Remarks to

National Family Law Program,

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[*Page numbers in the Remarks refer to 2010 paper at:* *http://www.lewisday.ca/ethics.html*.]

"Around half past two o'clock … [in] the morning … , …, a middle-aged attorney … was awakened by the ringing of his bedside telephone. …. The call, …, was a business one, and although it was from an undertaker, it did not turn out to be bad news."

So begins an instructive, not to mention indelible, account of "The Rich Recluse Of Herald Square" in *The New Yorker* Magazine.

The magazine article—recommended, for the taking, from our presenter's table—recounts the tumultuous challenges of determining when a lawyer is retained. More significantly, the article narrates the wrenching tribulations of the retained lawyer, in striving to ascertain the true identity of the retaining client, and whether that client was competent to give instructions.

After all, “the rich recluse of Herald Square”, in New York City, was 93 years old; had rarely ventured outside her two-room hotel suite in 25 years; sustained herself on evaporated milk, coffee, crackers, bacon, eggs, and “an occasional fish” which she consumed raw; limited her attire to a towel rarely laundered; was blind and severely hearing-impaired hearing; and constantly nurtured her face with petroleum jelly.

Knowing whether you have a client and, if so, who the client is, and whether the client is competent to instruct you are—indisputably—essential,

rudimentary tasks each lawyer must discharge at outset of each retention. They are initial tasks integral to responsibility—this panel's subject—in the law vocation.

Practising law is a vocation, my learned friend James J. Smythe, Q.C., of St. John's assures me, is a daily exercise in "lurching from crisis to crisis." And a vocation, another of my learned friends from St. John's, Lewis B. Andrews, Q.C., is convinced, in which "lawyers, not infrequently, are more troubled by retention subjects than their clients."

Responsibility comprises three elements: ethical, legal and professional.

First: Ethical responsibility is founded on codes that lawyers are expected to obey. One example is the Canadian Bar Association Code of Professional Responsibility, most recently revised, globally, in 2009 and presently accessible, only, at cba.org. Another example is the model code, drafted by Federation of Law Societies and presently under review by provincial and territorial law societies; although drafting is not quite complete. And, misbehavior of some family law practitioners has

prompted their colleagues, as well as law societies, to moot the want for a family law lawyer code of conduct.

Secondly, Legal responsibility—in reliance on ethical codes and common law and statutory standards—dispenses sanctions against lawyers who color outside regulatory lines; polices what lawyers charge; and imposes financial liability.

Thirdly, Professional responsibility, writes a former Deleware State Chief Justice, E. Norman Veasey, 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." Illustrations abound in the 2008 *Conflicts of Interest*: Final Report, Recommendations & Toolkit (including retention letter templates), by a Canadian Bar Association Task Force. And, examples are to be found in two sets of Association Guidelines, dedicated to practicing and advertising responsibly with new information technologies; published, respectively, in 2008 and 2009.

Whatever the specie of responsibility, it "is not an exact science, with every problem amenable to a set

and indisputable solution" write Honorable Michel Proulx—of Quebec Court of Appeal, at his passing—and British Columbia litigator David Layton, in their seminal 2001 work, *Ethics and Canadian Criminal Law*. These authors continue: "What can be most frustrating about the study of lawyers' … [responsibility] is the elusiveness of a widespread consensus on many important issues.

Moreover, the authors assert: "Our legal culture undergoes constant and inevitable change, and so too, then, do expectations and standards pertaining to lawyers' behaviour."

Challenges of responsibility issues put me in mind of the line from the R.E.M. song ‘Pushing an elephant up the stairs.’ And, the probability of more than one right answer recalls to memory Yogi Bear’s remark: “when you come to a fork in the road—take it.”

For these reasons, today, my co-chair, former British Columbia Law Society treasurer, Trudy Brown, Q.C. and I, do not warrant to have all the answers. And, we surmise, some of you will disagree with the answers we proffer when, shortly, we discuss

your professional issues, and concerns, and sleep inhibitors.

What we do acknowledge, however—as we have during the past 16 years on this panel—is that most lawyers present, today, are eminently capable of presenting this panel. And, that, most lawyers who need to be present at this panel, today, are not. Not least of them are lawyers in a Canadian law firm whose peculiar interpretations of responsibility have rated the firm's inclusion in the materials for each of the nine Responsibility panels in the National Family Law program history.

The modest bi-annual survey of responsibility literature, in this panel's 2010 materials at the beginning of Volume 2—which will shortly be available, like the materials for eight previous programs, at lewisday.ca—reports on frequently-recurring themes: retainer and authority; conflicts of duty; solicitor-client privilege; confidentiality; solicitor fiduciary duties to client; advertising; verification of client identity; settlement negotiations; civility; recusal applications; and fees and costs.

What has emerged, however, in the literature—judicial decisions, journal articles, and media cuttings—from 2008 to 2010, is the evolving, signal importance of another theme. That theme is client competency; more specifically, the responsibility of lawyers to ensure their clients are competent to furnish instructions. [**Program paper, Volume 2, first entry, page 29.**] And, related to that theme: lawyer competence to receive and perform those instructions—which is compellingly discussed in the entry commencing page 196 of the materials, entitled: "Life is overrated; One lawyer's struggles with depression."

Granted, competence is, by no means, a novel theme. Lately, however, the theme's practical implications have, deservedly, earned absorbing attention.

Competency is sometimes referred to as ability, or capacity or maturity. The term of preference in Supreme Court of Canada is "maturity". The subject has, lately, been the thesis of several publications; useful, in my view, to our profession. Take one of the numbers in the bag being passed around. At conclusion of today's panel, I will shuffle, and Trudy

will draw, nine numbers: six for the book, *When the mind fails*, published in 1994; and three for the book, *Capacity to Marry*, published earlier this year. Some would say the two titles are interchangeable. On a purely personal note, I have never been 'altered' or 'solemnized'; and after my reading, on a ten-hour journey to Victoria, Saturday past, of *Capacity to Marry*, I am crestfallen to conclude I copiously lack legal nuptial competence.

Circumstances generating importance of client competency are readily evident; as elucidated in the materials.

Justice Thorpe, of the Family Division of England's High Court, counsels:

> "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."

This counsel is echoed in Justice Harvey Brownstone's pragmatic 2009 book, *Tug of War: A Judge's Verdict on Separation, Custody Battles and the Bitter Realities of Family Court.*

And Supreme Court of Canada, in *Rick v. Brandsema*, in 2009, writes of the "singularly emotional environment that follows the disintegration of a spousal relationship"; "psychological exploitation"; "the husband's defective disclosure and exploitation of his wife's known mental vulnerabilities" and the "wife's profound mental instability."

Moreover, Professor Julie Macfarlane, University of Windsor, in *The New Lawyer: How Settlement Is Transforming the Practice of Law*, in 2007, writes about the importance of mental health specialists, in some situations, being integral to a client's negotiating team.

Inexplicably, a court recently overlooked the evidence of instability of a litigant, in permitting him to discharge his lawyer after the client, in court, smeared feces on the lawyer's face.

So much for client competency; for the moment.

As for lawyers practising family law—one of whom, Sarah Hampson describes, in *Happily Ever After Marriage*, in 2010, as "the new white knight"—their cerebral DNA is sometimes deserving of question.

Twelve years ago, the Report of Parliament's Special Joint Committee on Child Custody and Access detailed the unprofessional conduct—albeit infrequent—of "barracuda lawyers" who "inflame the system", "take advantage of an emotionally vulnerable client and … influence that client to do

unnecessary things". About five weeks ago, *The Globe And Mail*, commenting on a civility report by the Law Society of Upper Canada, referred to one lawyer who punched her client in the nose and pushed her, and another, who threatened a mediator that he [the lawyer] would prove to be "10 times a bigger asshole than" the mediator.

In related news, an Ontario lawyer pleaded "conspiracy, skullduggery, lying, case-fixing and criminality" by the judiciary. Another Ontario counsel, while intoxicated, appeared for her client.

This strident untoward behaviour is not exclusive to Canada's legal profession. *The Times* of London reports that when a client wondered aloud, in court, whether his lawyer "smokes crack", the lawyer kicked him. And, a Pennsylvania lawyer spent 14 years in jail—until released July last, aged 73 years—for civil contempt of court, rather than pay his former wife the amount of a divorce resolution.

Bear in mind, competency is (i) time specific; (ii) retention-subject specific; and (iii) client—or lawyer—specific.

Competency has been most fully-developed, judicially, in relation to making medical treatment decisions: (one) a child, as defined by child welfare legislation, is not competent; unless he or she establishes capacity congruent with his or her welfare—*A.C. v. Manitoba (Director of Child and Family Services*, Supreme Court of Canada, Abella J. for the majority, 2009; (two) an adolescent is presumed competent unless proven to the contrary, congruent with his or her welfare—*P.H. v. Eastern Health Regional Integrated Health Board and S.J.L.*, LeBlanc J., Newfoundland Trial Division, 2010, a case involving a teenager who swallowed steak,

butter and utility knives; and (three) an adult is regarded as competent, absent contrary evidence—*Malette v. Shulman*, Ontario Court of Appeal, 1990.

There is a fourth category: 35 and older; considering that a person is not competent for appointment to the Senate of Canada until 35 years of age.

The test of competency, stated by Supreme Court of Canada in *Starson v. Swayze*, in 2003, is whether a person—one—is able to understand the information

relevant to making a decision and—two—is able to appreciate the foreseeable consequences of a decision or lack of a decision.

There is no gold standard—no clinical test—for determining whether the test has been satisfied.

The Court, there, was considering Ontario mental health legislation, which codifies common law.

Meantime, considerable progress has been made in defining, judicially, capacity to make a last will and testament, and capacity to marry.

But what of competence to instruct counsel in a family law proceeding? Specifically, at the time instructions are furnished a lawyer, is the involved client capable of giving them, in relation to the subject of the instructions?

Judith Wahl's paper to the Canadian Bar Association's 2007 Elder Law Conference—excerpts

of which are reproduced in the materials, commencing page 28—offers some guidance. In so doing, the author underscores the fact most lawyers receive no formal training in assessing competence. And, she chides practitioners who—misguidedly and pointlessly—administer what is known as a ‘Mini Mental Status Exam,’ to determine client competence.

The author acknowledges the legal test for competence or ability; but laments the absence of a

clinical gold standard for determining whether the legal test has been met.

I can't tell you what competence or ability is. But I can inform you what it is not.

The facial facts that the recluse of Herald Square was 93, blind and hard of hearing, did not spanner the conclusion, initially, that she was competent. She proved much more cunning than her age and physical conditions suggested.

Competence aside, the materials reveal a banquet of more perennial practitioner problems from 2008 to 2010:

[1] Retainer and authority:

British Columbia Court of Appeal, in *Davis & Co., A Partnership v. Jiwan*, held to be a question of fact whether a client had made an allegation of law firm negligence while continuing to be represented by the law firm; and, in the result, decided the firm was entitled to terminate the retention while the subject of

retention was in full flight, and to seek to collect its fees. [**Page 28**]

[2] Conflicts of duty:

British Columbia Provincial Court found a lawyer to be conflicted in representing both a father and his two children in child protection proceedings. [**Page 52**]

At p. 61: Alberta Queen's Bench denied an application to strike a lawyer—a practising Jehovah's Witness—as solicitor of record for a Jehovah's Witness teenager. The application was founded on the facts both solicitor and client were adherents of the same religious faith. [**Page 61**]

Newfoundland Trial Division determined that a lawyer who acted for a couple when they purchased real property—called "chattels real" in Newfoundland—could not subsequently represent the couple's son in family law litigation in which the

son's wife pleaded the property was being held in trust by the son's parents for the son and his wife. [**Page 44**]

Lawyers often act for both husband and wife when both spouses seek to make their wills. After all, many lawyers reckon, this is estate planning. And, the spousal clients assure the lawyer they fervently believe in the permanency of their relationships. This can lull a lawyer into a false sense of comfort. When a joint retainer, in such circumstances, goes bad, issues of solicitor conflict, and consequent issues of

negligence, discipline, rules of practice and moral and ethical considerations are triggered. [**Page 49**]

[3] Solicitor-and-client privilege, and confidentiality:

Ontario Superior Court decided that e-mails on a husband's computer, which fell into the hands of his estranged wife—via a jilted post-separation girlfriend of the husband—were not admissible evidence. [**Page 99**]

Generally, reference pratising with new technologies, see pages 101-105 and 181-190.

Solicitor-client privilege was also centre stage in the Court's decision in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*. [**Page 97**]

[4] Solicitor fiduciary duties to client:

Justice Thomas Cromwell of Supreme Court of Canada clarified the law in *Galambos v. Perez*. There, a law firm employee had secretly paid her personal funds into the firm's bank account, to assist the financially-troubled firm. I have her telephone number—and I'm not sharing it. She was unsuccessful in recovering the funds when the law firm collapsed. [**Page 17**]

[5] Advertising:

Competition Bureau of Canada decided the legal profession needs to do more to make the legal landscape competitive; in criticizing advertisement limitations imposed by provincial law societies. [**Page 13**]

[6] Verification of client identity:

Of 12 lawyers in four provinces I asked, last month, just one was aware of the Federation of Law Societies "Know Your Client" rule. [**Pages 36, 37**]

[7] Settlement negotiations:

Justice Harrington of Newfoundland Trial Division painstakingly surveyed the law governing a dispute reference whether or not a settlement agreement had been reached. [**Page 106**]

[8] Civility:

Ontario lawyer Stanley Jaskot will never forget his representation of the husband in *Butty v. Butty*. Mr. Jaskot is certified by the Law Society of Upper

Canada as a family law specialist, with offices in Hamilton and Burlington, Ontario. The reported trial decision in the case was "extensively and highly critical of Mr. Jaskot"; finding that he "had suppressed information in a purposeful attempt to mislead opposing counsel and the court." Problem was: Mr. Jaskot had done nothing of the sort. The trial judge made remarks at the end of the trial which suggested he did not fully appreciate the involved factual circumstances. The wife's lawyer, in the opinion of Ontario Court of Appeal, could have then informed the trial judge his wife client "was under no misapprehension" about the involved facts. Nothing,

however, was said by the wife's counsel. "This court," wrote Ontario Court of Appeal, "cannot truly repair the damage that Mr. Jaskot has suffered"; and added: "We regret what appears, on the record, to be unwarranted judicial criticism levied against him" [**Page 173**]

[9] Recusal applications:

Chief Justice David Orsborne of Newfoundland Trial Division wrote as comprehensive a decision as

I have ever read on the law governing recusal applications. [**Page 164**]

[10] Last, but not least: fees and costs:

For an instructive decision on relevance to costs of counsel conduct, see Justice Jim Williams' decision at [**Page 259**].

Ontario family law lawyers appear, again, to be frontstall in hourly invoicing: $625.00 to $725.00 per

hour; modest by comparison with lawyers billing $800 to $1,000 hourly for some mergers and acquisitions.

Although not in the same league as Ontario lawyer Gerald Sadvari's $2.5-million court-approved costs for representing a wife, a British Columbia firm at p. 242 obtained court approval of fees totalling $833,400.00 in a family law proceeding. The firm, however, was denied a premium. The firm had accepted retention absent retainer agreement, with the understanding it would bill on a "fair fee" basis. The

firm felt a "fair fee" should be somewhat higher than $833,400. The British Columbia Court of Appeal disagreed.

And at p. 28: When fees are called into question, and taxation results, the consequences for lawyers may prove onerous. A British Columbia law firm invoiced fees of $991,000. On taxation, the fees were reduced to about $700,000.00, following a taxation by the Supreme Court Registrar—which lasted 40 days. [**Page 28**]