Principles and Practice of Legal, Ethical and Professional Responsibility

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SYNOPSIS

This Paper is a comprehensive introduction to Principles and Practice of Legal, Ethical and Professional Responsibility based on legislation, judicial decisions and quasi-judicial administrative (i.e., disciplinary) decisions, transcripts, book and journal scholarship, manuals, reports, 'tool kits', and media cuttings; most published from 09 July 2022 to 31 May 2024.

Fourteen comparable previous Papers—cumulatively covering the period 03 September 1189 to 08 July 2022—are often available at: http://www.lewisday.ca/ethics.html.

HYPERLINKING

[1] Each entry in the following Table Of Contents is hyperlinked to the text of the Paper.

[2] Most judicial decisions and quasi-judicial decisions and most other published materials cited in the Paper are, in turn, hyperlinked to the full texts.

PRESENTERS

Presenting at the 2024 National Family Law Program—based on this Paper—as they have since 1992 will be **Trudi L. Brown, K.C.**, Victoria barrister and Life Bencher of the Law Society of British Columbia, and **David C. Day, K.C.**, St. John's barrister and Master of Newfoundland and Labrador Supreme Court and Court of Appeal. Joining them in 2024 is Hon. R. James Williams of Nova Scotia Supreme Court, formerly a barrister, who is also a law professor, author, and leading advocate of accessibility to family justice.

ACKNOWLEDGEMENT

Kelly A. Hall (Day K.C.'s senior legal assistant since 1997) transcribed, formatted, and hyperlinked this Paper. She has verified currency of status of judicial and quasi-judicial decisions, and produced some appendices to the Paper.

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PRINCIPLES AND PRACTICE OF LEGAL, ETHICAL AND PROFESSIONAL RESPONSIBILITY

1.0 OVERVIEW

1.1 Partners In Responsibility

Legal responsibility mandates what practising lawyers shall and shall not do.

Ethical responsibility counsels what they either must, or should, do or not do.

Professional responsibility advocates what they could aspire to do and to avoid doing.

This trinity of partners in responsibility needs infuse the daily ritual of lawyers—what Beverley McLachlin, now-former Chief Justice of Canada, calls the "perpetual careen from crisis to crisis" (*Full Disclosure* (Toronto: Simon & Shuster Canada, 2018), at p. 49)—to enable them deserve, serve, and be profitably-reimbursed by, clientele.

One or another tableau of overarching and overlapping responsibility principles has obtained since birth of legal memory: 03 September 1189 (Holdsworth, Sir William, *Some Makers of English Law* (Buffalo: William S. Hein & Company, 1983), at p. 8).

The principles of responsibility are—or should be—embedded in the private legal services afforded the public by law practitioners. Those services, in the domestic context, furnish clients opportunities "to obtain, consider and act on family law advice [which] is the cornerstone of the family law justice system and sustainable agreements" (*McIntyre v. McIntyre* (2023), 91 R.F.L. (8^{th}) 377 (Ont. S.C.J.), per A. Himel J., para. [41]).

1.2 Development Of Responsibility

Interpretation of, and adherence to, the responsibility trifecta—legal, ethical, professional—addressed in this Paper are subject to caveats. Honorable Michel Proulx, a Justice of Québec Court of Appeal (at his passing), and David Layton, Vancouver civil and criminal litigator, articulate the reservations in *Ethics And Canadian Criminal Law* (Toronto: Irwin Law Inc., 2001). (The title belies the book's compelling utility to all law practitioners.) At page 3, Justice Proulx and Layton, K.C. observe:

> ... [w]hile 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. … [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.
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> Moreover, these co-authors caution:
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> 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 … [responsibility] by no means mutate daily, yet… . [t]his topic … is definitely not static.

No algorithm exists, or is likely to be designed, capable of navigating law practitioners through the behavioral intricacies which responsibility presents. This is because the constituents of responsibility have, consistently, proven elastic and malleable.

Concurrent compliance with each of the responsibility strains holds promise of fulfilling the entreaty of former New York Yankee baseball catcher, Yogi Berra: 'when you come to a fork in the road—take it'.

The three responsibility species, in one or another manner, animate practising lawyers in fulfilling their profession's duties. Those duties encumber them with attaining the goals of their clients' instructions, as conflict-chaste, competent, courteous, conscientious, committed, candid and confidences-keeping counsel.

Faithful heed to responsibility (and implicit accountability) in its three personalities, unsullied by life's other demands—or life's vices—is paramount when lawyers agree being tasked with client dilemmas. Not infrequently, those dilemmas are visceral, and freighted with complexity; their resolution, competence-challenging, sleep-depriving and patience-depleting; and their compensation parsimonious.

Prolonging, or discounting client dilemmas—indeed, any approach less than unblinkingly robust—is likely to court misadventure. Writes Mr. Justice Leurer of Saskatchewan Court of Appeal (2022 SKCA 87, para. [1]): " Litigation ages poorly. Costs soar. Witnesses die. Memories fade. Documents disappear. Circumstances change. Small complications twist into wrens' nests." Paramount—recalling Canadian barrister Shane Brady before European Court of Human Rights on 10 January 2024—is that issues be promptly resolved, such that they are "closed, locked, bolted and sealed irrevocably". The motives, purposes and pace of disclosure requests and disclosure responses often crucially dictate expedition and finality of resolution: *Anthony v. Anthony*, 2024 NSSC 100 (CanLII).

Coping with a disclosure-decrying contumacious spouse comprised the challenge for the court in *Boutin v. Boutin*, 2022 ONSC 3229 (CanLII); 2022 ONSC 4776 (CanLII).

The nature and breathe of complexities of family law practice wrought by non-disclosure—and the related involvement of 'invisible litigants'—are bluntly addressed in *Leitch v. Novac*, 2020 ONCA 257 (CanLII), paras. [44] to [47]; SCC appeal leave application dismissed: 2020 CanLII 87108 (SCC).

Conducting the law practice vocation, like life itself, is not a dress rehearsal.

Preparing for practice is another matter. Witness a barrister (a Juris Doctor), once subject of a grave mistake (when Newfoundland and Labrador Law Society erroneously reported him disbarred). He was in the habit of unusually rehearsing clients and, in so doing, demonstrating his loyalty to them and his dedication to advocating their causes with fearless candour. Until shortly

before he passed (30 April 2022), he would, in full trial attire, in his rural chambers, meet litigation clients weeks before fixed dates of hearing of their family law or other proceedings. While clients watched, often spellbound, he stormed about his chambers (his vestibule, waiting area, office, and boardroom library), his gown billowing and his tabs flapping. Sometimes he paused to genuflect. All the while he feigned, with bellowed oratory, to exhort an imagined court to grant clients the remedies they intended to seek. (Twice, this Paper's author sat, bewildered, in the chambers' waiting area of the barrister when he cannonaded through.)

In some other countries (lately joined by some Canadian jurisdictions), standards begotten by the three breeds of responsibility transcend law practice, into a lawyer's personal life. Stated Julia Dias, Q.C., while chair of England and Wales Bar Disciplinary Council (now High Court Justice) on 27 May 2012, "You are a member of a profession which is expected to adhere to higher standards than ordinary members of the public." In so adjudicating, she was penalizing a young London lawyer found in possession, in December 2011, of personal-use quantities of illegal drugs; Cocaine and Ecstasy (unrelated to the lawyer's retention obligations).

(The London lawyer's father, incidentally, had been known as 'Mr. Payout' for his formidable practitioner reputation in family law before appointment, in April 2010, to Family Division of the High Court. The lawyer's mother had divorced the father after he started a relationship with a family law barrister. That barrister's spouse—also a family law lawyer—was killed in 2008 by police when he threatened the police with a firearm.)

An England and Wales' barrister who groped a colleague's breasts during a 'night out'—away from law practice—was criminally prosecuted for sexual assault (six-month suspended sentence, rehabilitation order, sexual offenders' registry for seven years, and CDN $2,850.00 compensation order). Subsequently, he was disbarred by the Bar Standards Board. (*Legal Futures*, 26 October 2021.) Not long before the barrister's social malfeasance, a leading Queen's Counsel had advised the Bar en masse that lawyers could improve their mental health by spending less time away from the workplace socializing with other lawyers (*Legal Futures*, 05 October 2021).

Another barrister in England, misconducting himself away from his law practice, was disbarred for providing a court a wrong address for his spouse in obtaining a divorce from her

(*Legal Futures*, 25 October 2021); although, arguably, he was a self-represented person—i.e., acting *pro se*—in the course of his practising law. Neither the Court nor the Crown Prosecution Service appears to have proceeded against him.

Independently of practising law—beyond doubt—a 37-year-old solicitor, licenced in England and Wales, entered three supermarkets on Fulham Palace Road, west London, with a bucket of hypodermic needles. There, he infused, with his blood, an apple, bacon, buttermilk and Chicken Tikka Fillets. He also threw a syringe at a physician, and a plant pot at a waiter; neither of which flung chattels caused injury. Whether the England and Wales' organ responsible for lawyer discipline intervened could not be ascertained. However, the Crown Prosecution Service criminally charged him with three counts of contaminating food, and two counts of assault. In early 2022, a jury failed to reach verdicts against the lawyer after more than seven hours deliberation. In early May 2022, a second jury found him not criminally responsible due to insanity.

The Bar Standards Board for England and Wales, commencing 2020, has undertaken its most recent review of the Board's approach to policing barristers' conduct when not practicing (*Legal Futures*, 28 May 2020).

Do law societies in Canada, like United Kingdom regulatory authorities, have a compliance "oversight role" extending beyond lawyers' obligations to honor responsibility standards in conduct of their professional practices? (The question was posed by Canadian Bar Association (CBA) in: "Law society oversight of lawyers' private conduct justified", CBA online, 30 September 2020.)

Does the oversight role also embrace behavior, in 'private lives', of persons who later are admitted to the Bar? For example, a person entered on the Roll of the Barreau du Québec, about five days before the Barreau discovered he had been convicted of assaulting a correctional officer a year earlier (in other words, before he was enrolled as a lawyer). The Barreau, promptly, revoked his enrolment. The person's objection to the revocation was denied, in: *Cozak v. Barreau du*

Québec, 2021 QCCA 776 (CanLII); application for leave to appeal to Supreme Court of Canada dismissed: S.C.C. File No. 39677, 04 November 2021, 2021 CanLII 109584 (SCC).

A consultation report, published 29 January 2020, by Federation of Law Societies of Canada's standing committee on professional responsibility included consideration of the reach of the Federation's *Model Code* beyond lawyer behavior in the course of practice. As posted online 31 May 2024, the consolidated *Model Code of Professional Conduct* of the Federation appears to contemplate lawyer behavior external to practice boundaries.

The *Model Code* was, in 2009, originally crafted and approved by the Federation which functions as the national Canadian legal profession's supervisory and regulatory organ. Often revised, the *Model Code* has been largely, if not entirely, adopted as a professional code by 11 of Canada's 14 law societies (10 provinces, three territories and the Québec Chambre des notaires) and is being considered by the remainder.

Commentary [3] guiding interpretation and administration of Model Rule 2.1-1 (Integrity) explains that "[d]ishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action."

In contrast, Commentary [9] to Model Rule 6.3-1 (Discrimination) appears more explicit in defining the reach of that Model Rule, by stating: "Lawyers are reminded that provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's officer or in legal practice."

In submissions on the Federation's consultation report, the equality and ethics subcommittees of Canadian Bar Association—an Association which serves as the national Canadian profession's policy, advocacy and education vehicle—maintained that "[l]aw is a self-

governing profession, so lawyers must exercise their powers in the public interest. It is therefore appropriate for the *Model Code* to expand on what constitutes discrimination, harassment, and sexual harassment to set standards for lawyers' conduct in all cases" (underlining added for emphasis by this Paper's author).

1.3 Irresponsible Behavior

Distressing in nature, scope and intensity has been irresponsible behavior by some lawyers, in Canada, representing 'survivors' claiming restitution from government and church organizations. Commencing about 2003, the lawyers sought damages for tragic mistreatment of the 'survivors', inflicted by the Canadian residential school's program. The professional misbehavior is summarized by Trevor C.W. Farrow, a Professor at Osgoode Hall Law School (York University) in "Truth, Reconciliation, and the Cost of Adversarial Justice"; chapter 6 of: Farrow, Trevor C.W. and Jacobs, Lesley A., *The Justice Crisis[:] The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020), at pp. 133, 134:

> …. The legal representation of survivor claimants … involved problematic and unprofessional behaviour. For example, counsel for a number of IAP [individual assessment process] claimants purported to provide their clients with loans that were never received, often with unreasonably high interest rates. Other cases, …, involved insensitive, and at times misleading client solicitations; exaggerated promises of success; improper disclosure to consulting non-lawyers of confidential information; the unauthorized practice of law; failure to properly prepare and meet with clients; conflicts of interest; unacceptable correspondence, arrangements, and termination letters; failure to press for full compensation amounts; disregard for important terms of the alternative dispute resolution … settlement process; and misleading, incorrect, and falsely completed IAP forms. Overall, according to one judge [in: *Fontaine v. Canada (Attorney General)*, 2012 BCSC 839 (CanLII), B.J. Brown J., at paras. 163, 161 (a decision ultimately refused appeal leave by S.C.C.: File No. 38862, 27 February 2020, 2020 CanLII 15308 (SCC)], 'claimants were … treated not as individual people who had in many cases suffered traumatic personal experiences … but rather as claims, requiring little lawyer interaction', or more directly, 'claims became abstracted from claimants.'
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> . . . .
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> Costs on the plaintiff side were … often extremely high–sometimes out-weighing any meaningful benefit from the litigation or settlements. In some cases,

> contingency fees were above the allowable rates provided for in the settlement agreement; in others—particularly early in the process—half of recovered amounts reportedly went to lawyers. It is important to acknowledge that not all cases and not all lawyers' billing arrangements involved problematic fees. However, the examples documented … are certainly not unique or isolated incidents. According to one report, the fees paid to some lawyers were seen as 'unethical practices or greed' and 'nothing short of gouging,' and amounted to 'revictimization' and 'taking advantage of the wounded and the weakest.'

(In 2015, Canada took action (apparently not yet resolved) against a Saskatchewan law firm, involved in the residential schools' litigation, to recover about $25-million; alleging fabrication of, and overcharging for, legal services claimed.)

1.4 Responsible Behavior

Paramount function of responsibility law is to inform and shepherd lawyers in their behavior while competently representing their clients with civility.

Administrative legislation and rules; codes of professional conduct, and common law demand or counsel practitioners behave responsibly.

While conducting themselves responsibly—competently and civilly—lawyers are obliged to be "zealous advocates within the constraints of legality," contends Alberta Queen's Bench Justice Alice Woolley, while on the Faculty of Law, University of Calgary (*Understanding Lawyers' Ethics in Canada*, 2nd Ed. (Markham [ON]: LexisNexis Canada Inc., 2016), p. 2).

This signal counsel obligation of "resolute advocacy", cautions Professor Woolley, needs avoid "unethical extensions of [professional] behaviour that would otherwise be considered ethical and proper." As she writes, in case-commenting on *Merchant v. Law Society of Saskatchewan*, 2014 SKCA 56 (CanLII):

> [a]n unwavering commitment to your client's cause in some manifestations and circumstances accomplishes the very highest professional ideals. Taken too far, however, that commitment becomes dysfunctional and—ultimately—both unethical and unlawful.

As a benchmark, contributing to identification of boundaries of competent, civil advocacy "civility" is elusive of definition. Professor (now Justice) Woolley, in 2012, before a discipline panel (2012 ONLSHP 94 (CanLII)); eventually reversed in the result: 2018 SCC 27 (CanLII)) is reported (at para. [43]) to have offered her opinion criticizing (with good reason):

> … the inclusion of a requirement of civility in the *Rules of Professional Conduct* [Ontario] as hampering vigorous advocacy, particularly in the realm of criminal defence, and as being too vague to be meaningful. She agreed, however, that zealous advocacy is possible (and should be practised) within the boundaries of law, and that the *Rules of Professional Conduct* are part of the law.

For an incisive, pragmatic primer on practising responsibly, see: Jacqueline L. King's *25 Rules for Success and Tips to Help You Enjoy the Practice of Law* (Toronto: Thomson Reuters Canada Limited, 2020).

Above all—obligating family and other law practitioners—is what Dr. Noel Semple, University of Windsor Law School calls 'The Best Interests of the Client Rule' ((2020), 43 Dalhousie Law J. (Art. 13)). Citing a dictum in *Hodgkinson v. Simms*, he writes: "Supreme Court of Canada held that 'clients in a professional advisory relationship have a right to expect that their professional advisors will act in their best interests, to the exclusion of all other interests, unless the contrary is disclosed' ", 1994 CanLII 70 (SCC).

Serving the client's best interests, even when a lawyer acts with exquisite vigilance, is sometimes unattainable. Extensive and severe consequences, for a client, of both omitting and misleading disclosure in family law proceedings—judicially found to have deceived the other party, legal counsel (possibly on both sides), and the court—were imposed, in *Mina Esteghamat-Ardakani also known as Mina Estegahamat-Ardakani, et al. v. Mehran Taherkhani, et al.,* 2020 BCSC 101 (CanLII); 2021 BCSC 1339 (CanLII) and 2021 BCSC 1745 (CanLII); appeals dismissed: 2023 BCCA 290 (CanLII); SCC appeal leave application dismissed: S.C.C. File No. 40928, 21 March 2024, 2024 CanLII 22672 (SCC).

2.0 PROVIDING RESPONSIBLE LEGAL SERVICES

2.1 Providing Legal Services: Services Providers

Principal constituency of this Paper is membership of the ten provincial and three territorial law societies—especially those practising 'family' law—and the Chambre des notaires du Québec (Chambre). Their membership on 31 December 2022, most recent date for which Federation of Law Societies of Canada data (sometimes incomplete or inaccurately calculated) is available, their memberships totalled 144,651 lawyers and Québec notaires; 46.80% of them female. Of the 144,651 lawyers and Québec notaires in 2022, 78.68% — 113,885 lawyers and notaires, 48.01% of them female—had practising status on 31 December 2022.

Up to 31 May 2024, this Paper's most recent permitted research date, the Federation has not reported more-refined gender identity data.

Of the total membership of lawyers (Québec notaires did not report) in 2022, the largest percentage had been members of the Federation for 26 or more years in each of the provinces and territories excepting Manitoba, Yukon, Northwest Territories (N.W.T.) and Nunavut where the largest number of lawyers had been members for 0-5 years. (Categories in the Federation's 2022 data are: 0-5 years; 6-10 years; 11-15 years; 16-20 years; 21-25 years, and 26 years plus.)

Lawyers who, in 2022, were Federation members 26 or more years, among total membership nationally (Québec notaires did not report), comprised 31.28% of all lawyers: of which 31.18% (i.e., of the 31.28%) were female.

Federation 2022 total membership data (other than Nunavut, which did not report) reveals male outnumbering female lawyers in all jurisdictions except Québec. There, about 56% of lawyers and about 69% of notaires are female.

2.2 Providing Legal Services: Services Vehicles

As best can be extrapolated from the Federation's latest—2022—data, sole (active) practitioners are, most frequently, the unincorporated conduit for delivering legal services in Canada (Québec Barreau and Chambre did not report). Sole practitioners, as of 31 December 2022, comprised not less than; 13.35% of practising lawyers, and law firms of 2 to 10 lawyers, 4.22%. (The 13.35 percentage understates the extent of sole practitioner service delivery. The principal reason is that Federation 2022 data does not specify the portion of the 19,739 professional corporations operating nationally—exclusive of non-reporting Manitoba, Nunavut, Québec Barreau and the Chambre—which comprise sole practitioners.)

2.3 Providing Legal Services: Services Delivery

National mobility of the Canadian legal profession, in delivering legal services, is currently governed by three basic agreements among law societies: (i) the National Mobility Agreement, (2002); (ii) the Territorial Mobility Agreement (2006/2011), and (iii) the Québec Mobility Agreement (2008) and its Addendum (for notaires) (2012).

The agreements, facilitated by the Federation of Law Societies of Canada, serve to recognize and enable the constitutional right of Canadian lawyers to practice anywhere in the country (*Canadian Charter of Rights and Freedoms*, ss. 6(2) and (3)).

The National Mobility Agreement, made in 2002, permits lawyers to transfer, temporarily (maximum 100 days) or permanently, between Canadian common law jurisdictions (other than the three territories) based on their 'home' common law jurisdiction license, absent additional qualifying assessment. All law societies—other than societies of the three territories and other than the Chambre—have signed the National Mobility Agreement.

The Territorial Mobility Agreement, made in 2006 and renewed in 2011, provides for reciprocity between 'territorial' jurisdiction lawyers and those of other Canadian common law jurisdictions on a permanent, rather than temporary, basis. All law societies—other than the Chambre—have signed the Territorial Mobility Agreement.

Under the Québec Mobility Agreement, made in 2008 (i) Québec lawyers may in a common law province serve as Canadian Legal Advisers, having restricted practice status entitling them to practice federal and Québec law, and (ii) Canadian 'common law' lawyers may acquire a license from the Barreau as Canadian Legal Advisors permitting them practice, in Québec, federal law, law of their 'home' common law jurisdiction, and public international law. All law societies, both provincial and territorial—other than the Chambre—have signed the Québec Mobility Agreement.

A 2012 Addendum to the 2008 Québec Mobility Agreement—enabling members of the Chambre to acquire Canadian Legal Adviser (restricted practice) status in Canadian common law jurisdictions—has been signed by all provincial and territorial law societies, including the Chambre.

Significant mobility changes have (long) been imminent and are now partially implemented under two new Agreements:

(a) National Mobility Agreement, 2013 (signed or to be signed by all law societies (including the Chambre) other than the territorial law societies) extends its mobility provisions such that Canadian 'common law' and 'civil law' lawyers can transfer among each other's Canadian jurisdictions—and Québec notaires can transfer to other Canadian jurisdictions—with ease, regardless of whether they are trained in common law or civil law. The 2013 Agreement, when fully-implemented, will replace the 2002 National Mobility Agreement, and both the 2008 Québec Mobility Agreement and its 2012 Addendum. The 2013 Agreement currently is in force in British Columbia, Manitoba, New Brunswick, Ontario, Saskatchewan and Québec.

(b) Territorial Mobility Agreement, 2013, which includes the same permanent mobility provisions as the National Mobility Agreement 2013, has been implemented by all three northern territories. This gives Québec-licensed lawyers the right to transfer to the territories. When approved by the government of Québec, the agreement will give lawyers from the territories the same rights to transfer to Québec that they currently enjoy with the common law provinces.

In 2022 Federation data discloses 758 lawyers transferred more or less permanently; from one to another jurisdiction (usually between Canadian jurisdictions excepting N.W.T., and excepting the Chambre, which did not report).

'Mobile' lawyers and notaires must consult their professional liability insurers before practising outside their 'home' jurisdictions.

2.4 Providing Legal Services: Services Costs — *Canadian Lawyer* 2021 Survey

No matter the manner of structuring legal fees, their quanta is, or should be, ultimately dictated by the contemporary reality that practising law—and staying in practice—is an acutely-competitive business. Financially, the challenges can, ever-constantly, be Herculean.

Probably the only current national survey of any published legal fee data is furnished by *Canadian Lawyer* magazine. Its most recently available survey data—in May 2021 (based largely on a 2020 survey)—is summarized in the attached **APPENDIX A**. The Appendix tabularizes data accumulated by Aidan Macnab, editor for several law publications of Key Media International, Toronto. (Publication is imminent of results of a 2023 *Canadian Lawyer* fee data survey.)

2.5 Providing Legal Services: Services Costs - Canadian Research Institute For Law And The Family 2018 Report

On 07 March 2018, Canadian Research Institute for Law and the Family (CRILF) released conclusions of its study founded on a survey of Canadian family lawyers about their use of (i) collaborative settlement processes, (ii) mediation, (iii) arbitration, and (iv) litigation, as mechanisms for resolution of family law disputes, and related professional costs. The study (not since replicated) was requisitioned by the Canadian Forum on Civil Justice (affiliated with York University, in particular Professor Trevor C.W. Farrow) as part of its Social Sciences and Humanities Research Council-funded Cost of Justice project. The study's conclusions are published in a 59-page report, titled An Evaluation Of The Cost Of Family Law Disputes: Measuring The Cost Implication Of Various Dispute Resolution Methods. Authoring the report were CRILF's Research Associate, Joanne J. Paetsch; Senior Research Associate Lorne D.

Bertrand, and Executive Director John-Paul Boyd (now a prominent Canadian family law barrister, mediator, author and lecturer). (CRILF voluntarily dissolved on 31 August 2018.)

The Report—visionary and exhaustive—articulates preferred dispute resolution options and benefits (not least, cost), reliant on responses from 166 family law lawyers in Ontario, Alberta, Nova Scotia and British Columbia. They are:

(i) Collaborative Settlement Processes:

- 90% of lawyers prefer to use collaborative processes whenever possible;
- more than 94% of lawyers say their clients are satisfied with the results they achieve through collaborative processes.

(ii) Mediation:

- 78% of lawyers agree that mediation is usually cost-effective;
- 69% agree that mediation is usually fast and efficient.

(iii) Arbitration:

- 58% of lawyers report that their clients are satisfied with the results that they achieve through arbitration (this compares with a 94% perceived client satisfaction rate for collaborative processes and 82% for mediation);
- 90% of lawyers agree that they can deal with complex issues better through arbitration than other processes.

(iv) Courts:

- Views regarding the public court system in the context of family law are less positive; although approximately 64% of lawyers agree that litigation is suited to high-conflict family law disputes;
- most—over 83% of lawyers—disagree that litigation is either fast or efficient.

In addition to preferred options and benefits, the CRILF study provides an important unique glimpse into the relative costs associated with resolving family law disputes using different

processes. For example, in 2018 (with 2024 figures added to reflect inflation), the average legal fee to resolve low-conflict disputes through collaborative settlement processes was $6,269 [$7,538]; the average fee to resolve high-conflict disputes was $25,110 [$30,192]. By comparison, in resorting to litigation the average fee to resolve low-conflict disputes was $12,400 [$14,910], and the average fee to resolve high-conflicts was $54,400 [$65,411].

2.6 Providing Legal Services: Services Costs — Bench, Academy, And Bar Issues

2.6.1 Bench and Academy Issues

Critical assessments of lawyer legal services remuneration have originated with both bench and academy.

" … A person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover, there is something inherently troubling", wrote Justice Sarah A. Pepall on 01 December 2014 for a unanimous Ontario Court of Appeal, "about a billing system that pits a lawyer's financial interest against that of its client and that has built in incentives for inefficiency." Following her précis of the history of what she calls 'The Rise and Dominance of the Billable Hour', she compellingly portrayed hourly invoicing in less than shimmering language:

> … each hour is divided into 10 six-minute segments, with six minutes being the minimum docket. So, for example, reading a one line e-mail could engender a 6 minute docket and associated fee. This segmenting of the hour to be docketed does not necessarily encourage accuracy or docketing parsimony.

She continued: "In my view, it is not for the court to tell lawyers and law firms how to bill. That said, in proceedings supervised by the court and particularly where the court is asked to give its imprimatur to the legal fees requested for counsel by its court officer [i.e., a court-appointed receiver], the court must ensure that the compensation sought is indeed fair and reasonable." (*Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII), paras. [32] to [46].)

In the United Kingdom, Lord Chief Justice Thomas, on 16 December 2014, is reported by *Legal Futures* to have said, in his annual report to Parliament, that "steps must be taken" to find out why the cost of legal services is increasing, despite the changed market and "great number of [legal service] providers … ." His report also warned that use of mediation and … [other means of alternative dispute resolution] is reducing as the number of litigants in person increases. He acknowledged that "[t]he [2013 Lord Justice] Jackson reforms [based on Lord Jackson's 2009 and 2010 reports: *Review of Civil Litigation Costs: Final Report*] are playing a vital role in trying to ensure that there is access to justice for the citizen … ." Nonetheless, mounting legal service expense continues to be an impediment to justice access.

In "The Cost Of Seeking Civil Justice In Canada" ((2016), 93 Can. Bar Rev. 641, at pp. 642-643; 644-645; 649-652), Noel Semple, then Assistant Professor of Law, University of Windsor, drew these conclusions about the private financial impact on persons seeking resolution of civil 'personal plight' problems: (i) some accept "injustice in their lives, because they perceive that justice's benefit to them is not worth the cost of seeking it"; (ii) "[o]thers persevere and obtain at least partial justice, but its net benefit is seriously diminished by the cost they paid to seek it."

For those who persevere, Assistant Professor Semple has determined, (i) "legal fees … are very onerous for low and middle-income Canadians[;] [i]t being common for an individual to pay tens of thousands of dollars, at hourly rates exceeding $250 per hour, … . Canadian lawyers appear to charge higher average hourly rates [at least 50% higher] than their American counterparts do"; (ii) " … Canadians' efforts to obtain civil justice can last for many months and consume many hours. Especially for self-represented litigants, seeking civil justice can be time-consuming enough to undermine employment and personal relationships"; (iii) "psychological impacts such as stress and a sense of being overwhelmed constitute a … layer of costs, which … seems to fall most heavily on the self-represented", and (iv) "[t]here is some empirical evidence that access to justice may be more financially and emotionally draining in family disputes than it is in non-family civil disputes".

Ironically, tariffs—Himalayan in quantum—claimed by more than a few privately-practising lawyers, such as family practitioners, for their legal services have left them under-employed, and overly-occupied with invoice collection litigation.

In the initial Sir Francis Forbes Annual Law Lecture, at St. John's, on 25 January 2016, the-then Chief Justice of Newfoundland and Labrador J. Derek Green insightfully, though guardedly, remarked that:

> Lawyers have effectively priced themselves out of the market for many people. There may be many reasons for this, but the fact remains that, whatever the reason, many people cannot afford to be represented by a lawyer. As long as this situation remains and as long as lawyers have a monopoly on the practice of law and legal representation, the problem of lack of access to legal services will remain. People will either be prevented from accessing the system altogether or the outcomes they receive will amount to second-tier justice. While in theory, the courts are open to all, in practice many cannot effectively access them. As Sir James Mathew pithily put it many years ago in a phrase that is equally applicable to Canada, 'In England, justice is open to all – like the Ritz Hotel'.

2.6.2 Bar Issues

2.6.2.1 Invoicing

The president of the Québec Bar, in 2016, Claudia Prémont, is reported by Luis Millan, in *The Lawyers Weekly* on 29 April 2016, as saying that "[h]ourly billing is impregnated in our culture. It is the way that we evaluate if a law firm is prosperous, if a lawyer performs and if a lawyer can join as a partner. But we have to evolve and offer something else." Nonetheless, she notes that, in respect of some files, "hourly billing will remain the best way to charge for our services but we believe that there is a portion of legal services that can be billed differently. It's in our interest to open up."

An 84-page study published in 2016 by the Barreau du Québec, titled "Hourly Billing: Time For A Rethink," urges Québec lawyers, for "survival of the profession", to move from hourly billing to alternative pricing arrangements, to better serve their clients. About 70 per cent of Québec lawyers then invoiced by the hour. Even more anxiously is the Québec Bar encouraged

to transition from hourly invoicing to other options, in the Report "Lawyers In Private Practice In 2021" (pp. 66-72), by Barreau du Québec.

Fixed fees represent the predominant trend in providing family law services in the United Kingdom (comparable figures for the same trend in Canada could not be located). Almost two-thirds (64%) of divorce and separation clients now agree with payment of fixed fees. But, less than half of those clients eventually paid the fixed amount quoted when they retained lawyers. Most of the remainder of those clients paid more; a few paid less. Almost one third of family law clients were handling their divorce or separation proceedings, from start to finish; and another 10% begin as self-represented, but engage a solicitor or barrister to complete the process. Main reasons given for not instructing a lawyer were (i) because the uncoupling was amicable and legal implications straightforward to deal with, or (ii) because, in about one-third of cases, they could not afford legal advice. The information, based on a survey of 304 persons who had completed their family law matters, was accumulated and published in late 2019 in a UK Family Law Consumer Research Report by IRN Research, Coventry, England (which placed the total of family law services fees paid, in 2018 in the United Kingdom (i.e., England, Wales, Scotland and Northern Ireland), at CDN$2.57-billion. (Hillborne, Nick, *Legal Futures*, 25 September 2019.)

Lawyers in small law firms and in solo practice, in England and Wales, believe that clients' focus on price is compromising their work and even their ability to uphold the law, says the Report, *Bellwether Discussion Paper 2019: The Changing Face of Law*, by LexisNexis. The Report concludes, however, that the legal profession has a "perplexing blindspot" in understanding importance of price for clients that indicated a wider "disconnect" between solicitors and clients. Among surveyed solicitors, however, the main concern expressed by about 25% of them was that "the pressure to reduce costs was driving down the quality of legal advice, with several arguing that clients did not seem to be aware of the compromise that price was having on the quality of the work they were buying." (Rose, Neil, *Legal Futures*, 04 February 2019.)

Few family law practitioners are likely among lawyers (usually aged mid-twenties) whose starting salary, as juniors in some London, England law firms, is about CDN$187,260.00 (*The*

Times [London] 02 July 2022). Alison Brown, executive partner of Anglo-Australian law firm Herbert Smith Freehills explains, "[i]t is key that we continue to attract the very best talent, … to recognize high-performing lawyers … ." The handsome compensation, say legal analysts in London, will require recipient lawyers to "pay a price when it comes to balancing money with their quality of life." A legal industry Internet site, Legal Cheek, reports that some highly-paid junior lawyers in London practice an average of about 14 hours daily (start time, on average, 9:14 AM, continuing to times ranging from 10:17 PM to 11:28 PM). The juniors' hours are logged both at their law firms and at home. Said one junior: "It's become the norm that I will take a short break for dinner but feel compelled to log back on right up until I go to bed." (This, of course, begs such questions as: when do the juniors spend? are the juniors working to ensure opulent lifestyles for their beneficiaries or, earlier, to provide bounteous *inter vivos* gifts to charity?)

Whatever the fees arrangement, LawNet's 2019 survey, in England and Wales, of 75,000 former clients over six years concluded that "reputation and trust" remain "more important in winning new business than price, despite the push in the profession for greater transparency in advertisement of fees." LawNet reported that "[i]n two-thirds of cases client loyalty, referrals by recommendation, or a firm's reputation mattered more than price, which only 4% of clients named as their priority." LawNet added that "[w]here cost was a factor, the main thing was the sense that a firm was being transparent over the way it charged." Clients also wanted to know "the benefits of using the firm and to be kept updated as work progressed, … ." (Bindman, Dan, *Legal Futures*, 03 October 2019.)

Criticisms of the amount of expense of legal services deserve tempering to recognize countless, unavoidable realities.

First: law firms operate as a business whose culture involves relentlessly-mounting expenses: especially, for rent, salaries of legal assistants, paralegals and employed associates, and an accountant; digital technology, and supplies. To these expenses must be added client disbursements (eventually—one prays—reimbursed, unless sufficient retention funds are, continuously, obtained from clients; many of whom are financially ill-prepared to provide). Net-

of-expenses income, of course, is the cradle expected to dispense partners' monthly draws. Many law firms strive to generate annual profit margins capable of also bestowing bonuses on partners (and, perhaps, associates and staff).

Second: many retentions make much-increased demands on lawyers' stock-in-trade (time); due to retention subject matter complexities initially unforeseen or unforeseeable; due to client insistence on perfection, and—especially—due to prolix, vengeful third party agendas.

Third: time available for retention-performance is increasingly restricted by the need for attention to (self-educating about, and practising) heightened professional due diligence requirements (directed by endless legislation; professional governance advisories; court practice notes and rules revisions, caselaw and law society bulletins).

Fourth: client services delivery is also delayed or attenuated by required or voluntary professional development (in a profession increasingly-tilting to specialization); inevitable undocketed *pro bono* (both incidental, and external, to retentions), and law firm administration (including mentoring, promotion, and pursuit of clients whose invoices are outstanding).

Fiscal clauses of retention agreements or letters—when (often not) memorialised—may specify an hourly rate; a blended hourly rate (averaging rates where more than one lawyer performs service to a retention); a block (i.e., fixed) fee; a contingency fee; a success fee, or a fee package (bundling features of some of the foregoing). Whatever the fee arrangements, their most salient feature must be adequacy of measures to ensure expeditious payment of fees, to meet the industrial strength cash flow appetite of a law firm's business. (That objective is likely assured at the Montreal law firm whose family law lawyers, in 2021, were invoicing $1,000.00 hourly (exclusive of value-added tax).)

An insidious trend has emerged, countering the law firm custom, historically, of absorbing all office administration expense. Based on the experience of this Paper's author as a superior court Master (since 16 December 2010), many law firms now appropriate at least part of such expense

to their clients. Not infrequently, law firm invoices claim a file-opening charge; a file administration fee; digital caselaw data bank search charges; a claim for time spent by legal assistants or paralegals; a printing charge, and interest on disbursements. One invoice claimed for laundering of a lawyer's waist coat, gown, and tabs (mercifully confined to the shorter tabs worn by barristers not elevated to King's Counsel status). The disbursement was disallowed, on authority of a Federal Court of Appeal decision which rebuffed a Saskatchewan lawyer's similar claim: *Merchant v. The Queen*, 1998 CanLII 322 (TCC), at para. [41]; 2001 FCA 19 (CanLII). Unless such office administration expenses are expressly authorized by a retention instrument, this Master denies them.

Equally-concerning to the author, as Master, are: (i) the fact one law firm only has ever produced a retention agreement or letter in support of assessment of its account; (ii) the fact no law firm using computer time data entry has ever presented to him, for assessment, a bill of fees which corresponded with the computer time data; (iii) the fact some law firms, operating multiple offices in the same, or several, Canadian jurisdictions, annually increase hourly fee rates applicable to all their firm offices, although unable to explain the bases for the universal increases; and (iv) the fact some lawyers practice 'dumping' (also called 'padding' or inflating) of time spent in rendering services. (In an extreme 'dumping' case, in England, a solicitor was suspended nine months for recording nearly 530 hours against a probate matter when his law firm employer reckoned that a reasonable and proportionate amount of time required was 15 hours. The solicitor acknowledged, before the England and Wales' Solicitors Disciplinary Tribunal, that he was seeking "to demonstrate to the firm that he was meeting his target hours". (*Legal Futures*, 22 November 2021.)

On the topic of invoicing, generally, see: Sutherland, Sarah, "Valuing lawyers' work" (Canadian Bar Association (Legal Market / Law Firms), 01 February 2022).

For a decision furnishing quanta of appropriate hourly rates, for family and most other legal services, see: *R.M.M. v. L.G.*, 2020 NLMA 1 (CanLII).

For other aspects of invoicing, see below Part **7.11.2 Bills Of Fees**.

2.6.2.2 Recovery

Perennial are difficulties lawyers encounter in collecting their professional services' invoices from recalcitrant family law clients. More often than not, financial circumstances of such clients precluded precautions by a lawyer, on or during retention, to ensure payment of her(his) compensation. (Granted, a lawyer could decline retention by a potential family client lacking means congruent with timely payment of legal accounts. But, experience dictates not many prospective family clients possess such punctual fiscal capacity.)

Success was achieved in recovering unpaid fees by writ of seizure and sale, in: *Makovskis v. McKenney*, 2019 ONSC 1204 (CanLII), affirmed: 2019 ONCA 755 (CanLII), and by charging order, in: *Norris v. Norris*, 2019 ONSC 4490 (CanLII). A charging order was refused in: *Naccarato v. Naccarato*, 2022 ONCA 35 (CanLII).

Validity of a solicitor's lien, for legal fees on a client's share of matrimonial home sale proceeds which a law firm was holding in the client's trust account, is considered, in: *Phillips Legal Professional Corporation v. Schenher*, 2020 SKCA 87 (CanLII); 2020 SKCA 117 (CanLII). Such a lien was found to be valid, in: *Duff v. Dawe*, 2018 NLSC 3 (CanLII).

An order for payment by the Crown of legal counsel for a non-custodial parent, named respondent in Province of New Brunswick's application for permanent guardianship, was overturned, in: *Province of New Brunswick, as represented by the Minister of Justice v. J.F.*, 2021 NBCA 61 (CanLII); application for leave to appeal to Supreme Court of Canada dismissed: SCC File No. 40068, 30 June 2022, 2022 CanLII 56782 (SCC).

"Collecting unpaid accounts" is the subject of Ann Macaulay's commentary at Canadian Bar Association's online site (CBA-Practice-Link/solo, 10 July 2018).

2.6.2.3 Deductibility

Deductibility by clients of legal (and accounting) fees is detailed in "Canada Revenue Agency Interpretation Bulletin, IT-99R5".

Whether and when a lawyer's family law fees should be deducted, as a 'carrying charge', from a person's income in determining child financial support is addressed in the 355-page (380-paragraph) Reasons For Judgment of Chappel J. (including a 75-clause relief provision at paragraph 380), in: *McBennett v. Danis*, 2021 ONSC 3610 (CanLII), at paras. [297]-[299]; [308]; [327]; [371]; [375]-[377].

An ingenious, albeit unsuccessful, argument was made by a family law client to justify an income tax deduction, for legal fees, in: *Yovo v. Canada* (2018), 10 R.F.L. 27 (T.C.C.). The taxpayer contended that he earned income—(i) child tax benefits entitlement and (ii) child care expenses deductions on account of his child—as a result of his having spent $6,265 in legal fees in making a settlement agreement in which both were included in the agreement's parenting/child support provisions.

2.6.3 Self-Represented Litigants

Many persons requiring legal assistant cannot afford the involved services. (In more than half family law proceedings in Canada, at least one party appears without a lawyer.) Probative evidence of such is offered by Dr. Julie Macfarlane, K.C., Professor of Law, Faculty of Law, University of Windsor, in her May 2013 report: The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants (based on interviews conducted from 2011 to 2013):

At page 33:

> Figures provided by the provincial ministries of justice show that the proportion of litigants appearing pro se in provincial family court is consistently at or above 40%, and in some cases far higher. In proceedings under the Divorce Act, the figures are lower but still significant.

At page 34:

> The same trend is spreading to civil courts, with some lower level civil courts reporting more than 70% of litigants as self-represented. This goes much further than small claims courts which are designed to facilitate simple, speedy and inexpensive resolution and in which litigants have traditionally often represented themselves.
>
> At page 31:
>
> 75% of the … [self-represented litigants] in the sample [gathered for the Report] reported that the other party in their family or civil case was represented by counsel – in other words, that this was a matter in which one side was represented by counsel and the other was not.

In so stating, the May 2013 Report recognizes that both parties may have legal representation in some aspects of a proceeding, but not others.

Most self-represented litigants contacted for the May 2013 Report (see Report, at p. 16), had they financial means, preferred to retain counsel (so they are represented). Some litigants chose to represent themselves because they never wanted a lawyer (preferring to self-represent). Other litigants discharged their lawyers for perceived or actual incompetence; felt they could not afford a lawyer or would not qualify for legal aid, or could not find a lawyer (consequently, were unrepresented).

Results of follow-up interviews conducted by Professor Macfarlane in calendar 2017 were highly consistent with the outcome of her 2011 to 2013 research.

Most recent follow-up interviews—from 2019 to 2021—accumulated and analyzed by Charlotte Sullivan and Professor Macfarlane in October 2021, reveal (very briefly here summarized) that (i) "[a] concerning number of [interview] respondents reported … experiencing discrimination over the course of their case in relation to ability, gender, or race [in self-representing]"; (ii) 68.8% "reported having worked with a lawyer to represent them at some point during their case …. [t]he majority of whom … were not satisfied with the assistance they received (58.6%)"; (iii) only 8.4% "were able to retain *pro bono* legal services"; (iv) " … over half (50.5%) … unsuccessfully sought out unbundled legal services during their case, compared to 27.2% who were offered such services", and (v) "41.2% … referred to using mediation services at some point

over the course of their case, but over two thirds did not settle during the mediation process[;] mirroring anecdotal data from some self-represented litigants who … [were] unsure of the purpose of mediation or how to prepare for a mediation session."

(In November 2021, the National Self Represented Litigants Project published another Report: "Struggling for Accommodation: Barriers to Accessibility faced by Cognitively Disabled Self-Represented Litigants" (Shannon Meikle; Silvia Battaglia, and Julie Macfarlane).)

Serious adverse consequences for a self-represented litigant (cited for contempt and condemned to pay $80,000.00 costs) prompted Supreme Court of Canada, in a five-paragraph decision: *Pintea v. Johns*, 2017 SCC 23 (CanLII), to reverse a decision of Alberta Court of Appeal. Supreme Court of Canada's reasons included an endorsement of the Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused Persons*. Subsequent provincial superior court decisions likewise have approved of the Council's Statement of Principles: *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 530 (CanLII), at paras. [45]-[46] (not affected by subsequent appellate reversal in the result: 2019 ABCA 243 (CanLII)); *Young v. Noble*, 2017 NLCA 48 (CanLII), at para. [34]; and *Gray v. Gray*, 2017 ONSC 5028 (CanLII), at paras. [31]-[33]. As counsel for Mr. Pintea asserted, however,

> … the Statement of Principles on its own is no more than a flexible framework to promote access to justice and fair treatment of all litigants. It is in the application of that framework by all actors in Canada's justice system—judges, court officers, lawyers and self-represented litigants—that true procedural Justice will be achieved.

(Sutherland, Sean and Richards, Cassie, "Supreme Court of Canada Endorses A New Approach to Self-Represented Litigants", *Law Now*, 01 November 2017.)

A research paper titled "Pintea v. Johns: An Updated Commentary" was, in March 2021, published by Anjanee Naidu and Jule Macfarlane for The National Self-Represented Litigants Project.

Some self-represented persons do resort to legal assistance in at least three manners. First: they purchase services which provide 'coaching' (i.e., obtaining legal advice about how they may self-represent). Second: they retain a lawyer to provide part of the bundle of legal services their legal problem requires (i.e., in a process usually called 'unbundling'). Third: they retain a lawyer to ghostwrite, e.g., legal arguments, which arguably is a specie of unbundled legal services.

Occasionally, a self-represented person—if and when attending court—will resort to what might be a fourth legal assistance recourse. S(he) will appoint a 'McKenzie Friend' (first judicially-recognized: *McKenzie v. McKenzie*, [1970] 3 All ER 1034 (CA)). The role of the 'Friend' is to sit beside the person in court—if the presiding Judge exercises discretion to permit—and assist her(him) to be organized, to keep calm and focused, and to make notes; as well as to discreetly provide her(him) with advice. Although usually a trusted family member, not legally-trained, the 'Friend' is sometimes a lawyer. When asked, this Paper's author in his Master's capacity almost invariably allows for a 'McKenzie Friend'. At one hearing, the 'Friend' permitted was an emotional-support dog (who demonstrated considerable, persisting affection for the Master).

3.0 SOURCES AND CHALLENGES OF RESPONSIBILITY

3.1 Responsibility: Sources

Informing the culture of responsibility in family law practice—and, in law practice generally—are organic components that Justice Proulx and Mr. Layton characterize as "diverse and fluid". They are components which, "taken together, serve to develop and reflect the general principles that shape lawyers' actions and ideals, … ." Among them are "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 to be found at other sources, they "constitute the legal culture that frames and influences ethical debate" respecting responsibility. (*Ethics and Canadian Criminal Law,* at p. 3.)

To these sources must be added the ingredients of legislation and lawyer self-governance rules and directives—complementing formal codes—as well as parables of common sense and, of course, solicitor-client retention letters or agreements.

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

3.2 Responsibility: Challenges

Issues of responsibility present particularly meddlesome—not to mention, potentially-high octane due diligence—issues for those lawyers who practice what customarily, if not curiously, is called 'family' law; although, more accurately, is the law of 'uncoupling'.

Accounting, principally, for such issues in family law is clientele described by Justice Mathew Thorpe (*The Law Society Gazette*, 19 January 1994), while sitting in the Family Division of England and Wales High Court of Justice (within the Supreme Court of Judicature):

> 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. The opportunity for the lawyer to abuse that dependent trust [while being exposed to the risks and temptations of entanglement with a client] is obvious.

Not infrequently, "[s]uicide is a real concern", cautions Dana Schindelka, while a litigation partner at Davis LLP (and presently a partner at DLA Piper), Calgary. "Temporary insanity", in the view of John Wade, while director of the Dispute Resolution Centre, Bond University, Australia, is not an unrealistic consideration in taking instructions from vulnerable clients.

In such circumstances, responsibility issues abound for the practitioner. Most fundamental are: (i) Does the potential client have intellectual and psychological capacity to agree (and financial means of affording) retention? to rationally instruct counsel? to testify (if need be)? (ii) Should the

practitioner, even where satisfied a person is capable (and sufficiently solvent), agree retention, if s(he) assesses the person as indicating behaviours unspooled or scabrous that would undermine client management?

In deciding whether to accept, or early after, retention, a lawyer needs consider the prospect and impact of power imbalance and safety issues; canvassed by Hilary Linton, family lawyer, mediator, arbitrator, parenting coordinator, adjunct professor and trainer in: "Best Practices for Addressing Power Imbalance and Safety in Family Dispute Resolution Processes: Research, Protocols and the Law", 2020 CanLIIDocs 3556.

"Although a lawyer's opinion of the justice of a client's case is not relevant … in the sense that it may not be injected into the case," Ontario private practitioner Mark M. Orkin, Q.C. (a.k.a., 'God of Costs'; 71 years at the Bar, when he died December 2019, aged 102 years) wrote, in his invaluable *Legal Ethics* 2nd Ed. (Toronto: Canada Law Book, 2011, at p. 226):

> this should not be taken to mean that the opinion is of no consequence or that a lawyer should not consult his or her own conscience before accepting a retainer. No lawyer is required to go against the dictates of his or her own conscience, or to take a case which the lawyer personally believes not to be just.
>
> It has been said that a lawyer is under no duty to inquire as to the truth of a client's case. Yet it was also said that counsel in a divorce action is under a duty to make sure, as far as possible, that he is not being deceived by his client. If he suspects this is happening, he is under an obligation to bring his suspicions to the attention of the court [*Holowaty v. Holowaty*, 1949 CanLII 136 (SKQB), at para. 9]. However, in the absence of any evidence to the contrary, lawyers are not required to convince themselves, by something like an original investigation, that a client is in the right before undertaking the duty of acting for a client. To reject a client's story because it seems improbable would be to usurp the office of the judge and lead to great injustice. As has been said, 'Very little experience of courts of justice would convince anyone that improbable stories are very often true, notwithstanding their [apparent] improbability'.

Needs be added, lawyers must assiduously avoid being litigation 'mouth pieces' for their clients' cases, or traditional or social media spokespersons for their clients. Clients must be firmly counselled to eschew resort to any media as vehicles for articulating their domestic distresses, disputes or legal recourses.

"When family lawyers and lawyer-mediators are working towards settlement [or litigation resolutions]," writes Deanne M. Sowter, in: "Professionalism and Ethics in Family Law: The Other 90%" ((2016), 6.1 *Journal of Arbitration and Mediation* 167, at p. 169), "ethical quandaries present themselves on a daily basis. What process should a client use? What information should be disclosed to the other side? What types of conversations should a lawyer have with their client? Embedded in each decision the professional makes are ethical elements."

Globally, Serge Kujawa (1924-2014), former Director of Public Prosecutions of Saskatchewan, in a conversation in Vancouver several decades ago, offered this Paper's author sensible advice for coping with responsibility issues: "you'll intuitively recognize a practice ethical issue when you encounter it, and your professional instinct should be energized to rightly direct you."

4.0 LEGAL RESPONSIBILITY

4.1 Legal Responsibility: Overview

The three pillars of lawyers' legal responsibility (for acts and omissions) are (i) 'judicial' accountability to courts; (ii) regulatory accountability to their professional society—and by extension, the public—and (iii) civil accountability to their clients.

4.2 Legal Responsibility: Judicial Accountability To Court

Lawyers, first and foremost, are officers of the court and, as such, accountable to the court. They are, Mark M. Orkin, Q.C. writes in *Legal Ethics* 2nd Ed. (Toronto: Canada Law Book, 2011, at p. 12),

> liable to … [the court's] summary jurisdiction; they are liable on their undertakings and for contempt both of a civil and criminal nature; they are liable [when self-evident or on request] to deliver up their client's papers and pay over their client's money; and they are liable to attachment for misconduct. At the same time it is fair to say that Canadian courts for the most part have been content to leave the disciplinary process in the hands of the various governing bodies. ….

Once on the record in a proceeding before a court, a lawyer requires the court's leave to withdraw; where the subject of retention is criminal (*R. v. Cunningham*, 2010 SCC 10 (CanLII)) or civil (see: *CCAS v. M.R. and B.W.*, 2019 ONSC 4679 (CanLII)).

Circumstances in which a lawyer may obtain leave to withdraw from a civil case are considered in: *Cengic v. Castro*, 2020 ONSC 986 (CanLII); where differences developed between solicitor and client regards settling a personal injury proceeding.

Withdrawal of counsel for an ethical reason—inability to contact a client—rather than a financial consideration, was permitted in *S.R.W. v. W.W. Children* (2022), 75 R.F.L. (8th) 356 (B.C. Prov. Ct.).

A lawyer's obligation to perform lawful instructions before a court, and a court's limited discretion in applying the law, resulted in admission in evidence of a spouse's covert recordings; outweighing the almost certain consequences of eroded trust, increased conflict and hindered restructuring of a family's relationships, in: *C.C. v. S.P.R.*, 2022 BCSC 1057 (CanLII), per Gibb-Carsley J., para. [29]; 2023 BCCA 422 (CanLII).

Violations of the rule in *Browne v. Dunne* were identified (and provision made to alleviate them), in: *De Longte v. De Longte*, 2023 ONSC 5512 (CanLII). In discussing the rule, the Court referenced family law barrister Harold Niman's *Evidence in Family Law* (Toronto: Thomson Reuters Canada limited, 2010; looseleaf updated to April 2024), at para. 7:15:

> If you intend [as part of your own case] to challenge the credibility of a witness you must put the disputed facts or documents to them in cross-examination or run the risk of the ancient but still applied rule in *Browne v. Dunne*.
>
> This is based upon the principle of fairness, so that every relevant witness shall have an opportunity to address important facts or documents. You are not permitted to 'blindside' the other side of a case by remaining silent about an important and relevant fact or document which you intend to introduce in your part of the trial and thus rely upon as part of your own case. This is obvious if the 'hidden' fact or document relates to credibility, but just as applicable to any other relevant portion of the case.

Their obligation for accountability to a court does not, however, relieve lawyers from discipline by their law society for in-court behaviour, even if the Bench resiles from chastising or penalizing counsel: *Groia v. Law Society of Upper Canada*, 2018 SCC 27 (CanLII), para. [55].

"I have … reached the very troubling conclusion," wrote Peter Daley J. in *Blake v. Blake*, 2019 ONSC 4062 (CanLII), paras. [13] to [47]) "that counsel [for one of the parties] … purposefully did not bring … [a trial and appellate decision relevant to the Blake proceeding] to the attention of the court" (para. [26]). In the result, costs were awarded the other parties, totaling $91,695.13.

4.3 Legal Responsibility: Regulatory Accountability To Governance Authorities And Public

Provincial and territorial legislatures—not common law—created the right of a person to practise law (provided law society admission, including standards for practice, requirements are fulfilled). Nonetheless, like courts, legislatures have largely defaulted to law societies the governance of lawyers and performance of their practices, including their ethical regulation and discipline. Rationale of legislatures is that law societies are best positioned to facilitate the legal profession's competency and the protection of the public's welfare.

Rules regulating lawyers and law practices made, for example, by Law Society of Manitoba under authority of the Province's *Legal Profession Act*, were scrutinized by Supreme Court of Canada in *Green v. Law Society of Manitoba*, 2017 SCC 20 (CanLII). Involved was an appeal by a Manitoba lawyer called to Bar in 1955.

Solicitor Green had, in 2012 and 2013, declined compliance with an education rule made, on authority of the *Act*, by Manitoba Law Society. The rule then obligated its members annually perform 12 hours continuing professional development. The Society suspended him. He applied for a judicial declaration that the involved rule exceeded the Society's statutory mandate. Both Manitoba Queen's Bench and Court of Appeal (unanimously) disagreed. Likewise (although by a

5 to 2 majority) did the Supreme Court of Canada; whereupon the (suspended) solicitor retired from practise.

The Supreme Court majority reminds us that the Manitoba legislature invested the Manitoba Law Society with a broad public interest mandate, and broad regulatory powers to achieve that mandate. That mandate is to be interpreted by employing a broad, purposive approach. Empowered by statute to create continuing professional development requirements, the Society necessarily is empowered to implement them; to better ensure standards of competence of lawyers rendering legal services to members of the public. Suspension of a lawyer who fails compliance with the professional development imperatives serves the goal of enforcing them. Suspension, in this context, seeks neither to discipline nor to cast doubt on competence of a lawyer. As such, a suspension is administrative in nature; therefore, within the Manitoba Law Society's mandate.

Procedural rules of the Law Society, also impugned by the lawyer, do not include a pre-suspension right of hearing or appeal. The reason? Per Wagner, J., for the majority (2017 SCC 20 (CanLII), para. [62]):

> The impugned rules reasonably include no right to a hearing or right of appeal because lawyers are solely in control of complying with the rules in question at their leisure. Members report on their own compliance with the impugned rules — no adjudication is needed in order to determine whether a member has failed to meet the requirements. A suspension under the impugned rules ends immediately when the member comes into compliance with them. There is no residual punishment or fine other than a reinstatement fee. …. the Act and the Rules reasonably grant no right to a hearing or right of appeal because only the member can end the suspension by complying with the requirements.

In Québec, more so than elsewhere in Canada, government has scripted a role for itself in lawyer governance. Québec's Office des professions du Québec (R.S.Q., c. C-26), in effect, polices the Barreau—the province's law society—in the discharge, by the Barreau, of its brief to superintend Québec's advocates. (A separate society, likewise subject to dictates of the Office des professions du Québec, governs Québec notaires.)

Overall, (i) some provisions of enactments creating law societies, and other legislation, together with (ii) rules made by those societies, (iii) adaptations by those societies of the *Model Code of Professional Conduct* (as of 31 May 2024), crafted by the Federation of Law Societies of Canada and (iv) common law memorialise regulatory accountability of law practitioners to the societies—and the public. Conduct incongruent with required regulatory accountability exposes practitioners to investigation by, and—if warranted—disciplinary processes of, the societies (not to mention, if warranted, penal or criminal prosecution by the Crown).

A lawyer having an unblemished professional record during 46 years of practising law was convicted by Law Society of Saskatchewan for failure to maintain proper books and records for eight client matters, and for entering into creditor-debtor relationships with clients (2018 SKLSS 8 (CanLII)). His appeal from the convictions was dismissed: *Abrametz v. Law Society of Saskatchewan*, 2020 SKCA 81 (CanLII); although his objections to the sanctioning process and sanctions (disbarment, absent right to apply for readmission before 01 January 2021) were sustained, on the basis of "inordinate delay" by the Society in prosecution of the disciplinary proceeding. Sanctioning was stayed by the Court of Appeal. The stay was, on 08 July 2022, lifted by Supreme Court of Canada which remitted the penalty, as well as costs, aspects of the discipline matter to the Saskatchewan Court of Appeal: 2022 SCC 29 (CanLII). The Court of Appeal allowed Mr. Abrametz's penalty appeal and remitted sentencing, as well as costs, to the Law Society's Hearing Committee: 2023 SKCA 114 (CanLII). On 06 March 2024, Regina radio station CJME reported the Law Society's Hearing Committee (reconstituted after one of its three members died, and another accepted judicial appointment) had on 14 February 2024 accepted a joint submission from Committee counsel and Mr. Abrametz that he be granted leave to resign from the Law Society and pay $25,000 costs.

Denied leave to appeal to Supreme Court of Canada (File No. 39763, 20 January 2022, 2022 CanLII 1935 (SCC)), from judgment of Alberta Court of Appeal: *Law Society of Alberta v. Beaver*, 2021 ABCA 163 (CanLII) was a former member of Law Society of Alberta. His appeal to Alberta Court of Appeal had been dismissed from an Order of civil contempt by Alberta's Court of Queen's Bench for engaging in law practice after disbarment.

Decisions by the Chief Crown Prosecutor, a member of Law Society of Alberta, resulted in a complaint against him to the Society. Steps taken, in response to the complaint, by the Society, were sustained, in: *Quaye v. Law Society of Alberta*, 2021 ABCA 167 (CanLII); leave to appeal to Supreme Court of Canada denied: File No. 39840, 17 February 2022, 2022 CanLII 10381 (SCC).

A Saskatchewan Law Society's finding of conduct unbecoming (which resulted in severe sanctions) against a lawyer (involving an allegation he mishandled funds he received in settlement of a client's residential school claim) was reversed by a divided Saskatchewan Court of Appeal, in: *Merchant v. Law Society of Saskatchewan*, 2022 SKCA 2 (CanLII).

A lawyer (of impeccable barrister and academic credentials) agreed disbarment for having forged court documents to falsely indicate he was divorced and then unlawfully 'married' his law clerk, in: *Law Society of Ontario v. Morton*, 2022 ONLSTH 29 (CanLII).

A solicitor who, on nine occasions, used a 'disability' badge not belonging to him to park near his (personal injury) law firm, was disbarred by the England and Wales' Solicitors Disciplinary Tribunal. He had earlier been criminally convicted for three of the occasions of his parking misconduct. Three months before, the Tribunal suspended another solicitor (who suffered mental health problems) for six months, for one occasion of the same misbehavior. (*Legal Futures*, 03 November 2021.)

Two solicitors, who proved creative in having, for three months, managed to obtain daily rail travel from London to Surrey, England, without paying, reached the end of the line in 2019. Both fare-dodging lawyers were disbarred by the England and Wales Solicitors Disciplinary Tribunal. In unconvincing mitigation submissions, both informed the Tribunal they did pay the much cheaper daily fare when returning from Surrey to London. (*Legal Futures*, 29 January 2019.)

The managing director of a law firm who ordered legal assistants and a trainee solicitor to retrospectively 'witness' documents which had already been signed was disbarred by the England and Wales Solicitors Disciplinary Tribunal (*Legal Futures*, 04 December 2020).

Granted, an experienced solicitor in Hook, Hampshire, England was not found to have professionally misconducted himself "dishonestly or without integrity". Nonetheless, he was fined CDN$11,690 by the Solicitors Disciplinary Tribunal. He had received gifts as a legacy under an elderly client's will (including a dwelling which the solicitor later sold for CDN$745,000). The Tribunal found the solicitor had arranged for a young solicitor, and then a consultant legal executive, in his law firm, to provide advice when the client instructed the solicitor to include himself as a legatee in the client's will. The Tribunal concluded both had given the client "robust, independent advice." There was no suggestion, the Tribunal found, that any pressure was placed on the client by the solicitor to benefit him. The Tribunal concluded that the advice received from the solicitor and the consultant legal executive sufficed to ensure the client's decision was made with "independence of mind". The Tribunal gratuitously added that the advice should have originated from persons having "independence of position" from the client's law firm. (*Legal Futures*, 26 September 2018.)

Having received gifts totaling over CDN$6,235 from a client during a four-month period, a solicitor was disbarred by the Solicitors Disciplinary Tribunal. He had received the funds without first advising the donor client to obtain independent legal advice, and absent himself consulting his law firm. (*Legal Futures*, 19 December 2018.)

An appeal by a London, England barrister practising 40 years, from the fine (CDN$20,940) imposed by his professional regulator for behaviour external to law practice—late-payment of his income tax—was dismissed. The barrister explained that reductions in legal aid income had so reduced his cash flow as to impair his ability to promptly pay the tax. The regulator, in rebuking the solicitor, cautioned that all barristers would be "well advised" to make adequate provision for their income tax liabilities, given the "episodic" nature of their incomes. (*Legal Futures*, 21 December 2018.)

A solicitor practicing family law with Setfords, based in Guildford, England—a law firm which advertises: "We aren't lawyers first, we're family members—brothers, sisters, mothers, fathers, sons and daughters"—has been disbarred by the Solicitors Disciplinary Tribunal. Certainly, he appears to have put himself, not the law firm, first. From his home (the firm has 400

home-based lawyers), he created an online divorce service, separate from his law practice, to avoid professional regulation and avoid sharing with his law firm the fees the service generated. This collateral law practice, called 'Divorce Assistant', provided advice, documents, and court appearances. "His motivation," the Tribunal concluded, "was personal financial gain." (*Legal Futures*, 22 August 2019, and inquiries by this Paper's author.)

Law Society of Alberta dismissed the complaint of a client asserting professional misconduct against an Edmonton lawyer. The lawyer admitted having engaged in sexual relations with her. He argued the code of conduct governing him in Alberta does not prohibit lawyers having sex with clients. In dismissing the complaint, the Society stated that the lawyer "has demonstrated an understanding that he must conduct himself in a conscientious and cautious manner while representing his clients and that he must at all times maintain a professional solicitor-client relationship that does not bring the reputation of the legal profession into disrepute." (Most public reaction to the decision was hostile.) (Johnston, Janice, CBC News, 13 July 2018.)

On complaint of a state employees' union executive to Newfoundland and Labrador Law Society, about media statements by lawyer Robert W. Buckingham criticizing the Province's corrections system, the Society's Complaints Authorization Committee (CAC) concluded reasonable and probable grounds obtained to believe he had engaged in conduct worthy of sanction. The CAC issued a Letter of Counsel to Mr. Buckingham. That prompted Mr. Buckingham to have issues with the Society. He contended the Society's CAC process was flawed, and its decision to issue the Letter unreasonable. On judicial review, the court sustained Mr. Buckingham's position, quashed the counsel letter and remitted the matter to the CAC for reconsideration (2022 NLSC 37). The Society's appeal was unanimously dismissed (2023 NLCA 17), as was the Society's SCC appeal leave application: File No. 40884, 04 April 2024, 2024 CanLII 27905 (SCC).

Lawyer Wong employed Li as a real estate clerk in his law firm. Ho was Li's spouse. For failing to supervise his firm's real estate transactions, Wong was, by what now is Law Society of Ontario, suspended for four months and ordered to pay costs of $10,000, increased on appeal to $50,000. Wong, in turn sued Li and spouse Ho, alleging they used his firm to promote and facilitate

fraudulent schemes and conspiracies by fraud, deceit, and likesuch. Wong's civil suit was, by Ontario Superior Court, dismissed, as was his appeal: 2023 ONCA 42 (CanLII), and his SCC appeal leave application: S.C.C. No. 40657, 21 September 2023, 2023 CanLII 85847 (SCC), in *Oscar Wong v. Jennifer Li, also known as Jennifer Ho and Raymond Ho, also known as Ray Ho*.

"Vancouver lawyer … [P.D.] has agreed to pay a $15,000 fine to the Law Society of B.C. after admitting to professional misconduct related to his treatment of an articling student [M.O.]. In a consent agreement with the law society, which was published online … [22 December 2023], … [D.] acknowledges failing to 'act with courtesy, civility, and good faith,' contrary to the society's rules. The misconduct stems from a lawsuit … [D.] brought against the student, which made allegations regarding her 'loyalty, truthfulness, and competence' that the court determined were unfounded, according to the consent agreement. …. " (CTVNews Vancouver.ca Reporter, 23 December 2023).

Moving from Law Society to Court: in response to the impugned civil proceeding against her, M.O. counterclaimed against [P.D.] for wrongful dismissal. British Columbia Supreme Court granted her judgment for $18,934 general damages and $50,000 aggravated damages. [P.D.]'s appeal from the judgment was dismissed; M.O.'s cross-appeal was allowed. British Columbia Court of Appeal increased by $100,000 her general damages, from $18,934; maintained her aggravated damages of $50,000, and added $25,000 in punitive damages.

A member of the Barreau du Québec was, by its Disciplinary Council, convicted of (i) failing to declare to her client, for whom she was claiming compensation for assault, that she had collected $80,000 from a third party as extrajudicial fees when the case was settled; (ii) collecting from the client without entitlement, as professional fees, $95,000 which comprised half the settlement contrary to an avocat-client 30% fee agreement, and (iii) participating in a scheme whereby she gave the source of the $80,000 payment to her two fee invoices for services never rendered. The Council's disposition, which fined and disbarred the member, was not disturbed, on appeal, by the Professional Tribunal even though it quashed the member's conviction on count (ii). The member's further appeal to Québec Superior Court was dismissed, and her application for

leave to appeal to Québec Court of Appeal was refused: 2023 QCCA 1135 (CanLII), as was her SCC appeal leave application: S.C.C. No. 40953, 21 March 2024, 2024 CanLII 22669 (SCC), in *Diane Lafond v. Me Samy Elnemr, in his capacity as assistant syndic of the Barreau du Québec*.

In Canada, in 2022 (most recent year for which data available), complaints, and disciplinary responses to—and other resolutions of—complaints, based on analysis of Federation of Law Societies of Canada data (Chambre des notaires du Québec, New Brunswick, Nova Scotia and P.E.I. not reporting) totaled as follow:

Complaints received: 9,036

Complaints screened out: 4,276

Informal resolutions 338

Other dispositions (besides informal resolutions and disciplinary charges): 3,485

Complaints resulting in disciplinary charges: 223

Discipline panels convened which heard disciplinary charges: 393

Acquittals on disciplinary charges: 5

Convictions on disciplinary charges: 177

Disbarments: 47

Suspensions: 72

Resignations: 550

Custodial orders/Decisions/Trusteeships (above-mentioned and Ontario and the Barreau also not reporting) 24

(Note that although the above statistics show complaints received in 2022, reported dispositions may have been from some complaints received in 2022 and from some complaints in earlier years.)

Deserved criticism of deportment of some organizations tasked with enforcement of regulatory legal responsibility of Bar members and their law practices is made manifest by Gavin MacKenzie and Brooke MacKenzie of MacKenzie Barristers, Toronto ("How legal regulators lost sight of the public interest?" in: (2018), 27 *CBA/ABC National* (No. 1), at pp. 40-41):

> In December [2017], a British disciplinary tribunal suspended a barrister for six months because he gave £2,300 ($3,930 CDN) to a legal aid client who had told him that she could not afford food or electricity. The barrister, who had recently reported earnings of £787,000 ($1.3-million CDN) a year from legal aid, told the disciplinary panel that he wanted to help the woman, who struggled with drug addiction, "turn her life around."
>
> The panel found that the barrister had compromised his independence, and that his conduct was "likely to diminish the trust and confidence which the public place in the profession".
>
> The disciplinary tribunal's decision can be explained in part by the differences between the British and Canadian systems of legal regulation; in Britain the bar has traditionally enforced a more stringent view on the distance required between lawyers and clients. The penalty was also influenced by the panel's finding that the barrister had failed to co-operate with the regulator.
>
> Nevertheless, the panel's conclusion is dubious or worse. The barrister's decision to give money to a struggling client for food and shelter was "likely to diminish the trust and confidence which the public place in the profession"? Really? The opposite is true.
>
> . . . .
>
> In Canada, the enabling statutes of law societies impose on our regulators an overarching duty to protect the public interest. That is, no doubt, a weighty and difficult challenge.
>
> But have Canadian law societies lost sight of what the public really values? Are our regulators addressing the issues that truly matter to the public? A few well-publicized decisions cause us to wonder.
>
> Is the public's trust and confidence in the profession enhanced when a law society, without receiving a complaint, initiates discipline proceedings for a lawyer's "incivility" in his aggressive in-court conduct in defence of a client facing serious criminal charges? (This saga is now in its ninth year, at untold expense [now concluded with the Supreme Court of Canada's decision in *Groia v. The Law Society Of Upper Canada,* 2018 SCC 27 (CanLII)].)

Is the public's trust and confidence in the profession enhanced when two lawyers who acted on a large corporate transaction are acquitted of allegations of conflict of interest after a 138-day hearing, and the law society is ordered to pay them $1.3-million in costs because the proceeding became unwarranted when the law society's case collapsed? [*Law Society of Upper Canada v. DeMerchant*, 2017 ONLSTA 5 (CanLII); 2017 ONLSTA 10 (CanLII). The two lawyers, now retired from law practice, have since sued the Law Society of Ontario for $22-million.]

Is the public's trust and confidence in the legal profession enhanced when lawyers (and retired lawyers) are all required to sign and file away a template statement of principles in which they vow to promote diversity, equality, and inclusion?

4.4 Legal Responsibility: Civil Accountability To Clients And To Other Lawyers

4.4.1 Clients

Determining whether a lawyer owes a duty of care to a client or non-client requires examination of all surrounding circumstances that define the relationship. Defining the scope of the retainer is an essential, but not the only, element of the analysis where a client alleged that the lawyer's duty of care arises out of and extends beyond the retainer. *Meehan v. Good*, 2017 ONCA 103 (CanLII).

Where family law instructions received by a lawyer include allegations of intimate partner sexual mistreatment (or other violence), the lawyer's duty to the client is illustrated in *McCann v. Barens*, 2023 BCSC 2000 (CanLII).

Common law and equity, and retention letters and agreements—as well as instruments (e.g., rules and codes of conduct) prescribing accountability—define practitioner civil legal accountability to clients; whether in tort (e.g., negligence, fraud, deceit), under contract, or by fiduciary obligation. They are fulsomely detailed by Madam Justice Sheilah L. Martin (since 18 December 2017, a Supreme Court of Canada Justice), in her 587-paragraph, 24 March 2016 Reasons For Judgment—essential reading, although not a 'family law' case—which found a lawyer civilly accountable, in: *Luft v. Zinkhofer*, 2016 ABQB 182 (CanLII); appeal dismissed (except reference quantum of punitive damages; the issue of costs, and a loan agreement): 2017 ABCA 228 (CanLII); application for leave to appeal to Supreme Court of Canada denied: S.C.C.

File No. 37805, 07 June 2018, 2018 CanLII 51177 SCC). For another comprehensive treatment of lawyer civil liability principles also not originating in an exclusively 'family law' milieu, see: *Pilotte v. Gilbert*, 2016 ONSC 494 (CanLII) (trial); 2016 ONSC 1334 (CanLII) (trial costs) which denied liability.

Pre-dating *Zinkhofer* and *Gilbert* is a noteworthy civil legal accountability decision, for damages, by a former client against a lawyer, in this instance providing 'family law' services: *Rider v. Grant*, 2015 ONSC 5456 (CanLII), which dismissed action against the lawyer.

For a more recent negligence decision, partially allowing a proceeding against a family law lawyer, see: *Raichura v. Jones*, 2020 ABQB 139 (CanLII). The Court there found, at paras. [172]-[173]:

> [172] … the Defendant was negligent in the pre-mediation phase of the retainer. Ms. Raichura was coerced into a mediation she did not want or instruct on an informed basis. She was not properly prepared for the mediation and went in unaware of her legal entitlements. This meant she could not make an informed choice when settlement options arose. Nor was she advised of the risk of going into mediation without disclosure of the investment accounts.
>
> [173] At mediation, Ms. Raichura found herself in a position where … [her] arguments and positions she thought would lead to an unsuccessful mediation were struck down by her own counsel. Believing that she had a diminished claim, and having lived through an emotionally and financially stressful period for months, Ms. Raichura entered into an agreement where she received substantially less than she believed she was owed.

(In making the decision, the Court cited para. [57] from: *Webb v. Birkett*, 2011 ABCA 13 (CanLII), application for leave to appeal to Supreme Court of Canada denied: 2011 ABCA 170 (CanLII). The *Birkett* judgment sustained, on appeal, dismissal of a negligence action against a family law lawyer. That proceeding alleged the lawyer had failed to provide proper and complete legal advice, causing her client to make an improvident matrimonial property settlement and waive her spousal support entitlement.)

Fully allowing a claim in negligence against a lawyer in an Ontario family proceeding was: *Martin v. Giesbrecht Griffin Funk & Irvine LLP and Lavergne*, 2022 ONSC 1684 (CanLII).

In Québec, a lawyer, in 2003, introduced two clients to the lawyer's financial advisor and that advisor's personal friend. The lawyer recommended his two clients consult the financial advisor. During the next four years, the lawyer continued to recommend, to his two clients, the advisor. The two clients, on the strength of the lawyer's endorsement, invested and enlisted about 100 others who also invested, in total, over $7.5-million, with the firm of the financial advisor. In 2007 the lawyer-recommended financial advisor and his associate at their investment firm disappeared with all the invested funds. To recover their missing investment funds, the two clients sued the lawyer—and his law firm—in negligence: (i) for breaching the duty to advise them, and (ii) for disregarding the duty of loyalty to them. Their suit, dismissed at trial, was allowed on appeal to Québec Court of Appeal: *Matte-Thompson c. Salomon*, 2017 QCCA 273 (CanLII). The Québec Court of Appeal decision was affirmed by Supreme Court of Canada (8-1): 2019 SCC 14 (CanLII).

A social worker and her lawyer spouse (among others) were ordered to pay compensatory, moral (i.e., pain, suffering, likesuch), and punitive damages to a Québec Estate of an elderly woman they had abused. The abuse by the social worker and lawyer spouse comprised fabricating a false mandate in anticipation of the woman's incapacity; obtaining judgment homologating the counterfeit mandate; relieving the woman's bank account of $474,000; breaking into the woman's home; fraudulently obtaining an order to forcibly remove the woman from her home, and transporting the woman to a senior's residence (from which she later fled) with instructions she was not to receive visitors or telephone calls. She died during the consequent civil damages litigation, that was continued by her Estate. The appeal of the social worker and her spouse to Québec Court of Appeal was dismissed, in: *Obodzinski c. Succession de Kalimbet Piela*, 2021 QCCA 449 (CanLII); application for leave to appeal to Supreme Court of Canada dismissed: File No. 39751, 17 February 2022.

Due to a judicial finding that the law firm of a client had failed to divulge, to him, a conflict of interest while representing him, the firm was ordered to pay $10,000.00 moral damages (but not reimbursement of the legal fees he had paid the law firm, his expenses of travelling to Montreal for trial, or punitive damages). His appeal of the damages award was dismissed, in: *S.M. v.*

Sternthal Katznelson Montigny, 2021 QCCA 673 (CanLII); application for leave to appeal to Supreme Court of Canada dismissed: File No. 39791, 17 February 2022.

England and Wales High Court of Justice, having found a law firm rendered negligent advice, nonetheless refused to condemn the firm to pay damages because, the Court concluded, the client would not have listened to the proper legal advice anyway (*Legal Futures*, 12 October 2021).

Entirely aside from a judgment for damages, resulting from in-court or out-of-court negligence, a lawyer may be susceptible to adverse consequences. In exceptional circumstances, a lawyer suffered in-court costs; *Québec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 (CanLII), at paras. [16]-[20]; *Sangha v. Sangha*, 2014 ONSC 4088 (CanLII), additional reasons: 2014 ONSC 5301 (CanLII); *Macmull v. Macmull et al.*, 2015 ONSC 5667 (CanLII), and *Ferreira v. St. Mary's General Hospital*, 2018 ONCA 247 (CanLII), at paras. [23]-[40]; application for leave to appeal to Supreme Court of Canada dismissed: S.C.C. File No. 38109, 04 October 2018. Imposition of such personal costs was denied in: *Power (Re): Yetman v. Yetman*, 2016 NLCA 56 (CanLII), and *J.P. v. British Columbia (Children and Family Development)*, 2018 BCCA 325 (CanLII), at paras. [33]-[40]; SCC appeal leave application dismissed: File No. 37817, 08 March 2018, 2018 CanLII 11146 (SCC).

A missed deadline (i.e., negligence) did not warrant costs against a lawyer, personally, in: *R. v. Gowenlock*, 2019 MBCA 5 (CanLII); a criminal law decision, capable of much broader, helpful application.

A client's objection to her family law lawyer's bill of fees founded on alleged ineffective representation (i.e., negligence) was unsuccessful, in: *S. L. F. Law Office v. J. [B.] H*, 2021 NLMA 1 (CanLII), at paras. [37]-[56]. Likewise not sustained was an objection based on ineffective assistance of counsel, in: *Jewish family and child service of greater toronto v. E.K.B.*, 2019 ONSC 6214 (CanLII), at paras. [90]-[117], additional reasons: 2020 ONSC 2924 (CanLII); *CB v. BM*, 2021 ABCA 266 (CanLII), at paras. [70]-[87], and *Bors v. Bors*, 2021 ONCA 513 (CanLII), at paras. [45]-[51], additional reasons: 2021 ONCA 5912 (CanLII).

Recourses, other than pecuniary, are available (if not always successful) in response to lawyer negligence.

A lawyer's inadvertence (i.e., negligence), by missing the deadline to apply for spousal support, was procedurally overcome by a court, in: *Mihoren v. Quesnel*, 2021 ONCA 898 (CanLII).

A convicted man's appeal for a new trial, on the basis of alleged ineffective assistance (i.e., negligence) by his trial lawyer, failed, in: *Echalook c. R.*, 2017 QCCA 1318 (CanLII); application for leave to appeal to Supreme Court of Canada dismissed: S.C.C. File No. 37827, 04 October 2018.

Lawyer negligence in the personality of common mistakes, or typographical, mathematical and other errors, may be subject to judicial rectification: *Stephens v. Stephens*, 2016 ONSC 367 (CanLII), additional reasons: 2016 ONSC 1393 (CanLII).

Adverse consequences, for a client, of the lawyer's negligence involving deceptive conduct are addressed, in: *Cormier v. The Registrar of Land Titles*, 2018 NBQB 219 (CanLII) (which ordered rectifications of the land titles register).

A significant indicator of complaints of, and compensation for, negligent discharge by lawyers of their civil (including family law practice) legal responsibility is the 2023 annual report of LawPRO (Lawyers' Professional Indemnity Company). LawPRO underwrites mandatory primary errors and omissions coverage for more than 31,000 Ontario lawyers; about 27% of practising lawyers in Canada. (LawPRO, since 1997, has also been providing excess coverage for many of those lawyers in about 1,700 Ontario law firms.)

Most ever claims received by LawPRO (since incorporation in 1995) was in 2023. Of those claims, 34% were resolved without any payout; the response to 55% of the claims was confined to defence costs, and indemnity payments spoke to the remaining 11% of claims.

The frequency of claims per law practise disciplines, underlying the 2023 LawPRO report, reflects trends identified by LawPRO dating back to 2008 for some disciplines. In order of claim frequency, they are: litigation; real estate; wills and estates; family law; corporate/commercial; criminal; employment; intellectual property; immigration, and franchise. (See **APPENDIX B**.)

Family law—as a claims area, by count—has ranked fourth, based on the average number of claims, annually—222—from 2011 to 2021. Leading contributors to family law negligence and/or breach of trust claims have been: communication (38%); errors of law (22%); time management (10%); inadequate investigation (10%); clerical and delegation (8%); conflict of interest (4%), and other (8%). (See **APPENDIX C**.)

A family law lawyer cannot, however, be sued in negligence by a spouse before s(he) has exhausted all remedies against the other spouse: *Radosevich v. Harvey*, 2022 ONSC 3549 (CanLII).

For assessment of damages in civil claims against lawyers, see: Herschorn, Arnie," On The Measure Of Damages in Solicitor's Negligence Cases" (2011), 90 Can. Bar Rev. 151.

For circumstances where negligence of a plaintiff's lawyer will be attributed to the Plaintiff as being the Plaintiff's responsibility, see: *Hengeveld v. The Personal Insurance Company*, 2019 ONCA 497.

4.4.2 Other Lawyers

Arrangements for practising law made between a sole practitioner and a multi-member law firm (which included letterhead stating 'Practicing in Association, not in Partnership'), in Ottawa, may incur liability for the law firm when the sole practitioner is alleged to have defamed another law firm (about the manner in which it represented residential school clients), in: *Wallbridge v. Brunning*, 2018 ONCA 363 (CanLII), application for leave to appeal to Supreme Court of Canada dismissed: SCC File No. 38150, 17 January 2019; and additional reasons 2020 ONSC 6396.

Practising arrangements among lawyers proved critical in determination of when a law firm is liable for a lawyer's debts, in: *1062484 Ontario Inc. v. Williams McEnery*, 2020 ONSC 825 (CanLII); 2020 ONSC 3861 (CanLII) reference costs; appeals dismissed: 2021 ONCA 129 (CanLII); S.C.C. appeal leave application dismissed: File No. 39644, 19 August 2021, 2021 CanLII 75368 (SCC).

5.0 ETHICAL RESPONSIBILITY

5.1 Ethical Responsibility: Overview

Overlapping legal responsibility—'judicial', regulatory and civil (considered above)—is ethical responsibility. Currently, the template guiding authorship of codes of ethical responsibility is the Federation of Law Societies of Canada's *Model Code of Professional Conduct*. Historically, reliance was had on Canadian Bar Association's comparable code which, in turn, has influenced the Federation's *Model Code*. Provincial and territorial law societies have adopted or, at least, mirrored substantial parts of the *Model Code* in their respective ethical responsibility instruments. (Such instruments are comprised of ethical codes supplemented, complemented, or both, by some provisions of lawyer-regulating provincial or territorial legislation and law society rules.)

The national Federation comprises law societies of the nine provincial, and three territorial, common law jurisdictions: the civil law Barreau du Québec, and the Chambre des notaires du Québec. The Federation does not have any direct regulatory authority over any of Canada's legal profession. It does, however, supervise "the development of high national standards of regulation [by provincial and territorial law societies] to ensure that all Canadians are served by a competent, honourable and independent legal profession," the Federation states online.

The other national law organization is Canadian Bar Association, a voluntary assembly of Canadian lawyers, students of law, law teachers and judges. Like the Federation, the Association lacks regulatory authority over lawyers or notaires practising in the provinces or territories. Unlike the Federation, the Association possesses no supervisory role; but does serve an advisory function. The Association promotes itself as "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 for all members of the legal profession; … [and to promote] fair justice systems,… [facilitating] effective law reform,… [advancing] equality in the legal profession and … [being devoted] to the elimination of discrimination."

How do the codes of ethical responsibility published by both the Federation (commencing 2009) and by the Association (from 1920 to 2010) affect the three constituencies of lawyer legal responsibility, i.e., judicial, regulatory and civil?

Judicial accountability is impacted by ethical codes and other instruments espousing responsibility standards of the respective law societies only in the sense that such codes and other instruments are regarded as being significant public policy. Sopinka J. (for the Court) in *MacDonald Estate v. Martin* (1990 CanLII 32 (SCC), a decision involving the issue of conflict of duty), wrote 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.) [, 1983 CanLII 2810 (MB CA)]. The courts, which have inherent jurisdiction to remove from their 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. ….

As such, codes of professional conduct afford interpretive guidance.

Regulatory and civil (unlike judicial) accountability—as species of legal responsibility—are, however, extensively influenced by standards of ethical codes and other responsibility instruments.

They are central to regulatory accountability required by law societies.

They inform—and may determine standards for—civil accountability to clients. For example:

(a) Martin J., in *Luft v. Zinkhofer,* 2016 ABQB 182 (CanLII), application for leave to appeal to Supreme Court of Canada denied: S.C.C. File No. 37805, 07 June 2018, is of the view (at paras. [55]-[58]), that if the legal matter involves a civil action for damages against a lawyer, more than serving as a public policy statement (as in judicial accountability), regulatory professional standards may contribute to determining, or be, the standard of care.

(b) They are often pivotal in determining such legal civil matters as (i) whether costs in civil proceedings, in which practitioners are counsel, should be ordered against them personally (*Macmull v. Macmull et al.*, 2015 ONSC 5667 (CanLII)); (ii) taxation of lawyers' invoices to clients; (iii) whether a client is competent to give instructions (*Thorpe v. Fellowes Solicitors LLP*, [2011] EWHC 61 (Q.B.) (BAILII)); *Bank of Nova Scotia v. Kelly* (1973 CanLII 1289 (PE SCTD)), and (iv) whether the constitutionalized solicitor-client privilege applies to particular circumstances (*Canada (National Revenue) v. Thompson*, 2016 SCC 21 (CanLII), *Canada (The Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20 (CanLII)).

(c) They do not prelude collection of fees (*Pellerin Savitz LLP v. Guindon,* 2017 SCC 29 (CanLII), at paras. [34]-[35]).

5.2 Ethical Responsibility: Federation Of Law Societies Of Canada

5.2.1 Federation's *Model Code Of Professional Conduct*

5.2.1.1 *Model Code*

In the wake of its lawyer mobility agreements to November 2009, the Federation of Law Societies of Canada then approved a *Model Code of Professional Conduct* (currently posted online as amended to April 2024 and cross-indexed with codes of all provinces and territories). Promotion by the Federation of national standards included, in the Federation's view, harmonization of various then-existing rules of professional conduct. "With [agreements providing

for] national mobility of the profession", states the Federation online, "the law societies recognize the benefit of moving toward harmonized rules of conduct so that the public can expect the same ethical requirements to apply wherever their legal advisor may practice law."

The *Model Code* has since been amended in December 2011, December 2012, October 2014, and March 2016. Resulting amendments included alterations to *Code* provisions addressing conflict of interest (e.g., acting against former clients); the 'future' harm' exception to solicitor-client privilege; communicating with witnesses; and the duty to report another lawyer (among other amendments).

In February 2017, the Federation (based on a 31 January 2017 Consultation Report) commenced a public consultation dedicated primarily to identifying issues, deserving of *Model Code* amendments, that relate to technological competence, and return to law practice of former judges. Unclear is whether these subjects come within the scope of the current review by the Federation's Standing Committee on the Model Code of Professional Conduct; reference which the Committee has invited comment at consultations@flsc.ca until 29 November 2024.

In or since 2010, the *Model Code*—not itself binding on law societies of the provinces and territories—has, with modifications, been adopted by all save the Chambre des notaires du Québec in ethical codes of those law societies. Their respective memberships must adhere to such codes; in their home provinces or territories, and wherever else they practise in Canada.

Consideration by the Federation of further amendment of its *Model Code*, or of publication of guidelines, is warranted to provide for ethical direction of lawyers—retained by parents—respecting interests of the children of those parents. Compelling arguments for so undertaking is advanced in *Ethical Duties of Lawyers for Parents Regarding Children of Clients: Being a Child-Focused Family Lawyer* by Nicholas Bala, Patricia Hebert and Rachel Birnbaum ((2017), 95 Can. Bar Rev. 3).

5.2.1.2 Application of *Model Code*

Employment of provisions of the *Model Code* as adopted by a provincial law society is comprehensively and effectively documented in *The Law Society Of British Columbia v. Vining*, 2024 LSBC 15. In that regulatory proceeding, Respondent lawyer had exclusively practiced family law (representing, in approximately equal numbers, female and male clients) for 48 years (in itself, deserving of commendation). For his oral conduct during and shortly following an examination for discovery of his client's wife, he was on 18 March 2024 found by a Hearing Panel of the Law Society to have professionally misconducted himself.

A 24-paragraph Appendix to the Hearing Panel's Decision reproduces excerpts from the impugned discovery examination; primary focus of the proceeding.

The Citation against the Respondent lawyer, tried before the Hearing Panel, alleged (para. [3]):

> [a] On or about September 16. 2020, during and after an examination for discovery you conducted of a female opposing party, CK, in a family matter, you did one or both of the following:
>
> [a] made statements which were discourteous, uncivil, offensive, or demeaning, contrary to one or more of rules 2.2-1, 5.1-5, 7.2-1 and 7.2-4 of the *Code of Professional Conduct of British Columbia* (the "Code"); and
>
> [b] engaged in harassment by your inappropriate conduct or comments towards CK, that you knew or ought to have known were unwanted, and could have the effect of violating CK's dignity, contrary to rule 6.3-4 of the Code.
>
> This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

In the British Columbia *Code*, 2.2-1 (2.1-1 in the *Model Code*) requires a lawyer practice law "honourably and with integrity"; 5.1-5 requires a lawyer "be courteous and civil and act in good faith" to a tribunal; 7.2-4 requires a lawyer "be courteous and civil and act in good faith" regards all persons with whom the lawyer deals in law practice; 7.2-4 requires a lawyer not communicate "in a manner that is abusive, offensive, or otherwise inconsistent with the proper

tone of a professional communication", and 6.3-4 requires a lawyer not to engage in reprisals against anyone in defined circumstances.

"Professional misconduct" not being defined by British Columbia *Code* or legislation, the Hearing Panel concluded (para. [43]) that "[d]etermining whether a lawyer's behaviour warrants a finding of professional misconduct is context specific." In identifying the context, the Hearing Panel agreed Respondent's position (para. [60]) that the Panel "not parse out individual parts of the discovery and consider them in isolation." The Panel undertook to base its decision "on assessment of the whole examination for discovery."

Based on four days of evidence (and the audio recording and hardcopy transcript of the discovery, and submissions), the three-member Hearing Panel's Decision unanimously held that both during and after the discovery, Respondent's conduct "amount[ed] to a marked departure from the conduct expected of a lawyer and amounts to professional misconduct" as the Citation alleged.

The Decision is a cautionary tale for any lawyer engaged in litigation—especially in the milieu of often treacherous domestic retentions and proceedings.

5.2.2 Federations Rules and Standards Supplementing *Model Code Of Professional Conduct*

Model Rules—as well as standards, guidance, advisories, and reports—have been published by the Federation of Law Societies of Canada; separately from its *Model Code of Professional Conduct*. They have, substantially, focused on fighting money laundering and terrorist financing. The Model Rules, so focused, are dedicated to (i) cash transactions; (ii) maintenance of records of such transactions; (iii) client identification and verification, and (iv) trust accounting.

The Model Rule on Cash Transactions, approved by the Federation on 11 September 2004 (and amended on 19 October 2018) recommends that "[a] lawyer must not receive or accept cash in an aggregate amount greater than $7,500 Canadian dollars in respect of any one client matter."

The Model Rule on Recordkeeping Requirements for Cash Transactions, also approved on 11 September 2004 (and amended on 19 October 2018), requires that records be kept for six years immediately prior to the fiscal year of a lawyer in which s(he) destroys them.

Both of these Model Rules have been wholly or largely adopted by the Provinces and Territories. The stated amount of cash transactions has been increased by some law societies. In largely adopting the 'record keeping' Model Rule, Québec Barreau requires such records be maintained indefinitely.

The Model Rule on Client Identification and Verification was approved on 20 March 2008 (and amended on 12 December 2008, 19 October 2018 and 14 March 2023). The Model Rule has been adopted, in whole or part by most, if not all, law societies.

The Model Trust Accounting Rule was approved on 19 October 2018. The Rule includes the direction that a lawyer "must pay out money held in a trust account as soon as practicable upon completion of the legal services to which the money relates." The Rule has been adopted by all law societies.

(Four partners in a Welsh law firm were fined by the England and Wales Solicitors Disciplinary Tribunal for 'sitting' on 979 residual trust balances, totaling over CDN $744,205 where there had been no activity for at least six months. The same firm omitted to conduct reconciliations on its deposit accounts for 22 years. (*Legal Futures*, 01 May 2020.))

As relates to Canada's crime proceeds legislation, the Supreme Court of Canada, on 13 February 2015, dismissed an appeal by Canada (2015 SCC 7 (CanLII)) from the decision of British Columbia Court of Appeal (2013 BCCA 147 (CanLII)). The Court of Appeal had upheld the Federation's challenge of certain provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, as amended (the *Act*) and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, as amended (the *Regulations*), on the basis they were inconsistent with the Constitution of Canada to the extent that they applied to lawyers. The impugned provisions of the *Act* and *Regulations* required Canadian lawyers to (i) establish record keeping and client identification requirements for financial services providers and

other persons or entities that engage in businesses, professions or activities that are susceptible to being used for money laundering or the financing of terrorist activities, and (ii) to report suspicious financial transactions and cross-border movements of currency and monetary instruments, in relation to such clients.

The Federation had objected to those particular provisions of the *Act* and *Regulations* because, the Federation maintained, they violated solicitor-client privilege; unlike the Federation's own model rules to fight money laundering and terrorist financing, which, materially informed the 2015 Supreme Court of Canada decision.

Parliament of Canada subsequently, in 2018, engaged in the first statutory review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and related *Regulations*. Revisions of both, resulting from the 2018 review, have been made (to and including 31 May 2024). Required every five years, a second statutory review was conducted in 2023.

Since the Federation, in September 2023, commenced a legal challenge to proposed *Income Tax Act* amendments which would expand mandatory disclosure obligations and create a new category of notifiable transactions, British Columbia Supreme Court, late November 2023, granted an injunction suspending application of those proposed provisions to legal professionals pending outcome of the challenge: *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2023 BCSC 2068. Earlier this year, the language of the injunction was refined to provide that should the Court rule against the Federation on the merits of its challenge (hearing date not yet scheduled), legal professionals would be required to make disclosures only for transactions for which the reporting obligation arises after the date of the challenge's final disposition.

The Federation has also published National Discipline Standards to raise and assimilate standards on how law societies perform discipline functions and, more generally, how complaints are handled. They address fairness, public participation and timeliness in how the discipline process functions. The Standards were implemented by all provincial and territorial law societies effective from 01 January 2015 and revised on 07 June 2021. The Federation has also struck a Standing Committee on National Discipline Standards, whose mandate is to monitor

implementation of and compliance with the Standards by law societies. The outcome was the National Discipline Standards (revised October 2023).

5.3 Ethical Responsibility: Canadian Bar Association

5.3.1 Canadian Bar Association *Code Of Professional Conduct*

Besides the Federation's *Model* Code, Canada's other national code of ethical responsibility is the *Code of Professional Conduct*. This document originated with the *Canons of Legal Ethics* (very general statements of principle) approved by Canadian Bar Association (CBA) on 02 September 1920; materially influenced by comparable Canons that had been adopted by the American Bar Association in 1908. CBA's *Canons of Legal Ethics* were, on 25 August 1974, replaced by the *Code of Professional Conduct*, comprised of general rules and supporting commentary. The *Code of Professional Conduct* was, in August 1987, substantially revised. In August 1995, the Code was amended by addition of Chapter XX (non-discrimination) and, in 2004, was the subject of other substantial alterations and additions. An entirely-revised *Code of Professional Conduct* was published in August 2006.

As a result of "*Conflicts of Interest*: Final Report, Recommendations & Toolkit" by a Task Force of CBA published in August 2008, a further, entirely-revised version of the *Code of Professional Conduct* was approved in 2009, and published on 28 January 2010.

Because of adoption or adaptation by law societies of the Federation's *Model Code of Professional Conduct*, approved in 2009 (as since amended in 2011, 2012, 2014 and 2016), the Association's Code will not be further amended or revised. It will, nonetheless, serve advisory functions; for example, continue to provide a consensus record of the distilled 'responsibility' wisdom and experience of Association members from 1920 to 2010, for the benefit of current and future practising lawyers. It will also furnish a source of reference to enhance understanding and application of the Federation's *Model Code* (in many respects comparable to the CBA *Code*).

5.3.2 Canadian Bar Association Guidance

The Canadian Bar Association, in its advisory role, does, and will continue to, afford significant (other-than-regulatory) guidance to practice of law in Canada. In recognition of technology's increasing impact on Canadian legal practice, two sets of Guidelines were published by the Association: (i) *Guidelines for Practising 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). Both sets of Guidelines were updated in August 2014 by a manual entitled *Practising Ethically With Technology* guidelines which in turn, in 2015, was replaced by *Legal Ethics in a Digital Context* (completely revised in 2022).

Association tool kit publications (useful in daily practice to family law lawyers) include: *Retainers and Fees Toolkit*; *Conflicts Of Interest Toolkit*; *The CBA Child Rights Toolkit*; *Successfully Parenting Apart: A Toolkit*; *Promoting Preventative Legal Health [:] A Tool Kit for Lawyers*; *Assessing Ethical Infrastructure in Your Law Firm: A Practical Guide*; *Tax Matters Toolkit: Separation & Divorce FOR LAWYERS* and *Ethics Professional Responsibility* (which, under "Resources", includes "The Ethics of Advertising: A Toolkit for Lawyers" (31 March 2023)).

5.4 Ethical Responsibility: Other Canadian Ethical Responsibility Sources

Besides adopting—in many instances with modifications—the Federation's *Model Code*, some Canadian jurisdictions have published ethics codes of professional conduct for particular specialties of law practice. Perhaps most ambitious of these has been the *Family Law Standards*. The Standards were prepared by the Professional Standards (Family Law) Committee of the Nova Scotia Barristers' Society Council; approved on 25 March 2011 by the Council. The Standards, as since revised—which qualify as a model for establishing family law practise standards in any jurisdiction—are comprised of chapters on conflict of interest; client competence; lawyers' competence; reconciliation; dispute resolution options; documentation of advice and instruction; unrepresented party; domestic contracts; affidavits; children; scope of representation; independent

legal advice; adoption; assisted human reproduction, and electronic information and social media. The Standards are current to 09 May 2018.

Somewhat comparable to commentaries integral to professional conduct codes are "Loss Prevention" resources published by Canadian Lawyers Insurance Association.

Although neither code, nor commentary, nor practice bulletin, LawPRO Magazine, published quarterly by the Lawyers' Professional Indemnity Company, routinely addresses principles and practices of responsibility (appearing to focus, particularly, on interaction of practising lawyers and digital technologies).

5.5 Ethical Responsibility: United States

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 Federation's *Model Code* and 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 U.S. *Model Rules.* The other one-third of state Bar-governing bodies copy, more or less, the earlier (1969) U.S. *Model Code.* The *Model Rules* underwent major revision based on the November 2000 proposals of the ABA Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct, as adopted, then amended, by the ABA House of Delegates in 2002; resulting in the 2004 *Model Rules of Professional Conduct* (most recently amended in August 2020). (Courts—instead of lawyer governing bodies, as throughout Canada—are, largely, responsible for lawyer discipline in many United States' jurisdictions.)

5.6 Ethical Responsibility: Access To Codes Of Ethical Responsibility

Access to documents elucidating ethical responsibility is provided, online, by the Federation of Law Societies of Canada; the Canadian Bar Association (CBA); and American Bar Association.

Responsibility issues are also addressed, online, by the instructive Canadian Association for Legal Ethics.

5.7 Ethical Responsibility: Reception To Codes Of Ethical Responsibility

Despite titanic time and energy invested in their production and promotion, lawyerly conduct codes have sometimes received glacial reception. Joshua Wilner, former Federal Court of Appeal law clerk, reports ((2010), 89 Can. Bar Rev. 611, at pp. 616-618):

> An important empirical study has found that the majority of lawyers practising in Ontario did not find the *Professional Conduct Handbook* containing the Ontario Rules of Professional Conduct to be a useful tool. On the one hand, this finding begs the question whether there is a need for better codes of conduct. Certainly it is a fair interpretation of these findings that rules of professional practice would be more instructive to practitioners if they were more tailored to and contextualized in specific practice areas [such as the Nova Scotia Family Law Standards]. That is a somewhat intuitive hypothesis.
>
> On the other hand, though, these findings may at the same time point to a deeper issue concerning the inadequacy of rules regulating the ethics of professional practice. ….
>
> Legislative [including regulatory] solutions to ethical problems are often inadequate on their own because rules cannot fully capture the subtleties and complexities of the everyday reality of practising lawyers. The reason why all things are not determined by law is that law is defective owing to its universality. …. because lawyers trade in rules they have a predilection to conceive of problems in terms of rules—legal ethics as the 'law of lawyering'—as well as a deep-rooted reflex to deal with problems by promulgating more of them or amending the existing ones.

6.0 PROFESSIONAL RESPONSIBILITY

6.1 Professional Responsibility: Overview

A helpful definition of the distinction between the concepts of aspirational professional responsibility—'professionalism'—on one hand, and above-considered 'legal' and 'ethical' responsibility on the other, was provided by the (now-former) 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:

> Professionalism …, is not what a lawyer must do or must not do. It is a higher calling of what a lawyer should [aspire to] do to serve a client and the public.

Arguably, professionalism may be equated with "attainment of proficiency" which Joseph Conrad, in his first memoir, *The Mirror of the Sea*, perceives as involving

> "the pushing of your skill with attention to the most delicate shades of excellence, [which] is a matter of vital concern. Efficiency of a practically flawless kind may be reached naturally in the struggle for bread. But there is something beyond—a higher point, a subtle and unmistakable touch of love and pride beyond mere skill; almost an inspiration which gives to all work that finish which is almost art—which *is* art."

(Conrad was there writing about yacht racing; although his sentiment is known to serve as aspirational creed of not a few practising lawyers.)

Professor Beverley G. Smith of University of New Brunswick, in his supplemented *Professional Conduct for Judges and Lawyers*, 4th Ed. (Fredericton: Maritime Law Book Ltd., 2017, chap. 1, at para. [5]), joined in the debate about lawyer professionalism:

> …, there have been spirited debates as to whether law is any longer a profession, or has become a business. One such debate reportedly took place in Kelowna, British Columbia [in 1993], where lawyers attending a meeting of the British Columbia branch of the Canadian Bar Association expressed two differing views:
>
> 'We must confront the practical reality that we are in business and the importance, from a professional point of view, of staying in business.'
>
> and
>
> 'The profession of law involves service as its main aim[,] and profit as an incidental.'

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

6.2 Professional Responsibility: Civility Among Lawyers

"For so long as I can remember," recalls Justice Dennis R. O'Connor (Ontario's Associate Chief Justice from 2001 to 2012 and a Court of Appeal Justice from 1998 to 2012),

> lawyers have been talking about the decline in civility and professionalism among members of the Bar. It is frequently said that in the past, lawyers were more professional than they are today. They placed greater emphasis on public service, idealism and the importance of treating everybody, including their opponents, with courtesy and respect. The concern these days is that the pressures created by the business model of legal practice have overridden many of the values which distinguished a profession from a business.

(Wolfson, Lorne H. and Black, Adam N., "*Incivility and Sharp Practice in Family Law*" (2012), 31 CFLQ 275.)

In a succinct and savvy decision, Himel J. describes the decline as "a culture of unreasonableness that plagues the Court": *Schieder v. Gajewczyk*, 2021 ONSC 635 (CanLII), para. [11].

All responsibility—professional, not to mention legal and ethical—is perceived by some lawyers as comprising mere aspirational goals; which they honor in the breach. However, judicial attitudes toward that misguided approach are changing. Now-former Delaware Chief Justice Veasey, when he served as Chair of the Board of the National Centre for State Courts, trenchantly 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 … . Lack of professionalism is a cancer which also infects office practice.

(Note, above, reference to the Court's role in the United States as lawyer regulator.)

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."

Leading Canadian barrister Eugene Meehan K.C., who has written prolifically and lectured universally about incivility, says:

> The legal profession is an adversarial profession and gladiators for justice do not always follow the motto in the Russell Crowe movie Gladiator: 'Strength and Honour'. More often it's strength and crush. Some lawyers see—and use—litigation as a flamethrower.
>
> It may well be that they cannot change and that, as a lawyer, you simply will not be able to change them. What you can change is your attitude in dealing with such people and your tactics in dealing with them.
>
> . . . .
>
> As difficult as this may be, if you resort to similar conduct, you open yourself to countercharges or worse, and damage your own credibility. Make a practice of preparing yourself in advance of the next communication and anticipate the situation. This will allow you to control your emotions and responses.
>
> Never wrestle with a pig. You only get dirty and the pig likes it.

Sadly, the legal profession—in Canada and elsewhere—is plagued by more than a few practitioners who lack sense of proportion and, worse still, possess toxic mental hard drives bereft an 'off' switch. Only sodium pentothal may compel them grasp reality. They severely obstruct *bona fide* initiatives to resolve legal disputes. Their unprofessional behavior amplifies stress, prolongs negotiations, provokes or protracts trials (or both), and inflates expense. They overlook the wise counsel of New Brunswick native Francis Alexander Anglin (who was to become Chief Justice of Canada in 1924). He was prompted to write, in 1910, that nothing "is more destructive of public confidence in the administration of justice than … incivility, rudeness, or open disrespect on the part of counsel … " (cited in: Orkin, Mark M., *Legal Ethics,* 2nd Ed. (Toronto: Canada Law Book, 2011), at p. 31).

"The right way to deal with … [such lawyers]," advises Barry Laushway, Prescott, Ontario civil jury lawyer (passed, 2009), "[is] to completely ignore the provocative remarks [or other behavior] and under no circumstances … refer to it in writing or in conversation …. as if it never existed[,] and respond politely and professionally to the substantive issues … " (cited in: Meehan K.C., Eugene, "Civility as a Strategy in Litigation", a timeless, consequently, undated commentary published by his Ottawa law firm, Supreme Advocacy LLP (not susceptible to hyperlinking).

Public perceptions of incivility—not to mention, self-interest—of lawyers have contributed to activist challenges to the legal profession. Citing family law practitioners in particular, Kendyl Sebesta reports (*Law Times*, 19 March 2012), that lawyers are said—by a watchdog organization, Canadians For Family Law Reform (established April 2011)—to be "creating added conflict between former spouses in order to cash in on cases languishing in the … court system." (Not a few among the Reform membership are, of choice, former and current self-represented family litigants.)

A Sarnia, Ontario lawyer, targeted by the organization in February 2012, reacted by stating that "the organization has yet to offer any suggestions for reform and has instead focused on denigrating the system."

Certainly, Canada's legal profession—and the judiciary—have been resolute in efforts to curtail incivility. An instructive initiative has been the publication, most recently in February 2020, of *Principles of Civility and Professionalism for Advocates* by The Advocates' Society (Ontario). The booklet, first published in 2000 as "Principles of Professionalism for Advocates", acknowledges that counsel—"bound to vigorously advance their client's case, fairly and honourably"—fulfill a role that is "openly and necessarily partisan … ." Nonetheless, they can "disagree, even vigorously, without being disagreeable;" devoid of antagonism and acrimony. After all, "[c]ivility amongst … [law practitioners] entrusted with the administration of justice is central to its effectiveness and to the public's confidence" in it.

Whether a lawyer's in-court zealous advocacy warranted citation for unprofessional conduct was, on 01 June 2018, decided by Supreme Court of Canada: *Groia v. Law Society of*

Upper Canada, 2018 SCC 27 (CanLII). For the Court majority, Moldaver J. (in a 161-paragraph judgment) cautioned (at para. [3]) that

> [c]are must be taken to ensure that free expression, resolute advocacy and the right of an accused to make full answer and defence are not sacrificed at the altar of civility.

(Moldaver J. (McLachlin C.J. and Abella, Wagner and Brown JJ.); for separate reasons, concurring in the result: Cŏte J. (paras. [162]-[174]); for joint reasons, dissenting: Karakatsanis, Gascon and Rowe JJ., paras. [175]-[233].)

On the other hand (at para. [76]), Moldaver J. explains,

> … I should not be taken as endorsing incivility in the name of resolute advocacy. …. To the contrary, civility is often the most effective form of advocacy. Nevertheless, when defining incivility and assessing whether a lawyer's behaviour crosses the line, care must be taken to set a sufficiently high threshold that will not chill the kind of fearless advocacy that is at times necessary to advance a client's cause.

Disciplinary citation of Joseph Groia derived from events during a criminal trial which commenced in 1999 with pre-trial motions (and concluded, successfully for the accused, in 2007). Mr. Groia served, in court, as defence counsel, both during pre-trial and trial proceedings. Law Society of Upper Canada (now: Law Society of Ontario), on 03 April 2003, began monitoring, and subsequently instituted an investigation of, his in-court defence counsel conduct. The Society had not received any complaint against Mr. Groia. The Court, in which he defended the accused, had not censured him or sent a concerning letter to the Society. Instead, the Society was galvanized into action by having read media reports of Mr. Groia's in-court pre-trial and trial defence of his client. On 18 November 2009, the Society brought a disciplinary proceeding, rooted in alleged incivility, against Mr. Groia. The proceeding asserted six particulars of professional misconduct based on his in-court behaviour early in the criminal trial.

The disciplinary complaint was sustained by the Law Society Hearing Panel (2012 ONLSHP 94 (CanLII)): two-month suspension, $247,000 costs (2013 ONLSHP 59 (CanLII));

affirmed, in part, by the Law Society Appeal Panel: one-month suspension, $200,000 costs (2013 ONLSAP 41 (CanLII)). The Society Appeal Panel determination was affirmed by Ontario's Superior Court of Justice Divisional Court (2015 ONSC 686 (CanLII)). The decision of the Divisional Court, in turn, was affirmed by Ontario Court of Appeal (2016 ONCA 471 (CanLII)) and reversed by Supreme Court of Canada. (Mr. Groia's lead 'discipline' counsel, Earl A. Cherniak K.C., is reported by *The National Post* (01 June 2018) to have said, "… if you're only going to win once, the Supreme Court of Canada is the place to win.")

Moldaver J.'s decision exhibits his appreciation of the role of trial counsel—especially criminal defence lawyers—seeking to cope with perplexities, pressures and provocations of their vocation. (He had, for 17 years, practised criminal law in association with peerless criminal counsel Arthur Martin and Marc Rosenberg (later Ontario appellate Justices), Edward Greenspan and Alan Gold.) Family law lawyers experience, with exalted intensity, the same vicissitudes of trial counsel work.

The criminal trial, at the heart of the disciplinary complaint, was described by Moldaver J. (at para. [12]) as being

> … characterized [in the early going] by a pattern of escalating acrimony between Mr. Groia and the … prosecutors. A series of disputes plagued the proceedings with a toxicity [not occasioned exclusively by Mr. Groia] that manifested itself in the form of personal attacks, sarcastic outbursts and allegations of professional impropriety grinding the trial to a near standstill.

Applying the standard of review of "reasonableness", Moldaver J. (at para. [59]) agreed the Law Society's Appeal Panel had, correctly, taken "a context-specific approach in evaluating … [Mr. Groia's] in-court behaviour. In particular, it considered whether Mr. Groia's allegations [satisfied the bench marks of being] … made in good faith and … [having] a reasonable basis. It [the Appeal Panel] also identified the frequency and manner in which Mr. Groia made his submissions and the trial judge's [largely stoic] reaction to Mr. Groia's behaviour as relevant considerations."

Concerning what constitutes the applicable bench marks—"good faith" behaviour having a "reasonable basis"—Moldaver J. (at paras. [94] to [96]) wrote:

> [94] …there is good reason why a law society can look to the reasonableness of a legal mistake when assessing whether allegations of impropriety are made in good faith, but not when assessing whether they are reasonably based. The "good faith" inquiry asks what the lawyer *actually* believed when making the allegations. The reasonableness of the lawyer's legal mistake is one piece of circumstantial evidence that may help a law society in this exercise. However, it is not determinative. Even the most unreasonable mistakes can be sincerely held.
>
> [95] In contrast, the "reasonable basis" inquiry requires a law society to look beyond what the lawyer believed, and examine the foundation underpinning the allegations. Looking at the reasonableness of a lawyer's legal position at this stage would, in effect, impose a mandatory minimum standard of legal competence in the incivility context. In other words, it would allow a law society to find a lawyer guilty of professional misconduct on the basis of incivility for something the lawyer, in the law society's opinion, *ought to have known* or *ought to have done*. And, as I have already explained, this would risk unjustifiably tarnishing a lawyer's reputation and chilling resolute advocacy.
>
> [96] That, however, does not end the matter. As my [dissenting] colleagues correctly observe, "the Law Society rules govern civility *and* competence": reasons of Karakatsanis J. et al., at para. 193 (emphasis in original). A lawyer who bases allegations on "outrageous" or "egregious" legal errors may be incompetent. My point is simply that he or she should not be punished for *incivility* on that basis alone. As such, any concern that law societies are "effectively dispossess[ed]" of their regulatory authority misstates my position.

In summarizing the circumstances underlying, and the disposition of, Mr. Groia's appeal, Moldaver J. wrote (at para. [160]):

> … Mr. Groia's mistaken allegations were made in good faith and were reasonably based. <u>The manner in which he raised them was improper</u>. However, the very nature of Mr. Groia's allegations — deliberate prosecutorial misconduct depriving his client of a fair trial — led him to use strong language that may well have been inappropriate in other contexts. The frequency of his allegations was influenced by … [a then] underdeveloped abuse of process jurisprudence. The trial judge chose not to curb Mr. Groia's allegations throughout the majority of Phase One [of the criminal trial]. When the trial judge and reviewing courts did give instructions, Mr. Groia appropriately modified his behaviour. Taking these considerations into

> account, the only reasonable disposition is a finding that he did not engage in professional misconduct. [Underlining added to original for emphasis.]

The Court's minority decision agreed the standard Moldaver J., for the majority, adopted (from the decision of Law Society's Appeal Panel) in deciding the appeal. But, the minority pointedly disagreed the manner in which Moldaver J. applied the standard; e.g., "reweigh[ing] the evidence" (see espy. paras. [176]-[177]). The Court minority harbored (at para. [177]) "serious concerns about the impacts that will follow" from the majority reasons and disposition.

Six years after the *Groia* decision, evidence of such concerns has yet to surface. Meantime, Mr. Groia was, from April 2015 to 2023, twice elected a Bencher of Ontario's Law Society.

Neither judicial supervision, nor law society discipline, of barristers for inappropriate in-court conduct was engaged in circumstances which required the High Court of Justice of England and Wales to sit on appeal in *A v. R & Anor*, [2018] EWHC 521 (Fam). Rather, appellate court focus was on rectifying the adverse impact, on a family proceeding, of raucous trial advocacy. Involved was a parenting dispute; then in its tenth year. Quality (if you will) of the trial advocacy caused the trial judge to have "thoroughly blotted his copy book". On appeal, Mr. Justice MacDonald, in his 21 March 2018 judgment—a paragon of judicial understatement and restraint—wrote of the "concerning tendency on the part of the advocates simply to interrupt each other in an effort to advance their competing submissions". The advocacy in court, he added, descended into a "shouting match". Intermittently, the barristers were joined in their verbal discord by one or other of the parties, and a witness. Professional discipline in the well of the court appeared to MacDonald J. "to have broken down entirely" at one point. To cure this "serious procedural irregularity", a new hearing was ordered.

Evidently, trial counsel in *A v. R. and Another* had not read—or had chosen to neglect—wise counsel offered by *Ethical Duties of Lawyers for Parents Regarding Children of Clients: Being a Child-Focused Family Lawyer* (Bala, Nicholas; Hebert, Patricia and Birnbaum, Rachel (2017), 95 Can Bar Rev 1-33). Introducing (at pp. 2, 4) their seminal treatment of barrister

responsibility for children of the barrister's adult litigants in parenting proceedings, the authors contend:

> The traditional conception of Canadian lawyers is that they focus on the legal problems of their clients, take instructions from them, and have an ethical duty to be 'partisan advocates' for them without regard for the effect that the advocacy of their rights may have on others. While … appropriate … in criminal cases and … in some civil contexts, it is not … for family cases. …. One of … [our] purposes … is to stimulate discussion among family justice professionals about whether there should be a clearer articulation of ethical duties of lawyers for parents in regard to the children of their clients, and ultimately to animate the development of a set of ethical guidelines specifically for family lawyers in Canada. [Footnote 4 omitted.]

Outside the courtroom, what was found to constitute reprehensible zealous advocacy by a lawyer resulted in Law Society of British Columbia (*Johnson (Re),* 2016 LSBC 20 (CanLII)) suspending him for 30 days and requiring him pay costs of $10,503.05. He had employed the expletive "f--k"—in "an angry and insulting manner"—during a verbal altercation. The altercation, outside a Kelowna court room, involved lawyer J. and an RCMP peace officer subpoenaed to testify at the criminal trial of J.'s client on a charge bred of a matrimonial dispute.

Likewise reprimanded and fined (although not suspended) by a England and Wales Bar disciplinary tribunal was a Middlesbrough, England solicitor for shouting at a fellow solicitor "in an aggressive manner" and preventing the fellow solicitor from leaving a conference room by placing his arm against the door. (Rose, Neil, *Legal Futures*, 29 May 2018.)

The same tribunal fined a barrister, 48 years in practice, about CDN $1,600.00 for in-court shouting and pulling faces at a Justice (*Legal Futures*, 08 June 2020).

Such was the incivility of one lawyer in a family law proceeding in his dealings with counsel opposite that the trial judge, in *Morland Jones v. Morland-Jones*, 2018 ONSC 3758 (CanLII), at paras. [16]-[20], espy. at para. [18], supplied him with *Principles of Civility and Professionalism for Advocates*, by the Advocates' Society (Ontario).

Application for leave to appeal to Supreme Court of Canada (File No. 39894, 31 March 2022, 2022 CanLII 23896 (SCC)) was denied a lawyer from dismissal of his appeal from conviction by the Law Society of Manitoba (*Histed v. Law Society of Manitoba*, 2021 MBCA 70) for incivility in his correspondence with the Crown, the Law Society; in documents filed in court, and in oral submissions before court. The correspondence, court filings and oral arguments alleged misconduct by the Assistant Deputy Attorney General, and by a Crown attorney (e.g., that the Crown attorney caused a suicide).

Adjudged "unseemly" by Peel J., in *Crowther v Crowther & Ors (Financial Remedies) (Rev1)*, [2021] EWFC 88, was correspondence between solicitors adopting "a bitterly fought adversarial approach" in an England divorce proceeding (34 court hearings) that cost the parties legal fees totaling CDN $3.6-million. Collectively, the parties embarked on their litigation with CDN $2.7-million net assets. Lamented the Judge, "I have largely had to concentrate on how to divide the debts fairly." Under a judgment-ending "Last word" he commented, "[t]he only beneficiaries of this nihilistic litigation have been the specialist and high-quality lawyers."

Incivility of a 68-year-old solicitor in a central London law firm toward his Black legal assistant prompted the England and Wales Solicitors Disciplinary Tribunal to fine him. One wonders why the solicitor was not suspended on the basis of mental incapacity, or disbarred, after he sheathed his head in a large white envelope and ran, sober, through the law firm premises repeatedly calling the assistant's name and shouting that he had "joined the KKK". (*Legal Futures*, 23 October 2020.)

Highly unusual, although unavoidable in the circumstances, was an Order of the High Court of Justice of England and Wales in October 2020, enjoining a barrister from continuing to represent a father in a bitter parenting proceeding because of acrimony between the father's counsel and the mother. The Court concluded the barrister had become so embroiled in the courtroom litigation that she ceased to be either objective or dispassionate. (*Legal Futures*, 14 October 2020.)

A male barrister was reprimanded by the England and Wales' Bar disciplinary tribunal for describing the opposing counsel's instructing lawyer as an "hysterical woman" and female lawyers more generally as intemperate. Doubling down at his hearing before the tribunal, he stated that female solicitors can be "overemotional and can 'overegg the pudding', going overboard in routine situations …. That is, I believe, a biological fact rather than an insult". (*Legal Futures*, 10 February 2022.)

Untoward behavior by a senior barrister against a junior female member of his law chambers occasioned both a criminal conviction for assault by beating (12-month community service order; 180 hours of unpaid work), and a regulatory three-month suspension from practice imposed by the England and Wales Bar disciplinary tribunal. Following a meal with the junior (their relationship had always previously been purely professional), he headbutted her during an alcohol-fueled altercation, on a Chelsea street, which left the junior on the pavement, her face covered in blood. (*Legal Futures*, 01 April 2020.)

A regulator's decision (CDN $54,580 fine; CDN $311,875 costs), disciplining a former Freshfields law firm partner for having drunken sex with a junior lawyer from the same firm, at her flat, has been overturned by the High Court of England and Wales. Though the partner's conduct was "inappropriate", the Court identified the fact the Solicitors Disciplinary Tribunal decision under appeal did not find the solicitor's conduct to be an abuse of a position of seniority or authority. The two-member panel of the Court ruled that the solicitor did not conduct himself contrary to professional behavior principles requiring him to act with integrity (principle 2) and to behave in a way that maintained the trust the public placed in him and in the provision of legal services (principle 6): *Beckwith v. Solicitors Regulation Authority*, [2020] EWHC 3231 (Admin). (Freshfields, headquartered in London, and the world's oldest law firm, was founded in 1743.)

A High Court of Justice of England and Wales Judge, Paul Matthews, has expressed his despair at solicitors' incivility in conducting "bad-tempered" litigation, "like schoolchildren in the playground". The Judge explained that "[i]t somehow seems to have become acceptable for solicitors to become mere mouthpieces for their clients to vent their anger at their opponents. It is

not enough for the clients to dislike or even hate each other: the solicitors [appear to believe they] must do so too." (*Legal Futures*, 10 February 2022.)

A recent refreshing perspective on 'civil' advocacy among lawyers is offered in "The stress of incivility" by Loraine Champion on 31 May 2022, at the Canadian Bar Association online. Her commentary includes the prescription:

> Next time you see an email from an uncivil lawyer in your inbox, stop to take several deep breaths ….
>
> If the e-mail is offensive, notice the emotions you are experiencing. Name them without judging them, and then try a simple grounding exercise to help you move beyond your emotional reaction. ….
>
> ….
>
> You can … consider the situation of the uncivil lawyer. Do they have an unreasonable client whom they can't manage? Could there be a mental health or addiction issue underlying their behaviour?
>
> ….
>
> When we view incivility as an indicator of distress, rather than jerkdom, we exercise compassion, bringing greater humanity to the practice of law, …. When we engage our empathy, we can work to develop a more robust and constructive working relationship and enrich our resilience reserve. ….

Exercising restraint is no less important in written advocacy. Making forthwith and feverish—instead of delayed and deliberate—reply to another lawyer's e-mail or letter, or (improper as may be) to a judge's conduct of a judicial proceeding, can be fraught with disciplinary peril.

6.3 Professional Responsibility: Civility Between Lawyers And Judges

A civility report by Law Society of Upper Canada (now: Law Society of Ontario) recaps testimony at a series of 'civility forums' across Ontario. Commenting in *The Globe and Mail* on

09 June 2010, Jeff Gray writes that the forums evidenced "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; griping about having to wear black gowns; punching a client in the face; and a lawyer threatening a mediator that the lawyer promises to be "10 times a bigger asshole than you."

Less so than historically, barristers of impeccable litigation civility may have their discipline tested—not by a colleague, but—by the Bench. Witness this excerpt from a 2017 family law hearing:

> [Mr. …] I rest, for the facts, as viewed by my client, on Part 2 of our Trial Brief. Of the cases cited in Part 4 on the law, I choose, I regard by far most important the Supreme Court of Canada decision in [counsel cites the decision].
>
> [Justice] Look, Mr. […], I want you to know I read Supreme Court of Canada decisions. I'm up to date. Not just the headnotes, the full text, everything. Move on. I am very well aware of the decision. I don't need an introduction or a lecture. What's your next point?
>
> [Mr. …] I only want to refer to a paragraph or so, which is not in the Trial Brief because of evidence we didn't, couldn't anticipate.
>
> [Justice] Move on, counsel.
>
> [Mr. …] I'm duty bound to my client to make a record, I'll only need two minutes.
>
> [Justice] Which is two minutes I don't have. Move on.

The temptation, for involved counsel, to continue remonstrating with the obnoxious Court, was palpable. He, appropriately, did not. He 'moved on'. When the Court reserved decision in the proceeding, counsel prepared a short-written argument on the point he was precluded, by the Court, from advancing orally. Authoring counsel served the written argument on opposing counsel, and convinced the Court Registry to accept and file it. He needed 'make a record' in discharging his legal duty of care to the client, at trial, and in event of an appeal reliant on the trial record. The

written argument appeared to have been considered in the subsequent decision. In responding, as he did, to the Court, he avoided the potential for Court censure, a Court referral to his Law Society, and civil action by his client. Had such occurred, he probably would have successfully overcome those measures. But, the resulting involved substantial 'tax' on his professional time and personal pocket would have been largely, if not entirely, unrecoverable.

Much less circumspect was a member of the Barreau du Québec. He suffered discipline for his expedited, dissentious written communication to a disagreeable Justice of the Québec Superior Court. During argument, the Justice criticized the member in his role as defence counsel. In written reasons rejecting an application on behalf of counsel's client, the Justice levied further criticism, accusing counsel of using bombastic rhetoric and hyperbole, of engaging in idle quibbling, of being impudent and of doing nothing to help his client discharge his burden. Counsel, barely having had time to digest the reasons, despatched a private letter to the Justice. Counsel's letter (i) called the Justice loathsome, arrogant and fundamentally unjust; (ii) accused him of hiding behind his judicial status like a coward; (iii) asserted the Justice had a chronic inability to master any social skills, was pedantic, aggressive and petty, and exhibited a propensity to use his court to launch ugly, vulgar and mean personal attacks. Counsel copied the letter to Québec's Chief Justice; requesting he be relieved of ever again having to appear before the Justice his letter impugned. The Chief Justice, in turn, duplicated the letter to the Syndic du Barreau; responsible for discipline of Québec lawyers. Ultimately, counsel was suspended from practice for 21 days. Québec courts upheld the suspension.

In dismissing counsel's appeal to Supreme Court of Canada (*Doré v. Barreau du Quèbec*, 2012 SCC 12 (CanLII)), Abella J, for the Court wrote

> [68] Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they

> arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.
>
> [69] A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. …, such criticism, even when it is expressed robustly, can be constructive. However, in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, Mr. Doré's letter was outside those expectations. His displeasure with Justice Boilard was justifiable, but the extent of the response was not.

Much more jet fuel kinetic language by a sitting Justice was found not to deserve censure, in January 2017, by the Lord Chancellor and Lord Chief Justice of the United Kingdom Supreme Court. From the transcript of a defendant's hearing for sentencing by the Justice:

> Defendant: [You are a] bit of a c***.
>
> Justice: You are a bit of a c*** yourself. Being offensive to me does not help.
>
> Defendant: Go f***yourself.
>
> Justice: You too.
>
> (Defendant bangs on the dock, makes Nazi salute, and repeatedly shouts 'Sieg Heil'.)
>
> Justice: We are all really impressed, Take him down.

Shouting, in-court, when resorted to by the presiding Judge and directed at counsel did not impact validity of an involved trial proceeding in London, England. An appellate Justice took the view the behaviour of the first instance Judge in conducting himself "a little over the top" did not support the contention he was biased; and added that "the real point here in any event is that hostility shown toward an advocate is not to be equated with hostility towards a party." (Hyde, John, *The Law Society Gazette*, 31 May 2018.)

In October 1980, a barrister sat in Newfoundland District Court (since absorbed by Supreme Court [General Division]) in St. John's. He was awaiting the Judge. Abruptly, the Judge emerged. Unsteadily, he mounted the Bench steps and slumped into his judicial chair. His head, upper torso, and hands thudded onto the Bench table. In that posture, the Judge remained

motionless for several minutes. What to do? The barrister's activity of jettisoning several volumes of the English Reports and both volumes of a ninth edition of *Williams' Law of Executors and Administrators* (1893) from counsel table to floor startled the Judge. Abruptly, he rose, clutched his Bench Book and stumbled from the courtroom, supported by its walls. The barrister and opposing counsel (since then a Supreme Court Justice, who died in 2020) were summoned to the Judge's chambers, where the case scheduled for hearing was, after a fashion, mediated and settled.

Ontario Court of Appeal concluded at para. [225] in: *R. v. Mills*, 2019 ONCA 940 (CanLII); application for leave to appeal to Supreme Court of Canada dismissed: SCC File No. 39787, 13 January 2022, "that on multiple occasions the trial judge's remarks to defence counsel were critical, harsh, and at times belittling, having regard to the entire proceedings (trial and sentencing) … ." Nonetheless, the Court did not agree "that there was a reasonable apprehension of bias. …. [or] actual bias."

6.4 Professional Responsibility: *Pro Bono*

Aspiring to render, and performing, *pro bono* legal services are often cited as integral to deportment of professional responsibility. Privately-practising lawyers attest to challenges extended by habitués of the Bench (e.g., when investing them as King's Counsel), by Bar educators, and by the legal academy to deliver unremunerated legal assistance. Most private practitioners correctly regard the challenges as redundant. Rarely does a month elapse in which they do not provide un-invoiced legal advice; either to an otherwise-paying client or to a person who, absent retention, loiters in their law chambers.

Pity the Newfoundland and Labrador barrister whose annual Yuletide feast has, not infrequently, been punctuated by *pro bono* candidates. On 25 December 1979, at 10:30 AM, for example, he was telephone-requested by a federally-appointed District Court Judge (to whom he had never spoken outside a courtroom) to present at his residence at 2:15 PM. The purpose, stated the Judge, was to brief him and his spouse on implications of the provincial marital property legislation; assented to 14 December 1979, to take effect 01 July 1980. The barrister obliged

(attired in Court chambers dress, at the Judge's request). The service was entirely *pro bono*. As the barrister departed the Judge's matrimonial home at 4:30 PM, he declined an invitation to a *quid pro quo*: select a bottle of wine or more potent lubricant from the Judge's 'bar'; which occupied the floor, entirely, of each of the two garmentless closets in the home's front vestibule.

In England, a criminal conviction for harassment resulted from behavior of a barrister—a Tsunami of offensive e-mails—in response to a solicitor's refusal to provide her *pro bono* services. (*Legal Futures*, 21 May 2019.)

7.0 PRACTISING RESPONSIBILITY

7.1 Practising Responsibility: Retention

7.1.1 Retention generally

The three constituents of responsibility—legal, ethical and professional—first challenge law practitioners (i) when deciding whether to agree retention by a potential client and, if agreed, (ii) in establishing terms and conditions of the retainer (financial and otherwise).

Terms of retention should—nay, must—be reduced to writing and signed. (For precedents, see: CBA Retainers and Fees Toolkit.) All too frequently, practitioners—regrettably and inexplicably—default to informal oral, often skeletal, solicitor-client service arrangements.

Whether written or verbal, terms of retention must be (i) fair and (ii) reasonable. Ryan-Froslie, J.A. for a unanimous Saskatchewan Court of Appeal in *Maurice Law, Barristers & Solicitors v. Sakimay First Nation*, 2017 SKCA 36 (CanLII), at paras. [46] (in part) and [47], writes (with respect to a written retainer agreement, which the involved lawyer was attempting to renegotiate):

> [46] …. In order for a fee agreement to be upheld, it must be fair and reasonable. The onus of establishing that such an agreement is both fair and reasonable rests with the lawyer.

> [47] First, the agreement must be fair. The fairness test relates to the circumstances surrounding the making of the agreement and whether the client fully understood and appreciated its nature and effect. If the agreement is found to be fair, then the question becomes whether it is reasonable. Reasonableness relates to the fee charged. Factors relevant to that evaluation are well established and include, but are not limited to, the time expended by the lawyer, the legal complexity of the matter at issue, the results achieved, and the risk assumed by the lawyer … (*Raphael* [*Partners v Lam*, 2002 CanLII 45078 (ON CA)], at para. 50).

Whether a lawyer's cognitive condition precludes eligibility to accept retention was considered by British Columbia Law Society in *Arbabi (Re)*, 2024 LSBC 13 (CanLII). Having weighed evidence, argument and decisions including *Bogue*, 2019 ONLSTH 53 and *Hosein*, 2014 ONLSTH 218, an Interim Action Board of the Society's Tribunal "suspended [a lawyer] forthwith from the practice of law" until further order. In part (paras. [65] and [66]), the Board wrote:

> [65] … [it had] no hesitation in concluding that the extraordinary action of an interim suspension is warranted. In terms of the protection of the Lawyer's clients, the risk to the public and to the administration of justice, the Lawyer cannot be allowed to continue to practise. The risks are too great.
>
> [66] The Lawyer, who presented in the proceeding as earnest and honest, also presented as someone who at times had a shaky grasp on reality. Although she is legally trained and practiced in this profession, she seems to have lost, or at least discarded, any understanding of the process and content of the law and our legal system.

A Québec lawyer's claim for legal services allegedly performed over several years, totalling $268,495.37, was unsuccessful for failure to prove existence of a retention agreement, in *Jean Bigaouette v. Jacques Bérubé, et al.*, 2023 QCCA 1152 (CanLII); S.C.C. appeal leave application dismissed: S.C.C. File # 41001, 04 April 2024: 2024 CanLII 27907 (SCC).

7.1.2 Retention in family law matters

Written retainers are especially important in family law matters that involve parenting issues. The fairness test (cited two paragraphs above) requires special attention when crafting conditions of the retention agreement. Candidly describing such are Morag MacLeod K.C. and

Trudi L. Brown K.C., authors of an address, on 03 March 2016, in Vancouver to the Program: 'Family Law 2016: A Focus on Children and Parenting Issues'. In their address (unpublished)—'Ethics in Parenting Cases: What Are We Doing Wrong'—these two senior, Canadian family law barristers and mediators state:

> As counsel for a parent, the lawyer owes a duty not only to the client, but also to the children of that client.
>
> The children are the beneficiaries of the duties owed to them by their parents and those owed to them by their parents' counsel.

"[T]his statement," write Nicholas Bala, Patricia Hebert and Rachel Birnbaum, "is foundational for the practice of family law, not just in British Columbia, but throughout Canada, and indeed in other countries, where post-separation parenting laws are based on the best interests of the child" (*Ethical Duties of Lawyers for Parents Regarding Children of Clients: Being a Child-Focused Family Lawyer* (2017), 95 Can Bar Rev 3, at p. 9).

Bala, Hebert and Birnbaum explain (at p. 2) that

> [f]or family lawyers, fulfilling their responsibilities in regard to children of their clients are among the most challenging but rewarding aspects of their professional lives. The fulfillment of these responsibilities requires knowledge, skill, sensitivity and judgment. Like so many ethical responsibilities for lawyers, there is significant professional discretion on the part of family lawyers about how to fulfill their obligations to the children of their clients, and doing so requires taking account of the individual context of each case. Although complex and situational, one might summarize the duties of the family lawyer in this regard as 'helping their clients to be good parents.' Duties in regard to children must always be balanced against counsel's obligations to take instructions from their clients.

(The three co-authors footnote that "we consider only those indirect obligations, which are complimentary to but different from those of lawyers who are acting for child clients in family proceedings". For a discussion of the ethical obligations of lawyers representing children, see, e.g., Nicholas Bala, *Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings* (2006), 43 Alta L Rev 845.)

Parenting retainers harbour greater potential for withdrawal than retention agreements to provide legal services for other family matters. Consequently, a family lawyer, in drafting retention agreements involving parenting that address her or his primary obligation to a parenting client, and indirect obligation to the client's child(ren), need include an exit provision. The exit clause would entitle the lawyer withdraw her or his legal representation; including—where a legal proceeding has been commenced in which the lawyer is on record—the right to disengage from obligations to the parenting client and her or his child(ren) subject to being granted, by the Court, leave to withdraw.

7.1.3 Retention for unbundled services

Rendering unbundled services—limited scope retainers to provide part of the services a client's matter requires—demands surgical attention of the services-providing lawyer, not only in services' performance, but also earlier in preparing a retention agreement or letter. Exquisitely-clear language must carefully circumscribe the boundaries of the partial services to be furnished. Consult the Law Society of British Columbia, online, under Access To Justice (Unbundling Legal Services). (British Columbia was the first Canadian jurisdiction to foster unbundling of legal services.) (See **APPENDIX C**: LawPRO's Limited Scope Representation Resources hyperlink.)

7.1.4 Retention as legal coaches

Apposite is the same advice for lawyers serving as legal coaches in part or all of a client's matter. As explained by lawyer Carolynne Burkholder-James (Canadian Bar Association (Small, Solo and General Practice Section), 28 March 2022), "[l]egal coaches provide a valuable service to clients seeking legal advice, but still want to represent themselves and file their own documents." Like unbundled legal services, legal coaching is a form of limited scope retention. Unlike retention of unbundled services, the client "is taking responsibility of doing the legal work with the support of a coach", "has complete control over their case" and may maintain the coaching relationship "long-term".

7.1.5 Retention and third party professional assistance

As emphasized by McLeod James G. and Mamo, Alfred A., in *Annual Review Of Family Law[:] 2022-2023* (Toronto: Thomson Reuters, 2023), at p. 1795, "Income tax considerations intimidate many family lawyers." Therefore (although not there mentioned), family lawyers sometimes retain a chartered professional accountant or likesuch to assist them advise on often-involved income tax features of family law matters. A retention agreement should provide that a third party professional (e.g., to provide tax assistance) be selected and engaged by, and be liable for any inadequate tax advice provided to or for, the client. Were the lawyer, not the client, to select and retain the assisting professional, the lawyer could be saddled with professional negligence liability for income tax advice-related financial or proprietary loss occasioned the client, and have to 'third party' the assisting professional for contribution or indemnity.

The issue of who would bear income tax consequences of a transaction was of such fundamental importance to achieving a matrimonial settlement agreement, in *Neigum v. Van Seggelen*, 2022 SKCA 108 (CanLII), that the Court concluded an objective reasonable bystander would be unable to find, in the absence from the agreement of consequences on that issue, that the parties had agreed on all essential terms of settlement.

However, any dispute over a Canada Revenue Agency (CRA) determination, such as reference routing by CRA of Canada Child Benefit payments, was exclusively within the Tax Court's jurisdiction to resolve, decided *Cook v. Ballantyne*, 2022 SKQB 172 (CanLII).

7.1.6 Liability for retention

Two London, England partners have been fined by the Solicitors Disciplinary Tribunal, for having requested their clients to sign retainer letters which included a declaration absolving the law firm "from any liability whatsoever." The declaration continued, "Liabilities include professional negligence and I hereby indemnify … [the law firm] for all liabilities and costs which they may incur either now or in the future in relation to my instructions." The two lawyers admitted the declaration was both inappropriate, as such, and not in the interest of their clients. (*Legal Futures*, 16 October 2019.)

7.1.7 Changing retentions

Precautions and perils of changing retentions—both for the lawyer discharged, and the lawyer engaged to replace discharged counsel, especially where the client's capacity is in issue—are considered, in: *Estate of P.J.O'N. v. M.C.*, 2016 NLMA 1 (CanLII).

7.1.8 Court-directed retentions

A court, in exceptionally-adversarial family litigation, appointed *amicus curiae* counsel for an impecunious wife—who never retained a lawyer—at outset of trial and, separately, for the husband after he became impecunious during trial (whereupon his lawyer obtained leave to withdraw from the record), in: *Morwald-Benevides v. Benevides*, 2019 ONSC 1136 (CanLII); on appeal (dismissed as moot): *Morwald-Benevides v. Benevides*, 2019 ONCA 1023 (CanLII).

Amicus curiae counsel was appointed for a mother litigating a parenting proceeding in: *W.A.C. v. C.A.F.*, 2021 ONSC 5140 (CanLII) (ultimately, perhaps, decided by a 233-page decision by Justice Alex Finlayson in: 2022 ONSC 2539 (CanLII)).

All those counsel-engaging situations require retention agreements or letters.

7.1.9 Terminating retentions

Whether a retention agreement or letter covers all or part of services required by a client's matter, when the retention services have been completed—so far as the retained lawyer is concerned—s(he) must, in writing, explicitly so inform the client by a terminating document. So doing minimizes the prospect of the lawyer dealing with her(his) professional liability insurer if, e.g., a client is mistakenly expecting future services for a time-limited remedy.

Startling were consequences for two lawyers who had failed to inform their client whether or when a retention agreement terminated, in *Fitzpatrick v. Hefferman*, 2018 NLSC 167 (not published); appeal dismissed: 2019 NLCA 77 (CanLII). The consequences manifested about 10 years after a wife's lawyers evidently assumed the retention had ended. The wife divorced her

spouse in 2002 and resolved parenting and child support issues in 2003. Then, she relocated from Newfoundland and Labrador to British Columbia, without—in the appellate court's language—"clearly severing" retention of her two legal advisers. A draft separation agreement prepared before she departed was never signed. She told one of her two counsel, however, the only matter in the draft agreement that she fancied was a share of her former-spouse's pension. In 2013, she learned her former spouse had retired and was in receipt of his pension. She contacted her counsel from long ago and far away. She inquired about her share of the pension. She was informed her spouse's pension had not been divided. Worse still, she learned, the statutory period for so doing had long ago tolled. In 2013 she sued the lawyers. Suffice to add they were liable to compensate the former client. Baseball pragmatist Yogi Berra would assert, "It ain't over till it's over".

7.2 Practising Responsibility: Conflicts Of Interest (Of Duty)

Whether counsel is eligible to accept retention or, having so done, to continue to perform the retention (as the case may be), requires s(he) not be in 'conflict' of interest (more accurately, 'conflict' of duty). Failure to copiously ensure absence of 'conflict' before accepting retention may occasion financially-dear, discomforting, billable-time dissipating and reputation-deprecating ordeals. Even when 'conflict' due diligence is practiced, such ordeals may, nonetheless, freight counsel where the opposite party resorts, disingenuously, to 'conflict' applications to obstruct, frustrate and delay.

Conflict avoidance begins with screening potential new clients. A particularly-instructive opinion is provided by C. Horkins J. in *Barrese v. Barrese*, 2019 ONSC 3137 (CanLII).

Occasionally, the basis for a 'conflict' application is a concern—perhaps *bona fide*, perhaps not—that the lawyer for one or other of the parties is relying on the lawyer's affidavit or may need to testify (founded on the axiom a lawyer cannot be both counsel and witness in the same cause).

Of countless 'conflict' decisions, those striking counsel from the record or otherwise forbidding a client's counsel of choice from representing the client, recently, include: *Junger v. Portugese*, 2018 ONSC 3376 (CanLII), and *Nguyen v. Neuls*, 2021 SKQB 202 (CanLII).

And, decisions lately confirming counsel not to be conflicted include: *Sandhu v. Mangat*, 2018 BCCA 454; 2019 BCCA 238 (CanLII); *Shalaby v. Nafei*, 2020 ONSC 2437 (CanLII); *Harder v. Sartorio*, 2020 ABQB 404 (CanLII); *Vered v. Innes*, 2020 ONSC 894 (CanLII); *Fedun v. Korchinski*, 2021 ABQB 14 (CanLII), additional reasons: 2021 ABQB 259 (CanLII) (based on an allegation a counsel of record relied on her own affidavit); *Lavender-Smith v. Smith*, 2021 NBCA 34, and *Da Silva v. Kelly*, 2022 ONSC 1402 (CanLII) (based on an allegation a counsel of record may need testify).

Potential for conflict was not found in *Pyke v. Logan*, 2022 ONSC 1234 (CanLII).

No presumption precludes a judge who has heard a counsel-of-record removal application in a family law proceeding from subsequently trying that case: *CCAS v. M.R. and B.W.*, 2019 ONSC 4679 (CanLII).

For resolution of a circumstance in which a lawyer and a motion judge were 'conflicted', see: *S.W. v. C.J.*, 2021 NBQB 229 (CanLII).

7.3 Practising Responsibility: Confidentiality And Privilege

7.3.1 Confidentiality

" …. The rationale for the confidentiality rule ," writes Brent Olthuis, a Vancouver counsel, in *Canadian Legal Practice*, "is that it promotes full and frank communication between lawyers and those consulting them. In the absence of such communication, [concern may occur that] the lawyer might not obtain all the relevant information necessary to render effective professional advice." ((Dodek, Adam M., Gen. Ed.) (Toronto: LexisNexis Canada, 2002), vol. 1, p. 3-26, para. 3.71.)

That confidentiality rule, Olthuis continues, "is distinct from and wider than the solicitor-client privilege. The … [privilege]—a constitutionally protected right—springs from the same concern [as pertains to the confidentiality rule] for encouraging disclosure [by persons consulting lawyers] within the confines of the solicitor-client relationship. …. Even where … information is

not necessarily confidential, the lawyer should avoid gossip, indiscreet conversations and unnecessary shop-talk about a client's affairs. Such actions could result in prejudice to the client. They also tend to degrade the lawyer and the legal profession. …. Lawyers may occasionally receive 'cold-calls' or 'drop-ins' from prospective clients. These persons should be generally considered 'clients' for the purpose of the rule of confidentiality, although not necessarily for the purposes of other rules, such as the duty of loyalty. In these situations, the lawyer must make it clear that they are not representing the … [person] until they have been formally retained. …. Generally speaking, …, lawyers should be cautious in accepting confidential information on an informal or preliminary [unretained] basis, as it may prevent the lawyer from subsequently acting for another party in that matter or a related one. The identity of persons who have approached the lawyer for advice, whether or not those persons become clients, is as a general rule protected by confidentiality. A lawyer should not even disclose having been consulted … [whether or not retained] by a person unless the nature of such matter requires disclosure [or unless the person has, expressly or impliedly, given consent]." ((Dodek, Adam M., Gen. Ed.) (Toronto: LexisNexis Canada, 2002), vol. 1, p. 3-26, para. 3.72 to p. 3-28, para. 3.76.)

Confidentiality governs information a lawyer acquires from third parties, instead of the client, related to a retention. "It is a settled general principle of law that the knowledge of the solicitor is imputed to his or her client: …": *Medoc Properties Limited v. Standard Trust Company*, 2014 NLCA 13 (CanLII), application for leave to appeal to Supreme Court of Canada dismissed: S.C.C. File No. 187, at para. [16]; cited in: *Shinder v. Shinder*, 2018 ONCA 717 (CanLII), at para. [50].

Search warrants issued by Agence du revenue du Québec against a corporation were quashed because some members of Barreau du Québec had offices in the corporation's premises, in: *Agence du revenu du Québec v. 9229-0188 Québec inc.*, 2018 QCCA 1298 (CanLII); application for leave to appeal to Supreme Court of Canada dismissed: S.C.C. File No. 38348, 02 May 2019.

The international law firm Dentons, online, cautions lawyers be careful what they say while ridesharing (via cab, plane, train, elevator) or in a court house (Carolino, Bernise, *Law Times*, 25 February 2020).

Importance of confidentiality in matrimonial settlements, including mediation, whether or not a contract contains what is (or amounts to) a confidentiality clause, is made clear in: *Benson v. Kitt*, 2018 ONSC 7552 (CanLII) (where the contract included a confidentiality clause).

Allowing the Anglo-Canadian law firm Gowlings to rely on 'without prejudice' communications to defend allegations of professional negligence could "undermine the policy of encouraging parties to settle disputes," the England and Wales High Court has ruled: [2019] EWHC 102 (Ch) . The law firm had argued for a "broad exception" to the usual 'without prejudice' rules. The Court acknowledged that, if no exception was made, the trial judge might have an "incomplete picture". However, the Court explained, "[t]hat is, …, a consequence of the 'without prejudice' rule, justified by broad policy considerations and underscored in this case by all parties' implied agreement that their negotiations were to be inadmissible in evidence."

Discussions between counsel, held *Shipton v. Shipton*, 2023 ONSC 2711 (CanLII), per Akazaki J., para. [4], should be considered a confidential "safe space"; not to be detailed in an affidavit to provide "fodder for trial evidence."

7.3.2 Privilege

Privilege – Principles: Solicitor-client privilege is explained by eminent legal scholar Adam Dodek, Full Professor, University of Ottawa Faculty of Law (Common Law Section) in *Solicitor-Client Privilege* (Toronto: LexisNexis Canada Inc., 2014) at xlix, li:

> Solicitor-client privilege is the strongest privilege produced by law. It is also the privilege that clients and lawyers are most likely to encounter. Every time a client speaks privately with a lawyer, solicitor-client privilege is likely to be engaged. Conversely, most lawyers will never encounter informer privilege which is the only other privilege to rival solicitor-client privilege in terms of the zealousness with which courts protect it. Neither are lawyers likely to give spousal privilege much

> thought nor the much maligned priest-penitent privilege unless they are going to confess their sins or seek spiritual guidance. Even litigation privilege is likely to be avoided by most lawyers over the course of their careers. The same cannot be said of solicitor-client privilege. It implicates the work of all lawyers, even those who might have difficulty identifying warm bodies as 'clients'.
>
> ….
>
> …. The privilege … is best understood as a right to communicate in confidence with one's lawyer. This right comprises the protection against the voluntary or compelled disclosure by one's lawyer absent the client's consent or court order. It also includes a protection against the client being compelled to disclose information covered by the privilege. It can be invoked by the client or the lawyer on the client's behalf in the midst of or in the absence of court proceedings. The privilege has thus become much more than an evidentiary privilege; it is a substantive right with constitutional implications, if not constitutional proportions.

Former Supreme Court of Canada Justice Ian Binnie, C.C., K.C., in a droll Foreword to Professor Dodek's book, cautions that "[f]or a doctrine that is often bandied about by the legal community as too obvious for discussion, the reasons for solicitor and client privilege and its limitations are surprisingly unexplored, … ."

Privilege—Application Generally: A family law client complaining that her former legal advisers had not followed her instructions in drafting her divorce petition was held to have waived privilege regards her communications with them, in: *AG v. VD*, [2020] EWHC 1847 (Fam). In support of her argument, she alleged that during dealings with her legal advisers she did not appreciate her separation date was incorrectly stated in the petition. Drafted in English language, the petition was signed by her, without legal explanation from, or provision of translation by, her legal advisers. At very least, translation should have been provided, she submitted, because she is Russian and, consequently, not a confident English language reader. (*Legal Futures*, 13 July 2020.)

Likewise was the result where the separation date was disputed, in: *Laurent v. Laurent*, 2019 ONSC 3535 (CanLII), at paras. [33]-[54].

A wife applied to 'set aside' a separation agreement. Her estranged spouse motioned for an order requiring her produce the complete file of her now-former counsel who represented her

when the separation agreement was negotiated. Her grounds included duress and lack of financial disclosure. In support of her application, she relied on discussions between herself and her former lawyer. In *Shalaby v. Nafei*, 2022 ONSC 561, the husband's motion was granted on the basis the wife's 'set aside' application amounted to waiver of solicitor and client privilege by reliance.

Privilege over a lawyer's notes was found not to have been waived, in: *0678786 BC Ltd v. Bennett Jones LLP*, 2021 ABCA 62 (CanLII), SCC appeal leave application dismissed: File No. 39578, 2021 CanLII 94827 (SCC).

Privilege—Settlements: "The settlement privilege," write Franks and Zalev in *This Week In Family Law*, FAMLNWS 2021-10, 15 March 2021, "belongs to both parties. It cannot – **cannot** – be waived unilaterally. This means that not only is a party not free to disclose to the court an offer that a party received in court materials; but that party also cannot disclose their own settlement offers in court materials – as the other side may then feel unfairly compelled to put their own settlement offers or positions before the court. …. [Further, there is no such thing as a 'without prejudice' settlement offer. Just as marking something 'without prejudice' does not mean that the communication is, in fact, without prejudice, marking a settlement offer 'without prejudice' does not remove the jointly-held privilege. In fact, it is inappropriate to label a settlement proposal 'without prejudice': *Leonardis v. Leonardis* … [2003 ABQB 577 (CanLII)] … . Who would ever engage in settlement discussions if those discussions could be freely presented in court (save, of course, for costs)?"

On the basis of solicitor-client settlement privilege, all affidavits and exhibits relating to 'without prejudice' correspondence or settlement offers were struck from the record in a spousal property dispute, in: *Flock Estate v. Flock*, 2019 ABCA 194 (CanLII) at paras. [33]-[38]. In a dispute over validity of an agreement, the privilege was found to have been waived: *T.O.E. v. I.S.*, 2020 ONSC 2903 (CanLII).

The issue in *Butler v. Butler* (2022), 78 R.F.L. (8th) 237 (Ont. S.C.J.), was whether settlement privilege applied to a mediation agreement. Where one party denies an alleged settlement was accomplished in mediation, the settlement exception to privilege will allow

disclosure of communications necessary to attempt establish existence or terms of agreement. The need to ensure that pertinent evidence on the issue of agreement enforceability was before court overrode the parties' intention from the outset that the process be closed.

Privilege—Limits: The limits of solicitor-client privilege, particularly where the 'crimes and fraud exception' is raised, were considered, in: *AARC Society v. Sparks*, 2018 ABCA 177 (CanLII), application for leave to appeal to Supreme Court of Canada dismissed: SCC File # 38244, 24 January 2019.

A lawyer's failure to promptly recover a compact disk disclosed during pre-trial discovery which, mistakenly, contained conversations between the lawyer and his then-client (clearly dedicated to rendering and receiving legal advice) did not amount to waiver of solicitor-client privilege, in: *1778077 Ontario Limited (Chili's Grill & Bar) v. The Economical Insurance Group*, 2019 ONSC 3548 (CanLII), para. [56].

Privilege—Litigation: If not earlier, since 2006 the related concept of litigation privilege has been (or should have been) regarded as separate from solicitor-client privilege. Fish J. for five of the seven-member Supreme Court of Canada concurring in the result, wrote that the two privileges "often co-exist and one is sometimes mistakenly called by the other's name, but they are not coterminous in space, time or meaning …. ." (*Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), para. [1].)

7.3.3 Confidentiality and Privilege

Resolution, an organization of family justice professionals (including lawyers) in England and Wales, has announced plans to promote the 'one lawyer, two clients' model for divorce; which the group calls 'Resolution Together'. The group has sought advice from the Solicitors Regulation Authority and legal counsel to ensure that the initiative complies with regulatory requirements around confidentiality, privilege, information-sharing and conflict of interest (i.e., conflict of duty). (*Legal Futures*, 08 July 2022.) 'Resolution Together' launched in April 2023.

7.4 Practising Responsibility: Language

The nucleus of law practice is language: concise, clear, correct, condescension-lacking, written and spoken articulation.

To facilitate family law being more effectively understood—more accessible and less hostile—between clients/parties and their lawyers, The Family Law Language Project has been created by Emma Nash, partner in London law firm Fletcher Day. The Project aims, at very least, to identify terms, often misunderstood or outdated (e.g., "custody"); to correct misuse of terms in traditional and social media; to eliminate aggressive language (e.g., "custody battle"), and to furnish alternatives to language not appropriately focused on children's welfare and other family law issues. (*Legal Futures*, 09 December 2021.)

An England and Wales High Court Judge, Dan Squires K.C., in deciding an action against a solicitor for negligence and breach of retainer, emphasized importance of communicating legal language in writing, instead of orally: "I am sure, with the benefit of hindsight, things could have been done differently and that advice and other information that was conveyed, on occasions, orally could have been provided in writing. That may have avoided this litigation." (*Legal Futures*, 31 January 2022.)

A Kent, England law firm was, by Justice Mostyn, granted leave to come off the record of the court because of behavior of their client's spouse; amounting to a campaign of harassment (by incessant, sometimes corrosive, e-mails and court applications) against both the law firm and their client, and the court. Referencing the husband, an airline captain, the senior High Court Family Division justice stated: "[this is] one of the worse cases of [unrestrained] vexatious litigation misconduct that I have ever encountered." (*Legal Futures*, 21 January 2022.)

Most counsel, and not a few litigant clients, are frequently heard to employ the language: "with respect". An analysis of the term, conducted by Nottingham Trent University and Leicester's De Montford University, concluded that "with respect" serves to display reverential professional courtesy, and "to maintain the dignity and gravitas of court proceedings which are seen as being

central to upholding the rule of law". In the opinion of Lord Neuberger, former president of the England and Wales Supreme Court, the term exhibits, but does mean, courtesy: "when the judge makes what the advocate thinks is a stupid point, the advocate will often begin his answer with the language 'My Lords, with great respect' … ." Ditto, lawyers communicating with one another. (*Legal Futures*, 06 January 2022.)

For a 'tweet' about the choice of language for a name—Lilibet Diana—by the Duke and Duchess of Sussex for their first child, a family law lawyer (communicating personally and not as a solicitor) was the subject of enormous social media criticism, and more than 80 complaints to the England and Wales Bar Standards Board (all rejected). She was also, briefly, suspended from her law chambers, Family Café (which advertises: "Out of the Ditch and Onto the Mountain" and "the family law service you want but didn't know you could have"). She had 'tweeted' (what she characterized a "witty amalgam") that the baby should have been named "Doprah" (after the child's maternal grandmother Doria Ragland, and the self-obsessed Oprah Winfrey). (*Legal Futures*, 30 March 2022.)

Routine use of the word "file" to reference a client retention—rather than "matter", "concern", or "problem"—is regarded by some clientele as a trifle dehumanizing.

As a result of what he termed "false, degrading, malicious and mostly vile" allegations against him in a pleading filed in litigation in which he appeared as counsel, a Québec lawyer sued, in defamation, the parties opposite and their lawyers. His action was dismissed as abusive, in: *Joseph v. Bourghol*, 2019 QCCA 483 (CanLII); application for leave to appeal to Supreme Court of Canada dismissed: S.C.C. File No. 38652, 10 October 2019.

Initiatives by a lawyer (Bent) and her then-law firm, who were sued in defamation (based on the lawyer's e-mail), to procedurally dismiss the action were unsuccessful, in: *Bent v. Platnick*, 2018 ONCA 687; appeal to Supreme Court of Canada dismissed: 2020 SCC 23 (CanLII). The lawyer had settled a catastrophic impairment suit. She then posted an e-mail on the automated e-mail service of Ontario Trial Lawyers Association (while its president) which alleged a physician,

Platnick—who had during the suit assessed her client—"Alters Doctors' Reports". Only Association members could subscribe to the automated e-mail service, and subscribers were obligated to maintain confidentiality of information circulated on the service. (Not known is whether Dr. Platnick's defamation suit, remitted to Ontario's Superior Court of Justice, has been tried or settled.)

Offended by language of a doctor 'poking' fun at them via social media, several hundred Pakistan lawyers attacked and ransacked a Lahore, India cardiac hospital, reported BBC on 12 December 2019. Some of the lawyers had, three weeks earlier, attended the hospital and engaged hospital staff in a "fierce" fist fight.

In England, a solicitor was sanctioned with fines by the Solicitors Regulation Authority in the wake of his having incurred criminal convictions for impaired driving, cannabis possession, and possession of a knife in a public place. He responded by harassing the Authority with carnally-explicit language in a series of e-mails. Least objectionable of the messages invited the Authority to "stick your adjudication invoice [covering costs of the sanction proceedings] up you're a—e[,] you f---ing whore." Not receptive to this invitation the Authority, instead, disbarred him. (Hilborne, Nick, *Legal Futures*, 21 November 2018.)

Despite being repeatedly told a client had a learning disability and needed communications to be in plain English language, a law firm sent its client letters replete with Latin (e.g., *ab initio* and *prima facie*) and technical phrases. The Legal Ombudsman [Ombudsperson], situate in Wolverhampton, England, provided the law firm guidance on corresponding in language the client was expected to be likely to understand. Generally, in considering language complaints, the Legal Ombudsperson's position is that "[i]n addition to whether or not … [a client] has any particular vulnerabilities, we will also take into account the knowledge and experience of the … [client] in deciding whether the service provided [by a law firm] was reasonable." (*Legal Futures*, 05 February 2019.)

The Legal Ombudsperson ordered compensation paid a transgender woman by her solicitors for language they used in addressing her. The solicitors, when retained, had asked the client how she wished to be addressed. She apparently did not respond. The solicitors later chose to use her birth name in a letter of opinion to her. The client reacted by complaining to the Ombudsperson that she felt disrespected. (*Legal Futures*, 26 March 2019.)

(The client probably regarded the solicitors' indiscretion as a microaggression which undermined her value as a person. Microaggressions, whether or not intentional, may comprise behavioral, verbal or other offence to a person. The Legal Ombudsperson's discipline underscores the necessity of lawyers continuing to be—or becoming—cognizant of the potential for their personal beliefs adversely impacting, by oversight or design, their interactions with clients. At minimum, lawyers need appreciate the cultures, including integral language, of the LGBTQIA2S+ individuals and communities (lesbian, gay, bisexual, transgender, queer, intersex, asexual, two-spirit, plus). They need be sensitive to persons who identify, for example, as demisexual, omnisexual, and pansexual. Also, see: *Ajayi v. Ajayi*, 2022 ONSC 2678 (CanLII), paras. [19], [20], [31], [73] and [75].)

"Careful drafting with an eye to removing and replacing gendered pronouns and gender assumptions is a small but critical way the legal profession can promote equality and respect for gender diverse Canadians," states the Ontario Bar Association's Young Lawyers Division, online, in guidelines, on gender inclusivity, published 12 April 2019.

"They", in substitution for gendered pronouns, is extensively employed, currently, in Canadian law practice drafting.

Therapy affording him emotional regulation could have helped an experienced law partner practising in Ilford, Essex, England whose excessive language drew a caution from the England and Wales Solicitors Regulation Authority, in a regulatory settlement agreement. He had accepted retention by a woman who was registered blind and suffered deteriorating health, to assist her in administering an estate. As performance of the retention progressed, the client's sight worsened.

The solicitor began writing to her in larger font size; eventually reaching the maximum size the firm was able to provide. When she brought a form to the firm, to be enlarged, the solicitor asked whether she wished him "to come to your house and paint it all over the walls." The client complained to the Authority; explaining that the solicitor's question made her feel belittled and discriminated against. (Rose, Neil, *Legal Futures*, 24 May 2019.)

Previously given an administrative warning by the Bar Standards Board for her social media 'tweets' unrelated to her law practice, a barrister in England has been suspended for two years by the Bar Disciplinary Tribunal. She was found, post warning, to have sent obscene and offensive 'tweets'. She messaged another barrister, with whom in a public dispute, that she was "a toxic person", "making insane claims", a "lunatic liar", and a "nut job", and made offensive references to the other barrister's daughter. She 'tweeted' the Board that, "At Bar Standards you have been obsequiously appeasing foreign anti-Semitic trolls for upwards of three years. What's wrong with your Board exactly? Closet dikey fans, … or just terminally stupid?". (*Legal Futures*, 19 December 2019.)

Language in a Bootle, England family law lawyer's advertisement for several years has survived sanction by the Advertising Standards Authority, The advert states: "I'm James Murray. And what's more frightening than a social worker at your door to take your child. The kids are screaming, your head's banging. Ring James Murray Solicitors, you need a friend, someone to speak up for you, a tough lawyer. A James Murray, legal fighter in court, championing your case. And don't worry, legal aid is always available." In his previous professional life, Mr. Murray had been a social worker in a deprived area of Merseyside, in northwest England. The Authority, in response to a complaint, concluded "we did not consider that … [the advertisement] was likely to cause unjustifiable distress" to the public. Radiocentre, England's industry body for commercial radio, supported Mr. Murray in response to the complaint. The industry body argued that the language was not likely to undermine public trust in social workers. (*Legal Futures*, 06 January 2021.)

Perhaps having encountered inaccurate use of the terms in proceedings before him, Ranjan K. Agarwal J. explained in *Mensah v. Agogo*, 2022 ONSC 7077 (CanLII), a marital property proceeding, at para. [23]:

> Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Reliability engages consideration of the witness's ability to accurately observe, recall, and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence. See *R v GF*, 2021 SCC 20 at para 82; *R v HC*, 2009 ONCA 56 at para 41.

Aspects of credibility and reliability were wanting in the text of an e-mail authored by a Calgary lawyer, 34 years at Bar and invested March 2024 as King's Counsel. As named host of an annual Kimberley, B.C. invitational golf tournament, he sent professional colleagues and other lawyers a blast e-mail, soliciting their attendance. Since 07 May 2024, when he dispatched the 2000-word e-mail, his law firm candidly condemned the communication, and he resigned from his partnership with the firm. Remaining to be seen is whether he returns his K.C., and cancels his contract with the golf links, and his hotel room reservation.

The e-mail was laced with incendiary misogynistic and otherwise disrespectful language, such as: "guests can pick the three-night/four round package" which will be referred to as the "Finishers" package. "For those who will choose [this option], you will almost certainly need pharmaceutical assistance to have the stamina for 3 nights of action – yellow or blue pills, take your pick. On the " … issue of transpeople. People born one way but later decide they want to be another …", he references a colleague who "started to transition to left-handed. No one ridiculed him for his decision to change or his transition, and he did it all the natural way—no surgery, no hormones, etc." The e-mail continues: "I long for the day that we can award the trophy [at the golf tournament] to a person with a vagina." Regards tournament guests who, when walking by him, "plan on nodding repeatedly, as some do, please close your mouth lest people get the wrong impression, unless you are a person with a vagina, in which case I am in Room 408." In concluding, the e-mail states, "We love having our friends join us for a weekend away – no kids, no work, tons

of sex, no headaches … For the single guys, probably leave the Ho's behind this trip – there is enough talent in town."

7.5 Practising Responsibility: Record-Keeping

7.5.1 Documenting

Practising allegiance to professional (as well as legal and ethical) responsibility (i) serves clientele needs; (ii) enhances professional standards; (iii) augments reputation (which, more than advertising, generates clientele), (iv) diminishes (if not eliminates) potential for court censure, regulatory discipline, and civil liability, and (v) may avoid, or at least mitigate, solicitor-client invoice assessments, nuisance complaints (e.g., from a client' spouse), and media criticism.

Integral to achieving these goals is record-keeping every step relating to a retention—documenting by memoranda to file or correspondence to clients (preferably, both)—to reflect adherence, in practice, to the creeds of responsibility, including obligations of retention. So doing serves as some probative evidence of terms of retention (if parol), and of a retention's performance (including adequacy of lawyer communications with client).

7.5.2 Dealing with Third Parties

On occasion, most important documenting by a lawyer, during a retention, may not involve services to and communications with her (his) client. Instead, most significant may be record-keeping interactions with the 'other' party(ies).

Granted, a lawyer's primary duty of care—in the context of each of the three primary species of responsibility—is, solely, to his or her client. But an opposing litigant, who is self-represented or unrepresented will, almost invariably, seek guidance from counsel for represented persons. S(he) must be treated with abundant caution. Communications with him or her should, exclusively, comprise carefully-drafted written correspondence; devoid of defensive, imperious, or otherwise potentially incandescent, rhetoric. If, unavoidably, verbal communications occur,

their substance should promptly be reduced to writing and sent, as confirmation of the lawyer's understanding of such dialogue, to the self-represented or unrepresented party.

(But, a much more benevolent approach toward the self-represented and unrepresented is advocated by Janis Criger, while President of Ontario Deputy Judges Association, in "How lawyers can help self-represented litigants" (Balakrishnan, Anita, *Law Times*, 30 October 2019).)

Dealing with self-represented and unrepresented litigants can prove to be the most perplexing and time-consuming of responsibility issues; spannering efficient performance by a lawyer of legal and ethical obligations to her (his) own client.

More than a few family law litigants who have been supplied state-funded legal aid and many litigants who self-represent or are unrepresented are, by accident or design, indifferent to accumulating legal expense of their spouses who—when ineligible to seek, or denied, legal aid—personally underwrite their legal representation. Some state-funded litigants engage in countless applications, eschew settlement initiatives, and generate prolix court hearings. In court, tolerance of counsel for paying spouses is severely tested. Out of court, patience of such counsel is constantly tried by complaints of their paying clients whose financial resources to pay for representation are dwindling. And, if those financial resources are exhausted, the result is that: (i) one spouse continues to benefit from state-funded representation, and (ii) the other spouse commences to be represented by the same—now unpaid—counsel (unless that counsel: resigns, if not on the record; or is able to obtain judicial leave to withdraw from the record, or unless—time permitting—her (his) client can qualify for legal aid).

As to the duty of a lawyer (or a judge) to a self-represented or unrepresented litigant, see: *Girao v. Cunningham*, 2020 ONCA 260 (CanLII), at paras. [148] to [157], additional reasons: 2021 ONCA 18 (CanLII), and *Grand River Conservation Authority v. Ramdas*, 2021 ONCA 815 (CanLII), at paras. [17] to [24].

7.6 Practising Responsibility: Negotiating Settlements

Perhaps the most-invaluable skill for practising family law is the facility to negotiate settlements. The considerable 'costs' implications of responsibility for failing to compromise are considered in: *Fielding v. Fielding*, 2019 ONSC 833 (CanLII).

Wise counsel is, by *Debra Louise Vanbeselaere v. Daniel Gerard Vanbeselaere*, 2023 MBKB 67, supplied to lawyers receiving instructions from a spouse or, here, a pending spouse, to draft and arrange execution of a domestic agreement, where the other party is unrepresented.

The prospect of a client suffering costs due to rejecting genuine, comprehensive offers of settlement in ongoing litigation is articulated in *Barkwell v. McDonald*, 2022 ABQB 208 (CanLII), where the resulting costs proved substantial (SCC leave application dismissed: 2023 CanLII 100620 (SCC)).

Benefits of making severable offers to settle are considered in S. B. Sherr J.'s Costs Endorsement in *Mulik v. McFarlane*, 2023 ONCJ 191 (CanLII), especially at paras. [18] to [20].

Settlement privilege and its exceptions are treated, comprehensively, especially by Kasirer J., in: *Association de médiation familiale du Québec v. Bouvier,* 2021 SCC 54 (CanLII) (in the factual context of mediation); espy. see: paras. [94] to [115].

Whether "there was a consensus reached on all of the essential terms of" a domestic agreement was "a relatively close call" for Conlan J. of Ontario's Superior Court of Justice in *N.C. v. M.D.*, 2024 ONSC 2296, para. [8]. Helpful, in understanding this issue in practice (although not a family law case) is: *North Atlantic Marine Supplies & Services Inc. v. Hickey*, 2021 NLCA 4 (CanLII); SCC appeal leave application dismissed: File No. 39663, 2021 CanLII 94825 (SCC).

Because "[p]retty much every Domestic Contract and Spousal Agreement contains releases," write Aaron Franks and Michael Zalev in their 16 August 2021 edition of *This Week in Family Law* (FAMLNWS 2021-31), " …., [a 2021] … case from the Supreme Court of Canada [not involving family law]—that fundamentally changes how releases are to be interpreted—is of

importance to family lawyers": *Corner Brook (City) v. Bailey*, 2021 SCC 29 (CanLII). For about 150 years interpreted narrowly, releases are, in future, to be construed by reference to the general principles of contractual interpretation (i.e., (i) in entirety, (ii) giving words used their ordinary and grammatical meaning, and (iii) consistent with the surrounding circumstances known to parties when the contract is formed). "[F]or another day," added Rowe J. for the Court, is left the question of "whether, and if so, in what circumstances, negotiations will be admissible in interpreting a contract" (para. [57]). (Generally, see Rowe J.'s exceptionally-instructive review of law governing interpretation of releases at paras. [16] to [43], and see: Edmonton barrister Rodger C. Gibb's case comment, "Beware the General Release"; Long-standing special interpretive rule regarding Releases abrogated: Corner Brook (City) v. Bailey, 2021 SCC 29 (CanLII),

" …, [W]here one party denies an alleged settlement reached in mediation [or other form of negotiations], the settlement [privilege] exception will allow disclosure of the communications that are necessary to establish the existence or terms of the agreement (but no more than necessary to prove the agreement). …. [Y]ou can avoid this type of dispute entirely by ensuring that when engaging in settlement discussions (whether by correspondence, mediation, or direct negotiations), you make it clear at the outset that a written agreement signed by both parties is a true condition precedent to a binding settlement" (Franks and Zalev, *This Week in Family Law*, 2021-43, 08 November 2021; commenting on: *Association de mediation familiale du Québec v. Bouvier*, 2021 SCC 54 (CanLII)).

A litigant's initiative to renounce a settlement agreement, based on allegations of negligence by a solicitor in counselling the litigant to execute what the litigant regarded as an improvident agreement, failed, in: *Salman v. Ipacs*, 2018 ONSC 4803; affirmed on appeal: 2019 ONCA 151; application for leave to appeal to Supreme Court of Canada dismissed: S.C.C. File No. 38703, 26 September 2019.

Save in exceptional circumstances, a lawyer should not appear as counsel in a proceeding where an agreement prepared by that lawyer is at issue: *Kudoba v. Kudoba*, 2007 CanLII 41273 (ON SC), para. [74].

Tending to be overlooked, in Canada, as a vehicle for negotiating settlements is the specie of alternative dispute resolution called 'ENE' (i.e., Early Neutral Evaluation); where an independent and impartial evaluator assesses the merits of a case. "What makes ENE attractive is that it can be used by the parties to engage in settlement discussions and arrive at a resolution sooner," writes Alexander Gay, General Counsel at Department of Justice (Canada), in: "ENE: Another ADR path to consider" (CBA, 08 November 2019). He continues, "[i]t is non-binding and the process is conducted on a without prejudice basis. It can also be combined with mediation. If the parties can't come to a mutually acceptable agreement, they can empower the mediator to provide an evaluation of the case. That evaluation can then help soften positions and move the parties towards a resolution."

Begotten by senior Nova Scotia Supreme Court Justice R. James Williams (now supernumerary), in consultation with Nova Scotia's Justice department (and with assistance from Federation of Law Societies of Canada and National Family Law Program) is an innovative, transformative digital platform: "Online Dispute Resolution for Family Legal Matters". The platform is dedicated to provision of online judicial adjudication, decision-making, case management, and settlement conferencing. Groundbreaking in Canada, and available only in Nova Scotia (province-wide), the e-Court is affordable and accessible. Since August 2020, the platform has been available, in English, to family law parties represented by legal counsel. Re-designing of the platform may, eventually, include access by self-represented and unrepresented persons. Enlightening the industry of Justice Williams in development of the platform were his professional experiences, fostering compromise, as a social worker, then a family law barrister, and ultimately a Justice in Nova Scotia's Supreme Court Family Division.

Collaboration, as a unique, settlement-dedicated negotiating process in family law, is the subject of a Department of Justice [Canada] report, "The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases".

However a domestic or other agreement is achieved, good faith performance is necessary; *Bhatnagar v. Cresco Labs Inc.*, 2022 ONSC 1745 (CanLII).

If ever retained to advise respecting when a matrimonial or other agreement ends, be cognizant of *Saint John Tug Boat Co. Ltd. v. Irving Refining Ltd.*, 1964 CanLII 88 (SCC).

(Generally, see **APPENDIX C**: LawPRO's Domestic Contract Matter Toolkit hyperlink.)

7.7 Practising Responsibility: Bullying

Compounding challenges of counsel seeking, effectively, to practice professional responsibility is 'legal bullying'. Perpetrators usually are litigants, both represented (sometimes, one's own client), and self-represented.

The concept was defined, in 2003, by Esther L. Lenskinski, certified family law specialist; Barbara Orser, an Associate Business Professor, and Alana Shartz, a law student. In the family law context:

> Legal bullying is defined as a range of abusive behaviours and tactics intended to defeat or make inordinately difficult the resolution of a legitimate [family law] claim …].

Legal bullying, they continue, includes conduct of litigants who

> repeatedly engage in a number of the following behaviours: seek the same relief in different jurisdictions across Canada; bring the same motion on more than one occasion; fail to obey court orders; fail to obey rules of civil procedure; fail to comply with procedural requirements; complain to governing bodies in respect to professionals involved in the litigation; undertake excess delays and waste a disproportionate amount of court time; are self-represented when capable of employing legal assistance; represented by numerous lawyers; put forward unsupported allegations …; fail to disclose assets; attempt to manipulate or conceal assets; violate … [court orders]; and/or make unsubstantiated allegations of battery, physical abuse and/or molestation of themselves or children.

("Legal Bullying: Abusive Litigation within Family Law Proceedings" (2003), 22 CFLQ 337.)

Lenskinski, Orser, and Shartz propose a range of mechanisms to ameliorate—if not eliminate—the impact of legal bullying (subsets of which they identify as 'court harassment', 'court-related harassment' and 'legal harassment'). Although not specifically prescribed by them, the cardinal response of counsel to legal bullying is unerring patience and restraint, allied to initiatives to enforce compliance.

(Such measures could include requests (i) for case management; (ii) for security for costs (*Vermette v. Nassr*, 2016 ONCA 658 (CanLII); application for leave to appeal to Supreme Court of Canada dismissed: S.C.C. File No. 37232, 09 February 2017); (iii) for pleadings to be struck; (iv) for the Justice presiding to remain, pre-trial, seized of the case (*Peters-Webb v. Cloutier*, 2017 ONSC 6139 (CanLII), affirmed: 2018 ONSC 3589 (CanLII)); (v) for contempt citation, and (vi) (maybe) for fines (*Hutcheon v. Bissonnette*, 2017 ONSC 1108 (CanLII); but see: *Osborn v. Gagne*, 2017 ABQB 438 (CanLII).)

The Times (London) reports, however, that "[j]udges are [in England] one of the main sources of bullying in the legal profession" (Gibb, Frances, "Judges guilty of bullying in legal world that 'stinks of testosterone' ", 01 January 2019). (In the interest of full disclosure, *The Times* report additionally informs that bullying is also practiced by male barristers against their female counterparts; one of whom is quoted as asserting, "I've been referred to as 'legs' by a male barrister. I've had it suggested that compliments given by a [male] QC about my advocacy while I was a junior barrister were only given 'because he wanted to get into my knickers'.")

A young solicitor was "deceived, pressured, bullied and manipulated" at the Barton-upon-Humber, England law firm where she had fabricated numerous documents. She also failed to promptly—instead of 18 to 24 months later—report, to the professional discipline regulator, the two managing partners under whose supervision her misconduct occurred. She was disbarred for her fabrications and impunctual reporting. Both managing partners were also disbarred (and the law firm closed). (*Legal Futures*, 29 January 2019.)

Found in April 2024 by a Faculty of Advocates complaints committee sitting in Scotland to have displayed unsatisfactory professional conduct for how he mistreated a female witness at the High Court, Glasgow, during a criminal trial, a barrister in Scotland was fined, censured and required to compensate her.

The woman, a 26-year-old student, had testified as Crown witness against a former boyfriend, then a medical student, on charges he raped her (in 2017 and 2018). Convicted, he was in July 2022 sentenced to five years imprisonment. (The Crown case was immeasurably assisted by a recording the woman secretly made in which the accused confessed that he raped her, but in which he added that members of the public believed his denials.)

The accused ‘s defence advocate, during trial cross-examination of the woman, asked her whether she suffered from narcissistic personality disorder, which she did not. (The advocate offered no evidence alleging she did.) Concluded the Faculty of Advocates committee, the lawyer “repeatedly crossed the line” with improper cross-examination of the woman “even after several fairly lengthy exchanges with the trial judge where he was spoken to about this very issue.” The committee found that the defence advocate “exacerbated” his trial misconduct, in spite of having had time to reflect following the intense cross-examination. In some of his statements in closing argument to the jury and, later still, in his pleas in mitigation during the sentencing hearing, he maligned the woman. He told the Court,

> [my client] hadn’t even kissed a girl before …. [h]e went to freshers’ week and he met [the woman]. They were like chalk and cheese, my Lord. Chalk and cheese.

His client, the defence advocate asserted to the Court, “fell in love with the wrong person”. His client’s dream of becoming a medical doctor was in ruins, rendering “difficult not to imagine some sense of injustice in it all.”

The committee of Faculty of Advocates, which since 1532 has been responsible in Scotland for training, professional practice, conduct and discipline of advocates, decided this advocate, on six of the woman’s 11 complaints, “acted in a manner … discourteous to the court and abused the

privileged position … [he held as an advocate]. His conduct was a breach of the duty he owed to the court and was likely to undermine the trust and confidence which others, including the court and the Crown, place in advocates to obey the rules and the law in relation to evidence."

The advocate—after 34 otherwise "impeccable" discipline-free years at Bar—was fined CDD $3,460, administered a severe written censure, and required to compensate the woman "for considerable upset and distress" CDN $1,730. (Hunter, Katie, BBC Scotland News Online, 11 April 2024; Scottish Legal News Online, 11 April 2024; *The Daily Telegraph Online*, 17 May 2024.)

7.8 Practising Responsibility: Mental Health

"In the last decade," writes David Frenkel in *Canadian Lawyer* magazine ("Mental health awareness is positive, but can create challenges for family law", 28 February 2020), " 'mental health' was referenced approximately 4,200 times in published family law cases and decisions throughout Canada, according to Westlaw Canada. In the decade before that, the number was less than 50 per cent, at approximately 1,900. Going back further, it was merely an afterthought at 680 in the 1990s, 370 in the 1980s and 110 in the 1970s." Unsurprisingly, explains Mr. Frenkel, an Ontario family law practitioner since 2008, "the prevalence of mental health issues increased the need to better understand the relationship between the psychology of separating spouses and the family law world."

To cope with mental health stresses of (i) performing retentions and (ii) protecting oneself from liability—the twin pillars of law practice—and to foster emotional regulation, consult: "Mental Health And Wellness In The Legal Profession; An Online Course", offered by Canadian Bar Association.

Pressure of law practice or extreme practice working conditions cannot, ever, either alone or in conjunction with stress or depression—without more extenuating circumstances—justify resiling from disbarment of dishonest solicitors, the England and Wales High Court has ruled. Weight attached to mental health issues in deciding appropriate sanctions "will inevitably be less

than is to be attached to other aspects of the dishonesty found, such as the length of time for which it was perpetrated, whether it was repeated and the harm which it caused, all of which must be of more significance": *Solicitors Regulation Authority v. James, MacGregor and Naylor* [2018] EWHC 3058 (Admin) (BailII). Protection of the public and the legal profession's reputation are paramount.

Instead of revoking the practice licence of a lawyer, Law Society of Ontario allowed him to surrender the licence, after extensively considering the lawyer's mental health: *Law Society of Ontario v. Yantha*, 2018 ONLSTH 94 (CanLII).

Indefinite suspension, instead of disbarment, was meted by the Solicitors Regulation Authority to a senior solicitor who falsified a doctor's sick note. In support of an adjournment application in a Birmingham, England court, while she suffered moderate mental ill-health, she told the Court she was in possession of the sick note (which she did not produce). The falsified sick note was not intended to prove her own illness; rather, to establish that her client, a minor, was too sick to appear with her. Her own mental ill-health persuaded the Authority to forego disbarring her. (*Legal Futures*, 07 January 2019.)

The cultures of some law firms and other law workplaces mean that [mental health and emotional] well-being is "often not a concern" while they chase increased profits, reports LawCare-funded research at Open University, London, England. The research report, by Emma Jones and Neil Graffin (respectively, senior lecturer and lecturer in law), indicates, further, that lawyers engaged in emotionally demanding work were experiencing burn-out. (*Legal Futures*, 23 April 2019.)

In a lecture entitled "Is a family lawyer's work all stress and distress", Professor Jo Delahunty Q.C. said that legal aid lawyers on cases involving child death, sexual abuse, and similarly horrific events risk their own mental health. The senior family law barrister indicated the professional challenges such lawyers confront are compounded by need to show compassion to their junior staff who suffer from burnout. She cautioned that experienced barristers are leaving

the legal profession largely due to stress of over-work and under-payment. (Bindman, Dan, *Legal Futures*, 13 June 2019.)

Promoting accelerated and enhanced attention to vicarious trauma in the legal profession, reports Carolynne Burkholder-James (CBA, 21 March 2019), is British Columbia-based Cree-Metis lawyer Myrna McCallum. She urges all lawyers "to talk more about trauma and … have open conversations about how we are traumatized due to the work that we do. … We need to start advocating for support for lawyers who deal with traumatic incidents." (CBA, 21 March 2019.)

The issue of mental health of a Québec lawyer was crucial in a disciplinary decision of Barreau du Québec in March 2022. The lawyer was anti-vax; opposed to COVID health measures. Under Article 48 of the Québec *Professions Code*, the Barreau ordered the lawyer undergo a medical examination, on the ground his mental condition was believed by the Barreau to be incompatible with his practicing law. The lawyer refused the examination. The Barreau, under Article 51 of the *Code*, disbarred him.

Vitally-important is the mental health—as well as intellectual competence—of clients; particularly in ascertaining their capacity to retain, understand legal advice, give instructions, and appreciate the nature and implications of the subject of retention; especially when signing or deposing pleadings, and executing agreements. An exceptional publication treating the issue of client capacity is: *The Law Society of Upper Canada, Special Lectures 2010[:] A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Toronto: The Law Society of Upper Canada, 2011).

Not to be overlooked is the need for a lawyer to undertake such steps as will adequately satisfy her(him) that a client's (i) mental health, and (ii) intellectual, competence suffice to enable the client to execute a domestic agreement, and to provide reliable instructions authorizing the lawyer to sign the agreement certificate.

"Fundamentally, we are trying to normalize the conversation [in the legal profession] about mental illness," maintained Beth Beattie, senior counsel with Ontario Ministry of the Attorney General Ministry of Health, in a media report by Key Media's Global Managing Editor Tim Wilbur, published 14 May 2024, online. She was explaining why she, CIBC corporate counsel Carole Dagher, and Western law professor Thomas Telfer embarked on initiatives which include co-editorship of a book, titled *The Right Not to Remain Silent: The Truth About Mental Health in The Legal Profession* (Toronto; LexisNexis Canada Inc., 2024). In her interview with Mr. Wilbur, she reported that "[m]any very successful practicing lawyers are living with mental illness or addiction." Each of 18 "judges, young lawyers [, law professors] and senior leaders in the profession," she said, contributed a chapter to the book; sharing personal struggles of them (and their families) with mental health. Referencing the book's first chapter by former Ontario Chief Justice George Strathy, she says that he has outlined some very practical solutions to concerns such as lack of civility among some in the legal profession.

7.9 Practising Responsibility: Security

On 02 July, in 2015, a lawyer and notary (pregnant) were murdered in the lawyer's Terrebonne, Québec office by a disconsolate former client (who earlier, killed his two sons and, later, committed suicide).

Next day, a Winnipeg lawyer was injured (required right hand amputation) after opening a letter bomb (from her client's spouse) in her office. The Winnipeg assailant was, on 22 November 2018, sentenced to life imprisonment (10 years before eligibility to apply for parole) for attempting murder of, and grievously-harming Maria Mitousis, leading family law counsel, and for attempting murder of assailant's wife and another Winnipeg lawyer (neither injured): 2018 MBPC 46 (CanLII).

7.10 Practising Responsibility: Digital Technologies And Artificial Intelligence

7.10.1 Digital Technologies

Advent of digital technologies—fostering social media—has challenged lawyers with countless responsibility and practical issues. (See: CBA Legal Ethics in a Digital Context.)

Responsibility issues are most comprehensively treated by Jan L. Jacobowitz, Lecturer in Law and Director of the Professional Responsibility and Ethics Program at University of Miami School of Law, and John G. Browning, shareholder and litigator in the Dallas, Texas law firm of Passman & Jones. They caution consumers of their eclectic editorial endeavor—*Legal Ethics and Social Media: A Practitioner's Handbook* (Chicago: ABA Book Publishing, 2017)—that, such is the breadth and depth of their frenetically-evolving subject, full exploration of the subject is not, in their book, feasible.

Replete with exampled cautions for practising lawyers, Jacobowitz and Browning counsel (at p. 222) that

> …, lawyers are human, too. Human nature sometimes compels a person toward language or conduct that is born out of emotional reactivity rather than thoughtful decision making. Unfortunately, when a lawyer posts on social media, he or she is posting not only as a human, but also as lawyer—a role that has a 24/7 connotation where legal ethics are concerned. Moreover, lawyers may be particularly susceptible to ethical errors on social media because the cultures of social media and the legal profession possess inherently clashing values—social media is an environment of instantaneous sharing and connecting, while the legal profession prides itself on confidentiality and careful, analytical thinking.

A court capped the costs award in a personal injury proceeding; finding that use of artificial intelligence should have "significantly reduced" counsel's preparation time, in: *Cass v. 1410088 Ontario Inc.*, 2018 ONSC 5439 (CanLII); additional reasons: 2018 ONSC 6959.

Practically, digital technologies have enhanced capability of clients, if not emboldened them, to covertly record their private telephone conversations and *in personam* consultations with their lawyers. These communications may eventually be disseminated via social media platforms (perhaps permanently) by a disagreeable or deficiently-represented client; be used by a client as

evidence to resolve solicitor-client disputes about instructions and fees, or be replayed by a client to aggravate or intimidate an estranged spouse.

Practitioners must be alive to potential for, and implications of, intrusion, by these technologies, on communications between them and their clients. As they are expected, in any event, lawyers need be circumspect in discussions with clients. Essential is that they avoid (i) fatuous assurances of success; (ii) denigration of the client's spouse or lawyer, or the court; (iii) affirmation of expressed client intentions to engage in 'legal bullying'; and (iv) obscure or illegal (e.g., contingency) arrangements about legal services compensation.

Adamant cautioning of a client is advised regarding prospects of prejudice, to her(his) case, from any discussion about their case, via the Internet (e.g., e-mail or social media) or in person with her (his) spouse or with a potential agent provocateur of that spouse. In fact, the client must be told to say nothing about their case with anyone besides their lawyer (and only then when satisfied the communications are confidential and, preferably, not recorded).

Among infirmities of practising with digital technology is hacking of mobile telephones. Such was the experience of the United Kingdom's renowned family law solicitor, Baroness Shackleton, while representing Princess Haya Bint Al Hussein, former spouse of the ruler of Dubai and vice-president and prime minister of United Arab Emirates, in a parenting contact proceeding (*Legal Futures*, 07 October 2021). *Quaere*: Should lawyers ever rely on mobile telephones for saving or transmitting confidential or privileged communications and records?

Lawyer engagement of digital technology has resulted in disciplinary, civil and/or criminal proceedings, judicial chastisement, and condemnation, in England and Wales. A barrister was reprimanded and fined for misleading Google while he sought removal of a negative professional review (*Legal Futures*, 28 September 2020). A barrister was held to have been liable for defamation by 're-tweeting' an article, containing libelous statements, which he discovered on the Internet (*Legal Futures*, 19 May 2020). A junior solicitor was fined about CDN $15,660.00 for a series of abusive Facebook messages he sent to a woman he briefly 'dated' (*Legal Futures*,

24 June 2020). The business development manager at a law firm was imprisoned for four years after police found 6,000 indecent child images and nearly 60,000 offensive e-mails on his computer and other devices (*Legal Futures*, 21 July 2020). The president of the Queen's Bench Division reprimanded London lawyers of a United States law firm after they live-streamed via Zoom, to the United States, Cyprus and Russia, the first three days of a five-day trial in the United Kingdom (*Legal Futures*, 07 August 2020). A paralegal who asserted on Meta (a.k.a. Facebook) that (soon-to-be former) Prime Minister Boris Johnson deserved to contract coronavirus was condemned by his law firm employer and left the firm (*Legal Futures*, 09 April 2020).

In Ontario, a lawyer was reprimanded for his student's reckless use of social media (including derogatory comments about unnamed Justices of the Peace, Crown Attorneys and clients), in: *Law Society of Ontario v. Forte*, 2019 ONLSTH 9 (CanLII).

A law partner was, in November 2018, suspended by his employer, the law firm (world's largest) Hogan Lovells (established 1899, and currently having 51 offices and at least 2,532 lawyers who each annually earn an average US $1-million). A lawyer practising at another firm in a building situate across the street from the Hogan Lovells' law offices, in Holborn, central London, observed the Hogan Lovells law partner, seated just inside the floor-to-ceiling window of his office, viewing pornography on his computer. The surveilling lawyer recorded his observations and sent the recording to Hogan Lovells who referred the sending to its human resources department. (Kinder, Tabby, *The Times* [London], 10 November 2018.)

Potential negative implications of blockchain digital technology were not frontstall in otherwise helpful guidance published September 2020 (revised January 2022) by The Law Society of England and Wales and a private blockchain legal and regulatory group. The guidance forecast the technology will prove crucial to future legal practice. (Whether "crucial" to enriching, or bankrupting, law practice is not specified.)

Research by the Solicitors Regulation Authority of England and Wales concludes that most incidents of cybercrime suffered by law firms are due to individual errors and

misunderstandings by lawyers and their staffs, instead of computer systems being hacked. Inadequate law firm policies or controls (or both), and overestimation by law firms of their degree of digital knowledge, have proven pivotal in their being financially-victimized. (*Legal Futures*, 04 September 2020.)

Detrimental digital consequences are sometimes in store for lawyers who communicate, not via digital device; rather, in the old-fashioned way. The head of the Law Society of Scotland resigned that position after digital media reported remarks he was overheard to make on a train (which another passenger digitally recorded). While defending Scotland's former First Minister, charged with criminal sexual offences (eventually dismissed), he remarked, during the rail journey, that his client was a "quite objectionable bully"; a "nasty person to work for … a nightmare to work for"; a person who had engaged in "[i]nappropriate, arsehole, stupid … but sexual?"; and who was a "sex pest". (*Legal Futures*, 06 April 2020.)

"Cybercriminals can use complex technology but rely on old-fashioned human error to succeed" cautions Marg. Bruineman in *Canadian Lawyer* (June/July 2019, at pp. 20-23). She writes, " …. While American analytics company 250ok reports that 91 per cent of cyberattacks begin with a phishing [deceptive] email, a realistic looking yet sinister email can be the product of a very targeted approach that begins with … [an initially undetected] breach [of security,] and is followed by sometimes lengthy surveillance[,] of an individual's email cor6respondence. Law firms—targets for the valuable client information they harbour—are also particularly appealing to digital bandits for the trust accounts firms keep to safeguard clients' money." She referenced a Vancouver law firm associate who was tricked into transferring more than $2.5-million of client money, held in a trust account, to a fraudster's Hong Kong account (about 30% of which the law firm recovered, and the balance of which the firm has sought reimbursement from its insurer).

Lawyers crossing international borders, in the course of practice, need be cognizant of powers of involved customs authorities to seize and/or examine contents of their digital devices embedded with confidential client information. See, especially: Federation of Law Societies of

Canada, "*Crossing the Border with Electronic Devices: What Canadian Legal Professionals Should Know*", 14 December 2018.

Practitioners should be aware of expectations of them and their clients under the *Digital Privacy Act* (S.C. 2015, c. 32), some provisions of which took effect 18 June 2015, and others, which came into force 01 November 2018 (see 26 March 2018 Order In Council under section 27 of the Act: PC 2018-0369; bringing into effect, on 01 November 2018, Section 10 of the *Act* that requires reporting of data breaches). The *Digital Privacy Act* amended the *Personal Information Protection and Electronic Documents Act* (S.C. 2000, c. 5); most recently on 21 June 2019.

On 06 June 2018, Supreme Court of Canada addressed jurisdiction to adjudicate civil claims based on alleged digital defamation (2018 SCC 28 (CanLII)).

The England and Wales Bar Standards Board, in guidance to its members, has warned that barristers who use social media inappropriately will face disciplinary action even if they believe they are doing so in a private capacity. Stated the Board: " … the inherently public nature of the Internet means that anything you publish online may be read by anyone and could be linked back to your status as a barrister. Remember that you are bound by Core Duty 5 not to behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession **at all times**." (*Legal Futures*, 21 October 2019.)

Law firms need prepare for a host of possible scenarios to ensure they maintain full control of their data. If they store law firm data in the 'cloud', how do they back up successfully? How do they also protect against the risk of the law firm's storage provider ever losing law firm data? (*Legal Futures*, 18 November 2019.)

7.10.2 Artificial Intelligence

How should practitioners, family law or other, approach and engage with artificial intelligence (AI) (established in 1956 at a Dartmouth College workshop in Hanover, New Hampshire)?

To assist them, presently, is a bounteous selection of largely fee-for-service summits, conferences, programs, courses, hardcopy publishing, mentoring and likesuch. Most are promoted with soaring kinetic energy, not to mention, urgency. Many are presented with implications of foreboding for any professional failing acquisition of continuing legal education hours offered or required. But most everything on offer is, unavoidably, a work in progress.

Seven years ago, the cover of the April 2017 edition of *Canadian Lawyer* counselled legal practitioners to "Forget the type" and foretold that "Artificial Intelligence will change the legal profession, just not how you are expecting." Inside, six pages extolled the cover message.

May 2024, *Canadian Lawyer's* most recent cover heralded "AI'S MASSIVE DISRUPTION [:] With GenAI, the entire legal profession has now accepted real change is coming". Inside (p. 1), managing editor Tim Wilbur reservedly and perceptively commentates on "The predictability of unpredictable change"; emphasizing that "[w]hile … broad changes are inevitable, how technology affects market dynamics can be challenging to predict."

Several days after that publication's release came the 18 May 2024 distribution of the 131-page *International Scientific Report on the Safety of Advanced AI*. Chairing this initiative, discussed at the AI Seoul Summit on 21-22 May 2024, was the head of Mila, the Québec AI Institute, University of Montreal professor Yoshua Bengio. Summarized at pages 11-12 is this Report theme:

> It is difficult to assess the downstream societal impact of a general purpose A1 system because research into risk assessment has not been sufficient to produce rigorous and comprehensive assessment methodologies. In addition, general purpose AI has a wide range of use cases, which are often not predefined and only lightly restricted, complicating risk assessment further. Understanding the potential downstream societal impacts of general-purpose A1 models and systems requires nuanced and multidisciplinary analysis …. [representing] an ongoing technical and institutional challenge.

Not requiring further nuanced analysis are two of AI's early consequences: (i) vagaries of approaching and engaging variants of AI for legal research, and (ii) virtues, economically, of approaching and engaging AI to deliver, less expensively and more promptly, some legal services.

About a year before the May, 2024 AI Seoul Summit, a United States District Court Judge for Northern District of the State of Texas, Brantley Starr, on 30 May 2023, may have issued the first standing procedural order, anywhere, which requires attorneys and *pro se* litigants appearing in his Court to provide a certificate, when initially filing in a court proceeding, which declares that either no contents of any filing will be prepared using generative AI platform tools, or that generative AI content in proposed filings will be verified for accuracy.

What Judge Starr had directed be avoided in State of Texas, came to pass in the District Court for Southern District of State of New York. On 08 June 2023, Judge P. Kevin Castel, presiding over *Roberto Mata v. Avianca, Inc.*, was told that Steven Schwartz, Plaintiff's lawyer, who was not licenced to appear in New York, had prepared an argument which he supplied to a New York-licenced attorney he instructed. His argument cited six AI hallucinations, which facially appeared to be authentic judicial decisions. The cases were intended to support opposition to a request by the Defendant Columbia airline to dismiss Mata's claim. The claim sought compensation for in-flight harm Mata alleged was caused him by a metal serving cart. The six cases were discovered by Mr. Schwartz by resorting to ChatGPT [Generative Pre-Trained Transformer], a free-to-use AI Internet tool (which promises, 'just ask and we will brainstorm'). A sibling of ChatGPT is called InstructGPT (which promises, 'you prompt us with instructions and we will, in detail, respond').

The next filing for the Court prepared by Mr. Schwartz was not on Plaintiff Mata's behalf; rather, was in defence of himself—confronted as he was by prospects of citation and sanction for professional misconduct. This filing—by a counsel who the imperiled Mr. Schwartz retained to advise him—comprised an affidavit and, later, an argument, both authored by Mr. Schwartz. His affidavit, in response to a complaint of professional misconduct, for the purpose of avoiding sanction, deposed that by using ChatGPT for the first time, he did not intend to deceive the Court

and did not act in bad faith. In his argument, he contended he did not understand that instead of being a search engine, ChatGPT was a generative artificial intelligence language-processing tool. In his ignorance he believed the AI tool, when it assured him the cases were genuine.

From the Court transcript, part of Judge Castel's questioning of Mr. Schwartz:

> THE COURT: Let me ask you, did you do any other research in opposition to the motion to dismiss other than through ChatGPT?
>
> MR. SCHWARTZ: Other than initially going to Fastcase and failing there, no.
>
> THE COURT: You found nothing on Fastcase.
>
> MR. SCHWARTZ: Fastcase was insufficient as to being able to access, so, no, I did not.
>
> THE COURT: You did not find anything on Fastcase?
>
> MR. SCHWARTZ: No.
>
> THE COURT: In your declaration in response to the order to show cause, didn't you tell me that you used ChatGPT to supplement your research?
>
> MR. SCHWARTZ: Yes.
>
> THE COURT: Well, what research was it supplementing?
>
> MR. SCHWARTZ: Well, I had gone to Fastcase, and I was able to authenticate two of the cases through Fastcase that ChatGPT had given me. That was it.
>
> THE COURT: But ChatGPT was not supplementing your research. It was your research, correct?
>
> MR. SCHWARTZ: Correct. It became my last resort. So I guess that's correct.

Judge Castel, in his written opinion, remarked, " …there is nothing inherently improper about using a reliable artificial intelligence tool for assistance. But existing rules [in spite of being

silent about AI] impose a gatekeeping role on attorneys to ensure the accuracy of their filings. …. [The gatekeeping responsibilities were] abandoned [by involved attorneys] … when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question."

On 22 June 2023, Mr. Schwartz and his firm, jointly and severally, were sanctioned, fined $5,000, and required to "send via first-class mail a letter, individually addressed to each judge falsely identified as the author of the [six] fake … opinions."

Implicit in Judge Castel's vexing opinion is a cornucopia of admonitions for any practitioner minded to seek guidance from AI.

Unquestionably, much more prudent use of AI technology is capable of work product that "could finally make alternative fee arrangements truly transform how law firms price their services," contends David Cohen, senior director, client services delivery, McCarthy Tétrault LLP (*Canadian Lawyer*, Issue 48.01, May 2024, p. 13).

Manitoba is among jurisdictions which have published guidance for lawyers: The Law Society of Manitoba, "Generative Artificial Intelligence[:] Guidelines for Use in the Practice of Law" (April 2024).

Twenty-two authors, including both editors—Dr. Florian Martin-Bariteau and Dr. Teresa Scassa—have contributed to *Artificial Intelligence and the Law in Canada* (Toronto: LexisNexis Canada Inc., 2023; i-xxvii, 422 pp. with index). The 16 chapters are dedicated to copyright; patents and trade secrets; contract; tort; data protection; competition; administrative; health; human rights; technology-facilitated violence and abuse; equality by design; legal ethics; judicial decision-making; legal analytics; international regulation, and European Union and United States law. The legal ethics chapter (12) by Dr. Amy Salyzyn, University of Ottawa Faculty of Law Associate Professor (Common Law Section) is structured to address (i) sources; (ii) delivery of legal services

(tools for use by lawyers, and by the public); (iii) risks and opportunities, including rules of professional conduct, and (iv) key gaps in the law (facilitating responsible lawyer use of legal AI tools, and legal AI for public use). (The book was short-listed for the 2023 Walter Owen Book Prize, awarded in May 2024 by The Canadian Foundation for Legal Research.)

7.11 Practising Responsibility: Costs And Bills Of Fees

7.11.1 Costs

Modern family costs rules were designed to foster four fundamental purposes: to indemnify successful litigants for the cost of litigation; to encourage settlements; to discourage and sanction inappropriate behavior by litigants; and to ensure that cases are dealt with justly. A court has a range of costs awards available, from nominal to full recovery: *Mitchell v. Mitchell* (2023), 92 R.F.L. (8th) 439 (Ont. S.C.J.).

A father's income and assets far exceeded those of a mother in family litigation. More than two years of proceedings resolved the issue of parenting. Issues of child and partner support, and unjust enrichment, remained to be litigated. The mother's application for advance costs to fund the remaining issues was dismissed: *Nutbrown v. Corbiell*, 2018 ABCA 107 (CanLII); application for leave to appeal to Supreme Court of Canada dismissed: S.C.C. File No. 38121, 16 August 2018.

Costs totaling $750,000 were awarded a husband following trial of a matrimonial proceeding, in a decision which surveyed principles of family trial costs, and considered the parties' settlement offers and litigation behavior, in: *MB v. SBB*, 2019 ONSC 3960. The same principles, in the context of a party's reprehensible litigation behaviour, were addressed in *J.M.C. v. Y.S.*, 2018 BCSC 915 (CanLII); 2018 BCSC 1861 (CanLII).

Self-representing clients, in family proceedings, enjoy some flexibility from the justice system; but there are risks—not least, costs—when they manage their case without a lawyer: *Kirby v. Kirby*, 2019 ONSC 232 (CanLII).

An important function of a costs 'award' is to ensure a proceeding is justly dealt with. The fact a party was—often the case in family proceedings—represented *pro bono* does not render that party immune from costs consequences or disentitle that party from receiving costs: *A.P. v. L.K.*, 2021 ONSC 1054 (CanLII).

Costs were neither reward nor punishment; rather, were about accountability for the manner in which parties presented their cases and expedited reasonable resolutions. For a children's aid society, that meant accountability for the manner in which it investigated its case and presented the case in court, measured against relevant statutory requirements: *T.M. v. CAS et al.*, 2023 ONSC 5048 (CanLII), citing 1997 CanLII 9575 (ON CJ).

Counsel, personally, was condemned to pay costs for events occurring after settlement of a family law proceeding, in: *Knight v. Smith*, 2024 MBCA 5 (CanLII). One of the settlement terms required the husband to pay his spouse $40,000 by a date certain. Put in funds by the husband, his lawyer delayed onpassing them to the wife's solicitor for three weeks. When doing so, the solicitor added trust conditions. The wife motioned for costs against the solicitor. The motion was granted. The husband's solicitor was ordered, personally, to pay $10,000 costs to the wife. The solicitor's appeal was dismissed.

For considerations impacting costs *contra* counsel, see: *Québec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 (CanLII).

7.11.2 Bills Of Fees

An appellate court, in *Newell v. Sax*, 2019 ONCA 455 (CanLII), 2019 ONCA 608 (CanLII), resolved a dispute over the sum of fees for a legal service by resort to principles of *quantum meruit*. Involved were circumstances where no retention agreement (written or parol) had been made between lawyer, 87, and client, 93; no time dockets maintained, and no invoice rendered until after the lawyer collected his fee (which, earlier judicial consideration (2018 ONSC 4517 (CanLII)) concluded was equivalent to 72 hours service at $2,220 hourly).

Much else a court—and, much earlier, a law practitioner seeking to avoid a judicially-disputed bill of fees—should ponder is procurable from "Billing Without Bilking: Regulating Time-Based Legal Fees" ((2020), 43 Dalhousie Law J. (Art. 13)). Responsible for this triumph of clarity, conciseness, and constructive counsel is Dr. Noel Semple, Professor, University of Windsor Law School. As the article's title promises, his brief is "[t]ime-based fees …. used by 88.6% of Canadian lawyers for at least some of their files." His narrative is essential reading for every counsel preparing, and court (not least, Masters) addressing issues involving, bills of fees.

"The apparent simplicity of the time-based fee," cautions Dr. Semple, "is deceptive. Many questions are created by a time-based retainer, including the following:

> • Will the quoted hourly rates apply until the retainer ends? Or will the firm have the right to raise the hourly rates a client pays after the file has remained open for some time? If so, does the firm have an unlimited right to do so unilaterally?
>
> • Apart from the work of the individuals named in the contract, what other labour will be billed to the client? Will any – or all -- work by non-lawyers (e.g. clerks or assistants) on the client's file be "free" to the client, or will it be included on the bill?
>
> • If fees are not paid when due, what interest rate will be charged to the client? Interest, like the fee itself, must be "fair and reasonable" under current law. … [If] no further guidance is given, … is the only clear ceiling … the criminal rate of 60% per annum.
>
> • Can a client be billed for time during which work was being done for the client, but the timekeeper was also doing something else that did not benefit the client? One example is time a lawyer spends travelling on the client's behalf, while simultaneously doing document review or correspondence that is being billed to another client. Another is time that a lawyer spends productively thinking about a client's matter, while walking the dog or taking a shower.
>
> •Can a client be billed for time the lawyer spends trying to secure payment from the client?
>
> •Are dockets rounded to the minute, to the 1/10 hour, or to the 1/5 hour? Can "0.2" be billed when the lawyer actually worked for 10 minutes rather than 12? Can 0.2 be billed if the lawyer worked for 7 minutes or 3 minutes? Rounding as taught in elementary school includes rounding some numbers down. Does the same apply to dockets?

> •Does a docket for x hours literally mean that no less than x rounded hours were spent on the client's matter? Or can x be an "estimate" which might significantly exceed the time actually spent, e.g. because the lawyer does not stop the clock for breaks, or the lawyer has no reliable practice for recording time actually spent? Can x exceed the time actually spent because the lawyer believes that their efforts during that time were especially meritorious, because the outcome was especially good, or simply because the client's matter happens to involve a large amount of money changing hands?

Among Dr. Semple's warranted troubling concerns is that application of the 'Best Interests of the Client' principle or rule "to professional fees has not been clearly established in case law or codes of conduct."

A central contention of Dr. Semple's article is "not that every client must pay the same amount for a particular service, from a particular legal practitioner, but rather that every client has the right to a fair and fully disclosed fee." In pursuit of that goal, he articulates seven considerations which, he submits, "would create certainty, help prevent exploitation, and eliminate lawyers' conflicts of interest—without foreclosing any legitimate fee arrangement to which lawyers and clients might agree."

Dr. Semple's seven ushers:

> • The number of minutes billed in a docket should not exceed the number of minutes actually worked by more than 3. In other words, the minimum increment should not exceed 0.1, and normal rounding rules – including rounding down – should apply. The lawyer's signature on a bill should constitute an affirmation of this correspondence between minutes docketed and minutes actually worked.
>
> • When a lawyer is not sure how many minutes they spent, the client should receive the benefit of the uncertainty. Lawyers should be strongly encouraged to docket contemporaneously. It might be appropriate to require recording to happen within a specified number of hours after the work was done, [and] enact an adverse inference regarding dockets created more than a few hours after the work is claimed to have been done.
>
> • During a retainer, all decisions or recommendations that are likely to increase the client's legal fees should be made with exclusive regard to the best interests of the client, and no regard to the lawyer's profit. The client would, of course, retain the right to ask for the file to be staffed in a certain way.

• If a disbursement provides any benefit to a lawyer, the lawyer must subtract, from the amount charged to the client, a sum equivalent to the benefit received by the lawyer from the disbursement.

• No amount should be billed to or collected from a client unless that fee was explained to the client in writing at the outset of the retainer, and the client agreed to the retainer. Exceptions would be allowed for cases in which urgency would make the provision of a written retainer impracticable or clearly contrary to the client's interests.

• If it is anticipated that a legal fee will be paid by someone other than the client, a lawyer must not charge a higher fee than they would charge to the client itself for the same work. This rule would address situations where the client expects to pass the bill along to a third party, and therefore lacks any incentive to negotiate a fair price. In *McIntyre v. Gowling* [2017 ONSC 1733 (CanLII)], for example, the law firm charged its client the Royal Bank of Canada block fees for mortgage enforcement services. Borrowers were contractually obliged to reimburse RBC for these fees. The assessment officer reduced the law firm's bill from $4,795.00 to $3,770.00. The Ontario Superior Court of Justice upheld this result, noting that the client's expectation of passing on the fees to its borrowers distinguished it from the normal case in which a block fee is negotiated. A similar allegation of overbilling, made by a third party threatened with being required to pay a bill from Gowlings, was recently filed.

• Rules should also be drafted regarding (i) the adjustment of quoted hourly rates during the life of a retainer, (ii) the billing of non-lawyer labour to clients, (iii) interest rates on overdue accounts, and (iv) billing for minutes during which the time-keeper's energy was not exclusively dedicated to advancing the client's interests.

As you read, a family dispute lumbers through the Royal Courts of Justice, on the Strand, London. Not the dispute featuring the parties of the style of cause, in the High Court of Justice *per se*, mind you. Nonetheless, a dispute. The dispute features one of the parties to the cause, as Claimant, and her solicitors, as Defendants ([2024] EWHC 1107 (SCCO)). They are litigating in an appendage of the High Court; called 'Senior Courts Costs Office', Costs Judge Brown refereeing. This subordinate dispute, for certain, involves disagreement about what amount of legal fees (if any) remains to be paid by Claimant to Defendants for their services. Among questions preliminary to that issue is: what sums do the invoices claim? The solicitors say their invoices total £2,533,579 [CDN$4,371,183.85], of which £1,175,849.50 [CDN$2,028,692] has been paid on

account. What is more, "[i]t strikes me," said Justice Brown, "that the bills in this case could have been drafted in a clearer way." Moreover, the Justice posed a "need for explanation as to the level of costs claimed" [para. 46]. He felt confirmed in his concern "that there is scope for considerable reduction of sums claimed in the bill." Currently available information suggested to Justice Brown [para. 52] "there might even be room for challenge in respect of hourly rates [initially £375 (about CDN$645) increased unilaterally to £575 (about CDN $990)]. Brown J. wondered whether the solicitors "are indeed likely to recover more than, or appreciably more, than has already been paid" [para. 63].

After breakdown of a solicitor-client relationship, a law firm rendered the former client an invoice for $93,000 under a written retainer agreement. An assessment officer reduced the amount payable by the former client under the invoice to about $60,000. A motion justice, concluding the assessment officer lack jurisdiction, fixed the invoice amount at $45,000 (inclusive of disbursements and HST). The former client's appeal to Divisional Court was dismissed, as was her application to Ontario Court of Appeal: 2022 ONCA, and her SCC appeal leave application: S.C.C. No. 40687, 21 September 2023, 2023 CanLII 85855 (SCC), in *Suyi Cao v. Monkhouse Law Professional Corporation*.

A law group's lawyer was representing a client in a family law proceeding. The client in time rejected continuation of the lawyer's services. The lawyer sought leave to withdraw. The Court refused leave. The lawyer continued representing the client. Eventually the lawyer sought recovery of legal fees for representing the client. He obtained judgment for $10,677.62. Absent a retention agreement, the hearing officer relied on quantum meruit. But the court reviewing the hearing officer's decision held that quantum meruit cannot apply to a situation where the client did not want the lawyer's services (or, at least, did not want some of those services). Judgment was reduced to $3,050: *Merchant Law Group v. Champagne*, 2022 MBQB 64 (CanLII).

8.0 AUTHORS

Substantial literature, addressing legal, ethical and professional responsibility, published in Canada, includes (reflecting, only, preferences of the author of this Paper):

(1) Franks & Zalev *This Week In Family Law* (Carswell/Westlaw Online) (until 04 April 2021 written by Philip Epstein, Q.C. and since then by leading Ontario barristers Aaron Franks and Michael Zalev). This incisive, articulate, pragmatic necessity for 'family law' practitioners is published 50 times annually;

(2) Orkin, Mark M., *Legal Ethics* 2nd Ed. (Toronto: Canada Law Book, 2011);

(3) Dodek, Adam M. and Hoskins, Q.C., Jeffrey G., *Canadian Legal Practice [:] A Guide For The 21st Century* (Markham: LexisNexis Canada Inc., 2009) [formerly: *Barristers & Solicitors In Practice* under editorship of founding editors Derek Lundy, Gavin MacKenzie and Justice Mary V. Newbury], supplemented loose-leaf publication (if you can afford the annual subscription fee (in 2021: $5,805.02 (including 15% HST) for one practitioner; advertised as of 31 May 2024 as $3,415.50 (including 15% HST));

(4) Proulx, Michel and Layton, David, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law Inc., 2001);

(5) MacKenzie, Gavin, *Lawyers & Ethics – Professional Responsibility and Discipline* (Toronto: Thomson Reuters, 2018);

(6) Dodek, Adam M.; *Solicitor-Client Privilege* (Markham (ON): LexisNexis Canada Inc., 2016);

(7) Cipparone, Eugene and Tjaden, Ted (formerly: MacNair, M. Deborah), *Conflicts of Interest[:] Principles for the Legal Profession* (Toronto: Canada Law Book, 2011), supplemented loose-leaf publication;

(8) Smith, Beverley G., *Professional Conduct For Lawyers And Judges*, 4th Ed. (Fredericton: Maritime Law Book Ltd., 2017);

(9) Woolley, Alice, and Salyzyn, Amy, *Understanding Lawyers' Ethics in Canada*, 3rd. Ed. (Markham (ON): LexisNexis Canada Inc., 2023);

(10) Slayton, Philip (with Chisholm, Patricia), *How To Be Good[:] The Struggle Between Law & Ethics* (Toronto: Oblonsky Editions, 2017);

(11) Canadian Lawyers Insurance Association, "Loss Prevention Bulletin", May 1991 to Summer 2016, and

(12) Armstrong, Stephen V., Terrell, Timothy P., and Reich, Jarrod, F., *Thinking Like a Writer. A Lawyer's Guide to Effective Writing and Editing*, (New York: Practising Law Institute, Inc., 2021).

Perhaps the most exhaustive compendium on lawyer legal, ethical and professional responsibility is the 2-volume *Restatement of the Law Third. The Law Governing Lawyers*, published in 2000 by the American Law Institute. (Since 2007, a *Concise Restatement* has been available from the Institute.)

[Editor's Notes: This (2024) is the nineteenth 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 (other than in Covid-cancelled 2020). The author of this paper claims exception under the *Copyright Act,* R.S.C. 1985, c. C-42, ss. 29, 29.1 (as amended to 31 May 2024).]

APPENDIX A: CANADA – FAMILY LAW LEGAL FEES (2021)

TABLE 01: CANADA - FAMILY LAW LEGAL FEES - NATIONAL			
Nature of Service	**National (Average)**	**National (1 to 4 member law firms – average)**	**National (5 to 25 member law firms – average)**
Uncontested divorce	$1,860	$1,841	$1,925
Contested divorce	$20,625	$18,250	$16,833
Trial up to 2 days	$19,087	$13,317	$28,938
Trial up to 5 days	$43,481	$30,867	$55,938
Marriage/co-habitation agreement	$2,708	$2,452	$3,750
Separation agreement with children	$7,014	$4,091	$19,786
Separation agreement without children	$5,463	$2,682	$3,583
Child custody and support agreement	$2,236	$2,784	$3,600
Spousal support agreement	$6,274	$2,272	$3,600
Division of property/assets agreement	$3,363	$5,261	$21,083
Motion to Change/Variation applications	$6,863	$4,494	$10,464
Mobility cases (changing the child's residence outside province/territory)	$16,120	$9,467	$18,500
Child protection hearings	$7,391	$3,043	$16,667

(**Macnab, Aidan, *Canadian Lawyer* (Toronto: Key Media International, 2021**)

TABLE 02: CANADA - FAMILY LAW LEGAL FEES – EAST / QUÉBEC / NORTH								
Nature of Service	**NS**	**NB**	**NF**	**PEI**	**QC**	**YUKON /NWT /NUN**	**Average**	**Range**
Uncontested divorce	-	-	$1,000	-	$1,838	-	$1,419	$1,000-$2,000
Contested divorce	-	-	-	-	$20,000	-	$20,000	less than $25,000
Trial up to 2 days	-	-	$3,500	-	$20,000	-	$11,750	$3,500-$20,000
Trial up to 5 days	-	-	$8,500	-	$52,500	-	$30,500	$8,500-$55,000
Marriage/co-habitation agreement	-	-	$1,500	-	$2,000	-	$1,750	$1,500-$2,000
Separation agreement with children	-	-	$2,000	-	$3,750	-	$2,875	$2,000-$4,000
Separation agreement without children	-	-	$1,250	-	$2,000	-	$1,625	$1,000-$2,000
Child custody and support agreement	-	-	$1,250	-	$2,250	-	$1,750	$1,000-$2,500
Spousal support agreement	-	-	$1,500	-	$2,250	-	$1,875	$1,500-$2,500
Division of property/assets agreement	-	-	$3,000	-	$3,750	-	$3,375	$3,000-$4,000
Motion to Change/Variation applications	-	-	$2,000	-	$5,000	-	$3,500	$2,000-$5,000

TABLE 02: CANADA - FAMILY LAW LEGAL FEES – EAST / QUÉBEC / NORTH								
Nature of Service	**NS**	**NB**	**NF**	**PEI**	**QC**	**YUKON /NWT /NUN**	**Average**	**Range**
[CONTINUED] Mobility cases (changing the child's residence outside province /territory)	-	-	-	-	$12,500	-	$12,500	less than $15,000
Child protection hearings	-	-	-	-	$7,500	-	$7,500	less than $10,000

(**Macnab, Aidan, *Canadian Lawyer* (Toronto: Key Media International, 2021**)

TABLE 03: CANADA - FAMILY LAW LEGAL FEES – ONTARIO	
Nature of Service	**ONTARIO**
Uncontested divorce	$1,439
Contested divorce	$23,278
Trial up to 2 days	$23,150
Trial up to 5 days	$51,950
Marriage/co-habitation agreement	$3,531
Separation agreement with children	$13,300
Separation agreement without children	$10,467
Child custody and support agreement	$12,273
Spousal support agreement	$12,341
Division of property/assets agreement	$12,432
Motion to Change/Variation applications	$10,000
Mobility cases (changing the child's residence outside province/territory)	$26,778
Child protection hearings	$16,000

(**Macnab, Aidan, *Canadian Lawyer* (Toronto: Key Media International, 2021**)

TABLE 04: CANADA - FAMILY LAW LEGAL FEES – WEST						
Nature of Service	**BC**	**AB**	**SK**	**MB**	**Average**	**Range**
Uncontested divorce	$1,786	$2,677	$2,050	$1,500	$2,003	$1,500-$3,000
Contested divorce	$12,150	$23,182	$11,750	$7,500	$13,645	$7,500-$25,000
Trial up to 2 days	$12,875	$19,375	$12,500	$4,000	$12,188	$4,000-$20,000
Trial up to 5 days	$30,417	$44,375	$25,000	$10,000	$27,448	$10,000-$45,000
Marriage/co-habitation agreement	$1,821	$2,823	$1,440	$750	$1,709	$750-$3,000
Separation agreement with children	$2,158	$3,546	$1,938	$750	$2,098	$750-$4,000
Separation agreement without children	$1,833	$2,835	$1,583	$750	$1,750	$750-$3,000
Child custody and support agreement	$1,638	$3,760	$1,750	$750	$1,974	$750-$4,000
Spousal support agreement	$1,363	$2,911	$1,750	$750	$1,693	$750-$3,000
Division of property/assets agreement	$1,713	$8,735	$1,750	$750	$3,237	$750-$9,000
Motion to Change/variation applications	$3,475	$6,175	$3,833	$3,000	$4,121	$3,000-$7,000
Mobility cases (changing the child's residence outside province / territory)	$6,375	$12,750	$5,500	$7,500	$8,031	$5,500-$13,000
Child protection hearings	$5,525	$7,500	$5,600	$2,500	$5,281	$2,500-$7,500

(**Macnab, Aidan, *Canadian Lawyer* (Toronto: Key Media International, 2021**)

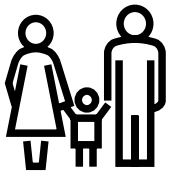
APPENDIX B

LawPRO CLAIMS SUMMARY **(*by Paper's author from LawPro data posted online as of 31 May 2024*)**			
Practice Discipline	**Average total cost annually**	**Average total claims annually**	**Average cost per claim**
Litigation	$22.7 million (*May 2020*)	744 (*2009-2019*)	$30,400 (*May, 2020*)
Real Estate	$22.7 million (*April 2023*)	665 (*2012-2020*)	$34,000 (*April 2023*)
Wills and Estates	$10.7 million (*April 2023*)	297 (*2012-2020*)	(not posted)
Family	$4.2 million (*June 2022*)	222 (*2011-2021*)	$18,708 (*June 2022*)
Corporate / Commercial	$8.9 million (*June 2022*)	162 (*2011-2021*)	(not posted)
Criminal	$1.1 million (*April 2022*)	62 (*2011-2021*)	$24,000 (*April 2022*)
Employment	(not stated)	49 (*2008-2018*)	$18,000 (*June 2022*)
Intellectual Property	(not posted)	47 (*2012-2022; 87% of claims closed absent cost*)	$90,500 (*April 2023*)
Immigration	$488,000 (*April 2023*)	31 (*2012-2022*)	(not posted)
Franchise	$1.4 million (*June 2022*)	9 (*2011-2021*)	$145,000 (*June 2022*)

APPENDIX C

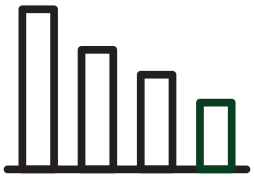
Source: LawPRO FAMILY LAW CLAIMS FACT SHEET
- practicePRO, 2023

FAMILY LAW CLAIMS FACT SHEET



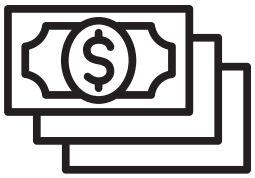
 # 5 claims area by cost

- average total cost $4.3 million per year



 # 4 claims area by count

- average 216 claims per year



$18,300 average cost per claim

RISK MANAGEMENT TIPS

Proactively direct and control client expectations

Family law clients can be emotional and difficult to manage. They may also have changing and unrealistic expectations. This makes it especially important that you manage their expectations from the very start of the retainer. Helping clients avoid disappointment and surprises will significantly lower your claims exposure.

Carefully explain agreement terms to clients

Carefully explain domestic contracts or settlement agreements so that clients cannot later allege that they did not understand the contents of these agreements.

Be aware of the limitations of your legal knowledge

Family law is one of the most complex practice areas, with federal and provincial statutes and voluminous case law. No lawyer can hope to be an expert in all aspects of this field, so it's important to know when to seek advice from more specialized counsel (e.g. for estate planning) or third party experts (e.g. tax advisors, accountants, appraisers or actuaries).

Make better use of checklists and reporting letters

LAWPRO's Domestic Contract Matter Toolkit has checklists and forms that contain issues lawyers should consider as they conduct the interview on a domestic contract matter and when they meet with the client to review and sign the document. A final reporting letter detailing what you did and what advice you gave can be a great help in the event of a claim, which may arise long after you've forgotten the details of a particular file.

Don't lower your standards for limited scope matters

A limited scope retainer does not mean less competent or lower quality legal services. Identify the discrete collection of tasks that can be undertaken on a competent basis and confirm the scope of the retainer in writing. Clearly document all work and communications. Recognize that unbundled legal services are not appropriate for all lawyers, all clients, or all legal problems. Sample retainers and checklists can be found on the Limited Scope Representation Resources page at practicepro.ca/limitedscope.

COMMON MALPRACTICE ERRORS

Communication - 37%

- Failing to ensure the client understands the potential consequences of excluding certain property from an equalization calculation in a marriage contract
- Failing to adequately explain the terms of a separation agreement, minutes of settlement, or that a settlement is final before the client is asked to sign
- In a limited-scope retainer, not communicating clearly what you are retained to do and what you are not going to do

Errors of law - 21%

- Errors as to entitlement, amount or duration of spousal support
- Not complying with Federal Child Support Guidelines when arrangements are made for child support
- Unanticipated and unintended tax obligations

Time management - 11%

- Claim for spousal support is not made for a lengthy period of time, and ultimately an amount of support is lost because the court will not make a retroactive order
- Missed deadline for an equalization claim

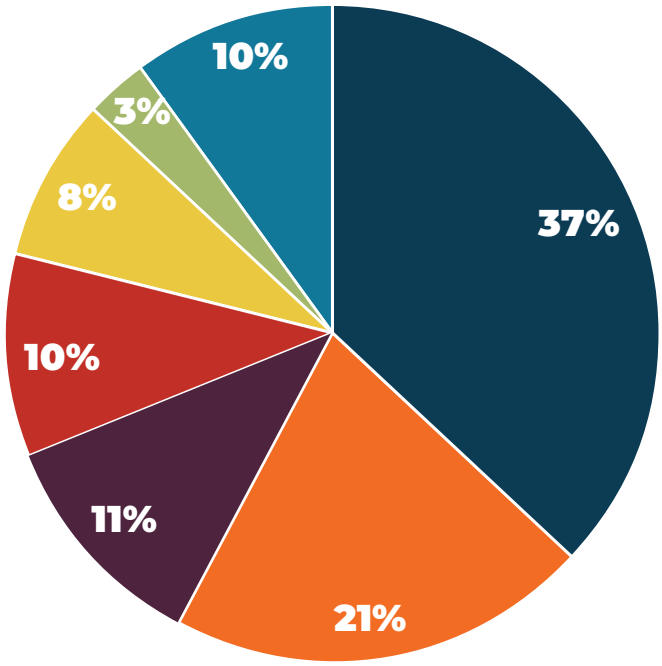
Inadequate investigation - 10%

- Failing to properly identify all assets and liabilities for the purposes of preparing financial statements and making net family property calculations
- Failing to explore full facts and circumstances of a client's marriage so as to appreciate issues that need to be dealt with in a separation agreement or litigation

Clerical and delegation - 8%

Conflict of interest - 3%

Other - 10%



Visit **practicepro.ca** for resources including the Domestic Contracts Toolkit, the Limited Scope Retainers Resources page, LAWPRO Magazine articles and other checklists, precedents, practice aids

We can provide knowledgeable speakers who can address claims prevention topics. Email **practicepro@lawpro.ca**

*All claim figures from 2013-2023. All cost figures are incurred costs as of June 2024