notes, but because it's often in their client's interest to proceed rather than wait to bring in another judge.

Occasionally, necessity will trump issue of bias, Kent notes. According to the Ethical Principles for Judges, a judge shouldn't disqualify herself in circumstances where delaying a case could lead to a miscarriage of justice.

For example, in a remote northern community where reassigning the case would delay a trial by months, a judge might decide to hear an urgent family law case despite having links to one of the lawyers involved.

The problems

If the extent of a lawyer's relationship with a judge was handling a straightforward house sale for her nephew six years ago, she may decide she is sufficiently impartial to hear the current case.

Other circumstances raise red flags. Providing legal services to a judge will likely preclude you from appearing in front of her in family court, suggests Folk. "The emotional overlay that

always comes in family matters makes it sometimes difficult for clients not to see personal reasons for judges to make decisions," she notes.

If a small-town case pits an outsider against a local, says Midwinter, it's particularly important to avoid any suspicion of a hometown advantages.

And, of course, you should make sure that appearing in front of the judge won't disadvantage your current client. "A lawyer has a duty to give undivided loyalty to every client," says Folk.

"Avoiding complaints—keeping judges up to the mark"

Gibb, Frances, *The Times,* London, 10 February 2009

The wheels of justice famously grind slow - but these days there are limits even to judicial slowness. More than 2,000 judges in England and Wales have been issued with a deadline for delivering their judgments and if they are late, must explain why.

The six senior presiding judges of the circuits have issued the reminder to all district, circuit and High Court judges who deal with civil and family cases: all judges sitting on family disputes should deliver judgment within one month, and judges sitting on civil cases within two months.

There is some concern that with the increasing pressure of work on judges—resulting from the growing complexity of cases—some may be slipping behind with the delivery of their rulings. Judge Isobel Plumstead, honorary secretary of the Council of Circuit Judges, said: "The pressures on judges at all levels are heavy. It can sometimes be difficult to arrange listing to allow time to prepare and give judgment. The reminder is a routine one; judges are conscious that litigants need a decision as soon as practicable."

Judges had been asked to inform the senior presiding and liaison judges in charge of their circuits if there was a delay. and were happy to do so, she said.

In the most infamous case of judicial delay, Mr Justice Harman was forced to resign after he took 20 months to deliver a judgment and was castigated by the Court of Appeal, which ordered a retrial.

The then Lord Chancellor, Lord Irvine of Lairg, ruled that the parties in the case should also be compensated for their legal costs.

A spokesman for the Judicial Communications Office said that the reminder to judges was issued regularly and was part of "good housekeeping" to monitor judges' work flow.

"It has been the practice for many years for the Lord Chief Justice, through senior judges, to monitor all instances where judgments have been outstanding for more than three months. This practice is part and parcel of managing levels of judicial workload and maintaining consistent standards.

"Of course, cases will vary enormously in their complexity and circumstances, but the overall process assists the senior judiciary to deploy their judicial resources in the most effective way."

In the case of Mr Justice Harman, who resigned in 1998, he not only took 20 months to reach judgment after a five-week trial but had also lost all his trial notes and forgotten much of the evidence.

The Court of Appeal said that the delay was "inexcusable" and had resulted in justice being denied to the winning party, adding: "Compelling parties to await judgment for an indefinitely extended period prolonged and probably increased, the stress and anxiety inevitably caused by the litigation, and weakened public confidence in the whole judicial process."

. . . .

Solicitors are to be taught the basics of how to give their clients good service in a drive to stem the growing volume of complaints over delays, costs and lack of communication.

A series of seminars are being held throughout England and Wales starting next week at Stockport and including Liverpool, Newcastle, Sheffield and Nottingham, to give "practical assistance" to solicitors on avoiding and handling complaints.

The initiative, to be held at local law societies, is being run by the Legal Complaints Service, the body that handles complaints about solicitors. In the past three years it has investigated 40,000 complaints and 40 per cent were about solicitors who had failed to respond to correspondence or failed to keep their clients informed of progress.

The volume of complaints is growing: there were 13,411 in 2006-07, 14,514 in 2007-08 and already there are 11,068 from April to December last year, with three months still to run.

Paul Marsh, president of the Law Society, said that idea was to help solicitors to "cut off a complaint at source and help firms to realise the common things people are concerned about. It's a question of priorities and about doing a good job at the basic level of service."

Solicitors, he added, now faced increased competition from "big brands" such as Co-op Legal whose "food and drink are built on service to the customer".

Under their code of conduct, solicitors are meant to inform clients at the outset of their terms of service, including who will supervise the work, the costs involved and how the client

wants to be kept informed. The Legal Complaints Service said: "Matters are often progressed without keeping the client informed. This leaves them feeling as though you don't see them as a priority."

Solicitors will be advised:

- If they agree to inform a client when a certain event occurs, that does not mean that they cannot contact clients at other times when significant developments occur.

- If delays occur that are outside the solicitor's control, that should be explained to the client and revised timetables given. Failure to do so could amount to inadequate professional service.

- Although one failure to respond to a client's letter would not normally lead to a finding of inadequate professional service, a pattern of such failure could do so.

Deborah Evans, chief executive of the Legal Complaints Service, said recently: "Problems usually arise when there is a breakdown in communication between client and solicitor, but with good client-care practices, these complaints can actually be the easiest to avoid."

"Advocacy so bad it puts justice at risk"

Slapper, Gary, *The Times*, London, 03 July 2009

How bad does a lawyer's courtroom performance have to be before a judge will order a retrial? This question was recently answered by a court in New York when Edward Trujillo appealed against a firearms conviction, arguing that his defence lawyer had spent the trial sleeping, reading a magazine and making irrelevant speeches.

In New York, citizens are legally entitled to "meaningful representation" in order not only to protect individual defendants but to ensure that the justice system itself isn't brought into disrepute by unprofessional conduct.

After he was convicted Trujillo submitted an affidavit swearing that during the trial his counsel fell asleep three times, spent significant periods of the trial, when he wasn't asleep, reading health and fitness magazines and made several eccentric speeches which did not seem to be related to the case at all, including an opening speech which caused the jury to laugh at the defence.

In hearing an appeal for a retrial, the original trial judge said he found himself "uncomfortable" whenever Trujillo's lawyer addressed a witness or the jury as "it was impossible to predict what he was going to say". Trujillo won his appeal for a retrial. The court held that the quality of representation he got was so insufficient that "the integrity of the judicial process was placed in jeopardy".

That inappropriate courtroom conduct is, though, trumped by the less than effective representation of attorney Raymond Brownlow who was charged with contempt of court in the District of Columbia in 1968. He had arrived in court in the late morning and had begun to address the judge in a most erratic way in front of a bemused client. This exchange then followed:

JUDGE: Have you been drinking?

BROWNLOW: I had a cocktail at lunch

JUDGE: This morning?

BROWNLOW: Yes

The first thing to draw the suspicion of the judge, however, was the fact that Brownlow was appearing in the wrong case — the opening speech into which he'd loudly launched was for a different trial being held in another courtroom.

"The Law Explored: misbehaviour in court"

Slapper, Gary, *The Time*, London, 18 July 2007

Old legal rules often need application to new technologies. What can be contempt of court from a juror changes over time. In 1578, in Gloucester, John Mucklow was sent to prison for bringing into court "preserved barberries and . . . sugar-candy". Today it is possible for a juror to bring into court a concealed nightclub or orchestra. A female juror was recently arrested after she was allegedly caught listening to an MP3 player hidden beneath her hijab during a murder trial at Blackfriars Crown Court in London. She was ordered to appear before another judge at a later date.

There are several types of crime under the heading "contempt of court". One branch of these crimes includes contempts committed away from the court—for example the publication of a news article which risks prejudicing justice by suggesting someone on trial is guilty. But the crime for which the juror was arrested at Blackfriars Crown Court is a special one of contempt committed "in the face of the court", in other words in the court itself.

In order to guard the dignity of the court, a judge has the power to fine and imprison anyone (witness, juror, lawyer, or stranger) who commits a contempt in its face. This includes any word spoken or act done which obstructs or interferes with the due administration of justice "or is calculated to do so". Shouting slogans at a judge might not ultimately interfere with justice but it would still be a contempt because it would be "calculated" to interfere with the administration of justice. This court power of instantly sending a contemnor (someone who commits contempt) off to the cells is ancient. Its origin can't be traced. In a case in 1765, Mr Justice Wilmot said he'd looked for the origin of the contempt law but couldn't find one. He said it comes from "the same immemorial usage as supports the whole fabrick of the common law" and that it was simply the lex terrae (Latin for "the law of the land").

In 1974, the Court of Appeal clarified the law when Stephen Balogh, son of the economist Lord Balogh, was convicted of contempt. He'd been discovered as he was about to put laughing gas through the air conditioning system during a pornography trial at St Albans Crown Court. Balogh, who was at court as a solicitor's clerk, planned to release the gas so that it would come out from vents in front of the barristers' rows, and "enliven their speeches" about the alleged pornography.

Mr Justice Melford Stephenson inhaled only the oxygen of outrage when he was told of the plan after Balogh was brought before him in a court up the corridor. The fuming judge sentenced Balogh to six months imprisonment. Balogh then opted to fan these flames and breezily told the judge "You are a humourless automaton. Why don't you self-destruct?" On appeal, Balogh was eventually released after 14 days in jail, having purged his contempt with a craven apology. It was ruled that a trial judge can punish contempt summarily (instantly, at the time it happens) whenever there has been "a gross interference with the course of justice". It didn't matter whether the judge had seen the contempt with his own eyes or it had been reported to him. But for a judge to punish this sort of misbehaviour, the contempt must have been proved beyond reasonable doubt, and it must have been urgent and imperative for the judge to act immediately to prevent justice being obstructed or undermined. Those criteria were not met—it wasn't imperative to act immediately since Balogh had already been arrested for theft of a cylinder of nitrous oxide (the laughing gas) and so was already in custody when he was brought before the judge. Where no immediate punishment is required, the proper thing to do is, as with the woman arrested for listening to music through her MP3 headphones, to bring the person before court at a later date.

In some cases, contempt can be dealt with simply by removing the culprit. In 1964, after being ordered to pay £50 into court as a security payment for a forthcoming action, Mr Moses Gohoho registered his despair by taking off his trousers and underpants and lying naked, except for his shirt, on the court bench. A female litigant sitting beside him "hurriedly retreated to junior counsels' seats". Ruling the nakedness as a contempt, the court then made another order—it didn't want the shirt off Gohoho's back, but the tipstaff to remove him from court.

Some cases of contempt in court have involved missiles being thrown at judges—a type of wrong treated severely. A convicted man who threw a large flint stone at a judge at Salisbury assizes (criminal trials) in 1631 was punished immediately, and the judge penalised him with more than a cutting remark: his hand was amputated in court. Judge Richardson, at whom the flint was aimed, used to slouch on the Bench "in a lazie reckless manner", and after the incident, in which he escaped with only his hat being knocked off, he said wryly "if I had been an upright judge I had been slaine".

The Law Explored: what to wear in court

Slapper, Gary, *The Times*, London, 30 May 2007

Imagine you're in a room filled with people dressed variously in tracksuit bottoms and trainers, white bands with horse-hair wigs, uniforms, lounge suits, long black robes: you're either at a fancy-dress party or in a law court.

The question of how to dress in court is a difficult one for some litigants, defendants and witnesses. Recently at Mold Crown Court in north Wales, a judge rebuked a police officer for wearing full uniform in court. The officer—sporting armour with baton, handcuffs and pepper spray – was told by Judge John Rogers, "You don't come to court dressed like that." Last week in Derbyshire, Wayne Fontana, a former member of the 1960s group The Mindbenders, twisted the head of the court by arriving to face a serious charge dressed as the Roman goddess Justitia, the Lady of Justice. Judge Andrew Hamilton said: "I hope they give him a prison uniform at Nottingham Prison to keep him warm."

Judicial responses to irregular dress in court have varied. In 2002, Terence Lynch, a Rastafarian, was arrested from a gallery in Birmingham Crown Court and held in the cells for refusing to remove his tam hat. Later, the judge stated that he did not mean to disparage Rastafarianism and regretted any such interpretation of his action. Mr Lynch said: “I know he wouldn’t ask a Sikh to take off his turban”.

That was not the first courtroom hat spat. In 1670, when the Crown was trying to extinguish nonconformist religious worship, two Quakers—Willam Penn, 25, and William Mead, 42—were prosecuted for “addressing a tumultuous assembly” in Gracechurch Street in London. Many Quakers opposed the convention of taking off their hats in the presence of social superiors. The judges were determined to get the defendants on that issue as well as on the criminal charge. So, although a court bailiff removed their hats before they entered the court, the judges ordered the hats to be replaced on the heads of Penn and Mead, then fined them 40 marks for refusing to take them off.

Hats off, though, to Edward Bushel, the jury foreman in the case who, along with other jurors, refused to convict Penn and Mead for the unknown crime of addressing a tumultuous assembly. Bushel’s case eventually established the important right of juries to give their own free verdicts as opposed to the ones judges demanded.

In 2003, at a criminal trial, Judge Hue Daniel dismissed a juror wearing a “fcuk” T-shirt. The judge said: “The misspelling of a basic Anglo-Saxon word on a garment hardly dignifies the court proceedings. It is beyond me why anyone can think they should wear anything like that in public, particularly in court."

Judges’ and barristers’ wigs today are in the style of the early 18th-century. At that time they signified wealth and status, and were adopted by advocates in that setting. Initially, judges thought the wigs were “coxcombical” (showy) and so didn’t allow young advocates to plead in them. But the wigs gradually became more accepted and stuck as a mode of court dress. The design of the barrister’s gown derives from the style of mourning gown adopted by the Bar following the death of Charles II in 1685.

Even in modern times, real and dramatised cases of dress code violation have resulted in trouble for some advocates. In the American film *My Cousin Vinny*, a newly qualified attorney, Vincent Gambini, the wonderful Joe Pesci, is standing in court in an open neck black shirt and a

black leather jacket when he is asked by the outraged judge what he is wearing. Gambini's answer is brief and genuinely puzzled: "Clothes, Your Honour," he says. "I am wearing clothes".

The English Bar has, historically, been meticulous in controlling the appearance of its members. In the 16th-century the Benchers of Lincoln's Inn banned barristers from having beards. Courts have also been strict. In one case a magistrates' court declined to hear an advocate who was wearing brown suede shoes. It condemned the footwear as better suited to the golf course than a law court. That, though, was before current human rights law applied, and it is doubtful that today an advocate's slightly unorthodox shoes would be a trial stopper.

" 'Scurrilous' attack on judges thrown out of court"

Makin, Kirk, *The Globe And Mail*, 01 November 2008, p.A4
[*in part*]

A lawyer for a Winnipeg band—the Wyrd Sisters—should prepare to pay out of her own pocket for a "scurrilous" legal attack she and her clients launched against a group of judges, an Ontario Superior Court judges ruled yesterday.

The Wyrd Sisters, who made headlines in 2005 when they tried to prevent the release of a Harry Potter movie based on trademark infringement, had filed a $21-million lawsuit against the judges alleging a massive conspiracy to fix the injunction case against them.

Throwing out their lawsuit yesterday, Mr. Justice Charles Hackland of the Ontario Superior Court ordered the band's lawyer, Kimberly Townley-Smith, to show cause why she should not be held personally liable for legal costs in the action.

"Apart from the impropriety of attempting to be both witness and counsel, the allegations being advanced in this action against three respected members of this court—and indirectly against at least 15 other judges—constitute, in my view, a scurrilous attack on the administration of justice by a member of the bar," Judge Hackland said.

He said that Ms. Townley-Smith's allegations of "conspiracy, skullduggery, lying, case-fixing and criminality" by the judiciary had no air of reality.

The extraordinary ruling was the latest chapter in a bizarre saga that began three years ago when the folk group claimed that Warner Bros., creator of the Harry Potter movies, had appropriated their name for a singing group named the Weird Sisters that was featured in the film Harry Potter and the Globlet of Fire.

Their $40-million lawsuit was swiftly thrown out, along with their request for the destruction of DVDs, CDs, video games and other paraphernalia containing references to an act named the Weird Sisters. The band, a three-time Juno award nominee, was ordered to pay Warner's legal costs of $140,000.

. . . .

Judge Hackland said yesterday the standard judicial immunity enjoyed by all judges extended to those targeted by the Wyrd Sisters.

He said that the band had spun its courtroom misadventures and failures, "into a broad-based and bizarre conspiracy theory allegedly involving the three defendants—as well as numerous other judges."

. . . .

Judge Hackland remarked yesterday that, while lawyers are permitted to represent their clients "fearlessly, resolutely and honourably," Ms. Townley-Smith had apparently strayed into the forbidden ground of improperly advancing her own opinions, and acting "for an improper purpose."

"I am concerned that counsel has failed to discharge [her] obligations as an officer of the court," he said.

Ms. Townley-Smith could not be reached for comment yesterday.

"Judge Labels Lawyer's Motion Nearly Incomprehensible, Marks Up Errors"

Cassens Weiss, Debra, *abajournal.com*, 22 September 2009

A federal judge irked at grammatical and typographical errors in a motion for dismissal has blasted the Florida lawyer who filed it and ordered him to copy his client on the criticism.

U.S. District Judge Gregory Presnell denied the motion to dismiss without prejudice, saying that it was "riddled with unprofessional grammatical and typographical errors that nearly render the entire motion incomprehensible." The judge also attached a copy of the motion that drew his ire, complete with red markings pointing out the errors.

Presnell's order also criticized the lawyer, David W. Glasser of Daytona, Fla., for failing to obtain a stipulation of dismissal from the defendant as required by procedural rules and ordered the lawyer to re-read both the local and federal rules in their entirety.

The judge's marked-up version of Glasser's motion pointed out these problems:

• Several examples of excess spacing.

• Incorrect use of apostrophes.

• Typographical errors (using the word "this" instead of "thus" and the word "full" instead of "for").

• Incorrect placement of periods and commas outside of quotation marks.

• Incorrect capitalization.

• Wrong word use (using the phrase the plaintiff "had attended on filing" this action, instead of saying the plaintiff had "intended" to file an action).

• One very long sentence.

Here is an example [from the motion] of some of the problems: "A review counsel's file subsequent to the court order indicates that for some reason full which counsel is unaware, the defendant named in the complaint was changed to the current defendant. Counsel believes this was changed by counsel's prior assistant it was no longer with counsel's firm."

Glasser did not immediately return a phone call from the *abajournal* seeking comment.

"Throwing the book at dozy judges"

Miller, Jeffrey, *The Lawyers Weekly*, 26 September 2008, p.5
[*in part*]

"If that were the case then even a party whose stay application… had been heard by a 'sleeping' judge would have no avenue through which to seek redress." So wrote Justice Joseph Robertson more than eight years ago, in *Panchoo v. Canada*,[2000] F.C.J. No. 143 (C.A.). The immediate subject was the right to appeal a judge's refusal to stay a deportation order. But the broader case law suggests the avenue of redress from sleeping judge cases is not all that broad.

In the most recent reported instance in Canada, *Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Limited Partnership* (2008), 90 O.R. (3d) 561 (C.A.) (released three months ago), the court said "there appears to be little case law on point"—of what to do when a judge nods off during your hearing.

. . . .

The law in Canada, and probably more generally, is that judicial "inattention" is reversible error only where it prejudices the litigants. *Leader* was counsel's first trial, and a senior litigator in her firm advised her not to raise the sleeping-while-sitting issue with the judge. This "roll of the dice" proved to be just that when the Court of Appeal ruled there was no evidence of prejudice and "counsel was obliged to bring the trial judge's inattention home to him at the time. Not having done so and having decided to wait and see what happened, they cannot now raise that inattention for the first time…."

. . . .

"Divorcing couples encouraged to search for the most favourable court"

Gibb, Frances, *The Times*, 02 September 2009

Divorcing couples who cannot reach agreement when they separate are being advised to shop around England and Wales to find courts most likely to award them a favourable settlement, *The Times* has learnt.

The divorce courts "lottery" means that when couples split there can be starkly differing outcomes depending upon which part of the country their case is heard in.

Family lawyers say that the district judges, who rule on 90 per cent of divorces, vary widely on how they split assets and how they order maintenance from one spouse to another, most often from husband to wife.

Some courts favour clean breaks, dividing a couple's assets and with limited or no regular maintenance payments, while others prefer lengthy maintenance awards.

Courts in the South, South East and London are seen as "very pro-wife", while husbands fare better in the North. One family barrister working in London said that if he wanted to divorce, he would do it in Newcastle upon Tyne because he would stand a better chance of getting a good deal.

The research comes as family lawyers prepare for the post-summer-holiday rise in divorce inquiries.

The Manchester-based firm Pannone, which carried out the research, said that there was in effect a "divorce map" applied by lawyers. It trawled 1,500 cases handled by its own lawyers since 2007 and also drew on findings from divorce lawyers at 20 roadshows in England and Wales.

Its findings are also confirmed by Resolution, the association of 4,000 family lawyers in England and Wales, which says that it is an open secret that lawyers shop around for the right court and judge.

Andrew Newbury, matrimonial partner at Pannone, said: "We've all heard of forum shopping, with foreign couples choosing the best jurisdiction to divorce between one country and another and often coming to London with its reputation as the 'divorce capital of the world'. Now it seems they are forum shopping within England and Wales as well."

The reason, he added, was not that judges were making wrong rulings but because they had a wide discretion to apply the law.

He said that he had tested out a hypothetical divorce at the roadshows, which were attended by district judges and family lawyers. "There was a very clear difference. Generally in the North judges tended to favour a clean break or limited maintenance, taking the view that the wife could stand on her own two feet."

Nigel Shepherd, of Resolution and a partner with the solicitors Mills & Reeve, agreed that a divorce ruling could be a lottery. He said: "The upside of our discretionary system is that it is designed to be flexible so judges can tailor the outcome to the needs of the parties. The downside of that is the lack of consistency or certainty as to outcome. It varies tremendously."

However, District Judge Stephen Gold, from the Association of District Judges, said that judges could spot attempts to shop around, adding that outcomes would be different because "no two matrimonial property and maintenance cases are ever identical". He said: "Even two cases — let alone a dozen or 1,500—with much in common will have nuances which distinguish them and make it notoriously difficult to compare or detect a trend."

Sir Mark Potter, the President of the Family Division, has called for the Law Commission to review section 25 of the Matrimonial Causes Act, which is the yardstick used by judges when deciding on the division of assets.

A series of "big-money" divorce cases seems to appear to confirm the perception that wives do well in London or the South East:

John Charman, an insurance magnate, lost his appeal against being ordered to pay his former wife, Beverley, £48 million after a marriage of almost 27 years. He said afterwards: "Until the 1973 law is reformed to bring it into line with the many changes to modern marriage and business life, London will remain the divorce capital of choice for the spouses of all very successful people"

A woman from Gloucestershire was awarded a maintenance package of £80,000 a year, including £50,000 for the upkeep of her horses, as part of a divorce ruling approved last year by District Judge Michael Segal in a West Country court and confirmed by the Court of Appeal

The House of Lords ordered Kenneth McFarlane, a Deloitte Touche Tohmatsu partner, to give his ex-wife £250,000 maintenance a year after a 16-year marriage, as well as their £1.5 million family London home in London

The House of Lords also ordered Alan Miller to pay £5 million to his ex-wife, Melissa, after a childless marriage of less than three years. They lived in Chelsea, West London.

Sullivan v. Sullivan

Ont. Ct. J. [Gen. Div.], 17 October 1991, McBride, Master (unreported)
[*paras. 1-14 (in part); 15-18*]

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[1] The parties hereto were married April 16, 1970. Because of differences between them they entered into a separation agreement dated March 3, 1983.

[2] The petitioner husband instituted divorce proceedings on September 16, 1988 and the marriage was dissolved on December 22, 1988. Left outstanding were corollary issues.

[3] In the respondent wife's answer and counter-petition the validity of the separation agreement was raised. The wife seeks an order setting aside that agreement on the grounds of the husband's misrepresentation of his income, assets and debts at the date of the separation agreement.

[4] Arising from the alleged misrepresentation the wife seeks an accounting of profits received by the husband or a division of net family property.

[5] The wife filed an affidavit dated March 27, 1991 and upon which she was cross-examined. Counsel for the husband objected to certain interruptions made by counsel for the wife. The motion is for a further cross-examination pursuant to rule 34.14 and that counsel for the wife bear the associated costs arising therefrom.

[6] That rule in its abbreviated parts provides "An examination may be adjourned by … a party … represented at the examination for the purpose of moving for directions with respect to the

continuation of the examination … where, (a) the right to examine is being … interfered with by an excess of improper interruptions or objections."

[7] Before moving to a consideration of the various submissions of counsel, I observe in a general way some observations concerning cross-examination.

[8] There can be no doubt about the right of cross-examination. The questions which may be put are of the sort outlined in *Superior Discount Limited. v. N. Perlmutter &Company*, [1951] O.W.N. 897; that is, the questions must be relevant to the matter in issue on the motion in which the affidavit is filed, be fair and be *bona fide* directed to the issue in the proceeding or to the credibility of the witness.

[9] To be observed is the distinction between a cross-examination and an examination for discovery. On a cross-examination what is sought is the knowledge of the witness. If a witness does not know, for instance, the fact that the witness does not have the knowledge, may of itself be important. If the knowledge is imprecise, that may be important. No objection is proper merely because the witness is guessing.

[10] On the other hand, on an examination for discovery the purpose is entirely different. What is there sought is information about the witness' case … disclosed by his knowledge, information, or belief and as well to obtain admissions. *Modriski .v. Arnold*, [1947] O.W.N. 483.

[11] Accordingly, the role of counsel in respect of cross-examination as opposed to examination for discovery is entirely different. In cross-examination the question is for the actual knowledge of the witness, a test of accuracy of recollection and credibility. That test cannot be augmented by the information of counsel, nor can the witness' memory be refreshed, jogged or aided. All that counsel can do is object to the propriety of the question as limited by *Superior Discount* and other cases.

[12] The role of counsel on an examination for discovery is entirely different although I do not pursue that topic further.

[13] Here while counsel for the husband points to some forty interruptions I propose to consider certain randomly selected questions to determine the outcome of the motion.

[14] The first is question 79 on page 18 through question 84.

"76	Q. [by husband's counsel to wife]	Do you remember when he showed you 120 Hazelton?
	A.	Yes. I do remember that, because it was very shortly before we separated.
77.	Q.	What do you mean by that, very shortly?
	A.	I would say a month before. You know, I am saying approximately a month before.
78.	Q.	May be a month before …
	A.	To the best of my recollection.

79.	Q.	A month before what?
	Ms.: …. [wife's counsel]	March of 1983.
	Mr. Ferrier:	Please let the witness answer.
	The Deponent:	A month before we separated.
By Mr. Ferrier:		
80.	Q.	Which was when?
	A.	In March of '83.
81.	Q.	What date in March do you say you separated?
	A.	The exact date?
82.	Q.	Yes.
	A.	At the end of the month, because I moved into 120 in the beginning of April.
83.	Q.	The end of March?
	A.	The exact date, I don't know the exact date.
84.	Q.	But when you said the end of the month, you meant …
	Ms.:	Well, I don't …
	Mr. Ferrier:	Just a moment. This is cross-examination, Ms. …. This is cross-examination. Now, please don't interrupt to protect your client."

. . . .

[15] I think the foregoing are typical of objections raised by counsel for the husband as to interruptions posed by the counsel for the wife. The answers given are not those of the witness as to her knowledge as further delineated by questions arising from the answers made. I am of the view that his examination was effectively thwarted. Counsel for the husband has not gotten the information he is entitled to get.

[16] What he seeks is important. The affidavit in question is one filed in opposition to the husband's affidavit which the husband filed in support of the husband's motion for summary judgment. The cross-examination may be critical in respect of the issue upon which the affidavit was filled, i.e., the motion for judgment.

[17] Accordingly, there will be an order the wife to attend, pursuant to an appointment to be served for that purpose to be cross-examined on her affidavit herein.

[18] The costs thrown away and of this motion will be paid by counsel for the wife forthwith after assessment. I will not fix those costs as no submissions were made in respect thereof.

Legal Principles

47 What are the legal principles and the interests which must be considered when a litigant seeks to disqualify a presiding judge?

48 In *Wewaykum Indian Band v. Canada*, 2003 SCC 45, the court was faced with an application to set aside a judgment, the reasons for which were written by Mr. Justice Binnie. The ground advanced was that Justice Binnie had been involved with the matter in question some 15 years earlier when he was the Associate Deputy Minister of Justice for Canada. Although the context of the application was an issue of disqualification relating to a judgment already rendered—compared to a matter not yet decided—the principles are the same.

49 Disqualification of a judge because of perceived impartiality is not a matter to be taken lightly. At para. 2:

> An allegation that a judgment may be tainted by bias or by a reasonable apprehension of bias is most serious. That allegation calls into question the impartiality of the Court and its members and raises doubt on the public's perception of the Court's ability to render justice according to law.

50 The circumstances must be fully set out so that a disqualification decision may be properly informed. At para. 7:

> To understand the allegations of reasonable apprehension of bias, it is necessary to examine the factual and procedural background of this case.

51 The court then discusses the principle of impartiality, the strong presumption of judicial impartiality, the definition of a lack of impartiality or bias, and the legal analysis required should it be asserted that a judge cannot adjudicate a particular matter impartially.

52 At paras. 57-60:

The motions brought by the parties require that we examine the circumstances of this case in light of the well-settled, foundational principle of impartiality of courts of justice. There is no need to reaffirm here the importance of this principle, which has been a matter of renewed attention across the common law world over the past decade. Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.

The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as

> a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a disposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.
>
> (*R. v. Bertram*, [1989] O.J. No. 2123 (QL) (H.C.), quoted by Cory J. in *R. v. S. (R.D.)*, 1997 CanLII 324 (S.C.C.), [1997] 3 S.C.R. 484, at para. 106.)

Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process, and must be presumed. As was noted by L'Heureux-Dube J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpre J. in *Committee for Justice and Liberty v. National Energy Board, ...*, at p. 394, is the reasonable apprehension of bias:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

53 And at paras. 76 - 77:

> ... it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpre J. added these words to the now classical expression of the reasonable apprehension standard:
>
> The grounds for this apprehension must, however, be substantial, and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

(*Committee for Justice and Liberty v. National Energy Board, …*, at p. 395)

Second, this is an inquiry that remains highly fact-specific. In *Man O'War Station Ltd. v. Auckland City Council* (Judgment No. 1), [2002] 3 N.Z.L.R. 577, [2002] UKPC 28, at par. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular

circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expressions of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

54 The court then comments directly on the issue of the timing of the application for disqualification. In particular, the court notes at para. 78 that an indication at the outset of or prior to a proceeding that a judge will not adjudicate the matter is not necessarily equivalent to a determination of legal disqualification based on a considered application of the governing principles:

> But hypotheses about how judges react where the issue of recusal is raised early cannot be severed from the abundance of caution that guides many, if not most, judges at this early stage. This caution yields results that may or may not be dictated by the detached application of the standard of reasonable apprehension of bias. In this respect, it may well be that judges have recused themselves in cases where it was, strictly speaking, not legally necessary to do so. Put another way, the fact that a judge would have recused himself or herself *ex ante* cannot be taken to be determinative of a reasonable apprehension of bias *ex post*.

55 In *Wewaykum*, the court referred to its 1997 judgment in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484. Some references to that judgment are helpful, including this passage from para. 36:

> The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail (*Committee for Justice and Liberty*, *supra*). The person postulated is not a "very sensitive or scrupulous" person, but rather a right-minded person familiar with the circumstances of the case.
>
> It follows that one must consider the reasonable person's knowledge and understanding of the judicial process and the nature of judging as well as of the community ...

56 And further at para. 49:

> Before concluding that there exists a reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. There must be some indication that the judge was not approaching the case with an open mind fair to all parties. Awareness of the context within which a case occurred would not constitute such evidence; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.

57 While this statement of the applicable legal principles is comprehensive and, of course binding, some reference to other decisions serves to gather the principles together and to highlight

particular aspects of the required analysis.

58 The principles in *Wewaykum* are usefully summarized in *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350 at para. 7:

These principles are:

(i) a judge's impartiality is presumed;

(ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;

(iii) the criterion of disqualification is the reasonable apprehension of bias;

(iv) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;

(v) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;

(vi) the test requires demonstration of serious grounds on which to base the apprehension;

(vii) each case must be examined contextually and the inquiry is fact-specific.

59 The tension between a presiding judge's duty to decide and the 'easy way out' was commented on by Goepel, J., in *Makowsky v. John Doe*, 2007 BCSC 1231at para. 17:

> Faced with an application of this kind, the natural tendency is to step aside and allow another judge to handle the case. Such a course of action, however, conflicts with the judge's duty to hear cases to which he is assigned. The point was best articulated by Groberman J. in *De Cotiis v. De Cotiis*, [2004] B.C.J. No. 150, 2004 BCSC 117, at para. 9-11:
>
> > The awkwardness of the situation and the importance of the court avoiding any appearance of bias leads the court to err, if at all, on the side of caution in these matters. That is, in my view, a salutary position. There is, however, another aspect of these matters that must not be forgotten. It is the duty of a judge to hear cases that come before him or her, and the party should not be able to unilaterally choose not to have a matter heard by a particular judge simply because that party would prefer that another judge hear the case. If one party, without sound reason, is able to unilaterally determine that a particular judge will not hear a case, it also tends to bring the administration of justice into disrepute. I do not suggest that the Defendants are engaging in "judge shopping" in this case. Nonetheless, it is my duty to determine whether or not I ought to recuse myself, not by simply agreeing to refrain from hearing the

> matter because an objection is raised, but by reference to established legal principles.

And also from *De Cotiis v. De Cotiis*, 2004 BCSC 117 at para. 12:

Mr. Sanderson mentions the case of *Locabail (UK) Ltd. v. Bayfield Properties Ltd.*, [2000] QB 451, a case in which the English Court of Appeal considered, in the context of a variety of applications for leave to appeal, the question of when a judge should recuse him or herself from hearing a case. The point that it is the duty of the court to consider, rather than give effect to, every objection, is made starting at paragraph 21:

> If objection is ... made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance.

60 The need to ensure that, in any analysis, the alleged predisposition (or closed mind) is connected to the issues in the proceeding was recognized by Doherty, J.A., in *Peart v. Peel Regional Police Services Board* (2006), 217 O.A.C. 269 at para. 36:

> For the purposes of this reasonable apprehension of bias claim, judicial bias refers to a judge's predisposition to decide an issue material to the proceedings such that his or her mind is closed or at least strongly resistant to persuasion to the contrary view based on the evidence adduced and submissions made in the specific case.

61 A number of decisions take care to point out that the necessary analysis focuses not on the subjective views of the complainant litigant, but on an objective assessment of all of the circumstances. I note the following:

• ***G.W. L. Properties Ltd. V. W. R. Grace & Co. of Canada Ltd.*** (1992), 74 B.C.L.R. (2d) 283 (at para. 13) (B.C.C.A.):

> A reasonable apprehension of bias will not usually arise unless there are legal grounds upon which a judge should be disqualified. It is not quite as simple as that because care must always be taken to insure [sic] that there is no appearance of unfairness. That, however, does not permit the court to yield to every angry objection that is voiced about the conduct of litigation. We hear so much angry objection these days that we must be careful to insure [sic] that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or at any price.

• ***Makowsky v. John Doe***, at para. 22:

> In his affidavit, the plaintiff raises his personal concerns about my hearing the case. The test for whether there is a reasonable apprehension of bias is an objective one; the subjective views of a party do not form part of the test: ***Lesiczka v. Sahota***, [2007] B.C.J. No. 723, 2007 BCSC 479, leave to appeal refused, [2007] B.C.J. No. 1289, 2007 BCCA 334.

• ***Peart v. Peel Regional Police Services Board*** at paras. 53 - 54:

> Judicial partiality is not a matter of personal perception. The personal characteristics of a litigant, such as race, may well affect the litigant's personal view of judicial partiality, but they cannot create a reasonable apprehension of bias where one would otherwise not exist. The outcome of a bias inquiry cannot turn on the perspective of the party advancing that claim. There either is or there is not a reasonable apprehension of bias.
>
> It is not unusual that a losing litigant honestly and, from his or her perspective, reasonably perceives the proceedings as unfair and the judge as partial. To equate that personal perception of bias with a reasonable apprehension of bias is to use a subjective and inherently partial perspective to decide whether a proceeding was conducted impartially.

• ***De Cotiis v. De Cotiis***, at paras. 13 and 15:

> Some counsel have advised me that while they themselves do not have an issue with me hearing the matter, their clients do. With all due respect, the issue is not one of the preference of a litigant; it is, rather, a matter of applying the legal test of whether there is a reasonable apprehension of bias to the facts. Counsel should not be hesitant in arguing that such an apprehension exists—to do so is not in any way disrespectful of the judge; rather it is helping to determine whether or not there is a reason for recusal. On the other hand, if there is no reasonable basis for any apprehension of bias, a client's preference that a judge not sit is not of any moment. ...
>
> While the case dealt with a somewhat different issue, I agree with the view expressed by MacKinnon, A.C.J.O. in *Re Currie and Niagara Escarpment Commission* (1984), 14 D.L.R. (4th) 651 (Ont. C.A.) at 679 that in matters such as the one at bar, the court must concern itself with what a "reasonable" person might apprehend rather than satisfying "the cynical, the capricious, the excessively suspicious, the paranoid or the perfectionist."

62 Decisions also confirm the objective nature of both the observer and the assessment, and reiterate the need for cogent evidence to displace the presumption of judicial impartiality. I refer to *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (1999), 51 O.R. (3d) 97 at para. 131 (C.A.):

> 4. The test for bias contains a twofold objective standard: the person considering the alleged bias must be reasonable and informed; and the apprehension of bias must itself be reasonable. ...
>
> 7. The threshold for a finding of actual or apprehended bias is high. Courts presume that judges will carry out their oath of office. Thus, to make out an allegation of judicial bias, requires cogent evidence. Suspicion is not enough. The threshold is high because a finding of bias calls into question not just the personal integrity of the judge but the integrity of the entire administration of justice.

63 Courts have also recognized, as noted in *Wewaykum*, that a cautious decision regarding the assignment of a judge is a matter of practical judicial administration and cannot be considered equivalent to a reasoned "legally necessary" disqualification. The comments of McEachern, C.J.B.C. at paras. 6-7 in *G.W.L. Properties Ltd.*, are instructive:

> The pre-trial management judge quite properly asked counsel to speak to the matter in open court which was done. I have read a transcript of those proceedings. The pre-trial management judge considered the matter and spoke to Chief Justice Esson as he had been invited to do by counsel for Grace.
>
> What happened is described in a memo delivered to counsel by Chief Justice Esson which includes the following:
>
> After the matter was raised on Friday morning last, the pre-trial management judge discussed the matter with me. It was for other reasons a hectic day. Without giving the matter adequate thought, I expressed the view that we should apply an approach (it is not a rule or a principle) which we often apply where questions of possible grounds for disqualification arise, as they often do, in circumstances of urgency. That approach is to avoid the "hassle" of having a judge face suggestions of bias, however spurious, by simply shifting the case to another judge. That problematic approach is entirely reasonable if it can be applied without injustice to the parties or the public interest.

64 Finally, in this discussion of legal principles, and fundamentally at the heart of any objective assessment, is this notion of the reasonable person, the fair-minded and informed observer. Who is this person? I am grateful for the description offered by Lord Hope of Craighead in a recent decision of the House of Lords—*Helow (AP) v. Secretary of State for the Home Department*, [2008] UKHL 62 at paras. 1 - 3:

> The fair-minded and informed observer is a relative newcomer among the select groups of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word "he"), she has attributes which many of us might struggle to attain to.
>
> The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J. observed in *Johnson v. Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. .... The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the

> conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
>
> Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

65 Drawing from the various authorities I have cited, it can be seen that the reasonable person, the fictional arbiter of this disqualification motion, is and is expected to be:

(i) fair-minded;

(ii) one who does not possess a very (in the sense of 'unduly') sensitive or very scrupulous conscience;

(iii) fully informed of and conversant with all relevant context and circumstances;

(iv) one who will reserve judgment until fully informed;

(v) one who will consider all relevant context and circumstances thoughtfully, realistically and practically before reaching a decision;

(vi) one who, in the specific circumstances of a motion to disqualify a judge, recognizes and accepts the fundamental value of a strong presumption of judicial impartiality and acknowledges the need for cogent evidence to displace this presumption.

"Judge Scolds Lawyers for Document Blizzard: You Wouldn't Do This to a Jury"

Cassens Weiss, Debra, *abajournal.com*, 20 November 2009

U.S. District Judge Gregory Frizzell has endured 25 days of testimony in Oklahama's pollution case against the poultry industry, but it's the blizzard of paperwork that is really fraying his nerves.

On Thursday, the Tulsa judge scolded a group of about 30 lawyers in Oklahoma's case for blanketing him with "thousands" of documents in the bench trial, the Associated Press reports. Frizzell accused the lawyers of trying to admit the documents with an eye toward an appeal.

"You wouldn't do this to a jury," Frizzell said. "You do this to a judge."

"I wish we had a jury," the judge said.

Frizzell warned the lawyers to avoid extremist positions in their proposed findings and conclusions, according to the AP story. "Be reasonable; don't be zealots,' he said.

The suit by Oklahoma Attorney General Drew Edmondson seeks to hold 11 poultry companies responsible for pollution runoff caused by poultry waste. *The Tulsa World* previewed the case as it began in late September.

Butty v. Butty

2009 ONCA 852, Per Curiam
[*paras. 3-6; 18-22*]

The Treatment of Mr. Jaskot

3 Stanley Jaskot served as counsel for Julius Butty at the trial of this matter before Pazaratz J. in April of 2008.

4 The issues at trial included the value of Mr. Butty's interest in a family farm at the date of marriage and date of separation, and the enforceability of a marriage contract entered into by the parties.

5 In his written decision, the trial judge was extensively and highly critical of Mr. Jaskot, based on his mistaken belief that Mr. Jaskot had suppressed information in a purposeful attempt to mislead opposing counsel and the court. The trial judge believed that Mr. Jaskot tried to hide the fact that the family farm consisted of two parcels of land by treating it as a single parcel.

6 As we will explain, this belief is misguided. It cannot stand, given the evidence at trial.

. . . .

18 As we have mentioned, the trial judge believed that Mr. Jaskot tried to hide the fact that there were two separate properties. In his reasons for decision, he describes Mr. Jaskot as having purposely suppressed information in an attempt to mislead opposing counsel and the court into believing that the farm property was a single parcel of land.

19 In light of the foregoing evidence, this characterization of Mr. Jaskot is completely unfounded. Opposing counsel and the court had documents clearly showing that the farm property consisted of two separate properties.

20 As a result of the reasons for judgment, Mr. Jaskot has suffered unwarranted personal and professional embarrassment.

21 …. when the trial judge expressed some concern about the matter at the end of trial, counsel for Ms. Butty should have made it clear to him that she was under no misapprehension that the farm property consisted of two parcels of land. The suggestion that Mr. Jaskot's theory that the two parcels could only, or would only, be sold as a single piece of farmland in no way explains away these failings. That theory could have been tested and challenged in the normal fashion. It does not amount to an attempt to deceive the court into believing there was a single property at issue.

22 This court cannot truly repair the damage that Mr. Jaskot has suffered. Having said that, its comments are intended to serve as an unequivocal statement that there was nothing improper in

his conduct in this matter. We regret what appears, on this record, to be unwarranted judicial criticism levied against him.

R. v. Cunningham

2010 SCC 10, 26 March 2010, Rothstein J. for full Court

C, a criminal defence lawyer employed by Yukon Legal Aid, represented an accused charged with sexual offences against a young child. Prior to the preliminary inquiry, Legal Aid informed the accused that failure to update his financial information would result in the suspension of his legal aid funding. The accused failed to respond to the request and Legal Aid informed him that C was no longer authorized to represent him. C brought an application to the Territorial Court of Yukon to withdraw as counsel of record solely because of the suspended funding. However, C indicated that she was willing to represent the accused if funding were reinstated. The Territorial Court refused her application. The Supreme Court of the Yukon Territory dismissed C's application for an order in the nature of *certiorari* seeking to quash the Territorial Court's order, holding that the Territorial Court did not exceed its jurisdiction. The Court of Appeal allowed C's appeal on the basis that the Territorial Court had no discretion to refuse C's application to withdraw.

The appeal should be allowed.

The Territorial Court had jurisdiction to refuse to grant C's request to withdraw. A court has the authority to require counsel to continue to represent an accused when the reason for withdrawal is non-payment of fees, but the authority must be exercised sparingly and only when necessary to prevent serious harm to the administration of justice. Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice. Likewise, in the case of statutory courts, the authority to control their process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law.

Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not prejudice an accused does not attract the protection of the solicitor-client privilege, and the remote possibility that a judge will inappropriately attempt to elicit privileged information in hearing the application to withdraw does not justify leaving the decision to withdraw exclusively to counsel. As well, the oversight of a lawyer's withdrawal does not fall exclusively to the law societies. Both the courts and the law societies play different, but important, roles in regulating withdrawal: the courts prevent harm to the administration of justice and the law societies discipline lawyers whose conduct falls below professional standards. These roles are not mutually exclusive; rather, they are necessary to ensure the effective regulation of the profession and protect the process of the court. While counsel's personal or professional interests may be in tension with an individual client's interest, courts must presume that lawyers act ethically. Where the court requires counsel to continue to represent an accused, counsel must do so competently and diligently. Both the integrity of the profession and the administration of justice require nothing less. Lastly, a *Rowbotham* order might be relevant to the court's residual discretion to refuse withdrawal, but it cannot operate as a replacement for it.

The court's exercise of discretion to decide counsel's application for withdrawal should be guided by the following principles. If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, the court should allow the withdrawal. If timing is an issue, the court is entitled to enquire into counsel's reasons. In either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege. If withdrawal is sought for an ethical reason, the court must grant withdrawal; if it is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request if it determines, after weighing all the relevant factors, that allowing withdrawal would cause serious harm to the administration of justice.

Refusing an application to withdraw is a coercive and conclusive order with respect to the lawyer and, in that context, an order in the nature of *certiorari* should be given its normal scope and can be allowed where there is an error of jurisdiction or an error of law on the face of the record.

In this case, the Supreme Court of the Yukon Territory correctly concluded that the Territorial Court had the jurisdiction to refuse to grant counsel's request to withdraw. The question of whether this case satisfies the high threshold that must be met to refuse leave to withdraw is now moot and the record before this Court does not provide information on several of the relevant factors. It is, therefore, not clear whether the circumstances of this case would, after full analysis of the relevant considerations, justify a refusal of leave to withdraw.

"Ex-Wife Can't Talk About Divorce to Media—Ever, Conn. Court Rules"

McDonough, Molly, *abajournal.com*, 24 June 2009

The ex-wife of a wealthy skin doctor can't talk about her divorce with the media—ever, Connecticut's Supreme Court has ruled.

The ruling establishes that private waivers of First Amendment free speech rights are "presumptively enforceable," the *Connecticut Law Tribune* reports.

Still, the state's high court said such decisions should be made on a case-by-case basis and should consider the abilities of the individual waiving rights.

The ruling enforces a confidentiality agreement signet by Madeleine Perricone, the wife of multimillionaire skin doctor Nicholas V. Perricone, who agreed not to talk about her divorce in the early stages of its bitter and contentious filing, the Associated Press reports.

Nicholas Perricone is a well-known skin doctor behind Meriden "cosmeceuticals" which include $250-an-ounce wrinkle cures, several patents and books, the news outlets report.

Litigation over his ex-wife's interview with the *New York Post* and plans to speak to the television news program 20/20 began in 2005, a year after their divorce became final.

At issue was a waiver Madeleine Perricone signed in 2003. She signed a confidentiality agreement to prevent pretrial discovery documents from being made public, a move meant to protect the interests of Perricone's lucrative skin-care business.

The divorce was final in 2004, and the initial confidentiality agreement was held to be in force, forever.

"Clearly our client is disappointed because she never thought that she was signing something that would bind her forever about the divorce, and the process that she went through," Madeleine Perricone's lead lawyer, Anne C. Dranginis of Hartford, told the *Law Tribune*. "She's a citizen who's being denied the opportunity to talk about [her divorce] process."

"Failure to gag Private Eye clears way to Publication of ruling against lawyers"

Gibb, Frances, *The Times*, London, 21 May 2009

Thousands of disciplinary rulings against lawyers accused of misconduct can be publicised after one of Britain's leading solicitors lost a battle in the Court of Appeal to keep his own case under wraps.

Lawyers for Michael Napier, former President of the Law Society, went to court to seek an injunction to stop *Private Eye* from publishing identifying details of a complaint against him. But on Tuesday the Court of Appeal backed an earlier ruling by Mr. Justice Eady in the High Court and refused to grant the banning order.

The ruling also clears the way for thousands of other cases each year against solicitors and barristers to be publicised, as well as findings by the legal ombudsmen who act as a last "court" of appeal.

The ruling also raises a question mark over the publication of disciplinary findings by other professional bodies and other ombudsmen.

One lawyer said yesterday: "This will be a free-for-all for complainants. Anyone aggrieved with his or her lawyer will be able to publicise details, whether the complaint was upheld or not—and the public will think there's no smoke without fire."

Mr. Napier, senior partner of the law firm Irwin Mitchell and a member of a new arch regulator, the Legal Services Board, has been reprimanded and found guilty of acting in circumstances where there was "significant risk" of a conflict of interest.

The complainant, a barrister called Michael Ford, then referred the case to the legal ombudsman. It was looked at by the Scottish ombudsman because Mr. Napier had held a prominent position in the Law Society. He concluded that the Law Society had failed to investigate the original complaint properly and said that the penalty imposed, the reprimand, should be reinvestigated to see whether some other penalty should be imposed. In January this year *Private Eye* obtained a copy of the ombudsman's report but Irwin Mitchell and Mr. Napier sought an injunction to prevent him from being identified in any publication.

This week's robust ruling by the appeal judges means that decisions by adjudication panels can be published if the complainant wishes. The Solicitors Regulation Authority, the body that took over the job of disciplining solicitors from the Law Society, makes almost 2,500 adjucations a year.

Lord Justices Hughes, Toulson and Sullivan ruled that complainants did not owe a duty of confidentiality to their solicitors. Lord Justice Hughes rejected the argument from Mr. Napier's lawyers that the disciplinary scheme would be unworkable or would "impair the integrity of the process" unless the adjudications by panels were confidential to themselves.

Mr. Napier was not available for comment.

Mr. Ford's complaint against Mr. Napier relates to the barrister's suspension from the Hong Kong Bar Association over misuse of confidential client information. He appealed to the Privy Council and engaged Mr. Napier, who acted free of charge and won the appeal. But five years later Mr. Ford alleged a conflict of interest.

He claimed that the relationship of another branch of Irwin Mitchell with Esso was detrimental to him and beneficial to Exxon and its wholly owned subsidiaries, including Esso, which was in litigation with him.

Irwin Mitchell said: "We expect the decision will be a surprise and of concern to the legal profession and to other regulated professions and businesses which might have thought information provided to their regulator would be treated as confidential, especially in the sensitive area of complaint investigation and processing."

Canada Lobbying Act Obligations

Hoyles, John (Ottawa: Canadian Bar Association, 30 June 2008)

... new monthly reporting obligations [came] … into effect on July 2, 2008 under the federal *Lobbying Act* [which replaced the *Lobbyist Registration Act]*. The purpose of this memo is to advise you of the impact of these new obligations on your volunteer work with the Canadian Bar Association.

The *Lobbying Act* will … apply only to activities you undertake for payment. Therefore, as volunteers involved with the CBA, there is no requirement for you to be registered under the *Lobbying Act*, nor is there any requirement for you to report any meetings with people designated in the government as designated public office holders.

The CBA President and Treasurer, who do receive an honorarium, and the National Office staff who interact with government on a regular basis are registered as lobbyists under the Act.

We have reviewed the legislation closely with our counsel, and are completely satisfied this is the correct approach.

If someone with whom you are speaking in your CBA capacity indicates they are a "designated public office holder" and ask whether you are registered, you obviously say no. If they are then reluctant to speak with you, you can advise them that you are not required to register as you are a volunteer. If you are trying to arrange a meeting and are rebuffed for the same reason, we can provide a Letter of Comfort to the designated public office holder indicating that you are exempt.

Under the Act designated public office [DPOHs] include Ministers, Ministers of State, any person employed in their office ("political staff"), a person in the Senior Executive position

(Deputy Minister, Chief Executive Officer), Associate Deputy Ministers, Assistant Deputy Ministers and those of comparable rank. An additional eleven positions have been designated, most involving the military. The key is asking the person you are speaking with if they are a designated public office holder.

If you are speaking with somebody at the Director General level or below, they are not DPOH's.

"Biggest-Advertising Lawyer Spent $20M in 2007"

Cassens Weiss, Debra, *abajournal.com*, 07 January 2009

Massachusetts lawyer James Sokolove is the biggest-spending legal advertiser, but he no longer tries any cases.

Sokolove spent more than $20 million advertising his firm in 2007, but he refers all of his cases to other lawyers and takes a percentage of the recovery, *Boston Magazine* reports in a profile. Sokolove spent twice as much as the next-biggest lawyer advertiser, the magazine says, and his radio and TV ads run once every eight seconds. His firm is keeping tabs on some 10,000 referred cases, and the clients who sought him out have won or settled for more than $2 billion in damages, the story says.

"Despite his prodigious success and his omnipresent image as a bulldog attorney, Sokolove hasn't seen the inside of a courtroom in nearly three decades," the story says. "Truth be told, he's argued only one case before a jury; it was back in the early 1970s, and he lost. It wasn't tenacious lawyering that allowed Sokolove to build a legal empire, but rather his prowess as a businessman and an innovator."

Asked about his reputation as an ambulance chaser, Sokolove told a reporter, "Yeah, the best you've ever seen."

"Law Firm Touts '60 Minute Divorce' (Poll)"

Cassens Weiss, Debra, *abajournal.com*, 11 February 2009

A New York City law firm is touting a "60 Minute Divorce" for couples with uncontested issues, no kids and no property to divide.

The Brodsky Law Firm is offering to prepare divorce papers and file the case while divorcing couples dine at a nearby McDonald's or Starbucks with a $10 gift card provided by the firm. "Walk in married. Walk out divorced (almost). And get a free lunch," says a press release issued by the firm.

"After that, it's just a matter of waiting for the court to issue the divorce, usually just a few weeks," the press release says. "There are no further office visits required, and no additional paperwork to sign."

The cost of the uncontested divorce is $299 plus court, filing, process and messenger fees—which comes to a total of $699, according to the law firm's website. Have property to divide? Add $99. Kids? Add another $99. Need spousal support provisions? That's $99 also.

Name partner Steve Brodsky says the cost of his firm's 60 Minute Divorce is less than that charged by do-it-yourself document preparation services.

"The paperless chase"

White, Emily, *National*, July-August 1009, pp. 38-39
[*in part*]

Looking for the a name for the cooperative law blog he would launch in 2005, Simon Fodden kept thinking about some of his favourite sites like *Salon* and *Slate*. So the Professor Emeritus at Osgoode Hall Law School in Toronto came up with *Slaw*, a fitting title for what has since become one of North America's most popular legal blogs: a name that evokes something crisp, tangy, and full of interesting bites (www.slaw.ca).

"If you say 'blog' to some lawyers, they think of it as a self-indulgence—some isolated person just reeling out random thoughts," says Fodden. But what lawyers need to realize, he says, is that blogs as a whole and law blogs in particular have come a long way. There are now blogs on everything from privacy law to product liability, providing sharp, up-to-the-minute analyses of legal developments.

"There are many practicing lawyers who have no time for blogs, who never look at them, or don't know much about them at all," Fodden observes. But while he understands some lawyers' inclination to keep their distance from online content, he warns against it. "These lawyers are missing the information they can gain from blogs, and they're missing the experience of working with a developing electronic medium."

. . . .

An online revolution

Fodden recognized early that technology could change how lawyers think and talk about the law. He and his crew of online colleagues at *Slaw* are now trying to help lawyers understand that the old ways of keeping up with the law—paper-bound journals, weekly case reports—are evolving into something quite different. Leading publications, such as the *Yale Law Journal*, are now posting online editions that allow short essays and comments on breaking news, and a lot of the most lively and topical legal writing has moved to the web.

"I understand the value of peer-reviewed journals," says Fodden, "but they take a *long* time." The definitive analysis of a case might still appear in the *Osgoode Hall Law Journal*, but that article will be months in the works. A blog, on the other hand, can offer instant information on decisions, policies, and legislative changes. "There's an urge to say something useful and critical, in the constructive sense, quickly, and blogs can serve that purpose."

Blogs also fill another important role. "I think there are a good many lawyers who would like to write much more than they do," says Fodden. "Of course, they write memos and opinions, but I think they'd like to expand on a topic. And blogs give them the opportunity to do that."

Lawyers who would never dream of contributing to the *Canadian Bar Review* might find themselves blogging quite happily about developments in their field. And lawyers reading the posts might find themselves writing in response. "You can see commentators getting carried away and obviously enjoying writing lengthy critiques," notes Fodden.

Blogs like *Slaw* are taking the previously cloistered discussion of law and opening it up to a whole new field of writers like students, young associates, and partners so busy they'd never have time to write a 10,000-word case analysis. The result, which *Slaw* captures, is a whole raft of new voices, opinions, and challenges from people with whom lawyers rarely interact.

Slaw has been instrumental in that effort, and is gaining increasing recognition for it. The site placed in the Top 10 of the American Bar Association's recent list of the best law and technology blogs and received the coveted "Best Law Blog" award from a renowned U.S. legal technology expert. *Slaw* and *The Court* are being archived by the U.S. Library of Congress. And in an unprecedented development for a blog, *Slaw* recently received the Canadian Association for Law Libraries Award for Excellence in Legal Publishing.

The challenge facing all law blogs, notes Fodden, is credibility. Posts aren't peer-reviewed and are rarely footnoted, but they do get "disciplined" by other readers, and many blogs are run by academics and practitioners with solid reputations. As the credibility of blogs increases, they'll become even more essential sources of new and updates.

"Many lawyers are stuck using email and Blackberries," says Fodden. Even as lawyers stay in place, however, the technology around them continues to develop. "It isn't going to stop with blogs," he says. "These technological developments and forms don't stay still. They just keep developing, with increasing rapidity." Lawyers who fail to pay at least some attention to blogs might be blindsided, as the most current legal research, commentary, and cutting-edge information continues to migrate to the web.

"Electronic Trail Reveals Lawyer Resume Lies, Costing Job Opportunities"

Cassens Weiss, Debra, *abajournal.com*, 22 September 2009

Wrong dates or an inflated work history has cost more than one lawyer a shot at a new job.

Legal recruiters Deborah Ben-Canaan and Martha Fay Africa say resumé fraud is easier to catch in the electronic age, according to their article in the *Recorder*. "The old paper trail has become a much more easily followed cybertrail," they write.

"Candidates may think that stretching the truth a little bit is not a big deal, but it is," the article says. "We have heard lawyers tell us that they only worked in a job for a few months, so they left it off their resumé, or they had a bad experience in that job, so it was left off the resumé and then dates were stretched to cover any resumé 'gaps.' This is deceit, plain and simple."

Africa and Ben-Canaan say they decline to represent lawyers if they discover their resumé fraud. They cite these recent examples:

• A candidate was a finalist for a general counsel position until a review revealed different law firms on different resumés, inconsistent employment dates, and a wrong date for passing the bar.

• A candidate who wanted an in-house position added a year onto his law firm experience by failing to mention that the year was spent as a summer clerk, and didn't disclose that another job was an internship.

• A solo practitioner who did work for a computer company falsely claimed he was an in-house counsel for the company.

"Smartphone etiquette: Where to draw the line?"

Kiang, Milton, *The Lawyers Weekly*, 28 August 2009, pp. 21, 23

It's a scene we've seen all too often. You're sitting in a room full of lawyers, and just as you begin to speak, you hear smartphones buzzing with incoming messages. Worse, as you utter your first few words, people start checking their e-mails, some furiously tap the keyboard, others giggle at the screen. Was it something funny you said?

Smartphones, such as the Blackberry and iPhone, have become a ubiquitous part of legal practice. Most national law firms hand them out to associates and articling students coming onboard. Denise Nawata, a third-year securities lawyer at B.C. firm Farris LLP, says, "I can't imagine what practice is like without one—I've always had it."

Nawata says everyone in her department has one, and when she's in the middle of transactions, she's on it, she says, "pretty much 24/7."

Lang Michener LLP securities partner John Conway says he sleeps by his BlackBerry: "It's the last thing I see before going to bed, and the first thing I see when I get up."

Clients now expect quick turnaround on their files, and lawyers have to be responsive to client demands. With intense competition between law firms during this economic downturn, lawyers can't afford to lose clients.

Lang Michener LLP banking partner Eric Friedman says matter-of-factly: "Clients have an expectation that you'll always be in touch with the office. Not all clients are like that, but with the increase in the use of BlackBerrys, more and more clients carry that expectation.

"If you can't provide that level of service, someone else will," says Friedman.

Borden Ladner Gervais LLP corporate partner Martin Donner says that according to a legal survey he read several years ago, a lawyer's availability is what clients value most. Donner says he checks his BlackBerry on evenings and weekends. "I do it because I haven't left the planet. If there's something I can do to help out, I'll do it. Clients' needs aren't confined to regular hours."

So where does one draw the line between work and personal life?

"It's a source of frustration," says one second-year Calgary litigation lawyer, who didn't want to be named. "I don't want to have my work attached to me all the time. Whenever you check your BlackBerry, it creates work. It doesn't make sense to be checking your e-mail [on holidays and weekends] because the whole point is not to be working."

Another Calgary lawyer, Clint Suntjens, a senior litigator with Litwiniuk & Company, refuses to carry a BlackBerry. "I don't want to be checking my Blackberry 2 million times a day. Of course, if I'm in the office, I'll check my e-mail messages."

One senior Vancouver securities lawyer, who also wanted to remain anonymous, says his primary school-aged children often wonder why their father is always on the BlackBerry, even on Sunday mornings.

Vancouver executive coach Allison Wolf says that it's not about the BlackBerry, but how you manage expectations—either with your internal clients (your colleagues and partners), or with your external fee-paying clients.

Wolf suggests that lawyers talk to their clients to find out how quickly they expect to receive e-mail responses. Lawyers should also explain how they run their practice, and talk about periods when they can't be reached because, for instance, they're spending time with family. "Clients will appreciate it," says Wolf.

Wolf says different clients will have different expectations. "The problem is that if you don't have that conversation, assumptions are made."

"We feel that we don't have the power, but control really begins with the lawyer."

Wolf says that a big part of work satisfaction — as well as profitability — rests with effective client-relationship management.

Wolf also suggests that lawyers talk to their families as to when it's appropriate to use BlackBerrys. For example, is it acceptable to use it while everyone's watching television? Or around the dinner table? "It's about setting boundaries," says Wolf.

Are there times when using BlackBerrys aren't acceptable? Wolf says that lawyers shouldn't be using their BlackBerrys in meetings. "It's vital that you're fully present. When you're using your Blackberry, you appear indifferent in front of your friends, colleagues and clients."

Most lawyers, however, don't seem to mind colleagues who use smartphones during internal meetings. Lang Michener partner Friedman says, "It's part of being in the service industry. Lawyers know that it's competitive out there, and they've got to use every tool at their disposal."

But when it comes to external client meetings, lawyers report that they put away their Blackberrys. It's common sense: if clients are paying lawyers $300 or $400 an hour, lawyers don't want them thinking their attention is elsewhere or, worse, that they're working on another client matter.

Clients, of course, are free to use their BlackBerrys during meetings. In fact, lawyers say that clients will often pull out their BlackBerrys in the middle of face-to-face discussions. Lawyers aren't bothered by it. "If they're paying us a lot of money, and they're not listening, that's their prerogative," quips a real estate lawyer from Fraser Milner Casgrain LLP.

Executive coach Wolf sees BlackBerry-use increasing in the future. "It's because so much of our communications is taking place over e-mails, and more and more people are connected to social media networks like LinkedIn, Facebook and Twitter. It's convenient, instantaneous and inexpensive."

By the same token, Wolf says that smartphones will make our face-to-face meetings more important, much more valued, simply because there will be less of them.

But as far as managing client relationships go, nothing beats sitting down with clients, showing support and giving them undivided attention for the next hour or so. Sans le BlackBerry, of course.

"Judge Strikes Down La. Restrictions on Lawyer Internet Ads"

Cassens Weiss, Debra, *abajournal.com*, 04 August 2009

A federal judge has upheld most of the new restrictions on advertising by Louisiana lawyers, but struck down two rules regulating Internet advertising.

U.S. District Judge Martin Feldman said Louisana's Internet restrictions don't account for differences between ads online and those in traditional media such as television, the Associated Press reports. "The Internet presents unique issues related to advertising, which the state simply failed to consider in formulating this rule," Feldman wrote in his opinion. As a result, the Internet ad restrictions violate the First Amendment, he ruled.

Feldman upheld most other restrictions, saying the state can regulate ads that promise results, portray a judge or jury, or use client testimonials, according to AP.

The Wolfe Law Group had challenged the Internet rules, claiming they would restrict the firm's right to comment on Twitter, Facebook, online bulletin boards and blogs. The firm also argued the rules would subject each of the firm's online posts to a cost-prohibitive evaluation and $175 fee.

The law firm had provided an example: It spent $160 on 12 different Google pay-per-click ads over a three-month period; the cost of the ad review would have been about $2,100.

Name partner Scott Wolfe Jr. said in a press release that Feldman's ruling is important to lawyers who advertise online. "The court not only noted that states must have a reason to regulate Internet speech, but it also recognized that the Internet media is different from broadcast media, and is entitled to unique protection," he said.

"CBA offers tips on legal Tweeting"

Todd, Robert, *Law Times*, 19 October 2009

Lawyers eager to dip their toes into the world of new media in hopes of marketing their business can look to new guidelines from the Canadian Bar Association to avoid getting burned.

Paul Paton, vice chairman of the CBA committee that created the guidelines, says the association has received an influx of questions from lawyers looking for help implementing new marketing strategies without flouting professional regulations. Web sites, blogs, social networking sites, and Twitter accounts have all prompted inquiries, he says.

"We know that there are people accessing or looking for lawyers through the Internet because of what they're doing in the United States or the U.K.," says Paton, a professor at California's University of the Pacific McGeorge School of Law.

"Lawyers themselves are finding different ways of actually functioning." He adds that many lawyers view the Internet as a forum to market their services more economically during tough financial times.

Paton says the CBA pondered a revamp of its code of professional conduct based on the queries but decided it would be best to convey that the traditional rules haven't changed, but their application to new technology has.

That prompted the 2008 release of the CBA's guidelines for practising ethically with new information technologies and the recent marketing guidelines.

The guidelines, prepared by the CBA's ethics and professional responsibility committee, are found in a concise 11-page document.

They begin by encouraging lawyers to overcome fears about the potential pitfalls of having an online presence by focusing on the benefits. The document goes on to offer simple advice on things such as acceptable web site addresses and blog titles, how lawyers should identify themselves online, the proper use of legal advice as a marketing strategy, avoiding of conflicts, and how to deal with unsolicited confidential information.

For example, lawyers are urged not to use a "web site address, blog name, e-mail signature tag line or other identifier that makes a claim about competence, results or fees or would otherwise be a transgression of the rules."

It's also vital, according to the guidelines, for lawyers to announce the jurisdiction in which they are licensed to practise when communicating in cyberspace. They are encouraged to give legal advice only to clients who have retained them and have staffers screen communications to ensure they don't threaten established or future retainers.

Hicks Morley Hamilton Stewart Storie LLP associate Dan Michaluk has keenly embraced new technologies in marketing his practice and applauds the CBA guidelines. He maintains his own blog, contributes to the legal blog Slaw, and posts updates on Twitter.

He also helped shape his firm's policies for lawyers actively using such technologies as a former member of its knowledge management group. Michaluk has parlayed his activity online into an expanding contact list that has helped him get advice from colleagues and land work. But he urges lawyers to ease into the online marketing world to avoid headaches.

"You develop a sense over time of the very subtle boundaries that delineate what is acceptable and what is not," he says, adding that the CBA guidelines hit on the main points. "But until you get out and you publish and you think through the process of critically analyzing what you publish before you do, it will take a while to develop an innate sense for them."

For Michaluk, the toughest calls are business conflicts. He notes that some legal issues are extremely sensitive to clients, and it's important to respect that. Even reporting factually on an issue that has affected a client can be enough to offend, he says.

"You have to be hyper-vigilant about those. Those scare me more than anything. The ethical conflicts are much easier to see than some of the subtle business conflicts."

Michaluk credits the drafters of the CBA guidelines for encouraging Canadian lawyers to use new marketing tools. He hopes that gives them some assurance to catch up with the more aggressive tactics of their U.S. counterparts.

"Especially some of the larger firms are quite conservative about marketing because what it does is it takes control away from the firm," he says.

Michael Rabinovici, a lawyer and vice president of strategic initiatives with AR Communications Inc., says lawyers can generally avoid problems in online communications by focusing on providing value to potential clients. Overly aggressive web-marketing tactics can backfire, he says.

"If your social media efforts are focused on education, as opposed to trying to sell people on becoming clients, then you're going to encounter a lot less barriers," he says.

"In terms of leveraging the web and social media marketing for the legal profession or for lawyers, doing business and doing the right thing are mutually inclusive."

Diana Miles, director of professional development and competence at the Law Society of Upper Canada, notes that rule 3 of the rules of professional conduct was relaxed last year. The changes generally reflect an effort by the LSUC to ensure advertising and marketing claims aren't false or misleading and are in line with professional duties.

"We acknowledge that lawyers are going to advertise and market in new media [and] in different types of media and that a certain amount of flexibility has to be allowed there for them to be able to conduct themselves in a professional capacity," says Miles.

"Guidelines for Ethical Marketing Practices Using New Information Technologies"

Ethics and Professional Responsibility Committee, Canadian Bar Association (Day Q.C., David; Paton, Paul; Cardinal, Inez; Brossard, Christian J.; Thomson; Tamra [Staff Liaison]; Schmolka, Vicki [Editorial Consultant]), August 2009
[*in part*]

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Social networks, blogs, web sites, on-line directories, e-mail tag lines – there are ever-increasing e-opportunities for lawyers to communicate with potential clients about what they do and to market their services to the public. The Committee has accordingly prepared these *Guidelines for Ethical Marketing Practices Using New Information Technologies* to interpret the CBA's Code of Professional Conduct in the context of the new information technologies. The Guidelines are not binding. They are advisory. In all cases, the specific rules of a lawyer's professional governing body take precedence.

[**Note:** *The Guidelines are available on the CBA's web site, at www.cba.org/CBA/activities/code/*.]

"Guidelines for Practising Ethically with New Information Technologies"

Ethics and Professional Responsibility Committee, Canadian Bar Association (Day Q.C., David; Stern Q.C., Alan J.; Cardinal, Inez; Folk, Felicia; Farrell, Shannon; Paton, Paul D.; Judge, Elizabeth J. [Project consultant]; Schmolka, Vicki [Editorial consultant]; Froc, Kerri [Staff Liaison]), September 2008
[*in part*]

. . . .

New information technologies, once mastered, can save time, contribute to efficiencies, and improve service. They are a benefit to lawyers and their clients.

These Guidelines recommend best practices in the use of information technologies. This is not a set of mandatory rules. For those, please refer to your governing body's code of professional conduct.

These Guidelines supplement the CBA Code of Professional Conduct and, in doing so, to assist lawyers when they use new technologies.

The Guidelines highlight best practices when using an information technology, with emphasis on the need to preserve the security of information and to maintain client confidentiality and privacy.

One striking element of information technologies is the rapid speed at which they are being integrated into our work and world, and the haste with which some of them become obsolete and are discarded.

Inevitably, courts are being called on to make decisions about a lawyer's ethical and legal responsibilities in response to the technology revolution. Some recent decisions have held that lawyers, in some circumstances, have an ethical obligation to use new technologies or, at least, have access to someone who can.

The Ethics and Professional Issues Committee [now: Ethics and Professional Responsibility Committee] will update these Guidelines regularly so that they remain relevant and useful to practitioners. We would appreciate your help. Please tell us if we have overlooked anything and make suggestions for resources or other information that need to be added to the Guidelines.

Information technologies include:

• office productivity software programs, including applications such as wordprocessing, spreadsheets, and presentations;

• computer-assisted legal research;

• e-mail;

• e-filing;

• voicemail;

• wireless devices, such as cordless computer peripherals (computer mouse, keyboard printer);

• pagers, cellular phones, and two-way radios;

• Global Positioning Satellite devices;

• personal data assistants;

• smart phones;

• facsimile machines;

• voice over Internet protocol (voice calls over a broadband Internet connection);

• video conferencing (interactive audio and video telecommunications);

• intranet (private computer networks – "private versions of the Internet" – that use Internet protocols to share information and resources but are usually restricted to an organization's employees);

• extranets (parts of the intranet that are made available to people from outside the organization, such as clients or suppliers); and

• external networks, including the Internet.

[**Note:** *The Guidelines are available on the CBA's website, at www.cba.org/CBA/activities/code/*.]

4.0 PROCEEDINGS DERIVING FROM BREACHES OF STANDARDS OF RESPONSIBILITY

4.1 Administrative: Disciplinary

"Lawyer Reprimanded for Charging $50 for Fee Reviews and Form Letters"

Cassens Weiss, Debra, *abajournal.com*, 11 June 2009

A North Carolina lawyer has received a reprimand for billing a divorce client $50 every time he reviewed her bill and every time he sent her a form letter enclosing the legal tab.

J. Calvin Cunningham of Lexington was reprimanded in connection with his representation of a divorce client, the *Dispatch* reports.

The Grievance Committee of the North Caroline Bar said the $50 charges amount to "task padding" and are excessive. Reviewing the bill is an "obligation every lawyer owes to a client and is an overhead expense incidental to the practice of law," the Feb.12 opinion said.

The committee also said Cunningham erred by charging his client for time spent preparing a motion to withdraw from representing her and by filing a suit to recover fees before a fee dispute resolution process had been completed.

Law Society (Saskatchewan) v. EM & M Law Firm

[2009] 3 W.W.R. 279 (Sask. C.A.), Richards J.A. for the Court
(*paras. 4-18 (in part); 22-27; 57-59*)

II. Factual Background

4 Vera Wolfe has custody of three children born from her relationship with Mr. Hunter. She secured an interim order requiring him to pay child support, commencing January 1, 2001.

5 Mr. Hunter had an outstanding "residential school" claim. The proceeds from the claim were likely to have been the only assets which could have satisfied support and arrears obligations and, as a result, no date was set for the trial concerning child support pending the outcome of the residential school litigation.

6 Counsel for Ms. Wolfe attempted to obtain an undertaking from Mr. Merchant whereby he would agree to advise of any settlement of the residential school claim and to hold settlement monies in trust until the child support issues were settled.

7 Unable to secure such an undertaking, Ms. Wolfe brought an application against Mr. Hunter seeking orders aimed at restraining his use of any settlement funds. A Chambers judge made an order on June 4, 2003 which bound both Mr. Hunter and Merchant Law Group. It read as follows:

> 1. IT IS HEREBY ORDERED that in the event the Respondent, [M.E.H.], receives a settlement in his law suit against the Government based on his claim of abuse suffered at the Indian Residential School, the first $50,000.00, after payment or reasonable solicitor fees and disbursements, shall be paid into Court so that the parties might speak to the distribution of same.
>
> 2. IT IS HEREBY FURTHER ORDERED that the Respondent's counsel, the Merchant Law Group, or any new counsel shall pay the settlement proceeds into Court, in accordance with the foregoing.

8 Mr. Hunter and Merchant Law Group appealed the order. This Court allowed Merchant Law Group's appeal on July 16, 2004 on the basis that the law firm had not been a party to the [family law] litigation. It rendered a decision which put the following order in place:

> 1. In the event the appellant, [M.E.H.], receives a settlement in his lawsuit against the Government based on his claim for abuse suffered at the Indian Residential School, the first $50,000 of the settlement is to be paid into court so the parties might speak to the distribution of the same.
>
> 2. It is further ordered that copies of this Order shall be served on the following persons:
>
> (a) by personal service upon the Director of the Regional Office of the Department of Justice in Saskatoon;
>
> (b) by personal service of the appellant Law Firm and any other Law Firms which may act for the appellant [M.E.H.].

9 While the Queen's Bench decision was under appeal, and the order binding Merchant Law Group still in force, Ms. Wolfe heard that Mr. Hunter had received settlement monies from his residential school claim. At some point, her counsel obtained a copy of a Notice of Discontinuance in that matter. It had been filed by Mr. Merchant on June 1, 2004, some six months prior to the decision of this Court allowing Merchant Law Group's appeal from the order requiring it to pay settlement funds into court.

10 On July 26, 2004, counsel for Ms. Wolfe wrote to the Attorney General of Canada seeking confirmation that a settlement payment had been made to Mr. Hunter. She was advised by letter dated August 4, 2004 that "... the Crown reached an agreement with Mr. Hunter regarding his ... claim ... and ... the Crown is not indebted to Michael Hunter".

11 Counsel for Ms. Wolfe wrote to Mr. Merchant on two occasions seeking clarification of the situation and inquiring whether funds had been paid into court as required by the Queen's Bench order. Mr. Merchant responded by saying only that, to answer her questions, it would be necessary for him to breach solicitor-client privilege.

12 On November 1, 2004, Ms. Wolfe wrote to the Law Society to express her belief that Mr. Merchant had disobeyed court orders. She briefly outlined the situation and said "Mr. Hunter has received 2 payments from Tony Merchant, I don't know the exact amount but the Appellant [Mr. Hunter] has received two payments".

13 On November 1, 2004, Ms. Wolfe also filed a motion in the Court of Queen's Bench asking that Mr. Hunter be found in contempt of court. The application was dismissed six weeks later. The endorsement on the fly leaf of the court file states:

> The evidence is not sufficient to prove beyond a reasonable doubt that the respondent [Mr. Hunter] received a settlement, in respect to orders for payment. Application is dismissed.

14 Ms. Wolfe brought a second contempt application against Mr. Hunter in April of 2005. It was dismissed on the basis Ms. Wolfe had not established beyond a reasonable doubt that Mr. Hunter knew the terms of the June 4, 2003 Queen's Bench order. The Chambers judge also said that the motion could have been dismissed on the basis of *res judicata*.

15 While Ms. Wolfe was pursuing the contempt of court proceedings against Mr. Hunter, the Law Society began looking into the complaint which had been filed against Mr. Merchant. By letter dated January 25, 2005, Mr. Merchant provided the Law Society with information about the financial dealings between his firm and Mr. Hunter. On March 11, 2005, in response to a Law Society request for additional information, Mr. Merchant provided a further explanation of his dealings with Mr. Hunter and copies of trust accounts, draft statements of account, an internal firm document and correspondence from him to Mr. Hunter.

16 On April 18, 2006, the Law Society wrote to Mr. Merchant and requested access to additional records described as follows:

> 1. All trust account, general account and billing records relating to all matters handled by the Merchant Law Group for Michael Earl Hunter.
>
> 2. All client file material relating to Mr. Hunter's Indian Residential School claim.
>
> 3. All client file material relating to Mr. Hunter's family law proceedings with Vera Anne Wolfe.

17 Mr. Merchant and his firm had retained counsel by this point. Counsel indicated to the Law Society that Merchant Law Group had significant concerns about supplying the information in question. He said Mr. Hunter was concerned about disclosure of the files and had instructed Merchant Law Group not to comply with the Law Society's demand.

18 In response, the Law Society narrowed its request and, in correspondence dated May 29, 2006, made a formal demand pursuant to s. 63 of the *Act* for the following records [which included]:

> 1. All trust account, general account and billing records relating to:

a) Mr. Hunter's Residential School Claim;

b) The family law matter involving Mr. Hunter and Vera Wolfe;

c) Any other matter involving Michael Earl Hunter for which there was trust account, general account or billing activity in the time frame June 4th, 2003 (the date of Justice Smith's Order) to July 14th, 2004 [...]

. . . .

IV. Issues

22 The Law Society appeals the decision of the Chambers judge and asks for an order requiring Mr. Merchant and his firm to provide the records in issue. First, it invites the Court to find there can be no violation of solicitor-client privilege if Mr. Merchant and his firm provide the documents requested because, by operation of the common law, privilege extends not just to a client's lawyer but to the Law Society as well. Second, and alternatively, the Society says the Chambers judge misapprehended the Supreme Court's decision in *Descôteaux c. Mierzwinski* and erred in applying the "absolutely necessary" test.

V. Analysis

A. Basic Principles

23 The essential contours of the law of solicitor-client privilege are well established and are not contested by the parties.

24 Solicitor-client privilege originally emerged as a rule of evidence which protected confidential communications between a lawyer and his or her client from disclosure in court. See: Hubbard, Magotiaux & Duncan, *The Law of Privilege in Canada*, looseleaf (Aurora, Ont: Canada Law Book, 2008) at pp. 11-4 to 11-10. More recently, of course, it also has taken on a substantive dimension. *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.) is generally considered to be the seminal authority in this regard. In that decision, Dickson J. (as he then was) said this:

> Recent case law has taken the traditional doctrine of [solicitor-client] privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits....

25 Lamer J. (as he then was) subsequently summarized the substantive nature of solicitor-client privilege by writing as follows in *Descôteaux c. Mierzwinski* at p. 875:

> 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.

26 The "absolutely necessary" concept referred to in paragraph 3 of Lamer J.'s summary is central to this appeal. It was the subject of further comment by the Supreme Court in *Ontario (Ministry of Correctional Services) v. Goodis* , 2006 SCC 31, [2006] 2 S.C.R. 32 (S.C.C.). Rothstein J. referred to the substantive character of privilege and wrote as follows at paras. 15 and 16:

> The substantive rule laid down in *Descôteaux* 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:

> However, solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

27 With those basic principles in mind, it is now possible to turn to the substance of the appeal.

. . . .

57 The respondents quite properly concede both that the Law Society has reasonable and probable grounds for requesting the records in question and, significantly, that those records are required for purposes of the investigation which the *Act* obliges the Law Society to conduct.

58 In my opinion, these concessions effectively determine the result of this appeal. The Law Society has a duty to investigate complaints and the authority to demand privileged records in the course of discharging that duty. It has framed a request which is as narrow as reasonably possible and is thus seeking only those documents necessary to investigate Ms. Wolfe's complaint. It is self-evident that there is no other way to obtain those records or to pursue the investigation. Thus, in my view, this is a clear example of what *Descôteaux c. Mierzwinski* described as "... not interfering with [privilege] except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation".

59 In the result, I agree with the Law Society that the learned Chambers judge misapprehended or misapplied the "absolutely necessary" concept. Given that the records in issue are required for the purpose of an investigation under the *Act*, and given that Mr. Merchant and his firm refused to comply with the Society's demand for their production, an order should have been made pursuant to s. 63 to facilitate access to them.

"Life is overrated"; One lawyer's struggles with depression"

Anderson, LL.B., LL.M., Keith. *Addendum* (Ottawa: Canadian Bar Association [Solo and Small Firm, and Young Lawyers], 16 December 2008)

"Life is overrated." I made that comment early one morning as I traveled to Cape Smokey to learn how to ski. Over the years, it became a phrase we would use at the firm when something went wrong. Little did I know that in time, I would actually think that of my life.

March 2003 was a turning point for me. On the 7th, I was diagnosed with depression. On the 11th, I was suspended from the practice of law by the Nova Scotia Barristers' Society. On the 11 and 12th, I suffered a breakdown. My mind was in fragments—some functioning, others not. I had lost my health and career in a week. Clearly, not my best moment.

But my life had become a series of bad moments—bad days, leading to even worse months and years. I just thought that was to be my life. I didn't recognize that it was an actual illness.

When I was advised by the Bar Society of the complaint filed against me, I took my own advice and retained a lawyer: Guy LaFosse, Q.C. I remember meeting with Guy after he had reviewed the complaint and my history. I had had three complaints in 18 years of practice, all of which were dismissed at the first stage of the procedure. His question to me was: "What happened? What went wrong in your life? This just doesn't happen." I had no response. He suggested I see my doctor. Two days later, my doctor of 25 years diagnosed me with depression and prescribed me an anti-depressant.

Four days later, I was suspended pending a final resolution. The public hearing was held in Halifax (I lived and practiced in Sydney) and lasted a few hours. I responded to questions from the Bar Society's lawyer, my lawyer, and the committee members. It all appeared surreal. However, I did accept responsibility for the decisions I made that formed the complaint. I had acted wrongly,

improperly, and unethically. The crux of the complaint was with regard to my purchase of a new house.

I wasn't sure how I had arrived at such a point in my life. Over the next few months, and even to this day, I would learn how depression wrapped around my mind and how it had such a devastating impact on me.

Depression is like a dark fog that slowly settles into one's mind. With a clear mind now, I can look back and recognize the symptoms.

I started to withdraw from my friends. Solo lunches became common. I would get a bagel and a bottle of water and drive around the city. If I didn't have the energy to drive, I would park among the vehicles in a parking lot, hoping that I would not meet anyone I knew. I just wanted to hide for that half hour.

Tears occurred daily. I would cry as I drove to the office. I would collect myself in the parking lot, walk in, and work all day as if all was wonderful. Pretending to be fine was exhausting. Then more tears as I returned home.

I cut off communications with important friends from university days. My last relationship was shortchanged. As depression eroded my self-confidence and self-worth, I slowly cut off my contact with her. I couldn't commit to a trip or even dinner the next night. I thought I didn't deserve to be with her. I could not allow myself to be happy.

Then insomnia took hold. I would sleep maybe two to three hours a night from Sunday to Thursday. By the weekend, I would be so tired from life, I would collapse and sleep. But the cycle returned on Sunday. This routine went on for months and years. I didn't sleep because I hated my life so much, I didn't want the next day to begin. So if I stayed awake, it delayed the next morning's arrival. Depression can be powerful.

My level of concentration was low. I couldn't focus to read a book. Watching a movie was no joy. I would be sitting in a theatre and after 20 minutes, I would realize I had no idea what I had been watching.

Why did I miss these signs of depression? For me, life in my twenties was wonderful; I did well in school, then at work. I was optimistic. Then my thirties rolled around, and I had my own personal challenges surface.

My law partner got us involved in a failed business, leading to some debt. My father died at age 59 in 1992. I come from a close family. As well, my father was a real estate agent, and my practice was in real estate, so we talked every day about something. His death was the trigger for my depression. As well, the pressures of the debt load and practice became overwhelming at times.

I thought I could handle my own difficulties, but in hindsight, I was at a loss. We, as lawyers, are the ones who fix other people's problems. We tend to be strong-willed, determined, and hard working. We don't ask for help; people ask us.

Now, back to March 2003. After the hearing at which I was suspended, I walked across the street to the hotel where I was staying. My mother and sister were waiting for me. My brother-in-law was called and arrived a few minutes later. I decided that we should check out. I wanted to see my niece and nephew at my sister's house, just outside of Halifax. My mind was beginning to unravel even more.

I mentally and physically collapsed at my sister's. I spent the next three months confined to a bed. My niece gave up her bedroom for me. There was a chair at my bedside, and my family took turns sitting with me. Without them, I would have ended up in hospital. This self-confinement would actually last, to some extent, for a few years.

The Bar Society gave me a list of doctors for whom they would cover the cost of the first ten therapy sessions. With my family's encouragement, I called one of the doctors. I had never been to therapy before, so it was all new. It's amazing what one will tell a stranger. The floodgates opened, and out flowed my life.

I attended therapy once a week for two years, then once a month for awhile. Attending therapy became the highlight of my week. I learned how to handle anxiety attacks, which occurred daily at this time. As well, I came to understand depression and its impact on my life. My doctor also helped me wean myself off the medication. My family and I discussed my illness at length, learning about depression and what steps to take to get me healthy.

June 23, 2003, was the date set for the final resolution of the complaint. By this time, my lawyer and the Bar Society's lawyer had come to an agreement to which I had consented. But the agreement had to be approved by a bar committee. I testified again for a few hours. I was better able to explain what happened in my life that led to the complaint. I now understood depression. I had found a new house, isolated from the world, with no neighbours. I told few about this house. The need to hide was paramount; it meant my survival. I had one goal, to get that house. My decision-making was governed, if not dictated, by my depression. Thus, my decisions were improper.

This committee approved the agreement. I would be suspended for two years, backdated to March 11, 2003. The only requirements to be reinstated are that I be healthy and that I cover the Bar Society's costs. The chair, John Merrick, Q.C., said at the conclusion, “I need say no more, but, Keith, go home and get well" Darrel Pink, the executive director, also wished me well.

Over the next months, some friends came forward to help. They did not just say they would help; they actually did so. They helped sell my house, stored my belongings, called just to see how I was doing. Others took me to a few movies and even got me to attend Pilates classes for awhile. Others contacted me when they read what I wrote for *The National Post*, an article called “How I Returned to a Life Worth Living.”

But I also wanted to get well. A series of small steps would lead to major accomplishments. I would go to a favourite restaurant, get take out, and eat in my vehicle in the back parking area. After doing this for a few months, I then could eat in the front parking lot. Then one day, I could actually eat inside. This entire process took around six months.

I would leave the house to go certain places where I would be comfortable. I could go to Chapters when it wasn't busy. I felt relaxed there. As well, my mind became clear, I tried reading books again. I could now read and enjoy it.

There were a few bumps along the way. Some people didn't contact me at all. The day I learned of the complaint, I told my law partner. He didn't speak to me after that and then went to Florida on holidays. He didn't know about the suspension until after the fact. He didn't attend the June 23 hearing. I haven't heard his voice since March 7, 2003.

I was snubbed by one person in a grocery store, who used to greet me with a hug. A local judge put his head down when he saw me in a corner store.

Now, I want to make it clear that this is actually a happy story. Getting suspended was a good thing. Don't get me wrong: it was devastating to me, but it had a positive aspect. It removed me from an unhealthy workplace. Those pressures were gone. I was put in a place, physically and mentally, where I could focus on getting well. I knew it would take a long time, but at least I had found a path to a second chance at a real life.

I will one day apply to be re-instated. I have a healthy mind now. If I am fortunate enough to be reinstated, I am not sure what my career will be, but it will unfold.

[Note: *Guly, Christopher, The Lawyers Weekly, 16 October 2009, p. 26: The 48-year-old 1983 law graduate from Dalhousie University, who holds a master's degree in law from University College in London, has been speaking publicly and writing about his battle with depression. In fact, one of his personal accounts was published in the January 2009 issue of the NSBS's monthly magazine,* The Society Record, *and elicited about 20 e-mails to him from people who read it. One of them was from a lawyer whose role with the NSBS six years ago was, as Anderson explained, "to get me suspended," but who now praised Anderson's "courage" for sharing his story with others and offered his advice to help get Anderson reinstated as a lawyer.*

"To get that from him left me a little overwhelmed. I felt a bit of redemption," said Anderson, who pointed out that he has not talked with his law partner's "voice" since the NSBS's suspension.]

"An Overwhelmed Lawyer Leads to Md. Suspension for Lemon-Law Founders"

Cassens Weiss, Debra, *abajournal.com*, 03 September 2008

The founders of Pennsylvania-based Kimmel & Silverman, the "1-800-Lemon-Law" firm, have been suspended from legal privileges in Maryland for failing to supervise a lawyer there unable to keep up with an overwhelming caseload.

Maryland's highest court suspended Craig Kimmel and Robert Silverman in an opinion released yesterday, the *Maryland Daily Record* reports. The lawyers, who are not licensed in

Maryland, can reapply for privileges in the state, which include the supervision of lawyers there, within 90 days.

Nearly four dozen of the firm's cases were dismissed in 2005 after its only Maryland lawyer was unable to keep up with discovery requests. The result, Judge Glenn Harrell Jr. wrote for the majority, was "matters ultimately [going] to Hades in a handbasket."

"In this business model and practice setting, a relatively inexperienced attorney was stationed alone in an office physically remote from the critical mass of the firm and directed to begin filing numerous cases as rapidly as possible," he wrote.

In the "post-Apocalyptic" period, Harrell wrote, the firm did a good job of resolving the problems by compensating the clients and hiring lawyers and staff to handle the remaining cases.

Two dissenting judges said the punishment is not harsh enough. The state bar counsel's office had argued the lawyers had unrealistic expectations for the firm's Maryland lawyer, Robyn Glassman-Katz, requiring her to file 10 lawsuits a week at first and later 15 a week.

" 'Unbecoming conduct' gets broader definition"

Claridge, Thomas, *The Lawyers Weekly*, 06 June 2008, p. 14

Benchers of the Law Society of Upper Canada (LSUC) have approved a broadening of the definition of "conduct unbecoming a barrister and solicitor" to make it clear that the conduct in question extends beyond that in the lawyer's personal or private capacity, and includes conduct that "undermines the administration of justice."

The amendment to the law society's Rules of Professional Conduct was recommended by LSUC's Professional Regulation Committee, which said a hearing panel last December into "certain activities of a licensee" had noted that while Rule 1.02 defined "conduct unbecoming" as conduct in a lawyer's "personal or private capacity that tends to bring discredit upon the legal profession," a commentary on the rule said it should include dishonourable or questionable conduct "in either private life or professional practice..."

The committee said the rule change was being recommended "after considering staff research on the issue, including a history of the rule, discipline cases decided on the basis of 'conduct unbecoming' and other law societies' rules and some options for dealing with the issue.

"Based on the history of the Law Society's definition of 'conduct unbecoming' and Commentary, other law societies' treatment of this concept and the manner in which the Hearing Panel has applied the definition, it would appear that the current definition may be too narrow and that the Commentary, as the Hearing Panel suggested, creates some confusion about what 'conduct unbecoming' is intended to encompass."

Similarly, amending the definition of "conduct unbecoming" to capture conduct which may not be dishonest per se but which undermines the administration of justice, mirrored similar language in the definition of "professional misconduct."

"Bad Behavior as Airline Passenger Grounds Attorney from Law Practice"

Neil, Martha, *abajournal.com*, 28 September 2009

A South Florida attorney has been temporarily disbarred, by consent, after allegedly using obscene language, groping a flight attendant and carrying a 7-year-old child down the aisle while the plane was airborne—nearly hitting the child's head on an exit sign—two years ago as a passenger aboard a Southwest Airlines flight.

John Michael Moody, 45, will not be able to practice for five years under the agreement. He earlier pleaded guilty to a federal criminal charge of intimidating or assaulting a flight attendant

on an aircraft concerning the June 11, 2007 incident and was sentenced to a four-month prison term, reports the *South Florida Sun-Sentinel*.

He could not be reached by the newspaper for comment.

"B.C.'s law society gives itself authority to copy hard drives without court order"

Mundy, Jane, *The Lawyers Weekly*, 30 October 2009, pp. 1-2

On the heels of the Law Society of British Columbia (LSBC)'s commitment to make major changes to its disciplinary process, B.C. Benchers adopted a rule in October that allows investigators to copy a lawyer's entire hard drive—including personal information.

Benchers agreed that the law society will create a rule that requires every lawyer to comply with an order to preserve all electronic records as they existed at the time a records search under R. 4-43 is presented to the member. The benchers ruled out using s. 37 of the *Legal Profession Act* to acquire a mirror image since that requires a court order.

In June 2008, the LSBC established a working group to explore the privacy and policy issues regarding mirror imaging and whether the rules should be improved. The working group considered how the law society can carry out its investigative function to protect the public interest pursuant to s. 3 of the *Legal Profession Act*, while respecting a reasonable expectation of privacy a member under investigation has in personal information stored on digital records.

Some benchers thought the law society shouldn't get involved in mirror imaging, but all benchers agreed they must keep up with changes in computer technology and at the same time reconcile public interest in investigations and the lawyer's privacy rights. "We need to speed up our discipline processes, and it is important that the law society be efficient and also protect self-governance," said Gavin Hume, chair of the Mirror Imaging Working Group.

Under R. 4-43, the society has a variety of powers to deal with lawyer's records, but it is not clear if the law society has the authority to make digital copies of an entire computer (R. 4-43 was conceived in the pre-digital age). The issue—and potential problem—with mirror imaging is that a hard drive co-mingles relevant and irrelevant (personal) information, whereas in a paper society, a search typically only included material relevant to the investigation. Law society staff got an order and copied papers they thought were relevant, but staff could spend days at an office, going through volumes of documents.

Hume said it is both important and timely to take a mirror image of all files on a hard drive. "As a practical matter, we have to copy the entire hard drive; the forensic expert said there is no choice," said Hume. "We have reports of members trying to destroy records and some members say they have personal information on their computers they don't want copied," said Hume.

"With a 4-43 [search], the expert comes with us [to the lawyer's office] and copies all the digital records that are easy to destroy, then we sort out what we need to look through afterward—same as sorting through a filing cabinet.

"It's not a paper world anymore," said Hume.

Hume explained how the recommendations would work: "Law society staff apply to the chair of the Discipline Committee for a 4-43 order, and for efficiency purposes, a forensic copy [mirror image] should be part of that order... evidence has to be preserved. And the copy should reside with an expert—the law society will get an edited version when collection occurs."

Hume spoke for the majority of the working group (five in total), however, Bencher Kenneth Walker said the process should be resolved through an application to the court pursuant to s. 37 of the Act, where a judge makes determinations regarding copying records and the scope of access, rather than seizure.

"If staff looks at a forensic copy, they won't have any other time—it is cumbersome," explained Walker. "In my view rule R. 4-43 doesn't authorize forensic copying of a complete office. I am not against mirror imaging, but s. 37 of our Act says the law society may apply to court for records wherever they are located. So we have the authority under s. 37 by a judge to go to a lawyer's home without notice, therefore I want a court order involved with R. 4-43."

Under the s. 37 of the Act, the "court has given an order before a member even gets a whiff of impending doom," said Bencher Robert Brun, "but with 4-43, the member is asked first, and if he opposes the scope of access to the mirror image, we get an independent supervising solicitor who gets the forensic copy and determines the scope of the [law] society's access."

Benchers agreed that the crux of the mirror imaging issue is co-mingling of personal information with the practice of law. But s. 37 allows the law society to seize computers, which means greater hardship to a lawyer. And "seize" means the law society has the computer.

"We want to allow our members to practise in an electronic age and protect their privacy," said Hume. "I'm dead against giving any more authority to courts and at the end of the day our members are entitled to judicial review. We have information, knowledge and expertise to determine our investigative role and we are better equipped as regulators than the courts."

"The firm should make it clear that lawyers keep personal stuff off their computers," said Bencher Bruce LeRose. "We would be better off educating our lawyers…so tell our members not to keep personal stuff with your client information."

"Lawyer Gets Slap For Punch"

***Law Times*, 31 August 2009**

A Toronto lawyer has been handed a 10-month suspension after punching a client in the nose and pushing her.

The Law Society of Upper Canada found Julia Ranieri, who was called to the bar in 2001, guilty of professional misconduct for "failing to act with integrity and failing to be courteous, civil, and act in good faith, in that she assaulted her client by punching her in the nose and pushing her…"

She also was reprimanded for not telling the law society she had been charged with assault causing bodily harm.

Ranieri's 10 month suspension will continue until the law society is satisfied "she is fit to practice law and able to serve clients, that she presents no danger to clients, and that she is able to exercise self-governance so that members of the public are not endangered."

She must also pay $5,000 in costs.

"Blogging Assistant PD Accused of Revealing Secrets of Little-Disguised Clients"

Cassens Weiss, Debra, *abajournal.com*, 10 September 2009

A former Illinois assistant public defender's blog musings about her difficult clients and clueless judges has landed her in trouble with disciplinary officials.

Kristine Ann Peshek has been accused of revealing client confidences, allegedly for describing her clients in a way that made it possible to identify them. Peshek referred to her clients by either their first names, a derivative of their first names, or by their jail identification numbers, according to the disciplinary complaint filed on Aug. 25. The Legal Profession Blog noted the accusations.

Peshek counters that she would never have posted information that she believed would lead to identification of a client, absent the client's permission or unless the information is a matter of public record. She tells the *ABA Journal* she is in the process of hiring a lawyer.

Peshek was an assistant public defender in Winnebago County, which includes Rockford, Ill., until she was fired in April 2008 when her supervisor became aware of the blogging, the complaint says. Peshek's blog, The Bardd Before the Bar—Irreverant Adventures in Life, Law, and Indigent Defense, was published for a little less than a year.

Disciplinary officials also accuse Peshek of failing to inform a judge that a client was taking methadone, information revealed in one of her blog posts. Peshek wrote in the April 2008 post that her client, accused of forging a prescription for a painkiller called Ultram, had claimed she wasn't using any drugs at the time of her sentencing, according to the complaint. But as she was leaving court, the client revealed the methadone use to Peshek.

"Huh?" Peshek wrote. "You want to go back and tell the judge that you lied to him, you lied to the pre-sentence investigator, you lied to me?" As a result of the revelation, Peshek is accused of failing to ask a client to rectify a fraud on the court, as well as other ethical violations.

In the same post, Peshek writes that Ultram is "a moderately decent painkiller, but after a day or 2, any opiate-type 'high' is long gone—at least for most people I know. I've used it off and on for years and I've never noted any 'craving' or any other significant effect when I stop."

In other posts Peshek complained that one judge was clueless and another was an—hole. She also wrote that one client was "taking the rap for his drug-dealing dirtbag of an older brother" and said another was "stoned" while in court, according to the complaint.

Peshek told the *ABA Journal* in an e-mail that the complaint was served on her less than a week ago. She disagrees with the assessment that her clients could be identified through her blog. "I would not have posted any information in such a manner that I thought a specific client could be identified, without that client's permission, or without the information being a matter of public record," she said.

Peshek also took issue with the complaint's characterization of her representation of the methadone-using client. Asked if the event happened, Peshek replied: "Not in the manner that the complaint implied. I did not collaborate with the client to conceal any information from the court, nor did she disclose any information about her methadone treatment program to me prior to her sentencing hearing."

"Lawyers for Hollinger facing discipline"

Todd, Robert, *Law Times*, 24 August 2009

Two Torys LLP lawyers say they are "disappointed" by Law Society of Upper Canada allegations they failed to guard against conflicts of interest in the sale of Conrad Black's Hollinger International newspapers.

The allegations stem from legal services provided by Darren Sukonick, a partner at the firm, and Beth DeMerchant, who is no longer practising, between 2000 and 2003. They relate to the sale of Canadian newspapers to Canwest Global Communications Corp. and Osprey Media Holdings Inc.

"Ms. DeMerchant and Mr. Sukonick are two highly regarded and accomplished corporate counsel who have always acted ethically and worked within the Rules of Professional Conduct,"

says a joint statement from lawyers Philip Campbell of Lockyer Campbell Posner, and Ian Smith of Fenton Smith, who represent DeMerchant and Sukonick respectively.

They say their clients are disappointed the law society has chosen to pursue these allegations. "Both Ms. DeMerchant and Mr. Sukonick continue to enjoy the support of their firm, Torys, and they appreciate this very much. They look forward to demonstrating that they worked entirely within the law society's rules and then prevailing and accepted professional practices, and countering the allegations at a hearing before their colleagues." The law society allegations, outlined in notices of application in April, include the claim that the lawyers worked on Hollinger's sale of newspaper assets to Canwest, "which included the provision of non-competition covenants and payments in respect of which the interests of two or more of your clients were not aligned."

That allegation goes on to suggest the lawyers had a solicitor-client relationship with Hollinger and a group of its subsidiaries, as well as recipients of non-competition payments, such as Black and former Hollinger executives Peter Atkinson and John Boultbee.

The law society alleges the lawyers were in a conflict of interest on that file with regard to "who was to receive compensation for their non-competition covenant; how much was to be received; what was the true purpose of the non-competition payments; what was required to be publicly disclosed in connection with the payments; and what was the appropriate tax treatment for the payments," according to the notices.

The law society also suggests the lawyers were in conflict when they helped Black renounce his Canadian citizenship. It alleges that Black's renunciation could hurt Hollinger.

The law society noted that s. 19 of the Income Tax Act prevents advertisers from deducting advertising expense in media controlled by a non-Canadian. It also pointed to, "The potential breach of *The National Post* partnership agreement with Canwest."

Les Viner, managing partner of Torys, also issued a statement supporting the lawyers. "Torys is committed to the highest standards of practice and professionalism," said Viner. "The firm and its lawyers have co-operated fully with the law society's investigation, and the process of the law society now provides an opportunity for Beth and Darren to address the allegations.

"Beth and Darren are principled and ethical lawyers. We believe they acted in good faith and with integrity in accordance with professional practices prevailing at the time. Whatever view the law society now takes on how its rules should have then been interpreted and applied, we do not believe Beth's and Darren's good faith and integrity can be doubted. The firm continues to support them."

A closed pre-hearing into the matter continued last week. A date for the full hearing will be set Aug. 31, and it should begin next year.

Defence lawyers for Black criticized Torys for offering poor advice on the disclosure of the non-compete payments during the sale of the newspapers to Canwest.

The firm never admitted any wrongdoing in the matter, but in 2005 agreed to pay Hollinger $30.25 million to settle allegations that the firm provided improper advice and did not act in the company's interests.

"Professions: Discipline"

S.C.C. L@wLetter, Lang Michener (Eugene Meehan Q.C., Editor), 17 September 2009

The Applicant Lienaux was a lawyer practicing in Nova Scotia. Since 1993, he and his wife had been embroiled in litigation with their former business partner, Wesley Campbell, with respect to a joint venture for the construction of a retirement residence. In the initial litigation, as self-represented litigants, they sued Campbell, alleging criminal fraud. They lost at trial, on appeal and in their leave application to the S.C.C. This was followed by several related actions and applications by Lienaux and his wife, most of which were unsuccessful. In the course of one appeal, Lienaux accused a trial judge in a prior failed action and three judges of the Nova Scotia C.A. of turning a blind eye to Campbell's fraudulent activities because they were involved in Halifax's "old boys' network". During the same appeal, Lienaux also claimed he caught Campbell's counsel rummaging through his private papers during a court recess. The Law Society commenced discipline proceedings against Lienaux, alleging he had engaged in conduct unbecoming a barrister. The Discipline Committee held in sum as follows: the Applicant suspended from practice for one month commencing May 1, 2008; prohibited from acting on behalf of his spouse, himself or anyone else in respect of any matter related to the proceedings giving rise to the complaint; and prohibited from having an articled clerk for a period of three years; costs of $30,000 awarded against him. The C.A. allowed the appeal in part, amending the order to allow the Applicant to represent himself.

Charles D. Lienaux v. Nova Scotia Barristers' Society (NS C.A., January 28, 2009) (33021) "The application [to Supreme Court of Canada] for leave to appeal…is dismissed with costs."

"A helpful kind of interference"

Millan, Luis, *Canadian Lawyer*, June 2009, pp. 17-19

When Ishwar Sharma, a Toronto criminal and immigration lawyer practising in the heart of Little India, received a phone call from a practice management reviewer from the Law Society of Upper Canada to schedule an appointment, his heart began thumping. Sharma had misgivings and was filled with apprehension over the notion that an outsider working for the profession's regulatory body was going to spend a day at his office, asking questions and sifting through books, files, and records to ensure his practice management was in compliance with established standards. "And there you are standing exposed," says Sharma wryly.

It didn't help that Sharma knew his practice could benefit from a small facelift. A sole practitioner who took over his father's busy general practice eight years ago, Sharma instinctively felt from the outset that his office lagged behind. Putting his finger on what, aside from knowing it could use a technology upgrade, proved elusive. Continuing legal education courses didn't really provide clues. Then, slowly, almost imperceptibly, complacency set in. "As a lawyer practising for a few years, you somewhat become complacent in the sense that you feel that you are doing everything well. Clients are happy. Practice is going OK," says Sharma, whose clients are principally of Indian or Filipino origin. "But I realized very quickly as the reviewer began making suggestions that there was a lot of room for improvement."

Far removed from the much-dreaded practice reviews, which are usually prompted by complaints and information received in the course of investigations or audits, practice management reviews are designed to assist lawyers in evaluating their practices and improving their skills and competencies. Besides providing practical mentoring and advice over common concerns such as communication, file and time management, quality of service to clients, technology, and professional and personal issues, practice management reviewers try to raise awareness of the available practical resources and tools. "It's a rather convivial process," says Thierry Usclat, a Montreal lawyer specializing in labour and workers' compensation who conducted more than 80 practice management reviews last year for the Barreau du Québec. "We're not there to conduct investigations or conduct an exhaustive analysis of each of their files. We're there to help them out, give suggestions, recommendations, and with the younger lawyers especially, give them some coaching."

After the review, appraisers write up a report. Depending on the evaluation, the file can be closed if all is well, lawyers can be subjected to further monitoring and provide proof that deficiencies have been addressed, or a formal investigation can even be launched if the review discloses misconduct or failure to meet standards of professional competence. The latter was the case for 33 Quebec lawyers in fiscal 2007-2008.

The Barreau was the first Canadian law society to introduce a practice management program because the Professional Code, which governs Quebec's 45 professional corporations, compels self-governing regulatory bodies to monitor the professional competence of its members and ensure compliance with the rules of ethics through discipline and professional inspection. Like

all other professional orders, the Barreau was required to establish a professional inspection committee.

"A professional corporation has a duty to protect the public, and one of the ways to achieve that is through prevention — and that's what professional inspections are all about. It's best to put a stop to poor practices now rather than see a lawyer end up before the syndic (or investigating officer) a couple of years down the road," says Usclat. Every year the Barreau dispatches a nine-page evaluation guide to up to 1,500 lawyers which must be completed, and based on the responses, the Barreau then draws up a list of 800 lawyers it will visit. In other words, Quebec lawyers can expect to be reviewed every five to seven years.

Driven, in part, by a healthy dose of self-preservation, other law societies are or will be following in its footsteps. Indeed, Canadian law societies have paid heed to painful lessons drawn from across the Atlantic. Increasing public distrust of the legal profession prompted England to enact the Legal Services Act, 2007, which effectively ended the authority of the legal profession's self-regulatory bodies, after more than a decade of discussion and debate. Closer to home, the Supreme Court of Canada's 2004 ruling in *Finney v. Barreau du Québec* served as another wake-up call. Its finding that the conduct of the Barreau "was not up to the standards imposed by its fundamental mandate, which is to protect the public," was not lost on Canadian law societies. As Diana Miles, the director of professional development and competence at the Law Society of Upper Canada, puts it: "If a regulatory authority in any profession is not appropriately overseeing the competence of its professionals, there is the potential that the government or others may take a look and say that's not adequate and may request that you make changes."

Law societies are not taking that chance, and are now more aggressively launching preventative initiatives. Nearly 18 months ago, the LSUC expanded its quality assurance program to include random practice management reviews. After meeting its objective of conducting 250 reviews in 2007, and 400 last year, the LSUC slightly altered its selection criteria. Instead of randomly selecting members who are in the first eight years of private practice, the LSUC will target sole practitioners, with solos making up at least half the members chosen to be reviewed. The reason, says Miles, is approximately 50 per cent of sole practitioners in the first few years of their practice face complaints or negligence or insurance claims. "We discovered when reviewing lawyers [working] in larger firms that there is a significant internal infrastructure to help support them in their practice activities. So they don't need as much assistance as lawyers working in smaller environments," says Miles, who is hoping to complete 500 reviews this year.

The Law Society of British Columbia also has gotten into the act, though it has taken a completely different tack. It decided nearly 18 months ago to use its trust assurance program as "Geiger counters" to determine if lawyers should be subject to practice reviews, says Kensi Gounden, manager of standards of professional development with the LSBC. "The trust assurance program is the detector," explains Gounden. "We use accountants as our resource to bring issues back to us to determine if there should be a practice review. We believe that by adopting this integrated approach, we are more agile and can deal with the serious problems really quickly, and the less serious ones in a different time frame."

Expected to join the ranks is the Law Society of New Brunswick, which is planning to unveil a practice management program that will be operational next January. Far more modest in scope, the N.B. law society expects to review between 25 and 35 lawyers, at least in the first two

years of its operation. The Law Society of Manitoba, which considered implementing a similar initiative three years ago but decided against it because benchers did not see the justification behind introducing a program that would intrude into "their day-to-day lives," may yet establish a practice management program in the future, says CEO Allan Fineblit. "We're aware of what other people are doing," adds Fineblit. "We're always looking for best practices, and that's why it would not surprise me if at some point in the future, based on the experience of other jurisdictions, we adopted a similar initiative."

All of which bodes well for lawyers, if one is to go by Mireille Vincent, a Montreal lawyer who was reviewed twice in the span of eight years. A family law practitioner, Vincent says while a practice management review is in some ways intimidating, intrusive, and time consuming, she is grateful for the experience. "The practice reviewer gave me precious suggestions that I applied immediately after she left," says Vincent.

That's a sentiment echoed by Sharma. He spent a few thousand dollars to implement a series of recommendations made by the reviewer, and he has no regrets. He has installed a new computer backup system, acquired a speech recognition software program that has saved him precious time, changed the signage to more accurately reflect his practice, and implemented a host of small but invaluable recommendations made by the reviewer that let him better serve his clients. "When I was selected for the practice management review, I asked myself, 'why me?' Now I realize I was one of the lucky few who was able to benefit from this exercise."

"Noted Bay St. lawyer feels watchdog's heat"

McNish, Jacquie, *The Globe And Mail*, 18 November 2009, pp. B1, B6

The Law Society of Upper Canada is seeking to discipline Joe Groia, one of Canada's most prominent and outspoken white-collar defence lawyers, for alleged professional misconduct during the fractious Bre-X Minerals Ltd. trial.

If the regulator succeeds in its accusations, Mr. Groia would be the only person to be in any way sanctioned in the fallout of the Bre-X gold salting scandal that wiped out billions of dollars in stock value and left Canada with a black eye for poor stock market policing.

Mr. Groia had no involvement with Bre-X until after the collapse, when he was hired to represent chief geologist John Felderhof in a seven-year legal battle that ultimately saw the charges of illegal insider trading dismissed in 2007. A former Ontario Securities Commission prosecutor, Mr. Groia earned a reputation as a combative defender of accused white-collar criminals.

Mr. Groia faces potential sanctions over caustic trial remarks that questioned the integrity of the OSC, which brought the charges against Mr. Felderhof.

It is rare for any provincial law society to discipline lawyers for courtroom behaviour. In the past, lawyers have been reprimanded for angry outbursts or, in one case, spilling coffee on an opposing lawyer.

According to people familiar with the case, a lawyer for the Law Society has advised Mr. Groia that allegations of misconduct will be announced later this week. These sources said confidential settlement talks broke off earlier this month and the Law Society, a self-governing body that regulates Ontario's 36,000 lawyers, plans to hold a hearing at an unknown date to consider the case.

In an interview yesterday, Mr. Groia said he has hired prominent Toronto litigator Earl Cherniak to defend him against the allegations. Mr. Groia said he "regrets" inflammatory remarks he made in court during the early months of what became a seven-year legal odyssey that ultimately saw the charges dismissed in 2007 against Mr. Felderhof.

Mr. Groia said the Law Society is overstepping because he has already been criticized by two judges involved in the case.

"The courtroom arbiter of civility is supposed to be a judge," he said. "I've already had my trial."

Tom Curry, a lawyer hired by the Law Society to lead the investigation, declined to comment.

If the Law Society wins its case, disciplinary action ranges from a public reprimand to disbarment. Any discipline, Mr. Groia warned, would send a chill through the profession.

"Is it now going to be unprofessional conduct for lawyers to use rhetoric to defend their clients?" he said.

Stanley Beck, a friend and former chairman of the OSC, where Mr. Groia began his career as a prosecutor, said it is "preposterous" and "outrageous" that the Law Society is seeking to discipline the lawyer two years after the Bre-X case closed.

Mr. Groia said he was first contacted by Law Society investigators in 2003, shortly after the Ontario Court of Appeal dismissed a move by the OSC to have the judge overseeing the Bre-X trial removed, in part because the judge had not curtailed the lawyer's frequent and caustic criticisms of the commission. In a written decision, Mr. Justice Marc Rosenberg wrote that Mr. Groia's conduct was "appallingly unrestrained and on occasion unprofessional."

A lower court judge took Mr. Groia to task for his "guerrilla theatre" approach to the case, but said that "prosecutors need thick skins."

Mr. Groia said he believes the trial was fraught with antagonism because there was pressure for Canada's top securities regulator to hold someone accountable for a scandal that hurt investors around the globe.

"The stakes from the beginning were very high. Did I say things that I ultimately came to regret? Sure."

Shortly after the trial began in 2000, Mr. Felderhof's lawyer, Joseph Groia, and prosecuting attorney Jay Naster argued bitterly for weeks about which documents could be admitted as evidence.

Mr. Groia told the court that the Ontario Securities Commission's "promises aren't worth the transcript paper they are written on." He accused OSC lawyers of "prosecutorial misconduct." And he said: "It's just not right, in my submission, for the securities commission to say, 'We're too lazy, we're too busy, we've got better things to do than go through the material to try to fix the mess that we have created.' "

Mr. Naster told the court: "We have been maligned as being lazy, incompetent and hell-bent on convicting Mr. Felderhof. I'm not going to personally attack Mr. Groia the way he has been personally attacking us."

"Lawyer Gets Reversal of Contempt Finding for 'Sarcastic, Unprofessional Looks'"

Cassens Weiss, Debra, *abajournal.com*, 20 July 2009

A Georgia appeals court has reversed a judge's contempt order that sent a lawyer to jail—albeit for just a few minutes—for making a sarcastic face.

The Georgia Court of Appeals said the judge didn't give the lawyer a chance to fight the contempt finding, according to the *Fulton County Daily Report*.

Chief Judge A.J. "Buddy" Welch Jr. of Henry County Juvenile Court had found lawyer Ella A. S. Hughes in contempt because he disapproved of the facial expressions she made. Hughes was reacting to Welch's order requiring her client's children be taken into custody by child welfare authorities, according to the story.

After just a few minutes in jail, Hughes was released to handle another case. She paid a $1,000 fine and did not have to go back to jail, the story says.

The story reported this back-and-forth between Hughes and Welch:

Judge Welch (to Hughes): "That expression, ma'am, just cost you $100. You are removed from the court approved list."

Hughes tries to speak up, but Welch tells her to stop.

Judge Welch: "Your sarcastic looks and your sarcastic attitude is unacceptable to this court. You are removed from the appointed list. You can reapply at some other time. You can stay on the cases that you presently have but if I ever see that action from you again I can assure you that appropriate actions will be taken. Do you understand that, ma'am?"

Hughes: "Yes, sir."

Judge Welch: "You may not like my rulings but you can surely appeal them."

Hughes: "If I may, Your Honor, the only thing I did was bow my head to write down what you were saying."

Welch: "No, ma'am. You did not. Now you have tested the court's patience. I find you in willful contempt of this court. You are fined $1,000 and you are given 10 days in jail. Take her into custody. I want the record to reflect that the attorney I just had to hold in contempt was not just bowing her head but she was giving sarcastic, unprofessional looks, body action that showed her disgust for the court's ruling and disrespect for the court in its entirety."

Toutissani v. Her Majesty The Queen

S.C.C., 28 April 2008

The Applicant, Roman Toutissani, was charged with offences under s. 94(1)(m) of the Immigration Act. His summary conviction trial commenced in January of 2003 and ended in November of that year as a result of a mistrial. The Applicant's second trial began in May of 2004. In December of 2006, another mistrial was declared. Subsequently, the Crown brought a *certiorari* application seeking to have the mistrial order quashed. Its application was allowed and the matter was remitted to the trial judge for the completion of the trial. The trial resumed on December 20, 2007, at which time, the Applicant advised the court that he had retained Mr. Edwin Pearson, a non-lawyer, to represent him. The Applicant told that court that he wanted Mr. Pearson to act as his agent. The Crown sought an order removing Mr. Pearson as representative for the Applicant. The Court ordered that Mr. Pearson was not permitted to act on behalf of the Applicant for failing to comply with the requirements of the Ontario *Law Society Act* ("LSA"). While the Applicant contended that the LSA encroached upon the federal government's exclusive jurisdiction over criminal law, specifically ss. 800 and 802 of the *Criminal Code*, Casey J. found that the LSA was *intra vires* the province of Ontario and concluded that a person could comply with both the provisions of the *Criminal Code* and the LSA.

Toutissani applied for leave to appeal to Supreme Court of Canada.

Roman Toutissani v. Her Majesty the Queen (Ont. Superior Court of Justice, April 28, 2008)(32684) "The application for an extension of time to serve and file the respondent's response is granted. The motion for a stay of execution and the application for leave to appeal...are dismissed."

"Lawyer Could Face Jail for Voir Dire Question"

Cassens Weiss, Debra, *abajournal.com*, 14 July 2009; 17 July 2009

A federal magistrate has found patent lawyer John van Loben Sels in contempt of court and threatened him with a 48-hour jail sentence for a question he asked during voir dire.

Van Loben Sels asked potential jurors in a patent infringement suit whether they had "a problem with a company that puts its headquarters offshore on a Caribbean island in order to avoid paying U.S. taxes," the *Recorder* reports. He is a partner with Wang, Hartmann, Gibbs & Cauley of Mountain View, Calif.

U.S. Magistrate Judge Charles Everingham IV of Marshall, Texas, had prohibited Van Loben Sels and other lawyers for Beyond Innovation Technology Co., a defendant in a patent suit,

from saying anything about the tax motivation for the Cayman Islands home of the plaintiff, O2 Micro.

Everingham said Van Loben Sels would not have to serve the sentence if he behaved for the rest of the case, according to the story. But he granted a mistrial and imposed other sanctions on Beyond Innovation Technology Co., known as BiTEK. It will have to foot the bill for new jury selection, will get half the voir dire time of its opponent and will get two peremptory challenges instead of four, according to the *Recorder*.

Van Loben Sels had defended his question, saying it was hypothetical and he didn't refer to O2 Micro by name.

"Lawyer Freed After Spending 14 Years in Jail on Contempt Charge"

Cassens Weiss, Debra, *abajournal.com*, 13 July 2009

A Pennsylvania lawyer has been freed after spending more than 14 years in jail for refusing to give his ex-wife more than $2.5 million in a divorce settlement.

H. Beatty Chadwick, a 73-year-old former corporate lawyer, told the Associated Press he couldn't pay the money. "If I had been convicted of murder in the third degree in Pennsylvania, I would have been out in half the time I was in jail," he said. He has previously maintained the money was lost in bad overseas investments.

But the judge who freed Chadwick, Joseph Cronin of Delaware County, said he believed that Chadwick had the money, but there was little chance he would ever pay, making his continued imprisonment unjustified.

The Philadelphia Daily News characterizes the case this way: "H. Beatty Chadwick is either the most hardheaded lawyer in America or a poor sap who lost 14 years of his life to a money-grubbing ex-wife and cold-hearted judges."

The Daily News said Chadwick is "reportedly a control freak who would ration his spouse's toilet-paper usage and designate specific times for sex." The *Philadelphia Inquirer* also has a story.

The 14-year imprisonment is believed to be the longest term served for a civil contempt charge, according to AP.

"Judge Jails 2 Attorneys for Contempt in 4 Days"

Neil, Martha, *abajournal.com*, 18 November 2009

It may not be a good time for Georgia practitioners to try the patience of Matthew Simmons, the chief judge of Clayton County Superior Court.

Within two business days he has jailed two lawyers for contempt in unrelated cases, according to a *Daily Report* article reprinted in *New York Lawyer*.

Tax attorney Francis X. "Frank" Moore got the stiffer sentence when Simmons sent him to jail Friday for 20 days for failing to return to a May court hearing after a recess. The judge, who denied bond on that count, also sentenced the Atlanta lawyer to serve up to 20 days, concurrently, for failing to post $80,000 bond concerning an attorney fee award.

Then, when another court-appointed lawyer showed up Monday intentionally unprepared for her client's murder trial because she hadn't been paid in full, Simmons lowered the boom again. He sentenced Loletha Denise Hale of Jonesboro to up to 10 days, the *Daily Report* recounts, and removed her as counsel in the case, substituting a public defender.

At last report, Moore was still being held at the Clayton County jail, but Hale's name wasn't listed on the jail log yesterday. Neither Hale nor Moore's lawyer returned the legal publication's phone calls.

"Warrant out for man accused of defrauding widow"

Canadian Broadcasting Corporation News website, 04 June 2009

Calgary police are looking for a convicted con man who is accused of defrauding a woman of more than $25,000.

A province-wide warrant was issued Thursday for Duncan James Ryan, 47, also known as James Ryan, of no fixed address. He's wanted for fraud over $5,000, theft and impersonation of a lawyer.

The victim, who is a widow in her late 50s, needed some minor legal matters dealt with and was introduced to Ryan in mid-March by a friend, said Det. Steve Harris.

In less than two weeks, the woman had lost the bulk of her life savings.

The victim's friend had met Ryan through an online dating site, said Harris.

"Like any fraud artist, he's obviously very smooth, good personality, very convincing," he said.

In 2002, Ryan, who worked as a paralegal, was sentenced in Newfoundland to two years in prison for a series of fraudulent schemes involving his clients. They lost more than $160,000.

Ryan is currently also wanted on Canada-wide warrants for parole violations.

Harris said Calgary investigators are also assisting in fraud investigations in Red Deer and Kelowna where a man has been meeting mature, single women through online dating services.

"Pellicano and a Top Lawyer Are Convicted"

Barners, Brooks, *The New York Times*, 30 August 2008, pp. B.1, B.4
[*in part*]

Los Angeles—Anthony Pellicano, a private investigator who once worked for Hollywood stars, and a prominent lawyer, Terry N. Christensen, were convicted Friday in the wiretapping of the ex-wife of the investor Kirk Kerkorian in a child-support case.

Both Mr. Christensen and Mr. Pellicano, 65, were convicted of conspiracy to commit wiretapping in Federal District Court here. Mr. Christensen was also convicted of aiding and abetting a wiretap; Mr. Pellicano was also convicted of wiretapping.

The conclusion of the six-week trial before Federal District Judge Dale S. Fischer opens the door for a number of civil suits against the two men as well as several others in the case. The suits, which were delayed during the criminal proceedings, largely involve victims of wiretapping seeking damages for incidents in which private conversations were recorded.

Mr. Christensen, 67, a founding partner of the leading entertainment litigation firm that bears his name, is the first Hollywood power player to be convicted in the six-year investigation and legal proceedings surrounding Mr. Pellicano's wiretapping operation.

In a statement, Daniel A. Saunders, the lead prosecutor, called Mr. Christensen's use of wiretapping to gain a strategic advantage in the child-support case "a stain" on the Los Angeles legal community.

"We are grateful to the jury for helping to eradicate that stain today," Mr. Saunders said in the statement.

The United States attorney for Los Angeles, Thomas P. O'Brien, issued his own statement, calling Mr. Christensen's behavior "reprehensible."

Patricia Glaser, Mr. Christensen's defense lawyer and a partner at his firm, said she would file an immediate appeal. "We will be fighting this to the end," Ms. Glaser said. "We think the jury got it wrong. We are going to be appealing on a myriad of issues." She declined to specify which issues, but added, "believe me, there are a ton."

The two men were found guilty of conspiring in the spring of 2002 to illegally tap the telephone of Lisa Bonder Kerkorian, who was involved in a lawsuit over child support at the time with Mr. Christensen's client, Mr. Kerkorian.

The evidence included a series of 34 recordings that Mr. Pellicano, who represented himself at both trials, made of his telephone conversations with Mr. Christensen. In the recordings, the two men are heard discussing and laughing about Ms. Bonder Kerkorian's private telephone conversations.

The case went to the jury on Wednesday but deliberations had to be restarted on Thursday after a juror was dismissed for making questionable comments about the severity of the charges and then lying about it.

. . . .

Mr. Pellicano was sent back to prison, where he is awaiting sentencing for his previous convictions. In May, the former private detective was found guilty on 76 charges, including wire fraud, racketeering and wiretapping. Mr. Pellicano faces up to 20 years in prison on the single count of racketeering in that case. He will be sentenced on Sept. 24 for the May verdict and for Friday's conviction.

Meanwhile, the civil suits can proceed, leading to yet another chapter in a courtroom drama that has stretched on for two years.

"For Christensen, that's the next punch," said Laurie Levenson, a professor at Loyola Law School and a former federal prosecutor. "I would think this gives impetus to try and settle some of those. There's not much of a defense once you are convicted."

Ms. Glaser confirmed that the civil suits could move forward, but said she was unsure to what degree before an appeal was resolved.

The investigation and subsequent trial have battered Mr. Christensen's prominent Hollywood firm, which employs about 110 lawyers. The assault on lawyers and the famous people they represent initially stunned the movie capital, where studio walls and security departments were built to keep the outside world out.

The investigation of Mr. Pellicano began when an entertainment journalist, Anita M. Busch, was threatened in June 2002 after writing damaging articles about Michael S. Ovitz, the once-dominant talent agent.

The investigation into the threat, which uncovered Mr. Pellicano's wiretapping enterprise, seized Hollywood's imagination as personalities like Mr. Ovitz and Bert Fields, the $900-an-hour entertainment lawyer who often retained Mr. Pellicano, were implicated.

Sylvester Stallone and Keith Carradine were wiretapped, it turned out; Garry Shandling was subjected to an illegal criminal background check. Other stars like Chris Rock and Courtney Love were revealed in courtroom testimony to be beneficiaries of Mr. Pellicano's illicit trade.

But Mr. Christensen is one of the few industry players who was charged. The only other person of note was the movie director John McTiernan, who pleaded guilty to lying to the Federal Bureau of Investigation and was sentenced to four months in prison; he has sought to withdraw that plea and is appealing.

[**Note:** *Christensen was, on 24 November 2008, sentenced to 3 years imprisonment and $250,000 fine (payable within 30 days).*]

"Prominent La. Lawyer Jailed After Courthouse Altercation"

Neil, Martin, *abajournal.com*, 15 December 2008

Madro Bandaries says fellow Louisiana attorney J. Robert Ates started the battle by grabbing his shirt and pushing him to the courthouse floor.

But colleagues of Ates claim Bandaries sparked the dispute by grabbing the 40-year practitioner's tie, as the two were about to participate in a hearing about a proposed $35 million class action settlement in a hurricane insurance coverage case, reports the Associated Press.

Judge Kern Reese of Orleans Parish Civil District Court apparently was persuaded by Bandaries' side of the story: By the time the hearing began today, Ates, who is an adjunct professor at Tulane University School of Law, had been led away in handcuffs to serve a 24-hour jail sentence, the news agency recounts. The judge also fined him $100.

Reese listened to testimony from several courtroom witnesses before reaching his conclusion, although he apparently didn't initially give Ates a chance to tell his side of the story, according to AP and *The Times-Picayune*. "The one thing I am not going to tolerate is lawyers being unprofessional," the judge said as he concluded that Bandaries had been attacked, the New Orleans newspaper reports.

Friends of Ates sought appellate court intervention to set bond and review his sentence, but got no immediate response, according to AP.

"Court drops Lawyer's charge"

Mitchell, Bob, *The Toronto Star*, 14 July 2009

Toronto lawyer will not face punishment from the court after her intoxication caused two mistrials, five months apart, in the same murder case.

Justice Francine Van Melle ruled Karen Cosgrove's contempt of court charge should be purged—with no conviction registered—because she has taken steps to deal with her alcoholism.

She said it was more appropriate for the Law Society of Upper Canada to decide when and if Cosgrove is "sober and healthy" enough to return to practising law.

"I'm satisfied she has taken her behaviour very seriously," Van Melle said yesterday in a Brampton courtroom. She said Cosgrove has already suffered the loss of her job, income and reputation.

Cosgrove, a single mother of a young child, was cited for contempt for being intoxicated in court when Van Melle declared a mistrial April 14, 2008.

That was the second time the judge had declared a mistrial in the murder trial of her client, Andrew Harris, 26, of Toronto.

He was charged with second-degree murder for the road-rage death of a 21-year-old Brampton man in August 2006.

At his third trial, represented by a different lawyer, he was found guilty of manslaughter in the hit-and-run death of Christymayooran Anton-Pious.

In December, Harris was sentenced to five years in prison. But Van Melle released him immediately, sentencing him to time already served, an equivalent time for remaining in custody during his two mistrials.

Crown prosecutor Steve Sherriff had sought assurances Cosgrove would be banned from defending clients accused of murder or other serious crimes until she proves she has beaten her alcohol problem.

Van Melle agreed with Sherriff that Cosgrove's actions "seriously damaged the justice system," but said she didn't agree her actions were "too serious" not to purge.

Court heard that Cosgrove remains enrolled in Alcoholics Anonymous, has undertaken alcohol treatment and is receiving counselling and support.

She has also removed herself from the legal aid panel, and hasn't been practising law since the second mistrial was declared.

She voluntarily reported her conduct to the law society, admitting she was intoxicated during the first trial and had consumed alcohol the night before she ran into difficulties again early in the second trial.

"Former B.C. lawyer sentenced in the 'biggest legal fraud in Canadian history'"

Oakes, Gary, *The Lawyers Weekly*, 19 June 2009, pp.1, 26

The man responsible for each of B.C.'s 10,000 Lawyers having to personally pay hundreds of dollars to compensate victims of his multimillion-dollar mortgage swindle before he was disbarred has been sentenced to seven years in prison for fraud and forgery.

Martin Keith Wirick brought shame on the legal profession, Patrick Dohm, associate chief justice of the Supreme Court of B.C., was reported by *The Province* to have said in passing sentence on June 9.

"Justice has been done," the Law Society of British Colombia (LSBC) President Gordon Turriff told *The Lawyers Weekly*.

Wirick was also ordered to make restitution of $2 million to the LSBC. The case has been called the biggest legal fraud in Canadian history.

By the time the scam came crashing down in May of 2002, the total take topped $40 million, which was "approximately the amount subsequently paid out by the…Society…in compensation to the victims of these offences," according to an agreed statement of facts.

Stuart Cameron, director of discipline and litigation counsel for the LSBC, explained that besides their regular obligations, members were required "to pay an additional $350 per year for 2003, 2004, 2005 and 2006 to fund the payments to the innocent parties who were victims of the scheme." The amount was increased the following year and payments continued to be made in 2008.

"[W]e were responding in the public interest in the spirit of reinforcing public trust in the legal profession," Cameron told the national legal newspaper. "We did manage to 'rescue' all of the innocent homeowners."

In addition, the LSBC has taken several steps "to guard against these circumstances from ever occurring again," he added.

The agreed statement was signed by Crown counsel Kevin Gillett and defence counsel Richard Peck. Gillett read much of it aloud in the Vancouver Courtroom.

He said Wirick, 54, was called to the B.C. bar in 1972 and 20 years later a large portion of his Vancouver-area practice involved real estate transactions.

A "developer client" who is also facing charges in the case used Wirick "for most of his legal work."

In the summer of 1999, Wirick "discovered he had made a calculation error and that the developer client needed to provide an additional $20,000.00 to complete" a transaction involving a property transfer.

But the client couldn't come up with the funds, and he asked the lawyer "to hold off paying out the second mortgage on the property until the sale of a second property completed," Gillett said. Wirick agreed, "leaving the second mortgage, which he had undertaken to remove from title, unpaid and a sum of money intended for that purpose in his trust account."

The client then asked the lawyer "to give him some of this remaining trust money so [he] could finish off construction on the second property that he planned to sell. He told [Wirick] that, once the second property sold, there would be enough money to pay off the outstanding mortgages on both properties." Once again, the lawyer complied.

"In fact, when the second property was sold, there was not enough money to pay off all of the outstanding encumbrances on both properties. [Wirick] paid off the outstanding second mortgage on the first property but left another mortgage unpaid on the second property. This was the start of a chain of similar and escalating events… ."

He also responded "to demands for proof that mortgages had been discharged by filing forged releases at the Land Title Office."

As the LSBC said in a Bencher's Bulletin, the scheme "was complex. Much like a house of cards, with each card propping up another in a structure that would inevitably collapse under its own weight; the frauds were intertwined." Wirick's dealings were so complicated that the proceeds of a single conveyance could be traced to more than 40 other transactions… .

"Families, financial institutions and the legal profession were left to pick up the pieces with the help of the Law Society… .

At its worst, his misappropriations caused many to fear they might lose their homes. At its best, the situation demonstrated the fabric of the entire legal profession when it stepped up to deal with the Wirick crisis… ."

"[T]he sheer number of misappropriations quickly became the most ever by a lawyer in B.C… ."

The bulletin also pointed out that in cases "where a financial institution had begun to foreclose on an innocent victim, the Law Society retained counsel to represent the victim's innocence."

As noted in the agreed statement of facts, the reforms adopted by the LSBC led to "a number of new reporting requirements being imposed on lawyers with respect to both mortgage discharges and trust accounts. It has also involved changes in provincial legislation with respect to the provision of discharges by mortgage Lenders."

Wirick resigned from the LSBC in May of 2002 and was formally disbarred the following December.

His lawyer, Peck, told the *Vancouver Sun* that Wirick was always anxious to please his clients and was too weak to say no. He quickly became ensnared in the developer-client's "web of deceit," the Vancouver counsel added.

"Gangsta Rap"

King, Mike, *Canadian Lawyer Magazine*, July 2009
[*in part*]

When Quebec provincial police launched Operation Piranha in February 2004 to investigate a drug-smuggling ring with links to traditional organized crime and the Mafia, they likely weren't expecting to put the bite on a Montreal lawyer. But found in their net after about 150 Surete du Quebec officers carried out a mid-March 2006 raid was Louis D. Pasquin, no stranger to drug dealers or major police probes as a well-known defender of bikers and mobsters from the Hells Angels to the Montreal Mafia's notorious Cotroni clan.

A member of the Barreau du Quebec since 1987, he was charged with committing a crime for the benefit of a criminal organization (better known as gangsterism), conspiring to traffic cocaine, and two counts of drug trafficking. Nine months after the end of the trial, which included at least three former clients of his, Pasquin, on March 6, earned the dubious distinction of being the first lawyer in Canada convicted of gangsterism. On June 12, Quebec Court Judge Carol St-Cyr sentenced 49-year-old Pasquin to serve 54 months or 4.5 years in prison. Despite the jail time imposed, Pasquin calmly walked out of the courthouse a free man after defence lawyer Pierre Panaccio dashed across the street to the Quebec Court of Appeal following the sentencing to complete filing a challenge of his client's verdict. At press time, Pasquin remained free while awaiting a hearing on his appeal.

He hasn't practised since his 2006 arrest and on March 24, was provisionally disbarred by the Barreau on the basis of his conviction. Barreau secretary Sylvie Champagne said when the executive committee is informed a lawyer has been found guilty of a criminal offence, "we want to act quickly to protect the public if there is a link to [the lawyer's] profession." Even when the offending lawyer appeals his conviction as Pasquin has, "we can act sooner and not wait for an [appeal] decision. If he wins the appeal, then the disbarment is dropped." She said it can also be dropped if the Barreau's disciplinary committee doesn't file a complaint against the lawyer.

In the end, Pasquin was done in by the close ties with some of his questionable clients that went beyond the professional relationship—the proof caught on wiretapped conversations. In his 40-page judgment, St-Cyr ruled that, "in the eyes of the court, it appears clear that according to all probability, Louis Pasquin was one of the co-conspirators in Dauphin's organization."

The judge said the essential elements provided as proof during last year's trial came from 924 taped communications taken from among 137,750 intercepted by a pair of 2005 court-approved wiretaps. "From the first telephone call interceptions, Pasquin uses a language full of implied meanings, willful vagueness, and notable familiarity," St-Cyr wrote. "Every time Dauphin and Russell made their subtle allusions to 'poutine,' they are beyond a shadow of a doubt referring

to the drugs. And when they refer to 'their friend,' it can't be interpreted as anything but their relationship with Louis Pasquin."

At what was the scheduled start to Pasquin's trial on March 31 of last year, Panaccio filed a host of petitions, most notably one that his client be tried by himself and another to discard the wiretap evidence. Panaccio suggested his client was in a paradoxical position since he was accused in a case implicating two past clients, Venneri and Jean-Daniel Blais. He said Pasquin feared betraying his solicitor-client confidentiality by testifying against them to clear himself. Comparing that professional secrecy to "almost a question of national interest," Panaccio painted his client as the "standard-bearer for other lawyers accused of criminal offences over the years."

In denying the petitions, St-Cyr sided with prosecutor Giauque, who pointed out: "The status of lawyer isn't in itself a motive for obtaining a separate trial. The important thing is seeking the truth."

When the trial finally got underway on April 23, 2008, two police officers were the first to take the stand and detail the vicissitudes of the long shadowing that concluded in a pair of seizures in Montreal totalling 49 kilograms of cocaine. The haul also included more than 136,000 Viagra pills. The officers testified that in the hours leading up to the Oct. 13, 2005 bust, Dauphin and Russell were seen separately going to Pasquin's private residence in Lachenaie. One thing they said was certain was that Russell had the cocaine in his car when he visited Pasquin that day, a scene described while hidden video was shown in court. Later testimony, based on wiretap evidence, showed Russell prepared his drug transactions from Pasquin's home.

In order to assure solicitor-client privilege wasn't violated during the wiretapping of Pasquin's phones, Sûreté investigators obtained a special warrant and weren't allowed to listen to the recordings until a judge vetted them. It was determined that, of 71 calls involving Pasquin, 48 were admissible and heard in court.

Cases like Cliche's and Pasquin's are exceptional, however. "Lawyers are not above the law, they're citizens like any other," Giauque told reporters the day St-Cyr handed down the guilty verdict. "But we shouldn't take from this that a majority of lawyers engage in dishonest practices. It's very much to the contrary."

"It presents a picture to the public that doesn't make us look good," said Rénald Beaudry, past president of the province's defence lawyers' association. "It's not great." Calling it sad and unfortunate "to know that we have a rotten apple in our ranks." He said, Pasquin's situation is a perfect example of what can happen when certain lawyers get too close to their clients. "You have to keep your distance from those clients and not fraternize," said Beaudry, whose two-year term as head of l'Association des avocats de la défense ended in May. "When that happens, sometimes you get results like this."

He acknowledged Pasquin is well known in Quebec for being a preferred lawyer of mobsters and gang members and who worked primarily alone because "big firms are more apt to represent bankers and not Hells Angels."

Robert La Haye, a veteran criminologist often called on as an expert by Quebec media to comment on unusual or high-profile cases, agreed with Beaudry by stressing the importance of

lawyers always keeping a distance between their offices and their clients—especially if those clients are members of recognized criminal groups. "It's very, very delicate for a lawyer [with such clients] not to appear to be engaged in crime," La Haye told *Canadian Lawyer*. "They must be prudent not to get caught up in things that can be interpreted by police or the courts as being a co-conspirator by being seen as acting as a gofer or messenger." Even more important is to be "very careful not to be trapped, especially in wiretaps" where conversations can be misinterpreted.

In Pasquin's case, La Haye said "as soon as he was arrested, I wondered how he got there. Even when they aren't charged, [lawyers with known criminal clients] live with that fear, the Sword of Damocles, that they will be brought down too."

"Stanford Law Grad Gets Home Detention for Unpaid Taxes on Escort Earnings"

Cassens Weiss, Debra *abajournal.com*, 29 September 2009

Stanford law graduate Cristina Warthen has been sentenced to one year of home detention and ordered to pay $243,000 for failing to pay taxes on money earned running an escort service.

U.S. District Judge James Ware also sentenced Warthen to three years of probation and said she could not continue to advertise her escort services during that period, *The San Jose Mercury News* reports. He imposed the advertising restriction after prosecutors said Warthen continued to promote herself on the Internet as a high-priced escort while awaiting sentencing for failing to pay taxes on $133,000 earned as a prostitute. Warthen had pleaded guilty to the tax charge.

"Warthen gained notoriety when she was busted as a jet-setting call girl who sold her services to pay off her Stanford Law School debts," the newspaper says. "She got her law degree from Stanford in May 2001, but quickly began to run a steamy website with offers to jet off for liaisons with clients in cities around the country, including New York, Chicago and Washington, D.C."

The plea agreement originally called for Warthen to pay $313,000. She later asked the court to reduce the amount because her former husband, the co-founder of Ask Jeeves, had lost money in the stock market downturn and would not be able to pay the full $350,000 she expected to get in a divorce settlement.

R. v. Shoniker

Livesey, Bruce, *Canadian Lawyer*, September 2007, pp. 34-37, 39, 41
[*in part*]

The origins of the RCMP sting began when the Toronto Combined Forces Special Enforcement Unit (CFSEU), which investigates organized crime, discovered a relationship between Toronto bar owner Jonathan Vrozos and some underworld characters. But what really

alarmed the unit, which is led by the RCMP, was when they discovered that Vrozos had a relationship with Calvin Barry, a senior and high-profile assistant Crown attorney. "Barry oversaw important files—everything about biker investigations and the gambling squad passed across his desk," says former RCMP staff sergeant Larry Tronstad, who was a leader of the CFSEU, in explaining why this relationship with Vrozos was so disturbing. The unit decided to target Barry in a corruption probe, dubbed Project OJUST, which got underway in early 2003.

Which is how Cpl. Al Lewis, an undercover RCMP officer, met with Vrozos on the pretense that $250,000 that Lewis was responsible for had been seized at the Toronto airport and needed to be retrieved with the help of a lawyer. Vrozos suggested meeting with Barry. On May 2, 2003, the three men got together, where Lewis "stated that the money had been skimmed from union pension funds and that they were stolen," according to the agreed statements of fact in the [Peter] Shoniker case. "Barry did not make any comment or react in any way to Lewis' admission regarding the funds and said he would contact Lewis with the name of someone to call." The next day Barry phoned Lewis suggesting the names of three lawyers, one of whom was his old pal Peter Shoniker.

According to Tronstad, the investigation into Barry came to an end then and there due to resistance within the Crown's office to press it further. Nevertheless, after Shoniker was arrested, Barry was immediately removed from prosecuting cases and soon left the Crown's employ. He is now in private practice and did not return phone calls seeking comment.

On May 8, 2003, Lewis met with Shoniker and the sting was underway. Over the course of several meetings, Shoniker boasted about his stature in the community and his ability to help Lewis. He remarked at one point that a native man worked for him and could transport banker boxes of cash. "I can give you an Indian who runs money who will take the fucking fall," said Shoniker. On another occasion, he told Lewis that there was not a "fucking judge" in Toronto who would grant authorization to wiretap Shoniker's phone lines, and that he was "untouchable, untouchable, untouchable by the police." Shoniker said he could move $1 million weekly with no problem. Lewis, meanwhile, always made it clear the money he wanted laundered was stolen or the result of drug deals.

Shoniker managed to secure the release of the initial $250,000 and had it laundered. Lewis provided more cash to be cleansed, a total of $750,000, which the lawyer put through an American bank account that was controlled by the police. Shoniker even dragooned one of his former clients, an Iranian-born jeweller, to help him with the laundering. At one point, he pocketed $50,000 of the funds, claiming that he used the money to give to various people to grease the wheels in the scheme. Shoniker also asked a friend whose wife worked as a detective for the Toronto police to have her do a computer search on Lewis to find out more about him.

The sting drew to a close in December of 2003. Shoniker and the jeweller were arrested the following summer. They agreed to plead guilty and take their lumps. Last fall [06 September 2006], Justice Cunningham gave Shoniker a 15-month sentence, which he served in Mimico correctional facility. He was released earlier this year and declined requests from *Canadian Lawyer* to speak about his life and case.

"The sweet smell of success [:]
The tale of Marc Dreier is a tragedy, but a cautionary tale as well

Slayton, Philip, *Canadian Lawyer*, October 2009, pp. 14-15
[*in part*]

"I have betrayed the people I care about the most, and I suffer every day from … shame and self-loathing and regret …."

So wrote disgraced New York lawyer Marc Dreier, after pleading guilty to massive fraud, in his sentencing letter to Judge Jed Rakoff of the Federal Distric Court in Manhattan. Dreier composed the letter to give "some context to what I did … to explain how a person with my background and advantages came to do the unconscionable." *Law.com* called Dreier's frauds "the most brazen and spectacular deception in law firm history." His sentencing letter unexpectedly tells us something important about the ethical perils of legal practice.

When the roof fell in, Dreier, in his late 50s, had a $10-million Manhattan condominium, a waterfront home in the Hamptons, a house in Santa Monica, Calif., a home in Anguilla, a $40-million art collection, and an $18-million yacht with a permanent crew of 10 (including a chief). Divorced with two children, he had dated a succession of beautiful young women. A graduate of Yale and Harvard law school, he was the sole owner of a New York-based law firm, Dreier LLP, with 250 employees. Today, tagged the "Houdini of impersonation" by the popular press, Dreier is in prison.

The final act in this sorry saga took place in Canada. On Dec. 2, 2008, Drier flew from New York to Toronto by private jet and went to the Ontario Teachers' Pension Plan Offices. After meeting with Michael Padfield, a lawyer for Teachers, Dreier asked to use a telephone and was shown into a conference room. There he met with Howard Steinberg, a New York Hedge fund representative he had previously invited to the Teacher's offices. Dreier pretended he was Padfield, used Padfield's business card (that he'd been given earlier), and tried to close the sale to the hedge fund of $33 million in fraudulent promissory notes supposedly backed by Teachers.

Steinberg sensed something was wrong, and ended the meeting early. He asked a receptionist if the man who had just left the conference room was Michael Padfield, and was told that he wasn't. Police were called. Dreier was arrested. Later, it turned out Dreier had defrauded a variety of investors of hundreds of millions of dollars; often, as part of the deception, he had impersonated someone.

In July, he pleaded guilty to multiple counts of fraud, and Rakoff sent him to jail for 20 years.

5.0 FEES AND COSTS

5.1 Fees

"Agreement to arbitrate fee dispute is enforceable: Ontario Court of Appeal"

MacInnes, Norman, *The Lawyers Weekly*, 15 May 2009, pp. 2, 24
[*in part*]

[*Lean Estate v. Wires Jolley LLP*, [2009] O.J. No 1734]

An agreement between lawyer and client to submit contingency fee disputes to arbitration is valid and enforceable, Ontario's top court has ruled. However, the arbitrator must apply the substantive law, including the statutory protections afforded to clients in the *Solicitors Act*.

The majority in *Jean Estate v. Wires Jolley LLP* also held that on an application to strike out a notice of arbitration, application judge Wailan Law was correct in assuming jurisdiction to decide the enforceability of the arbitration clause in the contingency fee arrangement, rather than leaving this determination for the arbitrator.

However, the judge erred in holding that an agreement to arbitrate a contingency fee dispute is prohibited and cannot be enforced on public policy grounds. The court therefore set aside her order striking the notice to arbitrate.

"This case should encourage lawyers and clients to put more arbitration clauses in retainer agreements, not necessarily just in contingency fee situations but in respect of any fee arrangement," said Graeme Mew of Nicholl Paskell-Mede LLP, who represented Wires Jolley LLP. "The courts have limited resources to do this through assessment officers. Arbitration should be quicker and has the potential to be cheaper."

Glenn Hainey of Gowling Lafleur Henderson LLP also thinks that lawyers are more likely to include arbitration clauses in all retainer agreements as a result of this decision. Hainey, who along with Gowlings' Christopher Stanek represented Peter Wong, estate trustee of the Lean Estate, said that the decision established two important principles: (1) that "lawyer' fee disputes are now able to be resolved by an arbitrator," but (2) "of equal importance, the majority made it clear that the assessment by the arbitrator must be carried out in accordance with the protections afforded under the *Solicitors Act*."

Peter Wong, the executor of his mother Tung Jean's estate and its sole beneficiary, agreed to play law firm Wires Jolley LLP a "success fee" of 10 percent of the value of the estate's assets if mediation successfully resolved complex international estate litigation. The success fee was clearly a contingency fee agreement within the meaning of the *Solicitors Act*. The parties also agreed that "disputes arising from or in relation to the success fee will be resolved by arbitration."

The mediation was successful, but a dispute arose over which of two dates should be used to value the assets for the purpose of calculation the contingency fee. Wires Jolley suggested a fee of $2,000,000. Wong estimated the fee at $461,115.

Wires Jolley served a notice of arbitration. Wong brought an application in the Superior Court to strike it out on the basis that an agreement to arbitrate a contingency fee dispute is an agreement to contact out of the client protection provisions of the *Solicitors Act* and is therefore unenforceable for reasons of public policy. Application judge Law agreed and struck out the notice of arbitration.

Justice Karen Weiler, writing for the majority, acknowledged that, as a general rule, the enforceability of an arbitration clause should be decided by the arbitrator. However, she noted that in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, the Supreme Court of Canada said that a Superior Court judge can assume jurisdiction over the threshold issue of enforceability when an important question of law is raised, when the challenge to the arbitrator's jurisdiction does not require a detailed factual inquire and when the party initiating the jurisdictional challenge is not doing so as a delaying tactic.

Here, "whether an agreement to arbitrate disputes over a contingency fee is unenforceable and void for reasons of public policy is very much a question of law" that is "of interest to lawyers and judges." Moreover, "brief consideration of undisputed facts is all that is necessary to resolve the questions at issue in this case" and "no suggestion of delaying tactics arises on this record."

Justice Weiler noted that there are two rights in ss. 23 and 24 of the *Solicitors Act*. One is the right to have a Superior Court judge decide a contingency fee dispute. But here the parties had agreed to have an arbitrator rather than a judge resolve any disputes. In *Dell*, the Supreme Court "held that the right to arbitration is a substantive right and the parties' choice should be respected. I would apply *Dell* … . Thus, I would hold that the application judge erred in concluding that a solicitor and his or her client could not agree to have an arbitrator, as opposed to a Superior Court judge hear a contingency fee dispute."

The second right is the right to an independent assessment of whether the contingency fee is fair and reasonable. "Both the broad public policy favouring the resolution of disputes on the merits and the public policy underlying the remedies given to a client in the *Solicitors Act*" support the view that a party cannot contract out of this right, said Justice Weiler. Thus, any arbitration must be conducted in accordance with the statutory protections contained in the *Solicitors Act.*

Label v. Albanese

2008 CarswellBC 1900, B.C. Sup. Ct., 09 September 2008, Reg. G. Taylor J.
[*Headnote*]

Father had child, born in 1996, of brief relationship with woman—Child lived with mother and grandmother and for several years father exercised almost daily access to child—Rift arose between father and mother, with father believing that mother was unfit parent, that grandmother was primary caregiver of child and that mother and grandmother were alienating child from father––Mother applied for sole custody and guardianship of child in June 2005 and father brought counterclaim two months later seeking sole custody and requesting expert assessment—Mother denied father all access—Father retained lawyer in December 2005 to replace previous lawyer and signed retainer letter agreeing to fees of $250 per hour plus fees and disbursements and interest of 18 per cent per annum for unpaid accounts after 30 days—Extensive litigation ensued over next two years, including 22-day trial awarding mother sole custody, with father obtaining 75 per cent of costs, and successful appeal by father two months later overturning trial decision—Throughout litigation father had alternately hostile and admiring relationship with lawyer but newspaper story generated by father and highly critical of father's lawyer prompted lawyer to withdraw as counsel––Father commenced, then discontinued, action against lawyer for negligent performance—Lawyer rendered accounts for period between January 2006 and September 2007 in total amount of $142,881.44, charging 12 per cent interest on unpaid account only from September 2007—As of June 2008, total of unpaid fees, taxes, disbursements and interest owing to lawyer was $59,147.31––Taxation of solicitor's accounts was conducted—Father objected to accounts on among other bases that he retained lawyer only to obtain access, that lawyer's fees greatly exceeded $30,000-$40,000 estimate and that lawyer failed to address trial costs appropriately at appeal.

Determination was made that lawyer was entitled to all fees, disbursements and taxes charged to client as well as interest on unpaid accounts at 18 per cent per annum—Pursuant to criteria set out in s. 71(4) of *Legal Profession Act* and considering all circumstances, lawyer earned fees by diligence, determination and loyalty to a most difficult client—Case raised complex issue of parental alienation and difficulty of case was increased by mother's obstructionist tactics—Lawyer brought excellent skills to matter and was able to overturn trial judge's decision within two months facilitating child's removal from mother and grandmother—Lawyer's hourly fee of $250 was less than other lawyers of less experience and skill—Any cost estimate lawyer gave to father was not firm estimate and lawyer worked outside estimate at behest of or with implied approval of client and faced many unforeseen circumstances.

"Lawyer Won $2.4M for Client, But Should Get No Attorney Fee, 2nd Circuit Says"

Neil, Martin, *abajournal.com*, 07 January 2009

In what the 2nd Circuit describes in a written opinion as a close case, the appeals court has upheld a lower court decision to award no attorney fee to a former New York lawyer who won a $2.4 million settlement for his client in a medical malpractice case.

Because Steven Goldman didn't adequately document either the basis of his eventual $388,000 fee request (it was initially higher) or the nature of his minor client's ongoing medical problems and future need for treatment, a trial judge acted within his discretion when he refused to approve any legal fee whatsoever, the New York City-based 2nd U.S. Circuit Court of Appeals held in a written opinion released Monday.

U.S. District Judge Edward Korman of the Eastern District of New York oversaw the settlement. He described the information provided by Goldman as "totally unhelpful," and wound up appointing both a special master and a medical expert to help him determine how to resolve the case, reports the *New York Law Journal*.

However, attorney Arnold DiJoseph, who represents Goldman, said the 2nd Circuit decision is troubling.

"I find it very disturbing that an attorney who obtained damages of $2.4 million versus Martin Clearwater & Bell, one of the top malpractice defense firms in the state of New York, right after examinations before trial, isn't getting a penny," he tells the legal publication. "Nobody is even arguing that the result he obtained wasn't satisfactory. He isn't getting any fees because he made a mistake and that somehow got transformed into how he was trying to steal $20,000 from a brain-damaged baby."

Goldman has since resigned from the New York bar to resolve an unrelated attorney disciplinary matter, the legal publication notes.

L'Abbee v. Denis

2007 CarswellOnt 9219, Ont. Sup. Ct.J., 06 June 2007, A.J. Roy, J.

[Affirmed on appeal: 2008 CarswellOnt 2349, Ont. C.A., Per Curiam; leave to appeal to S.C.C. refused: 05 December 2008.]

1 This application by the applicants is to set aside an agreement with the respondent, their former solicitor, and for an order directing a reference for assessment of the accounts sent by the respondent and paid in part by the applicants.

2 The applicants are an association of employees at the University of Ottawa representing some 1,300 non union support staff. This association had an annual budget of approximately $95,000 which was funded entirely by the University of Ottawa.

3 In 2004, the association retained the services of the respondent for legal assistance. In June 2005, the association indicated to the respondent that they wanted to initiate steps for their certification as a union and for incorporation. An agreement was drafted by the respondent and executed by the applicants.

4 For the period June 2004 to August 2006, the respondent sent accounts to the applicants for over $233,000.00 of which approximately $50,000.00 remains unpaid.

5 The applicants' motion is pursuant to the *Solicitors Act* to have the agreement of June 2005 either set aside or reopened and have the accounts sent by the respondent, assessed. It is conceded by the applicants that the only accounts involved here for assessment are the accounts which were sent by the respondent after June 2005.

6 It is argued on behalf of the respondent that the trust agreement that was signed by the parties is not a retainer for legal services and therefore is not an agreement pursuant to the *Solicitors Act*. Secondly, it is stated that the accounts were sent for not legal services but a combination of legal services, management consulting services and industrial relations services and therefore cannot be assessed under the *Solicitors Act*. Finally, it is argued by the respondent that the agreement cannot be reopened or set aside as there exists no special circumstances for so doing.

7 I have no hesitation in saying that after reviewing the so-called "trust partnership agreement" drafted by the respondent, that it is a very confusing and uncertain document. Whatever its intent or purpose, it is not accomplished by this document. The only logical conclusion is that it is simply a retainer for legal services. Accordingly, it falls within the agreement provisions of the *Solicitors Act*.

8 Based on the evidence before me, including the agreement itself, there exists a number of special circumstances which would justify reopening this agreement, such as:

1. the confusing and uncertain aspects of the agreement;

2. the amount that was intended to be charged under this agreement and the accounts that were submitted by the respondent, which appear to be totally out of line with the services to be performed;

3. the fact that the respondent was dealing with a small group of very unsophisticated clients who had a very limited budget;

4. that the respondent proceeded to certify this group when he knew that the funding for the association came from the employer.

9 Accordingly, there will an order pursuant to Section 25 of the *Solicitors Act* reopening the agreement between the parties and sending all accounts submitted by the respondent after June 2005 for assessment.

10 The parties will have 30 days to submit brief (3 pages or less) of written submissions for costs.

"It's about so much more than billable hours"

Makin, Kirk, *The Globe And Mail*, 25 February 2009, p. B8

As an articling student in the mid-1970s, Brent Cotter regularly trotted over to the Saskatoon law courts to handle chambers motions. After the work was done, the real learning began.

Mr. Cotter, now dean of the University of Saskatchewan's law school, would hang around in the large conference room, observing the way more seasoned counsel articulated their causes, elegantly conceding ground or standing firm. "I would stay the whole morning and watch, with the blessing of my [law firm's] principal," he recalled in an interview.

"It was a small firm, but the principal understood that this was a learning experience for me. You could learn a lot from the best and most respected lawyers – and come to see why they were so well respected by the other lawyers and by the judges. And you could learn what not to do through watching certain others."

Sadly, that valuable experience is much less available nowadays, largely because of the business pressure placed on law firms. Young lawyers are under the gun, stressed out by the demands of a work world that measures worth in 15-minute increments.

Professor Cotter spoke of a recent encounter he had with a young law clerk, who insisted that he could never get away with sacrificing billable hours for an opportunity to watch senior colleagues in action. “You stay and watch,” he told the young man. “I'll go and explain to your firm why there will be no billable hours.”

The story is symptomatic of a worrisome trend—the erosion of professional standards as billings take precedence over the long-term development of proficient, ethical, well-rounded lawyers. With public criticism of the legal profession on the rise, a call for more exacting professional standards has taken on new urgency.

The first task for proponents of the professionalism movement has been defining what they mean. By consensus, it appears to boil down to civility; mentoring; continuing education; maintaining client confidentiality; avoidance of conflicts; and maintaining independence.

“It has to do with the notion that being a lawyer does not mean simply holding a job,” said Ontario Court of Appeal Judge Stephen Goudge, a moving force in the campaign. “This is about being part of a profession that is given a stature and a certain prestige and, in return, includes a significant service component.”

Evidence is mounting that the movement is more than hot air. The Law Society of British Columbia recently became the first regulator to mandate compulsory continuing education for lawyers. Others intend to follow suit, including the Law Society of Upper Canada, which will make extra training compulsory for lawyers in their first two years of practice.

Institutes have also sprung up, such as the Chief Justice of Ontario's Advisory Committee on Professionalism and the University of Toronto's Centre for the Legal Profession.

Across the country, law schools are adding ethical training to their curriculums. The number of law students enrolled in a course on professional responsibility grew to 80 per cent in 2008 from 25 per cent in 1985. Over the same period, the number of law schools that include compulsory ethical training in their curriculum has grown to 16 from two.

“The momentum in the law schools is spectacular,” Judge Goudge said. “But the rest of us have to pick up our game.”

That could present a challenge.

After all, it is one thing for second-year law students to become engrossed in a debate over conflicts of interest. It can be quite another for a Bay Street lawyer to risk losing an important client over a marginal conflict of interest, or because a client is intent on “motioning” the other side to death.

Those who are pushing professionalism must come to grips with a business model of law that places a premium on retaining clients. As Cornwell University law school professor Brad Wendel told a U of T symposium on professionalism last week, sharpening your ethical acuity can be difficult when you are "maniacally billing 2,200 hours a year."

There is hope. U of T law dean Mayo Moran, who has been touring law firms to test the waters on the professionalism debate, said she detects a growing desire to shore up ethical standards and mitigate the billable-hours mentality.

Notwithstanding the professionalism movement's focus on lofty motives, there is also a defensive undertone to it all. The profession is undeniably under siege.

At the Law Society of Upper Canada, complaints involving ethical shortcomings jumped to 31 per cent of total complaints in 2007 from 11 per cent in 2004.

Moreover, the news media never tire of stories involving the difficulty of gaining access to justice, often juxtaposing greedy or unethical lawyers with the lack of timely access for all but the wealthy. The theme reached a new high, or low, last year with a Maclean's magazine cover story that characterized lawyers as "dirty rats."

The profession is fighting a potent narrative line alleging that the practice of law has declined from a golden age—when lawyer-statesmen operated with a communal sense of honour––into a grubby little trade whose practitioners scrap for the right to gouge clients.

The trashing of his profession "drives me into a spiralling funk," Judge Goudge said. "But I think it is a bit of a mug's game to try to analyze just how deep the hole might be in the eyes of a particular perceiver. The point is that we can clearly improve things."

Prof. Moran agreed: "It isn't that we were worried about the Maclean's story. It's more that we feel it would be helpful to think in a more sophisticated way about these issues."

Either way, if the public loses confidence in its lawyers, the profession could lose the right to govern itself. "The organized bar lost this debate long ago about self-regulation in the U.S.," Prof. Wendel warned.

The key question for the professionalism movement lies in whether counsel – not only academics and law society benchers—also buy into it. The answer is likely to hinge on whether the movement maintains a sense of realism about life in the legal trenches.

"There are no easy answers as to how a lawyer gets it exactly right between being an officer of the court and being somebody who serves the interests of their client," Prof. Moran said. "I think the best thing we can do is have a really vigorous discussion about it. Because every lawyer is going to face those questions all of the time."

L.(J.K.) v. S. (N.C.)

(2009), 64 R.F.L. (6th) 32 (Ont. Sup. Ct. J.), Turnbull J.
[*Headnote*]

Parties separated in 2005 and son resided with father. Son was increasingly alienated from mother by words and conduct of father. Mother applied for custody and at time of trial had not seen son, aged 13, for over one year. Court ordered that custody be forthwith granted to mother with no access on interim basis to father. Also, it was ordered that mother be permitted to take son to United States to participate in therapeutic program with him. Pending return of this application before court, father was ordered to participate in therapeutic program with son, but he did not do so. Therefore, on return of application, court was not satisfied that it was in best interests of son to vary 'no access' provision of custody order. On issue of costs, mother claimed and court agreed that she was entitled to her costs of trial proceedings on full indemnity basis. With regard to costs of other proceedings, father claimed that time spent by law clerks and legal assistants on secretarial tasks were not properly charged as part of costs claimed against him. Regarding experts' fees, father claimed that portion of experts' costs post trial should be payable in accordance with formula set out in Federal Child Support Guidelines as special expenses. Father also took exception to travel time charged by mother's counsel and disbursements paid directly by mother for experts fees.

Cost of secretarial work and travel time were reduced but father was responsible for all experts' expenses post trial. It was appropriate to reduce account for secretarial work done by law clerks and legal assistants. It was not reasonable for father to have to indemnify mother for her lawyer's travel time on same basis as court or preparation time. Accordingly, while travel costs were payable on substantial indemnity basis, time claimed was to be reduced by 50 percent. Regarding experts' fees, R. 24(12) of Family Law Rules states that court can order one party to pay amount to other to cover part or all of expenses of carrying on case. Mother correctly felt expenses incurred for son's treatment were in son's best interests and were necessitated by father's behaviour. In circumstances, these expenses were incurred by mother to carry on case within meaning of Rules. Case was novel and presented efficiently and with no unnecessary motions or other delay but fees of mother's counsel were to be reduced from $500 per hour as claimed to $450 per hour as this was fair and reasonable and within reasonable expectations of father.

Boyd v. Boyd

(2008), 54 R.F.L. (6th) 460 (Ont. Sup. Ct. J.), M.P. Eberhard J.
[*Headnote*]

Parties were engaged in matrimonial litigation which included wife's claim for equalization. At date of separation husband held title to former matrimonial home and wife filed designation on title giving notice of designation as matrimonial home. Husband subsequently accepted offer of purchase and sale in 2007 with net proceeds of $114,600. Prior to closing of transaction, husband's lawyer, continuing to represent husband in matrimonial litigation, sued husband for fees of $35,000.00. Husband did not oppose suit, default judgment was entered in amount of $35,000 and lawyer filed writ of execution against the sale proceeds. Wife refused to remove execution and husband obtained order dispensing with wife's consent and placing sale proceeds in trust pending hearing on matter. Wife brought motion for order setting aside lawyer's judgment and execution writ and for payment into court of net sale proceeds being held in trust, pending hearing. Husband brought cross-motion for payment out of trust funds and distribution of balance and for removal of lawyer as lawyer of record.

Motion granted. Cross-motion granted in part. Order was issued to remove husband's lawyer as lawyer of record. Suing client during course of representation had obvious appearance of conflict and fact that husband agreed to continuation of representation at time of lawsuit did not negative appearance of conflict. Lawyer asking for default judgment and execution against vulnerable client amounted to lawyer extracting agreement by exercise of imbalance of power. Removal of lawyer on grounds of existing conflict was required to discourage others from following same course and to avoid serious potential for unfairness to client.

Patton v. Patton

(2008), 54 R.F.L. (6th) 446 (Ont. Sup. Ct. J.), R.D. Kelly J.
[*Headnote*]

Wife and husband separated in 2005. Solicitor acted for husband from June 2005 until relationship was terminated in early 2006. Husband and wife had joint equity in matrimonial home. Wife was entitled to acquire husband's interest in home on payment of $31,708.50. Husband's spousal support obligation was regularly in arrears. Wife was awarded lump sum support in amount of $31,708.50. Wife used this debt owed to her by husband to purchase his interest in home to satisfy spousal support obligation. Order vesting full title to matrimonial home to wife was made. Solicitor made claim for $6,700.53 for unpaid services to husband when acting as his counsel. Claim was now subject to writ of seizure and sale, filed with sheriff's office. Solicitor brought motion for order declaring that he was entitled to first charge on husband's equity in matrimonial home.

Motion dismissed. By law, charging order could be directed only when solicitor was "entitled to a charge on the property recovered or preserved through the instrumentality of the solicitor". Solicitor's efforts did not ultimately result in recovery or preservation of husband's interest in matrimonial home because husband no longer had interest in matrimonial home, having been compensated for his interest by satisfying his lump sum spousal support obligation. Court's jurisdiction to direct charge order was discretionary. Order would furthermore not have effect, given priority of order for lump sum spousal support. Solicitor was not defeated in claim for fair compensation but prevented from claiming relief against wife's unencumbered interest in matrimonial home.

"Flat-fee Billing[:] A family law pricing model that replaces time with value"

Balbi, Lonny, *The Lawyers Weekly*, 03 July 2009, pp. 9, 13
[*in part*]

Clients often complain of legal bills because they are not sure of the amount, the timing, outcome or how a final price is achieved. Just knowing that lawyers charge based on time often results in a feeling of being "nickel and dimed to death."

We share a mentality that as lawyers, we sell our time. But clients are not buying time. They want their fears addressed, your experience and results.

Lawyers have traditionally had a monopoly on the business of divorce. Our law societies protect us by saying that only lawyers are allowed to give legal advice. Anyone trying to do our job is either embarking in the unauthorized practice of law or is not serving the client properly.

Competition is coming. There are already several organizations that guarantee clients a settlement within 120 days for a fixed fee known to the client in advance. The lawyers are involved only at the end of the process to complete the paperwork. These types of businesses will flourish in the future.

The client's view

The client comes in to see the lawyer and the lawyer explains the law, the options for settlement and gives advice to the client on how to resolve the matter. When it comes to setting the fee, the lawyer advises that it depends on many factors, including how long it will take, the reasonableness of the parties, the complexities of the issues and whether or not research may be required. The lawyer might tell the client that there is a "ball park" fee available, but it just depends on too many factors.

The client is then asked to retain the lawyer, trusting that the lawyer will be honest and not bill too much. In essence, the lawyer is asking that a blank cheque be written by the client, and the lawyer will fill in the amount later. This does not sound like a very positive experience for any client.

A new business model

Most other businesses do not equate time with value. For example, Merv Griffin wrote the theme song for Jeopardy in about one minute. To this day, he receives $7 million per year for that theme song. The value of his idea was not based on time at all.

Principles

There are several principles that can be gleaned from looking at other businesses and how they have dealt with the pricing model:

1. The customer has a fixed price up front. Most solid business models are not based on time. The risk is shifted from the customer to the business. In many cases, the customer is willing to pay a premium for that shift.

2. A service that is needed is worth more than a service that has been delivered. Most lawyers understand this concept, but do not use it in practice. The more that a client needs the service you are willing to provide, the more it is worth prior to the delivery of the service. It is once the service has been delivered that problems in collection and complaints arise.

3. Focus on the customer, not the cost to produce. The value equation to the customer is the most important aspect in pricing. The cost to produce the good or service is not important to the customer. Focus on the customer's needs, wants and values in order to determine an appropriate price.

4. Look at value to the customer. Each customer has different value propositions. These may include costs, security, fear, social status, speed and delivery. Lawyers must dig down and discover what the customer really wants in order to deliver the best value to that customer. Determine the value the customer is looking for, and then exceed those expectations.

Family lawyers actually have a large advantage in determining the client's values. At the first interview, the lawyer tries to understand the client, focusing in on the fears, hopes, dreams and desires—before setting a price.

"$1 million divorce tab upheld as 'fair fee'"

Schmitz, Cristin, *The Lawyers Weekly*, 19 September 2008

The British Columbia Court of Appeal has unanimously affirmed a $1-million-plus legal tab for work done on a quantum merit basis in a complex court fight over matrimonial property.

Justice Mary Newbury upheld a registrar's ruling that Vancouver's Nathanson, Schachter & Thompson charged "a fair fee" of $833, 400 (plus disbursements and tax), based on the factors listed in s. 71 (4) of the B.C. *Legal Profession Act,* for representing client Marian Levitt in matrimonial property litigation with her husband of 42 years.

In 2006 the registrar certified Levitt's final tab at $1,018, 461—a result affirmed as reasonable by the appeal court last month.

It is among the highest known legal bills in a Canadian divorce case, said Philip Epstein, of Toronto's Epstein Cole.

"That's an unusually high amount," confirmed the senior family law practitioner. "Lawyers in family law do not charge contingent fees and they don't charge a percentage of the result, and therefore to incur fees of a million dollars usually means that there is either a significant premium for a superb result, or there has been an enormous amount of preparation and court time."

The registrar did find that Nathanson, Schachter & Thompson reasonably undertook "enormous" preparation. The firm took on Levitt's case in 2001, without a written retainer, on the understanding it would bill on a "fair fee" basis. According to the registrar, the ultimate fee charged was about $125,000 less than it might have been had the lawyers billed the time docketed at their usual hourly rates.

Levitt unsuccessfully argued that a fair fee would be $250,000.

Her case ultimately resulted in a 29-day trial in 2002 and a two-day appeal in 2003. At stake were some $12-million in assets, which included shares in family companies, and assets that were difficult to evaluate.

Levitt argued that the results of the litigation were "disastrous" for her because she was effectively left in partnership with her ex-husband in their business assets, rather than with a significant monetary award.

Her lead counsel, Irwin Nathanson, one of the province's leading commercial litigators, billed her $500 per hour for his services in 2001 and 2002. But he cut his fees in half after the trial judgment came down because Levitt was "devastated" by the outcome. Nathanson deposed the case outcome was within the range he had anticipated.

Nathanson was assisted by partner James MacInnis, who was at that time a firm associate, with four years at the Bar, who billed at $200 per hour.

The registrar held that the time the firm spent on the file was "reasonable in the circumstances" and that the fee was fair. His decision was upheld at successive appeal levels.

Family law practitioner Stephen Grant of Toronto's McCarthy Tetrault said that legal bills that approach $1 million remain "extraordinary" in divorce cases.

Nevertheless "courts are much more willing to assess costs realistically to indemnify the successful party from his or her expenditures," he said. "Courts have shown themselves much more aggressive in making sure the losing party pays most, if not all, of the winner's costs and disbursements."

Grant should know. In 2005 his partner Gerald Sadvari won a record $7-million judgment––plus a whopping $2.25-million costs award—for a woman whose ex-husband engaged in what the judge called "litigation misconduct."

DeBora v. DeBora marked the country's first family law "costs premium"—$150,000—to reflect the outstanding success Grant and Sadvari achieved in the difficult litigation. It remains what is believed to be the country's record divorce costs award.

But *DeBora's* "substantial indemnity" award included significant forensic accounting costs that the wife was forced to incur to uncover the assets of her husband.

Epstein noted that while the average high-net-worth case probably results in legal bills under $100,000, nearly half might be eaten up by disbursements. "Accounting investigations are always [at least] in the $15,000 to $40,000 range," he noted.

"Sometimes 'carriage-trade' divorces are actually cheaper than non-carriage trade divorces because the senior Bar tends to work more quickly, doesn't need to spend time researching, and often is dealing with lawyers at the same level and they reach consensus much quicker," Epstein observed. "I think carriage trade cases tend to be resolved more quickly and with less legal maneuvering and wrangling."

Practitioners told *The Lawyers Weekly* that the top-tier divorce lawyers handling the carriage trade in Toronto charge from $625 to $725 per hour. That's a bargain compared to their elite commercial law counterparts, who bill $800 to 1,000 per hour to do high-stakes mergers and acquisitions or tax cases.

"Suits for Unpaid Legal Fees in Top 10 for Stupidity, Lawyer Says"

Cassens Weiss, Debra, *abajournal.com*, 30 September 2009

A lawyer who represents a company sued for unpaid legal fees says such claims aren't a good idea.

Lawyer Warren Trazenfeld represents Whitney Information Network, sued by the Florida law firm Rothstein Rosenfeldt Adler, allegedly for failing to pay more than $400,000 in legal bills, the *Daily Business Review* reports.

Trazenfeld told the publication he is planning to file a malpractice counterclaim. Suing a client is "one of the top 10 stupidest things a lawyer can do," he said.

The story asserts the case is one of a growing number of instances in which law firms are suing clients for unpaid bills. "Most clients think the best defense is a good offense, and there's no better offense than a counterclaim for legal malpractice," Trazenfeld told the *Daily Business Review*.

Another law firm that recently filed suit for unpaid fees is Ruden McClosky, the story says. Last week the firm filed suit claiming nearly $40,000 in unpaid legal bills by the father of retired pro quarterback Bernie Kosar.

Ruden managing director Carl Schuster acknowledged that some malpractice claims have merit, but said clients often file them as a settlement tool in fee cases. "They obviously haven't paid the bill so that's not a defense, so they have to think up a defense," he told the *Daily Business Review*.

"Appeal court rewrites lawyer 'fair fee' rules"

Schmitz, Cristin, *The Lawyers Weekly*, 25 September 2009, pp. 1, 27
[*in part*]

Despite the "superlative results" it attained in a high-value, six-year commercial litigation file, a B.C. law firm is estopped from billing more than the $5.2 million it collected along the way because it didn't tell its corporate client up front that it planned to charge a "fair fee" at the conclusion of the case, the British Columbia Court of Appeal has ruled.

The appeal court's 4-1 ruling Sept. 8 in *Nathanson, Schachter & Thompson v. Inmet Mining Corporation* rewrites the rules that apply when lawyers and clients do not have a (usually written) agreement on fees — a common scenario which is governed by s. 71 of the B.C. *Legal Profession Act* (LPA).

The LPA stipulates that where lawyers and clients don't specifically address the question of fees, the default billing regime is *quantum meruit*, or a "fair fee." At the behest of the lawyer or client, this is determined by the registrar "in light of all of the circumstances," including such factors as the difficulty, importance and result of the case.

In that context, the Court of Appeal has ruled that lawyers have a fiduciary "duty of candour" to "fully and fairly advise" their clients about their fees in advance. While there was no question of deceit or bad faith on the part of the Vancouver law firm involved, the majority ruled that Nathanson, Schachter & Thompson inadvertently breached its professional duty by billing client Inmet Mining Corp. periodically during its retainer without fully and fairly advising the client that it planned to bill a fair fee at the end and obtaining the client's informed agreement.

"We conclude... in the circumstances, it is estopped by its failure to discharge that duty from claiming a fee greater than the sum of the fees already paid by the client," Justices Mary Newbury and Kenneth Smith wrote in joint reasons backed on this issue by Justices Pamela Kirkpatrick and David Frankel.

The upshot of the majority's ruling seems to be that not fully advising clients on fees—and the relevant law around those fees—will disentitle law firms who are interim billing their clients from billing on a *quantum meruit* basis at the end of a case—even if those fees might otherwise be justifiable as fair fees.

"To me the essence of it is if you [are interim billing and] intend to reserve the right to bill on a fair-fee basis at the end of the case, you have to tell your client that at the outset, and explain ... what the law is, and explain how you are doing your billing," explained John Hunter of Vancouver's Hunter Litigation Chambers, counsel for the respondent client Inmet Mining Corp.

Commented George Macintosh of Vancouver's Farris, Vaughan, Wills & Murphy LLP, counsel for the appellant law firm Nathanson, Schachter, "so whereas the Legislature has set up

fair fees as the default billing regime to apply precisely where the lawyer and client don't address the issue, the Court of Appeal has now essentially amended the LPA to require lawyers to specifically claim fair fees if they are going to send interim accounts."

Hinz v. T. (A.)

(2009), 7 Alta. L.R. (5th) 264 (Alta. Q.B.), J.B. Veit J.
[*paras. 1-6*]

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1 Based on unpaid legal fees of approximately $216,000.00 incurred during matrimonial litigation, on April 9, 2008, a law firm, Skovberg Hinz, obtained a Rule 625 charge against the residence of a former client, Alan Tarapaski; the charge also extended to "any funds payable to Mr. Tarapaski arising from his interest in Gorg Farming Ltd." As of April 9, 2008, this court had issued a judgment on the Tarapaski matrimonial property; pursuant to that judgment, the parties were each to retain certain property then in their possession, including for each of them their Alberta residence and its furnishings, and other matrimonial property, including Gorg Farming Ltd., was to be sold. On April 9, 2008, the parties were awaiting a decision of the court on Ms. Tarapaski's application to vary the judgment to allow her to keep Gorg Farming Ltd. on the condition that she make an equalization payment to Mr. Tarapaski. The parties were also awaiting a decision from the court on costs of the matrimonial litigation. On April 14, 2008, this court issued a decision allowing Ms. Tarapaski to retain Gorg Farming Ltd. on condition that she pay to Mr. Tarapaski an equalization payment of approximately $400,000.00. On April 14, 2008, Skovberg Hinz registered its R. 625 order against Mr. Tarapaski's residence. On November 18, 2008, this court determined that Mr. Tarapaski was liable to pay costs of approximately $820,000.00 to Sharon Tarapaski. On December 12, 2008, a costs judgment was entered in the Tarapaski matrimonial property action; paragraph 2 of that judgment allowed the equalization payment to be offset against the costs award. On December 12, 2008 Sharon Tarapaski registered another writ of enforcement, in the amount of approximately $416,000.00 against Mr. Tarapaski's residence, that amount being the balance of the costs award after the offset of the equalization payment.

2 On this application, the law firm asks the court to determine priorities as between its charge and the writ-based claims of Mr. Tarapaski's former wife, Sharon Tarapaski. In particular, claiming that it was entitled to notice of any application for set-off, the plaintiff law firm asks the court to set aside or strike out the order of December 12, 2008 which allowed the setoff of costs against the equalization payment due from Sharon Tarapaski to Alan Tarapaski.

3 A Rule 625 charging order is a discretionary remedy which can be fashioned by the court to serve the interests of justice in a particular situation. Historically, the lien "can be exercised against the client only and it attaches the property only to the extent of the client's interest in it. The solicitor has no greater right than his client and takes subject to all the equities between his client and the other parties interested in the property": Halsbury, Fourth ed. Reissue, vol. 44(1), para. 255 ff. Despite the genesis of R. 625 orders, in a specific situation, a court could grant an absolute priority to the solicitor's charge over other interests. Here, the transcript of the application for the charge establishes that the granting judge intended to grant only a charging order of the historical

type, i.e. one which is subject to all of the equities between Mr. Tarapaski and his other creditors including his wife and which would attach only to any ultimate balance payable to Mr. Tarapaski.

4 Ms. Tarapaski was not required to give Skovberg Hinz notice of her application to offset costs of the litigation against the equalization payment which she owed to Mr. Tarapaski: set-off is a matter between the parties to litigation, and Skovberg Hinz was [counsel in, but] not a party to the matrimonial litigation. Rule 604 further supports the principle that a lawyer's charge in circumstances such as those in this case, is subject to all offsets to which the lawyer's client is subject. In any event, assuming that Ms. Tarapaski was required to give notice of her application to Skovberg Hinz of her application for set-off, the transcript of the application for the R. 625 charge establishes that Sharon Tarapaski gave adequate notice to the law firm of her intended application for set-off.

5 Because of the equitable nature of the R. 625 charge, each of the parties argued that there were other funds to which … [the solicitors] could look for reimbursement of their claim against Mr. Tarapaski. Even though there are other potential sources of funds which Ms. Tarapaski might access to satisfy her judgment against Mr. Tarapaski, it would be unfair to deprive her of access to this specific fund; the court's charging order was only intended to protect Mr. Tarapaski's law firm from their former client, not from all others who had claims against their former client.

6 In summary, in the circumstances of this case, the Skovberg Hinz R. 625 charge was intended to apply and does apply only to any monies that Mr. Tarapaski would be entitled to receive from the judicial sale of his residence and the disposition of Gorg Farming Ltd. after all the equities have been resolved, in other words to any ultimate balance payable to Mr. Tarapaski. Mr. Tarapaski is not entitled to receive any monies from the judicial sale of his residence or from the disposition of Gorg Farming Ltd.; therefore, his former lawyers are also not entitled to receive any monies from the fund created through the sale of the Tarapaski residence.

"McDermott's Shared Tab for 'Abuse of Advocacy' is $4.3M in Attorney Fees"

Cassens Weiss, Debra, *abajournal.com*, 02 October 2008
[*in part*]

McDermott, Will & Emery and its client Medtronic Inc. have been ordered to pay $4.3 million in attorney fees for "abuse of advocacy" in a patent case.

U.S. District Judge Richard Matsch of Denver imposed the sanction Tuesday for attorney fees incurred by Medtronic's trial opponent BrainLAB, the Recorder reports. Both McDermott and Medtronic plan to appeal the decision.

In a ruling last February, Matsch found that McDermott lawyers had asked a jury to apply a broad reading of surgical-instrument patents on behalf of Medtronic even though he had ruled the patents were narrower. "At trial, [McDermott]'s conduct was in disregard for the duty of candor, reflecting an attitude of 'what can I get away with?' " Matsch wrote at the time.

. . . .

Legal ethics expert Diane Karpman told the Recorder she sees a pattern in the sanctions. "The courts are sending a very clear message that they're not going to tolerate misbehavior," she said.

Mercer v. Mercer

2009 CarswellNfld 72, NLSC[TD], 30 March 2009, Handrigan J.
[*paras. 8-10*]

Solicitor and Client Costs

8 The *Judicature Act*[FN9] and the *Rules of the Supreme Court, 1986* [FN10] provide for awards of costs and generally leave them in the discretion of the Court: see, section 53 of the *Judicature Act*; and Rules 55.02 to 55.14 of the *Rules of the Supreme Court, 1986*. Costs usually follow the cause: Rule 55.03(1); and costs are generally awarded on a party and party basis: Rule 55.04(1).

9 The discretion to order costs is broad, but it is not unfettered. At a minimum the discretion must be exercised judicially and according to law. Wells, C.J.N. contemplated limitations on the exercise of the discretion in *Holloway v. Holloway*:

> The breadth of the discretion which the Court has with respect to ordering costs would allow the Court to grant the respondent's request. However, its decision cannot be based on a whim. Neither can it be a knee jerk reaction to the abuse of process by the appellant in taking the application he did or to the unsound position taken by the appellant on this appeal. The Court must exercise its discretion through the application of proper principles.

10 There are three kinds of costs: party and party; solicitor and client; and, solicitor and own client: see, *Holloway*. Solicitor and client costs represent all disbursements, charges and fees, taxable by the solicitor … as necessary for the proper presentation [on behalf of a client] of the proceeding for which the costs are awarded, but they are limited to the four corners of that proceeding. In effect, solicitor and client costs will amount to full indemnification of the party bringing proceedings in all but exceptional cases. For those exceptional cases, solicitor and own client costs are reserved. But it is clear, particularly from Wells, C.J.N.'s reasons in the *Holloway* case, that solicitor and own client costs should be reserved for the clearest of cases.

[**Note:** *Solicitor and own client costs will usually be the same as solicitor and client costs; except that where circumstances warrant, solicitor and own client costs will also include any further disbursements, charges or fees that may arise out of the equities, in a case, as between the solicitor and the client, even though not within the four corners of the proceeding (other than further disbursements, charges or fees resulting from unreasonableness of the solicitor*).]

Ludmer v. Ludmer

2008 CarswellOnt 4987, Ont. Sup. Ct. J., 27 August 2008, Pardu J.
(*Headnote, in part*)

Parties were in disagreement over how matrimonial home with value of $900,000 would be divided following marriage breakdown—Wife's legal fees totalled $810,000—Wife brought motion for interim costs of $200,000, and for leave to encumber matrimonial home in order to fund her legal costs in part.

Motion dismissed—Parties were in middle of trial, and wife made no such request at commencement of trial—Payment of advance costs would amount to license to litigate without regard to need for proportionality—Wife failed to establish that her claim was meritorious—There was no power imbalance that required interim costs payment.

Khan v. Yakub

2008 CarswellOnt 6363, Ont .Sup. Ct. J., 29 October 2008, D.S. Ferguson J.

Background

1 The matter is before me to fix costs.

2 The parties separated in 1998. They litigated their financial issues until they settled in 2000. A consent order was taken out on July 23, 2001 under which the Respondent was ordered to pay child support to the Applicant for their 4 children based on an annual income of $72,000.

3 In August 2002 the Respondent brought a motion to change the child support.

4 The Respondent earned his income through two corporations.

5 The litigation of the motion to change continued until a settlement in March 2008. The Respondent contended his income was about $51,000. The Applicant contended it was much higher.

6 During the proceeding the parties consented to two orders changing the child support so it was based on $94,500 (as of January 2004) and then on $104,000 (as of May 25, 2005).

7 The proceeding was settled on the basis that the Respondent would pay child support based on an income of $120,000 and pay retroactive child support of $50,000 and pay the Applicant's costs on a partial indemnity basis.

8 The Applicant is claiming legal fees of $79,016 and disbursements of $103,098. The disbursements include expert fees of $98,719.

9 The Applicant had only one expert, Mr. Neil Maisel, who was retained to provide an opinion on the Respondent's income.

10 The legal fees were incurred with three law firms: Andrew Feldstein & Associates, Ricketts, Harris and Chappell Bushell Stewart who were retained in succession by the Applicant.

11 The astonishing feature of the matter is that the lawyers and expert spent 6 years running up these costs when the only significant issue was the Respondent's income.

12 The file now fills the better part of 3 file boxes. My overall impression of the whole litigation is that the parties have litigated extravagantly and the lawyers and expert for the Applicant have failed to exercise any professional judgment as to what the litigation was worth.

13 The potential benefit to the Applicant could only last as long as the children were dependent. The youngest was age 9 at the start of the motion to change proceeding.

14 The gain achieved from the date of the consent order of May, 2005 until settlement in March 2008 was the $50,000 in retroactive support and a monthly increase in support of $64.00 commencing in April 2008. The youngest child is now age 15.

Position of the Parties

15 I shall address the issues raised by the Respondent's counsel.

16 He argues that the partial indemnity rates claimed by the various lawyers working on this file at the three successive law firms are too high. I agree.

17 In my view the policy in the memorandum, "Information for the Profession", published by the Costs Subcommittee of the Civil Rules Committee which is reproduced in the commercial publications of the rules should be applied to family law cases. This case is not what that memorandum contemplated as "the more complicated matter".

18 The Respondent's counsel also argues that there was overlap because of the time spent by each successive law firm to get up to speed and by virtue of several lawyers in each firm being involved. The Applicant is only claiming the time which is not highlighted in the dockets. I find that the Applicant has omitted the duplicated time and there is no reason to reduce the fees on this ground.

19 The Respondent's counsel also contended that the time for motions and other court attendances was included even though there were no costs ordered on those attendances. Again, I am satisfied that the Applicant has excluded that time which is highlighted.

20 The Respondent's counsel also contended that once the fees of the expert were reduced to a reasonable sum that sum should be further reduced to determine the partial indemnity amount. I disagree. The practice has always been to allow reasonable expert fees in full. They are not reduced as are legal fees which are only partially recoverable on a partial indemnity scale.

21 There were two primary grounds of complaint.

22 The first was the amount of Mr. Maisel's fees.

23 It is difficult to assess the propriety of the fees because none of his accounts set out how much time was spent or what hourly rate was charged. Many of the accounts are perfunctory.

24 The Respondent's counsel points out that after the consent order based on an income of $103,000 Mr. Maisel ran up accounts of a further $70,000. The implied complaint was that the consent order indicated that the Respondent was conceding his income would be found to be at least $103,000 and a further $70,000 of expert time was unwarranted to obtain the end result.

25 The general approach advocated by the Respondent's counsel was to consider what is fair and reasonable for the work done: *Pakka v. Nygard* , [2004] O.J. No. 2121 (Ont. S.C.J.) at para.13 and, to reduce the fees and disbursements if they reveal that the Applicant's counsel and expert failed to conduct a reasonable cost benefit analysis and limit the costs to what was reasonable in all the circumstances: *Garfin v. Mirkopoulos*, 2008 CarswellOnt 4906 (Ont. S.C.J.) at para. 15.

26 In my view the factors listed in Civil Rule 57.01 are applicable by virtue of Family Rule 1(7). In particular, I find that this factor is a crucial consideration in this case: "the amount of costs that an unsuccessful party could reasonably expect to pay".

27 The Applicant's counsel agrees that I can reduce fees of both counsel and the expert if I find them unreasonable in all the circumstances. I do.

28 I have considered the following aspects of the case relied on by the Applicant to justify the amount of costs claimed:

(a) The proceeding was started by the Respondent.

(b) The Respondent had a duty to obtain his own expert opinion of his income: *Pakka* at para. 62.

(c) The Respondent failed to obtain his own expert opinion until late in the proceeding and the Applicant acted reasonably to pay her own expert to do an analysis.

(d) Despite consenting to the two orders based on higher incomes, it was the Respondent's continued position that his income was only about $ 50,000.

(e) The Respondent didn't accept the Applicant's offers until the eve of trial.

(f) The opinion of the Respondent's expert was unreasonable because he contended that the Respondent was entitled to write off personal expenses through his business and deduct legal fees from the corporate income.

(g) The Respondent has a much higher income than the Applicant and therefore is better able to bear the costs of this litigation.

29 In addition, I have considered that the Applicant was trying to maximize child support not spousal support. Further, counsel for the Respondent did not advise me of the amount paid to the Respondent's expert so I could compare it to the Applicant's expert's fees.

Analysis

30 In addition to the comments interspersed above, I make the following observations.

31 In my view counsel and experts have a professional obligation to provide advice to their client not just on the merits of a claim but also about the potential costs of pursuing it, about what is a reasonable sum to invest in the case, and about what might reasonably be expected to be the outcome on costs. There is no evidence before me as to whether this happened in this case. In the absence of such evidence I find the costs incurred by the Applicant's counsel and expert to be so excessive as to imply that they failed in these duties.

32 It is now commonplace for counsel to ask for what I consider to be excessive fees when costs are fixed at all stages of litigation. In my view the courts have an obligation to reject such claims. To award costs in extravagant amounts will simply encourage counsel and experts to charge excessive fees. This will not only ruin clients but will also make litigation even more inaccessible to the average litigant. The Applicant earns $57,600. To legitimize the amounts charged to her in this case by her counsel and expert for a case about child support is unthinkable.

33 I see no utility in going through the accounts in minute detail or in fixing partial indemnity rates for all the counsel over all the years of this proceeding. In my view the overriding factor here in determining costs is what is a reasonable amount in all the circumstances.

34 The disbursements other than expert fees amount to $4379.65 including GST. I allow that.

35 The legal fees claimed on a partial indemnity scale amount to about $79,000. I have already found that the rates are too high. I find the time spent excessive in proportion to the issues and the potential benefits of the action even accounting for the fact that the Respondent acted unreasonably. I fix them at $50,000 including GST.

36 The fees of Mr. Maisel [the Applicant’s expert] are $98,719. I fix them at $12,000 including GST. In my view that is all that such services in a case like this are worth.

37 I fix the costs relating to this attendance at $3,000.

38 Therefore I order that the Respondent shall pay costs of [$4,379 + 50,000 + 12,000 + 3,000 =] $69,379 to the Applicant payable forthwith. The costs shall be included in a support deduction order.

(2009), 64 R.F.L. (6th) 113 (Ont. Sup. Ct. J.), G.R. Strathy J.
[*Headnote*]

Insured's former wife was named beneficiary of insurance policy for $100,000. Insured was married to spouse at time of his death. Spouse brought motion for declaration of constructive trust in proceeds of policy or, alternatively, rectification of policy. Former wife made offer to settle by payment to spouse sum of $40,000 all inclusive in exchange for dismissal of claim and full release. Offer was not accepted. Motion was dismissed. Former wife asked for costs of $27,709.52.

Award of $22,500 plus GST for fees and $1,275.78 inclusive of GST for disbursements was ordered. Former wife was entirely successful. Time spent on matter was entirely reasonable. Costs claimed were in range of reasonable expectations. Amount recovered was $100,000. Matter was not factually complex and parties agreed on material facts. Matter had some legal complexity. Issues were not of particular public importance. Proceeding was managed efficiently and effectively. Offer to settle was very reasonable. There was discretion to award enhanced level of costs after unaccepted offer by former wife, where spouse made no recovery. It was appropriate to give former wife "bonus" to reflect her reasonable offer. Reasonable award of costs on partial indemnity basis, exclusive of GST, would be $19,000. In view of offer to settle by former wife, that was increased to $22,500, exclusive of GST.

Khodeir v. Canada (Attorney General)

2009 CarswellOnt 3706 (Ont. Sup. Ct. J.), Whitten J., 25 June 2009
[*paras. 1; 3-5; 15-23*]

1 On May 13, 2009 the defendant [Canada] successfully moved to strike out the plaintiff's Amended Statement of Claim and dismiss the action. Cost submissions were invited and have now been reviewed.

. . . .

3 The general principles applicable [to losts] are enumerated in Rule 57. Generally speaking, a successful party is entitled to their costs. In this claim the plaintiff alleged negligence on the part of members of a committee who were instrumental in recommending to the government at the time the foundation for the Child Support Guidelines. The negligence, according to the plaintiff, was that the formula behind the guidelines was flawed in that it did not factor for the support costs of an assessing parent, and that failure resulted in payment of excessive amounts which would be considered a form of spousal support. This allegation was massaged out of the existence of a dissenting view on the original committee. This claim of negligence was coupled with a claim based on the tort of misfeasance in public office, as against various Ministers of Justice. Those ministers, according to the statement of claim, had essentially buried the existence of the "flaw" referred to above or had failed to act knowing of the "flaw".

4 Neither of these allegations is inconsequential. In a way, the claim is an assertion against the character of the defendants, who are vulnerable in that they practice very much in the public eye. As the case law referred to in the judgment of May 13, 2003, the administration of or act of governance rarely pleases all, but generally speaking in our democracy is for the greatest good of the majority of citizens.

5 In any event the respondent, the Attorney General of Canada, was completely successful.

. . . .

15 Throughout his submissions, the plaintiff seeks to leave the impression he was the model of reasonableness, he espouses that there was a public interest involved in his litigation, it was a novel point of law, a test case, and finally a question of access to justice. One cannot ignore the rather base objective of staying the support obligation pending the hearing and its appeal. That objective is quite personal. It somehow lacks the lofty suggestions of higher interests at stake.

16 Dealing with the public interest, it is arguable that the personal attack on the framers and implementers of the Child Support Guidelines is against public interest. The plaintiff positions himself as the champion of child support payors who, given his belief as to flawed methodology, have been victimized. This crusade is entirely self-proclaimed, with a coincidental element of self interest. Obviously, the policy makers believed that guidelines would save countless parents, both payors and payees, many dollars in legal fees and would reduce the tension and emotional upheaval

in family litigation. An ill-founded tort claim against the policy makers and implementers hardly seems in the public interest. If any, it is more of a public nuisance.

17 Did the claim raise a novel point of law? Not really. It is true that the tort of abuse of public office or misfeasance in public office is in its developing stages according to the writers. But the attempt to employ this tort does not make the action itself novel. The committee could not be sued. Legislators are immune from suit. These concepts alone are not novel, and were fatal to the success of the action. It can be said that this meritless action consumed valuable, scarce judicial and legal resources for what was essentially a collateral attack on a personal support obligation. The plaintiff has a personal interest in avoiding the effect of the guidelines. This cannot be characterized as an altruistic novel undertaking, a test case. This is an attempt at the end of the day to avoid his responsibilities under the Child Support Guidelines, based on his belief that a portion of that due is in a way spousal support.

18 Mr. Khodeir in his cost submissions reiterates his allegations with respect to the flawed analysis behind the guideline amounts, and how various successive Justice Ministers have buried this fact or failed to act upon it. These assertions have already been dismissed by this court as baseless.

19 The reference by Mr. Khodeir to the status of his constitutional challenge before Justice Turnbull is an irrelevancy as far as the cost issue in the matter before the court.

20 Does the imposition of costs in this case raise a question with respect to access to justice? It is trite to say no one wishes to discourage meritorious claims, but it would be naïve to think that all claims are per se meritorious. Costs do not exist to inhibit access to justice but, having said that, costs are a consequence of accessing a system of justice with a frivolous matter. Perhaps it can be illustrated by an analogy to the fire department. As citizens we trust that we can readily access and benefit from the services of the fire department. Having so accessed this service we should be prepared to face the consequences, costs or otherwise, if we phone in a false alarm or something we can readily extinguish ourselves. Access to justice does not mean an absence of consequences or responsibilities. Mr. Khodeir was warned by counsel that if he pushed on with this action, costs would be sought. There is no lofty altruistic reason that he should not pay costs, or that the defendant not be entitled to costs.

Quantum of Costs

21 The disbursements of $2,103.77 appear legitimate. As to the actual services rendered, one wonders if it was really necessary to consult so widely with the Family, Children, Youth Sections of the Department of Justice. This is especially so given that the motion was successful on substantive law grounds.

22 The hourly rates for counsel are clearly less than what would be expected in the private sector. However, the actual hours dissipated prior to the hearing appear quite high. Counsel for the defendant have effectively reduced their amount by two-thirds to $20,000. Given that reduction, the reduced hourly rate, and the fact that an entire court day was spent in the hearing of the motion, that sum inclusive of the disbursements is acceptable.

23 Therefore, Mr. Khodeir shall pay the Attorney General of Canada the sum of $20,000 forthwith.

"How to handle costs in family law"

MacKenzie, Tammy, *The Lawyers Weekly,* 13 November 2009, pp. 11, 12

A successful party is entitled to costs, although the court has discretion on the issue. But practitioners and the courts face unique challenges for costs in the family law context.

Some decisions suggest that the general principle for costs is not appropriate in family law matters. In recent years, the judiciary has awarded costs consistently in family law cases. There must be good reason to depart from the normal rule of costs—a successful party in a family law matter should be no less entitled to costs than a party in other types of proceedings.

But an assessment of costs in family law presents unique considerations in both entitlement and quantum. Most family cases involve a multitude of issues, very often resulting in divided success. The issues are frequently non-pecuniary in nature.

For example, the best interest of the child is the prevailing consideration in custody disputes. This is a difficult concept to define with certainty and will result in different conclusions on a case-by case basis. Should an unsuccessful parent be penalized for seeking a resolution to such an issue? Reasonableness will be the key.

Justice Douglas Campbell noted in *Kennedy-Dowell v. Dowell*, [2002] N.S.J. No. 499 (NSSF) that "the reasonableness of both the trial position and the bargaining position (including the timing of concessions made) is a very important factor in deciding whether an order for costs should be made. This is especially true in family law matters because the parties are often of limited resources and can often face legal fees after a trial which make the process uneconomical and devastating to the family including children. Family law disputes are capable of out of court resolution in many cases and the policy of the court regarding costs should promote compromise and reasonableness in the negotiating process."

Formal offers to settle may be instructive in assessing reasonableness, but will be of limited value if they are comprehensive and thus not open to acceptance on an issue-by-issue basis.

The Nova Scotia Civil Procedure Rules give the court the option to consider any matters relevant to the question of costs, including factors such as the conduct of the parties, the manner of conducting the proceeding and the failure to make admissions. The rules also require reference to the "amount involved" and the tariffs. How does one attribute an "amount involved" to a custody determination or to a periodic support award that may be the subject of future variation?

Nova Scotia courts have relied on a "rule of thumb," coined by Justice Walter Goodfellow, who recognized the need for some degree of uniformity and consistency in costs awards where there are significant aspects of the case with no clear "amount involved." In *Urquhart v. Urquhart,*

[1998] N.S.J. No. 310 (NSSC), Justice Goodfellow states, "In the determination of costs, I have guidance from the developing rule of thumb of equating each day of trial to an amount of $15,000.00 where there is no clear 'amount involved.' This has the benefit of reflecting the time aspect of the trial, which in itself normally reflects the degree of preparation and time."

The rule of thumb approach is often viewed as a practical solution to the problem of determining the "amount involved" and in recent cases has increased to $20,000 for each day of trial.

There is also the need to consider the parties' financial circumstances, obligations to children and the effect that a costs award would have on them. Justice James Williams stated in *Grant v. Grant*, [2002] N.S.J. No. 14 (NSSF), "The parties relative financial, income, and asset situations, and the arrangements for and their obligations to the children are part of my consideration of the issue of costs. Ms. Grant's circumstances temper the amount of costs I would otherwise order."

Impecuniosity cannot, however, be a complete bar to costs. In *Grant*, Justice Williams cited with approval *Britt v. Britt*, [2000] O.J. 5981 (S.C.J.), wherein Justice MacKinnon observed "the financial ability to pay costs has long been a factor to take into account in fixing the amount of costs in a family case … It cannot be a complete 'defence' to an award of costs, because if it were, this would mean that a party could litigate with financial immunity."

While this is a review of the Nova Scotia experience, the considerations are similar across the country. Practitioners must maintain a position of reasonableness throughout the process while representing clients who are facing raw and intimate emotions.

A practice of making reasonable written proposals throughout the proceedings, a willingness to negotiate and an awareness of family law costs principles will assist practitioners in making or defending a costs claim at the end of a proceeding.

Grant v. Grant

(2002), 200 N.S.R. (2d) 173 (N.S. Sup. Ct.), Williams J.
[*paras. 13-15; 38-41 (in part); 42; 50*]

13 Divorce and family law proceedings often involve a multitude of separate and inter-related problems—custody and access influence support, child support and spousal support are related, property division impacts on support—one could go on and on. It is often difficult to identify an isolated litigated "event". The result is that, at least relative to other types of litigation, the issue of who has been successful in family law litigation and in consequence, costs, is potentially more complex.

14 In *Draper v. Draper* [1992 CarswellNS 556 (N.S. T.D.)], July 14, 1992, S.H.1202-000313, Glube, J.(as she then was) observed:

> I recognize the difficulty in dealing with costs in a matrimonial matter and as stated in *Trifts v. Trifts* (1984), 54 N.B.R. (2d) 147 at p.157:
>
> The task of assessing costs in the Family Division is a difficult one particularly when issues such as divorce, custody, access, maintenance and division of property have to be dealt with in the same proceeding...

15 This does not mean a Court should not consider or make Orders of costs in family matters. The Court should if there is reason to do so.

. . . .

38 I conclude that the manner in which this proceeding was conducted by Ms. Grant and her counsel, Mr. Leahey unnecessarily complicated and lengthened the proceeding, by raising incorrect, improper, vexatious *(without reasonable or probable cause or excuse*; Black's Law Dictionary, 7th Ed.) and unnecessary allegations, assertions and accusations. Too often, they were made without due or any regard to the background material and information available. Too often hyperbole was embraced. The first part of the trial was conducted in an exaggerated manner. On some critical issues (for e.g. the question of taking five courses at university, the availability of nursing re-training) the assertions made by Ms. Grant (up to the time of her testimony in trial) were less than accurate.

39 The factors raised by Ms. Grant's current counsel, Ms. Beeler, in relation to the conduct of the proceedings on behalf of Mr. Grant are appropriately considered. They do not remotely approach the impact the conduct of Mr. Leahey and Ms. Grant on the course of the proceeding. I conclude that the manner in which the proceeding was conducted by Mr. Leahey and Ms. Grant unnecessarily lengthened the proceeding. It was rife with unproven allegations, some of which had no practical likelihood of being true. It made untrue assertions. It made improper allegations and assertions that were inconsistent with available documents and information. It misconstrued the obvious. It inflamed the proceeding.

. . . .

40 The "amount claimed" is difficult to determine in multi-issue matrimonial proceedings.

41 There are different ways to consider this:

1. In *Kapoor v. Kapoor* [1999 CarswellNS 221 (N.S. S.C.)] (S.F.H. 1201-52376/142792) Justice Hood discussed the "amount involved in a matrimonial property dispute. Justice Hood stated (at p.9):

> "... Although each claimed an unequal division, neither would anticipate that 100% of the matrimonial assets would be awarded to either. The best either could hope for was approximately a 75-25 split in his or her favor. In essence then the parties were disputing, who, if either would get an additional 25% of the assets."

Justice Hood attempted, it appears, to acknowledge the 50/50 presumptive matrimonial property split in identifying a 25% swing in that particular case.

. . . .

2. In *Ellis v. Ellis* (1999), 45 R.F.L. (4th) 234 (N.S. C.A.), the Court allowed that the "amount involved" in determining costs in a matrimonial proceeding could "be tied to the cumulative monetary amounts in issue for child support, matrimonial debt, arrears of support and a notional figure for custody and access" (at p. 255). A similar approach was taken in *Edwards (Pereira) v. Edwards* (1994), 133 N.S.R. (2d) 8 (N.S. C.A.). One might add spousal support to this list. Such an approach would increase significantly the "amount involved here - and the "tariff" that would result.

3. Justice Goodfellow, in *Urquhart v. Urquhart*, 1998 CarswellNS 280 (N.S. S.C.) , also commented upon the difficulty in determining an "amount involved" in relation to a proceeding dealing with matrimonial property (at p.18)

> The value of matrimonial assets... with a prima facie entitlement to an equal division, provide no guidance to concluding with any reasonable measure of certainty an "amount involved" ...

Justice Goodfellow goes on to refer to the "rule of thumb" he developed to bring some consistency to his determination of costs where the "amount involved" was difficult to fix or approximate—equating a day of trial to $15,000 as the "amount involved."

. . . .

4. Arguably, the conduct of the proceeding here was fueled by the unproven beliefs, allegations, or assertions that there was, variously, at different times:

- a "deception process" with Babcock and Wilcox

• "doctoring" of tax returns

• undisclosed loans (that had been disclosed)

• a claim for punitive damages being made/forthcoming

• deception and perjury

• hundreds of thousands of dollars in bribe money or assets undisclosed. ($1 million suggested at one point—October 22, p.303)

The "amount involved" for Mr. Leahey and Ms. Grant—was far beyond that which was proven or documented. They suggested that efforts to inflate debt, secret money or not properly disclose assets and income were made by Mr. Grant in concert with Tate Construction, Michael Foley, Babcock and Wilcox, and even by innuendo, counsel. As indicated, Ms. Grant abandoned this course mid-trial.

42 One is left observing what others have, that an "amount involved" analysis has limited utility in complex, multi-issue matrimonial proceedings. That is particularly so, I believe, where the litigation is as conflictual as this was.

. . . .

50 In my view, the issues of relative success and especially the "conduct of the litigation" create compelling reasons for Mr. Grant to receive an award of costs. It would be unjust not to make an award of costs. Complex litigation was made far more complex and lengthy than necessary by the actions of Ms. Grant and her then counsel, Mr. Leahey.