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and
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SENSITIVITY

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

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Summaries of, and excerpts from, decisions, legislation, authors, and reports on principles and practice of professional, ethical, and legal responsibility, published during the period, primarily, from June 2002 to June 2004.

June 2004

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1.0 INTRODUCTION

Nature Of Paper

This anthology summarizes, and excerpts from, judicial decisions, book and journal scholarship, legislation and reports, published primarily from June 2002 to June 2004, which address (i) selected principles of responsibility – professional, ethical, and legal – governing the law avocation and (ii) the practice of those theorems of responsibility, particularly by "family law" practitioners. (Unless essential to understanding of the text, footnotes are omitted from excerpted material.)

Previous Papers

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

Caveat

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

> … while certain ... [responsibility] issues yield to reasonably clear answers, on many occasions identifying or applying the proper standards can be a maddeningly challenging exercise. Reasonable people can differ as to the proper … approach to apply in a given situation. Legal … [responsibility] is not an exact science, with every problem amenable to a set and indisputable resolution. What can be most frustrating about the study of lawyers' … [responsibility] is the elusiveness of a widespread consensus on many important issues.
>
> Moreover. Justice Proulx and Mr. Layton caution (at p. 3):
>
> Our legal culture undergoes constant and inevitable change, and so too, then, do expectations and standards pertaining to lawyers' behaviour. What was contentious fifty years ago may seem totally unproblematic today, and vice versa, Or the preferred method of approaching an issue may change dramatically over time. Ideas about legal …[responsibility] by no means mutate daily, yet … [t]his

topic … is definitely not static.

Practising Lawyers In Canada

The constituency of the subject of this anthology comprises, as of 31 December 2002, 85,863 lawyers; 84.9 % of whom (72,914) – including 34.9 % (25,513) female lawyers – hold practicing status (Federation Of Law Societies Of Canada, 24 June 2004). Among them are 3,929 lawyers admitted to provincial and territorial Bars across Canada in 2002; 53.3% of whom (2,098) were female lawyers.

Challenges Facing Lawyers Practising Family Law In Canada

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

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

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

Lawyer Responsibility

(a) Sources

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

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

(b) Professional And Ethical Responsibility

The principal code of responsibility in Canada is the Code of Professional Conduct. This

document had its origins in the *Canons of Legal Ethics* (very general statements of principle) established by the Canadian Bar Association on 02 September 1920; materially influenced by comparable Canons adopted by the American Bar Association in 1908. Canada's *Canons of Legal Ethics* were, on 25 August 1974, replaced by the *Code of Professional Conduct*, comprised of general rules and supporting commentary ("CBA Code") which, in turn, in August 1987, was substantially revised and, in August 1995, was amended by addition of Chapter XX (regards non-discrimination). The Code is undergoing further review; resulting in proposed substantial alterations and additions which will be considered for approval in Winnipeg at the August 2004 annual convention of Canadian Bar Association.

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

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

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

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

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

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

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

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

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

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

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

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

(c) Legal Responsibility

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

> A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings. See, for example, *Law Society of Manitoba v. Giesbrecht* (1983), 24 Man. R. (2d) 228 (C.A.). The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict

of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy.

Program History

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

Copyright Exception

This anthology claims exception under the C*opyright Act*, R.S.C. 1985, c. C-42, s.29.

2.0 SOURCES AND STANDARDS OF RESPONSIBILITY

2.1 Professional And Ethical Responsibility

"Michael Franck Recipient Address"

Berry, John T., Executive Director, State Bar of Michigan, speech to American Bar Association National Conference on Professional Responsibility, Vancouver, B.C., 31 May 2002 (in part)

…. We lawyers who are trained to analyze, dice, and slice issues, tend to react very poorly to dramatic change. We like to stabilize things, not shake them up. Our instinct is to reduce uncertainty, not embrace it. A story about a supposed encounter off the coast of Newfoundland illustrates the danger of settling in to a fixed course and defending it at all costs.

Canadians: Please divert your course 15 degrees to the South to avoid a collision.

Americans: Recommend you divert your course 15 degrees to the North.

Canadians: Negative. You will have to divert your course 15 degrees to the South to avoid a collision.

Americans: This is the Captain of a US Navy ship. I say again, divert YOUR course.

Canadians: No. I say again, you divert YOUR course.

Americans: THIS IS THE AIRCRAFT CARRIER USS LINCOLN, THE SECOND LARGEST SHIP IN THE UNITED STATES ATLANTIC FLEET. WE ARE ACCOMPANIED BY THREE DESTROYERS, THREE CRUISIERS, AND NUMEROUS SUPPORT VESSELS. I DEMAND THAT YOU CHANGE YOUR COURSE 15 DEGREES NORTH. I SAY AGAIN, THAT'S ONE FIVE DEGREES NORTH, OR COUNTER MEASURES WILL BE UNDERTAKEN TO ENSURE THE SAFETY OF THIS SHIP.

Canadians: We are a lighthouse. Your call.

The changing economic and societal landscape in which we operate is our lighthouse. It's our call. What's it going to be? Narrow-minded self-interest, or a rededication of our essential values to a changing environment? Bar leaders must listen to individual lawyers' concerns, but in the long run the role of our profession in protecting our democracy through the rule of law trumps our individual concerns and our service to the public is the foremost consideration of all. This means that in accepting the privilege of practicing law we must also accept the requirements of high competence, high integrity, and the cost in terms of both time and money of promoting both qualities individually and throughout the profession.

"CLE For The Whole Person"

Keeva, Steven, (2004), 90 A.B.A. Journal (February 2004), pp. 76; 77 (in part)

When Howard Vogel arrived at the Minnesota Supreme Court building in September, he came with Atticus Finch on his mind.

Vogel, a professor at Hamline University Law School in St. Paul, was one of 12 people there to address the court on an issue they believed went to the very heart of what it means to be a lawyer.

He told the justices that he uses Harper Lee's *To Kill A Mockingbird* to help his students understand the concept of professional identity. On a recent occasion, he said, he asked his students what most stood out to them about Atticus.

"We had a wide-ranging discussion," he recalled, and a student who had been rather quiet up until then said that what struck her was the fact that Atticus is the same everywhere he goes. "He's the same when he's at home and when he's at church. He's the same when he talks with Calpurnia, who takes care of his children, and when he visits with neighbours. He's the same when he goes to the state legislature, and when he goes to represent a black man against a rape charge."

The student's point, and the message Vogel came to make to the court, was simple but weighty: Finch was a whole person. "You have a complete range of skills rooted in your humanity," Vogel said he tells his students, "and you will bring those to your work, as did Atticus."

. . . .

The dispute that brought Vogel to the Court had its beginning in October 2001 when the state CLE board awarded 2.75 credits to lawyers who attended a program called "Career Satisfaction, Renewal and Resilience for Lawyers and Judges." Its sponsors had applied for seven credits, which would have been standard for a seven-hour course.

.... the [CLE] board drew a line between material that is "directly related to the practice of law," and that which is peripheral to such work. It OK'd CLE credit for portions of the course led by a judge and a law professor, but disallowed those that concerned "adult developmental theory."

Among the points that came across quite clearly on the argument were these.

- That being a complete lawyer requires more than understanding the rules and having the ability to deploy them. It also includes being able to relate well with clients, empathize and be a good listener, among many other traits.

- That it is unfair to force lawyers to choose between, say, law office management and career satisfaction courses; both are essential.

- That a large percentage of malpractice claims arise out of poor practice management, on the one hand, and problems such as depression and substance abuse on the other. Both could be more adequately addressed if the cap were lifted.

- That different types of programs are appropriate for different lawyers, depending on their stage of life and their professional identities. For example, a senior attorney who is an expert in a substantive area might be facing issues of resiliency and purpose, while a younger colleague needs work on the basics of practice.

- That lawyers can be trusted to take the CLE courses they need. It is in their best interest to do so.

On Dec. 11, the court sided with Vogel and company when it promulgated an amendment to the state board of continuing legal education. "There shall be," it read, "no limit on the number of credit hours for professional development courses that [except for this order] shall be used to satisfy a lawyer's CLE requirements in any reporting period."

The court defined professional development courses to include those that address issues such as "career satisfaction and renewal, stress management, mental or emotional health, substance abuse and gambling addiction."

"Mentoring: learning from other's experiences"

Stephens, Cheryl, *The Family Way [:] National Family Law Section Newsletter* (Ottawa: Canadian Bar Association, February 2004), pp. 8-9

By lending support to a junior colleague, be it personally or professionally, a mentor plays an important role in the business community. They are a source of information and inspiration for a new recruit and help not only to set an example for future generations, but also to build the business community, by strengthening ties between generations.

When many of us were young practitioners, there was little talk of mentorship. In recent years, however, mentoring has risen to prominence and is now quite popular in the business world.

Increasingly, businesses are beginning to see the value of passing on skills and advice from the older generation to the newer one through the personal dynamic that exists in a mentor-protégé relationship.

Lawyers are also gradually beginning to appreciate the benefits that can be transferred from partner to associate in a mentoring scenario. More than just a valuable source of skills and knowledge, the mentor imparts wisdom on how to avoid breakdowns in the lawyer/client relationship, or how to balance work and personal life commitment and other key elements of a legal career that aren't taught in law school.

What is mentoring?

Broadly speaking, mentoring is a defined relationship that exists between a youth and an adult. By extension, in the business world, it becomes the relationship between a new recruit and an experienced team member and one in which the new recruit benefits from the older employee's years of experience.

In formal programs, a mentoring relationship is structured in a one-on-one dynamic with a focus on the needs of the protégé with the aim of helping them develop to their fullest potential. Programs often last in terms of years, but can be tailored to suit the specific needs of either party in the relationship.

The attractiveness of mentoring comes from the fact that it centres around a personal and flexible dynamic between two people, the key elements of which are respect, communication and honesty. Participants in voluntary mentoring relationships can define their own terms and actively design and redesign the relationship as time passes and needs change. In some cases, a new hire may be given two mentors: one to provide technical assistance in his or her practice area and the other to advice on corporate culture or other career issues.

Blurring the line somewhat are personal issues and typically, a mentor will not act as an advocate for career advancement, or advise or assist in issues such as: dispute resolution, lending money or financial assistance, personal issues (unless otherwise agreed upon), client confidence, or excessive instruction in substantive law.

Benefits of mentoring

Mentoring benefits the junior professional in both personal and career arenas. The support of the mentor engenders increased self-confidence, beneficial self-reflection, and a conscious approach to balancing work and life. Mentors also provide career guidance and help with goal setting.

Many participants consider the most valuable feature to be the creation of a safe haven for frank disclosure: a place where the junior lawyer can ask dumb questions without judgment and find out what he doesn't know. For the law firm, mentoring benefits include enhanced communication that promotes competence and enhances morale. These contribute to career satisfaction and associate retention.

For their part, mentors benefit through personal satisfaction, learning and personal growth, as well as more tangible benefits such as a refresher course in law.

For the community at large, mentoring helps build ties between lawyers and helps promote professionalism, collegiality and civility.

Finding a mentor

Often, the process of finding a mentor is one of simply asking. Consider someone who might be a suitable role model for your own career, or professional development (What aspects of their work are attractive to you? Whom do you admire?) and ask them for their assistance.

It's likely that this person will be quite flattered by your request for assistance, even if they cannot meet your needs.

Are you a mentor?

Being a mentor demands commitment and an ability to solve problems and certainly isn't a good fit for many people. That said, however, mentoring might be for you if you're the type of person who welcomes the opportunity to reflect on the significant events in your life, and the obstacles you overcame and the lessons you learned.

Don't let your own self-doubts hold you back from helping another lawyer avoid your own mistakes. Even a mediocre mentor can be helpful by providing knowledge, experience, and access to information and referrals. A superior relationship can be built with developed listening skills, problem-solving abilities, and a grasp of people and politics.

If you would like to mentor, but you don't have the time, remember that the relationship can be designed to be flexible, requiring only one or two phone calls weekly or less frequent face-to-face meetings. The relationship should be about quality time, as opposed to quantity.

"Professional courtesy"

***Canadian Lawyer,* January 2004, pp. 8-9**

J. Kirby Inwood, the controlling mind behind an online lawyer referral service, CanLaw.com, has threatened to sue the Law Society of British Columbia (LSBC) for a story which ran in a recent *Benchers' Bulletin*. The Bulletin says that some women seeking a lawyer referral from CanLaw have been receiving offensive emails from the firm in reply.

The newsletter says the abusive e-mails apparently target women who are requesting a referral for family law matters. One woman involved in a custody dispute supplied CanLaw

with her home address and phone number.

But when she tried to pay a $5 service charge by credit card she was told by e-mail: "You are a deadbeat You are also a lunatic. I hope you and your family die. Now go to hell."

Another woman was told after her request for a lawyer referral: "Are you stupid? You want us to provide you with thousands of lawyers' names for free? Piss off you pathetic lunatic."

When one woman lawyer tried to put a stop to CanLaw's unsolicited e-mails, the company wrote back, calling her "another stupid little girl who got through law school on her back" and a "despicable, ignorant, roundheeled, feminist bigot"

The *Bulletin* points out: "Some members of the public mistakenly assume CanLaw, which is based in Toronto, is in some way affiliated with or approved by provincial law societies or the Canadian Bar Association. CanLaw is not associated with any law society or with any bar association and its principal is not a lawyer."

Inwood is well-known as a "men's rights" activist and an "anti-feminist" He was much in news in the mid-1980s when he waged a highly public campaign to bring his Russian wife Tanya Sidorova, and Russian-born infant son, Misha, to Canada. He'd met and married Sidorova while on holiday in the former Soviet Union.

Soviet authorities finally allowed the wife and son to travel here, but nine days after their arrival in September 1987, Inwood was charged with assaulting both the boy and his mother. Convicted, Inwood served 20 days of a 30-day sentence for the assault on Misha. He received a suspended sentence for the attack on his wife.

In March 1989, the Ontario Court of Appeal ruled Inwood should have been sentenced to three months in jail, but ruled there was no point in sending him back to jail.

LSBC communications officer Brad Daisley says that although Inwood has contacted the society and threatened to sue, the regulator has not received formal notice of any court proceedings.

"Working 9-5, or 10-3, or 1-4 …"

Neil, Martha, (2003), 89 *ABA Journal* (December 2003), p. 62 (in part)

According to the National Association for Law Placement, 96.3 percent of surveyed firms permitted part-time work in 2002, the most recent year for which NALP statistics are available. But only 3.7 percent of the lawyers at those firms were part-timers, according to the nonprofits educational organization.

"The perception is, still, that doing so stops your ability to continue to get good work and stay on the partnership track," says Jerry Nash, interim executive director of NALP. "The reality is that sometimes that is accurate."

The key for law firms is to design a written policy to assure lawyers who choose to work part time that they may stay on a partnership track, says Chicago attorney Julie A. Bauer. Chair of the hiring committee at Winston & Strawn, where she is a partner, Bauer helped redraft the firm's policy several years ago.

While "the number of attorneys who ask to go part time is still fairly low," the policy is a valuable recruitment tool, Bauer says. Many incoming lawyers "want to know they're going to have that option, if they choose to exercise it." Previously, it was common for part-time lawyers to set specific days to be in the office. Today, however, proposals often focus on an expected total of annual billable hours, Bauer says.

At Winston & Strawn, men and women lawyers can work part time in order to care for a child, a "parent or a spouse. Most who do so are female associates with young children, Bauer says.

A lawyer's workload can vary tremendously from one week to the next, says Bauer, who adds that technology makes it possible to work efficiently from home. "It's not a 'one size fits all' deal."

“In defence of lawyers”

Johnson, F. William, *The Financial Post,* 31 December 2003, p. FP.11 (in part)

Canada's press - and most recently, this national newspaper - has dedicated many column inches to criticizing the legal profession. To judge by the inaccurate and unsubstantiated charges made in these columns, you might mistakenly think that the rule of law in Canada has somehow gone off the track.

I suggest the real reason behind ongoing criticism of the legal profession can be summed up into two words: contradictory expectations. There is a dichotomy underlying Canadians perceptions of the role of lawyers (and judges, for that matter). That's not surprising, given that stand-alone courses on Canadian law and our legal system are not mandatory in most Canadian high schools.

When public expectations of the legal profession are informed by factors as random as television programs, best-sellers or the news of the day, it's perhaps no surprise that public expectations and demands of the legal profession are so contradictory.

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The perception of lawyers: The legal profession is often on the receiving end of one-line caustic jokes. Yet surveys and focus groups reveal that people have the highest regard for the lawyers they've actually retained. The fact is, when Canadians need legal advice or representation to protect or advance their rights, they turn to a legal advisor whose integrity, competence and dedication are assured, backed up by law societies that enforce strict codes of ethics. When it comes to their own legal representation, it's no laughing matter.

[**Editor's Note:** The author, F. William Johnson, is President of the Canadian Bar Association, 2003-2004.]

"First Thing We Should Do Is: (Not Kill, But) Listen to the Lawyers"

Moore, Sean, *The Hill Times*, 25 August 2003 (in part)

Though lawyers come in all shapes, sizes, genders, ethnic, racial, religious, and political and sexual orientations, their diversity doesn't end there. Collectively, they do such different things. Only a minority of them every really go to court. Some deal exclusively with business issues; others focus on managing clients' compliance with all manner of local, provincial, national or international law. Of course, many run businesses, serve as public servants or live the life of a politician. Indeed, lawyering has always been, since Confederation, the single most common professional background or occupation among our elected members of parliament. (The second most common? Farmers.)

Advocacy

Bindman, Stephen, "Farewell to Ivan [:] Justice top litigator is retiring": (2003), 3 *Justice Canada* (April 2003), pp. 2-3 (in part)

… [Ivan Whithall] describes his approach to litigation as "95 percent work, and five percent brains."

He says, "I believe 95 per cent of the work is done before you get to court, and by the time you get to court, the world should unfold as planned.

"I think my style of litigation is really non-confrontational, when it doesn't need to be confrontational, and I try to look for resolution of issues without actually going to court.

"Once you are in court and the battle lines are drawn – then, of course, you push as much as you need to push.

"I think an overarching principle is integrity. And I think that's one of the things that it takes a long time to acquire, and minutes to lose.

"It may not be politically correct to say that any more, but I like to think that one behaves as a gentleman in court, and so long as you know what the code of a gentleman is, you should be all right."

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Whitehall laments that much has changed since he began practising [32 years old].

"There are fewer gentlemen. When I started practising, a case that lasted two weeks was considered to be a lengthy case. Going a month was really a long case. Nowadays, a motion can take you that length of time.

"I think the amount of documentation has increased exponentially and with that the pressures on counsel have increased as well. And not surprisingly, as pressures increase, tempers become shorter.

"I think the profession has become a business. I suppose it always has been, but I think – perhaps it was a fiction-that the part of the profession that was considered to be an avocation was more important than the part that paid the overhead. Everybody accepted that you had to pay the overhead, but that wasn't the overarching, all-consuming goal.

"I think the profession is much more aggressive than it used to be. The notion of *ad hominem* is much more common than it used to be."

"Burnout"

Cumming, Jean, *The National*
(Ottawa: Canadian Bar Association, March /April 2003), pp. 16-17; 18; 21; 22 (in part)

"I always have this feeling I should be somewhere else. On a normal day, I feel as though I leave home for work sooner than I'd like, and get to work later than I'd like. I leave the office in the evening just in time to get home at a decent hour. Then if I have to, I go back to the office at night."

These words were spoken by one Canadian lawyer, but they represent the feelings of many. It's time the profession faced the facts: lawyers are working too damn hard. We're putting in too many hours, and subjecting ourselves and others to too much pressure and heartache. Stress rates are sky-high, cases of burnout are growing, and lawyers' physical and mental health is suffering.

Lawyers get stuck in a rut, working ever-increasing hours to make ever-more important money, losing sight of why we got into this business in the first place. No lawyer should ever be available to her clients 24/7 - but that's becoming the gold standard for our profession. And as a result, lawyers are hurting their families, their health and themselves.

Overwork has a better reputation within the legal profession than it deserves. Lawyers are encouraged to work and to bill as many hours as possible; it's considered by some a rite of passage to work from dusk till dawn. The myth of the hard-working lawyer burning the candle at both ends to satisfy the client or the firm is so deeply embedded that a generation of lawyers has been raised to think of it as normal.

Proponents of overwork maintain that lawyers who want to find ways to work fewer hours are "uncommitted," "not team players," and perhaps worst of all, "lazy." In contrast, these proponents characterize lawyer overwork as "good client service," "healthy competition" and so forth.

But health and overwork are at opposite ends of this spectrum. Leading careers advisor and *Globe & Mail* columnist Barbara Moses points out that overwork can lead to repercussions that include "burnout, eroded relationships, bad partnering, physical illness, absent parenting, and bad parenting." And law, she says, is a poster occupation for overwork.

"Personally," says Moses, "I worry about the impact on children when their lawyer parents come home angry and grumpy after 90 hours of work." Women lawyers are more likely to "push back" by articulating their concerns, she says, by looking for better positions or even switching careers. But both women, and men lawyers are working too hard.

Money talks

There are many factors contributing to the overwork phenomenon, but a good place to start is with an honest assessment of the impact of the billable hour on the profession's work habits.

The billable hours structure, the most widely used measure of lawyer performance, naturally lends itself to overwork. When you're paid not for the work you produce or the results you achieve, but for how long it took you to do it, there is a direct financial incentive to stay at the office as long as possible.

Lawyers …. often work in a highly competive “testosterone culture”, where more is always considered better.

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It's difficult for lawyers to break these habits once they've passed the senior associate or junior partner level. By this point, they're already socialized into overworking patterns. "What are your billables?" is the bottom-line question for most every lawyer not in solo or small-firm practice. For too many, the answer is a number approaching 2,000 a year - sometimes more.

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“The economy isn't as good as it was," points out [Vancouver sole practitioner Ming] Song, Chair of the CBA's Young Lawyers' Conference. "Competition is stiff, firms don't want to lose clients, [and] lawyers don't want to be let go. Young lawyers have to work very, very hard. [They] widely assume that the first five years of practice are going to be tough and that you have to put in your time. That's how you prove yourself."

Many new practitioners start overworking at a high-paying job to payoff student loans, and pretty soon there's a mortgage, maybe a car or even a vanload of children involved. Is it even possible for young lawyers to avoid overworking in this context? If they want to exercise some control over their working hours, Song believes, they need to go into practice knowing what their -priorities are, and what financial compromises they're prepared to make, if any.

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Accomodating solutions

As [Pat] Cassidy [volunteer chairperson of the Nova Scotia Lawyers Assistance Program (LAP)] says, "accommodations are being made," but lawyers themselves have to ask for those accommodations, and they most certainly will have to compromise. For example, with three young children at home, Laurence Goldberg [a partner in the business IT department at Lang Michener, in Toronto] "doesn't have much time to socialize with colleagues after work." But he does structure regular physical exercise into his work week.

Other lawyers ask for work-at-home opportunities, flextime or part-time, compromises that allow them to fulfill their personal and family goals yet still work within a traditional law firm framework. But as recent reports have confirmed (see "Women in Law," National, August/September 2002, p. 12), law firms are still a long way from viewing flex-time arrangements as acceptable legal career paths.

Is technology the answer, or is it part of the problem? Goldberg points out that lawyers now spend much of their workday responding to e-mails on top of telephone calls. "There isn't time then during the day to spend two or three uninterrupted hours on a document," he observes. "That has to be done in the evenings."

But Stikeman Elliott's [Rod] Barrett [the firm’s Toronto managing partner], while acknowledging that technology has time-consuming qualities, believes that firms that invest in technology are allowing their lawyers a degree of workplace flexibility, reinforcing the message that lawyers should leave their offices now and again.

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Seeking help

Modifying your job description, acquiring new time-management and technology skills, and rededicating yourself to a different and better lifestyle are all critical to slamming the brakes on the cycle of overwork. But a growing number of lawyers are already in too deep to pull themselves free, and they find themselves at the mercy of overwork forces they can no longer control.

For these lawyers, and for those of any age who might be in danger of joining them, a battery of assistance is available. The CBA's Legal Profession Assistance Conference, which sponsors the "Swimming with Sharks [, Dancing With Dolphins]" seminars at the CLC, and its many provincial counterparts, are ready and more than willing to provide advice, assistance or just a little perspective. And they have no shortage of clients.

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Ironically perhaps, one of the obstacles preventing even more lawyers from turning to these programs is a perception that because they are funded by law societies and/or the CBA, information about potential lawyer misdeeds will be shared with governing bodies. Indeed, Ming Song acknowledges that unfortunately, "any young lawyer would think twice before turning to these services." But [Leota] Embleton [Program Manager of the Ontario Bar Assistance Program] is quick to assure that all such services are completely confidential.

"If you call LAP's toll free number [in Nova Scotia], your call is answered by a non-lawyer health professional," adds Pat Cassidy. "That professional decides whether the caller needs professional help, peer counselling, minor help or none at all. No files are opened. The person calling is assigned a billing number, and that number is used on the invoice submitted to the Barristers' Society. The only tracking we do is geographical.

"Barristers' Society president calls on lawyers to speak up about troubled colleagues"

Moulton, donalee, *The Lawyers Weekly*, 07 February 2003, pp. 1, 3 (in part)

The President of the Nova Scotia Barristers Society (NSBS) has appealed to lawyers to come forward and speak up when they know a colleague is troubled.

"Lawyers see problems every day - it's our job to analyze and solve them for clients. But put a fellow lawyer with a problem in our paths, and we may look the other way," Ray Larkin said in a recent article in the NSBS Society Record.

The result of looking the other way often means a serious escalation of a problem before it is identified, he told The Lawyers Weekly. Colleagues and others in the legal community too often are aware of a lawyer's problem but reluctant to speak up.

"Over the past year, some very serious situations involving our members have come to light. In each case, the situation reached catastrophic proportions before the society became aware and

stepped in. It became clear that members of the Bar, the Bench and the public had been aware of the problems for some time. In each case, the damage to clients, members and to the reputation of the legal profession was significant," he said in his column.

Coming forward does not come easily for lawyers, at least when it pertains to others in the profession. Although lawyers in Nova Scotia have a duty under Chapter 18 of the Legal Ethics Handbook to report to the society any member's conduct they reasonably perceive may result in serious damage to a client or other person, this threshold has been interpreted by members as being very high – so high that few reports are ever made, despite loud warning bells, Larkin said.

A partner with the Halifax firm Pink Breen Larkin, the NSBS president said it is "very, very, very uncommon for lawyers to make a report [about another lawyer]. It's rare," he stressed.

Part of this reluctance has to do [with] the perception – and misconception – about what the barristers' society will do if one lawyer reports on another. 'The society doesn't just respond to problems with one approach: heavy handed. We can help lawyers get over problems," Larkin said.

"Reporting on someone isn't like throwing them to the wolves," he added.

Larkin maintains that today there is little justification for not coming forward. Ten or 15 years ago there may have been no place for lawyers to turn when they had a drinking problem or a personal problem, but that is no longer the case. The Lawyers Assistance Program and the Practice Assistance Committee are two options available to lawyers in Nova Scotia looking for a helping hand.

"The confidentiality of the complaints resolution process only permits publication of the horror stories of poor judgment and professional misconduct," Larkin noted. "The stories about how the society has stepped in to help lawyers in need, even in the face of complaints, remain confidential. For these lawyers, the sky didn't fall when a concerned colleague or client called the society, and they are now back on their feet and functioning well."

In addition, making a report benefits all lawyers. "The reputation of the profession is harmed when clients are not being dealt with properly by lawyers," he said.

The bottom line is also adversely affected. In Nova Scotia, the barristers' discipline expenditures went over budget by $85,000 before the last fiscal year came to a close.

"This will translate into an increase in fees to every member," Larkin said.

***LawyerLife* [:]**
Finding a Life and a Higher Calling in the Practice of Law

Horn III, Carl, (Chicago: American Bar Association, 2003),
pp. 1-2; 6-7; 17; 25; 35; 51; 52-53; 76-77

Recent books and articles about the legal profession paint a troubling picture. Although the optimism/pessimism mix and proposed remedies vary, many agree with Harvard Law Professor Mary Ann Glendon that the profession is in extremis-or, as she puts it, on "the edge of chaos.” Indeed, Yale Law School Dean Anthony T. Kronman ups the philosophical ante in *The Lost Lawyer: Failing Ideals of the Legal Profession*, diagnosing "a spiritual crisis" in which "the profession now stands in danger of losing its soul.”

Other notable commentators concur. Almost ten years ago Sol M. Linowitz, about to retire from a distinguished career in law, business, and government, minced no words in *The Betrayed Profession: Lawyering at the End of the Twentieth Century*. Ambassador Linowitz's assessment, rich in historical example, laments the transformation of the profession he loved – and understood to be a high public calling – into an increasingly unprincipled, dollar – driven business,"'

With the current prevalence of lawyer misery, lawyer-bashing, and lawyer jokes, it is crucial that the legal profession rediscover the "high calling” and rekindle the ideals that are its prouder heritage. On the other hand, lest we appear hopelessly naive, before the law-as-a-high-calling flag can be credibly raised, two caveats are in order.

Caveat One: Polls, Surveys, and Opinions

Whether or not it is entirely deserved, the general public's low opinion of lawyers must be acknowledged and engaged. Even if much of the criticism is based on composite stereotypes or media hype of atypical cases, addressing negative perceptions is a necessary step toward reestablishing foundational ideals and restoring public respect for the legal profession.

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Caveat Two: No “Golden Age”

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…. it would be a mistake to consider any period a “Golden Age” or to apply recent critiques and criticism primarily as a call for return to the past. We cannot turn back the clock – and might not be as pleased as expected if we could – although our own period may be becoming, as … [Marc Galanter] has quipped, "the … Golden Age of nostalgia for the Golden Age of lawyering."

There are two fundamental reasons why we must not allow future efforts to restore or reform the legal profession to devolve primarily into nostalgic longing to turn back the clock. First. whatever period is selected as a model, upon closer scrutiny we will discover that it had ample deficiencies and problems of its own. The legal profession has been, and continues to be, a work in progress. And second, comparing the large and diverse bar of the twenty-first century, and our increasingly varied and complex work arrangements. to the much smaller, more homogenous bar of any other period is to a substantial degree a comparison of apples to oranges.

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If the bad news is a profession on "the edge of chaos" and “in danger of losing its soul," the good news is a rich heritage stretching back hundreds of "years from which we can draw wisdom and seek contemporary guidance. Historically and even recently, there have been lawyers in a variety of practice contexts – from major city firms to small town solo practitioners – who have understood law as a "high calling," who have balanced the business of law with a commitment to public service, and as a direct consequence of their "ideals," have been held in high public regard.

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Holding “little doubt [that] the legal profession is at an important crossroads," the lawyers who participated in the ABA 2000 focus groups [i.e., the Pulse Study] were "concerned" about the following "real-life trends":

- Financial pressures that are transforming law from a profession to a business;
- Clients becoming increasingly demanding;
- A lack of mentoring the next generation of attorneys;
- The increasingly central (and double-edged) role of technology;
- A growing public distrust and disrespect for the legal profession: and
- An erosion of professional courtesy and sense of community.

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…, the collective teaching of … ABA surveys in 1990, and 1995, and the Pulse Study in 2000, is this: A majority of lawyers remain at least somewhat satisfied with what we will call “LawyerLife”. On the other hand, a minority, which began to grow in the 1980s and may or may not have plateaued. has become at least somewhat dissatisfied. And a not insignificant number of the dissatisfied – those who regularly consider killing themselves, for example [–] are truly miserable.

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… [A] 1990 Johns Hopkins study, in which lawyers were found to be suffering with major depressive disorder (MDD) at the highest rate of any of the 104 occupations and professions studied, remains the most exhaustive research on the subject. …, “[L]awyers topped the list, suffering MDD at a rate 3.6 times higher than nonlawyers who share their same sociodemographic traits."

Although this is the only major study comparing depression in different occupations and professions, the results are consistent with other studies and surveys focused solely on lawyers. In … [a] North Carolina survey [,] …, "[m]ore than 24 percent reported symptoms of depression 'at least three times per month during the past year,' with 11 percent reporting they had considered

suicide at least once a month during the same year." Research conducted several years earlier in Arizona and Washington found "one-third of all lawyers [in those states] suffering from either clinical depression or substance abuse, both at twice the general prevalence rates for these disorders.

In 1996, analyzing this and other research for the Journal of Law and Health. psychologists Connie J. A. Beck, Bruce D. Sales. and G. Andrew H. Benjamin concluded:

> The data and analyses … manifest a highly alarming fact: a significant percentage of practicing lawyers are experiencing a variety of significant psychological distress symptoms well beyond that expected of the general population."

Although that conclusion will not surprise those familiar with the surveys and research reviewed in this chapter [i.e., chapter 2], it does confirm the nature and extent of the psychological distress altogether too many contemporary lawyers are facing.

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… , the ABA's "Pulse Study [in 2000]", which involved lawyers at all stages of practice in cities in three different parts of the country, identified "Financial Pressures Turning Law Into a Business, Not a Profession" as "Pressure Point #1." The November 2000 [Pulse Study] report detailed the specific concerns of those who participated in the 14 focus groups conducted earlier that year. Among them:

- Managing partners take on more work so that profit levels can be maintained.
- Everyone is expected to produce more.
- The general professional atmosphere is more businesslike and less congenial.
- Less time is spent on nonbillable efforts, including mentoring and "work for the greater good."
- Young lawyers may be required to meet ambitious billable-hour goals to justify their salaries.
- Lawyers also are expected to be "rainmakers" earlier on in their careers.
- The focus becomes business development and quickly churning work, not larger aims.
- Firm decision-makers must focus on running the business not practicing law.
- Significant pressure is placed on young lawyers, who are expected to begin soliciting business and learn the nuts and bolts of how to practice law on their own shortly after they joint a firm.

Or, as one of the participants more poignantly summed it up, "I think the practice of law has become the business of law, and it's a grind."

On the other hand, before we have too unmitigated a pity party, a few qualifying points are in order. First, to some extent there has always been a business element to the practice of law. Office space must be obtained, upfitted, furnished, expanded, and so on. Personnel must be hired, managed, and paid; employment and other taxes withheld; benefits fairly apportioned under complex federal regulations; and so forth. Office equipment and technology is ever changing and always more expensive. And all this requires a great deal of money, however professional, wise, or dignified the lawyers are who must ultimately generate it.

Second, as Harvard Law Professor Mary Ann Glendon reminds us, the very "idea that law is not a business, or only 'incidentally' so, was a conceit seized upon by elite attorneys in the early years of the [Twentieth century] to distance themselves from their buccaneer predecessors and from 'hustling' immigrant lawyers, as well as to assert their independence from their own clients." Professor Glendon faults the "careless use of 'commercial' as an epithet [as] mischievous," that is, as resting "either on the arrogant assumption that businesspeople have no ethics or on the dubious proposition that businesspeople invariably place short-term profits ahead of all other considerations." Glendon agrees "that lawyers assume higher responsibilities toward those they represent than businesspersons do toward customers," but correctly objects to the "cramped concepts of business ethics" that are often assumed in complaints about "commercialization."

Third, the current environment, in which many firms pay top dollars to associates and then work them to death to "turn a profit," is a vicious cycle that grew out of – or dramatically escalated during – the "freakish law boom of the 1980s." In other words, the seeds of certain of the maladies about which many now complain were sewn in a period when lawyers and law firms were making unprecedented amounts of money, a period many assumed was here to stay. But then, alas, as Professor Glendon describes it, "the binge of the 1980s gave way to the hangover of the 1990s."

Whatever qualifications may be appropriate, however, there are many lawyers today who remain trapped in this metaphorical "hangover." In some ways the remedy is quite simple. As the nursery aphorism goes, "All work and no play makes Jack a dull boy." And today there are far too many dull lawyers, exhausted yet never feeling really caught up, who desperately need to learn how to "play" again. Reflecting on the real-life effects of billable hours requirements on the associates at many large firms, Ambassador Sol M. Linowitz captures the opportunity costs of contemporary "success":

> At the large firms, associates are now expected to "fill the book" (show time sheets involving two thousand hours a year of work for clients). If the lawyer takes the normal ten [statutory] holidays and a minimal two weeks' vacation, this demand works out to forty-two billable hours a week, which implies fifty or even sixty hours a week at the office, The associates in the large firms cannot play the piano or paint a picture or act in a church play because they simply don't have the time.

In Linowitz' analysis, excessive hours not only inhibit personal balance and growth, but also have negative consequences on professional development:

> The tragedy is that, in the end. the single-minded drive toward winning the competitions at the firm will make these young lawyers not only less useful citizens, less interesting human beings, and less successful parents but also less good as lawyers, less sympathetic to other people's troubles, and less valuable to their clients.
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> . . . .

Remedies for … professionwide ills … fall in two broad categories: (1) those based on individual choices and (2) systemic initiatives and reforms. ….

…. Although there is nothing magic about the delineation or order of the [12-step program for lawyers] recommended [here] ... there has been an intentional blending of the professional and the personal. Keeping that in mind, the 12 steps toward greater fulfillment in the practice of law – and in life generally – are:

- Step 1. Face the facts.
- Step 2. Establish clear priorities.
- Step 3. Develop and practice good time management.
- Step 4. Implement healthy lifestyle practices.
- Step 5. Live beneath your means.
- Step 6. Don't let technology control your life.
- Step 7. Care about character – and conduct yourself accordingly.
- Step 8. "Just say no" to some clients.
- Step 9. Stay emotionally healthy.
- Step 10. Embrace law as a "high calling."
- Step 11. Be generous with your time and money.
- Step 12. Pace yourself for a marathon.

Gibbs v. Law Society of British Columbia

[2003] B.C.J. No. 2912 (QL) (B.C. S.C.), Taylor J.
(Summary)

Facts: Petition by Gibbs for judicial review of the British Columbia Law Society's compulsory collection of Canadian Bar Association fees.

Decision: Application dismissed.

Reasons: The CBA's national and British Columbia local branch objectives were mirror images of the duties and obligations of the British Columbia Law Society, except for the CBA's insurance operations which were so small they were not determinative. Given the consistency between the objects and functions of the two organizations, it was not unreasonable for the Society to determine to carry out its objects by universal member support of the CBA. The Benchers properly exercised their authority in collecting and remitting CBA fees and thereby carrying out the Society's objects.

[**Editor's Note:** The Law Society of British Columbia is one of two law societies in Canada which collect and remit CBA membership fees. Elsewhere in Canada, provincial and territorial law society members are invoiced directly by CBA for CBA membership. Whether all practicing members of the Law Society of British Columbia should be required to pay an amount equivalent to the CBA membership fee was the subject of a referendum approved by the Society's Benchers on 07 May 2004 and conducted from 01 to 22 June 2004. The result, released by the Society on 23 June 2004, was that (by a 52.7% majority) payment of the CBA membership fee will, commencing 2005, be optional in British Columbia.]

"Professionalism: A Lost Art?"

Peck, Q.C. Richard C.C., *National Criminal Law Program [materials]*
(Ottawa: Federation of Law Societies of Canada, July 2002), Section 6.2, pp. 2-6; 7-12

Being a professional means to be a member of a profession. A profession is a vocation, or calling, involving a branch of learning or science traditionally related to divinity, law or medicine. In the modern era, the notion of professionalism has been" mongrelized" to embrace life insurance, salesmen, plumbers [, fishers] and "sanitary engineers" … . None of the latter are professionals as that word was used in its historical sense and none embrace the quality of professionalism as it is properly to be understood.

Professionals take an oath on being "sworn-in" to their respective callings. This is true of the doctor, the lawyer and members of the clergy. Professionals are bound by a strict code of conduct and are subject to an historical governing body with immediate supervisory powers of discipline. Professionals are both accounted and accountable. They are expected to accord to the highest standards of personal conduct in return for privileges not granted to lay members of the body politic. They are expected to exercise perspicacity, restraint and the utmost moral worthiness in both their private and public lives. They are required to strive to be "beyond reproach" in the conduct of their affairs.

Ironically, there has been a devolution of the respect in which we have held our institutions over the past several decades. The genesis of this was both healthy and necessary, for, in the progressive development of democracy, criticism is essential. Having said this, it would appear that constructive criticism and healthy skepticism have been reduced to what Hunter S. Thompson referred to as "fear and loathing".

If one picks up a daily newspaper in virtually any part of this country, one is struck by the omnipresent criticism of virtually every institution in our society. Both the news pages and the editorial pages are rife with carping. No one, and no institution, is safe. Politicians, lawyers, doctors, police officers, the Courts, the government, the clergy and even God are assailed. If media truly represents public sentiment we are all at risk.

It will not avail us to further examine the fact that various institutions, including the legal profession, are the subject of regular slight. What remains to be examined is why the problem exists and how we can remedy it.

In recent years, the legal profession has demonstrated a self-destructive tendency. It has become a querulous. petulant and puerile organization that has lost its moral compass. *Ad hominem* and *in terrorem* attacks have become commonplace. Civility and logic have been shunted and replaced with a "win at any costs" attitude. In short, there has been a woeful dissolution of the principles which historically marked our profession. We no longer adhere to the standards which set us apart from the mainstream of everyday life. This has resulted in a diminution of the respect in which both the legal profession and judiciary have been previously held.

[1] LESSON ONE: KEEP YOUR OWN COUNSEL

This erosion is due, in some measure, to our own attitude toward the work we perform. We have taken the barristers' locker room "chit-chat" into the public hallways of the Courthouse. Gone are the days when we confined our excoriation of our opponents, and the judges we appeared before, to the Barristers' gowning room. The modem trend is to decry our opponents, and the judges we appear before, to our clients and their supporters and anyone else within reasonable hailing distance who might provide a sympathetic ear. ….

When we make such disparaging remarks to our clients we necessarily diminish the respect that members of the public will have for the institution of the law. If we don't show respect for our own institution why should they? It is difficult enough for members of the public to have regard for a system where, as a general rule, fifty percent of those engaged in litigation will leave the forum unsuccessfully. This brings us to the first lesson: keep your own counsel. In other words, keep your private thoughts to yourself. Do not rationalize your losses by publicly criticizing your opponent or the judge no matter how justified you feel your comments to be. Such comments will tend to have a hollow ring and reduce your stature as counsel. Such comments lack professionalism.

[2] LESSON TWO: AVOID *AD HOMINEM* ATTACKS

We must comport ourselves in a manner that maintains and supports the values of our profession.

Our conduct in the Courts requires examination. Nowadays it is commonplace to observe lawyers, during the course of trials, making *ad hominem* attacks on their opponents. The phrase *ad hominem* literally means "at the man". Its extended meaning is "an argument which appeals to personal prejudice or emotions rather than reason". There is no place for such vitriol in the courtroom. Such attacks indicate a loss of self control and thus bespeak a loss of objectivity. The lawyer who does not remain in control and objective will lose sight of the goal posts and be less able to handle the contingencies of litigation. The courtroom is a place for cold, clear logic. Emotional utterances are to be disavowed.

[3] LESSON THREE: DO NOT OVERACT IN YOUR ROLE AS ADVOCATE

Advocacy is an art form. The skilled advocate will bear some of the qualities of the thespian. However, there is sometimes a tendency to carry acting too far. The over-dramatization of the courtroom scene is to be avoided. Spectacles such as lawyers crying during jury addresses, or rolling around on the floor while re-enacting a fight, detract from the dignity of the setting.

As lawyers we are artisans, if not artists. We are not charlatans. Our skills lie in the art of persuasion using elocution and rhetoric. The aim is to convince rather than confound. Lawyers who resort to emotion will often achieve the latter, but seldom the former.

[4] LESSON FOUR: OBSERVE COURTROOM ETIQUETTE

Appropriate courtroom etiquette is essential to maintaining the dignity of that most manifest aspect of our system of justice, namely, the trial itself. This is where the public observes us in our day-to-day work. This is where the public will get a sense of the solemnity of the process. This is where the symbolism of the courts and the sanctity of the justice system are best exemplified.

If we are to sustain public respect for the law, we must firstly do so by overtly demonstrating the respect we, as lawyers and judges, have, for the juridical process in the forum of the courtroom. This is our only visible arena.

We must ask ourselves what is occurring in our courtrooms today. It appears that the amenities of yesteryear are rapidly disappearing, only to be replaced by the most commonplace conduct of those who would unthinkingly adhere to the lowest common denominator.

[4.1] [Tardiness]

The first complaint relates to tardiness. Tardiness has become a virtual mainstay of the system. It is an example of the laxity which has infected the process. ….

. . . .

[4.2] [Addressing the court]

The next complaint relates to counsel who do not rise from their seated positions when speaking to the court. Not long ago, it was unthinkable that a lawyer would address a judge from a seated position. Now, this unseemly occurrence is rather commonplace, at all levels of court. ….

. . . .

[4.3] [Facing the court]

Another indication of respect is not turning your back on the judge. Counsel in a trial (or on appeal) should never turn their back to the court. Yet, this occurs more and more often in our courts today, with counsel turning around to speak to various persons during the court proceedings. This is sloppy practice and a sign, wittingly or unwittingly, of disrespect to the judge. ….

[4.4] [Communicating with other counsel through the court]

One recent development is the conduct of counsel in speaking directly to opposing counsel in the presence of the judge. When court is convened, the judge is the arbiter. The judge is the person to whom, and through whom, one speaks. We are not yet "Americanized". We still maintain the dignity which has separated our system of justice from those of other countries. The proper way to address one's opponent is through the judge:

"Your Honour: Through you I wish to pose this question to my learned friend..."

It is inappropriate to simply turn to your opponent, and speak to him/her personally, as through the judge were a mere bystander.

[4.5] [Objecting before the court]

Yet another problem relates to the manner of objection. This applies to both form and substance. If counsel wishes to raise an objection, counsel should rise to state the objection. The manner of objecting is to state the objection and then to state the legal rationale behind the objection. At this point it is appropriate for counsel, whose comments are being objected to, to sit down. Responding counsel will always have an opportunity to reply. It is unseemly for both counsel to be on their feet at the same time.

[4.6] [Keeping one's own counsel before the court]

A further aspect of inappropriate courtroom demeanor occurs when one counsel is making a submission while the other counsel, who is seated, is shaking his or her head, speaking sotta voce, or nodding and turning around to gesticulate to others. Such conduct is distracting for the trial judge (or the appellate judges), demonstrates disrespect for opposing counsel, and is slighting of the process. Such conduct has no place in the courtroom.

[4.7] [Decorum before the court]

The final note here, in the context of appropriate courtroom decorum, is that there is no place for gum-chewing, poor dress code or slovenly personal habits. Briefcases should not be left on counsel's table. ….

Our demeanour in this context is of the utmost importance. As lawyers we enjoy privileges not bestowed upon other members of the public. If this tradition is to continue we must ensure that the public retains respect for the institution of the law.

[5] LESSON FIVE: COMPETENCE

The next issue is competence. At its essence the word "competence" means "the ability to perform a task". As lawyers, we are required to perform legal tasks on behalf of clients to a level that is reasonably acceptable to the public. In this country our training requires us to achieve both undergraduate and law school degrees as prerequisites, coupled with a period of articling and the taking, and passing, of the Bar examinations. In reality these steps are only the start. We must then take our oath of office as barristers and solicitors and continue to improve ourselves in the practice of law. This improvement requires our determination to, as best each of us can, fully prepare ourselves for each and every case which we undertake to defend or prosecute.

Today, in our courtrooms, there are far too many "last minute Charlies". This phrase bespeaks counsel who are ill-prepared, or not at all prepared, for trial. When such circumstances exist, both the clients and the courts are let down.

The practice of law requires that we keep current with the developments of the law and that we sufficiently acquaint ourselves with the facts of the case before us so as to adequately present the case. Being ill prepared is an anathema to the proper development of the cases in which we … [appear as counsel]. If we do not competently perform our tasks we should not be performing them at all.

[6] LESSON SIX: DO NOT LIGHTLY ATTACK O'PPOSING COUNSEL

There appears to be a trend in a number of different provincial jurisdictions of … counsel inappropriately attacking each other's integrity. Questioning the integrity of opposing counsel should only be done in rare circumstances, and must be carried out in a most careful manner when those rare circumstances arise. Counsel should operate from the presumption that opposing counsel has acted honourably. Where circumstances arise which could possibly indicate that opposing counsel has failed in one of their duties, one must not leap to an assumption of improper conduct and make allegations in open court. Counsel are obliged to conduct a very thorough inquiry to ensure that the perceived problem actually exists, and should further operate on the assumption that any errors of opposing counsel were not made deliberately. In most instances an explanation from opposing counsel will clarify the problem which is likely to
be an innocent mistake or misunderstanding, and the proceedings will be able to continue without a groundless attack having been made against the character of counsel.

In those rare circumstances where, after a careful due diligence assessment, counsel are forced to raise an issue before the Court which even indirectly engages the integrity of opposing counsel, this process must be conducted in a most prudent manner. First, thorough materials should be filed which clearly outline the entire history of the matter and provide a strong foundation for the motion. Second, except in the most extreme circumstances, the issue should be approached in a manner which does not presume a finding of bad faith, but which leaves this issue before the court to be decided on the basis of the record. Third, opposing counsel should be put on notice of any

motion which will even indirectly touch on their duties to the court. The first that opposing counsel hears of such a motion should not be in court as the allegations are being made to the judge.

It is simply unacceptable, absent a proper foundation, to make comments in open court which question the integrity of opposing counsel. Engaging in such tactics will have numerous detrimental effects. First, such a baseless attack will be worn by the counsel making the allegations if they are unfounded. Such counsel will lose the respect of the trial judge, opposing counsel, and the members of the profession in general. Second, such baseless attacks often cause similarly baseless counter-attacks, and can consequently derail an entire proceeding. Third, a person who is known for making such baseless attacks will find that he or she will not have the ear of the court when a factual foundation does exist for bringing a motion which engages the duties of opposing counsel.

Accordingly, while there certainly are circumstances where counsel must bring motions which reflect on the integrity of their opponents, such circumstances should be rare and should only arise when a clear foundation exists.

CONCLUSION

In a profession as challenging and difficult as the practice of law … [every] lawyer … occasionally has failed to perform to the best of his or her abilities. Lapses will happen, and we learn from those bad experiences to make ourselves better professionals. However, a serious problem develops when those lapses become more the rule rather than the exception. Such a problem then develops into an epidemic when the system begins to accept such conduct as the norm. Professionalism is maintained by a group of individuals dedicated to carrying out their duties in the highest possible manner, and a court system which quickly reacts when conduct is routinely falling below an acceptable standard. Given the great history and tradition of the legal profession in our country these two sides of the balance can work together to both maintain and, more importantly, help re-establish the professionalism that our clients, ourselves, the courts, and the public are entitled to expect.

'Medical care divorce'

Cohen, Randy, *The New York Times Magazine*, 28 July 2002

[**Editor's Note:** A husband and wife, both in their fifties, remarried 7 years ago. Last year, the husband was given a diagnosis of early-onset Alzheimer's disease. Most of the spouses' combined assets, under Washington State law, would have to be spent on the husband's care before he could qualify for State medical assistance (Medicaid). The wife consults you for a 'medical care divorce' so the husband can receive treatment without spending the assets of the spouses. Both of them dread

the prospect of divorce and the wife does not want to cheat Medicaid. However, she does not want to be driven to poverty. Is such a divorce ethical?]

People marry late in life for various reasons, but the pursuit of financial ruin is not one of them. So it is through divorce, paradoxical as it sounds, that you can best honor your marriage vow to cleave to your husband for better or worse. Preserving your small savings will be enormously beneficial to you both. I can understand his fear that divorce could be the prelude to your abandoning him, but you can help him most by offering tenderness and reassurance, not by joining him in penury. If you become loving but unmarried companions, your ethical obligations to one another will not be transformed. It is a grim irony that while the … [United States'] president touts marriage as the road to financial security, your staying married would mean a descent into poverty.

What you are contemplating is not the exploitation of a legal loophole but adherence to the regulations governing Medicaid. But you should seek legal and financial advice: besides divorce, there are other options to consider, including, for instance, transferring some assets to your children (if you have any) or protecting your assets through annuities or trusts. Done with respect for the law and compassion for your husband, such actions, divorce included, are prudent and ethical courses of action.

Ultimately, the question is who should pay for your husband's care: Medicaid or you, the late-in-life spouse? To me the answer is both. You should assist him [financially] but should not be utterly impoverished. And Medicaid should be reformed so as to spare you this painful dilemma. Medicaid rules envision a couple in a lifelong economic partnership. While this is true of many couples', it is not the case for those like you who marry late in life.

Yours is a situation in which an individual moral goal – to behave honorably toward both your spouse and the law – is best facilitated through political action. Both major parties must make changes embracing measures to protect the assets of middle-class seniors and taxing the assets of the rich (including through the estate tax) to provide all Americans with catastrophic medical care.

Ethical Ambition [:] Living a Life of Meaning and Worth

Bell, Derrick, (Vancouver: Raincoast Books, 2002), pp. 112-114; 114-116

Although I spent substantial amounts of time with my sons as they were growing up, I was also away a great deal, particularly in their early years. Even when I was at home, the long hours I spent at my desk effectively rendered me unavailable to them, and certainly deterred them from considering careers in law. Whenever I suggested it, their response was, "No, Dad. You work too hard."

You work too hard. Four small words, but they packed a punch I didn't even know I was feeling at the time. As someone dedicated to the work of social reform and social change, I have found it difficult to say no to more projects; the no I didn't say usually translated into the sacrifice of time with my family. Such trade-offs become habit. Almost everyone on the trail of success knows the complaint about "living to work, rather than working to live." What is commonly called "workaholism" can become a serious neurosis, and yet those of us afflicted by it tend to see it as a virtue - we certainly do not view it as unethical conduct! Unfortunately, our passion for our work may be real, but carried to extremes it can result in our neglecting the people we care about most passionately. This, as Patrick J. Schiltz maintains, is both wrong *and* unethical.

Schiltz, now a law professor at Notre Dame, speaks from experience. Despite a fine law school record and a Supreme Court clerkship, he turned down big money offers from big city law firms, and instead accepted a position in his home state, Minnesota, with a large firm that had a reputation for treating people well. Married and with a child on the way, he had every intention of leading a balanced life. Perhaps he did lead that life by the standards of New York or Washington law firms, but by anyone else's standards, including his own, he did not:

> I worked three or four nights and one or two weekend days every week. When I was preparing for a trial or arbitration or appellate argument, I worked almost around the clock. I put hundreds of hours into business development, and, within three years or so, had created a self-sustaining practice. I traveled constantly. What I remember about the times my children first talked or walked or went to the potty was the hotel room in which I was sitting when my wife told me about the event over the phone. I was in Seattle when my grandmother died. I was in Pittsburgh when the worst snowstorm of the century trapped my family in our house for two days. I was in Williamsburg when my wife learned that our third child, with whom she was four months pregnant, had Down Syndrome. I failed miserably in my resolve to lead a balanced life, and neither my family nor I will ever be able to get back what we lost as a result.

Professor Schiltz is quite open about the fact that, while he never thought about money before going into practice, slowly but surely making money became his chief goal. Finally he and his wife were able to recognize what had happened, and walked away from the money; he is now a full-time scholar and teacher. I would argue that the belief that you are working for justice and against evil can take over your life as much as the drive for wealth can. During my five years of litigation with the Legal Defense Fund, my hours and travel were the same as Schiltz reports working for his firm. I left for Birmingham less than an hour after our second child was born and was away in the South when our third child arrived - a friend had to take [my wife] Jewel to the hospital. I was on the West Coast when the riots in Washington, D.C., broke out after the death of Dr. Martin Luther King, Jr, and instead of being there with my wife and boys, I had to hear her describe the smoke and flames and mayhem over the phone.

. . . .

Professor Schiltz and I were doing ethical work on the job, but we were both acting highly unethically with our families. Whenever I thought about it ("I should have been there, I should be

there"), I rationalized that I was also sacrificing myself to long hours, and my family must certainly learn to bear my absence with understanding. They did, for the most part, but that did not make my work habits any less unethical. So, not surprisingly, my approach to working "as long as it takes" did not change as I took on other important jobs with the government, as head of a poverty law program in California, and then at Harvard Law. If anything, I worked harder.

Although she supported my work, Jewel reminded me more often than I like to remember that life was more than work. On occasion, I would agree and manifest my agreement by going to a movie or having friends over for dinner. But these were just breaks, rather than real changes in my work habits.

It would have required more insight than I had to recognize that while my work was important, my family was at least as important. They were entitled to more than my all-too-often long-distance love. What Professor Schiltz says about lawyers applies to people who work in many fields. He writes:

> Being admitted to the bar does not absolve you of your responsibilities outside of work – to your family, to your friends, to your community, and, if you're a person of faith, to your God. To practice law ethically, you must meet those responsibilities, which means that you must live a balanced life. If you become a workaholic lawyer, you will be unhealthy, probably unhappy, and, I would argue, unethical.

These words should be a flashing neon sign for the ethical person that courage can take many forms. For some of us, it is easier to confront an angry boss or even a hostile crowd than it is to leave an exciting work project and do justice as a spouse and parent. Achieving balance is an ongoing challenge, but an absolutely necessary one, and one well worth the continuing effort it requires. Work does have addictive qualities, but once away from my desk, I always enjoyed taking trips with my family or participating in any of the many activities that interested them.

And by the way, if you don't have children or a partner, don't think your relative solitude exempts you from this – if anything, since there's no one whose daily presence can remind you of the need for balance, you may need to be more careful to do your life justice.

“The hatred still shocks”

Yeager, Holly, *The National Post*, 29 May 2004, p. RB5 (in part)

In his latest book, *Bare-Knuckle Negotiation*, [New York City matrimonial lawyer Raoul] Felder recalls his early years in New York. His father was a lawyer whose office was in their home. His brother was a songwriter and nightclub singer; Felder is writing a musical based on his songs.

The book offers clues to his meticulous personality. Once, before a coin toss was to be used to decide which side would choose the first painting from the [couple’s] valuable collection, he

prepared by flipping a quarter for several hours. "I concluded that if I started with the head side palm up, the outcome would be tails more than 50% of the time. I thought these skewed results probably occurred because the raised head side [George Washington's profile] contained a tad more metal, which would favour landing face down." Felder won the first toss, and his client got a Jasper Johns.

When he was a young lawyer, Felder says "divorce law was to law as proctology was to medicine." Tough times demanded tough measures. "No one can state when it is the right moment to go for the jugular. I have learned that by looking into my opponent's eyes for a subtle clue, I will know when to put the dagger in. On some occasions I can smell the fear."

He writes about walking out of the room in the middle of bargaining, using clever manoeuvres to sew division between an opposing lawyer and his clients, even denying food to the diabetic husband on the other side of the negotiating table. He kept hungry piranhas in the conference room and made it a point to feed them during heated meetings. "Those are things I did early in my career," he says.

. . . .

These days, as divorce has become more common and laws have changed to take into account the financial standing of both parties, divorce law has become more respectable, he says. Nonetheless, "the perception is that divorce lawyers are the lowest scum of the world, and some of them are."

[**Editor's Note:** Felder, Raoul, *Bare Knuckles Negotiations: Savvy Tips And True Stories From The Master of Give-and-Take* (Hoboken, New Jersey: John Wiley & Sons, Inc., 2004).]

2.2 Legal Responsibility

"The Fiduciary Concept"

Ellis, Mark Vincent, *Fiduciary Duties in Canada* (Toronto: Thomson / Carswell, 2002), pp. 1-1 to 1-8.1; 1-8.3; 1-23 to 1-24

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1. DEFINITION

. . . .

…. Simplistically put …, a fiduciary duty is one that arises in the context of trust. A fiduciary individual is someone who stands in a position of trust to another individual. However, as noted below, a true "trust" relationship need not underlie a fiduciary relationship.

. . . .

2. NATURE OF THE RELATIONSHIP

. . . .

…. where one party has placed its "trust and confidence" in another and the latter has accepted – expressly or by operation of law – to act in a manner consistent with the reposing of such "trust and confidence," a fiduciary relationship has been established.

…. the Supreme Court of Canada in *Roberts v. R.*., … [2002] … 220 D.L.R. (4th) 1, … stated …:

> …. not all obligations existing between the parties to a well-recognized fiduciary relationship are themselves fiduciary in nature… not all fiduciary relationships and not all fiduciary obligations are the same: These are shaped by the demands of the situation … [para. 79]

. . . .

3. THE TRUST ASPECT

The terms "trustee" and "beneficiary" conferred on the respective parties to the fiduciary relationship belie the underlying trust aspect of that relationship. However, it is clear that the relationship is not one premised upon the existence of a true "trust": This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the [fiduciary] breaches this fiduciary

duty it will be liable. . . in the same way and to the same extent as if such a trust were in effect. (Guerin v. R., [1984] 2 S.C.R. 335 at 376.)

. . . .

4. NATURE OF THE DUTY

(1) "Utmost Good Faith"

(a) Generally

The reposing of trust and confidence, once accepted, impresses the fiduciary with a duty to act in a circumspect manner toward the beneficiary. This duty is aptly described as one of utmost good faith (uberminae fides), which itself imports a requirement that the fiduciary act toward the beneficiary with a heightened sense of loyalty and fidelity.

. . . .

…. In keeping with the definition, the law will strictly enforce this responsibility of faithfulness, loyalty and conformity to the instructions of the beneficiary:

> An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties . . . shows the pervasiveness of a strict ethic in this area of law. (*Canadian Aero Service Ltd. v. O'Malley* (1973), 40 D.L.R. (3d) 371 at 382 (S.C.C.) (hereinafter referred to as *Canaero*))

(b) Strict Liability: The Impact of Good Faith

The law requires the fiduciary to act in a manner consistent with the best interests of the beneficiary in all matters related to the undertaking of trust and confidence. As a corollary to the heightened degree of loyalty required, the actions of the fiduciary will be viewed with a strictness unknown to most other areas of law. It is the fact of a departure from adherence to the beneficiary's best interests, rather than an evaluation of the fiduciary's motive in the departure, that constitutes a breach of fiduciary duty. It is in this sense that the absence of malice will not validate a repugnant act: ….

. . . .

(c) Incidental Benefit to the Beneficiary

As a corollary to the irrelevance of good faith, the fact that the transaction that is impugned actually has a beneficial effect for the beneficiary will not assist the defaulting fiduciary. Thus if a fiduciary acts with the object or effect of deriving an improper advantage, he cannot validate an invalid act by showing that the act benefited the beneficiary

. . . .

(d) Inevitability of Loss

Under a doctrine not dissimilar to the irrelevance of good faith, the fiduciary is not entitled to allege that the loss resulting from the breach would have occurred notwithstanding the breach. …. see *Island Realty Investments Inc. v. Douglas* (1985), 19 E.T.R. 56 (B.C.S.C.) … .

(e) The Reverse Onus

In equity the Courts will jealously protect the interests of the party entitled to the fiduciary's loyalty.

…. In keeping with the strictness illustrated by the Court's disinterest in the fiduciary's motivation (i.e. good faith does not validate a breach) or in the inevitability of the loss (i.e. causality is not analyzed where there has been a breach), the fiduciary is subject to a reverse onus whereby a presumption of undue influence is automatically extant and must be overcome by rebuttal on the party of the fiduciary. ….

(f) Vulnerability

Vulnerability of one of the parties is not a prerequisite to a finding that a fiduciary duty is owed to that party, but is a consideration in deciding whether to impose a fiduciary duty in non-traditional situations. …. .

(2) Departure From The Duty Of Utmost Good Faith: Breach Of Fiduciary Duty

It is important to remember that the fiduciary concept is based on the flexibility and fluidity in its approach. … the fluidity is a two-edged sword – as the duty expands, the principles underlying the concept are used in a myriad of different fact scenarios, often not consistently and often in a manner repugnant to the concept itself. Therefore, in evaluating the concept of breach, it must be remembered that *any* act will be evaluated in keeping with the premises of dedication to the best interests of the beneficiary. The test for liability is to be interpreted widely and without undue adherence to fixed principles:

> It is a mistake, in my opinion, to seek to encase the principle … in the straight-jacket of special knowledge. … As in other cases in this developing branch of the law, the particular facts may determine the shape of the principle of decision without setting fixed limits to it. (*Canaero*, above, p. 390).

. . . .

(3) Comparison With Other Civil Wrongs

"Breach of fiduciary duty" has become a predictable allegation in the pleadings for tort and/or breach of contract actions in recent years. But even though the misconduct to be proven and the quantum of damages – but not available remedies - may be similar, the fundamental differences

among all three must always be borne in mind. In *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, McLachlin J. in her dissenting judgment stated that:

> The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached, and preserving optimum freedom for those involved in the relationship in question. The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.
> (p. 272)
>
> . . . .
>
> The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is limited by the obligation he or she has undertaken – an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest"; … To cast a fiduciary relationship in terms of contract or tort (whether negligence or battery) is to diminish this obligation. If a fiduciary relationship is shown to exist, then the proper legal analysis is one based squarely on the full and fair consequences of a breach of that relationship. (p.274)
>
> . . . .

(4) Comparison With Statutory And Other Duties

The question often arises as to the effect of an express statutory duty on an alleged fiduciary relationship. In *Terra Energy Lt. v. Kilborn Engineering Alberta Ltd.* … (1999) … 170 D.L.R. (4th) 405 … reconsideration refused (1999), 232 A.R. 195 (Alta. C.A.), leave to appeal refused (2000), 253 N.R. 193 (note) …, the Alberta Court of Appeal noted the following:

> … Some of the duties imposed by statute on parties to what is essentially a fiduciary relationship may not be fiduciary duties since they do not derive from the loyalty and trust of the relationship: *Luscar Ltd. v. Norcen Resources Ltd.* (1994), 162 A.R. 35 (C.A.). For example, a principal may have a statutory obligation to remunerate his agent. That duty is not fiduciary, although it arises in the context of what is generally a fiduciary relationship. [paras. 41-42]
>
> . . . .

5. THE SCOPE OF THE CONCEPT: TO WHOM THE FIDUCIARY CONCEPT APPLIED

. . . .

In a paper delivered at the 11th Commonwealth Conference in Vancouver in 1996, Madame Justice Beverly McLachlin of the Supreme Court of Canada discussed the concept of fiduciary relationship and recent Canadian experience with it, analyzing the characteristics necessary to a fiduciary relationship as follows:

> Since Guerin the Court has, in the words of one commentator, moved from 'generality to particularity'. In Frame v. Smith, Madam Justice Wilson refined the broad principles expressed in Guerin and earlier cases, setting out what has proved to be an influential summary of the characteristics shared by fiduciaries:
>
> > "Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
> >
> > (1) The fiduciary has scope for the exercise of some discretion or power.
> > (2) The fiduciary can unilaterally exercise that power or discretion so as
> > to affect the beneficiary's legal or practical interests.
> > (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion of power."
>
> While this statement has become the starting point for all subsequent judicial discussions of fiduciary law in Canada, it is important to remember two important qualifications.
>
> First, it may not provide an absolute test. Sopinka J. opined in LAC Minerals Ltd. v. International Corona Resources Ltd., that "it is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship". If this is accepted, Frame v. Smith may be seen as describing the characteristics that usually mark a fiduciary relationship, but no more.
>
> Second, it is precondition of a fiduciary relationship, that the alleged agent have bound himself in some way to protect and/or advance the interests of another. "As Professor Smith has observed, "a person cannot become a fiduciary unless he or she wills it." The undertaking may be implied by the nature of the relationship, but it cannot be imposed except by statute; the factual context mustsupport an inference that the agent has agreed to relinquish his self-interest and act solely for the benefit of the principal in some defined capacity … [p.4]

(Quoted in *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.* (1998), 66 Alta. L.R. (3d) 1 (Alta. Q.B.).)

Fiduciary Duties [:] Obligations of Loyalty and Faithfulness

Ng, Michael, (Aurora, ON: Canada Law Book Inc., 2003), pp. 1-1; 1-4; 1-7 to 1-8; 5-32 to 5-34

… **POSITIONS OF TRUST AND CONFIDENCE**

The area of fiduciary law … pertains to the faithfulness or fidelity of a person in whom trust or confidence has been reposed, and renders enforceable the expectations of loyalty and faithfulness arising from such intimate or co-operative relationships. The word "fiduciary" came into common usage as a legal term to describe relationships of trust that could no longer practicably be described as such, given the technical and property-centered legal meaning attaching to the word "trust". The term fiduciary thus pertains foremost to trust and confidence in the popular sense, although it necessarily acquires a more specialized meaning in a legal context.

. . . .

… **Law Of Confidences**

The law of confidences [in contrast] deals with how Courts will restrict the inequitable use of information disclosed in confidence. .... The law of confidences has, …, thus far been treated in Canada as distinct from, albeit related to, fiduciary law ….

. . . .

… **Law of Trusts**

Fiduciary law arose from courts of equity applying the duties of [property-centred] trustees to other types of persons in positions of trust. ….

. . . .

… **Tort Law**

…. The circumstance of a common law duty of care may justify equity imposing an equitable duty of prudence with an independent or a co-extensive standard of care, or refraining from intervening on the basis that the common law already provides an adequate remedy for carelessness. The intervention of equity might also be limited by the scope of the trust or confidence reposed. For example, a particular solicitor might be said to owe a fiduciary duty of prudence with respect to his advisory role, but not with respect to his other functions as a barrister or solicitor, which would be governed by contract and negligence law.

… **Contract Law**

Although contract law and fiduciary law may result in similar duties in particular cases, they each deal with duties imposed by the law for different reasons. Contract law deals largely with the enforcement of express promises. In contrast, fiduciary law deals largely with implicit expectations arising from the fact of a trust or confidence reposed. ….

. . . .

… **Legal Advisers**

Legal advisers are clearly fiduciaries towards their advisee-clients. The fiduciary role of legal advisors was established in *Nocton v. Lord Ashburton* [[1914] A.C. 932 (H.L)], ….

Legal advisers will owe their clients, at the very least, a [implied] fiduciary duty to avoid engaging themselves so that the advisers' interests may conflict with their [implied] duty. For example, in *Szarfer v. Chodos* [(1986), 27 D.L.R. (4th) 388 (Ont. H.C.), aff'd 54 D.L.R. (4th) 383 (Ont. C.A.)], a solicitor was found in breach of his fiduciary duty to avoid actual or possible conflicts of interest and duty when he took advantage of his knowledge of his client's difficulty with his wife to engage her in an affair. Furthermore, lawyers may not act for different clients in a manner giving rise to conflicts between their duties to each of them.

But solicitors may also be burdened with prescriptive or positive fiduciary duties as well, including a duty to disclose material facts pertaining to a transaction. ….

In *Jacks v. Davis* [(1982), 141 D.L.R. (3d) 355 (B.C.C.A.)], the British Columbia Court of Appeal found a solicitor in breach of fiduciary duty for failing to disclose to his client, who was purchasing an apartment building, that the client's financial advisor was receiving a secret proft. For the court, Hinkson, J.A. affirmed first that the relationship between the solicitor and his client were generally fiduciary in nature.

> Viscount Haldane indicated that in order to determine whether a fiduciary relationship existed which would give rise to the solicitor being under a special duty to make full disclosure depended upon the circumstances and relations of the parties. But it is clear from that decision that such a relationship arises when the solicitor-and-client relationship exists. The reason it arises is that the client is reposing confidence in the solicitor and the solicitor is obliged to make full disclosure to the client in order that the client may properly make decisions in respect of the matter upon which he is retaining the solicitor. I conclude that the defendant was under a fiduciary obligation to make full disclosure to the plaintiff with respect to the secret profit and that a clear breach of that obligation occurred.

The Court of Appeal specifically acknowledged in Jacks that liability for fiduciary breach could arise even though a solicitor might have no personal interest in a transaction: "In many of the cases in this field of the law the solicitor had a personal interest in the transaction which he failed to

disclose. In my opinion where no such personal interest is involved the measure of compensation for breach of the fiduciary obligation is the same as where such an interest exists."

Although a fiduciary legal adviser may well owe his advisee a fiduciary duty of prudence in theory, such a duty has largely been eclipsed by the law of negligence, which provides a common law remedy with respect to negligence resulting in pure economic loss. But the duty to avoid conflicts, and the duty to disclose material information, continue to apply to legal advisers in full force. Furthermore, in *R. v. Neil* [(2002), 168 C.C.C. (3d) 321 (S.C.C.) at para. 24], the Supreme Court of Canada opined that lawyers will owe their clients a fiduciary "duty of commitment to the client's cause" which entitles the client to "a level of commitment from his lawyer that whatever could properly be done on his behalf would be done as surely as it would have been done if the appellant had had the skills and training to do the job personally."

"Fiduciary Duties in Canada: Lawyers"

Ellis, Mark Vincent, *Fiduciary Duties in Canada* (Toronto: Thomson / Carswell, 2002), chapt. 9 (in part)

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1. THE FIDUCIARY RELATIONSHIP WITH THE CLIENT

There are certain relationships which automatically give rise to a fiduciary duty. The relationship between lawyer and client is a circumstance where the reposing of trust by the client is automatically assumed.

. . . .

The substantive content of the solicitor's fiduciary obligation to his or her client was addressed by the Supreme Court of Canada in *R. v. Neil*, 2002 CarswellAlta 1301, 2002 CarswellAlta 1302, [2002] S.C.J. No. 72, 2002 SCC 70, 168 C.C.C. (3d) 321, 6 Alta. L.R. (4th) 1, 6 C.R. (6th) 1, (sub nom. *Neil v. R.*) 218 D.L.R. (4th) 671, [2003] 2 W.W.R. 591, 294 N.R. 201, where the court stated that:

> The duty of loyalty is intertwined with the fiduciary nature of the lawyer-client relationship ... Fiduciary duties are often called into existence to protect relationships of importance to the public including, as here, solicitor and client. Disloyalty is destructive of that relationship.
>
> While the Court is most often preoccupied with uses and abuses of confidential information in cases where it is sought to disqualify a lawyer from further acting in a matter … the duty of loyalty to current clients includes a much broader principle of avoidance of conflicts of interest, in which confidential information may or may not play a role… [paras. 16-17]

The court went on to cite *Drabinsky v. KPMG* (1998), 41 O.R. (3d) 565, 1998 Carswe11Ont 5085, [1998] O.J. No. 4075, 45 B.L.R. (2d) 196 (Ont. Gen. Div.) for the proposition that the fiduciary relationship between the client and the professional advisor, either a lawyer or an accountant, imposes duties on the fiduciary beyond the duty not to disclose confidential information, stating that:

> The aspects of the duty of loyalty relevant to this appeal do include issues of confidentiality in the *Canada Trust* matters, but engage more particularly three other dimensions:
>
> (i) the duty to avoid conflicting interests: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599 (C.A.), and *Services environnementaux Laidlaw (Mercier) Ltee v. Quebec (Procureur general)*, [1995] R.J.Q. 2393 (C.A.), including the lawyer's personal interest: *Szarfer v. Chodos* (1986), 54 O.R. (2d) 663 (H.C.), aff'd (1988), 66 O.R. (2d) 350 (C.A.); *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371 (Gen. Div.); *Stewart v. Canadian Broadcasting Corp.*, … [(1997), 150 D.L.R. (4th) 24 (Ont. Gen. Div.)].
>
> (ii) a duty of commitment to the client's cause (sometimes referred to as "zealous representation") from the time counsel is retained, not just at trial, i.e. ensuring that a divided loyalty does not cause the lawyer to "soft peddle" his or her defence of a client out of concern for another client, as in *R. v. Silvini* (1991), 5 O.R. (3d) 545 (C.A.); *R. v. Widdifield* (1995), 25 O.R. (3d) 161 (C.A.); *R. v. Graham*, [1994] O.J. No. 145 (QL) (Prov. Div.); and,
>
> (iii) a duty of candour with the client on matters relevant to the retainer, *R. v. Henry* (1990), 61 C.C.C. (3d) 455 (Que. C.A.) per Gendreau J.A., at p. 465; *Spector v. Ageda*, [1971] 3 All E.R. 417 (Ch. D.), at p. 430; the *Canadian Bar Association, Code of Professional Conduct* (1988), c. 5, Commentary 4 - 6. If a conflict emerges, the client should be among the first to hear about it. [para. 19]

2. LENGTH OF FIDUCIARY ENGAGEMENT

If viewed in a restricted manner, the relationship between a lawyer and his client does not commence until the former is retained by the latter. However, a fiduciary relationship has been found to arise before the retaining of a lawyer and to continue well past the termination of the formal relationship.

(1) Commencement Of The Duty

It is now clear that a fiduciary duty may be owed to a client before the retainer is created: *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Courtright v. Canadian Pacific Ltd*. (1983), 45 O.R. (2d) 52 (H.C.); affirmed (1985), 50 O.R. (2d) 560 (C.A.).

In *Descoteaux*, the Supreme Court of Canada stated that while a retainer may create the solicitor-client relationship, the client is protected by a duty prior to the inception of the formal relationship:

> When dealing with the right to confidentiality it is necessary, in my view, to distinguish between the moment when the retainer is established and the moment when the solicitor-client relationship arises. The latter arises as soon as the potential client has his first dealings with the lawyer's office in order to obtain legal advice.
>
> The items of information that a lawyer requires from a person in order to decide if he will agree to advise or represent him are just as much communications made in order to obtain legal advice as any information communicated to him subsequently. It has long been recognized that even if the lawyer does not agree to advise the person seeking his services, communications made by the person to the lawyer or his staff for that purpose are nonetheless privileged. . . . (pp. 876-877)

[In the *Courtright* decision] Mr. Justice Bowlby cites authorities including *Descoteaux*, above, and continues:

> [The] cases seem to confirm that certain ingredients of solicitor-and-client privilege arise whether or not a retainer is established. Arguably, if solicitor-and client privilege attaches to the communications prior to a retainer, so do all the fiduciary aspects of the relationship including the obligation of utmost good faith. . . . . .
>
> Perhaps repeating myself, it is argued that if solicitor-and-client privilege arises whether or not a retainer is established, so too do all the fiduciary aspects of the relationship including the obligation of utmost good faith. . . . (p. 63)

The lawyer had failed to inform the company – his potential employer – that he was under investigation for "influence peddling". After being hired but prior to commencing employment, he was in fact charged. Throughout he expressed surprise about the charge, which he considered to be unsubstantiated, and which was ultimately dismissed. The employer considered the charge very serious given the professional nature of the employment position and the delicate nature of the government involvement that he would have. He was therefore terminated for cause for having failed to inform the employer of the salient information. His Lordship having found that the fiduciary relationship of solicitor-client existed prior to hiring, the lawyer was under a duty to disclose that information:

> [T]he solicitor, when he met with the defendant company, was discussing a contract of employment where a very high fiduciary relationship is involved and taking the facts of this case, did [he] . . . owe a duty to disclose what had occurred between him and the police. . . and allow [the employer] to make an informed decision as to whether he should be employed at this particular time or not?
>
> . . . It is my view that the contract of employment discussed in the offices of the defendant company wherein a solicitor is discussing with a potential client the cementing of a relationship where a high degree of fiduciary involvement is indicated, . . . [is) a special fiduciary relationship involved in the proposed contract between [the lawyer) and the defendant company.

> In other words it is my view that the highest fiduciary relationship exists between a solicitor and a potential client when he discusses whether a contract of employment shall be entered into and this obliges complete disclosure by the solicitor of any pertinent matter which would or could have a direct relationship to the effective performance of the duties which are clearly set out to the solicitor in which he would be involved in the predominance of such a contract or retainer. (p. 64)

Therefore, the action for wrongful dismissal was dismissed, cause being successfully shown to be a breach of fiduciary duty.

. . . .

(2) Duty Extending Beyond Period Of Retainer

The fiduciary duty naturally extends to the requirement that a lawyer not assume a role adversarial in nature to a former client with respect to the same subject-matter for which the lawyer had previously been engaged: *Re R. and Speid* (1983), 43 O.R. (2d) 596 (C. A.).

. . . .

3. BREACH OF FIDUCIARY DUTY

Not every breach of duty by a solicitor toward a client constitutes a breach of his or her fiduciary duty. In *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 (B.C. S.C.) at 362, Southin J. stated the following:

> "[F]iduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty – if not of deceit, then of constructive fraud. See *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.).

. . . .

Any activity inconsistent with the concept of adherence to utmost good faith toward the client is a breach of fiduciary duty. The activity precluded includes secret profit (see *Read* [*v. Cole*, [1915] S.C.R. 176]). It requires the lawyer to act in good faith to clients both before and after the actual term of hire (see *Speid*, *Descoteaux* and *Courtright*, above). While the potential areas of fiduciary

breach are, then, as myriad in scope as the circumstances of each solicitor- client relationship may be, certain areas of defined breach can be specifically reviewed.

. . . .

In *Fasken Campbell Godfrey v. Seven-up Canada lnc* (1997), 142 D.L.R. (4th) 456 (Ont. Gen. Div.), affirmed (January 25, 2000), Doc. CA C26626 (Ont. C.A.) the trial judge held that the claim alleging a breach of a solicitor's duty to warn a client with respect to a problematic transaction rested on negligence in terms of a failure to render appropriate advice, rather than on a breach of fiduciary duty. The trial judge stated:

> In my view, a claim for breach of fiduciary duty involves situations in which the solicitor takes advantage of the solicitor-client relationship by failing to make proper disclosure, acting for both sides without informing the client, breaching confidence, or other like behaviour. The claim here is not based upon allegations of this quality but rather upon failure to render appropriate advice. [p. 483]

. . . .

To prove that a solicitor breached his or her fiduciary duties is necessary for the plaintiffs to prove that the misrepresentation or omission was material in the sense that it would be likely to influence the conduct of the plaintiff or likely to operate on his judgment: see *Canada Trustco Mortgage Co. v. Bartlet & Richardes* (1996), 28 O.R. (3d) 768 (C.A.). See also *Threemor Enterprises Ltd. v. Parente, Borean* (April 20, 2000), Doc. 96-CU-I09773 (Ont. S.C.J.).

"Courting Disaster"

Rubin, Sandra, *The Financial Post*, 10 December 2003, p. FP6 (in part)

Some of Canada's senior barristers say the high cost of litigation and the economic pressures on law firms are marrying with unintended result: An entire generation of litigation counsel is not getting out of the office and into the courtroom frequently enough to develop basic advocacy skills.

While some people may take quiet pleasure in the notion of lawyers, themselves, falling victim to the cost of litigation, the situation is sounding alarm bells in some quarters.

A number of the country's most experienced trial counsel warn that the lack of courtroom experience is driving discovery costs higher, further tipping the scales toward settlement over trial, and making the judgment imparted by first-hand trial experience ever more difficult to obtain.

Where it used to be that young litigators could cut their teeth on seven or eight trials a year, many of them minor criminal matters, practitioners say there are corporate litigators today who've been out more than a decade but haven't been involved in more than a couple of trials.

"This is a very serious issue," says Jim Hodgson, of Hodgson Tough Shields DesBrisay O'Donnell, a Toronto litigation boutique. "Trials teach what's important and what isn't, what will win a case and what won't. And if you don't know what's important then everything is important, and when everything's important you conduct endless examinations for discovery.

"What happens then is the ticket gets run up very high and so much is now at stake the case settles - because, let's face it, nobody ever lost a settlement. But take a case where's there is a huge amount of money in fees, lose it, and you may lose a client as well. So it's safer to settle.

"What it means though is people are being required to compromise their legal rights. Settlement should come from a rational assessment of the strengths and weaknesses of a case, not because it's too expensive to pursue. I think a settlement arrived at because legal expenses are so high is a failure of the system."

. . . .

"There are huge, huge, implications in this situation," says … [David] Scott [co-chairman of Borden Ladner Gervais and president of the American College of Trial Lawyers], who is the litigator of choice for people like the Prime Minister. "If you have a judge who has rarely, if ever, tried a case and rarely, if ever, even presided over a trial, the ramifications where the lawyers have no experience either is that there aren't going to be as many trials.

"One of the things that's most troubling is that we now have a judiciary whose agenda places a huge priority on settlement. The pressure to settle these cases, in some situations, has become intense. The risk is you end up in a structure in which there's a social compulsion to resolve everything by negotiation, which is very worrying. It means that every business transaction resulting in a dispute will be resolved by taking half a loaf.

3.0 APPLICATIONS OF STANDARDS OF RESPONSIBILITY

3.1 Relationships With Clients - Retainer And Authority

"The Less You Know…"

Cohen, Elizabeth, *ABA Journal*, December 2002, p. 62 (in part)

A potential new client consults you about a legal problem but doesn't hire you. Later, someone else comes to discuss the same legal problem and asks you to represent him. He will be opposing the person who had earlier consulted you.

Problem? After all, you never represented that first person. But like it or not, you did learn something about the case from her. And while you may not even remember that preliminary consultation, she does. Depending on what she told you, you – and your firm – may be precluded from representing the other side.

A new ethics rule clarifies the problem. Rule 1.18 of the ABA Model Rules of Professional Conduct, adopted by the ABA House of Delegates in February 2002, is called Duties to Prospective Clients. This is the first time the ethics rules have recognized prospective clients and former prospective clients as a distinct group to whom lawyers owe distinct obligations.

Rule 1.18 says that for purposes of confidentiality, treat prospective clients and former prospective clients the way you treat former clients. This means that you may not use information about them until it has become generally known, and you must never reveal that the client told it to you before it became public.

(Compare this to the greater degree of confidentiality you owe your current clients: Unless certain narrow exceptions apply, you may not use or reveal any of their information at all, ever, without their permission.)

. . . .

But when it comes to disqualification, former prospective clients are not the same as former clients. Model Rule 1.18 and the new Restatement provision on prospective clients, Restatement of the Law Governing Lawyers § 15(2) (3d ed. 2000), make it official: A consultation in which you learn nothing that could be "significantly harmful" to the prospective client will not disqualify you from later representing the other side in the same or a related matter.

Again, compare this to the greater loyalty you owe your former clients: If someone's interests are materially adverse to a former client's, you may not represent the new litigant in anything related to what you handled for the former client.

In the case of *Camuto v. Camuto* No. FA960329816S (Conn. Super. Oct. 7,1999), for example, a husband moved to disqualify his wife's lawyers in custody and visitation proceedings because their firm was one of several that he had interviewed three years earlier before he instituted dissolution proceedings. Finding no Connecticut authority, the trial court turned to the draft of Model Rule 1.18 and to the testimony of two enminent legal ethics scholars, Charles Wolfram and Geoffrey Hazard Jr.

The court decided not to disqualify the wife's firm, reasoning that it was the husband, not the lawyer, who had conducted the interview. Anything he had been told was generic information, the court held, and could not cause significant harm in the postjudgment proceedings.

ABA ethics opinion 90-358 (1990) recommends that you try to limit what a prospective client tells you to keep your risk of disqualification to a minimum.

Rule 1.18(d)(2) offers an additional incentive. Even if you do wind up disqualified, you can keep your disqualification from being imputed to your firm if you 1) try not to learn more than you have to for conflicts-checking purposes, and 2) screen yourself from your colleagues so you can rebut the presumption that you shared any confidential information with them.

So, to avoid "infection," try not to learn any more than you need. And keep what you learn to yourself, so that if you are infected, at least you won't be contagious.

Retainers rule

(2003), 2 *LawPRO* (March 2003), pp. 3-4
(excerpted from "Dealing with the Dollars [:] Why Financial Planning and Management are as Important as Lawyering")

Retainers rule

Even the most seasoned lawyers may balk at a discussion of retainers. Don't, advises Fred Cameron [St. Catherines, ON sole practitioner]. "The reality is, many of us have trouble asking for money. But you quickly get over this after you've had to write off a few thousand dollars in bad debts. So the lesson is to pay attention to retainers. Get a retainer in writing - right from the outset."

Adds [Glenn] Rumbell: "When I first started out, I made the mistake of carrying a client through a transaction, even though my interim accounts weren't paid. As the receivable piled up, I couldn't afford to stop working on the file. I had too much time invested, and it ended up badly. Now, I'm careful not to let that happen. I insist on being paid on a regular basis."

In Graham Wilson's practice, his assistant gives new clients a heads up on the practice's policies on rates and retainers. "By the time they get to me, they've been primed and I just fill in the details," says Wilson.

Dawn Melville of Windsor credits Robert Balance, a seasoned area practitioner with whom she now shares office space, with giving her some of the best advice a young lawyer could get: "I remember him saying that if your clients (largely family law clients) cannot afford this kind of retainer (typically $1,500 to $2,000), chances are there will be other financial issues with this client later on. So now I ensure that the retainer is sufficient to finance the initial work that is contemplated. Then I monitor the file, and try to ensure that I have a good handle on how much of the retainer I have used on a regular basis, so I can go back to the client and ask for more."

Cameron has made a habit of replenishing retainers as part of his reporting letter: "In my final line, I'll provide an accounting of where we are at, and ask to have the retainer replenished going forward."

Seta International Trade Inc. v. Duboff, Edwards, Haight & Schachter

[2001] M.J. No. 467 (QL) Man. Q.B., Monnin J.,
paras 1; 8; 14; 31-34

¶ 1 … The law firm of Thompson, Dorfman, Sweatman (the "law firm") moves to withdraw as solicitors of record for the plaintiff in this matter. The plaintiff has retained alternate counsel for the purposes of this motion and opposes the request. ….

. . . .

¶ 8 This claim involves a suit brought by the plaintiff, originally without counsel, against its former solicitors, the defendant, over allegations of payment of funds from a trust account without authority. ….

. . . .

¶ 14 The law firm moved on September 17th to withdraw as [Plaintiff's] solicitors. By that time, … [the Plaintiff] had retained alternate counsel for the purposes of this motion.

. . . .

¶ 31 On the issue of non-payment of fees, the Code of Professional Conduct is clear that a solicitor may withdraw for non-payment of fees after reasonable notice unless serious prejudice to the client would result.

¶ 32 Leaving aside the issue of whether notice in the middle of a trial can be seen as reasonable, I am satisfied that the prejudice caused to the plaintiff would not allow the law firm to withdraw

over the issue of non-payment of fees. The evidence is clear that the plaintiff is unable to provide the funds requested at this time given … [Plaintiff's] impecunious position. Over the past number of years since the law firm has rendered interim statements of account, payment has been made on a number of occasions by the use of post-dated cheques by… [the Plaintiff]. Although not necessarily in the agreement entered upon between the parties, it is clear that a certain mode of conduct has been accepted by the law firm until this summer. The plaintiff will be unable, in the short term, to obtain representation and will suffer prejudice simply by the delay caused by seeking new counsel.

¶ 33 Counsel for the law firm argues that by not allowing the law firm to withdraw, I would in fact be forcing it to proceed to complete the trial with no expectation of payment. That assumes two matters, namely, that the plaintiff would not be able to make the payments of the current or forthcoming accounts over time and that it would not be successful at trial. In the event it was successful at trial, the funds obtained would then be available to cover the fees and disbursements of the law firm and there is no evidence that payments could not be made over time.

¶ 34 I would, therefore, not have allowed the motion to withdraw solely on the basis of non-payment of fees.

Brace v. Canada (Customs and Revenue Agency)

[2004] N.J. No. 46 (QL) (NLSC [TD]), Green C.J.T.D., (orally), paras. 3-12; 15-16; 18-20; 22-26; 29-36; 75-76

[**Editor's Note:** Two weeks before a scheduled hearing, in a dispute with Canada Customs and Revenue Agency (CCRA) over ownership of goods seized by the Sheriff of Newfoundland on behalf of CCRA, solicitors for the Applicant clients requested an order declaring that they cease to be the solicitors for the clients, on grounds of serious lack of confidence between the solicitors and clients. The clients asserted they continued to have confidence in the solicitors and wanted them to remain as solicitors of record. The court refused to grant the requested order because "good cause", supported by appropriate affidavit evidence, had not been established by the solicitors.]

¶ 3 …. It is not the sort of case that one normally deals with in applications to withdraw as solicitor. Usually when one party, be it the lawyer or the client, comes into court and says, "I just can't work with the other, this is beyond my capability", the other party, be it the lawyer or the client, will generally throw up his or her hands and acknowledge that the "writing is on the wall" and that the relationship is effectively over. This case is unusual because, notwithstanding the positions put forward by Ms. O'Dea on behalf of herself and McInnes, Cooper, the assertions that there has been a serious loss of confidence are not shared by the clients. Notwithstanding what has been said, Mr. Brace and Ms. Curl say that they do not believe there is such a degree of loss of confidence that should result in a fracturing of the solicitor/client relationship. In spite of the somewhat strong language put forward by Ms. O'Dea, Mr. Brace and Ms. Curl are nevertheless, to

use a phrase, "prepared to let bygones be bygones" and continue on with the relationship. They say they believe that it can work.

¶ 4 What is involved in continuing the relationship at this point? I have to make the assumption that all the preliminary work has been done, that the basic interviews with the clients have occurred, and that the clients have supplied the information to the lawyer for the purposes of preparing the case for hearing. Indeed, the hearing is scheduled for two weeks hence. The affidavit that has been prepared on behalf of Mr. Brace and Ms. Curl is completed and is now filed. What is being waited upon is a response from the Canada Customs and Revenue Agency (CCRA). We are told that there will be a response from the CCRA and that it will likely be a lengthy affidavit. That may or may not require a reply affidavit or it may simply require some response in the courtroom on the day of the hearing from Mr. Brace and Ms. Curl who presumably would be giving some viva voce evidence at least by way of cross-examination or re-examination at that time. So, what is left appears to be the role of the barrister, if you will, as opposed to the solicitor.

¶ 5 In those circumstances then, is it appropriate that Ms. O'Dea and McInnes, Cooper be effectively relieved of their responsibility to act for Mr. Brace, Ms. Curl and their company?

¶ 6 The authority of the court to deal with this matter flows from the inherent jurisdiction of this court as a superior court, but more specifically, it is dealt with in Rule 23.06. That rule provides in essence that where a solicitor ceases to act for a party and the party has not given notice of change of solicitors when they should have, the solicitor may apply to the court for "an order declaring that the solicitor has ceased to be the solicitor acting for the party".

¶ 7 The rule does not set out the test or the legal grounds for the making of such a declaration. It merely sets out the procedure which must be followed. That is what has been followed here. What the rule does make clear however is that the lawyer, once engaged, and having entered upon acting for the client, has no automatic right to withdraw from the file. It is a discretion that is left with the court to determine whether in the circumstances it is appropriate to allow withdrawal, bearing in mind the impact on the client as well as the impact on the lawyer and the case generally. …. [i]n Jorgensen v. Kelly Peters & Associates Limited [1987] B.C.J. No. 1890 (BCSC) [QL]. … [a]t p. 3 Catliff, L.J.S.C. quotes from an English case Re Creehouse Ltd. [1982] 3 All E.R. 659 as follows:

> "In those circumstances [i.e., where a solicitor decides that he will no longer act for a party], as the solicitor is an officer of the court, it is only right that the court should investigate whether, in all the circumstances of the case, it is appropriate for the solicitor to withdraw. It may be that the solicitor has been over-hasty in refusing to go on acting for a client. He may by his action have put the client in difficulty and therefore it is appropriate ... that the court should be apprised of the reason why the solicitor wishes to withdraw, so that the court can consider whether the reasons for withdrawal are adequate and can give protection to the client if it is necessary to do so." ….

¶ 8 What, then, is the test that must be applied? Generally speaking, the case law establishes that a solicitor may only withdraw for "good cause" and the good cause must, in general, be supported by affidavit evidence. There is, however, one caveat to that: where the affidavit evidence

in support of the good cause would disclose solicitor/client confidences or matters that might prejudice the client with respect to the case, the lawyer must be circumspect in what he or she puts into that affidavit. Even in such circumstances, however, there must be something to indicate, perhaps in generic terms, the nature of the breakdown between the lawyer and the client's relationship so as to give some idea to the court as to the nature of the fracturing of the relationship that has occurred. Is it because of some ethical issue that has arisen? Has the client asked the lawyer to do something that he or she feels is inappropriate to do? Has some difference of opinion arisen as to how the case is to be conducted? Has there been such an inability to communicate or take instructions that the lawyer feels that he or she cannot properly act and respond in the client's best interest, etc., without necessarily going into the specifics?

¶ 9 Good cause for withdrawal, of course, can be constituted by a number of things. A failure to pay an account could be one. A request that the lawyer do something dishonourable is another. Lack of co-operation on the part of the client to enable the solicitor to provide proper representation could be another. Or a general failure to give instructions so that the lawyer does not know how he or she should proceed. There are many others, of course, but those are some examples. Hovering over all of these types of examples of what is good cause for withdrawal is also the consideration of potential prejudice to the client if withdrawal is allowed - prejudice in terms of additional cost and time involved and prejudice to the other parties and to the conduct of any pending hearing if it is closely scheduled.

¶ 10 In this particular case, the issue of the costs of the litigation has raised its head in the affidavits that have been filed. I note, for example, that at one point there was a letter sent by the law firm to Mr. Brace and Ms. Curl indicating that no further work would be done and no affidavits would be prepared unless payment of the account was made. So, finances certainly was an issue in the background, at the very least. To put it another way, given what I have heard about the assertions that there have been agreements reached as to the level of fees to be charged, namely, whether there should be a cap in the amount of $7,000.00 as Mr. Brace has mentioned or $10,000.00 as appears in Mr. Russell's affidavit, it seems to me that there are obvious financial benefits that may incidentally accrue to the law firm if they were given leave to withdraw if, indeed, those limits on the ability to charge further fees exist. Whilst it may not be the immediate catalyst for withdrawing, nevertheless the law firm will benefit from not being put in a situation of where it may have to continue to do work for a limited further return. By the same token, I think we have to recognize that there are obvious financial benefits to Mr. Brace and Ms. Curl, if indeed one of these caps on fees exists, in having the law firm continue to represent them because they will then be in a situation where whatever else has to be done, can be done at perhaps little extra cost to them.

¶ 11 …. I accept that the issue of money is not the factor that is driving the application. I am going to accept … that that is not the real issue here. I am going to put financial motivation to one side. Instead, I will look at what the law firm has said as to the reasons for their wishing to withdraw.

¶ 12 I start with the application itself which is verified by Ms. O'Dea's affidavit. Paragraph 15 of that application sets out the initial statement of the reasons for withdrawal. She says that:

> "The applicants' [i.e., Mr. Brace, Ms. Curl and D.L. Brace Limited] solicitors have, throughout their retainment on the matter, had difficulty corresponding and generally communicating with the applicants on a consistent basis on file management issues as well as the scope of the applicants' solicitors retainer. Further, it has become evident since mid-January that this solicitor-client relationship lacks the mutual understanding, respect and good faith required to perpetuate further representation in relation to this matter. The applicants' solicitors state that there has been irrefutable damage to the solicitor-client relationship and feel that it would be in the best interest of the applicants to be represented by another solicitor."

That is, in essence, the case put by Ms. O'Dea here in court today.

. . . .

¶ 15 …. I find on the evidence that is in front of me that the primary motivation for withdrawal here is because of the difficulties caused by the telephone conversation between Mr. Brace and Mary McGrath [a secretary employed by the solicitors for the Applicants]. Without that incident, I doubt that this application would be in front of me today.

¶ 16 What, then, happened in that conversation? In Ms. O'Dea's supplementary affidavit, she repeats what Mary McGrath said: that Mr. Brace raised his voice, cursed at her, said that they were not fit to be lawyers and that he was changing law firms …. Mr. Brace stressed here in argument in court and stated in his affidavit as well that he said to Ms. McGrath: "I'm not giving you shit, I'm upset with what the lawyers have done, I think they've acted wrongly". That is the way he puts it.

. . . .

¶ 18 …. when put in context, and recognizing that this is the only incident of this nature that is before the court, and considering the frustration that I think one could reasonably expect to exist in these circumstances, I do not believe that this incident in itself is sufficient to justify withdrawal from continued representation of Mr. Brace and Ms. Curl.

¶ 19 What, then, of the other arguments that have been put forward? Well, it has been suggested that McInnes Cooper has had difficulty in corresponding and communicating with Mr. Brace and Ms. Curl. I do not doubt that there may have been some difficulty in that regard but the only information that is in the file in the affidavits is that there was some difficulty with a fax machine which ran out of paper and sometimes it was difficult to reach them by telephone. That can be frustrating for a lawyer but I am not convinced that that in itself is generally sufficient to justify the severing of the relationship unless the unavailability of the client is such that it prevents the law firm from properly doing its job or would put them in a situation where they are embarrassed in court because they can not properly represent the client effectively due to lack of necessary information. I do not see that level of lack of communication between the parties in this case.

¶ 20 The other argument that has been made is that there has been a general breakdown in the trust that exists between lawyer and client. As put by Ms. O'Dea, given the positions taken by Mr.

Brace over certain conversations that occurred about fees in the past, which Ms. O'Dea feels is an improper interpretation of what was discussed, she feels now that she needs someone else in the room with her to verify what is said in case her words get twisted and used for an improper purpose in the future. The example that was given was the discussion about whether or not $10,000.00 was the upside amount of the fee for the work that was to be done. From the information that I have in the affidavits, I have to say that I do not believe that the difference of opinion between the two parties on this issue is necessarily indicative of an attempt by Mr. Brace now to twist or lie about statements that were made before. I know I do not have the whole story but from what I have in the affidavits, the discussions that I have been told about, might well be capable of two interpretations, thereby leading to an honest misunderstanding between the parties as to whether, on the one hand, Ms. O'Dea was saying that it could cost "up to $10,000.00" or some words to that effect, meaning that that was the maximum fee that could be charged, or whether on the other hand she was simply giving a ballpark figure as to the sort of fees that might be involved. To me, that seems indicative, possibly, of an honest misunderstanding rather than an attempt by one party to deliberately twist the language for some improper purpose. That being so, I do not think that the evidence in front of me demonstrates, to the level of sufficiency that I think is necessary, a degree of lack of trust that could potentially exist between the two parties that should make continued representation impractical or unfeasible.

. . . .

¶ 22 I stress here that there is no indication on the record that ethical issues are involved. There is no indication that McInnes Cooper has been asked in any way by Mr. Brace or Ms. Curl to do something dishonourable that would put the lawyers in an untenable position vis à vis their obligations under their Code of Professional Ethics. There is no real indication of a failure to give instructions to the degree that it would be necessary to prevent the lawyer from properly representing the client and there is no indication that the actions of Mr. Brace and Ms. Curl have placed McInnes Cooper in a position where their reputation as ethical solicitors is in any sense damaged.

¶ 23 I also have to say that in this unusual case I am influenced to some extent by the fact that Mr. Brace and Ms. Curl, notwithstanding everything that has been said here today, have stated that they are still willing to put these issues behind them and to try to continue their relationship. They have also said they are willing to apologize for the inappropriate language they have used to Mary McGrath. I am also influenced by the fact that there may well be prejudice to Mr. Brace and Ms. Curl both in terms of cost and time spent, and to be spent, if a new lawyer were to be engaged at this late stage.

¶ 24 … there would be additional prejudice to Mr. Brace and Ms. Curl if they were now put in a situation where they have to find another law firm and pay them up front. I recognize that Ms. O'Dea says that this is an issue that really should be addressed at the point where the bill of account for the original lawyers is being taxed and assessed. I am not so sure. I believe it is also a factor that can be taken into account in respect of the prejudice to the clients in determining whether withdrawal should be allowed.

¶ 25 I have to balance those factors against what I accept is a bona fide statement by Ms. O'Dea of a subjective loss of confidence in her ability to properly represent Mr. Brace and Ms. Curl. One

has to give a certain degree of deference to a lawyer who stands up in court and says she has lost confidence in her ability to represent the client, but the court nevertheless has to be careful not simply to rubber stamp what the lawyer says in that regard. The court cannot allow withdrawal simply because the client may be perceived to be "difficult" or because the lawyer does not like the clients or because the lawyer is acting, shall we say, in a fit of pique because in the heat of the moment the client somehow criticized the lawyer. In fairness to Ms. O'Dea, she is not really saying those things. But I simply mention those examples to indicate that there is a limit to the degree to which the court can simply accept the lawyer's statement that there is a loss of confidence. Here I do not have a lot to go on in terms of specific information as to why this loss of confidence, other than the issue involving Mary McGrath, has come to the fore. I essentially have Ms. O'Dea's subjective assertion that there is this loss of confidence and I have recognized, as I have said, that weight has to be given to that because of the difficulties of the lawyer discussing such issues on the record without jeopardizing solicitor-client privilege. Nevertheless, in these circumstances, I would have expected something more, especially since the clients do not share the lack of confidence. Perhaps statements in generic terms, identifying the types of events, if not the actual events, that led to the solicitor's lack of confidence could have been given. Those that have been referred to in the affidavits, in my view, are not sufficient.

¶ 26 I believe that ... [the Applicants' solicitors] … can put what difficulties existed behind them and continue to represent Mr. Brace and Ms. Curl in these circumstances. Having said that, I nevertheless expect that a written apology will be given to Ms. McGrath because I think that would go perhaps some way to alleviating concerns that might exist.

. . . .

¶ 29 **MS. O'DEA**: My lord, only the issue as to outstanding fees. Our hands are tied at this point then -

¶ 30 **THE COURT**: Yes.

¶ 31 **MS. O'DEA:** - and we have to continue acting for Mr. Brace despite non-payment or any payment at this point.

¶ 32 **THE COURT**: Yes. The reason I think you do is because there is this apparent dispute between you as to whether there is a cap on the fees.

¶ 33 **MS. O'DEA**: Yes, my lord. Even before that point, though, without seeing the accounts before the cap was placed but -

¶ 34 **THE COURT**: Yes.

¶ 35 **MS. O'DEA**: - anyhow -

¶ 36 **THE COURT**: Well, all I can say to you is that inasmuch as non-payment of fees was not put forward as a ground for withdrawal in this application, that is not currently an issue. If, indeed, you believe that there is still a legitimate claim for unpaid fees, even with the argument with respect to the cap, and if you were to render such an account, then there is nothing to preclude you

from raising that as another issue as part of another application to withdraw. But you would have to do it on the basis of those unpaid fees and then that issue would be engaged.

. . . .

¶ 75 **THE COURT**: — …. Now, let me just say one other thing to both parties here. At one point in your affidavit Mr. Brace, you did say you were not "looking for a marriage", you were just looking for a legal relationship. That is true but I do want to say to you and Ms. Curl, and Ms. O'Dea knows this already, whilst the relationship between a lawyer and a client is not truly like a marriage, it is a very important and intimate relationship and trust has to be there. It depends upon how both sides act and I would say to you, given what happened with respect to the conversation with Ms. McGrath, there is a certain expectation on you now to try to build bridges, if you will, to repair what may be perceived by the other side as barriers to a continuing relationship. I believe Ms. O'Dea, as the true professional I know she is, will attempt to push any personal considerations to one side and will try to deal with you in a professional way. Do not be surprised if she is perhaps a little bit more formal, a little bit less expansive in her discussions with you than before because I think she is only obligated to treat you as a professional, not necessarily in a more loose or relaxed relationship which might have existed in prior dealings. So you have to understand that that may well happen and that is to be understood in the circumstances. As well, I would suggest to you that you must take very great care in not saying or doing anything to employees of McInnes Cooper or to Ms. O'Dea or any of the other partners in the firm that might give them offence or question their ability. If you do honestly feel that they are not capable and they are incompetent, then I think you should be backing away from the relationship -

¶ 76 **MR. BRACE**: That's for sure.

3.2 Relationships With Clients - Conflicts Of Duty

3.2.1 Generally

"A 'wake-up call' for Bay St."

Rubin, Sandra, *The National Post,* 13 November 2002, pp. FP12-FP13 (in part)

A recent ruling by the Supreme Court of Canada may have serious repercussions for the country's law firms – curtailing their ability to represent a variety of large corporations, their eagerness to take on litigation and their willingness to accept smaller matters, several firms say.

The decision in *R. v. David Lloyd Neil* appears to prohibit a firm from accepting a file [of a potential client] if it has lawyers anywhere in the country acting for a competitor [of that client] – "even if the two mandates are unrelated" – unless both parties provide informed written consent.

. . . .

Mr. Justice Ian Binnie, who wrote the decision, acknowledges that the general prohibition is undoubtedly a major inconvenience to large law partnerships and especially to national firms with their proliferating offices in major centres across Canada.

"Conflict searches in the firm's records may belatedly turn up files in another office a lawyer may not have been aware of. Indeed, he or she may not even be acquainted with the partner on the other side of the country who is in charge of the file. [Conflict search procedures are often inefficient] Nevertheless it is the firm [,] not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client – even if the two mandates are unrelated – unless both clients consent after receiving full disclosure (and preferably independent legal advice) [, and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.]" [[2002] S.C.J. No. 72 (QL) (S.C.C.), para. 29.]

Some of the language in the ruling is broader than the facts of the case (a criminal case involving conflict of interest, unauthorized legal advice and fraud) would appear to have warranted, says Ed Waitzer, the chairman of Stikeman Elliot. He calls it a "very significant" decision.

. . . .

Glenn Leslie, who heads the conficts committee at Blake Cassels & Graydon, says he believes Mr. Justice Binnie has simply reinforced existing principles, "although it's new in the sense that it's a wake-up call.

“I think it reaffirms principles that people sometimes forget about. People tend to think of conflicts in terms of confidential information, but sometimes they forget the duty of loyalty you have to your clients. It's true, sometimes conflicts are difficult to administer, but we don't plan to do anything differently."

John Evans, who heads the conflict committee at Oslers, says he does not believe the ruling will result in any fundamental change to the way I understand the conflict rules and fiduciary-obligation rules are supposed to be played out.”

3.2 Relationships With Clients - Conflicts Of Duty

3.2.2 Conflict found

Gottschlich v. Gottschlich

[2001] A.J. No. 696 (QL) (Alta. Q.B.), Lee J.
(Summary)

Facts: The parties were involved in a contested divorce action. L was the legal secretary for the husband's lawyer and had access to that lawyer's files. She then left her employment with that lawyer and took new employment as a legal secretary for the wife's lawyer. At the time that L switched employment, it was her understanding that the wife's file would be sent by the wife's lawyerto a new lawyer. The wife's lawyer was on vacation when L commenced her new employment. No arrangements were made to ensure that L had no contact with the file. When the wife's lawyer returned she did not refer the wife to a new lawyer. The husband moved to remove the wife's lawyer as lawyer of record on the basis of a conflict of interest. In her affidavit, L swore that she had not discussed the husband's file with anyone at her new firm, (i.e., which represented the wife, and had signed an undertaking to that effect).

Held: The wife's lawyer was to be removed from record.

Reasons: While legal secretaries occupied a different position than lawyers, the prejudice to a client was no different. Despite *bona fide* efforts made to isolate L from the wife's file, the reality was that she was exposed to and familiar with the file from her previous employment. The issue ultimately turned on the balance of convenience. The divorce file was not close to completion. It was likely that the matter was still several months from going to trial. The conflict potential was more important because the issues of custody and access had yet to be dealt with. L's prior involvement with the husband's file did create a disqualifying conflict of interest sufficient to remove the wife's lawyer from record.

Comrie v. Comrie

[2001] O.J. No. 2411 (QL) (Ont. Sup. Ct.), Timms J.
(Summary)

Facts: The parties were involved in divorce proceedings. Prior to the divorce, the husband had retained a law firm to act for his business. Three lawyers of that law firm had been involved in legal matters dealing with the husband's business. Later, one of the lawyers left the firm and went

into business with the husband. The other two lawyers also left the firm and set up a new firm. One of those two was now counsel for the wife in the divorce proceedings. The husband alleged that he had a social relationship with all three lawyers. He also alleged that the wife would not have personal knowledge of the names of 13 companies listed in a schedule to an affidavit in support of her application, unless she had access to confidential information. The husband moved to have counsel for the wife removed as solicitor of record in the divorce proceedings.

Held: Counsel for wife was to be removed from the record.

Reasons: In this case, it would be beyond artificial to draw the corporate veil in such a fashion that the husband and any company in which he was a major or the sole shareholder would be considered totally different entities, when it came to confidential information provided by the husband regards the companies. Both the firm that counsel for the wife had left and the firm she was now a partner of, were small firms. No institutional measures were in place throughout as they were not necessary. Even if counsel for the wife did not practice corporate law and even if that counsel's social contact with the husband had been minimal, it was virtually impossible for her to satisfy the test that no disclosure of confidential information ever occurred.

R. v. Neil

[2002] S.C.J. No. 72 (QL) (S.C.C.), Major, Bastarache, Binnie (for the Court), Arbour and LeBel JJ.,
paras. 1; 4-5; 8; 12-14; 15-17; 20; 31-35; 46-47

¶1 What are the proper limits of a lawyer's "duty of loyalty" to a current client in a case where the lawyer did not receive any confidential information that was (or is) relevant to the matter in which he proposes to act against the current client's interest? The issue arises here in the context of a series of criminal prosecutions against the appellant. He complains that a member of a law firm, with which he had an ongoing solicitor-client relationship in respect of certain transactions that were the subject of criminal proceedings pending against him, provided to the police information about an unrelated matter which led directly to the laying of additional charges. … [The appellant] was eventually convicted on those unrelated charges. The appellant's position is that his lawyers violated their duty of loyalty, and on that account the conviction that grew out of their conflict of interest should be stayed.

. . . .

I. <u>The Facts</u>

¶ 4 The appellant carried on a business in Edmonton as a paralegal for many years. He was assisted by Helen Lambert. He regularly consulted "Pops" Venkatraman, a solicitor, about issues arising in his files, and when advised by "Pops" that matters exceeded his competence he would refer his clients to the Venkatraman law firm. The Law Society of Alberta took the view that these

referrals did not take place frequently enough, and in October 1994 supplied the Prosecutors' Office in Edmonton with complaints that the appellant was providing legal advice contrary to the Alberta *Legal Profession Act*, S.A. 1991, c. L-9.1. The police investigation eventually led to a 92-count indictment against the appellant for a variety of different transactions related to different complainants [including Canada Trust].

¶ 5 The conflict of interest largely concerns the activities of one of the Venkatraman firm's associates, Gregory Lazin. Lazin shared office space and some facilities with the law firm in the fall of 1994. The trial judge found that as of January 1, 1995 he should be considered a member of the Venkatraman firm for the purpose of conflict of interest and confidentiality by virtue of the extended definition of "firm" adopted by the Law Society of Alberta in its *Code of Professional Conduct* (loose-leaf ed), effective January 1, 1995, at p. ix. I say "extended meaning" because the evidence established that Lazin was essentially carrying on an independent practice despite the shared facilities. Effective May 1, 1995, however, Lazin's practice was rolled into the Venkatraman firm, and Lazin himself became an employee. He has since left.

. . . .

¶ 8 The conflicts of interest involving the Venkatraman firm came from two sources:

> (i) With respect to the *Canada Trust* indictment, the firm acted simultaneously for the appellant in the criminal proceedings and his business associate Helen Lambert in divorce proceedings at a time when they knew, or ought to have known, that she would also be charged in the *Canada Trust* criminal proceedings, with an interest adverse to his. Two members of the firm visited the appellant at the Remand Centre on April 18, 1995, including Lazin who arrived late and was there for about 12 minutes during a two-hour interview. At the time he was acting for Helen Lambert. The trial judge concluded that Lazin attended for no purpose except to collect information from the appellant that would be useful to him in his defence of Helen Lambert in the anticipated criminal proceedings. Lazin's plan was to run a "cut-throat defence", seeking to paint the appellant as the manipulative criminal and Helen Lambert as an innocent dupe. He was subsequently retained formally as her defence counsel and eventually offered the Crown Attorney's Office a deal under which Lambert would testify against the appellant if the charges against her were dropped. As it was put in cross-examination, "in return for Lambert sinking [the appellant], Lambert would walk". None of this, obviously, was in the appellant's interest. The appellant was belatedly advised that the Venkatraman law firm would not act for him in the *Canada Trust* criminal case because of its involvement with Helen Lambert.
>
> (ii) In July 1995, Lazin, still a member of the Venkatraman firm, was approached by Darren Doblanko whose wife had obtained a divorce with the assistance of the appellant [i.e.. the paralegal] some years previously. Quite innocently, she had relied on an affidavit of service on Darren Doblanko (who had earlier deserted her). The affidavit was false. The jury found that the false

> affidavit of service had been prepared by the appellant. Moreover, the wife had innocently relied on a Certificate of No Appeal containing the forged signature of Doblanko. At the suggestion of the trial judge in … [Mr. Doblanko's application to regularize the previously ill-begotten 'divorce' granted to his wife], Lazin suggested to [Mr.] Doblanko that he report the forgery to the police. In fact, Lazin steered Doblanko to the same police officer who was responsible for the *Canada Trust* file and other cases pending against the appellant. ….

II. Analysis

. . . .

A. *The Lawyer's Duty of Loyalty*

¶ 12 Appellant's counsel reminds us of the declaration of an advocate's duty of loyalty made by Henry Brougham, later Lord Chancellor, in his defence of Queen Caroline against the charge of adultery brought against her by her husband, King George IV. He thus addressed the House of Lords:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.
> (*Trial of Queen Caroline*, by J. Nightingale, vol. II, The Defence, Part 1, (1821), at p. 8)

These words are far removed in time and place from the legal world in which the Venkatraman law firm carried on its practice, but the defining principle -- the duty of loyalty -- is with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1243 and 1265, and *Tanny v. Gurman*, [1994] R.D.J. 10 (Que. C.A.). Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies: *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 2; *Smith v. Jones*, [1999] 1 S.C.R. 455. As O'Connor J.A. (now A.C.J.O.) observed in *R. v. McCallen* (1999), 43 O.R. (3d) 56 (C.A.), at p. 67:

> ... the relationship of counsel and client requires clients, typically untrained in the law and lacking the skills of advocates, to entrust the management and conduct of their cases to the counsel who act on their behalf. There should be no room for doubt about counsel's loyalty and dedication to the client's case.

¶ 13 The value of an independent bar is diminished unless the lawyer is free from conflicting interests. Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of an adversarial system rests. Other objectives, I think, can be related to the first. For example, in *MacDonald Estate, supra*, Sopinka J. speaks of the "countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause" (p. 1243). Dubin J.A. remarked in *Re Regina and Speid* (1983), 8 C.C.C. (3d) 18 (Ont. C.A.), at p. 21:

> We would have thought it axiomatic that no client has a right to retain counsel if that counsel, by accepting the brief, puts himself in a position of having a conflict of interest between his new client and a former one.

See also: *Teoli v. Fargnoli* (1989), 30 Q.A.C. 136.

¶ 14 These competing interests are really aspects of protecting the integrity of the legal system. If a litigant could achieve an undeserved tactical advantage over the opposing party by bringing a disqualification motion or seeking other "ethical" relief using "the integrity of the administration of justice" merely as a flag of convenience, fairness of the process would be undermined. ….

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

¶ 16 The duty of loyalty is intertwined with the fiduciary nature of the lawyer-client relationship. One of the roots of the word fiduciary is *fides*, or loyalty, and loyalty is often cited as one of the defining characteristics of a fiduciary: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, at p. 149; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 405. The lawyer fulfills squarely Professor Donovan Waters' definition of a fiduciary:

> In putting together words to describe a "fiduciary" there is of course no immediate obstacle. Almost everybody would say that it is a person in whom trust and confidence is placed by another on whose behalf the fiduciary is to act. The other (the beneficiary) is entitled to expect that the fiduciary will be concerned solely for the beneficiary's interests, never the fiduciary's own. The "relationship" must be the dependence or reliance of the beneficiary upon the fiduciary.
> (D. W. M. Waters, "The Development of Fiduciary Obligations", in R. Johnson et al., eds., *Gérard V. La Forest at the Supreme Court of Canada, 1985-1997* (2000), 81, at p. 83.)

Fiduciary duties are often called into existence to protect relationships of importance to the public including, as here, solicitor and client. Disloyalty is destructive of that relationship.

B. *More Than Just Confidential Information*

¶ 17 While the Court is most often preoccupied with uses and abuses of confidential information in cases where it is sought to disqualify a lawyer from further acting in a matter, as in *MacDonald Estate, supra*, the duty of loyalty to current clients includes a much broader principle of avoidance of conflicts of interest, in which confidential information may or may not play a role: *Montreal Trust Co. of Canada v. Basinview Village Ltd.* (1995), 142 N.S.R. (2d) 337 (C.A.); *Enerchem Ship Management Inc. v. Coastal Canada (The)*, [1988] 3 F.C. 421 (C.A.); *Jans v. Coulter (G.H.) Co.* (1992), 105 Sask. R. 7 (C.A.); *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 (Ont. Ct. (Gen. Div.)); *Gaylor v. Galiano Trading Co.* (1996), 29 B.L.R. (2d) 162 (B.C.S.C.).

. . . .

The Venkatraman Law Firm's Breach of Professional Obligations

¶ 20 The present appeal involves criminal proceedings and it is in that context that I propose to review the applicable legal principles.

. . . .

¶ 31 In my view the Venkatraman law firm, and Lazin in particular, put themselves in a position where the duties they undertook to other clients conflicted with the duty of loyalty which they owed to the appellant. I adopt, in this respect, the notion of a "conflict" in s. 121 of the *Restatement Third, The Law Governing Lawyers* (2000), vol. 2, at pp. 244-45, as a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person".

¶ 32 The initial conflict was to attempt to act simultaneously for both the appellant and his eventual co-accused in the *Canada Trust* charges, Helen Lambert. They were clearly adverse in interest. It is true that at the time Lazin and his colleague from the firm met the appellant in the Remand Centre on April 18, 1995 Lazin had not been retained by Lambert on the criminal charges. He was acting only with respect to her divorce. It is also true that in the end the appellant was eventually represented by other counsel. Nevertheless the trial judge found that on April 18, 1995, Lazin was *in fact* (if not yet officially) acting on Lambert's behalf in the criminal proceedings. Her indictment was reasonably anticipated (given her involvement in the subject matter of the *Canada Trust* charge) and, most importantly, the trial judge held that the purpose of Lazin's attendance at the Remand Centre was to get evidence to run a "cut-throat" defence against the appellant who, he found, was an ongoing client of the Venkatraman law firm. The fact that the appellant eventually looked elsewhere for a lawyer in the *Canada Trust* case, whether as a result of his choice or theirs, did not diminish their duty of loyalty. Nor does it make a difference that no professional fee was charged for that particular consultation. The Venkatraman firm (Lazin) appreciated that the appellant having been arrested, the long arm of the law would soon be laid on Helen Lambert. In fact, Helen Lambert was arrested less than two months later, on June 6, 1995.

¶ 33 The second conflict relates to the *Doblanko* charges. As mentioned, both Doblanko and his former wife (who had by now remarried and produced children of her second "marriage") needed their earlier divorce to be regularized. The Venkatraman firm breached their duty to the appellant in accepting a retainer that required them to put before the [more recent] divorce court judge evidence of the illegal conduct of their client, the appellant, [in the proceeding before the original divorce court judge,] at a time when they knew he was facing other criminal charges related to his paralegal practice, in which their firm had had a long-standing involvement. It was contended that the *Doblanko* and *Canada Trust* cases were wholly unrelated in the sense that Lazin could not have obtained in the *Doblanko* mandate confidential information that would be relevant in the *Canada Trust* mandate. This, as stated, is not the test of loyalty to an *existing* client, and it is not entirely true either. While the two cases were wholly independent of each other in terms of their facts, the Lambert's cut-throat defence was helped by piling up the allegations of dishonest conduct in different matters by different complainants in a way that would make it easier for the jury to consider her a victim rather than a perpetrator. The linkage was thus strategic. The *Doblanko* application was initiated in July 1995. The Crown advised us that the *Canada Trust* criminal charges against Helen Lambert were not resolved until the spring of 1996.

¶ 34 In the course of the *Doblanko* application, the divorce court judge expressed the view (according to Lazin) that Lazin should report the appellant's apparent falsification of documents to the police [when the appellant earlier acted for Ms. Dobalanko on her divorce]. I think at that point that Lazin, as an officer of the court, was obliged to do so. Lazin then called the Law Society (without disclosing that the appellant was a client of his firm) who advised that Lazin *could* advise his divorce court client to report the matter to the police but he was not bound to. Lazin advised neither the trial judge nor the Law Society that the suspected forger (the appellant) was a client of his firm. Further, Lazin made a point of having the matter reported to the police officer who was responsible for investigating the appellant in connection with the *Canada Trust* and other matters.

¶ 35 It was the Venkatraman firm that put the cat among the pigeons by bringing the *Doblanko* application before the divorce court. Mr. Doblanko would likely have found another lawyer to make the application, and the facts might equally have eventually made their way to the police, but it was in violation of the firm's duty of loyalty to the appellant to contribute in this way to the appellant's downfall.

. . . .

¶ 46 …, the trial judge declared a mistrial with respect to the *Canada Trust* charges and directed that they proceed to a new trial before a different judge, he did, however, express in his reasons the view that eventually those charges as well should be stayed because of the conflict of interest engaged in by the Venkatraman law firm. It is appropriate that we comment on his expression of opinion.

¶ 47 The conflict of interest in *Canada Trust* relates to a brief period of consolation that ended soon after it began. The Venkatraman law firm was in breach of its duty of loyalty to the appellant, but shortly thereafter they reconigized the conflict and acted no further on the *Canada Trust* file. Other counsel were retained, who were not privy to whatever confidential information the Venkatraman firm possessed. The Helen Lambert charges have been resolved. There is no danger that the Venkatraman law firm’s conflict would affect the fairness of a new trial. On the basis of the

record we have before us, I would not regard the *Canada Trust* charges as so vitiated by the law firm's conduct as to render it an abuse of process for the state (which had no role in the conflict of interest) to seek a conviction at a new trial. In any event it is certainly not one of the "clearest cases" in which a stay would be justified. There may of course be other or different evidence before the judge presiding at the new trial and the disposition of the stay application, if renewed, will be for that trial judge to decide.

Catholic Children's Aid Society of Toronto v. B.(S.).

(2002), 24 R.F.L. (5th) 15 (Ont. Ct. J.), Cohen J.
(Summary)

Facts: Motion by the court to determine whether the same lawyer should be permitted to represent both parents in an application by Children's Aid Society for wardship of two children. The younger child sustained serious injuries consistent with shaken baby syndrome. The mother was charged with assault. The parents retained the same lawyer. At the hearing of the motion, the court was told that the lawyer was now acting only for the mother and the father would represent himself. The parents had executed an Acknowledgment and Direction prepared by the lawyer in which they expressed the desire to retain the services of the lawyer's firm, that they were told of the potential risk of conflict, and that they understood that the law firm would withdraw if a conflict arose.

Decision: The lawyer was disqualified from representing either parent.

Reasons: Neither the withdrawal of the father from the joint retainer nor the execution of the Acknowledgment and Direction addressed the fundamental concerns raised by a joint retainer. Although both parents supported the same plan thus far, one of them might later wish to employ the strategy of shifting blame for the child's injuries to the other. The lawyer could be placed in a situation of having to use confidential and relevant information previously received from both parents in order to properly represent one of them. Thus, it was possible that confidential information would be used to the prejudice of one of the parents. They were unsophisticated and vulnerable. Their signed Acknowledgment and Direction was given little weight because the lawyer had them sign it only after the court had directed a motion on the issue of the lawyer's potential disqualification.

First Property Holdings Inc. et al v. Beatty et al

[2003] 66 O.R. (3d) 97 (Ont. Sup. Ct. J.), Wilson J.
(Headnote, in part)

The 'bright line' test for a conflict of interest applies with respect to suing an existing client of a law firm. A current client of a law firm, even a client for whom mechanical tasks are performed, is entitled to a duty of confidentiality and loyalty. It is not within the reasonable expectations of the client in these circumstances or a member of the public that the law firm could be retained by a third party to sue the client. A distinction should not be drawn between different classes of clients, with differing obligations and duties dependent upon the nature of the tasks performed and the advice given.

The 'balancing of competing interests' test applies when a law firm is contemplating suing a former client. If a balancing of competing interests in the interests of justice was the applicable test for existing clients of a law firm, the law firm should be removed as solicitor of record. No steps were taken to protect the confidentiality of the defendant's files. The lines of loyalty became very blurred when a solicitor from the law firm sought information from the law clerk before the statement of claim was issued. This communication breached reasonable client expectations, as well as the reasonable expectations of members of the public. In the circumstances, the protection of the transparency and integrity of the legal system outweighed the right of the plaintiffs to retain their counsel of choice.

Calvert v. Lamoureux

[2003] B.C.J. No. 1277 (QL) (B.C. S.C.), Gill J.,
paras. 1-4; 14-19

¶ 1 The plaintiff, Mr. Calvert, seeks an order preventing Mr. Millar, counsel for Ms. Lamoureux, from continuing to act on her behalf. The circumstances giving rise to this application are somewhat unusual.

¶ 2 The parties to this action, Mr. Calvert and Ms. Lamoureux, resided together for a number of years and have one child, Madison, born May 20, 1993. They separated in early 2002. Mr. Calvert was previously married to Julie Calvert. After their separation in 1992, Mr. Calvert commenced proceedings against Ms. Calvert which also remain outstanding.

¶ 3 After Mr. Calvert and Mr. Lamoureux separated, Ms. Lamoureux moved to rental accommodation in North Vancouver. Julie Calvert was living in the same house. Ms. Lamoureux

deposed that she and Ms. Calvert formed an alliance hoping that they could negotiate with Mr. Calvert to settle his outstanding matters with each of them. Within months, that alliance ended. According to Ms. Lamoureux, it ended because of Ms. Calvert's drunken behaviour.

¶ 4 As stated, Ms. Lamoureux is represented by Mr. Millar. For a short time, Mr. Millar also represented Ms. Calvert. As to how that came about, it is Mr. Millar's evidence that he first met Ms. Lamoureux in March, 2002, and after their initial meeting, an appointment was arranged for March 31. On that date, Ms. Lamoureux came to his office with Ms. Calvert and during the course of their meeting, Mr. Millar learned that Ms. Calvert had an ongoing action involving the plaintiff. Ms. Calvert requested that he consider acting for her and he agreed to do so. ….

. . . .

¶ 14 …. One of the arguments on appeal was that confidential information had not been passed as there was no entitlement to confidentiality where one lawyer acted for both parties. The reasons of Conrad J.A. concluded as follows:

> [11] Much was made of the fact that when a single counsel acts for two parties there is no confidence between them and all information must be produced. We do not need to decide in law all the details surrounding the production of such information between the parties. The facts of this case lead us to conclude that the lawyers must cease acting.
>
> [12] In our view, to allow a law firm to act for both parties and then elect to act for one party against another in a closely related matter (here the same matter) is to create at least an appearance of unfairness and impropriety which is unacceptable. Accordingly, the appeal is dismissed.

¶ 15 In my view, the only question is whether there are reasons why an order ought not to be made on Mr. Calvert's application, given that he was never Mr. Millar's client and has never communicated directly with him.

¶ 16 The importance of the perception of fairness which was referred to by Conrad J.A. is emphasized in many of the relevant authorities. As was noted by Esson C.J.S.C., as he then was, in Manville Canada Inc. v. Ladner Downs, [1992] 2 W.W.R. 323 (B.C.S.C.), the court's power to enjoin a lawyer from acting is based upon the confidential character of the relationship between a lawyer and client, but even more basic is the concept of fairness and the precept that justice must not only be done, but must be seen to be done.

¶ 17 Although not referred to by counsel, the decision in Williams v. Williams, [1997] O.J. No. 4657 (Ont. C.J., Gen. Div.) is in my view particularly helpful. Mr. Williams sought an order prohibiting solicitors for Sandra Williams from continuing to act. Mr. Williams had married three times. From 1968 to 1980, he had been married to Carol. From 1982 to 1988, he was married to Sandra. He married Su-Ann in 1991. During a temporary separation, Su-Ann retained solicitors who initiated an action which was withdrawn after reconciliation. All three women were represented by the same solicitor. It was alleged on behalf of Mr. Williams that information gained by Sandra's

solicitor from Su-Ann should disqualify him from acting in the lawsuit because Su-Ann was now Mr. Williams' ally and their interests coincided.

¶ 18 Wood J. began by noting that Ms. Williams' solicitor had always been in an adversarial relationship to Mr. Williams. One of the questions considered was whether the solicitor could be removed when the client had not requested the relief and was not a party to the proceedings. It was concluded that Su-Ann Williams could be affected by the outcome of the lawsuit, either directly or indirectly. Reference was made to the policy behind recent decisions, being fairness and the need to avoid even the appearance of unfairness. In the end result, Wood J. concluded that notwithstanding that the client was not a party and had not sought removal, the appearance of justice demanded removal.

¶ 19 In my view, the same result should follow in the present case for the same policy reasons. I cannot conclude that Mr. Calvert and Julie Calvert do not have any commonality of interest vis-à-vis Ms. Lamoureux. As already stated, both women have monetary claims and there are children from both relationships. To allow Mr. Millar to act against Mr. Calvert in a matter which is seemingly closely related to proceedings involving Ms. Calvert at least creates an appearance of unfairness. The plaintiff is therefore entitled to the order sought.

Brown v. Brown

[2003] M.J. No. 228 (QL) (Man. Q.B. [Fam. Div.]), Diamond J.
(Summary)

Facts: Motion by the wife, Brown, for an order removing her second husband's lawyer, Blair, as counsel on the record. The wife claimed that Blair acted on her behalf against her first husband, and that she gave Blair information about her personal finances. Blair did not recall meeting with the wife or receiving such information. The wife argued that Blair was in a conflict of interest. Brown's second husband argued that he was present with the wife, Brown, when she met with Blair in her suit against her first husband and, thus, was privy to the information.

Decision: Motion allowed.

Reasons: The court was satisfied that Blair received confidential financial information from the wife, and that the information would be relevant to the matter at hand. There was therefore a risk, or at least a perception of a risk, that this confidential information could be used to the prejudice of the wife. The fact that Blair did not recall receiving the information did not mean that she would not have a recollection in the future. The fact that the husband was also present when the information was given did not remove the conflict.

R. v. Zenli

[2003] M.J. No. 297 (QL) (Man. Prov. Ct.), Chartier Prov. Ct. J.
(Summary)

Facts: Application by the Crown for an order removing Guttman and Miller as counsel of record for the accused, Zeneli, on the basis of a conflict of interest. The Crown argued that Guttman was in a conflict of interest on the basis of his former representation of a Crown witness. It argued that Miller, as co-counsel with Guttman, was deemed to have the same information as Guttman. Miller filed an affidavit deposing that he had not received any confidential information on the Crown witness from Guttman.

Decision: Application allowed in part.

Reasons: Guttman was removed as counsel of record. There was a substantial relationship between Guttman and the Crown witness. However, Miller was entitled to continue to act unless Guttman was asked to testify in the matter, in which event he was required to step aside temporarily.

Sauter v. Sauter

[2003] S.J. No. 516 (QL) (Sask. Q.B. [Fam. Law Div.]), M-E. Wright, J.
(Summary)

Facts: Application by the husband in a divorce action to remove the wife's solicitors, the Kendall firm, from the record. In the fall of 2002 the husband consulted Curtis Kendall, a lawyer at the firm. The husband told Curtis Kendall that he was considering divorce, and Curtis Kendall provided a free consultation covering the major issues, including support obligations and child custody. The client did not formally retain Curtis Kendall. In January 2003 the husband received a divorce petition from Deryk Kendall, a lawyer at the same firm. He argued that, as he had provided confidential information to Curtis Kendall, the Kendall firm was in a conflict of interest. Curtis Kendall submitted that although the husband's name was in his diary, the husband never formerly retained him. Further, he denied having any memory or record of the consultation.

Decision: Application allowed.

Reasons: The firm was removed as solicitors of record. It was possible for a conflict to exist without the existence of a formal retainer. Confidential information passed from the husband to the Kendall firm, and his relationship with it was sufficiently related to the divorce proceeding.

The evidence fell short of being clear and convincing that the firm took all reasonable measures to ensure that no disclosure of the husband's confidential information would occur.

Wolfe v. Wolfe

[2003] S.J. No. 795 (QL) (Sask. Q.B. [Fam. Law Div.]), McIntyre J.
(Summary)

Facts: Application by the wife for an order removing a solicitor, Merchant, as counsel for the husband on the ground of conflict of interest. The wife retained an Ontario solicitor to assist her in her divorce proceedings. Her Ontario solicitor contacted Merchant to obtain advice on the law in Saskatchewan. The Ontario solicitor claimed that she disclosed confidential information to Merchant regarding the litigation strategy of the wife. The husband subsequently retained Merchant to represent him in the proceedings. Merchant claimed that he had no recollection of the conversation with the wife's counsel and that his notes of the conversation revealed no confidential information.

Decision: Application allowed.

Reasons: The duty of confidentiality arose whether the information came from the wife herself or her counsel. It was not necessary for the wife to have retained Merchant for the solicitor and client relationship to arise. There was a rebuttable presumption that confidential information was imparted. Further, Merchant's notes did not reflect the entire conversation with the Ontario solicitor.

3.2 Relationships With Clients - Conflicts Of Duty

3.2.3 Conflict not found

Newhook v. Newhook

[1999] N.J. No. 24 (QL) (NL S.C.T.D.), Wells, J.
(Summary)

Facts: Husband and wife consulted a solicitor in 1980 ("1980 solicitor") to obtain the business venture advice. The wife provided no information to the 1980 solicitor in regard to business venture for which the consultation took place. In 1992, the wife was directed by her bank to obtain independent legal advice regards a financing guarantee. The wife consulted a former associate of the 1980 solicitor to obtain independent legal advice. In 1996, the wife brought a matrimonial property action. The husband retained the 1980 solicitor to defend the wife's matrimonial property action. The 1980 solicitor had no recollection of previously meeting the wife. The wife brought an application to remove the 1980 solicitor from the record for conflict of interest.

Decision: The application was dismissed.

Reasons: The 1980 solicitor was not in possession of confidential information from the wife detrimental to the wife's position. The former associate of the 1980 solicitor was not presently associated with the 1980 solicitor. The wife did not discharge the onus of proving conflict of interest.

Leopold v. Leopold

[1999] O.J. No. 2181 (QL) (Ont. C.A.), Doherty, Goudge and Borins JJ.A.,
paras. 1; 2-3; 7-8

¶ 1 The parties were divorced in 1994. They settled their support obligations by way of an agreement. The agreement provided support for a fixed period of time for the appellant.

. . . .

¶ 2 The respondent made the required payments throughout the term of the agreement. When no further payments were required under the agreement, the appellant applied for a variation of the agreement and an order requiring the respondent to continue making the payments.

¶ 3 The respondent brought a motion to have the appellant's counsel disqualified as she took the position that the appellant's counsel would be a witness on the trial in relation to the requested variation. The motion judge agreed and removed counsel from the record.

. . . .

¶ 7 Neither the fact that the lawyer may have relevant evidence to give on the variation motion, nor the fact that the appellant apparently has no recall of what he contemplated his future circumstances to be when he signed the agreement, make his communications with his lawyer compellable evidence. The former, that is the relevance of the evidence, ignores the privilege which operates to exclude relevant evidence. The latter, the appellant's apparent inability to recall his state of mind when he signed the agreement, does not constitute an implied waiver of the client-solicitor privilege.

¶ 8 The appeal must be allowed, the order made below is set aside. The appellant is entitled to his costs here and in the court below.

Tjader v. Tjader

(2002), 31 R.F.L. (5th) 460 (B.C.C.A. [in Chambers]), Hall J.A.
(Summary, and para. 14)

Facts: Husband and wife were married in 1979 and separated in 1992. They had two children. At separation, both parties had consulted with a solicitor from a local law firm ("the local law firm"). The meeting lasted between 30 and 45 minutes; dealing with advice regards matters relating to their separation and how their children could be protected in case of the death of the husband and, further, the husband's need for a Will. After consult ting with the local lawyer, the parties, themselves, finalized a separation agreement which was filed in a court registry. In 1999, the wife commenced working for a local law firm. In 2001, the husband informed his wife that he wanted a divorce and he retain counsel to act in the matrimonial proceedings he contemplated. The wife was represented by the local law firm. A settlement was negotiated with respect to child support and the resulting order was filed by consent. The wife commenced an action for divorce, spousal support and division of family assets. The husband's application to remove the local law firm as solicitor for his wife was dismissed. The chambers judge noted that lawyer doing actual work for the wife in her matrimonial proceeding was in a different office of the local law firm. The husband applied for leave to appeal.

Decision: The husband's application was dismissed.

Reasons: The parties had had a fairly general discussion, on a *pro bono* basis with a lawyer from the local law firm at the time of their separation. The meeting occurred 10 years ago. The local lawyer they consulted professed that he had no present recollection of the spouses having consulted him. Because the spouses had then met together with the local lawyer, no confidential information

was imparted. Nothing of significance to the current litigation between the spouses was dealt with at the meeting between both spouses and the local lawyer 10 years earlier. No harm to the administration of justice would occur or be apprehended in allowing the local law firm to represent wife.

Hall J.A. wrote, in part, as follows:

¶ 14 While the Courts must be zealous to ensure that justice is properly administered and that members of the public continue to have full confidence in the Courts and in lawyers and judges, Courts also have to approach applications such as the one in this case with a sense of reality. As I analyze this case, the parties had a fairly general discussion on a pro bono basis with a lawyer in a town in this Province about matters relating to their pending separation and how their children could be protected in case of the death of the husband. These events took place about ten years ago and the lawyer in question professes, (not surprisingly), that he has no present recollection of the consultation or its contents. Is it appropriate on these facts that the law firm of which that lawyer is a member ought to be restrained from acting for one of the parties? The learned chambers judge thought not and I agree with her view of the matter. For one thing, there could be no confidential imparted information since the parties met together with the lawyer. The fact that parties jointly consult a lawyer would not necessarily be dispositive in all cases - see the case of *Thomson c. Smith Mechanical Inc.*, [1985] C.S. 782 (Que. S.C.), a case referred in the *Martin* case [[1990] 3 S.C.R. 1235], but here it does not seem possible to me to suggest with any air of reality that anything of significance to the present litigation was … [dealt] with in the earlier brief meeting between the parties and the solicitor.

New Brunswick (Minister of Family and Community Services) v. A.N.

[2003] N.B.J. 256 (QL) (N.B. C.A.),
Drapeau C.J.N.B., Larlee and Deschenes JJ.A., paras. 4-8
(Summary, and paras. 4-8)

Facts: Appeal by the parents from an order transferring guardianship of their six children to the respondent Minister of Family and Community Services. The parents claimed that the counsel appointed to represent the children was in a conflict of interest throughout the trial. One year earlier, that counsel had successfully represented the Minister on an application for an interim supervisory order for five of the children. The parents were aware at trial of counsel's previous involvement. They waived any right to object to counsel’s participation. The mother also claimed that the judge erred when he decided that it would be in the best interests of the children to have their guardianship transferred. A psychologist had testified that the parents caused anxiety to the children.

Decision: Appeal dismissed.

Reasons: The objection about counsel's involvement could not be raised on appeal since it had been waived at trial.

Drapeau C.J.N.B. wrote, in part, as follows.

¶ 4 Paragraph 7(b) of the Act provides that "where the Minister is a party to the proceeding and the court is of the opinion that the interests and concerns of the child should be represented by counsel or by a responsible spokesman, [the court shall] advise the Attorney-General that in his opinion counsel or a responsible spokesman should be made available to assist in the representation of the child's interests and concerns". Counsel appointed under paragraph 7(b) must represent the interests and concerns of the child. It is trite to point out that it is not up to the Minister to dictate the content of this representation. It is equally obvious to me that it is in the best interest of the administration of justice that reasonable and appropriate steps be taken to convince the parents that the person appointed under paragraph 7(b) truly represents the interests and concerns of the child and not those of the Minister.

¶ 5 In the part of his submission dealing with this question, A.N. properly relies on the well-settled principle that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". See The King v. Sussex Justices, [1924] 1 K.B. 256, at p. 259. Based on that principle and given the importance of what is at issue for the parents, I am compelled to find that, having previously acted on behalf of the Minister in a proceeding against the appellants and which concerned five of the children who are the subject of this application for guardianship, Ms. LeBlanc should have turned down the mandate given to her under paragraph 7(b). For a proper lawful execution of that mandate, counsel appointed under this provision must be independent. I subscribe to the following comment made by J. Wilson in Wilson on Children and the Law, looseleaf, Markham (Ont.), Butterworths, 1994, paragraph 6.22: "the child's counsel must be in actuality and appearance independent of the party litigants".

¶ 6 Having said that, it is only at the end of the trial, more specifically during closing arguments, that A.N. raised the conflict of interest issue resulting from the past professional relationship between Ms. LeBlanc and the Minister. Robichaud, J. responded to A.N.'s comments on the matter by stating that she was open to allowing the appellants' application if they wished to abort the proceedings and proceed with a new trial. She explained to the appellants, in unequivocal terms, that the matter would be heard by one of her colleagues and that the children would then be represented by another lawyer. Robichaud, J., then encouraged the appellants to consult with duty counsel, which they did. At the resumption of the hearing, the appellants stated, unequivocally, that they did not want her to declare a mistrial; they then asked Robichaud, J. to take into consideration the conflict of interest when determining the matter on the merits.

¶ 7 In this case, Ms. LeBlanc never acted on behalf of the appellants. The children's counsel for the appeal, Mr. George A. Lyons, maintains that the past professional relationship between the Minister and Ms. LeBlanc is not a sufficient reason to set aside the trial judge's decision. In fact, he asks, on the children's behalf, that the appeal be dismissed. In my view, it is not necessary to determine whether, notwithstanding the absence of any past professional relationship [of the appellants with Ms. LeBlanc], the appellants are still entitled to some sort of redress for this conflict of interest.

¶ 8 It is trite law that a party who is aware that counsel for the adverse party is in conflict of interest must raise the issue promptly. If such party fails to act promptly, the court may conclude that he or she waived any right to object. See Saint John Shipbuilding Ltd. v. Bow Valley Husky (Bermuda) Ltd. et al. (2002), 251 N.B.R. (2d) 102 (C.A.), para. 71, and Bank of Montreal v. Dresler et al. (2002), 253 N.B.R.(2d) 37 (C.A.), para. 94. The minutes confirm that the appellants knowingly and deliberately waived any right to object to Ms. LeBlanc's participation in the trial hearings. Given the circumstances, the Court cannot allow the appeal on the ground stated in the Notice of Appeal.

Remus v. Remus

[2002] O.J. No. 4242 (QL) (Ont. Sup. Ct. J.), G. P. Smith J.

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[1] This is a motion brought by the wife, Ann Marie Remus, for an order removing the firm of Cheadle, Johnson, Shanks, MacIvor as solicitors of record for the husband, Robert Remus.

[2] The wife's evidence in support of the motion can be summarized as follows:

-- the Cheadle firm was jointly retained by both parties on several matters throughout the course of their marriage;

-- the wife was "very good friends with the ex-wife of one of the partners" [See Note 1 at end of document] and she and her husband have attended at that partner's home for social occasions;

-- that she has imparted personal information about herself to solicitors of the firm and that having the firm act against her now would make her "uncomfortable" but also provide an unfair advantage in the custody action because the Cheadle firm knows her personality as well as her emotional and psychological makeup;

-- that the Cheadle firm currently is holding the proceeds of the sale of the matrimonial home in a trust fund earmarked for the real estate file but that this fund had been transferred to the family litigation file.

[3] The husband argues that he would be prejudiced by having to retain alternate counsel; that there is no conflict of interest and that this motion is a "tactic" designed to limit his choice of counsel and gain the upper hand in the custody litigation.

[4] The husband, in his affidavit sworn September 12, 2002, states that at all times he and his wife jointly retained the Cheadle firm and, at no times, was any confidential information communicated by either party to the law firm.

[5] A domestic contract excluding the husband's inheritance from his net family property was entered into between the parties in November of 1995. The husband, with the consent of the wife, was represented by the Cheadle firm notwithstanding the firm having acted for the parties jointly previously. The wife received independent legal advice from a separate lawyer in town.

[6] Conflict of interest is not a new topic of concern. Several centuries ago Plutarch wrote that Caesar's wife must be above suspicion. The oft-quoted statement that "justice must not only be done, but also seen to be done" was uttered initially by Lord Goddard in 1924 [See Note 2 at end of document] and has been repeated innumerous times since, including by the Supreme Court of Canada. [See Note 3 at end of document]

[7] In MacDonald Estate v. Martin, Sopinka J. set out a two-pronged test to determine whether a disqualifying conflict of interest exists:

> (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?
>
> (2) Is there a risk that it will be used to the prejudice of the client?

[8] It is clear that if a lawyer has confidential information, he or she cannot act against the former client and disqualification is automatic.

[9] This is a case where the solicitor does not possess specific confidential information. The allegation is that Mr. Shanks and/or his firm has acted for the client in non-related matters and, hence, has acquired a general knowledge about the emotional and psychological personality of Mrs. Remus, their former client. Is this enough to disqualify the firm from acting for Mrs. Remus? Does the firm's relationship with Mrs. Remus mean that it possesses confidential information and, if so, would it cause a reasonably informed member of the public who is in possession of the facts to conclude that an unauthorized disclosure of confidential information would occur?

[10] If knowledge of the makeup and personality of the former client is not confidential information, is the appearance of impropriety alone sufficient to disqualify the solicitor?

[11] The Law Society of Upper Canada has codified a set of rules regarding conflicts of interest. Rule 2.04(4) of the Rules of Professional Conduct and the commentary provides:

> Acting Against Client
>
> 2.04(4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter:
>
> (a) in the same matter,
> (b) in any related matter, or

(c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information unless the client and those involved in or associated with the client consent.

Commentary

It is not improper for the lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter.

[12] A lawyer will not be precluded from acting against a former client if there is no relation to the two matters. Therefore, in the instant case, even if the Cheadle firm received confidential information in their previous representations, they may still act if that confidential information is irrelevant to the new matter. [See Note 4 at end of document] The first question however, is whether the general information that they have acquired about the personality and makeup of Mrs. Remus can be classified as confidential information.

[13] The mere assertion that there is an appearance of impropriety or that the former lawyer has some general form of confidential information, has been held by various courts to be insufficient to remove the solicitor. There must be clear and cogent evidence from which the court can reach the conclusions that in all the circumstances it is reasonably possible that the lawyer acquired confidential information pursuant to the first retainer that would be relevant to the current matter. [See Note 5 at end of document]

[14] It is incumbent on a party seeking to disqualify a solicitor to specify why the documents and information supplied previously to the solicitor are connected or related to the new matter rather than leave the court to have to guess at the degree of connection. [See Note 6 at end of document]

[15] In this case the evidence as to what information the Cheadle firm possesses and why that is confidential is far from clear. I am unable to conclude that the Cheadle firm has acquired anything more than a general knowledge of the personality of the applicant. Therefore on the evidence before the court I am not prepared to find that this information is confidential in nature. Without a finding that the firm possesses confidential information, it should not be disqualified from acting for Mr. Remus.

[16] Further, I do not find that allowing the Cheadle firm and Mr. Shanks to continue to act in any way offends the appearance of propriety or lessens the confidence in the administration of justice. This is the third aspect of this issue that Justice Cory referred to in the MacDonald Estate case [[1990] 3 S.C.R. 1235].

[17] The maintenance of public confidence in the administration of justice and the ethical standards of the legal profession has become known as the "appearance of impropriety" standard. This standard however, can result in substantial unfairness and may not be the most appropriate or effective way of enhancing the public's [confidence] in the administration of justice. Gavin MacKenzie in the text, Lawyers and Ethics, 3rd ed. (Toronto: Carswell, 2001), at p. 52 has this to say about the appearance of impropriety standard:

> To determine whether a lawyer's representation of a party to litigation gives rise to an appearance of impropriety, the courts have invented a fictitious person to whom they have delegated the task of deciding whether the questioned lawyer's conduct is acceptable …. The result of using such a device is unlikely to differ from the result of the judge using his or her own impression of the propriety of the lawyer's representation. The fictitious person is likely to contribute little more than an illusion of objectivity to the process.

[18] This debate has also occupied the interest of legal scholars in the United States. In the text Modern Legal Ethics (St. Paul, Minn.: West Publishing Co., 1986), Charles Wolfram points out that to determine whether a conflict of interest exists based on appearances can and does lead to unfairness since it deprives clients of their right to choose their counsel and can result in duplication of efforts, delays in proceedings and significant additional expense and may be based on nothing more than suspicion and innuendo.

[19] It is therefore not reasonable or fair to adopt a knee-jerk reaction where there is an allegation of conflict based on perceived impropriety. As stated by MacKenzie in Lawyers and Ethics at p. 5-3:

> The chief difficulty with the appearance of impropriety standard, however, is that the application tends to result in decisions that, although clothed in objectivity, are in fact arbitrary. It does not follow that public perceptions should be disregarded, or that the importance of maintaining public confident [sic] in both the administration of justice and the ethical standards of lawyers should be minimized…

[20] For the reasons set out above, I find that the Cheadle firm and/or Mr. Shanks does not possess confidential information. Further, if general knowledge about a client gleaned from acting on non-litigious matters could be classified as confidential, it is not sufficiently related to the "new matter", namely, the custody case, to succeed in disqualifying the firm.

Disposition

[21] The defendant's motion is dismissed with costs fixed at $2,000 payable in the cause.

Motion dismissed.

Notes

Note 1: See para. 7 of the affidavit of Ann Marie Remus sworn August 23, 2002.

Note 2: See R. v. Sussex Justices ex parte McCarthy, [1924] 1 K.B. 256, [1923] All E.R. Rep. 233.

Note 3: See MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249.

Note 4: See Messinger v. Bramalea Ltd., (1989), 35 C.P.C. (2d) 260 (Ont. H.C.J.).

Note 5: See Chapters Inc. v. Davies, Ward & Beck LLP (2001), 52 O.R. (3d) 566, 10 B.L.R. (3d) 104 (C.A.); Moffat v. Westein (1996), 29 O.R. (3d) 371, 135 D.L.R. (4th) 298 (Gen. Div.).

Note 6: See Trizec Properties Ltd. v. Husky Oil Ltd. (1997), 200 A.R. 48, 148 D.L.R. (4th) 300 (C.A.); and Ontario New Home Warranty Program v. Campbell (February 10, 1999), Doc. 98-CV-161622.

Ferrarotto v. Ferrarotto

[2003] O.J. No. 864 (QL) (Ont. Sup. Ct. J.), Rutherford J. (endorsement), paras. 1; 4-7

¶ 1 Married in 1972, the parties separated in 1994 and executed a comprehensive separation agreement on August 22, 1994. A divorce judgment was granted in 1995 in Court File No. 51684/95. Elly Ferrarotto now moves to set the separation agreement aside on the basis of material non-disclosure by her former husband or, alternatively, to enforce substantial unpaid arrears and vary and enforce new obligations on the basis of new and substantially changed circumstances.

. . . .

¶ 4 Mr. Phillips also moves for an order to remove Mr. Cardill as solicitor of record for Elly Ferrarotto on grounds that he will be a witness at the trial. Mr. Cardill acted for Ms. Ferrarotto in the negotiating and executing of the separation agreement and it does seem likely that he may have to be a witness at trial. Mr. Phillips says that if Mr. Cardill is not called by the moving party, he himself will call him as a trial witness.

¶ 5 The commentary to Rule 4.02(2) of the Revised Rules of Professional Conduct adopted by Convocation of the Law Society of Upper Canada in July 2000 includes the following admonition to the practitioner:

> The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer.

¶ 6 Likely as it may be that Mr. Cardill will have to testify, I think it is somewhat premature for the Court to have to order him to cease acting for his client in the matter. The client should be given as much discretion … as to the timing of such a change of lawyers as is consistent with a fair process. In Woodglen & Co. v. Owens, [1995] O.J. No. 1361, E.M. Macdonald said that:

> A court should refrain from making an order preventing a solicitor from acting, when to do so was premature. These matters ought to be left to the trial judge or until such time when it was more apparent that the evidence sought was not obtainable from other witnesses and that the solicitor was indeed going to be

required to testify in a manner or on issues which could jeopardize the position of the defendants.

¶ 7 Having to retain and instruct new counsel in this case will be a costly matter. It should not be ordered by the Court until it not only becomes apparent that a trial will proceed and that Mr. Cardill will be a necessary witness, but also that the timing is such as to require the change to be ordered because a fair trial is jeopardized for want of the change being brought about in due time and course by the client.

Chapates v. Petro Canada

[2004] N.S.J. No. 75 (QL) (N.S. S.C.), Cacchione J.
(Summary)

Facts: Lawyer with firm representing one of the Applicants left the firm and joined another firm. He then began to represent the Respondent in the same action. Was he in a disqualifying conflict?

Decision: No conflict found.

Reasons: Unlike the situation in *Martin v. Gray*, (1990), 77 D.L.R. (4th) 249(S.C.C.), the lawyer took no part in the file while at the previous law firm and was unaware that his previous firm represented the Defendant. Cacchione J. wrote (at para.38) that "I find that the respondent does not possess confidential information concerning the applicant's case which might be used to the prejudice of the applicant. There does not exist nor is there any reasonably anticipated danger of a breach of confidentiality that would justify the granting of an order removing the respondent's solicitor from this file."

"Faultless receipt of privileged document held not grounds for law firm's removal"

Jaffey, John, *The Lawyers Weekly*, 23 April 2004, pp. 1, 3 (in part)

A lawyer who was sent confidential information through the inadvertence of opposing counsel has been restored as counsel of record by an Ontario Superior Court judge after having been removed by order of a Master.

[**Editor's Note:** The confidential information consisted of a copy of an opinion letter the lawyer had earlier sent to his client. When later sent, inadvertently, to opposing counsel, that counsel returned the copy of the opinion letter with covering correspondence which stated that he had

stopped reading the opinion letter when he realized what it was, and did not make a copy. In subsequent correspondence, opposing counsel stated that only he and his assistant saw the opinion letter, and while both recalled seeing the amount of the settlement estimate mentioned in the opinion letter, they did not remember the exact amount.]

Master Joan Haberman had said that without impugning the recipient lawyer's integrity or material discipline, "he cannot be expected to compartmentalize his mind so as to screen out what he knows."

She added, "It is bound to have some impact on how he approaches any negotiation, as he now knows the insurer has received a legal opinion about the contents of which he has relevant knowledge."

However, Justice James Spence found that Master Haberman "did not premise her decision on fault on the part of the appellant. She decided on the basis of the risk of prejudice."

He said she erred when she used the "prejudice" test in *MacDonald Estate v. Martin* [1990] 3 S.C.R. 1235, distinguishing it as a "conflict of interest case" rather than an "inadvertent transmission of information" case.

Justice John Sopinka's two-part testing in *Martin* asks "(1) did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? And (2) is there a risk that it will be used to the prejudice of the client?"

In rejecting Master Haberman's application of the test, he quoted from *Coulombe v. Beard,* (1993) 16 O.R. (3d) 627, in which Superior Court Justice Roger Salhany ruled that if the *Martin* test were strictly applied, "it would mean that a litigant would be deprived of counsel of choice even though the litigant or his solicitor was innocent of any wrong-doing. It seems to me that the test should not be an absolute one and must have due regard for the right of a litigant to choose his or her own counsel."

Adopting the *Coulombe* rationale, Justice Spence said the first question posed by Justice Sopinka "cannot be answered by asking only whether the solicitor has been tainted by receiving confidential information.

"If the litigant's right to counsel of choice is to have any meaning, then the court must also inquire into and assess the degree of involvement by the solicitor in attempting to obtain that privileged information. …. ."

. . . .

In allowing Brown's appeal of the master's ruling, Justice Spence found … that …. [:]

. . . .

… there are safeguards in place. He also found there are safeguards in place to protect against the improper use of innocently received confidential information. He quoted *Lockheed*

Martin Inc. v. Bombardier Inc. (2002) 59 O.R. (3d) 517: "There are numerous protections for parties involved in actions that are not properly constituted, including relief for vexatiousness, frivolity, abuse of process or the failure to plead a valid cause. As well, there are broad powers conferred upon the court to stay any proceeding on such terms as are considered just. ….

He concluded that there was no basis to apprehend a material risk of prejudice to Citadel if the matter proceeds trial. "It is hard to see how it could not be an abuse of the process of the court if the counsel for the plaintiff were to seek to use the confidential information in the course of the trial. The court would be in a position to prevent such an abuse."

[Editor's Note: Citation for decision: *Fotwe v. The Citadel General Assurance Co.,* [2004] O.J. No. 1209 (QL) (Ont. Sup. Ct. J), Spence, J.]

3.3 Relationships With Clients - Rendering Services

3.3.1 Generally

"Surviving the e-mail onslaught"

Pinnington, Dan, *LawPRO*, pp. 7, 8 (in part)

Email has become an essential tool for lawyers and law office staff alike. It allows faster and easier communications between lawyers and their clients, and for many has become a preferred way of communicating. However, while communicating more efficiently via email has led to a gain in productivity there is no doubt that dealing with large numbers of e-mail messages is now causing losses in productivity although estimates vary, in round numbers approximately nine billion e-mails are sent daily in North America. That means that just over 100,000 people hit "Send" every second of every day. All those messages end up in someone's inbox.

Email will become even more common and vital to the practice of law as people become more connected to the Web, and as electronic filing becomes more widespread this article reviews how you can use email more effectively and efficiently.

. . . .

Use Proper Netiquette

Count to 10 before you hit "Send": Every lawyer has dictated an overly aggressive letter in a moment of anger or frustration. only to tone it down later with the benefit of some time to cool off while the letter was being typed. The instantaneous nature of e-mail doesn't give you this built-in cooling off period. Be careful not to send an inappropriate message in a moment of anger.

. . . .

Don't use email when it is inappropriate: E-mail is not the same as a phone or a face-to-face conversation. At the top of the hierarchy of communications are face-to-face meetings, then phone calls. Then voice mail, and lastly e-mail. Face-to-face meetings have the most impact. Not only can you hear and talk back to the other person, you also have the ability to see gestures and facial expressions etc. E-mail has the narrowest communications bandwidth – it is only words on a screen. Make sure the mode of communication you use fits the circumstance.

Clean up messages before you forward them: Many e-mail programs have a feature that highlights or indents the original text of a forwarded message. This can be helpful in distinguishing between new comments and original text. However, it can make messages that have been forwarded many times unreadable. To avoid this problem, clean up all text in any message you forward.

. . . .

Use correct document extensions on all attachments: Document extensions are the three letters at the end of a file name. For example, Word files have the .doc extension, and WordPerfect files

have the .wpd extension. These extensions are important as they tell a computer what program should open the file. Including the proper extension on an attachment helps insure that it can be opened by the recipient.

. . . .

Remember that e-mails are lawyer/client communications

When it comes to e-mails, remember, they fall somewhere between phone calls and letters. On one hand, e-mail is like correspondence written on paper and probably should be kept. On the other hand, some e-mails are like phone message slips and are not important to keep (unless you ever need to confirm the date or time when a client called or left a message at your office). Use your own judgment. When in doubt take the cautious approach and keep the e-mail in question.

Consider having a system to print and file each email in the proper client file or create a system to store all e-mails electronically which gives you the ability to retrieve them later – up to many years later, if necessary.

Most case management products allow you to do this very easily. You may also consider as part of your closing procedure for a file, printing up all the e-mail communications on the file and storing those with the closed file. If the electronic records are lost, the paper copies would be preserved.

E-mail confidentiality and encryption

The Law Society of Newfoundland's Code of Professional Conduct states that lawyers shall ensure that client confidentiality is maintained when electronic communication is used. The steps required include understanding how to minimize the risks of the disclosure, discovery or interception of confidential client information, as well as using technology and creating office management practices to maintain confidentiality.

The use of encryption software is not mandatory for e-mail communications, although it is something that should be discussed with any client with whom you intend to e-mail. However when information is extraordinarily sensitive, a lawyer should use, and advise a client to use, encryption software to help maintain confidentiality.

"Run Away! Run Away Fast!"

Tebo, Margaret Graham, (2003), 89 *ABA Journal* (September 2003), p. 34

Here's a quick quiz: What is the No.1 red flag that should give you pause about taking on a new client?

"Find out how many prior attorneys the person has had. If it's more than one, run," says Miriam Rittmaster, a Kansas City solo practitioner.

"That's a malpractice action waiting to happen."

Such a client is never satisfied, says Rittmaster, and tends to blame the lawyer for everything--even adverse court rulings based on solid statutory law.

Other attorneys agree that unless "lawyer shoppers" have a good explanation, they should be avoided at all costs, no matter how much money they have to spend on legal fees or how enticing their cases may sound.

"I'll be somebody's second attorney. Everybody gets 'one free bite' because family law is very emotional. But I'll want to call the previous attorney for his or her version of what happened," says Carolyn J. Stevens, a solo family lawyer in Missoula, Mont.

Stevens has another category of what she calls "life is too short" potential clients: Those who careen from one crisis to another and expect the lawyer to go along for the emotional ride.

One divorce client wanted to freeze a dirty disposable diaper as evidence that her ex-husband couldn't properly care for their infant daughter because he had returned her from visitation in a diaper that the mother contended was too small. To make matters worse, the mother expected Stevens to store the frozen popsicle until the next court date.

"Sometimes, the clients who are really good at being 'victims' of their exes are also really good at being 'victims' for their lawyers, and they want to get you emotionally invested in 'saving' them from their circumstances," says Stevens.

D.Z. Kaufman has his own war stories about clients with "emergencies." Kaufman, who is a solo litigator in Fairfax, Va., accepted a somewhat dicey referral as a favour to a good client. The referral, who lived in another state, needed someone to step into a local collection case on short notice. Because of the urgency, Kaufman sent the man an engagement letter and headed for the courthouse to review the case file.

After spending about eight hours on the case, Kaufman asked for a $2,000 retainer, which the client sent. Two days later the client called to say that he had independently settled the case and wouldn't be needing Kaufman's services after all. When Kaufman tried to cash the retainer check to cover the time he'd already spent, it bounced.

Now, Kaufman has a new policy: "Your emergency becomes my emergency right after the check clears."

Another red-flag client, according to Rittmaster and Stevens, is the person who swaggers into the lawyer's office and says something like, "Tell me why I should hire you as my lawyer."

Such clients are often demanding micromanagers who think lawyers are simply hired guns, says Stevens. A subset comprises third parties – often parents – who pay legal fees on behalf of the client and think that entitles them to direct the lawyer's actions in the case.

Stevens has gleaned a few lessons from years of experience with not-worth-it clients.

Once clients have related the story of what brought them to her office, she asks them to tell her the bad news – the worst thing that the other side knows about the client and will try to use in court. She also tells potential clients at the first meeting that if they ever lie to her, she'll drop out of the case immediately.

Stevens assumes "that there are, in fact, three realities: the client's, the spouse's and mine. I've got to know about all three up front.

"If the client's story just doesn't add up, I'm not getting involved."

"Privacy and your clients [:] An agenda for every firm"

Chester, Simon (partner, McMillan Binch LLP, Toronto),
(2004), *LawPRO* (Issue 1, January/February 2004), pp. 5-7 (in part)

When lawyers think of privacy compliance, many probably think about advising business clients about the requirements of the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA). This statute, which applies to all businesses as of January 1, 2004, requires all Canadian businesses to implement policies and procedures to safeguard personal information. What lawyers may not fully recognize is that they too are businesses and they too must act to protect personal privacy.

Where is this coming from?

PIPEDA has applied to federally regulated employers for almost four years now. It sets out rules for the collection, use and disclosure of "personal information" about customers, clients and employees in the course of commercial activities.

Effective January 1, 2004, Newfoundland and Labrador businesses [, for example] are subject to the requirements imposed by PIPEDA, until any "substantially similar" provincial legislation is proclaimed in force. Whatever the source of privacy obligations, the standards are going to be substantially similar to PIPEDA - and law firms are going to have to comply.

What is "personal information"

The statute cuts a broad definition. Personal information includes any factual information about an "identifiable individual," recorded or not, and includes age, identification numbers, income, ethnic origin, employee files, evaluations, credit and loan records, and medical records. Personal information does not include an employee's name, title, business address or phone number. An e-mail address seems to be personal information. ….

What is required to protect personal information?

PIPEDA's requirements stem from 10 basic principles, developed by Canadian Standards Association, which are explicitly set out in the legislation. These principles articulate guidelines for what businesses must do when they collect, store and use or disclose confidential information.

What does PIPEDA require law firms to do?

First, every law firm must have formalized its privacy practices and procedures. This will mean systematically examining their practices and how they use personal information. Not all practices are the same, since different practice areas handle greater or lesser amounts of personal information. Criminal defence lawyers' offices are likely full of extremely confidential personal information. A small firm which deals in family law or estates matters, or whose clients are largely individuals, is more likely to have sensitive information in its files than a large business firm whose clients are corporations.

Coping with the new law

A number of Ontario firms have taken steps to comply with the new law. For Merv White of Orangeville's Carter and Associates, the firm's privacy policy sprang out of work he was doing to advise the firm's many charitable and not-for-profit clients.

He drafted a Privacy Policy which can be found on Carter and Associates' Web site (www.carters.ca/privacy.pdf), as well as a detailed internal Policy Implementation Manual. His advice to his colleagues in other firms - "you'd better get your privacy policy in place - this issue is not going away."

. . . .

What does your firm need to do now: A compliance checklist?

Building on the 10 principles, the following checklist can help you sort through the steps you need to take to comply.

- Read the Personal Information Protection and Electronic Documents Act. Understand privacy law and how the privacy principles impact your firm. The Web site of the Privacy Commissioner of Canada - www.privcom.gc.ca - provides a good starting point for both you and your clients.

- Select a privacy officer. Pick a firm member who can assume responsibility for privacy. Give this privacy officer the resources needed to meet the new requirements.

- Look at your practice. Assess the impact of the privacy principles on your clients. Not all firms will be affected in the same way.

- Develop a privacy policy. Your new privacy officer should set policies and procedures for protecting privacy and addressing complaints, train staff to adhere to the privacy policies and procedures, and develop your public positions on privacy.

- Track data flow. Identify your personal information holdings. Track how personal information is collected. What sensitive information do you have on clients or third parties? How is it circulated internally? What is personal information used for? Is it ever sent outside your business? You need to map data flow within your business to identify vulnerabilities. Rationalize your personal information handling practices.

- Revise your contracts. The new law requires that privacy is protected when data leaves your firm. In your agreements, you must ensure that the other parties (e.g. process servers, title searchers, investigators, experts) who receive or process personal information provide the same protection that you do, and will not disclose this information to others.

[**Editor's Note:** Jeffrey Kaufman, of Fasken Martineau DuMoulin LLP, in a commentary entitled "Law Firm Privacy Compliance in 10 steps" published by *CBA.ORG* earlier this year include the following: "Documents such as retainers and engagement letters should be reviewed to determine if you have the requisite consents to collect, use or disclose personal information in the course of the retainer. Your web site should contain a statement about your firm's privacy policy. If you do not have a web site, you must still provide information on your policies upon request."]

- Ensure consent. Do you ask for consent when you collect information? You should review all your consent provisions to ensure they meet the new law. Make consent meaningful. The form and manner of consent that is required will depend on the sensitivity of the information and the surrounding circumstances.

- Security systems. Computer security is very important. Make sure personal information is secure, by keeping it physically and, where applicable, electronically protected. Design or change existing information management systems. Check firewalls of your computer system for vulnerability. Test and evaluate systems and processes.

- Support staff training. Your assistant or secretary has a key role to play in ensuring that personal information is kept truly confidential. Train your legal support staff on the changes you are implementing.
- Allow access. Establish procedures to allow individuals access to their personal information, and to correct or update information when appropriate.

- Finally, educate your clients and help to inform the public. The obligations fall on every business or other entity in the province engaged in commercial activities. They need help to

understand a broad-ranging and unusual statute that speaks in terms of principles rather than specific statutory requirements.

What are the risks of non-compliance?

A failure to comply can expose your firm to a number of costly, time-consuming and potentially embarrassing circumstances. PIPEDA makes the federal Privacy Commissioner responsible for ensuring compliance with the Act and for promoting its purposes. The Commissioner has five main ways of ensuring that organizations subject to the Act adhere to its principles:

- investigating complaints;
- mediating and conciliating complaints;
- auditing personal information management practices;
- publicly reporting abuses; and/or
- seeking remedies in court.

An individual may complain to the organization in question or to the Privacy Commissioner about any alleged breaches of the law. The Privacy Commissioner may also initiate a complaint. This will prompt an investigation and the preparation of a report.

After receiving the Commissioner's investigation report, a complainant may, under certain conditions, apply to the Federal Court for a hearing. The Privacy Commissioner may also apply to the Court on his own or on the complainant's behalf. The Court may order an organization to change its practices and/or award damages to a complainant, including damages for humiliation suffered.

The Privacy Commissioner may, with reasonable grounds, audit the personal information management practices of an organization.

An audit or complaint that results in a public report about breaches of compliance at your firm would be very embarrassing.

Anyone who believes that any of Sections 5 to 10 of PIPEDA have been or are about to be contravened, may notify the Privacy Commissioner, and ask that his or her identity be kept confidential. Once the Privacy Commissioner has given assurance, he/she is bound to protect the person's identity.

It is an offence to:

- destroy personal information that an individual has requested;
- retaliate against an employee who has complained to the Privacy Commissioner, or who refuses to contravene Sections 5 to 10 of PI PEDA;
- obstruct a complaint investigation or an audit by the Privacy Commissioner or his/her delegate.

A person is liable to a fine of up to $10,000 on summary conviction up to $100,000 for an indictable offence.

Employees

For constitutional reasons, the federal law stops short of imposing privacy obligations on workplaces. It grants privacy rights only to employees in federally regulated workplaces. Until … [a province or territory] passes its own privacy legislation [as has occurred in British Columbia, Alberta and Quebec], there are no mandatory requirements. Nevertheless, given an increasingly privacy-conscious public, your employees may wonder whether their personal information is being adequately protected.

As with other personal information, you need to ensure that your personnel files are both physically and electronically secure. You also need to safeguard health information about your employees, and protect the identity of those who take advantage of employee assistance programs.

Ensure that your employees understand the importance of privacy. Develop clear written policies for your employees about how you, as their employer, treat privacy issues.

. . . .

Next steps

For most law firms, complying with privacy law should not impose a significant burden. Once your policy and systems are in place, you are largely responding to any inquiries and making sure that your firm is living up to its commitments. As Ontario's Information and Privacy Commissioner, Dr. Ann Cavoukian tells businesses "the fact is that good privacy is good business - it fosters trust, builds consumer confidence, strengthens brand recognition, increases customer loyalty and ultimately delivers competitive advantage."

For lawyers, a final point is that protecting privacy aligns with our professional obligations to preserve confidentiality. As of January 1, 2004, it is also a legal requirement.

Model privacy policy for law firms

LawPRO has a generic policy which can be used as a precedent and checklist to guide you as you examine your own firm's procedures for dealing with confidential information. The policy deals with a fictitious firm called Smith & Partners. It is available at www.practicepro.ca/privacypolicy.

"Sample Firm Privacy Policy"

***LawPRO*, 2004**

[Note 1: **This Sample Firm Privacy Policy is provided by LAWPRO as a precedent and checklist to guide you as you examine your own firm's procedures for dealing with confidential information. The policy deals with a fictitious firm called Smith & Partners.]**

[Note 2: **This Sample Firm Privacy Policy is provided by LAWPRO for your consideration and use when you draft your own privacy policy. It is NOT meant to be used "as is". It should be adapted for your practice, and may need to be modified to correspond to current law and practice in this area.]**

[Note 3: **Electronic copies are available at www.practicepro.ca/privacypolicy.]**

Smith & Partners Privacy Policy

Smith & Partners recognizes the importance of privacy and the sensitivity of personal information. As lawyers we have a professional obligation to keep confidential all information we receive within a lawyer-client relationship. We are committed to protecting any personal information we hold. This Privacy Policy outlines how we manage your personal information and safeguard your privacy.

Your Privacy Rights

From January 1, 2004, all businesses engaged in commercial activities must comply with the Personal Information Protection and Electronic Documents Act, and the Canadian Standards Association Model Code for the Protection of Personal Information, which it incorporates. These obligations extend to lawyers and law firms, including Smith & Partners. The Act gives you rights concerning the privacy of your personal information.

Smith & Partners is responsible for the personal information we collect and hold. To ensure this accountability, we have developed this policy, and trained our lawyers and support staff about our policies and practices.

Why Does Smith & Partners Need Personal Information

Smith & Partners provides legal services and products to a wide range of clients. In doing so, it produces direct marketing materials concerning its services and developments in the law.

What personal information do we collect?

Personal information is any information that identifies you, or by which your identity could be deduced. If we did not collect and use your personal information we could not provide you with legal services.

How do we collect your personal information?

We collect information only by lawful and fair means and not in an unreasonably intrusive way. Wherever possible we collect your personal information directly from you, at the start of a retainer and in the course of our representation.

Sometimes we may obtain information about you from other sources: for example,

- your insurance company;
- your real estate agent in a property transaction;
- from a government agency or registry;
- your employer, if we are acting for you, at its request;
- your accountant.

Consent

In most cases, we shall ask you to specifically consent, if we collect, use, or disclose your personal information. Normally, we ask for your consent in writing, but in some circumstances, we may accept your oral consent. Sometimes, your consent may be implied through your conduct with us.

Use of Your Information

We use your personal information to provide legal advice and services to you, to administer our client (time and billing databases) and to include you in any direct marketing activities. If you tell us that you no longer wish to receive information about our services, or about new developments in the law, we will not send any further material.
Smith & Partners does not disclose your personal information to any third party to enable them to market their products and services. For example, we do not provide our client mailing lists to other law firms.

Disclosure of your Personal Information

Under certain circumstances, Smith & Partners will disclose your personal information:
• when we are required or authorized by law to do so, for example if a court issues a subpoena;
• when you have consented to the disclosure;
• when the legal services we are providing to you requires us give your information to third parties (for example a lender in a real estate mortgage transaction) your consent will be implied, unless you tell us otherwise;
• where it is necessary to establish or collect fees;
• if we engage a third party to provide administrative services to us (like computer back-up services or archival file storage) and the third party is bound by our privacy policy;
• if we engage expert witnesses on your behalf;
• if we retain other law firms in other jurisdictions, on your behalf;
• if the information is already publicly known.

Updating Your Information

Since we use your personal information to provide legal services to you, it is important that the information be accurate and up-to-date.
If during the course of the retainer, any of your information changes, please inform us so that we can make any necessary changes.

Is My Personal Information Secure?

Smith & Partners takes all reasonable precautions to ensure that your personal information is kept safe from loss, unauthorized access, modification or disclosure. Among the steps taken to protect your information are:
• premises security;
• restricted file access to personal information;
• deploying technological safeguards like security software and firewalls to prevent hacking or unauthorized computer access;
• internal password and security policies.

Access to Your Personal Information

You may ask for access to any personal information we hold about you. Summary information is available on request. More detailed requests which require archive or other retrieval costs may be subject to our normal professional and disbursement fees.

Correcting Errors

If Smith & Partners holds information about you and you can establish that it is not accurate, complete and up-to-date, Smith & Partners will take reasonable steps to correct it.

Can I be Denied Access to My Personal Information?

Your rights to access your personal information are not absolute.
We may deny access when:
• denial of access is required or authorized by law (for example, when a record containing personal information about you is subject to a claim of legal professional privilege by one of our clients);
• information relates to existing or anticipated legal proceedings against you;
• when granting you access would have an unreasonable impact on other people's privacy;
• when to do so would prejudice negotiations with you;
• to protect our firm's rights and property;
• where the request is frivolous or vexatious.
If we deny your request for access to, or refuse a request to correct information, we shall explain why.
Smith & Partners does not use your Social Insurance Number as a way of identifying or organizing the information we hold upon you.

Can I request anonymity.

Whenever it is legal and practicable, we may offer the opportunity to deal with general inquiries without providing your name (for example, by accessing general information on our website). The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* requires us to confirm the identity of all new clients. It may also require us disclose information to FINTRAC in relation to certain large cash transactions.

Credit Bureaus

To help us make credit decisions about clients, prevent fraud, check the identity of new clients and prevent money-laundering, we may on occasion, request information about you from the files of consumer reporting agencies.

Communicating with Us

You should be aware that e-mail is not a 100% secure medium, and you should be aware of this when contacting us to send personal or confidential information.

Changes to this Privacy Policy

Since Smith & Partners regularly reviews all of its policies and procedures, we may change our Privacy Policy from time to time.

Requests for Access

If you have any questions, or wish to access your personal information, please write to our Privacy Contact at

<address>.
If you are not satisfied with our response, the Privacy Commissioner of Canada can be reached at
112 Kent Street,
Ottawa Ontario, K1A 1H3
1.800.282.1376.

Employment Inquiries

If you apply to Smith & Partners for a job, we need to consider your personal information, as part of our review process. We normally retain information from candidates after a decision has been made, unless you ask us not to retain the information. If we offer you a job, which you accept, the information will be retained in accordance with our privacy procedures for employee records.

Web Site

Our website contains links to other sites, which are not governed by this privacy policy.
On our website, like most other commercial websites, we may monitor traffic patterns, site usage and related site information in order to optimise our web service. We may provide aggregated information to third parties, but these statistics do not include any identifiable personal information.

"Privacy Law [:] Lawyers must take steps to guard the secrets entrusted to them"

Bilinsky, Dave, *The Lawyers Weekly,* 16 January 2004, pp. 14-16 (in part)

As lawyers start to wrestle with the implications of privacy laws in their practice, there is another arena where privacy issues are playing out – on lawyer's computer desktops. The sanctity of a solicitor-client communication is under constant electronic attack, requiring lawyers and law firms to take practical technological steps to guard the secrets entrusted to them.

Here is an overview of the various ways and precautions that lawyers should be considering to guard against loss of privacy and confidentiality:

Ethics

Ethical rules specify that lawyers shall ensure that solicitor-client confidentiality is maintained, including circumstances where electronic or email communication is used. To guard against loss of confidentiality, lawyers must understand how to minimize the risks of disclosure, discovery or interception of confidential client information, as well as understand how technology and office management practices work together to maintain confidentiality and minimize the risk of disclosure.

As yet, no ethical opinion has held that encryption algorithms are mandatory for solicitor-client e-mail communications. However, it is prudent to discuss with a client beforehand which communication methods are acceptable to the client and which are not (for example, a client may

not desire to receive faxes to a common fax machine or to receive e-mail sent to a shared or family e-mail address).

Specifically, you are ensuring that the client considers the methods of communication and consents to their use. However, in certain circumstances, when information is extraordinarily sensitive, a lawyer should use, and advise a client to use, encryption software to help maintain confidentiality at all ends of the communication process.

There are a number of ways to communicate via e-mail in an encrypted form. PGP (for Pretty Good Privacy) is a PKI public/private key infrastructure system that integrates with Outlook, Outlook Express, Eudora, Entourage, and Apple Mail in the personal version and with Microsoft Exchange, Lotus Notes, and Novell GroupWise in the Corporate Desktop enterprise version (see www.pgp.com). This product also allows you to encrypt portions of a hard drive (via PGP Disk) to protect its contents in the event that the handheld, laptop or desktop computer is stolen. While PKI encryption does provide significant advantages – authentication, nonrepudiation, encryption, and digital signatures, among others – there has not been a large uptake of the technology, principally since both sender and receiver must install the PKI software.

However, there are other ways to communicate securely by e-mail without having to install PGP or PKl software. Ziplip (www.ziplip.com) and other secure e-mail services offer user and password authentications for e-mail exchange. If both sender and receiver use the Intent Ziplip system, both parties can communicate in a secure manner using Internet Explorer.

Information rights management

Microsoft has recognized that up to now, senders of electronic information had no control over that information once it left their desktop, and that this was posing a problem in today's world. In perhaps the biggest development in Microsoft's Office 2003, that will change. Lawyers will be able to control the information rights for both documents and e-mails. Lawyers will be able to prevent recipients from forwarding, copying, or printing selected e-mail messages by using information rights management (IRM) functionality. You can even specify an expiration date for the message, after which it cannot be viewed or otherwise acted upon. To gain access to IRM, you will require Microsoft Windows Server 2003 running Microsoft Windows Rights Management Services (RMS).

There is an important difference to note between different versions of Office 2003 with regard to information rights management: With Microsoft Office Professional Edition 2003, you will be able to use Outlook 2003 to create IRM-protected email messages and grant others permission to access and modify your e-mail messages. You can also apply policy templates to IRM-protected e-mail messages you create. But Microsoft Office Standard Edition 2003, Microsoft Office Small Business Edition 2003, and Microsoft Office Student and Teacher Edition 2003 lack the fully featured set of IRM rights management.

Authorized use policies

E-mail can, however, also expose a law firm to embarrassment, unwanted media exposure and litigation. So can accessing inappropriate websites and storing accessed data on office computers

and networks. Increasingly lawyers are becoming adept at discovery of electronic evidence such as e-mail or images, including data the user thought had been deleted, but in fact has remained in data backups or on unerased hard drives. As we all know, dragging a file to the recycle bin does not destroy the data. It remains on the hard drive until overwritten – and even then it may be recovered.

Accordingly, it is prudent for a law firm to take a reasoned policy approach to the Internet that balances the innovative and productive use of Internet resources against inappropriate use.

Having a written policy on the use of Internet and e-mail resources allows a firm to ensure that it has taken appropriate steps to ensure that communication technologies are not compromised by "malware" (malicious or rogue software) that oftentimes piggy-backs on inappropriate downloads.

This rogue software can create security "holes" that penetrate office firewalls and thereby allow access to confidential data. Go to www.lawsociety.bc.ca/ services/frame-practice.html for a sample Internet and Email Use Policy (Word or PDF Formats).

Spyware

Unfortunately, there are many malicious software programs floating on the Internet.

This malicious software can send, collect and send back user information to a host server; it can take over control of your computer to a remote user for the purposes of viewing your computer's contents or corrupting your data; or it can grant control of your computer in order to use it for launching a denial of service attack (DoS) on a legitimate corporation's servers. There are ways to protect yourself against these malicious software programs. First, you can scan any computer that appears to be acting strangely by visiting such sites as Trendmicro.com. This service can detect malicious viruses and similar threats. Next, Ad-aware, an anti-spyware application can scan for spyware on your computer (see www.lavasoftusa.com) Lastly, software such as Spybot (http:/ / security.kolla.de) allows you to stop hijacking software and other threats.

Hackers

Hackers exploit vulnerabilities that exist when a computer is connected to the internet. All of these vulnerabilities should be stopped by your office firewall. But how would you be able to verify your system? Fortunately, Steve Gibson of Gibson Research has written ShieldsUP! – a free Internet security check-up and information service. This service scans your computer and its Internet connection implications. For the scan and further information go to http://grc.com/default.htm.

These days it is imperative that lawyers take technological steps to guard against attack from those who are unable to resist their deepest urges and whose wish is to seek those secrets that are the privilege of lawyers to know.

"Who owns what lawyers sell?"

Slayton, Philip, *Canadian Lawyer*, March 2003, pp. 38-39 (in part)

…. What if the form of an agreement, a specific agreement paid for by a particular client, amounts to a valuable precedent? Has the lawyer sold the precedent, so that it is now owned by the particular client and cannot be sold by the lawyer to anybody else?

. . . .

Observed … [British Columbia Supreme Court Justice Peter D. Lowry in *3464920 Canada Inc. v. Robert C. Strother, Davis & Company, et al.* (2002), 26 B.L.R. (3d) 235]: "… [the Plaintiff] seems driven to saying that solicitors cannot use documents prepared for one client as precedents when preparing documents for another client. But that has long been professional practice and it would certainly not serve the public interest in terms of the provision of professional services if it were otherwise."

He continued: "Businessmen seek out solicitors possessing the experience and the necessary tools to perform the work efficiently, without needing to reinvent the proverbial wheel for each new transaction. Solicitors provide a legal service: they do not, as a rule, sell documentation. The copyright in their, work belongs to them.

"Solicitors are entitled," said Lowry, "to use documentation they have prepared in the course of an earlier retainer providing that by their doing so, information is not disclosed which remains confidential to the client for whom the documentation was initially prepared."

. . . .

… the law seems to be that, although a client may own specific documents at least for the limited purposes of solicitor-client privilege (the *Lavallée* case [(2002), 216 D.L.R. (4th) 257)]), the client has no claims over knowledge and expertise, or precedents, even though the client paid the lawyer for the time spent (*Strother* [, *supra*]).

This principle appears subject only to two exceptions. Specific language in a retainer agreement may limit or exclude it, and the principle is subject to a lawyer's duty of confidentiality concerning his client's affairs (a duty that extends to former clients: *Neil* [(2002), 218 D.L.R. (4th) 671 (S.C.C.)]). Otherwise, a lawyer owns what he or she produces, and is free to sell what's essentially the same "product" over and over again and to all comers.

Once sophisticated clients realize that this is so, they will demand retainer agreements which assign them copyright in work products. ….

Another consequence is that the proprietary precedent bank – which law firms today regard as a major revenue-producing asset – will become a thing of the past. To mitigate this blow to the profession, no doubt legal fees will rise as lawyers are forced continually to re-invent what Lowry calls the "proverbial wheel" in *Strother* [, *supra*].

Law firms themselves will also take up the question of copyright. It is the *lawyer*, says the *Strother* case (and by implication not the law firm of which the lawyer is a partner or employee) who owns copyright in what is produced. ….

. . . .

For the traditional solicitor-client relationship however, it follows from Canadian case law that not only can a lawyer take her precedents with her if she moves firms, but the firm she left behind can no longer use those precedents. After all, the intellectual property belongs to the individual lawyer.

. . . .

But I say that, as a matter of public policy, legal ideas and precedents should not belong to anyone. Legal ideas, and their expression on paper, are part of the law and the legal system, which must be open and accessible to all.

Intervention by the courts, or perhaps by the law societies and even legislatures, is necessary to deal with this issue.

Independent Legal Advice

McLeod, James G. and Mamo, Alfred A., *Annual Review of Family Law* (Scarborough: Thompson / Carswell, 2003), pp. 380-381

In some jurisdictions, a domestic contract is invalid unless the parties had independent legal advice. The *Family Law Act* does not contain such a provision. Nor is independent legal advice a prerequisite to a valid contract at common law: *Fahandezh v. Sadi* (2002), 2002 CarswellOnt 4217, 33 R.F.L. (5th) 327 (S.C.J.) (agreement valid notwithstanding absence of independent legal advice).

The fact a person had independent legal advice minimizes the risk of mistake, undue influence, etc. That a party may have had independent legal advice during the negotiations will often be sufficient to ensure he or she understood the nature and effect of an agreement even if he or she did not have a lawyer at the time the agreement was signed: *Hill v. Ilnicki* (2000), 13 R.F.L. (5th) 73, 273 A.R. 131, 2000 CarswellAlta 1153, [2000] A.J. No. 1219 (Q.B.), affirmed 2002 CarswellAlta 1217, 2002 ABCA 209, 31 R.F.L. (5th) 335, 317 A.R. 389, 284 W.A.C. 389 (C.A.), leave to appeal refused (2003), 2003 CarswellAlta 410, 2003 CarswellAlta 411 (S.C.C.) (presence of lawyer negating duress, unconscionability); *Shingait v. Grinberg* (2002), 2002 CarswellOnt 2617 (S.C.J.) (more difficult to avoid contract with independent legal advice); *Kopelow v. Warkentin*, 2002 CarswellBC 2706, 2002 BCSC 1546 (S.C.), additional reasons at 2003 CarswellBC 756, 2003 BCSC 526 (S.C.) (difficult to prove unconscionability after independent legal advice); *Van Der Ros v. Van Der Ros*, 2003 CarswellBC 1078, 2003 BCCA 270, 32 B.L.R. (3d) 1, 12 B.C.L.R. (4th) 307,

182 B.C.A.C. 211, 300 W.A.C. 211, 50 E.T.R. (2d) 304 (C.A.) (independent legal advice making it difficult to invalidate agreement for mistake or compulsion); *Desramaux v. Desramaux* (2001), 15 R.F.L. (5th) 337, 2001 CarswellOnt 1151, [2001] O.J. No. 1273 (S.C.J.), reversed on other grounds (2002), 28 R.F.L. (5th) 25, 2002 CarswellOnt 2731, 216 D.L.R. (4th) 613, 162 O.A.C. 338 (C.A.), leave to appeal refused (2003), 2003 CarswellOnt 1383, 2003 CarswellOnt 1384 (S.C.C.) (independent legal advice important); *Rolland v. Guptill* (2002), 2002 CarswellOnt 1074 (S.C.J.), additional reasons at (2002), 2002 CarswellOnt 2500 (S.C.J.) (independent legal advice important to allegations of compulsion and lack of disclosure).

Most courts are not inclined to set aside a domestic contract where a person declines to seek legal advice notwithstanding the ability and opportunity to do so: *Rosen v. Rosen, supra* (mother not seeking advice at time of final agreement notwithstanding father's advice to do so); *Clayton v. Clayton*, (1989), 1989 CarswellOnt 232, 19 R.F.L. (3d) 430 (Ont. Div. Ct.) (lack of independent legal advice; wife told to obtain independent legal, advice); *Royston v. Royston* (2003), 2003 CarswellOnt 695 (S.C.J.) (court refusing to set aside contract as unconscionable where husband advised to get independent legal advice but declined to do so).

If a non-represented spouse believes that his or her partner's lawyer was helping him or her, a court may set aside or override a resulting agreement. Accordingly, a lawyer negotiating with a self-represented party should emphasize that he or she is not provided advice to the self-represented person.

3.3 Relationships With Clients - Rendering Services

3.3.2 Confidentiality and Privilege

"Uncertain Duty: Prospective Clients' E-mail Queries May Not Be Entitled to Confidentiality"

Maher, Kathleen, (2003), 89 *ABA Journal* (June 2003), p. 38 (in part)

Another day, another batch of e-mail to go through.

The next one you open is like many others: Someone you have never met, spoken to or had any other contact with has sent a message asking you to provide representation or at least offer some legal advice.

While perusing the message, you realize that it contains information concerning one of your current clients that, if revealed, would be helpful to your client but detrimental to the sender.

Can you disclose the contents of the e-mail to your client, or do you have some obligation to protect the interests of the sender?

New Rule 1.18 of the ABA Model Rules of Professional Conduct provides some guidance.

Rule 1.18, which was incorporated into the Model Rules in February 2002 as part of the Ethics 2000 revisions, recognizes an explicit duty of confidentiality to prospective clients that was not previously contained in the Model Rules.

The commentary to Model Rule 1.18, however, states that not everyone who contacts a lawyer qualifies as a "prospective client" for confidentiality protections. "A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client,' " states the commentary. That language appears to foreclose a lawyer's duty of confidentiality to someone who contacts the lawyer by e-mail.

But the issue may not be that easy. Neither Model Rule 1.18 nor its commentary provides a definitive answer on what encompasses a "reasonable expectation" on the part of someone contacting a lawyer – by e-mail or otherwise – that a client-lawyer relationship will be formed.

So far, Rule 1.18 has not been interpreted in the context of real cases because it has not gone into effect in many states. Most states are reviewing the Ethics 2000 revisions but have yet to adopt

them. Instead, their professional conduct codes are based largely on the ABA Model Rules in place before the changes were made.

Meanwhile, however, recent ethics opinions issued at the state and local levels suggest that whether someone sending a lawyer an e-mail qualifies as a prospective client entitled to confidentiality protections may turn on whether the lawyer maintains a Web site and posts confidentiality disclaimers on it.

Privilege

Thompson, D.A. Rollie, "Are There *Any* Rules of Evidence in Family Law?" (2003-2004), 21 C.F.L.Q. 245, at pp. 264-270

There is a short list of privileges: Some arise only in criminal cases. The privilege for marital communications is an old form of categorical privilege, one that rarely arises in family law cases. Only a shorter list of privileges arises with any frequency in family law matters but it is clear that the conventional law of privilege applies.

(i) Solicitor-Client Privilege

Solicitor-client privilege is accepted as the "King" or "Queen" of privileges, the most assiduously protected and most categorical of the blanket or categorical privileges. The privilege admits of a very short list of exceptions, each of which now has its own Supreme Court of Canada decision defining its limits: (i) communications criminal in themselves or to further a criminal purpose; (ii) public safety; and (iii) innocence at stake.

It is conceivable that the "public safety" or "innocence at stake" exceptions might arise in family law, especially in the protection context. A child protection agency's duty of disclosure is subject to privilege, with solicitor-client being an obvious example in the cases.

What does come up regularly is the issue of waiver of privilege, usually when one party attacks a domestic contract. The issue is obviously not express waiver by the client, but implied waiver. Waiver is not to be implied merely by a simple reference to legal advice, without more.

Implied waiver is found in a party's raising his or her "state of mind" at the time of signing the agreement: claiming no intent to transfer beneficial ownership in lands; a husband offering his understanding of the terms of an alleged agreement; a wife alleging no knowledge of an eye condition subsequently claimed as a change in circumstances on a variation application; suggesting a breach of a duty of disclosure by former solicitors; alleging a lack of sound mind or independent legal advice; or claiming the agreement was signed under duress and on the basis of false statements.

Where implied waiver is found, the courts have been careful to define what portions of the file or the advice must be disclosed: by narrowing the scope of questions on discovery, or by requiring the solicitor to testify *viva voce* on a chambers hearing in order to control the scope of questions.

All of these cases were built around specific allegations of implied waiver. In a recent case, one judge was prepared to venture further, to find that the solicitor's certificate and affidavit of independent advice amounted to a waiver of the privilege for the matters covered by the agreement. In *Griffore v. Adsett*, MacKinnon J. stated unequivocally:

> I also ruled that the solicitor's certificate and affidavit of Independent Legal Advice is, in fact, a waiver of solicitor/client privilege as to the matters addressed in it. These solicitors' certificates and affidavits are an integral part of the contract They are exchanged in order to protect the integrity of the agreement, with the expectation that each party to the contract can and will rely on the other party's solicitor's affidavit and certificate in order to enhance the enforceability of the contract.
>
> In my view, if parties to a marriage contract were permitted to have their lawyers swear a certificate and affidavit, as was done in this case, but then to claim privilege when the contract is sought to be set aside on the same issues as covered in the certificate, that would compromise, in a serious way, the utility of having the affidavit tendered in the first place. Fairness and the intent of the parties at the time of the contract require a ruling that privilege is waived as to the matters addressed in the solicitor's certificate and affidavit. [(2001), 18 R.F.L. (5th) 63, at paras. 20-21.]

There is much to recommend this distinctive family law approach to "implied waiver," as it furthers the purposes of reducing conflict and restructuring relationships.

(ii) Litigation Privilege

Litigation privilege was once treated as part of solicitor-client privilege, but the only thing these two privileges have in common is a lawyer at the core. Their rationales are different, as explained most cogently by then-Professor Sharpe in his 1984 article:

> Litigation privilege. . .is geared directly to the process of litigation. …. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely the adversary process), while solicitor-client privilege aims to protect a relationship (namely the confidential relationship between a lawyer and a client).

Litigation must be contemplated or under way to claim this privilege, which covers not only the inner files of the lawyer's brief, but also communications with third parties, often experts, provided that the dominant purpose of those communications is for use in litigation.

The leading Canadian case on litigation privilege has now become the Ontario Court of Appeal decision in *General Accident Assurance Co. v. Chrusz*. Appeal courts across the country

have been quick to cite and follow *Chrusz*, in Nova Scotia, New Brunswick, Newfoundland, Manitoba and British Columbia. In *Chrusz*, Carthy J .A. emphasized that litigation privilege is the area of privacy left for the advocate after the obligations of discovery have been met. Thus the boundaries of this privilege will vary with the provincial scope of discovery and any changes in those rules.

An older case, wrongly decided in my view, offers an example. Spouses are required to exchange and file statements of property: A husband puts values on his real estate in his statement and, on discovery, states the values to be based upon appraisal reports. In my view, the affirmative obligation of disclosing property holdings and their value means that the underlying appraisals must be disclosed too. But that is not what a reluctant Alberta court ruled, admittedly in the early days of matrimonial property law. [*Warunki v. Warnuki* (1983), 44 A.R. 135 (Alta. Q.B.).] In my view, the result would be different today, as the modem family law on disclosure has become more expansive.

As with solicitor-client privilege, litigation privilege can be waived, expressly in the case of delivery of an expert's report before trial, or impliedly. Accidental or inadvertent disclosure does not amount to an implied waiver, nor does mere reference to the existence of a report. A party can impliedly waive litigation privilege for a draft expert's report by subsequent disclosure of the final report, as was the case in *M. (D. G.) v. M. (K.M.)* [(2000), 257 A.R. 232 (Alta. Q.B.)] on the grounds that the earlier letter was "closely connected" and "fairness and consistency" required an implied waiver. Mind you, the draft report had been stolen by Ms. M. from Mr. M's house and then used by her lawyer, resulting in the lawyer s removal from the case and an award of costs against Ms. M.

In *M. (D. G.) v. M. (K.M.)* [*supra*], Veit J. raised the question whether litigation privilege ought to receive the same high degree of protection as solicitor-client privilege. In a 1997 child protection decision, the Manitoba Court of Appeal plainly gave less protection to an expert report inadvertently disclosed by the intervener Awasis agency of Northern Manitoba: *C. (J.M.N.) v. Winnipeg Child & Family Services (Central Area)* [(1997) M.J. 297 (QL) (Man. C.A.)]. In a confusing decision, the Court ruled: that the expert's report only discussed general issues of placement of aboriginal children, hence was not confidential; that the report did not meet Wigmore's four-fold test for confidential relationships; that irrational English law on equitable relief by way of injunction should be followed; and that any pre-trial injunction against use required that there be something "unconscionable about the applicants retaining the report."

Implicit in the Manitoba decision is a mistrust of litigation privilege in the child protection context. Unfortunately, the modern view of litigation privilege refers to its necessity within an "adversarial" system, that word being in bad odour in family law. At its heart, what distinguishes our Anglo-American-Canadian system of litigation from the continental or inquisitorial system is who bears the tasks of investigation, preparation, and presentation of the evidence: in ours, it is the parties and their counsel, not a judge or judicial officer. Litigation privilege serves a broader systemic purpose, encouraging the parties to investigate the facts and seek out evidence for trial, without fear of intrusion or cherry-picking by opponents or second-guessing by judges. On the facts of particular cases, judges can lose sight of those broader purposes and reflexively allow disclosure, or simply undervalue such purposes, or, worst of all, deny the existence of the privilege in child protection proceedings.

"Libel and You, …"

Porter, Julian, *For the Defence*, September/October 2002, p. 20 (in part)

You have an absolute privilege in Court or in the pleadings you file in Court but the moment you speak outside of Court you had best choose your words with precise care. In any interview with press you are on your own. If you wish to say something off-the-record you must establish this before you make the off-the-record remark and the reporter must expressly agree to this. Once this is done you may speak freely but you must clearly indicate when the remarks are back on the record again. I repeat: you cannot say to a reporter and have it work "oh, what I just said – treat it off the record". Too late! Oh, and you better know some people may not respect the off-the-record bargain. Know your reporter!

The Nova Scotia Court of Appeal majority said lawyers had an ethical responsibility to speak out against injustice and hence they have a qualified privilege when they speak to the world, even though what they say is wrong and libellous [*Campbell v. Jones*, [2002] N.S.J. No. 450 (QL)]. That may be so in Nova Scotia but so far, not here [Province of Ontario].

Campbell v. Jones

[2002] N.S.J. No. 450 (QL) (N.S.C.A.),
Glube C.J.N.S. and Roscoe J.A. (for the majority); Saunders J.A. (dissenting),
paras. 1-13; 30-34; 71-74 (of majority decision)

[**Editor's Note:** The appellant lawyers had been found by a civil jury to have defamed the respondent police officer, as a result of comments made by them at a press conference concerning the respondent's search of their student clients at a school. Damages of $240,000 had been awarded by the jury to the respondent police officer. The appellant lawyers appealed. The appeal was allowed. The majority (per Roscoe J.A. with Glube C.J.N.S. concurring) decided that the trial judge erred in law in not finding that the press conference was an occasion of qualified privilege. The majority reasoned that the trial judge had interpreted *Jones v. Bennett*, (1969) S.C.R. 277 too strickly; took too narrow a view of the overall circumstances of the case; applied to stringent test in assessing the circumstances; failed to find that the ethical responsibility of lawyers to speak out against injustice was sufficient to ground the defence of qualified privilege in the circumstances; overemphasized the timing of the publication; and failed to consider Charter values in examining the overall circumstances. It was not necessary to decide the other issues raised.]

¶ 1 As a result of comments made at a press conference by Anne Derrick and Burnley "Rocky" Jones, two prominent lawyers, a Halifax police officer, Carol Campbell, brought an action in

defamation against them. After a 22 day trial, the jury delivered a general verdict in favour of the police officer, finding that the lawyers had defamed her and awarded her damages of $240,000.

¶ 2 Ms. Derrick and Mr. Jones appeal from the jury verdict and damage award and several rulings made by the trial judge in the course of the trial, including the denial of their defences of qualified privilege and qualified reporting privilege. It is also submitted that the trial judge made many errors in his instructions to the jury and in various evidentiary rulings. They appeal, as well, from the award of costs in the amount of $75,000 made against them by the trial judge.

. . . .

¶ 3 On March 6, 1995, Constable Carol Campbell, a police officer with the Halifax Regional Municipality Police Force, was called to St. Patrick's - Alexandra School to investigate a theft. The school is an inner-city school in a neighbourhood where many of the students are Black and many are poor. Upon arriving, the respondent was advised by the Vice-Principal that there had, in fact, been two thefts at the school; one involving $300.00 stolen from the library assistant, and the other involving $10.00 missing from the backpack of a university student who had been working in the guidance area of the school. Two separate groups of students were identified as possible suspects. One group suspected of the theft from the library assistant was held in a classroom. Three 12 year old girls, L.S., J.F. and T.V., suspects in the $10.00 theft, were in the guidance office. These three girls had previously denied any knowledge of the missing $10.00.

¶ 4 The respondent entered the guidance office with Peter Wicha, the Vice-Principal, and the girls again denied any knowledge of the theft. The Vice-Principal left and Constable Campbell conducted a personal search of the three girls. There is conflicting evidence as to the nature of the search. The three girls testified that they were required to remove their socks, shoes, and jeans and pull down their underwear. The respondent, on the other hand, testified that the girls were not asked to pull down their underwear, but only to pull it away from their bodies so that she could see if the $10.00 was in their underwear. The respondent also testified that one of the girls, L.S., without being asked to, pulled her panties down to her knees.

¶ 5 At no time prior to the search were the girls informed of their right to counsel or that they had the right to refuse to be searched. None of the parents or guardians of the girls was contacted prior to the search. Each girl was searched in the presence of the other two in an office with windows facing the hallway. No money was found during the search.

¶ 6 The police officer left the room as did T.V. and J.F. The police officer was then advised by T.V. that L.S. had the missing $10.00 "between her legs." The respondent re-entered the room with a rubber glove, either on her hand or in her hand. She advised L.S. that she knew she had the money and asked her to hand it over which L.S. did. She was charged with the theft of the $10.00.

¶ 7 The local media became aware of the events at the school and several newspaper articles, beginning on March 10, 1995, reported on the incident. The headlines included "Girls Strip Searched At School", "Complaint Expected After Girls Strip Searched", "Parents Furious Over Strip Search". Constable Campbell was reported to be the police officer involved. The parents of the three girls, Mr. Wicha and a Director of the Canadian Civil Liberties Association were quoted in the articles.

¶ 8 The parents of two of the girls retained the appellant, Burnley A. Jones, to represent them with respect to a complaint they intended to make to the police department. The guardian of the third girl retained the appellant, Anne S. Derrick, for a similar purpose. On April 3, 1995, Mr. Jones filed a formal letter of complaint under the Police Act with the Halifax Police Chief respecting the conduct of the search at the school. On the same day, Ms. Derrick filed a similar complaint on behalf of the third girl, adopting the first complaint. The two lawyers issued a press release "... in their joint capacity as solicitors for the three young women who were strip searched at St. Pat's Alexandra Junior High ..." to announce a press conference regarding the matter.

¶ 9 On April 5, 1995, Ms. Derrick and Mr. Jones held a press conference which approximately 40 people attended, including members of the electronic and print media. Copies of the complaints made to the Chief of Police, from which the names of the three girls had been deleted, were circulated at the meeting. In addition, letters prepared by the parents and guardian of the three girls were read. Ms. Derrick and Mr. Jones made statements to the media and responded to questions put to them by persons in attendance.

¶ 10 References to systemic racism within the Halifax Police Department, as well as the strip search at the school, were made by each of the appellants. There was extensive press coverage of the comments made by the appellants, including stories on each of three local television news programs later that evening and articles in the two daily newspapers the following day.

¶ 11 On September 5, 1995, the three girls and their parents and guardian commenced action against the City of Halifax, the Halifax Police Department, the Halifax District School Board, Mr. Wicha and the respondent claiming damages as relief pursuant to s. 24(1) of the Charter of Rights and Freedoms for infringement and denial of the girls' constitutional rights. The appellants did not act for any of the plaintiffs in that case.

¶ 12 The complaints pursuant to the Police Act were resolved informally before the defamation trial and the respondent acknowledged that the Charter rights of the girls had been breached during the investigation and search.

¶ 13 On October 4, 1995, Constable Campbell commenced a defamation action against Mr. Jones and Ms. Derrick, as well as various media entities, which had reported on the press conference. The respondent eventually settled the case against the media defendants prior to the trial of the matter. The total amount paid by the media to settle the claims by the respondent was $14,500.

. . . .

¶ 30 The defence of qualified privilege is described by Raymond E. Brown in The Law of Defamation in Canada, 2nd edition, 1994, at page 13-4, as follows:

> There are certain occasions on which a person is entitled to publish untrue statements about another, where he or she will not be liable even though the publication is defamatory. One such occasion is called a conditional or qualified privilege. No action can be maintained against a defendant unless it is shown that he or she published the statement with actual or express malice. An

> occasion is privileged if a statement is fairly made by a person in the discharge of some public or private duty, or for the purpose of pursuing or protecting some private interest, provided it is made to a person who has some corresponding interest in receiving it. The duty may be either legal, social or moral. The test is whether persons of ordinary intelligence and moral principle, or the great majority of right-minded persons, would have considered it a duty to communicate the information to those to whom it was published.

¶ 31 Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. In a statement endorsed by Justice Cory in Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 (S.C.C.) at s. 143, Lord Atkinson in Adam v. Ward, [1917] A.C. 309 (H.L.), at p. 334 explained:

> ... a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

¶ 32 More recently, in RTC Engineering Consultants Ltd. v. Ontario, [2002] O.J. No. 1001 (C.A.) (Q.L.), Laskin, J.A. said:

> [16] At the heart of the defence of qualified Privilege is the notion of reciprocity or mutuality. A defendant must have some interest in making the statement and those to whom the statement is made must have some interest in receiving it. "Interest", however, should not be viewed technically or narrowly. The interest sought to be served may be personal, social, business, financial, or legal. The context is important. The nature of the statem, the circumstances under which it was made, and by whom and to whom it was made are all relevant in determining whether the defence of qualified privilege applies. ….
>
> . . . .
>
> [18] Not everything said or written on an occasion of qualified privilege is protected. As is evident from the term "qualified privilege" itself and from the previous discussion, the privilege is not absolute. It may be lost in one of two ways. First, it may be lost if the dominant motive for making the statement was malice. In this context, malice means not just ill will towards another but any ulterior motive that conflicts with the interest or duty created by the occasion. And it includes recklessness. Both dishonesty and a reckless disregard for the truth may amount to malice. Second, a privilege may be lost if the statement is not commensurate with the occasion, either because the statement is not germane and reasonably appropriate to the occasion or because the recipients of the statement have no interest in receiving it. Put differently, to maintain privilege a defendant must communicate appropriate information to appropriate people. See Hill v.

> Church of Scientology, supra, and Douglas v. Tucker, [1952] 1 S.C.R. 275, [1952] 1 D.L.R. 657.

¶ 33 The rationale for qualified privilege is described in Gatley On Libel and Slander, 9th ed. 1998, para 14.2, p. 327:

> Statements published on an occasion of qualified privilege "are protected for the common convenience and welfare of society". "It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some (self or) common interest." "In such cases no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances, the law declares it privileged amount of public inconvenience from the restriction of freedom of speech or writing would far out-balance that arising from the infliction of a private injury." "It may be unfortunate that a person against whom a charge that is not true is made should have no redress, but it would be contrary to public policy and the general interest of business and society that persons should be hampered in the discharge of their duty or the exercise of their rights by constant fear of actions for slander." "It is better for the general good that individuals should occasionally suffer than that freedom of communication between persons in certain relations should be in any way impeded. .... [footnoted citations omitted]

¶ 34 The question of whether the occasion was privileged is a question for the judge and the defendant bears the burden of proving the facts necessary to create the privilege. (See: Gatley, ibid, para. 14.1, p. 326 and the cases cited there.) ….

. . . .

¶ 71 I would conclude that in all the circumstances of this case, observed with "today's eyes", in today's social conditions, that it is in the public interest that the press conference be found to be an occasion of qualified privilege. The appellants, in accordance with the principles of their professional ethics, had a duty to speak about the events at the school, the complaints filed against the respondent and the Charter breaches they reasonably understood had taken place. The members of the public in attendance at the meeting had a reciprocal interest in hearing about the exercise of the authority of the police in a neighborhood school. In the whole context, including the Charter rights and values implicated, the previous press coverage and the resulting community interest in the matter, and given the position of the appellants as counsel for the girls, the occasion ought to have the protection afforded by the defence of qualified privilege.

¶ 72 Although the trial judge did not go on to determine whether the privilege had been exceeded, he did note that the comments made by the appellants at the press conference were "very serious". That finding however was made in the context of his observation that the search was “not technically a strip search". Given the decision in Golden… [[2001] S.C.J. No. 81 (QL) (S.C.C.)],

which affirms that even on the evidence of the respondent, the searches in question were in fact strip searches, I would conclude that the statements made were reasonably appropriate to the occasion. As noted, the trial judge found there was no malice, and in so concluding, indicated that there was nothing to suggest personal animosity, and that the appellants had not been careless or reckless. The comments by the appellants at the press conference were relevant to the type of search and the Charter violations to which the girls were subjected, and thus were germane and commensurate with the occasion.

¶ 73 The appeal should accordingly be allowed on this issue, and the respondent's claims of defamation against the appellants dismissed. ….

¶ 74 I would allow the appeal, set aside the jury verdict and the order made after trial. I would order the respondent to pay costs of the trial to the appellants in the amount ordered by the trial judge: $75,000, to be divided equally between them, plus disbursements, and costs of the appeal, in the total amount of $30,000, to be divided equally between them, plus reasonable disbursements, which includes the costs of the application for a stay pending appeal.

Comeau v. Pole

[2003] N.B.J. No. 440 (QL) (N.B. Q.B. [T.D.]), LaVigne J.
(Summary)

Facts: One Breau had sued Comeau. Pole represented Breau in the proceeding. Dissatisfied with Pole's representation of him in that proceeding, Breau sued Pole. In his proceeding against Pole, Breau was represented by David H. McIntrye. Pre-trial oral examination for discovery of Pole was conducted by McIntrye, on behalf of Breau. During the discovery McIntrye asked Pole why he (Pole) had been unable to settle Breau's action against Comeau. The discovery transcript states what ensued;

> Daniel G. Pole: Because we're dealing with a nut on the other side, that's why Comeau is an absolute idiot.
>
> David H. McIntyre: I can't disagree with you there, but-
>
> Daniel G. Pole: The man's a loony-tune. I mean, he's a con-man that took the Breau in the first place, and you're saying why didn't we sit down and discuss--you can't argue with a terrorist, negotiate with

Comeau then sued both Pole and Breau's lawyer McIntrye, for defamation; based on Pole's testimony on the examination for discovery. The defendants, Pole and McIntrye, applied to dismiss the defamation action against them. They asserted that Pole's statements on the

examination for discovery were absolutely privileged because they were uttered in the course of judicial proceedings.

Decision: Application allowed; action dismissed.

Reasons: Statements made in the course of judicial proceedings were protected by absolute privilege. This privilege extended to all participants in the proceeding. The law on alleged defamation arising from Court proceedings is stated by Raymond Brown in *The Law of Defamation in Canada*, 2nd. ed (Scarborough: Carswell), Vol. II, paras. 12.4 (1) as follows:

> 4. Absolute Privilege - Judicial Proceedings
>
> (1) Statement of the Privilege
>
> An absolute privilege attaches to those communications which take place during, incidental to, and in the processing and furtherance of judicial or quasi-judicial proceedings. No action for libel or slander will lie for words spoken or written during the ordinary course of those proceedings. The only exceptions to this rule are the civil code jurisdictions of Quebec and Louisiana where participants in judicial proceedings are protected only by a qualified privilege. Where the absolute immunity prevails, it makes no difference that the words may be totally false and spoken mala fide and with actual malice, or that they may be irrelevant to all the issues in the judicial proceeding. Nor does it matter why the proceedings were begun or that the judicial process is being abused.
>
> It is the occasion, not the communication, that is privileged. The privilege belongs to the occasion and attaches by reason of that setting. Once the occasion is recognized as privileged, no cause of action can be maintained for libel and slander by a plaintiff for words that are published reflecting upon his or her reputation, no matter what form that cause of action may take, except where it takes the form of an action for malicious prosecution or abuse of process. The communication is protected whether the person defamed is a party to or participant in the proceedings, or even a complete stranger to those proceedings. If the tribunal is performing a judicial function, the absolute privilege attaches even if the defamatory statement is made in Chambers in a closed proceeding on an ex parte application.

"Lawyer Whose Disclosure of Confidence Brought Down a Judge Is Punished"

Liptak, Adam, *The New York Times*, 20 April 2003, p. A.11 (in part)

A lawyer who divulged a client's confidences to bring down a corrupt judge acted improperly, the Washington Supreme Court ruled on Thursday. It suspended the lawyer, Douglas Schafer, for six months.

"Because of Schafer's actions, a corrupt judge was exposed and the public was served by the judge's removal from office," Justice Bobbe J. Bridge wrote for the majority in the 6-to-3 decision. But "in light of the importance of maintaining client confidences and Schafer's wilful, unnecessary and repeated violation of his ethical duty not to betray his client's trust, we hold that a six-month suspension is appropriate."

Robert Winsor, a visiting judge writing in partial dissent, questioned the majority's contention that the punishment was needed to maintain confidence in the judicial system.

. . . .

The case arose from a conversation between Mr. Schafer and a client in 1992. The client, William Hamilton, told Mr. Schafer that Grant Anderson, who was about to become a superior court judge in Tacoma, Wash., was going to engage in improper conduct as the trustee of a dead man's estate. Soon afterward, Mr. Hamilton bought a bowling alley owned by the estate at a below-market price. At around the same time, Mr. Hamilton gave Judge Anderson a Cadillac.

In 1999, in response to Mr. Schafer's disclosures, the Washington Supreme Court removed Judge Anderson from the bench for "a pattern of dishonest behaviour unbecoming a judge." He was also forbidden to practice law for two years. Mr. Anderson has since resumed his legal practice.

Experts in legal ethics called Mr. Schafer's suspension justified. "The public has a lot of trouble understanding that lawyers keep secrets for guilty people, but it's important for the functioning of the legal system," said Steven Lubet, a law professor at Northwestern University. "It's uncomfortable, but necessary."

Stephen Gillers, a law professor at New York University, said there were good arguments for relaxing some of the stricter ethical rules, like the one at issue in Washington.

"The rule in Washington today," he said, "would not allow a lawyer, even with the best of motives, to speak up to save an innocent person on death row based on confidential information from a client."

The Washington ethical rules do allow disclosures that would stop a client from committing a crime in the future.

Mr. Schafer did not inform the authorities of Judge Anderson's misconduct until three years after he learned of it – when the judge sanctioned him for bringing a frivolous suit in 1995.

"I think six months is too little," Professor Gillers said of the sanction imposed against Mr. Schafer. "A motive makes a big difference here."

In an interview, Mr. Schafer said the court had sent the wrong signal to potential whistle-blowers.

"They are clearly delivering the message that the secrets of a corrupt client who conspired with a corrupt judge are more important than the restoration of the integrity of the judicial system," Mr. Schafer said.

Gay (Guardian ad litem of) v. UNUM Life Insurance Co. of America

[2003] N.S.J. No. 442 (QL) (N.S.S.C.), Wright J.,
paras. 20-21; 24-25

¶ 20 …. the principle affirmed by the British Columbia Court of Appeal in Middlekamp v. Fraser Valley Real Estate Board (1992) 96 D.L.R. (4th) 227 [is] that the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. The court in Middlekamp classified this as a blanket or class privilege because it arises from settlement negotiations and operates to protect documents and communications created for such purposes both from production to other parties to the negotiations and to strangers. It further observed that without such protection, the public interest in encouraging settlements would not be served.

¶ 21 The court in Middlekamp was dealing with the issue of a litigant's obligation to produce documents for inspection prior to a civil trial that were earlier generated in negotiating the resolution of potential criminal charges against the party under the Competition Act. It upheld the privilege asserted over the documents, having been created for the purpose of negotiations towards settlement. That decision was recently revisited and applied by the same court in British Columbia Children's Hospital v. Air Products Canada Limited, [2003] B.C.J. No. 591, where it was ruled that the settlement agreement itself was privileged and not subject to disclosure, having been reached on a without prejudice basis.

. . . .

¶ 24 …. As set out in The Law of Evidence in Canada, … [Sopinka, Lederman and Bryant (2d ed.) (Toronto: Butterworths, 1999)] at page 810, there are a number of conditions that must be present for this form of privilege to be recognized:

> (a) a litigious dispute must be in existence or within contemplation;
> (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and,
> (c) the purpose of the communication must be to attempt to effect a settlement.

¶ 25 This commentary was recently cited with approval by the Alberta Court of Appeal in Costello v. Calgary (City) (1998) 152 D.L.R. (4th) 453.

Collaborative Family Law: Confidentiality

Shields, Richard W.; Ryan, Judith P.; and Smith, Victoria L.,
Collaborative Family Law [:] Another Way to Resolve Family Disputes
(Scarborough: Thompson/Carswell, 2003),
pp. 1-2; 9-10; 63-65

THE WORD

We begin with the *Word*. Our word is *collaboration* and it is the subject of this work. The verb, collaborate, as a derivative from two Latin roots, is itself a collaboration of words. Collaborare, to work together, derives from *com-*, with, and *laborare*, to work. Our English word, *to collaborate*, means to work with.

Collaboration has two faces. For the generation that lived through the Second World War, collaborators were conspirators. Veterans and other survivors of that great conflict recall the betrayal by the Norwegian Minister of War, Vidkun Quisling, the duplicity of the Vichy regime that governed unoccupied France, and all those other war criminals who gave aid and support to the enemy. To the innocent victims of their war crimes, collaboration was treason. It was an abominable act comparable to that of Judas. When we speak of collaboration as working with an adversary in this fashion, we describe one of its two faces only.

We turn to the other face of collaboration in support of our model for another way to resolve family disputes. We collaborate with those with whom we are in conflict not for the purpose of obtaining a beneficial outcome for one party only. Rather, we intend that our collaborative efforts should secure a result that is to the mutual advantage of the parties. The goal of collaborators is not the satisfaction of *self-interest* alone but *other-interest* as well.

THE NATURE OF COLLABORATION

What do we mean by collaboration? To some working together means no more than engaging in a process in which the disputing parties voluntarily disclose and exchange all of their information and remain civil and respectful toward one another. They refrain from resorting to destructive behaviour and communication. Their discourse is both informative and pleasant. However each remains steadfast in his determination to secure the best outcome for himself. That it should likewise be beneficial for the other is incidental to his primary purpose. This view of collaboration might more properly be described as cooperation. Does collaboration mean no more?

For those disputing parties who recognize that to commence or continue contentious litigation will be disadvantageous to them both. Collaboration promises something else. They recognize that self-destruction is antithetical to the objectives of any dispute resolution process. To avoid that outcome they collaborate to arrive at some mutually acceptable point between their apparently incompatible positions. They seek a compromise. The end result will almost certainly be less for each than what was sought and what might have been realized through litigation. Is this all that we intend through collaboration?

Whether we consider collaboration to be synonymous with either cooperation or compromise, it appears to occupy a place at the opposite end of the conflict resolution continuum from competition. When we compete, we seek to win and that goal serves to rationalize any strategy or tactics. A more vigorous exchange between competing forces may be referred to as a confrontation, an interaction often associated with provocation. Whatever collaboration is, it is neither competition nor confrontation but, its opposite. Are competition and confrontation everything that collaboration is not?

Before we can move ahead to describe this alternative dispute resolution process, we must first be clear as to our understanding of collaboration. Are we talking about something more than cooperation, something other than compromise, and something quite unlike either competition or confrontation? The literature offers guidance. We begin there.

. . . .

A SYNTHESIS

. . . .

…. While collaboration incorporates all of the qualities of cooperation, it contemplates so much more. The primary focus of cooperation appears to lie with the *process* alone while collaboration addresses the *outcome* as well. Throughout this book, we approach our topic from these two perspectives. Compromise and collaboration are alike in that they both involve the satisfaction of the interest of both parties to a dispute. They differ in the degree to which they accomplish their task. Compromisers achieve partial interest satisfaction for each; collaborators maximize their combined interest satisfaction. Collaboration does not require that either participant forego the attainment of his goals. Collaboration is not accommodation; it does not involve sacrifice. Self-interest and other-interest need not be incompatible. The nature of collaboration is their reconciliation.

It is our premise that collaborative negotiation has the potential for creating the best possible agreements for both parties to a dispute in the best possible way. …

. . . .

THE PARTICIPATION AGREEMENT

. . . .

Confidentiality

The [Collaborative Family Law (CFL)] Participation Agreement must … clearly deal with confidentiality, an issue paramount to CFL. The parties agree that all communications made and all information exchanged within the process are confidential and made without prejudice. If subsequent litigation occurs, the following conditions apply:

1. Neither party will introduce as evidence in court information disclosed during the CFL process, except documents otherwise compellable by law including any sworn statements as to financial status made by either party;
2. Neither party will introduce as evidence in court information disclosed during the CFL process with respect to either party's behaviour or legal position with respect to settlement;
3. Neither party will request or compel either lawyer to attend court to testify in any court proceedings or request or compel either lawyer to attend for an examination under oath with regard to matters disclosed during the CFL process;
4. Neither party will require the production in any court proceedings of any notes, records, or documents in the lawyer's possession; and
5. Neither party will introduce as evidence any report or notes or documents prepared by a neutral expert retained by the parties in the CFL process unless the parties accept the expert's report and recommendations.

These provisions raise other evidentiary and professional conduct issues. The distinction between privilege and confidentiality must be clearly understood. Privilege pertains to the admissibility in evidence of certain communications. Communications that are in the nature of settlement proposals are privileged and neither party is at liberty to give evidence of offers made in the course of negotiations. The courts have also long recognized a privilege in respect of lawyer and client communications. It is fundamental to the adversarial process that a lawyer not be compelled to repeat what her client said to her. Lawyers are further constrained by the rules of professional conduct from revealing the information provided by their clients in the course of their professional relationships.

The lawyer and client communication privilege and the confidentiality provision found in the rules of professional conduct may only be waived in certain circumstances. The client can always repeat what she said to her lawyer and she implicitly foregoes the prohibition if she makes the communication in the presence of a third party. Furthermore, the privilege does not apply if there is an imminent risk of death or serious bodily or psychological harm to others, as for example, children.

In the absence of protection from disclosure by virtue of either of the foregoing evidentiary privileges, the parties to a process or service, in which sensitive and compromising communications might be made, may rely upon the Wigmore Test to prevent their repetition in a court proceeding. For that test to apply, the court must conduct a four-part inquiry in which the following questions are asked:

1. Was the communication imparted in confidence that it would not be disclosed to others?
2. Is the preservation of secrecy essential to the success of the process or service relationship?

3. Is that relationship one that society wishes to foster and protect?
4. Will any injury to the relationship caused by disclosure outweigh the expected benefit to be derived from compelling disclosure?

The problem with relying upon the Wigmore Test is that lawyers are unable to advise their clients in advance of their participation in a process or service setting whether a court will apply it to their case. An inhibition to disclose may remain. The limits of evidentiary privilege and the vagaries of the application of the Wigmore Test make it incumbent upon lawyers to ensure that there is an adequate confidentiality provision in the Participation Agreement. Mediators insert similar clauses in their agreements. As the courts encourage parties to negotiate settlements of their disputes, it is anticipated that they will enforce these provisions. However, there has not been sufficient jurisprudence to assert unequivocally that a court will do so in a given case. CFL lawyers are well advised to educate the judiciary in their locale with respect to the CFL process and enlist their support.

Collaborative lawyers struggle with their professional and contractual obligations in respect of sensitive or personal information that clients instruct them not to share, which may not be strictly relevant from a legal perspective but would likely be important on a financial or psychological level to the other party. If a client requests that such information not be revealed, the lawyer must not disclose it by virtue of the confidentiality provisions found in the rules of professional conduct. However, if she considers that the withheld information could reasonably affect the other party's decision making, for any reason whatsoever, she should remind her client of the undertaking under the Participation Agreement to share all important information. It is often helpful to discuss how and when the information might be shared so as to minimize the anticipated reaction of the other party, as well as the consequences to the client if the CFL process ends. If the client refuses to permit the disclosure, the lawyer may have no alternative but to withdraw from or terminate the CFL process.

Pritchard v. Ontario (Human Rights Commission)

[2004] S.C.J. No. 16 (QL) (S.C.C.),
Iacobucci, Major (for the Court), Bastarache, Binnie, Lebel,
Deschamps and Fish JJ.,
paras. 14-18

VI. Analysis
A. *Solicitor-Client Privilege Defined*

14 Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function: see *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 46.

15 Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837, as: "**(i)** a communication between solicitor and client;

(ii) which entails the seeking or giving of legal advice, and **(iii)** which is intended to be confidential by the parties". Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not: see *Solosky*, *supra,* at p.834.

16 Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In *Descoteaux v. Mierzwinski,* [1982] 1 S.C.R. 860, the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established". The scope of the privilege does not extend to communications: **(1)** where legal advice is not sought or offered; **(2)** where it is not intended to be confidential; or **(3)** that have the purpose of furthering unlawful conduct: see *Solosky, supra,* at p. 835.

17 As stated in *R. v. McClure,* [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 2:

> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.

The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction.

18 In *Lavallee, Rackel & Heintz v. Canada (Attorney General),* [2002] 3 S.C.R. 209, 2002 SCC 61, this Court confirmed that the privilege must be nearly absolute and that exceptions to it will be rare. Speaking for the Court on this point, Arbour J. reiterated what was stated in *McClure, supra*:

> ... solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis. [Emphasis in original.]

(Arbour J. in *Lavallee, supra,* at para. 36, citing Major J. in *McClure, supra,* at para. 35.)

3.3 Relationships With Clients – Rendering Services

3.3.3 Negotiations

"Settlements and Agreements Between Counsel"

McLeod, James G. and Mamo, Alfred A., *Annual Review Of Family Law*
(Scarborough: Thomson / Carswell, 2003),
pp. 367-370 (in part)

As a general rule, settlements of pending litigation between counsel acting within the scope of their retainer will be upheld in order to maintain the integrity of the settlement process regardless of whether the agreement meets the formal requirements under the local domestic contract legislation. While a court may decline to enforce a settlement between counsel, so long as the lawyers acted within the scope of their retainers and there was no obvious overreaching, this is unlikely: *McIvor v. McIvor*, 2002 CarswellSask 604, 2002 SKCA 111, 223 Sask. R. 152, 277 W.A.C. 152, 34 R.F.L. (5th) 252 (C.A.) (court maintaining settlement and consent order incorporating settlement); *Woodley v. Woodley* (2002), 2002 CarswellNfld 251, 217 Nfld. & P.E.I.R. 41, 651 A.P.R. 41, 32 R.F.L. (5th) 230 (U.F.C.) (principales regarding settlement between counsel; use of "without prejudice" letters); ….

However, in *Desjarlais v. Desjarlais*, 2002 CarswellSask 698, 2002 SKQB 444, 32 R.F.L. (5th) 302, 230 Sask. R. 34 (Q.B.), the Court held that minutes of settlement in proceedings under the *Family Property Act* were not binding under the Act unless they complied with the formalities under the Act. While the conclusion makes sense from the point of view of formal validity of a domestic contract, it seems to ignore the effect usually given to settlements of pending litigation between counsel.

. . . .

In Smith v. Smith (2002), 2002 CarswellNfld 367, 2003 NLCA 1, 220 Nfld. & P.E.I.R. 307, 657 A.P.R. 307, 33 R.F.L. (5th) 413 (C.A.), the parties and their lawyers agreed they had settled the property division but disagreed on what they had agreed. One side alleged the settlement was all-inclusive in the sense whatever was not expressly re-apportioned remained with the owner. The other side alleged the agreement only covered those assets that were expressly dealt with. The Court held that both interpretations were reasonable in the circumstance, so there was no meeting of the minds and no agreement.

In *McIvor v. McIvor*, 2002 CarswellSask 604, 2002 SKCA 111, 223 Sask. R. 152, 277 W.A.C. 152, 34 R.F.L. (5th) 252 (C.A.), counsel took out a consent order incorporating a settlement arranged between counsel. The Court confirmed that an aggrieved party could set aside the consent order by setting aside the underlying settlement. However, on the current state of the law, that is

extremely unlikely unless one or both lawyers acted outside the scope of his or her retainer, or the agreement was patently unreasonable.

In *Woodley v. Woodley* (2002), 2002 CarswellNfld 251, 217 Nfld. & P.E.I.R. 41, 651 A.P.R. 41, 32 R.F.L. (5th) 230 (U.F.C.), the Court confirmed that "without prejudice" letters may be used to prove a settlement was reached between counsel.

In *Botros v. Botros*, 2002 CarswellAlta 1532, [2002] A.J. No. 1500, 2002 ABQB 436 (Q.B.), Mahoney J. explained why agreements entered into at judicial resolution conferences but not reduced to writing and signed by the parties are enforceable. But contrast *Underhay v. MacDonald*, 2003 CarswellPEI 53, 2003 CAD 14, 38 R.F.L. (5th) 225, 224 Nfld. & P.E.I.R. 320, 669 A.P.R. 320 (C.A.) (court erred in taking into account statements made at settlement conference); [and] *Kubinec v. Kubinec*, 2003 CarswellSask 195, 2003 SKQB 119 (Q.B.) (proper to rely on discussions at pre-trial to show no settlement).

. . . .

Although a court will not complete an incomplete settlement, if the parties settled a case in substance but left open a few minor things, a court may be willing to finalize the arrangement: *Dixon v. Dixon*, 2002 CarswellNB 18, 2002 NBQB 18 (Q.B.); ….

Commentary on *Miglin v. Miglin*

McLeod, James G. (2003), 34 R.F.L. (5th) 263: Annotation, at pp. 269-270 (in part)

Separated spouses who negotiate financial settlements are expected to take into account all probable contingencies when they settle support. The majority pointed out that parties are presumed to be aware that health, job markets, parental responsibilities, housing markets and the values of assets are all subject to change. A court should intervene to change a final support agreement only if the circumstances at the time of the application represent a significant departure from the range of reasonable outcomes anticipated by the parties at the time of their agreement, so that the agreement no longer reflects the parties' expectations or the relevant support objectives to any appreciable extent.

. . . .

A lawyer who suspects that a spouse is emotionally vulnerable during settlement negotiations is in a difficult situation. If the lawyer is satisfied that he or she can help the party overcome his or her problem, at least for the purposes of settlement, he or she will probably continue to represent the spouse. Unfortunately, if things turn out badly, the lawyer can expect some complaint from the client. Most people are unwilling to accept responsibility for their problems. The obvious person to blame for a bad settlement is the professional who advised on the settlement. If the settlement turns out to

be sufficiently poor that the spouse is left with nothing, the lawyer should expect to be sued in the current climate. This means that lawyers must keep clear records of what went on during settlement negotiations to show that they fully represented their clients' interests and fully advised them of the implications of settlement.

What of the case where a lawyer suspects that even with his or her advice a client is still vulnerable? A lawyer should not allow a client to enter into an agreement which reflects unrealistic expectations. Producing notes that show that the client did not appreciate the nature and consequences of the agreement he or she executed is hardly the way for a lawyer to prove that he or she provided competent assistance to a client. We may have reached the point where a lawyer should refuse to act for a client who refuses to take the lawyer's advice on settlement. Those people who most need independent legal advice may not receive such advice because they are incapable of accepting it. Unfortunately this forces a lawyer to choose self-interest over a client's interests.

Works v. Works

[2002] N.S.J. No. 305 (QL) (N.S.S.C.), MacLellan J.,
paras. 11-14; 18-23

[**Editor's Note:** The parties made an oral separation agreement, assisted by legal counsel, shortly before trial of the husband's divorce application. The oral agreement included provision that the husband convey his interest in the matrimonial home to his wife in settlement of her claim for spousal support. The husband's interest in the matrimonial home was $15,000.00. The husband had been advised by his lawyer that he was entitled to claim the $15,000.00 as an income tax deduction. On later determining that he was not entitled to the deduction, he refused to sign the Minutes of Settlement intended to memorialize the oral separation agreement. The wife applied to enforce the oral agreement. The issue was whether mistaken legal advice should allow the husband to refuse to formalize, through minutes of settlement, and perform, the oral agreement.]

¶ 11 The law on unilateral mistake is somewhat confused. There are many cases dealing with the issue. Recently, the Ontario Court of Appeal dealt with the issue in Bogue v. Bogue (1999) 1 R.F.L. (5th) 213. There the Court dismissed an appeal from a trial decision which forced the husband to abide by the terms of an oral agreement entered into with his wife. Both parties were represented by legal counsel and had, based on a settlement conference with a Judge, reached agreement on all issues. During the settlement discussions the husband's lawyer had not raised as an issue the form of release he would be asking his wife to sign. Following the oral agreement, his lawyer drafted Minutes of Settlement indicating an unusual form of release which contained a penalty clause indicating that if the wife applied to vary the agreement she would have to forthwith re-pay the lump sum of $400,000.00 which she had received in the settlement. The wife refused to sign such an agreement and brought an action to force the husband to sign the Minutes of Settlement without the penalty clause.

¶ 12 At trial the Court found that there was an agreement reached between the parties and the clause, subsequently inserted in the formal document, was not discussed prior to the settlement and while the parties would normally expect to have a standard release clause in such an agreement this was an unusual clause and the wife should not be bound by it.

¶ 13 At the appeal level, Rosenberg, J.A. writing for the Court discussed the issue of oral agreements: He said: [page 4]

> It is an over simplification to say that there cannot be an agreement to agree. The true legal position was explained by Robins, J.A. in Bawitko Investments Ltd. v. Kernels Popcorn Ltd. (1991), 79 D.L.R. (4th) 97 (Ont. C.A.) at pp. 103-04:
>
> > As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.
> >
> > However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself...
>
> And at p. 105:

> If no agreement in respect to essential terms has been reached or the terms have not been agreed to with reasonable certainty, it can only be concluded that such terms were to be agreed upon at a later date and until that time there would be no completed agreement.

¶ 14 He also dealt with the issue of mistake. He said: [page 5]

> I find it difficult to characterize what occurred here as a case of mutual mistake as that term is understood: see Fridman, The Law of Contract in Canada, 3rd ed. (1994), at pp. 258-60. In any event, the test to be applied is set out in Smith v. Hughes (1871), L.R. 6 Q.B. 597 at p. 607, [1861-73] All E.R. Rep. 632:
>
> > If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.
>
> . . . .
>
> In cases of unilateral mistake, if the unmistaken party is ignorant of the other's mistake the contract is valid in law: Fridman, supra at p. 261. Assuming a mistake was made in this case, in that the husband agreed to the settlement without realizing that it did not contain a repayment clause, there was no evidence that the wife or her lawyer were aware of the mistake. Nevertheless, the husband may be entitled to an equitable remedy if the wife ought to have known of his mistake: Stepps Investments Ltd. v. Security Capital Corp. (1976), 14 O.R. (2d) 259 at p. 272, 73 D.L.R. (3d) 351 at p. 364 (H.C.J.). On this aspect of the case, the motions judge made the following finding:
>
> > Having observed the repayment clause in a draft proposal six months earlier should the wife and her counsel have expected that this was the release clause to be included? Was there anything in the husband's words or conduct to cause the wife to think that the repayment clause was still part of his earlier position? A majority of family law counsel would expect a release clause to state that neither party would seek spousal support from the other in the future and not the wording of this repayment clause which is potentially punitive. If the parties intended a release clause this unusual, I find they would have discussed it in detail before reaching a "settlement".
>
> I take this as a finding that neither the wife nor her counsel ought to have known that the husband was still insisting on a repayment clause. In my view, this finding was open on the evidence and I would not interfere with it.
>
> . . . .

¶ 18 I conclude that generally the law is that where one party only is mistaken about something significant to a contract, the Court will exercise its discretion to not enforce the agreement only if it is satisfied that it would be unfair, unjust or unconscionable to do so considering all the circumstances, including whether the other party was aware of the mistake or should have been aware of it and also whether it was central to the agreement itself.

¶ 19 In this case, I conclude that it would not be unfair to enforce the agreement entered into between the parties. I find that the issue of tax deductibility for a lump sum payment of spousal support was not discussed between counsel and that the respondent's counsel would have no reason to believe that the agreement was based on that assumption. I understand that the amount involved in this dispute is simply the tax saving going to the petitioner if he was able to claim a deduction. Based on a $15,000.00 claim it would appear that he may be entitled to something in the range of $6,000.00.

¶ 20 I believe the settlement entered into between the parties is fair considering the length of the marriage. I am not prepared to exercise my discretion to relieve the petitioner of his obligations under the oral agreement. It is clear to me that the petitioner understood exactly what he was doing in that he was trading his property rights against his wife's claim for spousal support.

¶ 21 Counsel for the petitioner has, following the hearing of this matter in written submissions, raised the issue of the Statute of Frauds. He submits that Section 7(d) of that Statute would require that the agreement to convey his client's interest in the matrimonial home be in writing. Section 7 provides:

> Action Upon Agreement:
>
> 7 No action shall be brought:
> . . . .
>
> d) upon any contract or sale of land or any interest therein; …
>
> . . . .
>
> unless the promise, agreement or contract upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to be charged therewith or by some other person there unto by him lawfully authorized.

¶ 22 I reject this argument. Here the oral agreement was that there would be written Minutes of Settlement covering the agreements arrived at by the parties. I have found that the petitioner is bound by that oral agreement and therefore must sign the written Minutes of Settlement thereby satisfying the requirement under the Statute of Frauds.

¶ 23 I would order that the Minutes of Settlement as agreed to by the parties be signed by both parties and subject to any right of appeal that the matter proceed by way of an uncontested divorce.

3.4 Relationships With Clients – Personal

"Proposed Amendments To The [Ontario] Rules Of Professional Conduct On Conflicts Of Interest Respecting A Lawyer's Sexual Relationship With A Client"

The Law Society Of Upper Canada,
Professional Regulation Committee Report to Convocation,
***January 22, 2004*, paras. 1-4**

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1. The Professional Regulation Committee has approved the policy basis and the text of new rules of professional conduct and commentary within the rules on conflicts of interest on the subject of lawyer's sexual relationship with clients. The recommendation is that there be an absolute prohibition on sexual relationships between lawyers and clients, with a limited exception for relationships that pre-date the lawyer and client relationship.

2. The Committee's policy report, which includes the proposed amendments, is provided to January 22, 2004 Convocation for information. The Committee, following discussions between the chair and the Treasurer, is making the report available to the profession for comment. Following Convocation, the Committee will be issuing a call for input on the proposals through the Society's website and in the *Ontario Reports*, and notifying the profession of the report's availability through the Law Society's website or Customer Service Centre. Responses will be requested by the end of March 2004.

3. After reviewing responses to the call for input, the Committee will prepare a report requesting Convocation's consideration of the proposals. . . . .

4. The proposed wording of the new rules and commentary, which are located under rule 2.04 on conflicts of interest, appears below, … . Amendments are shown in bold … .

2.04 AVOIDANCE OF CONFLICTS OF INTEREST

Definition**s**

2.04 (1) In this rule

a "conflict of interest" or a "conflicting interest" **means includes an interest**

(a) **an interest** that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, **or**

(b) **an interest** that a lawyer might be prompted to prefer to the interests of a client or prospective client, **or**

(c) **a sexual relationship between a client and a lawyer handling the client's work.**

"sexual relationship" means a relationship between a lawyer and a client or prospective client where

(a) there is sexual intercourse,

(b) a lawyer touches the client's or prospective client's sexual or other intimate parts for the purpose of arousing or satisfying the sexual desire of the lawyer, client, or prospective client, or

(c) a client or prospective client touches the lawyer's sexual or other intimate parts for the purpose of arousing or satisfying the sexual desire of the lawyer, client or prospective client.

Avoidance of Conflicts of Interest

(2) A lawyer shall not advise or represent more than one side of a dispute.

(3) A lawyer shall not act or continue to act in a matter where there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

Sexual Relationships between Lawyer and Client

(3.1) Where there is a sexual relationship between a client and a lawyer handling the client's work, the lawyer shall not act or continue to act in a matter unless,

(a) the sexual relationship came before any lawyer and client relationship, and

(b) after disclosure adequate to make an informed decision, the client or prospective client consents.

(3.2) A lawyer shall not have a sexual relationship with a client or prospective client unless the sexual relationship came before any lawyer and client relationship.

Commentary

A sexual relationship combined with a lawyer and client relationship is always problematic, even when the sexual relationship is consensual, loving, and caring. The lawyer's devotion and emotional involvement with the client may interfere with the lawyer's fiduciary duties, independent professional judgment, ability to provide competent legal services, and responsibilities to the courts, the public, and other lawyers. The sexual relationship creates an interest that conflicts with and potentially undermines, a lawyer's duty to provide objective,

disinterested advice. (It should be noted, however, that there is no conflict of interest if another lawyer of the firm who does not have a sexual relationship with the client is the lawyer handling the client's work.) The existence of a sexual relationship may interfere with the lawyer's obligation to hold in strict confidence all information concerning the client's business and affairs, since the sexual relationship obscures whether the information was acquired in the course of the professional relationship, which is a factor in determining whether the information is confidential and protected by lawyer and client privilege. Conversely, the existence of a lawyer and client relationship frequently creates circumstances where the lawyer may have considerable power over a client, who may be vulnerable and dependent, and these circumstances may be abused by the lawyer taking advantage of the client for the purposes of initiating or agreeing to a sexual relationship. In some circumstances, the power imbalance may undermine the client's ability to truly consent to a sexual relationship.

The definition of conflict of interest in rule 2.04 (1) and rules 2.04 (3.1) and (3.2) recognize that a sexual relationship is a type of conflict of interest. These rules regulate this conflict of interest by differentiating two situations. The first situation is where the sexual relationship is in existence before the lawyer and client relationship begins. An example of the first situation would be a retainer where a lawyer is retained by his or her spouse with whom there is a consensual sexual relationship. The lawyer may act in this situation provided that the client provides an informed consent to the lawyer acting notwithstanding the lawyer's conflict of interest.

The second situation is where there is no pre-existing sexual relationship between the lawyer and his or client. In the second situation, rule 2.04 (3.2) prohibits a lawyer from initiating or agreeing to a new sexual relationship with a client or prospective client. However, should a sexual relationship develop, then, pursuant to rule 2.04 (3.1), the lawyer handling the client's work cannot act or continue to act. It may be noted that where there is no pre-existing sexual relationship, a client cannot consent to a lawyer acting or continuing to act if a sexual relationship develops.

Where the client is an organization, which includes corporations, partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships, the rules about sexual relationships between a client or prospective client apply as between the lawyer handling the client's work and any representative of the organization who instructs or could instruct the lawyer on behalf of the organization.

[**Editor's Note:** The proposed amendments had not been implemented up to and including 24 June 2004.]

MODERNIZING THE CANADIAN BAR ASSOCIATION
CODE OF PROFESSIONAL CONDUCT:

FINAL REPORT OF THE STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
http://www.cba.org/CBA/EPIIGRAM/Mar2004/

INTRODUCTION

In April 2000, the Canadian Bar Association's Standing Committee on Ethics and Professional Issues was charged with the task of reviewing the CBA's *Code of Professional Conduct* and consulting broadly for the purpose of making recommendation to [the CBA] Council to modernize the *Code.*

The Committee's work was divided into three phases.

During Phase I, in 2000 and 2001, the Committee identified possible changes to the *Code*, and in early 2002 sought input from members on the issues identified.

During Phase II, the Committee analyzed those submissions and met at length to formalize its recommendations. The Committee sought further input from members with respect to its proposed revisions. This final report results from the Committee's detailed consideration of the submissions received during both these phases of the project.

CBA Council considered these amendments at the ... [2004] Mid Winter Meeting, and will vote when i t meets at the 2004 CBA CanadIan Legal Conference in Winnipeg ... [in August 2004].

Phase III will be the production and distribution of the amended CBA *Code* following Council approval.

. . . .

[**Editor's Note:** Reproduced below is the portion of the Final Report concerning sexual relationships with clients.]

CHAPTER VI - CONFLICT OF INTEREST BETWEEN LAWYER AND CLIENT

(a) Sexual Relationships with Clients

. . . . .

The Committee ... submits the following options for Council's consideration:

Option 1

Rule

…

(e) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer and client relationship began.

Option 2

Commentary

Sexual Relationships with Clients

7. The Rule prohibiting lawyers from acting for a client where the lawyer's duty to the client and the personal interest of the lawyer are in conflict is intended to prohibit (among other things) sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the representation, the client is vulnerable. The lawyer must not take advantage of that vulnerability. The lawyer-client relationship frequently involves an imbalance of power in favour of the lawyer where the client exhibits dependence on the lawyer. The lawyer owes a duty of utmost good faith to the client and must at all times keep the client's interests paramount in the course of the representation. A lawyer's sexual relationship with a client will be an appropriate subject of discipline where the lawyer takes advantage of the client.

3.5 Relationships With Clients - Special Cases

"Beware the dangers of acting for family and friends"

Pinnington, Dan (Director, practicePRO (Lawyers' Professional Indemnity Co.)),
National General Practice, Solo & Small Firm Conference Newsletter,
(Ottawa: Canadian Bar Association, December 2003), pp. 5-6

At one time or another, every practising lawyer has been approached by a friend or family member for legal advice. And, of course, the natural inclination is to help. For a variety of reasons however, acting for friends and family is risky business and you should think twice before doing so.

Due to the closeness of the relationship, in many cases where lawyers act for family or friends, the help offered is informal, or is at a level that is less formal than it would be for a regular client. This lack of formality can result in the cutting of corners, or a failure to obtain consents or written instructions. Misunderstandings as to the scope and nature of the services to be provided are more likely due to the informal handling of the matter. Lastly, standard procedures are frequently not followed, including completing a conflicts check, opening a file, signing a retainer agreement, sending correspondence, etc. All these standard procedures occur for good reason, and should occur on every matter that you handle, regardless of your relationship with a client.

For several reasons family and friends can be the most difficult and awkward of clients:

- They can be extremely demanding: they can (and will) ask you questions 24 hours a day.
- It is more difficult, to give them honest, objective, independent and professional advice: no matter how hard you and they try, your personal relationship will cloud your judgment, and their ability to listen to your advice.
- They can be unreasonable: an inability to properly listen to and to accept your advice makes for unreasonable expectations.
- Family members and fees don't mix: the discussion of fees is more difficult with family members, and often you will find yourself doing the work on a pro bono basis, or at a much reduced hourly rate.
- There can be dire consequences for the relationship if the matter doesn't go as expected: this can, and often does, include a malpractice claim, notwithstanding the family or personal relationship. There can also be hurt feelings which may affect not only your relationship with that person, but also with other family members.
- Similarly, changes in family relationships or circumstances, most notably a separation or divorce, can also colour how they view your earlier legal advice or services.

Be aware that dabbling is also dangerous. In our claims files we often see lawyers getting in trouble when they try to handle a matter outside their normal area of practice. This frequently occurs when lawyers are trying to help a family member or friend. In all cases you should avoid acting on a matter that is outside of your area or areas of expertise, and this is especially true in the case of matters for family or friends. Don't be a dabbler!

You should also keep in mind the related entity or business enterprise exclusion under your LAWPRO policy. It can have the effect of limiting coverage in cases where you, your spouse or others related to your firm have an interest in the claimant. Refer to your policy for more details.

What do you do when a family member or friend approaches you for help on a legal matter? Politely and firmly explain to them that it would be better to have someone else in the firm or … even an outside lawyer handle the matter for them. Explain that by doing this they can better ensure that the lawyer acting on their behalf has the right expertise and is able to offer independent and objective advice. Also, this way, any possible errors do not affect personal relationships, things are more apt to be documented, family members are more likely to be more realistic in their expectations, and the acting lawyer is more easily able to give the client advice they would prefer not to hear (e.g. "you don't have a case").

"Lawyer, Not Lender […]"
Use Credit Reports to Weed Out Clients Unlikely to Pay for Services Rendered"

Schachner Chanen, Jill, *ABA Journal,* December 2002, p. 63 (in part)

Nicholas Literski is not used to getting stiffed. A solo practitioner in the 1,200-person town of Nauvoo, Ill., Literski knows most of his clients and rarely worries about getting his fees paid.

But with a surge of land development in the area, Literski says non-paying clients are becoming more frequent and he's ready to do something about it.

Lately, Literski has begun asking all his new clients to provide their driver's license and Social Security numbers. He is contemplating joining a credit-reporting agency so he can see their credit histories to help him decide whether he wants them as clients.

"Unfortunately, I am finding that this sort of thing is becoming necessary he says."

Reid Trautz, the District of Columbia Bar's practice manager, applauds Literski's efforts and says more solo and small-firm practitioners should consider using credit reports in their new-client intake procedures.

When lawyers do not get a retainer, they are put in the position of extending credit to clients. Most businesses that extend credit first check for credit worthiness, says Trautz, but lawyers usually

do not." There are three kinds of [non-paying] clients: The don't-pays, the can't pays and the won't pays," says Trautz.

"The don't-pay and won't-pay are client-relation issues. The can't-pays – the people who say, 'Gee, I have no money and cannot pay you' – are credit problems. Those credit problems can be handled at the beginning."

Lawyers who want to use credit reports should be prepared to make a few calls to find a credit bureau that will offer them service.

. . . .

Linda Ravdin of Ravdin & Wofford in Washington, D.C., says financial information can best be used to help a lawyer understand a prospective client's fiscal responsibility. That information may help the lawyer to better predict whether the client will pay the bill.

A matrimonial lawyer, Ravdin says a bad credit report should not be enough to turn away a prospective client but should raise some red flags. "The general type of thing that causes me to pause is evidence of a really financially irresponsible person, like the kind of person with $50,000 worth of credit card debt," she says. "It's not necessarily the existence of those red flags, but rather how the client acknowledges them and chooses to deal with them," she says.

Ganapole agrees that credit reports can be a useful tool in the intake process.

"If they are not paying their receivables to other people, then they are probably not going to pay you."

3.6 Relationships With Third Parties

"Unrepresented litigants in family law proceedings"

Franco, Veronica, *The Family Way [:] National Family Law Section Newsletter* (Ottawa: Canadian Bar Association, February 2004), pp. 4-6

Whether because of funding cuts to legal aid or because of an increase in readily accessible information, unrepresented litigants are becoming increasingly common in family law courts. No matter the case, however, working with unrepresented litigants can be a challenge.

Usually, the unrepresented litigant is unfamiliar with Court procedure and the legal system generally. Also, he or she is not aware of the courtesies afforded between counsel. Quite often, they are scared of the system, feeling that they are the only stranger in a courtroom filled with people who know their roles. As a result, they are bound to make mistakes, take extra time to do things, and generally lead to higher costs to clients and prolong litigation. Our task is to try to minimize the impact on our clients.

From the bench's perspective, the overriding principle is to ensure a fair hearing or trial. Typically, judges will afford an unrepresented litigant more leeway and assistance to counteract the unrepresented litigant's lack of knowledge of the law and Court procedures. That advice, however, should be limited to that necessary to counteract the imbalance, and not enough to provide the unrepresented litigant with any advantage.

In the courtroom, you will find that Masters and Judges may help unrepresented litigants by stating the issues, explaining the rules, and even bending the rules somewhat by granting adjournments and extensions of time to respond and prepare. These extensions only become problematic when they are long and result in a number of adjournments. At a March 13, 2003 CBA Vancouver Family Law Subsection meeting, Master Donaldson and Madam Justice Martinson made the following suggestions to help prevent undue delay in having applications heard:

1. **Send self-serving letters** – Send a letter to the unrepresented litigant that explains that every application must be supported by affidavits, and that notice is required. When asking for costs, send a letter which explains that you are asking for costs, and include a dollar amount.
2. **Admonish the judge for providing too much help** – You can do this by showing the Judge or Master the self-serving letter, which will demonstrate that the unrepresented litigant has already been told what is required of him or her, and therefore has no excuse not to have an affidavit, or not to be prepared.
3. **Remind the judge that delay costs your client significantly** – Consider advising the Court the total amount of legal fees that have been charged to your client as a result of delays (including time for attending applications that are adjourned, and multiple occasions spent preparing for hearings).

4. **Have the same judge hear all applications** – Ask the Master or Judge if he or she will hear other applications in the proceedings, especially where there are multiple unnecessary applications.

5. **Explain the process and the repercussions for failing to cooperate** – For example, when drafting Orders, explain what is expected of him or her, and set out the consequences for failing to cooperate (such as an award of costs, and include the amount).

If an adjournment will likely be granted, agree to a short adjournment subject to certain conditions, such as a support payment or an access visit. Make sure the conditions are included as terms in the Order or request a transcript of the proceedings. Alternatively, ask for an interim order especially where the adjournment will be long.

Generally, unrepresented litigants should be treated with the same courtesy afforded to counsel. In other words, comply with the Rules of Court, disclose what needs to be disclosed, and provide ample notice, where notice is required. Also, point out time constraints and grant extensions of time. It is useful to send the unrepresented litigant a letter setting out timelines and what is required of him or her. Take the time to explain legal issues and procedure before going to Court. However, avoid jargon and legalese. This way the unrepresented litigant will have a much more difficult time arguing that they did not know or understand the rules.

Because the unrepresented litigant can be intimidated by the judicial process, some react by being confrontational. As a result, an effort should be made to try to diffuse and not escalate conflict and paranoia. This can be accomplished by being helpful and telling them where to obtain legal advice or where to obtain information, such as the Court Registry, or the Internet. Although some unrepresented litigants can become rude and belligerent, the Canadian Bar Association's *Code of Professional Conduct* should be kept in mind. Counsel should not direct derogatory comments to him or her. Instead, counsel should be scrupulously polite. Where you are dealing with a verbally abusive unrepresented litigant, consider telling him or her that you will be taping the telephone call. This may temper his or her remarks. Finally, the unrepresented litigant's letters should be given a response. However, counsel should be very careful and document everything.

In the courtroom, volunteer to give the background and set out the issues even if it is not your client's application. After you finish, ask the unrepresented litigant to confirm whether you have left anything out. Make only those objections that are necessary, taking into account that the unrepresented litigant does not know what he or she is doing. Also, only make the objection once. When making an objection, explain the basis for the objection so that the lay litigant understands.

To assist the Judge, include the unrepresented litigant's documents in the Book of Documents. If you do not know which documents will be used, include those documents you expect will be used. Draw attention to authorities even if they do not support your client's position and provide copies of the cases before the hearing so he or she has an opportunity to review them. Also, offer to draw up the Order.

Consider asking for an Order for costs payable forthwith, especially in situations where counsel has provided the unrepresented litigant assistance, and that assistance is documented in letters. Next time, the unrepresented litigant may not be so willing to bring a frivolous application.

"Conduct Unbecoming [:] Private lies and public duties"

Lundy, Derek, *Canadian Lawyer,* September 2003, pp. 26-27; 30-31 (in part)

After a lot of matrimonial litigation, your judgment goes to rat shit. That's what happened to me," says Larry Pierce. A tall, burly man who speaks in a humorous, measured manner, he laughs ruefully as he recounts how he got into trouble with the Law Society of British Columbia.

At the heart of it all was his allegation - which has never been proven, but which is alluded to in numerous court documents - that his wife, lawyer Eva Van Loon, had channelled money out of their law partnership.

The allegation came in the midst of a bitter divorce action and demonstrates the overheated atmosphere of the pair's crumbling marriage. It is only stated here to help explain Pierce's state of mind at the time of the events which led to his being disciplined.

At the same time as these messy divorce proceedings, Pierce was scheduled to be a witness for his wife in a personal injury action where she was the plaintiff. Van Loon was suing a construction company after she broke an ankle and wrenched her back stepping into an unprotected hole in the sidewalk in front of a building site in 1990.

She subsequently had back surgery and developed fibromyalgia. Pierce was a potential witness because he had been with her when the accident occurred, plus he could testify about the effect of her injuries as well as loss of income.

In November and December of 1995, Pierce met with Van Loon's two Vancouver counsel in her personal injury case, John O. Richardson and Tova G. Kornfeld, and later had two telephone conversations with Richardson. They discussed the imminent trial in Van Loon's action and they also talked about the husband-and-wife partners' ongoing matrimonial imbroglio.

What Pierce said in the course of these conversations, and what he meant by it, became the subject of disciplinary hearings by the law society and several court decisions.

And the story of the disciplinary hearings, and their judicial fallout, is also a tale of delay, fuzzy evidence and a lawyer deep in the law society's bad books – plus it's a starting point to discuss when and to what extent professional governing bodies can (or should) punish their members for what they do outside the practice of law – in their so-called private lives.

About three months after Pierce's conversations with Richardson, Van Loon sent a letter of complaint to the law society. Another five months went by before the society wrote to Pierce to tell him about it. The delay was apparently at Van Loon's request and, according to Pierce, she claimed to fear for her safety if he found out about her complaint while divorce proceedings were still going on. That was nonsense, Pierce says, but in marriage break-ups, "all wives say that".

At the end of October 1996, the law society provided Pierce with copies of corrected and deciphered notes that Richardson had made of the conversations [i.e., one in person, two by telephone] between himself and Pierce. The society conducted an investigation which dragged on for 10 months and resulted in a disciplinary charge against Pierce. It stated that Pierce had threatened to sabotage his wife's personal injury action by exposing her alleged misappropriation of funds from the partnership unless she agreed to a favourable separation agreement before trial.

After a further nine months and before a disciplinary hearing could be arranged, the law society sent Pierce a copy of a second page of notes made by Richardson - notes of the third conversation between himself and Pierce [i.e., the second telephone conversation] which the lawyer had inadvertently failed to send to the society.

Pierce received this second page close to two-and-a-half years after the conversation had taken place. He had made no notes of his own. The law society expanded its charge to include the new material [i.e., the second page of notes]. A hearing was held in March 1999, by mutual consent before a single bencher, Peter J. Keighley, who, in April, found Pierce guilty of both professional misconduct and conduct unbecoming a lawyer. Keighley gave Pierce a three-month suspension and ordered him to pay costs.

Pierce says he had never intended to link the two pieces of litigation – his wife's personal injury action and the ongoing family law matter. "1 talked to two lawyers, one of whom I went to school with, and I thought we were having a friendly conversation about my ex-wife."

According to Pierce's recollection of things, he told Richardson and Kornfeld: “There's a problem here: she ripped me off and I'm going to have to speak to that in court. If I end up going to trial for her in the personal injury action and I know about this stuff, I may not be a very good witness for her."

He says he used the term "good witness," and according to Pierce, it was in the sense all litigators do, that it's "not good if I know stuff that could be embarrassing to her case." He was never trying to shake her down for a favourable separation agreement, he says.

Nevertheless, Pierce concedes, "I should never have spoken to them. There's no doubt about that but these things happen." Pierce says he'd gone over to talk to Richardson and Kornfeld at the end of the day and he'd been working long hours and the divorce was dragging on – plus, he thought he'd been ripped off.

The problem, according to Pierce, was the law society's long delay – first, in telling him about his wife's complaint; and second, in getting the second page of her lawyer's notes to him. That delay in particular, he says, compromised his ability to make a full and fair defence. "By the time they told me about the other two [phone] conversations, I didn't even remember."

Pierce applied to the Supreme Court of British Columbia for judicial review of the discipline panel's ruling. Judge M. Marvyn Koenigsberg overturned the law society’s decision holding that the delays and the notes' late disclosure had caused "substantial procedural unfairness" to Pierce. Furthermore, the notes were the evidence the society had relied upon, and that evidence was "so

fragile and fraught with difficulty" that the disciplinary panel's decision was unreasonable: 2000 BCSC 887.

The society appealed, and in April 2002 a unanimous B.C. Court of Appeal begged to differ. Koenigsberg had gone beyond the restricted purview of a judicial review and had substituted her own findings of fact and credibility, assessments for those of the panel, said Justice Mary V. Newbury with justices Ian T. Donald and Jo-Ann E. Prowse concurring.

Koenigsberg's job, the court said, had been to decide whether or not the panel's decision was unreasonable – in the sense that "no reasons supported the finding;" and, it wasn't unreasonable in that sense. The delay in getting the second page of notes to Pierce wasn't a problem. Pierce should have known when he got the law society's original notice of Van Loon's complaint way back in July 1996 that all three conversations were going to be relevant: 2002 BCCA 251.

In June, 2002, two months after the Court of Appeal released its decision, a seven-person panel of the Law Society held a review of Pierce's penalty, and in August, five members of the panel increased his suspension to nine months, while two would have disbarred him.

Pierce sought leave to appeal to the Supreme Court of Canada but his application was refused by the court in February 2003.

Pierce still claims he didn't have the blackmailing intent the law society found he had when he initiated the conversations with his wife's counsel, and that he was guilty only of a dumb indiscretion brought on by work and personal pressures. But he concedes that if he did have that intent, then he was clearly guilty of professional misconduct and/or conduct unbecoming a lawyer.

Attempts to reach Van Loon for comment was unsuccessful.

Martel v. Spitz

[2003] A.J. No. 1348 (QL) (Alta. Q.B.) Watson, J.
(Summary)

Facts: Martel appealed the decision of a master to strike her action against a lawyer, Andrew. Andrew had represented an opposing party in litigation against Martel. Martel advanced a claim against Andrew for violating the Alberta Rules of Court and Legal Professions Act. She alleged that Andrew acted in bad faith and abused the legal process. She alleged harassment through the litigation. Allegations in Martel's Statement Of Claim included:

> 3. The Rules of Court of Alberta have not been followed by the Defendants. They did not act in a reasonable or proper manner which as officers of the court should be unquestionable. They acted in bad faith.

4. The Defendants violated the Legal Professions Act when they failed to:

(1) take time,
(2) take care,
(3) investigate.

5. The Defendants offered nonprofessional service to both clients which has resulted in an abuse of the legal system and the Honourable Court's time. It has also resulted in considerable financial cost and time for the Plaintiff. This abuse is causing the Plaintiff considerable emotional distress. The continuous affidavits, motions, and appeals filed when there is clearly no merit are now harassing the Plaintiff. Fair warning has been given without prejudice.

. . . .

10. The long delays by the Defendants have prohibited the Plaintiff from enforcing a true and just claim and have increased the cost by thousands of dollars and have forced the Plaintiff to spend days of her time defending an issue that has no right to be presented to this Honourable Court. Both lawyers acted in bad faith and in a nonprofessional in dealing with the Plaintiff by failing to follow the Alberta Rules of Court and failing to provide full disclosure to the court or their clients as per these Rules.

The Master decided that there was no genuine issue to be tried.

Decision: Appeal dismissed.

Reasons: Martel's action against the lawyers for her opponent could not succeed on policy grounds. Further, the facts did not establish a genuine issue to be tried.

3.7 Relationships With Other Lawyers

"Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment"

American Bar Association (Standing Committee on Ethics and Professional Responsibility), Formal Opinion 03-431, 08 August 2003 (Chicago: American Bar Association, 2003) (in part)

A lawyer who believes that another lawyer's known violations of disciplinary rules raise substantial questions about her fitness to practice must report those violations to the appropriate professional authority. A lawyer who believes that another lawyer's mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer's consequent violation of Rule 1.16(b)(2), which requires that she withdraw from the representation of clients.

…. Under Rule 1.16(a)(2) of the Model Rules of Professional Conduct, a lawyer must not undertake or continue representation of a client when that lawyer suffers from a mental condition that "materially impairs the lawyer's ability to represent the client." That requirement reflects the conclusion that allowing persons who do not possess the capacity to make the professional judgments and perform the services expected of a lawyer is not only harmful to the interests of clients, but also undermines the integrity of the legal system and the profession.

Under Rule 8.3(a), a lawyer with knowledge that another lawyer's conduct has violated the Model Rules in a way that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" must inform the appropriate professional authority. Although not all violations of the Model Rules are reportable even under Rule 8.3, as they may not raise a substantial question about a lawyer's fitness to practice law, a lawyer's failure to withdraw from representation while suffering from a condition materially impairing her ability to practice, as required by Rule 1.I6(a)(2), ordinarily would raise a substantial question requiring reporting under Rule 8.36.

When considering his obligation under Rule 8.3(a), a lawyer should recognize that, in most cases, lack of fitness will evidence itself through a pattern of conduct that makes clear that the lawyer is not meeting her obligations under the Model Rules, for example, Rule 1.1 (Competence) or Rule 1.3 (Diligence). A lawyer suffering from an impairment may, among other things, repeatedly miss court deadlines, fail to make filings required to complete a transaction, fail to perform tasks agreed to be performed, or fail to raise issues that competent counsel would be expected to raise. On occasion, however, a single act by a lawyer may evidence her lack of fitness.

A lawyer may be impaired by senility or dementia due to age or illness or because of alcoholism, drug addiction, substance abuse, chemical dependency, or mental illness. Because

lawyers are not health care professionals, they cannot be expected to discern when another lawyer suffers from mental impairment with the precision of, for example, a psychiatrist, clinical psychologist, or therapist. Nonetheless, a lawyer may not shut his eyes to conduct reflecting generally recognized symptoms of impairment (e.g., patterns of memory lapse or inexplicable behavior not typical of the subject lawyer, such as repeated missed deadlines).

Each situation, therefore, must be addressed based on the particular facts presented. A lawyer need not act on rumors or conflicting reports about a lawyer. Moreover, knowing that another lawyer is drinking heavily or is evidencing impairment in social settings is not itself enough to trigger a duty to report under Rule 8.3. A lawyer must know that the condition is materially impairing the affected lawyer's representation of clients.

In deciding whether an apparently impaired lawyer's conduct raises a substantial question of her fitness to practice, a lawyer might consider consulting with a psychiatrist, clinical psychologist, or other mental health care professional about the significance of the conduct observed or of information the lawyer has learned from third parties. He might consider contacting an established lawyer assistance program. In addition, the lawyer also might consider speaking to the affected lawyer herself about his concerns. In some circumstances, that may help a lawyer understand the conduct and why it occurred, either confirming or alleviating his concerns. In such a situation, however, the affected lawyer may deny that any problem exists or maintain that although it did exist, it no longer does. This places the lawyer in the position of assessing the affected lawyer's response, rather than the affected lawyer's conduct itself. Care must be taken when acting on the affected lawyer's denials or assertions that the problem has been resolved. It is the knowledge of the impaired conduct that provides the basis for the lawyer's obligations under Rule 8.3; the affected lawyer's denials alone do not make the lawyer's knowledge non-reportable under Rule 8.3.

If the affected lawyer is practicing within a firm, the lawyer should consider speaking with the firm's partners or supervising lawyers. If the affected lawyer's partners or supervising lawyers take steps to assure that the affected lawyer is not representing clients while materially impaired, there is no obligation to report the affected lawyer's past failure to withdraw from representing clients. If, on the other hand, the affected lawyer's firm is not responsive to the concerns brought to their attention, the lawyer must make a report under Rule 8.3. We note that there is no affirmative obligation to speak with either the affected lawyer or her firm about her conduct or condition before reporting to the appropriate authority.

Schut v. Magee

[2003] B.C.J. No. 102 (QL) (B.C.S.C. [in Chambers]), Kirkpatrick J., paras. 2-3; 11-12 (summarized)

The plaintiff, Dr. Schut, alleged that the defendants defamed him in correspondences sent by the defendants to the College of Physicians Surgeons of British Columbia. The allegations of defamation are founded on two letters from some or all the defendants, dated, respectively, 15 January 1999 and 01 March 1999, to the Deputy Registrar and the Registrar of the College. The 15

January 1999 letter reported “some ongoing concerns about the quality, safety and ethics of the medical practices” of Dr. Schut. The letter of 01 March 1999, to the Registrar of the College in response to his request for information regarding concerns expressed in the 15 January 1999 letter, provided details of six cases in which the reporting physicians raised concerns about Dr. Schut’s care of patients and her fitness to practise medicine. The defendants applied for an order striking out the plaintiff’s claim. In striking out the action, Kirkpatrick J. referred to *Hung v. Gardner,* [2002] B.C.J. No. 1918 (QL) (B.C.S.C.). There, court held, at para. 66, that an individual who makes a complaint about a professional person to his or her governing body enjoys the protection of absolute privilege. The *Hung v. Gardner* decision citied, with approval, *Sussman v. Eales* (1986), 25 C.P.C. (2d) 7 (Ont. C.A.) at p. 8, which makes it clear that absolute privilege applies in the defamation context:

> In our view, the doctrine of immunity by reason of absolute privilege with respect to statements made in the course of proceedings before a statutory body, exercising disciplinary powers over a member with respect to unprofessional conduct, applies to statements made in a letter of complaint addressed to the Registrar of the Royal College of Dental Surgeons. It is a document incidental to the initiation of quasi-judicial proceedings, and it matters not that the Complaints Committee has investigatory powers which may or may not lead to a direction that the matter be referred to the Discipline Committee. A complainant in the respondent Eales' position should not be deterred by the fear of proceedings and "the vexation of defending actions". (Lincoln v. Daniels, [1961] 3 All E.R. 740 at 748).

[Editor’s Note: Appeal to B.C.C.A. dismissed, 17 July 2003: [2003] B.C.J. No. 1689 (QL).]

3.8 Relationships With Courts

D. v. D.

N.S. Sup. Ct. [Fam. Div.], S.F.H. No.1201-47308, 18 April 2000, Williams, R. James, J. (unreported) (in part)

The application before the Court is unusual and unfortunate. Catherine D., is the Respondent in an application to vary a Corollary Relief Judgment pursuant to her divorce.

She alleges that her ex-husband's lawyer has improperly obtained her (Catherine D.'s) personal psychiatric, medical and other files. Catherine D. wants her ex-husband's lawyer removed from the file and steps be taken to protect her (Catherine D.'s) personal information. Ms. C. is the lawyer whose actions are put in question. Ms. C. is the lawyer for Dr. Colin Francis D. ….

Matters before the Court concern Dr. Colin Francis D., a medical doctor; Catherine Anne D., his former wife; and their daughter Michelle Sarah D. born July 23rd, 1991. The parties were divorced September 23rd, 1994. The Divorce Petition of Ms. D. indicates that they married September 29th, 1989 and ceased cohabitation May 1st, 1993. Their Corollary Relief Judgment provides in part that:

(a) Michelle Sarah D. shall be in the custody of Ms. D., that Dr. D. would have reasonable and particularized access.

(b) That Dr. D. pay $2000 per month in support to Ms. D., representing $1000 in spousal support and $1000 in child support until further order of the Court.

(c) That Ms. D. acknowledge her obligation to work towards self-sufficiency.

The background includes the following:

. . . .

(7) June 17, 1999: Dr. D signed an application seeking "an order terminating spousal support through an Application to Vary and a child maintenance order pursuant to the Child Support Guidelines."

. . . .

(25) December 7, 1999: Ms. C. [Mr. D.'s lawyer] wrote Ms. Ingraham [Ms. D.'s lawyer] enclosing draft Orders of Production for … :

(a) The file of the QEII Health Services Centre re Catherine D..

(b) The file of the Abbie J. Lane Memorial Hospital re Catherine D..

(c) The file of Dr. Claire O'Donovan re Catherine D..

(d) The file of Dr. Robert Frederickson re Catherine D..

Also enclosed was a copy of a consented to Order of Production re Brian Burgess, Dr. D.'s Accountant. … .

. . . .

(27) January 12, 2000: A telephone conversation was held at Ms. C.'s request with Justice Hamilton [of Nova Scotia Supreme Court [Trial Division]]. It was apparently agreed that Orders of Production would be consented to with respect to the file of Catherine D. from:

(a) QEII Health Services Centre

(b) Abbie J. Lane Memorial Hospital

(c) Dr. Claire O'Donovan

(d) Dr. Robert Frederickson

(e) Dr. Cathy Connell

(f) Dr. Sandra Hodson

(g) Dr. A. Trenholm

(h) Carol Pye.

The Orders of Production were agreed to on specific terms and were issued January 18th, 2000. They were essentially the same and provided [in part]:

. . . .

IT IS ORDERED that the complete medical record files, and chart … with respect to the Respondent, **Catherine** Anne D., born December 22, 1966, except for any information or documents in the files and records with respect to third persons who are not parties to this proceeding or information for which privilege is claimed shall forthwith be reproduced and a true copy shall be provided to the Respondent's solicitor, Shannon L. Ingraham, at Arnold Pizzo McKiggan, Queen's Court, 304-5475 Spring Garden Road, Halifax, Nova Scotia, (902) 432-2050. **The reproduction of the files and records shall be made on or before**

Monday, January 31, 2000.

IT IS FURTHER ORDERED that counsel for the Respondent, Catherine D., shall make copies of the relevant portions of the files and records produced pursuant to this Order and provide these documents to counsel for the Applicant, Colin Francis D., on or before **Friday, February 4, 2000.**

IT IS FURTHER ORDERED that the production of the files and records shall be subject to the following conditions:

> (a) the files and records, or any part of them or the information contained in them, shall only be used for the purposes of the proceedings;
> (b) the files and records, or any part of them or the information contained in them, shall not be reproduced, disseminated, published or made public in any manner whatsoever, except as required by the Civil Procedure Rules or for any use authorized by the court, or by professionals engaged in therapy, counselling, treatment or assessment of the parties subject to the proceeding;
> (c) the files and records, or any part of them or the information contained in them, shall be treated as confidential by the parties, their counsel, by professionals engaged in therapy, counselling, treatment or assessment of the parties subject to the proceeding, and any other employees, associates, servants or agents of those persons…"

. . . .

(31) February 16, 2000: Ms. C. requested by letter to Mr. MacDonell [by now Ms. D.'s lawyer] copies of the complete files produced pursuant to Orders of Production. ….

(32) February 16, 2000: Mr. MacDonell wrote in reply to Ms. C. stating that relevant portions of the files had been disclosed [under the 18 January 2000 Orders of Production]. He said:

> You are free to subpoena whomever you wish for the hearing but I will not do that for you. If you do subpoena any of the persons listed in your letter, I will object to any attempt to elicit irrelevant testimony from them.

. . . .

(33) February 16, 2000: That same day Ms. C. wrote Justice Hamilton stating she sought the entire files. She goes on to say:

> I will be filing my submissions today, Dr. D.'s Affidavit tomorrow, regarding our request that the Court reconsider the issue of custody in Michelle's best interests.

This is the first mention of the custody issue being or coming before the Court.

(34) February 16, 2000: Ms. C. again wrote Mr. MacDonell:

> Please be advised that in light of the sketchy materials we have received (such as Ms. D.'s Affidavit yesterday afternoon), Dr. D. is very concerned for Michelle's well being and will be seeking custody. It is for this reason that we require all of the particulars concerning Ms. D.'s ability to care for Michelle …

(35) February 17, 2000: Ms. C. issued the following Subpoena and Summons for the scheduled February 22. 2000 trial:

1. Sandra Hodson
2. Dr. Cathy Connell
3. Dr. Claire O'Donovan
4. Dr. Arthur Thenholm
5. Dr. Grant Gillis
6. Dr. Carol Pye
7. Queen Elizabeth II Health Services Centre
8. Drug Dependency Services
9. Medical Services Insurance

The subpoenas required each to attend the February 22nd hearing and bring with them the complete file and records of Catherine A. D.. Each was issued by the Deputy Prothonotary and was an instrument of the Court.

(36) February 17, 2000: Mr. MacDonell wrote Justice Hamilton with a copy to Ms. C. stating:

> ... I am concerned that Ms. C. subpoenaing these witnesses might result in having her access to Ms. D.'s complete medical files. As per your Lordship's previous order, Ms. C. is only entitled to have access to those portions of the files relevant to the support issues, and by copy of this letter to Ms. C. I request that she not obtain or review any of the physicians' files directly.

Ms. C. has acknowledged receiving this letter.

(37) February 18, 2000: Ms. C. served the subpoenas on and wrote the QEII Health Services Centre and Drug Dependency Services. The letter read as follows:

> Re: Colin Francis D. v. Catherine Anne D.
> S.H. No. 1201-47308
>
> Further to the above noted matter, you will have been served with a Subpoena and Summons in relation to a hearing commencing February 22, 2000 at 9:30 a.m. We represent the Applicant, Dr. Colin D.. Please note that the subpoena is in relation to your file only, and that you are not required to provide testimony. Specifically, we require your file in relation to the Respondent, Catherine Anne D., born September 22, 1966.
>
> Please contact Sheila Prall Dillman of my office at 460-3426 and we will arrange a courier to pick up a copy of the file. Otherwise you are required to attend with your file at the Supreme Court (Family Division … on February 22, 2000). Please include your invoice with the file and we will ensure prompt payment. We apologize for any inconvenience this request may cause you, and we appreciate your timely cooperation.

Similar letters were sent to the Halifax Regional Police, 911 Services and EHS Ambulance Services, and apparently Dr. Dhar. These letters were not on their face copied to Ms. D.'s counsel.

. . . .

(39) February 21, 2000: Ms. C., Dr. D.'s counsel, received the records on Catherine Anne D. from the Drug Dependency Services and the QEII Health Services Centre.

(40) March 3, 2000: Ms. C.'s brief [on behalf of Dr. D.], Dr. D.'s affidavit, and Sylvia Dubois' affidavit, all of this date (a Friday) are stamped as filed with the Court.

. . . .

(42) March 6, 2000: Ms. C. filed an Interlocutory Notice, returnable March 10, 2000, seeking production from a number of the third parties [including some of them mentioned at above paragraph (35)] of the files of Catherine D. ….

. . . .

(43) March 9, 2000: Mr. MacDonell filed affidavits from Angela Byrne (dated March 7th) and Catherine D. (dated March 8th), as well as a brief [on behalf of Catherine D.], Catherine D.'s affidavit states, in part, the following:

> 3. **THAT** I am advised by Mr. MacDonell, and verily believe, that through the subpoena process and in the absence of any

> Order by this Honourable Court and without my consent, the Applicant and his solicitor have obtained large portions of my private and confidential medical files, specifically files from the QEII Hospital and Nova Scotia Drug Dependency. I have not given these files to anyone but my own solicitor.
>
> 4. **THAT** by virtue of this unauthorized and unlawful disclosure, I am now afraid to seek medical care for my condition, for fear that the Applicant will have access to records of everything I say and do in the course of seeking treatment.
>
> . . . .
>
> 8. **THAT** annexed hereto as exhibit "A" is a letter from the Applicant's solicitor to Mr. MacDonell stating that she was serving subpoenas on certain individuals: ….
>
> I am advised by Mr. MacDonell, and verily believe, that the Applicant's solicitor [Ms. C.] did not advise that she had subpoenaed my complete, confidential medical files from the QEII Hospital and Nova Scotia Drug Dependency. I am further advised by Mr. MacDonell, and verily believe that he learned this for the first time when he read the Applicant's brief delivered to him on March 3, 2000 at approximately 4:45 p.m. [The brief acknowledges that Ms. C. had obtained Catherine D.'s complete confidential medical records from QE II and Nova Scotia Drug Dependency Services.]
>
> . . . .

The brief filed by Mr. MacDonell opposes the disclosure application brought by Ms. C.; ….

The position of Ms. D. has been summarized by her counsel in his brief. Its assertions include:

> (1) That … [a] letter of February … 17 [from Ms. D.'s counsel] expressly stated that his client opposed Ms. C.'s attempts to secure … [Ms. D.'s] complete and entire medical and psychiatric files.
>
> (2) That the first time Ms. D. or her counsel learned that Ms. C. had independently secured Ms. D.'s complete files from the QEII Hospital and Nova Scotia Dependency was in Ms. C.'s brief [on behalf of Dr. D.] on March 3, 2000.
>
> (3) THAT Ms. D. has a right to have her medical and psychiatric records kept confidential, except by an operation of law or her consent. ….

(4) That the subpoena served by Ms. C. and returnable February 22, 2000 on the QEII and Nova Scotia Drug Dependency read:

> You are also required to bring with you and to produce at the hearing, the following documents or things: the complete file and records of the Nova Scotia Drug Dependency Services (QEII et cetera) in relation to the respondent Catherine Anne D. born September 22nd, 1966.

(5) That the purpose of a subpoena is to obtain documents at a trial. R. 31.24 (1) provides:

> When a party desires to call any person as a witness at a trial, he may serve him with a subpoena in form 31.24(a) requiring him to attend at the time and place stated therein, and if required, produce documents at that trial.

(6) That Ms. C.'s letter of February 18, 2000 to recipients of the subpoenas misrepresents their effect and her authority by stating:

> Please note that the subpoena is in relation to your file only, and you are not required to provide testimony. Specifically, we require your file in relation to the Respondent, Catherine Anne D., born September 22, 1966.
>
> Please contact Sheila Prall Dillman of my office at 460-3426 and we will arrange a courier to pick up a copy of the file. Otherwise you are required to attend with your file at the Supreme Court (Family Division) 3380 Devonshire Avenue, Halifax, Nova Scotia on February 22, 2000.

. . . .

(8) That the proper way to secure or attempt to secure these records was to issue, serve notice, and seek from the Court, an Order of Production pursuant to Civil Procedure Rule 20.06 which provides:

> (1) The court may order the production, for inspection by any party or the court, of any document relating to any matter in question in a proceeding at such time, place and manner as it thinks just. [E.24/11/12]
>
> (2) Where a document is in the possession, custody or control of a person who is not a party, and the production of the document might be compelled at a trial or hearing, the court may, on

> notice to the person and any opposing party, order the production and inspection thereof or the preparation of a certified copy that may be used in lieu of the original.
>
> (3) An order for the production of any document for inspection by a party or the court shall not be made unless the court is of the opinion that the order is necessary for disposing fairly of the proceeding or for saving costs and is not injurious to the public interest. [E.24/13/15]

Ms. C. has expressly reserved her right to do so in the consent Orders of Production agreed to January 12th and issued January 18th.

> (9) That Ms. C.'s actions deprived Ms. D. of the opportunity on the disclosure issue [to advocate that right] ….

. . . .

Conclusion

Private records in the possession of third parties should not be disclosed without first being subjected to a balancing of the completing constitutional rights of privacy and full answer and defence (R v. O'Conner (1993), 4 SCR 411 at page 419; or, I might add, the consent of the person in question.) [**Editor's Note:** Justice Williams here considers *A.M. v. Ryan* (1997), 1 S.C.R. 157, at pp. 170-171, then continues.]

. . . .

There are an increasing number of family law cases where the Court has considered personal psychiatric and other records and issues such as whether the disclosure should be made; whether there has been a waiver of privilege or confidentiality, the degree (partial or complete) of disclosure that should take place, and the conditions that might be placed on disclosure should it be ordered. ….

Ms. C.'s actions:

(a) misrepresented the effect of the subpoena; and

(b) deprived Ms. D. of the opportunity to have a Court make the above determinations.

Ms. C.'s rationale for her actions collectively amount to the suggestion that it was difficult to get the material; it was important; it was relevant. This sounds very much like "the end justifies the means." In the observation of legal process, where there is a potential violation of privacy rights, this seldom, if ever, can be the case.

I can come to no conclusion but that Ms. C., on behalf of Mr. D., has improperly secured private records of Ms. D..

. . . .

Regretfully, I can think of no way, but for the removal of counsel to begin to remedy the situation before me, and to express the Court's disapproval. I believe a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires this. Process is one of the principal sources of integrity that the justice system has.

Lawyers cannot unilaterally make their own rules or alter the effect of instruments of the court. I will order that Deborah C. and her firm be removed as counsel of record for Dr. D..

. . . .

Ms. D was affronted by actions that violated proper legal process and … [results in her medical records being] improperly made available to her ex-husband and her ex-husband's counsel (her most private and intimate professional consultations). She has effectively requested that the justice system provide some accountability for the breach of its process. I view the order I have made to be extraordinarily unusual; I believe it to be severe; I believe it expresses the Court's disapproval of the manner in which Ms. D.'s records were secured. While an award of costs is appropriate, I believe the severity of the order I have made mitigates against an order of punitive costs as requested by counsel for Ms. D.. There shall be an order for costs payable to Ms. D. in the amount of $1,500, on or before May 1, 2000.

National Mobility Agreement
(Editor's Note)

The National Mobility Agreement, the result on an initiative of the Federation of Law Societies of Canada, is intended to facilitate temporary and permanent mobility of lawyers between Canadian jurisdictions.

[The Federation's address is: 480-455, boulevard Saint-Laurent Montreal, QC, H2Y 2Y7; telephone 1-514-875-6350; fax 1-514-875-6155; e-mail; info@flsc.ca .]

The Agreement took effect on 01 July 2003 in 7 of the 13 Canadian jurisdictions.

Among the other six Canadian jurisdictions, currently:

¶ Quebec has not fully embraced the Agreement. For example, participation by the Chambres des Notaires remains problematic, because of the nature of the work of their members. Discussions dedicated to their eventual inclusion under the Agreement are continuing. (See: Agreement paras. 37 to 40.)

¶ New Brunswick, Prince Edward Island and the three Territories have, to date, excluded themselves.

Canadian jurisdictions not participating in the Agreement continue to be governed by the Interjurisdictional Practice Protocol, 1994. Under that Protocol, members of lawyer-governing bodies of non-participating Canadian jurisdictions are limited to practicing, in participating jurisdictions, in a maximum 10 matters involving a maximum 20 days in each 12-month period. The Protocol likewise applies, of course, to members of law societies of participating jurisdictions when practicing in non-participating jurisdictions.

In participating Canadian jurisdictions, temporary mobility under the Agreement operates as follows.

Under Agreement para. 7, the host jurisdiction – i.e., the governing body of a participant jurisdiction – will allow a lawyer from another Agreement-participing jurisdiction "to provide legal services in the host jurisdiction or with respect to the law of the host jurisdiction on a temporary basis, without a mobility permit or notice to the host governing body, for a total of not more than 100 days in a calendar year, …" . This is subject to Agreement paras. 10 and 16.

To qualify for mobility, a putative mobile lawyer from an Agreement-participating jurisdiction must meet specified criteria under Agreement para. 10. These include, for example, entitlement to practise in the lawyer's home jurisdiction; absence of conditions of or restrictions on the lawyer's practice or membership in any jurisdiction; and absence of a disciplinary record in any jurisdiction.

Further, the putative mobile lawyer, under Agreement para. 16, must not have established an "economic nexus" with the host jurisdiction. Indicators of an "economic nexus" include provision of legal services in a host jurisdiction for more than 100 days in a calendar year; or becoming a resident of the host jurisdiction (a "resident" having the meaning provided for under the *Income Tax Act*).

Liability insurance and defalcation compensation funds are provided for under Agreement paras. 19 to 23.

Liability insurance: Each participating jurisdiction must ensure that ongoing liability insurance is in place which "(a) extends to its members for the provision of legal services on a temporary basis in or with respect to the law of" a host jurisdiction and "(b) provides occurrence or claim limits of $1,000,000 and $2,000,000 annual per member aggregate". (Agreement para. 19.)

Defalcation compensation funds: Participating jurisdictions "will apply or continue to apply the provisions of the Interjurisdictional Practice Protocol [, 1994] respecting defalcation compensation" under Protocol para. 10 and Appendix 6. (Agreement para. 22.)

In participating Canadian jurisdictions, permanent mobility under the Agreement operates as follows.

A participating jurisdiction "will require no further qualifications" for a member of another participant, to be "eligible for membership" than "(a) entitlement to practise law in the lawyer's home jurisdiction; (b) good character and fitness to be a lawyer, on the standard ordinarily applied to applicants for membership; and (c) any other qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction." (Agreement para. 32.)

However, a participating jurisdiction "will not require the lawyer to pass a transfer examination or other examination, but may require the lawyer to" (i) disclose or consent to disclosure of records, including certificates of standing in all jurisdictions where a lawyer has been a member; criminal and disciplinary records in any jurisdiction; and regulatory files about the lawyer; and (ii) certify that he or she reviewed all materials reasonably required by the host governing body. (Agreement para. 33.)

Scheuneman v. Canada (Attorney General)

[2003] F.C.J. No. 1736 (QL) (Fed. C.A.),
Richard C.J., Evans and Pelletier JJ.A., para 5

¶ 5 The Court [a superior court of record] may well have an inherent discretion, exercisable in unusual circumstances, to permit a person other than a lawyer to represent a litigant when the interests of justice so require: Erdmann v. Canada, [2001] F.C.J. No. 834, 2001 FCA 138 at para. 11. However, if it exists, this residual discretion can only properly be exercised in the context of specific facts, including the suitability of the person who has agreed, at Mr. Scheuneman's request, to represent him.

[**Editor's Note:** Application for leave to appeal to S.C.C. (File No. 30088) dismissed, 19 February 2004, with costs.]

Children's Aid Society of Haldimand-Norfolk v. S.A.M.R.

[2003] O.J. No. 2635 (QL) (Ont. Ct. J.), Thibideau J.,
paras. 1-3; 8-9; 19; 22-24; 28

¶ 1 Mr. Allison Gowling has brought a motion on notice dated 4 May 2003 to request the court to make an order that he be authorized to act as agent for the respondent parents. ….

¶ 2 … [He] requests that he represent the parents as a person who is not a lawyer.

¶ 3 However, in his affidavit (a personal affidavit of a person appearing before the court), he wishes status as a person working under supervision of a law firm, namely Marshall, Loucks and Associates, and in particular Mr. Andrew G. Loucks of that firm.

. . . .

¶ 8 It is agreed that the retainer is a legal aid certificate issued to Andrew G. Loucks of the Marshall, Loucks firm by Legal Aid Ontario to act on behalf of the father in this proceeding.

¶ 9 The reason given for the requested standing before the court is the confidence that each parent has in the integrity and ability of Mr. Gowling as a result of previous representation of them by him as an agent before the court related to a non-family law matter. Mr. Gowling is a paralegal and not related or known to the parents except by previous professional involvement.

. . . .

¶ 19 … in Stone v. Stone (No. 2) [(2000), 5 R.F.L. (5th) 151 (Ont. Ct. J.)], … Justice Steinberg … observed that there is some lack of clarity regarding non-lawyer representation. The ability for an agent to appear is clearer and wider in criminal proceedings because of specific statutory authority in the Criminal Code, R.S.C. 1985, c. C.46.

. . . .

¶ 22 …, because of the lack of special circumstances, the motion was denied. ….

¶ 23 In Children's Aid Society of Niagara Region v. D.P. and S.B. (No. 2) …, …. [2002] O.J. No. 4993, … (Ont. Fam. Ct.), ….

¶24 Justice J.W. Quinn found that, if the facts were such that the issue was representation by a paid paralegal, the motion would have been denied on the basis of the reasoning in the Stone v. Stone cases. He accepted and endorsed as long-standing the proposition that, absent a statutory prohibition, the court has a discretion as to who may act as an advocate before it. However, that discretion in Ontario was fettered by the Law Society Act and the Solicitors Act. The exception was a non-paid friend or relative who merely assisted the litigant in furthering the litigant's own case where such assistance would overcome some inability on the part of the litigant.

. . . .

¶ 28 …. The need for protection of the public and the current state of statutory law requires that the motion be denied and it is so denied. To hold otherwise would permit litigant representation by an unqualified person putting the litigant at risk. It would permit the legal aid certificate issued to a qualified practitioner to be used by an unqualified one, creating the perception for the litigant that the case is in qualified hands, ensuring proper representation before the court, which it is not.

Leonardis v. Leonardis

[2003] A.J. No. 848 (QL); 43 R.F.L. (5th) 144 (Alta. Q.B.), Slatter J.

¶ 1 …. issues arose over the contents of various affidavits, and I indicated I would give written reasons on one particular point.

¶ 2 The affidavits filed by both parties are to some extent unsatisfactory. They are argumentative and in some respects irrelevant. They deal with issues such as the reasons for the breakup of the marriage and matrimonial fault, which are unlikely to be relevant at trial and were certainly not relevant to this application. The affidavits are argumentative ("The Plaintiff has purposely minimized . . ."; "The Plaintiff has gone beyond responding to my affidavit . . ."; "If so, why did she . . .?"; "If there is a failure to disclose, it is . . . not me."; "On the other hand . . ."; "In my view it is unreasonable to require me to pay support based on . . .") and resort to conclusory and flamboyant language. ("I am shocked . . ."; "I am mystified . . ."; "It is unreasonable . . ."; "I am very worried . . ."; "It would be unfair to assume . . ."). It was said they violated the three affidavit rule in Family Law Practice No. #3. These issues were adequately dealt with in Chambers. The purpose of these Reasons is to discuss a particular problem: the tendency of family law litigants to include without prejudice materials in their affidavits, and of their counsel to mention without prejudice offers in court.

¶ 3 The rule is quite straightforward: communications in furtherance of settlement are privileged, and they should not be placed before the Court. If the communications amount to formal offers of judgment, then Rule 173 makes it clear that the offer is not to be disclosed to the Court until it becomes time to address the issue of costs. But the common law privilege covers all communications in furtherance of settlement, and no such communications should be disclosed to the Court. There are two main exceptions:

> (a) Offers may be disclosed when costs are discussed, and
> (b) Without prejudice communications may be used to prove the fact of and contents of a contract of settlement if a settlement is reached: Comrie v. Comrie (2001), 17 R.F.L. (5th) 271, 203 Sask. R. 164 (C.A.).

¶ 4 In Pinder v. Sproule, [2003] A.J. No. 32, 2003 ABQB 33, I summarized the law respecting privilege as follows:

> As I noted in Hansaraj v. Ao (2002), 4 Alta. L.R. (4th) 124, [2002] 8 W.W.R. 725, there are three types of privilege encountered in everyday litigation. The first privilege is that which attaches to communications relating to legal advice between solicitor and client. This privilege is recognized by the law because of the importance of allowing full and frank communication between a solicitor and his or her client. For the privilege to attach, there need only be communication

> between the solicitor and client for the purpose of seeking or giving legal advice: R. v. McClure, [2001] 1 S.C.R. 445, 195 D.L.R. (4th) 513, 151 C.C.C. (3d) 321 at paras. 31-37. It is not necessary that any litigation be in existence or contemplated, or that the correspondence be in furtherance of litigation. The privilege in question belongs to the client, and can only be waived by the client.
>
> The second and separate common type of privilege is the so-called litigation privilege. It attaches to documents that have been created for the dominant purpose of furthering litigation: Opron Construction Co. v. Alberta (1989), 71 Alta. L.R. (2d) 28 (C.A.). In order for this privilege to attach, it is necessary that there be litigation existing or contemplated. It is not a requirement of this type of privilege that solicitor-client communication be involved. The privilege is again the privilege of the client, and must be waived by the client. This type of privilege, like the privilege over solicitor and client communications, can be waived expressly or by knowingly giving a copy of the privileged document to one's opponents, or by attempting to rely on the privileged document to obtain some relief from the Court. This is commonly done, for example, when expert reports are used in Court.
>
> The third type of privilege attaches to communications in furtherance of settlement. The law encourages settlement, and accordingly permits the parties to exchange correspondence with a view to resolving their disputes: Costello v. Calgary (City) (1997), 53 Alta. L.R. (3d) 15, 152 D.L.R. (4th) 453, [1998] 1 W.W.R. 222, 209 A.R. 1 (C.A.). This correspondence may not be used in evidence if the settlement efforts fail. On the other hand, if an agreement of settlement is reached, the correspondence can be used to prove the settlement contract. The privilege that attaches to correspondence in furtherance of settlement belongs to both parties, and it cannot be unilaterally waived by either one of them.

This decision involves the third type of privilege, namely that relating to communications in furtherance of settlement.

¶ 5 There are two important things to note about the settlement privilege. The first is that the privilege belongs to both parties, and it cannot be unilaterally waived by either one. Therefore, no party can unilaterally purport to waive privilege and attach such privileged materials to an affidavit or otherwise mention them in court.

¶ 6 The second point is that it is the contents of the communication that determine if it is privileged, not the way it is labeled. If the contents of a communication are truly in furtherance of settlement and therefore privileged, it makes no difference whether the communication is marked "Without Prejudice" or not. A communication that is not in substance privileged does not become so just because one party places "Without Prejudice" on it. Likewise, the absence of the words "Without Prejudice" means nothing if the communication is truly privileged. See Phillips v. Rogers (1988), 62 Alta. L.R. (2d) 140, 92 A.R. 253, 29 C.P.C. (2d) 193; William Allan Real Estate Co. v. Robichaud (1987), 37 B.L.R. 286, 17 C.P.C. (2d) 138 (Ont. H.C.); Underwood v. Cox (1912), 21 O.W.R. 757, 26 O.L.R. 303 at 310 (Div. Ct.).

¶ 7 Examples of the privileged communications improperly mentioned in the affidavits on this file are as follows. In her affidavit of April 23, 2003 the Plaintiff deposes:

> 15. The Respondent has not made me a proposal for settlement through his legal counsel but has sent three realtors or appraisers to look at the matrimonial home. The Respondent has told me that the home should be sold and the proceeds divided equally. He told me that I could keep my small pension at work, my R.R.S.P.'s and my Jeep, and he has told me that this is all he feels I am entitled to.

These communications involve either irrelevant "demands" which should not be in the affidavits (the issues and "demands" being set out in the pleadings), or they are without prejudice communications in furtherance of settlement and therefore privileged. It does not matter that the without prejudice communications are directly between the parties, as opposed to between their counsel: Welch v. Welch (1994), 27 C.P.C. (3d) 190 (Ont. H.C.). It does not matter that they were not expressly stated to be without prejudice. This material should not be in the affidavit. Even if the privilege was waived by both parties, this material is not evidence of any fact in issue, and is not relevant. This sort of material seems to be placed in affidavits to show that one party is being unreasonable, and therefore does not deserve the sympathy of the court. Who is being reasonable can only be decided after trial, and even then it is only relevant to costs.

¶ 8 A second example of privileged material on this record is in the form of a letter from the Defendant's counsel to the Plaintiff's counsel. This letter is an exhibit to the Defendant's affidavit of June 8, 2003. The letter is specifically marked "With Prejudice". However, the third paragraph of the letter contains ten subparagraphs that set out a comprehensive proposal for the settlement of this application. The subparagraphs make a proposal for child support, spousal support, the matrimonial home, etc. The letter then follows with the sentence:

> This letter is written with prejudice and will be the basis of our next representation to the court.

The fact that this letter is marked "With Prejudice" does not change its character as a communication in furtherance of settlement. The letter sets out a proposal, and is part of a series of settlement communications, the whole of which is privileged.

¶ 9 As I have indicated, the labeling of a communication does not change its character. The letter of June 8, 2003 is privileged and putting "With Privilege" on it does not change that. As I have previously indicated, this type of privilege can only be waived by both parties. A litigant cannot purport to unilaterally negate or waive the privilege by placing "With Prejudice" on the letter.

¶ 10 Even if the privilege was somehow to be removed from this letter, it is not relevant. It does not outline any facts. It is argumentative, and merely puts forward the position of one party. At best it is an editorialized prayer for the relief that one of the parties thinks the Court should grant. This is the proper subject either of argument by counsel, or of the prayer for relief in the pleadings, and it should not be contained in an affidavit. In either event, when the matter is argued in Court, it is improper for either party to say "We agreed to settle on this basis before we even got here". That is only relevant to costs, after the motion is decided.

¶ 11 There are occasions when it is appropriate to place "With Prejudice" on a letter. Examples are where the author of the letter seeks to fix legal rights, as where the letter demands payment of a sum, or exercises an option or election, or gives notice of a breach of a contract. However, placing "With Prejudice" on a settlement offer is inappropriate and ineffective.

¶ 12 It should be emphasized that in most cases even if the privilege over settlement communications can be removed somehow, the underlying communications are still largely irrelevant: see Pinder v. Sproule, supra. In most cases they amount to mere assertions by one party of the merits or fairness of that party's position, and such opinions are irrelevant. To the extent that offers of communication contain admissions, those admissions are always conditional upon other portions of the overall settlement proposal, and such conditional admissions are of no relevance.

Hutchinson v. Hutchinson

(2002), 25 R.F.L. (5th) 289 (Man. C.A.),
Scott C.J.M. (for the Court), and Huband and Kroft JJ.A.,
paras. 3-5

¶ 3 During the course of the litigation an issue had arisen whether or not an exchange of correspondence between counsel had the effect of constituting a binding agreement that the wife would not receive further support upon achieving the age of 65. Before the motions court judge counsel for the wife indicated that he intended to call the husband's lawyer, Mr. Ernst, on this issue. Before this court, it was argued that it was essential that this evidence be heard, both to explain the circumstances surrounding the exchange of correspondence, as well as to impugn the credibility of the husband.

¶ 4 We know of no basis upon which the opposing party could compel counsel for the husband to testify in such circumstances, nor when challenged was counsel for the wife able to provide any authority to support his argument. The issue as to the credibility of the husband with respect to the alleged agreement, in the event such evidence is deemed admissible at trial, can be dealt with in the usual way. In the highly unlikely event an issue should arise which might require Mr. Ernst to testify, then the matter can be dealt with at that time by the trial judge.

¶ 5 Resolution of the issues raised in these proceedings has now been delayed for some 13 months while this evidentiary question has been litigated. It is high time that the parties now proceed with diligence to resolve the merits of the dispute.

R. v. Felderholf

[2003] O.J. No. 4819 (QL) (Ont. C.A.),

Carthy, Doherty, and Rosenberg (for the Court), JJ.A.
paras. 78; 80-85

…Civility

¶ 78 In his reasons, the application judge has set out many examples of Mr. Groia's conduct in the trial. The application judge described this conduct in some of the following ways:

> * "unrestrained invective" (at para. 34).
> * "excessive rhetoric" (at para. 34).
> * "The tone of Mr. Groia's submissions ... descended from legal argument to irony to sarcasm to petulant invective" (at para. 64).
> * "Mr. Groia's theatrical excess reached new heights on day 58" (at para. 89).
> * "Mr. Groia's conduct on this occasion more resembles guerilla theatre than advocacy in court" (at para. 91).
> * "unrestrained repetition of ... sarcastic attacks" (at para. 271).
> * "Mr. Groia's defence consists largely of attacks on the prosecution, including attacks on the prosecutor's integrity" (at para. 272).

. . . .

¶ 80 Mr. Groia's rhetoric was improper. The application judge so found and I agree. But, did the trial judge's response deprive him of jurisdiction to proceed with the trial? I agree with the test proposed by the application judge at para. 273 of his reasons.

¶ 81 Even if counsel's litigation style, as alleged by the prosecution, is abusive and sometimes personally nasty, the judge does not lose jurisdiction unless it prevents a fair trial. The trial judge, who takes the daily temperature of the trial in a case where both opposing counsel have a low threshold of moral outrage, has a wide discretion to decide whether the wounded feelings of one side prevent it from presenting its case adequately…. .

¶ 82 I also agree with the application judge's ultimate conclusion that the trial judge did not lose jurisdiction in this case:

> [279] The fact that a counsel may be abrasive does not deprive the court of jurisdiction. It may be that some judges would put an early lid on Mr. Groia's profusion of self righteous moral outrage and insist that he make his points without excessive rhetoric. A less patient judge or a more interventionist judge might have done more to curb the nasty edge in Mr. Groia's rhetoric, and also more to discourage Mr. Naster from challenging adverse rulings. But it is a matter of judgment in every case whether it is best to intervene, and risk further inflaming a counsel whose zeal exceeds his civility or his judgment, or simply to let the storm pass and then move ahead. It is not the function of the trial judge to intervene constantly and curb every rhetorical excess. Many judges take the view that it is more productive in the long run to give such counsel as much rope as

> they want, out of concern that constant judicial reaction will simply provoke more rhetoric and further delay. As noted above and below Mr. Justice Hryn has taken some steps to discourage Mr. Groia's rhetorical excess, just as he has taken some steps to discourage Mr. Naster from challenging adverse rulings [footnote omitted].
>
> ...
>
> [284] It is unfortunate that Mr. Groia took every opportunity to needle Mr. Naster with sarcastic allegations of professional misconduct. But prosecutors need thick skins and need not be easily baited. It is open to a judge, faced with cycles of provocation and reaction, to intervene strongly. It is also open to choose the path of complete non-intervention on the basis that judicial intrusion might simply excite further provocation. It is also open to take the middle ground adopted by Mr. Justice Hryn reflected in the above passages.
>
> ...
>
> [286] It cannot be said that Mr. Justice Hryn's patient refusal to descend into the arena or to depart from his established position of judicial neutrality above the fray represents an error of law, let alone a jurisdictional error.

¶ 83 I agree with the conclusion of the very experienced application judge that the prosecution was not prevented from having a fair trial and, just as importantly, I accept his understanding of the role of a trial judge. I would just add these comments.

¶ 84 It is important that everyone, including the courts, encourage civility both inside and outside the courtroom. Professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client and is as important in the criminal and quasi-criminal context as in the civil context. Morden J.A. of this court expressed the matter this way in a 2001 address to the Call to the Bar: "Civility is not just a nice, desirable adornment to accompany the way lawyers conduct themselves, but, is a duty which is integral to the way lawyers do their work." Counsel are required to conduct themselves professionally as part of their duty to the court, to the administration of justice generally and to their clients. As Kara Anne Nagorney said in her article, "A Noble Profession? A Discussion of Civility Among Lawyers" (1999), 12 Georgetown Journal of Legal Ethics 815, at 816-17, "Civility within the legal system not only holds the profession together, but also contributes to the continuation of a just society. ... Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice." Unfair and demeaning comments by counsel in the course of submissions to a court do not simply impact on the other counsel. Such conduct diminishes the public's respect for the court and for the administration of criminal justice and thereby undermines the legitimacy of the results of the adjudication.

¶ 85 Nothing said here is inconsistent with or would in any way impede counsel from the fierce and fearless pursuit of a client's interests in a criminal or quasi-criminal case. Zealous advocacy on behalf of a client, to advance the client's case and protect that client's rights, is a cornerstone of our adversary system. It is "a mark of professionalism for a lawyer to firmly protect and pursue the

legitimate interests of his or her client". […. Nagorney, Kara Anne, "A Noble Profession? A Discussion of Civility Among Lawyers" (1999), 12 Georgetown Journal of Legal Ethics 815, at p. 817.] As G. Arthur Martin said, "The existence of a strong, vigorous and responsible Defence Bar is essential in a free Society" [emphasis added]. […. "The Practice of Criminal Law as a Career" reprinted in [2002] Law Society of Upper Canada Gazette at p. 93.] Counsel have a responsibility to the administration of justice, and as officers of the court, they have a duty to act with integrity, a duty that requires civil conduct. […. See Chief Justice of Ontario Advisory Committee on Professionalism, "Defining Professionalism".]

"Justices Call on Bench's Bard to Limit His Lyricism"

Liptak, Adam, *The New York Times*, 15 December 2002

May a jurist rule in verse, if he's dignified and terse?

Or are some texts meant to be wholly free of poetry?

A dissent last month by a justice of the Pennsylvania Supreme Court, in seven quatrains and one footnote, drew a sharp response from two colleagues.

Chief Justice Stephen A. Zappala wrote that "an opinion that expresses itself in rhyme reflects poorly on the Supreme Court of Pennsylvania."

Justice Ralph J. Cappy said "every jurist has the right to express him or herself in a manner the jurist deems appropriate," but expressed concern about "the perception that litigants and the public at large might form when an opinion of the court is reduced to rhyme."

In an interview, Justice J. Michael Eakin, who wrote the dissent, declined to talk about last month's case. But he was cheerful and expansive on the topic of poetic justice generally.

"You have an obligation as a judge to be right," he said, "but you have no obligation to be dull."

The case that gave rise to his latest poem turned on whether a lie about an engagement ring should void a prenuptial agreement.

Louis Porreco had told his teenage wife-to-be that the ring was worth $21,000, about half of her net worth at the time of the marriage.

Mr. Porreco, who was 30 years older than his fiancee, was worth about $3 million. The agreement entitled Ms. Porreco to a lump sum settlement of $3,500 per year if the marriage failed.

After they separated, she discovered that the stone in the engagement ring was fake.

The majority ruled that Mr. Porreco's misstatement did not amount to fraud because she should not have trusted her fiance. Justice Eakin dissented, writing:

A groom must expect
matrimonial pandemonium
When his spouse finds he's given
her cubic zirconium.
Given their history and
Pygmalion relation
I find her reliance was with
justification.

Cases involving prenuptial agreements seem to bring out the poet in Justice Eakin. In 1999, as a judge on the Pennsylvania Superior Court, he rejected a husband's effort to undo one.

“A deal is a deal, if fairly undertaken," he wrote, "and we find disclosure was fair and unshaken."

He has also ruled in rhyme in cases involving animals and car repair companies.

"I would never do it in a serious criminal case," Justice Eakin said.

"The subject of the case has to call for a little grin here or there."

Other judges have tried their hand at precedential rhyme, not always with happy consequences.

In 1975, the Kansas Supreme Court censured a judge who sentenced a prostitute to probation in verse.

"On January 30th, 1974," he had written, "this lass agreed to work as a whore."

The supreme court objected, it said, not to the poetry but to its content, which had ridiculed the defendant. "Judges ought to be more learned than witty," the justices wrote.

Other judges have escaped judicial sanction but may be glad there is no appeal to panels of literary critics.

A court of appeals in Michigan, in a case about an encounter between a car and an oak tree:
We thought that we would never see
A suit to compensate a tree.

A bankruptcy judge in Florida:

Upon consideration of Section
707(b), loud I cried

The court's sua sponte motion to dismiss under Section 707(b) is denied.

Stephen Gillers, who teaches legal ethics and law and literature at New York University, said there is a place for judicial verse.

"A couplet here or there is fine, and judges should strive to use poetic devices in opinions to make them memorable and readable," Professor Gillers said. "But a judge's opinions often cause pain. Rhyming diminishes the solemnity of the event and its seriousness to the litigants."

Justice Eakin said the people affected by his decisions were generally amused rather than insulted. He recalled the response of one lawyer on the losing end of a rhymed decision.

"He filed a motion for rehearing in seven limericks," the judge said. "He told me it was easy to rhyme 'Eakin' and 'mistaken.' "

3.9 Relationships With State

Lavallee, Rackel & Heintz v. Canada (Attorney General)

[2002] S.C.J. No. 61 (QL) (S.C.C.),
McLachlin C.J.C. and Iacobucci, Major, Bastarache, Binnie and Arbour (for the majority) JJ.; L'Heureux-Dube, Gonthier and LeBel (for the minority, dissenting in part)
(Headnote of majority decision)

Since s. 8 of the *Charter* only protects against unreasonable searches and seizures, the issue is whether the procedure set out by s. 488.1 results in a reasonable search and seizure of potentially privileged documents in the possession of a lawyer. Section 488.1 permits solicitor-client privilege to fall through the interstices of its inadequate procedure. This possible automatic loss of solicitor-client privilege through the normal operation of the law is not reasonable.

Where the interest at stake is solicitor-client privilege, which is a principle of fundamental justice and a civil right of supreme importance in Canadian law, the usual exercise of balancing privacy interests and the exigencies of law enforcement is not particularly helpful because the privilege is a positive feature of law enforcement, not an impediment to it. Given that solicitor-client privilege must remain as close to absolute as possible to retain its relevance, the Court must adopt stringent norms to ensure its protection. The procedure set out in s. 488.1 must minimally impair solicitor-client privilege to pass *Charter* scrutiny.

Section 488.1 more than minimally impairs solicitor-client privilege and amounts to an unreasonable search and seizure contrary to s. 8 of the *Charter*. Its constitutional failings can result from: (1) the absence or inaction of the solicitor; (2) the naming of clients; (3) the fact that notice is not given to the client; (4) its strict time limits; (5) an absence of discretion on the part of the judge determining the existence of solicitor-client privilege; and (6) the possibility of the Attorney General's access prior to that judicial determination. The one principal, fatal feature shared by them is the potential breach of solicitor-client privilege without the client's knowledge, let alone consent. The fact that competent counsel will attempt to ascertain the whereabouts of their clients and will likely assert blanket privilege at the outset does not obviate the state's duty to ensure sufficient protection of the rights of the privilege holder. Privilege does not come into being by an assertion of a privilege claim; it exists independently. Section 488.1 provides that reasonable opportunity to ensure that the privileged information remains so must be given to the privilege keeper, but not to the privilege holder. It cannot be assumed that the lawyer is the *alter ego* of the client. Section 488.1(8), which provides that no examination may be carried out without affording a reasonable opportunity for a claim of solicitor-client privilege to be made, cannot raise this entire procedural scheme to a standard of constitutional reasonableness given this failure to address directly the client's entitlement to ensure the adequate protection of his or her rights.

The absence of judicial discretion in the determination of the validity of an asserted claim of privilege is the second fatal flaw in the statutory scheme. A residual discretion cannot be read in s. 488.1(6), which confers an entitlement on the Crown to access the seized documents if an application has not been made, or has not been proceeded with, within the time limits imposed by subss. (2) and (3). This mandatory disclosure of potentially privileged information, in a case where the court has been alerted to the possibility of privilege by the fact that the documents were sealed at the point of search, cannot be said to impair the privilege minimally. Reasonableness dictates that courts must retain discretion to decide whether materials seized in a lawyer's office should remain inaccessible to the State as privileged information if and when, in the circumstances, it is in the interest of justice to do so.

The provision in s. 488.1(4)(*b*) which permits the Attorney General to inspect the seized documents where the applications judge is of the opinion that it would materially assist him or her in deciding whether the document is privileged is also an unjustifiable impairment of the privilege. Granting the Crown access to confidential solicitor-client communications would diminish the public's faith in the administration of justice and create a potential for abuse. This provision is unduly intrusive upon the privilege and of limited usefulness in determining its existence.

Section 488.1 cannot be infused with reasonableness, in a constitutional sense, on the basis of an assumption that the prosecution will behave honourably. Nor can it be saved by s. 1: while effective police investigations are a pressing and substantive concern, s. 488.1 does not establish proportional means to achieve that objective. The provision should be struck down. The process for seizing documents in the possession of a lawyer is a delicate matter which presents some procedural options that are best left to Parliament.

The following guidelines reflect present-day constitutional imperatives for the protection of solicitor-client privilege and apply to law office searches until new legislation is in place. (1) A search warrant should not issue for documents known to be protected by solicitor-client privilege. (2) As well, they should not issue if other reasonable alternatives to the law office search exist. (3) The issuing justice must be rigorously demanding with respect to solicitor-client privilege. (4) Unless otherwise authorized by the warrant, all documents in a lawyer's possession must be sealed before being examined or seized. (5) Every effort must be made to contact the lawyer and the client when the search warrant is executed and, where the lawyer or the client cannot be contacted, a representative of the Bar should oversee the sealing and seizure of documents. (6) The investigating officer executing the warrant should report the efforts made to contact all potential privilege holders to the justice of the peace. These privilege holders should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided. (7) If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so. (8) The Attorney General may make submissions on the issue of privilege but should not be permitted to inspect the documents beforehand, and the prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged. (9) Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation. (10) Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.

Maranda v. Richer

[2003] S.C.J. No. 69 (QL) (S.C.C.),
McLachlin C.J.C. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel (for the majority) JJ.; and Deschamps J. (separate reasons concurring in result)

(Headnote of majority decision)

[Facts:] Suspecting that C was involved in money laundering and drug trafficking, the RCMP obtained authorization to search the appellant's law office for any documents relating to fees and disbursements billed to C or relating to the ownership of an automobile that C had allegedly transferred to his lawyer in payment for professional services. No advance notice of the search was given to the appellant law office but a representative of the Syndic of the Barreau du Québec went with the police when they conducted the search, which lasted thirteen and a half hours. The appellant brought an application for *certiorari* in the Superior Court to have the warrant quashed and the search declared to be unlawful and unreasonable. An application was also filed under s. 488.1 of the *Criminal Code*. Although the Crown conceded that the search was void, the trial judge decided to continue hearing the case given the importance of the issues. He allowed the application for *certiorari* and quashed the search warrant and the procedures that had been carried out under it, declaring them to have been unlawful and unreasonable. The Court of Appeal reversed that decision. In the time since the Court of Appeal's judgment, this Court has declared s. 488.1 to be unconstitutional.

[**Decision:]** The appeal should be allowed.

[Reasons:]

[1] The search and seizure were unreasonable and abusive within the meaning of s. 8 of the *Canadian Charter of Rights and Freedoms* because of the breach of the duty to minimize and the failure to contact the lawyer. The duty to minimize requires, first, that a search not be authorized unless there is no other reasonable solution and, second, that the authorization be given in terms that, to the extent possible, limit the impairment of solicitor-client privilege. The search must be executed in the same way. In this case the application for authorization did not comply with the duty to minimize. It was neither alleged nor established that there was no other reasonable alternative and that the information sought could not be obtained using other sources. The trial judge found that the evidence showed that the Crown could have obtained at least half of the information sought from different sources. A search and seizure procedure for the purpose of acquiring information half of which could have been obtained in another manner would not be tolerable. Nor does executing the search during business hours and making off with a large quantity of documents comply with the principle of minimization, given the nature of the information sought. Finally, no notice was given to the appellant. There is [page195] nothing in the application for authorization to indicate why such contact should not or could not have taken place.

[2] An application for information concerning defence counsel's fees in connection with a criminal prosecution involves the fundamental values of criminal law and procedure, such as the accused's right to silence and the protection against self-incrimination. The preservation of those values leads to the conclusion that no distinction should be drawn between a fact and a communication in determining whether the solicitor-client privilege applies to lawyers' billings for fees and disbursements. The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship and must be regarded, as a general rule, as one of its elements. The fact consisting of the amount of the fees must therefore be regarded, in itself, as information that is generally protected by solicitor-client privilege. While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by which effect is given to solicitor-client privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of the solicitor-client privilege are achieved and helps keep impairments of solicitor-client privilege to a minimum. In this case, the Crown neither alleged nor proved that disclosure of the amount of the appellant's billings would not violate the privilege that protected his professional relationship with his client and that information therefore had to remain confidential.

[3] The Court of Appeal of Quebec should not have applied the crime exception since it was not alleged by the informant and was not argued by the Crown at trial. It is not possible to find information that would justify applying that exception in the affidavit submitted in support of the application for warrant authorization.

[Money Laundering: Part 1]

"Lawyers help launder money: RCMP report"

Humphreys, Adrian, *The National Post*, 02 April 2004, p. A.8 (in part)

Half of all dirty money cases tracked by the RCMP saw proceeds of crime slip into the legitimate economy through the hands of a lawyer, according to a detailed report on money laundering.

The report, the most comprehensive examination of moneylaundering cases ever undertaken in Canada, comes amidst an ongoing dispute between the federal government and the country's law associations over whether lawyers can be included in new anti-money laundering regulations.

Of the 149 major money laundering and proceeds of crime cases solved by the RCMP between 1993 and 1998 analyzed in the report, lawyers played a role in 74.

Moreover, the larger the financial transaction involved and the greater the sophistication of the scheme, the more likely a crook was to bring in a lawyer for help, according to the report that was funded by the RCMP and provided to the National Post.

In the majority of police cases involving lawyers, they appear to have been unaware of the criminal source of funds provided by an offender; the report says.

However, the research also identified cases where a lawyer should have become suspicious of the circumstances surrounding a particular transaction, such as the use of a large amount of cash in small denominations to purchase real estate…

"In those cases where a lawyer appears to have been cognizant of the criminal source of funds, their services were often explicitly sought out and, in some cases, repeatedly used by offenders to launder their illegal revenue."

In the largest and most well oiled crime syndicates, lawyers were often essential to the laundering schemes and some even appeared to tailor services expressly to conduct money laundering, the report says.

That seems to reflect what police who are fighting organized crime see on the street.

Organized crime around the world today is becoming more sophisticated, said RCMP Chief Superintendent Ben Soave of the Combined Forces Special Enforcement Unit.

With today's technology, international borders are irrelevant. Organized crime has a need for expertise to set up illicit front companies and offshore corporations in order to conduct sophisticated money laundering schemes. They have a need to move information, money and product on a global scale.

For these reasons they go out of their way to engage, recruit, compromise or corrupt lawyers, bankers, accountants, police officers and politicians. For organized crime it is survival, said Chief Supt. Soave.

"Lawyers won a series of court ordered exemptions from the government's Proceeds of Crime (Money Laundering [and Terrorist Financing]) Act [S.C. 2000, c.17] that require a long list of bankers, accountants and other financial intermediaries to report suspicious transactions.

The Act – that initially included lawyers among those who had to report client transactions – was immediately challenged, by lawyers' groups in most provinces. After the lawyers won court injunctions in Alberta, Saskatchewan, Nova Scotia and Ontario, the government agreed to re-evaluate.

Since then, officials with the departments of Justice and Finance have been meeting with representatives of the Federation of Law Societies and the Canadian Bar Association to try to reach an agreement.

Yesterday both sides said they would not publicly discuss the substance of their discussion.

"We're continuing to negotiate," said Maurice LaPrairie, a Regina lawyer and chairman of the federation's task force on the money laundering issue.

Andree Houde, spokeswoman for the Department of Finance, called it "constructive dialogue."

Neither side, however, seemed to have shifted positions.

"The federation has taken the position in all of the litigation to date that the suspicious transaction reporting regime that the federal government tried to implement against lawyers, which they have withdrawn, is something that is not workable in the solicitor-client relationship," said Me. LaPrairie.

Said Ms. Houde: "we have said from the beginning that in order to have a comprehensive anti-money laundering regime and anti-terrorist financing regime we have to cover all intermediaries, including the legal profession. We don't want to leave any doors open."

[Money Laundering: Part 2]

Federation of Law Societies of Canada, 2004

[Editor's Note: The final set of Regulations on the crossborder movement of currency and monetary instruments under Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) took effect January 6, 2003. Under these regulations specified persons must report the import or export of amounts of $10,000 or more, in currency or monetary instruments in bearer form].

All lawyers should understand the circumstances when they or their client would be required to file a cross-border transaction report. However, practically speaking, very few lawyers will have occasion to engage in the types of cross-border transactions that are reportable under this legislation.

The Federation of Law Societies has received clarification from the Attorney General for Canada as to who is obligated to file reports on reportable cross-border transactions under s. 12 of the PCMLTFA. In most cases where a lawyer is involved in a reportable cross-border transaction on behalf of a client, it is the client who is obligated to report the transaction, not the lawyer [ss. 12(3)(b)-(e)]. Lawyers are obliged to file a report only if they act as the courier, that is, only if they physically carry funds or monetary instruments in bearer form across the border on behalf of a client [ss. 12(3)(a)].

Under this legislation lawyers are not required to report cross-border transactions involving bank drafts or cheques or other negotiable instruments made payable to a named person, and which have not been endorsed. Lawyers are also not required to report cross-border electronic funds transfers they are involved with through banks (banks may report these EFT transactions).]

[Money Laundering: Part 3]

"LSBC benchers okay new rule to monitor money laundering"

Wilhelmson, Michael, *The Lawyers Weekly*, 23 April 2004, p.18 (in part)

… Law Society of B.C. (LSBC) benchers have managed to hammer together a tough new money-laundering rule for lawyers.

The new measure, approved at the April benchers' meeting, bans lawyers from accepting $10,000 or more in cash … [effective from May 7, 2004].

. . . .

Benchers from the criminal bar helped defeat the motion the first time it came to a vote, fearing it would bar criminal practitioners from picking up and dealing with cash released from police custody after a seizure, which is "far more common than you think," said bencher Ian Donaldson. The original draft of the rule did not expressly exempt such dealings.

After a break, the benchers put together an amended version which ultimately passed, letting lawyers accept cash of $10,000 or more from a "law enforcement agency, pursuant to a court order, in the lawyer's capacity as executor of a will or administrator of an estate, or as professional fees, expenses or bail."

. . . .

The new rule mirrors *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* regulations, which define a cash transaction as receipt of $10,000 or more in cash in a single transaction or the receipt of two or more cash amounts in a 24-hour period that total $10,000 or more. They also mirror the regulations in exempting fees, expenses and bail from the reporting requirements. Clients who wish to deposit $10,000 or more in cash with a lawyer will be required to convert the cash into negotiable instruments through a financial institution before depositing the money with a lawyer.

Lawyers are currently exempt from the regulations' reporting requirements after the LSBC, along with the Federation of Law Societies of Canada, obtained an injunction from the B.C. Supreme Court in November 2001, arguing that the regulations were unconstitutional in requiring

lawyers to make secret reports about privileged client matters to the government, contrary to the concept of an independent legal profession. The B.C. Court of Appeal upheld the decision and the superior courts of several provinces have granted similar injunctions. The federal government has agreed to abide by the decision until the issue comes on to trial in November.

[**Editor's Note:** The Federation of Law Societies of Canada, at its 01 May 2004 Council meeting in Fredricton, recommended that all other Law Societies "adopt a no cash rule which substantially mirrors the BC rule by September 2004".]

[Money Laundering: Part 4]

"8-country survey shows lawyers' concern at having to disclose clients' illegal activity"

***The Lawyers Weekly*, 26 September 2003, p. 8 (in part)**

The vast majority of lawyers responding to an eight-country survey say the interests of justice will be harmed if they are required to report their clients' illegal activities.

The survey was co-sponsored by LexisNexis and the International Bar Association (IBA).

A full 85 per cent of Canadian IBA members responding said that if lawyers had to report their clients' illegal activities, the clients would be less open with counsel, and 73 per cent said that would be detrimental to justice.

IBA members in Canada, more than in any other surveyed country except Australia, feel that the public doesn't understand the reasons behind client confidentiality or legal privilege. About half (49 per cent) of the Canadian lawyers said they would risk jail to protect their clients' confidentiality/legal privilege. Only 22 per cent of the United Kingdom respondents would risk jail.

In a related question, a large majority of the lawyers in most of the eight countries are troubled by the potential consequences of government regulation that might be aimed at their profession in an effort to help stop illegal activity such as money laundering or terrorism by clients.

"It's heartening to see that so many Canadian solicitors feel so strongly about their obligations to confidentiality and solicitor-client privilege," said William Rowley, chairman of the IBA's Global Competition Forum and chairman of McMillan Binch LLP, "If we Canadians, as a society, believe in the rule of law, then we have to believe deeply in the importance of people being able to speak freely to their lawyer. Only when a client is able to speak with complete candour can a lawyer provide truly informed legal advice. And under the rule of law, those faced with legal issues are entitled to be properly advised."

[Money Laundering: Part 5]

"Britain won't bow to self-serving lawyers"

Francis, Diane, *The Financial Post*, 04 November 2003 (in part)

Early last month [October 2003], England's senior family judge, Dame Elizabeth Butler-Sloss, ruled that barristers and solicitors negotiating divorce settlements must report any suspicion of tax evasion or fraud to the National Criminal Intelligence Service (NOS), according to the Manchester Guardian.

"The ruling, which had been anxiously awaited by divorce lawyers, applies as much to the plumber paid partly in cash as to the millionaire with a string of offshore accounts," reported the newspaper. "Dozens of divorce cases had been put on hold pending yesterday's judgment. Lawyers fear there will be more do-it-yourself divorce settlements as couples seek to avoid a possible Inland Revenue investigation [tax department probe] by not involving solicitors."

Canada's lawyers would close ranks over any such ruling here, arguing that such a precedent would trample their sacrosanct client confidentiality requirement. (That's the argument that Canadian lawyers successfully argued before Ottawa which resulted in their exemption from having to report suspicions about money laundering by terrorists.)

The British court didn't buy any such argument.

It ruled that the government's recent Proceeds of Crime Act included those assets that gangsters or terrorists had put into the wife's, or children's, names. The Act meant that people could not possess the proceeds of crime, whether they were ex-spouses or not and that lawyers could not be exempted from reporting requirements, whether they were involved with the individuals as lawyers or not.

"Family court rules, which require full disclosure of assets by both parties, often reveal some tax evasion - the fruits of which fall into the category of criminal property. One solicitor estimates that as many as 50% of big money divorce cases involve unpaid taxes," said the news story.

The ruling clarified the fact that the Act regards divorce lawyers as criminals if they negotiate a settlement or make a court application without notifying authorities if they suspect tax evasion or the proceeds of crime are involved.

The case in Britain involved the divorce of Mr. and Mrs. X after 24 years, who had amassed £19-million in assets. Her lawyer, after seeing financial details, suspected tax evasion by Mr. X and reported him to tax authorities. The investigators asked the lawyer not to tell Mr. or Mrs. X he had turned him in or face another offence known as "tipping off" under the Act.

The judge ruled that the lawyers were entitled to tell their own client or their opponent that a report had been made because the Act applied to all "criminal property."

"Parliament clearly intended this to be the case," she said. "Whatever may be the resource implications, the legal profession would appear to be bound by the provisions of the Act in all cases, however big or small."

Hardly surprising is the fact that Britain's Parliament is not dominated by members of the legal profession as is the case in Canada and the United States.

Facts are that lawyers [in Canada], exempt from reporting suspicions or wrongdoing, have aided, abetted and profited from illegalities of all kinds. Arguments that client confidentiality is necessary so that people can get unfettered legal advice are totally off base. Medical, education and welfare officials are deputized by the state to automatically report wrongdoing of any kind, despite their own professional confidentiality restraints, and why not lawyers too?

"Landmark case in copyright law looms"

Makin, Kirk, *The Globe And Mail,* 03 November 2003, p. B12

They spend their days in cramped quarters, methodically servicing all comers at a mere 30 cents a throw. Yet, as miscreants go, they could hardly appear more benign.

The five photocopiers in the Law Society of Upper Canada's Great Library are indeed an unlikely bunch to find at the heart of a high-stakes legal dispute.

. . . .

At first blush, the facts in the case seem simple. For many years, the Great Library has permitted the photocopying and sale of portions of legal publications. Customers can either do the work themselves or order copies to be printed and faxed or mailed to them.

The Law Society never pursued a licensing arrangement to make copies. It has doggedly insisted that its service is a mainstay of out-of-town lawyers and those who lack extensive libraries. Therefore, it had a mandate to provide the service. The publishers – CCH Canadian Ltd., Canada Law Books Inc. and Carswell a division of Thomson Canada Ltd. – see the photocopying as a form of larceny. Each of the 100,000-odd pages copied annually is a dart to their collective heart.

No one argues that judges are not the true writers of judgments. But nameless scriveners in legal publishing empires go on from there to produce headnotes – abstracts showing the principles involved in a case and the court's opinion – and whatever punctuation or rearrangement may be required.

Does this exacting analysis and spark of originality raise them to the level of original works of creativity? Would it be fair, or perhaps, absurd, to let publishers siphon off a never-ending flow of royalties based on minor modifications?

"Law libraries' photocopying not breach of copyright: SCC"

Schmitz, Cristin, *The Lawyers Weekly*, 12 March 2004, pp. 1, 19 (in part)

… the Supreme Court has ruled 9-0 that the Law Society of Upper Canada's Great Library does not infringe the copyright of legal publishers by providing lawyers with photocopies of reported judgments.

Of note internationally for its treatment of the key, but elusive, concept of "originality," Chief Justice Beverley McLachlin's March 4 judgment holds that legal publishers Canada Law Book, Carswell Thomson and CCH Canadian hold copyright in their headnotes, case summaries, topical indexes and compilations of reported judicial decisions because the latter are "original works."

But the top court also ruled the publishers do not hold copyright in the accompanying edited judicial reasons, in and of themselves, since the court found the minor editing changes and additions to the reasons to be "trivial" and hence not copyright-protected as "original works."

Awarding the law society costs throughout, the high court went on to hold that it could rely on the "fair dealing" exception or "defence" under s. 29 of the Copyright Act, which provides that fair dealing with copyrighted works "for the purpose of research or private study" does not infringe copyright.

"The Law Society's custom photocopy service is an integral part of the legal research process, an allowable purpose under s. 29 of the Copyright Act," Chief Justice McLachlin held. "The Law Society does not profit from this service. Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law."

. . . .

In the courts below, the law society asserted that the case raised an issue of access to the law, while the publishers consistently maintained the case was about the payment of appropriate license fees. The publishers delivered a cease-and-desist letter in 1993 to the Law Society and then sued, seeking declarations that their copyright was infringed as well as injunctive relief.

The law society denied liability, citing the overriding public interest, the "fair dealing" exemption, implied license to copy, and Charter arguments about access to justice.

The Supreme Court declared that a law society does not infringe copyright when it makes a single copy of a reported decision, case summary, statute, regulation or "limited selection of text from a treatise" in accordance with an access policy which stipulates that it will provide single copies of library materials to patrons for the purposes of research, review, private study or criticism.

The chief justice also declared that the law society did not authorize copyright infringement by maintaining self-service photocopiers in the Great Library for use by its patrons.

. . . .

In discussing "originality," the chief justice explained that an original work must be the product of an author's exercise of skill and judgment and this effort must not be "so trivial" that it could be characterized as a purely mechanical exercise.

"Creativity" is not required to make a work original, she said, citing the plain meaning of "original", the history of copyright law, recent jurisprudence, the purpose of the Copyright Act and the fact that this constitutes a "workable yet fair standard." Elaborating on the "fair dealing" exception, she stressed "research" must be given a large and liberal interpretation to ensure that users' rights are not unduly constrained. Moreover, this was not limited to non-commercial or private contexts.

She said these factors "help determine" whether dealing is fair: the purpose of the dealing; the character of the dealing; the amount of the dealing; the nature of the work; available alternatives to dealing, and the effect of the dealing on the work. The access policy placed appropriate limits on the type of copying the library would do.

The high court also rejected the publishers' argument that the law society authorized copyright infringement by providing self-service photocopiers.

"While authorization can be inferred from acts that are less than direct and positive, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement."

Here there was no evidence the copiers were used in a manner that was inconsistent with copyright law.

She also ruled that fax transmissions of copies of the publishers' works were not secondary infringements as "communications to the public."

[**Editor's Note:** Citation for decision: *CCH Canadian Limited v. Law Society of Upper Canada*, [2004] S.C. J. No. 12 (QL) (S.C.C.).]

Roberts v. Senior

(2003), 35 R.F.L. (5th) 440 (Ont. Ct. J.), R.J. Spence J.
(Summary)

A lawyer was disbarred for defrauding the Ontario Legal Aid Plan by intentionally over-billing. The disbarred lawyer brought a motion for permission to appear as agent for a party in domestic proceedings under the Family Law Act. Motion dismissed. The disbarred lawyer did not provide clear and convincing evidence to rebut the presumption that dishonesty that led to disbarment continued to exist. So long as the disbarred lawyer continued to deny the existence of dishonesty which led to his disbarment, it would be inappropriate for him ever to appear as agent in court pursuant to R. 4(1) (c) of Family Law Rules. A Court should not fetter its discretion by imposing a requirement to ascertain whether special circumstances exist before permitting a person to act as agent. An inflexible rule that a disbarred lawyer can never under any circumstances appear as agent should not be adopted.

"Lights, Camera, Law!"

Rogers, Bill, *Canadian Lawyer,* July 2002, pp. 20-21 (in part)

THE SITUATION IN CANADA

Can Canadians expect courtroom cameras to arrive? Not any time soon, according to Lorne Honickman. "I don't see it happening in the near future," he laments. "There's too much pressure against it."

For instance, the Canadian Judicial Council, at its March 2002 meeting, re-affirmed its (non-binding) policy against cameras in trial courts: "They would not be in the interests of the administration of justice." As for the Canadian Bar Association, it remains tentative, maintaining its long-standing support, in principle, of the establishment of pilot projects to test the use of cameras in trial courts. At the same time, it has recently decided to support – thanks to Judith Huddart and the Family Law Section – the notion of banning TV coverage at family law trials.

There is a Charter challenge – under the s.2(b) freedom of the press guarantee – being brought by a bunch of TV networks who have been shut out of the ongoing criminal breach-of-trust trial of former B.C. premier Glen Clark. This Charter challenge is scheduled to be argued at the Supreme Court of Canada on January 14, 2003. [**Editor's Note:** Appeal quashed as moot, 02 December 2002; i.e., before oral argument of appeal: S.C.C. Bulletin, 2002, p.1764.]

Dan Burnett, of Owen, Bird in Vancouver, is representing the TV networks. "It would be nice for Canadians to see what goes on in their courts," he says, "rather than the courts of another country." Often he wonders "whether witnesses are more distracted by sketch artists sitting in the front row with a great big piece of paper, scratching away, grabbing pencils, versus a little camera at the back sitting on a tripod."

His opponent, Richard Fowler of Gibbons, Ritchie in Vancouver, notes that cameras will, if nothing else, increase the stress on trial participants. Furthermore, he says, “trials are not entertaining. They should not be entertainment. They have entertaining moments, but they’re not predictable. And it would be alarming if they ever became predictable. That would mean somebody behind the scenes is controlling things for that purpose.” He adds that if you want to see why cameras are not desirable, “you only have to look south”.

. . . .

WILL THE WALL EVER COME DOWN?

It's hard to say exactly when the camera first became an irritant to the judicial system, but a good candidate for that honour is an incident that took place in the Old Bailey, the historic criminal court house in London, England. It was 1912, and someone put a camera down his pants and snuck it into the gallery. Then, just as one Frederick Seddon was being sentenced to death, a picture was snapped. The panoramic shot appeared the next day in the Daily Mirror. A great furor ensued. Judges were outraged. And it wasn't long before legislation was passed banning photography in court.

Today if you visit the Old Bailey you will see TV crews outside – cameras are still not allowed in – and you'll see their TV cameras on tripods pointed at freshly-drawn courtroom sketches which have been taped up onto the exterior wall of the building. The spectacle is somewhat absurd, and yet telling: there's a thick stone wall, and an intense urge to photograph what's going on behind it.

That same kind of curiosity may provoke Canadians into wondering why they have to watch American trial coverage. Why can’t we watch our own courts on TV?

. . . .

REALITY CHECK

As Shakespeare wrote: "All the world's a stage, and all the men and women merely players." Okay, whatever. The thing is, a lot of lawyers don't want to be on stage. They just want to do their job. The good news for them is, if Court TV USA is any indication, they won't likely ever see a camera in their courtroom. After all, only the most extraordinary and dramatic cases get on the air. For some lawyers, this might come as a disappointment. They might end up feeling that, to paraphrase Oscar Wilde, "there is only one thing worse than being televised - and that is not being televised."

4.0 PROCEEDINGS DERIVING FROM BREACHES OF STANDARDS OF RESPONSIBILITY

4.1 Administrative: Disciplinary

"Letters seeking N.S. judge's recusal grounds for lawyer's suspension"

Jobb, Dean, *The Lawyers Weekly*, 05 March 2004, pp. 1-2

A senior Nova Scotia lawyer embroiled in a bitter child-support dispute has been barred from practicing law for at least a year after mounting a letter-writing campaign to force the presiding judge to recuse himself.

Robert Murrant flouted a court-imposed maintenance order and demonstrated disrespect for the courts and "a profound lack of integrity" in his campaign against Associate Chief Justice Robert Ferguson of the province's Supreme Court Family Division, a discipline panel of the Nova Scotia Barristers' Society ruled.

The panel granted Murrant's request to resign - "effectively removing him from the practice of law" - once he pays $14,000 in discipline costs. In the meantime, Murrant has been suspended and cannot reapply for readmission for at least one year after he resigns.

What happened was not in dispute. Murrant, a Queen's Counsel twice reprimanded in 1995 for what the panel termed similar "abusive behaviour," circulated a series of letters during a bitter dispute with his ex-wife. He conceded that his comments were "inappropriate, shocking, scandalous and lacking in emotional control ... on their face way over the line."

While the society portrayed them as professional misconduct and conduct unbecoming a barrister, Murrant - who represented himself during the discipline process - contended they were written not as a lawyer, but "as a dad" concerned about the welfare of his daughters.

The discipline panel, chaired by former Dalhousie Law School dean Innis Christie, flatly rejected that position. "He used his professional letterhead and in most of these instances was performing the functions of a lawyer," it found.

"Whatever the line is for the behaviour with which Mr. Murrant is charged," the panel added, "even if we were to accept that he [was] acting in his personal capacity and not as lawyer, he was so clearly over it that no precise delineation was called for."

Under the terms of Murrant's 1994 divorce, he was obliged to pay $1,750 a month to support his two daughters. When direct payments stopped in 1996, his ex-wife filed an order with the province's maintenance enforcement program.

A lawyer acting for the program, Megan Farquhar, commenced proceedings to garnish a mortgage that Murrant had assigned to his daughters to pay for their university education.

The dispute came before Justice Ferguson, who found that Murrant was $80,000 in arrears in child support payments. In May 2002, he ordered Murrant to pay $15,000 within two months, and another $25,000 by October 2002, or face imprisonment.

Murrant responded with a flurry of letters that attacked and ridiculed the judge and Farquhar.

In an April 2000 missive, he called Farquhar "disgustingly dishonest" and described the maintenance enforcement legislation as "foolish."

Another letter accused Farquhar of lying, described operation of the Family Division of the Supreme Court as "a farce," and accused Justice Ferguson of contributing to "the problem" by encouraging Farquhar's efforts.

In a February 2002 fax, Murrant said that "if Ferguson ACJ can't judge a dog show, could he at least find someone who can because I'm sick and tired of being jerked around."

That letter was circulated to Justice Ferguson, another judge, senior officials of the Nova Scotia Department of Justice, family court officials and an RCMP officer. Other letters, in a similar vein, were copied to the minister of justice and other lawyers.

By January 2003, Justice Ferguson had apparently had enough. He referred the letters to the Barristers' Society and recused himself.

Notified of the complaint, Murrant unleashed a fresh torrent of criticism. In a letter to the Society, he described Ferguson as "disgustingly ignorant and insensitive," the complaint as "misleading and delusional," and accused the judge of "corruptly trying to save his own career by destroying mine." In a follow-up letter, he referred to the judge as a "narcissistic fool."

At his discipline hearing, Murrant described himself as "a tactical terrorist" engaged in a campaign to force Justice Ferguson to quit the case.

The panel's decision notes that when its members suggested this was an abuse of process and showed a lack of integrity, Murrant "obfuscated and attempted to retract this testimony in part, saying that he had been desperate and not thinking clearly."

The decision said Murrant improperly attempted to influence a court decision and publicly expressed "a lack of respect for Associate Chief Justice Ferguson in a way that is totally inappropriate for a lawyer to do."

His unsubstantiated attack on Farquhar, it added, was "clearly unethical."

The committee also found Murrant unrepentant, noting he had vowed during the hearing that "as a dad from Glace Bay I'd do it again in a heartbeat."

In the Matter of the Law Society Act [Ontario] and Zuker

Majority Reasons of Convocation Of The Law Society Of Upper Canada: Gerald A. Swaye, Q.C.; Gary Lloyd Gottlieb, Q.C., and Edward W. Ducharme, (for decision made 24 June 1999)

INTRODUCTION

1. The matter relating to Allan Murray Zucker came before Convocation on Thursday, the 24th day of June, 1999. Zuker is 64 and was called to the Bar in 1962. Following a hearing on January 27, 1998, the Discipline Committee found him guilty of misconduct in that he "sexually harassed his client AT in the course of their solicitor/client relationship in 1992 and in 1993 by making unwelcome comments and overtures of a sexual nature to her." The Committee's recommendation as to penalty was that Zuker be suspended for three months and that, thereafter, he undertake in a manner suitable to the Law Society not to attend unaccompanied with any female clients. Counsel for the Law Society urged Convocation to substitute a greater penalty, disbarment.

FACTUAL BACKGROUND

2. The factual matrix underlying the Discipline Committee's finding of professional misconduct is essentially as follows. In December 1991, AT became Zuker's client. As time went by he became inappropriately personal with her during meetings at his office. For example,
after greeting her, he would shut the door to the office, put his hands on her shoulders and draw her close to him. These advances made her uncomfortable and she told him so. But he persisted, telling her that he liked to greet clients this way, particularly the pretty ones. She told him that she did not appreciate his conduct, that he had no cause to become personal, that he was old enough to be her father, and that he should honor and respect his professional obligations. His conduct, however, did not change, except when she brought her four-year-old with her to the meetings.

3. During one meeting, Zuker told AT that he found her attractive, referred to a couch he once had in his office, and told her that he would like to show her a good time on it. She was offended, said that he ought to know better and that he could get into trouble for his actions. His response was that he knew the loopholes and could get himself out of such situations. According to AT, he tried to kiss her and said that he would like to kiss her but did not act on these expressions of interest. He also asked if she had a boyfriend.

4. Before the Discipline Committee AT testified that she became frustrated with Mr. Zuker's lack of progress with her legal problems but that, despite his unacceptable conduct, she continued to retain him for a time because she felt vulnerable, because she trusted him, and because she hoped his behaviour would change if she gave him another chance. Eventually she changed solicitors, not

because of Zuker's offensive conduct towards her but because he had done little, she said, to advance her lawsuit.

5. When, about a year after she had terminated her retainer with Zuker, AT lodged a formal complaint with the Law Society, Zuker insisted that she was "lying in all respects" and denied all allegations. The Discipline Committee concluded otherwise and made the following specific determinations of fact:

(a) he greeted her in an inappropriate physical manner when she entered his office and also when she was leaving by approaching her closely and placing his hands on her shoulders;

(b) he tried to kiss her;

(c) he hugged her;

(d) he inquired about her personal relationships;

(e) he made sexually suggestive remarks to her; and

(f) he inappropriately commented on her appearance.

The Discipline Committee concluded, based upon the foregoing, that the allegation of professional misconduct had been proven. Convocation readily agrees with this finding.

THE DISCIPLINE COMMITTEE'S FINDING AS TO PROFESSIONAL MISCONDUCT

6. In Commentary 1 to Rule 27 [of the Rules of Professional Conduct of the Law Society Of Upper Canada], sexual harassment is described as “one or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature, (i) when such conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to another person or group ... ."

Commentary 2 to Rule 27 sets out several examples of the types of behaviour which constitute sexual harassment, including the following:

> “sexually suggestive or obscene comments or gestures; unwelcoming queries or comments about a person's sex life; unwelcome sexual flirtations; advances; propositions; requests for sexual favours; unwanted touching."

Zuker's conduct towards his client was abusive in virtually every one of these ways and was, in a word, deplorable.

7. In light of the finding of professional misconduct, the sole remaining issue was whether or not the Committee's recommendation as to penalty - 3 months' suspension, together with terms and costs - was appropriate in all the circumstances.

THE DISCIPLINE COMMITTEE'S RECOMMENDAITON AS TO PENALTY

8. Counsel for the Law Society urged before Convocation that the Discipline Committee's recommendation as to penalty was inadequate, that the Committee failed to weigh sufficiently Zuker's disciplinary history: and that what was required was disbarment. The relevant aspects of Zuker's history are set out in the Report and Decision of the Discipline Committee in the following terms:

> In 1989 the Member was found guilty of the fol1owing complaints and reprimanded in Convocation:
>
> D91/88
>
> 2 (a) During the period August to October, 1984, he attempted to engage in sexual activity with his female client,
>
> 2 (b) During the years 1981 to 1983, more or less, he attempted to engage in sexual activity with his client,
>
> D77/89
>
> 2(a) During the years 1983 to 1985, more or less, he engaged in sexual activity with his client
>
> In 1995 the member was found guilty of the following complaint and reprimanded in Committee:
>
> D490/94
> 2(a) In or about December 1988 he misapplied $14,000.00 more or less belonging to the estate of Pearl Tepperman;
>
> (b) In the period October 1982 to December 1988 he failed to maintain a record of assets of the Tepperman estate under his control as required by Section 15 of Regulation 708;
>
> (c) During the period August 1988 to January 1990 he borrowed a total of $67,500 from his client, James Patterson, contrary to Rule 7 of the Rules of Professional Conduct.

9. Zuker's misconduct in relation to AT thus represents a second discrete set of circumstances in which he has been brought before the Law Society for inappropriate behaviour constituting sexual harassment. That the behaviour is recurrent is obviously an exacerbating factor, and one which

persuades Convocation that the penalty recommended by the Discipline Committee must be changed to more accurately reflect the Law Society's revulsion for and unwillingness to tolerate such avowedly anti-social behaviour by any of its members.

10. The Law Society has as its principal duty, of course, to govern the profession in the public interest. Protection of the public and protection of the reputation of the profession are paramount considerations in determining the appropriateness of penalty in all disciplinary matters. But while the Discipline Committee erred in principal on the issue of penalty in this case, it no doubt placed considerable importance upon the following relevant observations made by AT in a letter she wrote to the Law Society dated January 6, 1995:

> *"I wish to re-iterate that I did not fire Mr. Zuker because of his sexual misconduct toward me. At no point in my statement did I express that I was dismissing Mr. Zuker for that reason. I dismissed Mr. Zuker because 1 was dissatisfied with his handling of my legal matters."*
> *...*
>
> *"My intention was simply to bring this matter to the attention of the Law Society, as it is a governing and licensing body for law practioners and thus the most likely to look into this matter seriously. Even if there is no outcome to all of this, I would still be satisfied in knowing that at least I have had my grievances heard by a higher authority that is empowered to handle this matter with discretion and professionalism. I may not have had that option elsewhere. There are some who would not avail themselves of this democratic right and therefore be left unheard."*
> *...*
>
> *"I do not bear any ill will toward Mr. Z, rather my good wishes to him in his continuing law practice…."*

11. In *Robichaud v. The Queen*, [1987] 2 S.C.R. 84, 40 D.L.R. (4th) 577, a case involving allegations of sexual harassment in violation of the *Canadian Human Rights Act*, LaForest J. observed that statutory prohibitions against discrimination and harassment are intended not to punish anti-social behaviour but to remove it and to redress the socially undesirable conditions. *"The central purpose of a human rights Act, LaForest noted, "is remedial – to eradicate antisocial conditions without regard to the motives or intention of those who cause them."* LaForest J. added that the Act, "*is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the 'almost constitutional' nature of the rights protected."*

12. Although Convocation is keenly aware that the sexual harassment against AT was not Zuker's first offence of sexual harassment it also understands that on the occasion of the first offence the assumption was made that his anti-social behaviour was an aberration and that a reprimand alone was sufficient to ensure against any recurrence.

SUBSTITUTION OF PENALTY

13. Given the advantage of hindsight, and given the evolving emphasis in human rights legislation on the prevention and elimination of undesirable conduct and conditions rather than on fault and punishment. Convocation believes that an appropriate remedy in these circumstances must be one which rejects not only the public's and the profession's abhorrence for the offence but also the importance of remediating the anti-social conditions underlying the offence. The sanction should be severe; it should also include a meaningful corrective or educational component designed to bring home to the offender the offensiveness of the behaviour as well as its devastating effects upon those subjected to it.

14. As noted at the outset, this offender is 64 years of age. Disbarment, for him, would likely mean an enforced end to any further gainful employment in or out of the profession. The penalty shall therefore be as follows:

(a) [T]he member will be suspended for six (6) months commencing August 1, 1999;

(b) The member will submit to a plan of supervision, approved by the Law Society which includes a requirement that he participate in and complete an educational and training program designed to teach increased awareness of and sensitivity to all issues relating to sexual harassment and gender discrimination;

(c) The member will submit to a plan of supervision, approved and monitored by the Law Society whereby following the expiration of his suspension, he shall not under any circumstances in the future meet unaccompanied with any female client;

(d) the member will pay to the Law Society costs as assessed in the amount of $2,5000.00

[**Editor's Note 1:** In Dissenting Reasons of Convocation of The Law Society of Upper Canada, Carole Curtis, George D. Hunter and Gavin A. MacKenzie wrote (in part):

In determining the appropriate penalty in discipline cases, Convocation must bear in mind the need to accomplish the goals of both specific deterrence and general deterrence, that is, a deterrent element in the penalty which will effect the future behaviour of both the lawyer presently being disciplined, and will also influence the behaviour of all other lawyers.

Neither the discipline panel nor Convocation was content with a suspension alone. In fact, the discipline panel noted "we find that a suspension alone would be inadequate protection of the public *because there is little assurance that the member will not re-offend"* (emphasis added).

The prior discipline history of the lawyer is a very serious matter in determining the appropriate penalty. The reprimand of the lawyer in Convocation was delivered prior to the sexual harassment of this client. The lawyer has not responded to the prior discipline and the penalty that was imposed on him. As well, there is a common theme throughout the lawyer's discipline history of breach of trust.

Convocation must find a penalty which will accomplish several goals, to protect the public, to ensure the continued confidence of the public in the legal profession, and to continue to advance sexual equality, among others.

What message is sent (to the bar and to the public) by not terminating this lawyer's right to practice? That a lawyer gets three chances (or four chances) before his right to practice will be taken away? How many times is too many?

The terms imposed by Convocation are unenforceable, inappropriate, and in fact, may be outside the jurisdiction of Convocation's authority. Convocation has ordered that the lawyer shall not be alone with female clients, a difficult requirement given that his practice is family law and about 50% of his clients female. How is this requirement to be satisfied? Is the "chaperone" (this is what it sounds like) to be another lawyer (remembering that this lawyer is a sole practitioner)? Is it to be an employee of the lawyer? Surely an employee could not be the person present in the office with the lawyer and his female clients; any suggestion that such an arrangement was workable ignores the realities of the workplace hierarchy and power-structure.

The attachment of this sort of condition is tantamount to a restricted license, a direction that the Law Society has previously been uncomfortable taking out of concern for its authority to do so. No precedent was offered for such a restriction and it is unlikely that there is a precedent. There is likely to be great difficulty figuring out how to structure such a restriction.

In short, the terms of the suspension are unworkable, unenforceable, and neither adequately protect the public nor offer sufficient *"assurance that the member will not re-offend"* (emphasis added).]

[Editor's Note 2: Having again, in 2003, been found guilty by the Law Society of Professional misconduct on several grounds, including his failure to comply with a term or terms of the 24 June 1999 Order resulting from the 1999 professional misconduct proceedings, Mr. Zuker was permitted to resign from the Law Society. He resigned on 12 June 2003.]

4.2 Judicial: Penal

Ghafari v. Qayumi

[2002] B.C.J. No. 2748 (QL) (B.C.S.C.), Parrett J., paras. 11-14

¶ 11 The present state of evidence before the court is that the affidavits assert, on the one hand, that a valid marriage occurred and, on the other, that no marriage occurred but that a forged marriage certificate was paid for and obtained to specifically facilitate the plaintiff's entry into Canada.

¶ 12 These are serious allegations which go to the root of this court's jurisdiction to grant relief under the Divorce Act. They are also serious allegations based on sworn evidence indicating a fraud was carried out in order to deceive Canadian Immigration officials. Finally, it seems clear at this stage that the affidavits filed by the two sides are completely irreconcilable. Either a valid marriage occurred as attested to by the plaintiff, or it did not as attested by the defendant, her friends and relatives. On its face, it appears that one or the other may well meet the requirements of the definition of perjury contained in s. 131 of the Criminal Code.

¶ 13 I have directed a trial of the specific issues set out above at a date to be fixed before me. I am further directing that copies of these reasons be immediately forwarded to the Attorney General of British Columbia, the Department of Justice, and Citizenship and Immigration Canada.

¶ 14 I also direct that contrary to the general practice, these reasons be posted on the Court's internet web site.

4.3 Judicial: Disciplinary

Law Society of New Brunswick v. Ryan

[2003] S.C.J. No. 17 (QL) (S.C.C.),
McLachlin C.J.C., and Iacobucci (for the Court), Major, Binnie, Arbour, LeBel and Deschamps JJ.

(Headnote)

[**Facts:**] The respondent lawyer was admitted to the New Brunswick Bar in 1984 and carried on a private law practice. In 1999, a complaint was filed against him by two of his clients. In 1993, the clients had sought the respondent's legal advice with respect to their dismissal by their employer and gave him a small cash retainer to represent them for wrongful dismissal. For five and a half years, the respondent did nothing to advance the claims. To disguise his inattention to his clients' interests, the respondent spun an elaborate web of deceit. He lied to his clients making it seem as if he was taking action on their behalf and placing the blame for delays on others. In response to persistent requests for information, the respondent gave his clients a forged decision of the New Brunswick Court of Appeal dealing with their case. Moreover, the respondent falsely told his clients that a contempt motion against the defendants was granted and that they had been awarded $19,000 and $18,000 respectively. He then invented significant delays and appeal periods that prevented his clients from collecting these sums. Finally, he admitted to his clients that the "whole thing was a lie", at which time the clients filed a complaint with the Law Society. The complaint was referred to the Law Society's Discipline Committee, which decided that the respondent should be disbarred. The respondent appealed this decision and made a motion to adduce medical evidence to show that he was under a mental disability contributing to his misconduct. The Court of Appeal ordered that the case be reopened before the Discipline Committee for the purpose of hearing and deciding on this medical evidence. After considering the medical and psychiatric evidence, the Discipline Committee confirmed its earlier decision that disbarment was the appropriate sanction. The Court of Appeal allowed the respondent's appeal and substituted its own sanction of indefinite suspension with conditions for reinstatement.

… [**Decision:**] The appeal should be allowed and the order of the Discipline Committee restored.

[**Reasons:**] There are only three standards for judicial review of administrative decisions: correctness, reasonableness simpliciter and patent unreasonableness. Additional standards should not be developed unless there are questions of judicial review to which the three existing standards are obviously unsuited. The pragmatic and functional approach will determine, in each case, which of these three standards is appropriate. Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. A consideration of these four contextual factors leads to the conclusion that the appropriate standard is reasonableness simpliciter.

There is nothing unreasonable about the Discipline Committee's decision to ban a member from practising law when his repeated conduct involved an egregious departure from the rules of professional ethics and had the effect of undermining public confidence in basic legal institutions. The Discipline Committee considered and weighed conflicting medical evidence and then concluded that the reasons that it originally gave for disbarring the respondent suggested disbarment even in light of this fresh evidence. Since the Discipline Committee provided reasons in support of its choice of sanction that were tenable and grounded in the evidence, its decision was not unreasonable and the Court of Appeal should not have interfered.

4.4 Judicial: Civil

CLAIM COSTS BY DESCRIPTION OF LOSS, 1989-2002

***LawPRO*, Winter 2002, p. 3**

Description Of Loss	**Percentage Of Total Claims**	**Percentage Of Overall Claim Costs**
Missed Deadline; Documents Not Filed; Procrastination	34%	30%
Defective Searches	15%	11%
Failure to Follow Client Instruction; Failure to Get Client Consent	14%	12%
Planning Error in Choice of Procedure	7%	15%
Failure to Know Law; Failure to Apply Law	7%	9%
Conflict of Interest	3%	4%
Fraud	2%	7%
Other	18%	12%

[**Editor's Note:** In the March 2003 issue of *LawPRO*, at p. 28, Dan Pinnington, Director of practicePRO, the LawPRO's risk and change management program, writes (in part).

> A review of LAwPRO claims data for the last 20 years [1982 - 2002] shows that the third most common error relates to conflicts of interest situations. Almost nine per cent of the claims we have handled since mid-1982 involved this error. The costs associated with resolving claims that involve this type of error are even more

> significant. It is the second most costly error, representing 16.7 per cent of estimated and incurred costs for all claims over this period of time.
>
> . . . .
>
> The most claims-prone conflicts arise when lawyers act for more than one person or entity on a single matter, and when lawyers act for a client on a matter where the lawyer has a personal interest other than reasonable professional fees. This personal interest is frequently a direct financial stake in a matter, or a client who is a family member or personal friend.

A representative of LawPRO, in conversation with this paper's editor on 09 March 2004, reported that from mid-1982 to mid-2002, about 1,100 family law claims had been received; involving costs approximately divided as follows: (i) payouts: 55% ; (ii) solicitors fees and disbursements of advising on and litigating claims: 45%.

The approximately 1,100 claims indicate the following: failure to follow up instructions (25%); failure to interpret and apply law correctly (20%); failure to obtain consent and failure to inform client (15%); poor communications with the client as to process, costs and options (7%); lack of follow-up, conflict of interest, inadequate investigation, failure to ascertain deadlines, errors in planning and choice of procedure, and overlooking or miscalculating tax consequences (33%).

The 2002 annual report of LawPRO (i.e., Lawyers' Professional Indemnity Company), which is licensed to provide professional liability insurance to 18,650 members of the Law Society of Upper Canada and manage the liability insurance program of the Law Society of Newfoundland and Labrador reported: that "within the category of litigation claims, costs for family law claims have jumped significantly, from approximately four per cent of total claims costs in prior years to more than seven per cent of claims costs in 2002. This increase may be attributable in part to the increased complexity of family law legislation."]

"Sued by a client"

The National **(Ottawa: Canadian Bar Association, May 2003), p. 20 (in part)**

… hundreds of practitioners across the country …, at one time or another in their careers, have lived the worst-case scenario: a lawsuit from a client. Even when the lawyer has done nothing wrong and is eventually vindicated – and indeed, a high portion of these suits fail, or are dropped before trial – it's a traumatic and draining experience.

. . . .

"Most lawyers who've been sued have told us they never thought this could happen," says Raymond Duquette of the Barreau du Quebec's Professional Liability Fund. "And it was the worst experience of their life." No one should be surprised, therefore, that jurists would refuse to speak about their past or present legal problems. We interviewed ten practitioners and all of them, without exception, declined to talk on the record.

Duquette understands their frustration. "Some of them don't know where to turn," he says. "They experience a great feeling of injustice, because they feel they've done everything for their client. Others are discouraged, dejected. And still others are fighting mad and ready to go all the way to the Supreme Court to prove their innocence."

Even though the practitioner is usually vindicated, the cases cause stress and even breakdowns. "Nobody ever practices quite the same afterwards," says Marlene Ouellet, President of the Professional Liability Fund with the Chambre des Notaires.

A lawsuit from a client carries financial consequences as well. Members of the Quebec Bar are fortunate; their insurance premium has been just $1 for four years in a row, with no deductibles. The 14,323 lawyers insured in 2002 enjoyed the benefit of an $83-million fund, $4.4 million of which was dispensed in indemnities.

. . . .

Many lawyers interpret a client lawsuit as an attack on their integrity, and often they're tempted to sue the client right back.

"When the client turns on you"

Lundy, Derek, *Canadian Lawyer*, April 2004, pp. 22, 24-25, 26 (in part)

That would be you

… more than 30 percent of all complaints to the Law Society of British Columbia are about family matters (2002 figures), more than the next two biggest categories combined – general civil litigation and real estate at 17.5 and 10 percent respectively (motor vehicle amounts for another 10 percent of complaints). And this isn't just a B.C. problem. While the figures for Ontario aren't as dramatic, family law matters are a huge source of complaints to the Law Society of Upper Canada, amounting to be about a fifth of total numbers.

All litigation, indeed, most contact between individuals and the legal system, is fraught with emotion. But a family law dispute ratchets it up to a tight, humming intensity until, for many people, rationality becomes a distant memory. It's fertile ground for complaints and lawsuits.

. . . .

Can lawyers, even family lawyers, head off … [these] time-consuming and emotion-draining ordeal[s]? They can certainly tend their files and manage their clients with the utmost care, but maybe that's not enough with some people, especially in the maelstrom of family or relationship break-ups. Perhaps the best that lawyers can do is merely minimize the chances of clients turning on them, but that in itself is no mean feat.

. . . .

"When people are dealing with cases that really matter to them, and nothing matters more than family cases, it's *very* personal," says Toronto family lawyer, psychologist and mediator Barbara L. Landau. "Everything gets hyped, especially fears around loss." It's often like a door slamming in your face and you feel frustrated and blocked.

"And the only way you can do something about it is by pursuing someone; you get stuck in anger mode," she says. And the anger is *empowering*. It gives people who hate feeling weak and vulnerable a "to-do" list.

Other people respond to the loss and frustration of break-up by depression or passivity. They withdraw or even become immobilized. And if a cycle of anger and depression develops for these people, they soon realize that anger feels better – it gives them a reason to get up in the morning; they have a task to carry out. It's often a harmful one for themselves and others, but, in a destructive way, it centers them, says Landau.

It's all a matter of disappointed expectations, she says. Some people take these as a learning experience and say, "Okay, I'm going to cut my losses, learn from this, redirect my energy." This is healthy and rational.

But others often don't have such a strong or self-reliant personality. They're incapable of taking a constructive approach and they look for an external remedy. Added to this is the hard time most humans have in making themselves accountable for their shortcomings. Something bad happens to them but it's not their fault - it must be caused by bad luck, or by someone else. They look to pin that accountability somewhere else.

The legal system allows people to do just that, says Landau. They have the chance to argue: my case was meritorious but my lawyer wasn't, or wasn't diligent enough, or the judge didn't see through the other person's cunningly created false impression.

. . . .

…. Sometimes, no amount of managing expectations, hand-holding or cover-your-ass (CYA) letters and notes to file can head off the client scorned. "It's the nature of the beast, in a way," says University of Victoria law professor Andrew Pirie.

Nevertheless, there are a number of practical measures that lawyers – all lawyers, but especially vulnerable family practitioners – can take to at least reduce the chances of complaints and lawsuits.

The key word is expectations

Managing client expectations is crucial, says Pirie, especially these days. People may have deferred to lawyers (and other professionals) in the past, but they're much less likely to now. The client has to become a partner in the decision-making process, and must be made to feel that he or she is a genuine participant.

It's a matter of reducing the chances of clients thinking they didn't do as well in the case as they should have, he says. Family lawyers are vulnerable because, even with the Federal Child Support Guidelines, there's a lot of uncertainty and it's a costly process. And of course, there's the particularly intense emotions of families and relationships in crisis.

The lawyer has to recognize that you can't treat all clients the same, says Pirie. For some clients, it may be all right to take oral instructions on the phone and make a note to file. But others may need much more care and attention: a detailed letter outlining the instructions and requiring the client to confirm them in writing before things get going.

If it's hard to tell which client is which, then write the CYA letter *all* the time. ….

Lawyers must also deal with the gap between what the law actually allows and bestows on one hand, and common public perceptions of what should happen on the other.

. . . .

That attitude must be even more prevalent now: if same-sex couples can get married, then presumably they're entitled to share assets when the marriage breaks up. It's a reasonable conclusion that heterosexual common-law partners should get the same deal. But they don't.

That was made very clear by the Supreme Court of Canada in *Walsh v. Bona* (2002), 221 D.L.R. (4th) 1. With one dissent, a nine-justice panel of the court held that the exclusion of common-law spouses from the definition of "spouse" in Nova Scotia's Matrimonial Property Act is not discriminatory under s. 15 (1) of the Canadian Charter of Rights and Freedoms.

. . . .

The legal system has a rigidity which looks to external standards in making decisions, says [Barbara L.] Landau, whereas things almost always go better, especially with family law litigants, if someone talks to them and listens to what they say about fairness, their hopes and expectations. "Feeling heard and understood often allows people to give up what may be an unreasonable legal expectation."

In other words, there's a need for some form of alternative dispute resolution. And the less clear and consistent the law is – and that's certainly the case with common-law relationships - the more valuable mediation becomes. ….

"When the client from hell pursues you personally, to the very limit, I think this is part of living in the 21st century in an adversarial system where there are dysfunctional people," says Tim Holmes, manager of professional conduct for the B.C. Law Society. The issues in family law are highly charged and you just have to expect it. "But you cannot turn around to a mad-as-hell person and say, 'Fuck you, too!' " Your personal instinct is to fight back in kind, but that isn't the professional response, he says. And anyway, the client's reaction will be: "If it's a fight to the death you want, I can give you that because I'm crazy and I'm not governed by a code of conduct."

The only thing to do is to try to manage the client's expectations from the beginning of the professional relationship, document instructions scrupulously and try alternative dispute resolution. If the client complains about you or sues you anyway, take it like a pro. It's an economic and emotional cost of doing business.

Butler v. Kronby

[1999] O.J. No. 1486 (QL) (Ont. Gen. Div.), McLean J.
(Summary)

Facts: The defendant solicitor represented the plaintiff wife in a family law proceeding. The wife and her husband had entered a pre-nuptial agreement in which the husband released his rights to the matrimonial home to the extent possible under governing Ontario legislation. The plaintiff retained the defendant's solicitor to act in her family law proceeding. The plaintiff claimed that the defendant solicitor consented to an order which included a mutual non-depletion clause without any instructions from her. The plaintiff argued that the clause prevented her from listing the house for sale. The plaintiff consulted another lawyer and placed mortgages on the property. She was found in contempt as a result of this action. On resolution of the family law proceeding, the plaintiff was unable to sell the house. Eventually, it was sold by the mortgagee and the plaintiff declared bankruptcy. The plaintiff argued that the defendant Kronby was negligent in not pursuing a settlement when the husband raised the possibility of dropping his claim for a cash payment and not apposing the non-depletion order. Experts offered conflicting opinions as to how the non-depletion order should have been dealt with.

Decision: Action against defendant solicitor dismissed. (Ont. C.A. dismissed appeal.)

Reasons: The defendant solicitor had not breached his duty of care to the plaintiff client. His conduct regarding the settlement was appropriate. He reported on settlement discussions he conducted on behalf of the plaintiff solicitor with her husband's solicitor. That he did not seek further instructions to settle the matter at that point was reasonable, as the plaintiff client had no desire to sell the matrimonial home until renovations were completed. The evidence indicated that the plaintiff client was not concerned about the non-depletion order until served with the contempt motion. There was no evidence she gave instructions to the solicitor to remove the order or to obtain an order to sell the house. The defendant solicitor was never asked for advice as to mortgages and it was reasonable for him to expect that if a mortgage was to be placed, advice

would be required as to the consent necessary. The defendant solicitor acted reasonably on the instructions he had been given.

Barrett v. Coull

[1999] O.J. No. 1571 (QL) (Ont. S.C.J.), Rutherford J.
(Summary)

Facts: The plaintiff Barrett sued the defendant solicitor, Coull for damages on the basis of professional negligence. The plaintiff and her husband were divorced in 1978. The defendant represented the plaintiff in the divorce proceedings. She alleged the while the defendant represented her, she instructed him that she whished to pursue a share of her husbands Canada pension plan entitlement, but, she alleges, was told by the defendant solicitor that she was not entitled to it. In 1995, the plaintiff called an office of Canada pension plan and discovered that her claim to a share of her husbands Canada pension plan credits had been extinguished thirty-six months after her divorce. The defendant solicitor testified that he had no recollection of the plaintiff ever asking about dividing her husbands Canada pension plan credits and that if she had done so, she would have advised her that she was entitled to it but that there was little benefit in doing so because her primary concern was to obtain immediate funds

Decision: The plaintiff's action dismissed.

Reasons: The solicitor's failure to mention to the plaintiff her entitlement to husband's Canada pension plan was not breach of duty of a reasonably prudent solicitor. Therefore, the solicitor was not negligent. Division of pension plan credits at that time was a matter for government administrators to perform and not lawyers. Even if the defendant was negligent, the action was statuted barred as it was not brought within six years of the allegedly act.

Hagblom v. Henderson

[2003] S.J. No. 261 (QL) (Sask. C.A.),
Bayda C.J.S. and Sherstobitoff and Jackson (for the Court) JJ.A.,
paras. 1; 2; 51-63; 68-71; 86; 119-120

¶ 1 This case concerns an allegation of negligence made against a lawyer. By way of brief overview, the appellants in this case, George Hagblom and George Hagblom Masonry Ltd., claim that their lawyer, Marvin Henderson, negligently defended them against a law suit brought by Peter and Yvonne Patrick. I call this the "first trial." The trial judge who presided over the first trial found in the Patrick's' favour. [See Note 1 below]

Note 1: Patrick v. Hagblom et al (1995), 129 Sask. R. 24.

¶ 2 Following the first trial, Mr. Henderson attempted to collect his final account from the appellants. When they refused to pay him, Mr. Henderson and his law partner then sued the appellants to collect their fees, which prompted the "second trial." The appellants defended the second trial and counterclaimed for damages, in tort and contract, said to have been caused by Mr. Henderson's failure to consult or call an expert in the first trial.

. . . .

¶ 51 By way of a preliminary matter, neither party raised any issue regarding "barrister's immunity." Unlike in England, barrister's immunity was not part of the common law of Canada. [See Note 49 below] When Demarco v. Ungaro et al. [See Note 50 below] considered the matter in Ontario, as a result of Rondel v. Worsley, [See Note 51 below] Krever J. declined to introduce such immunity. The lawyers on this case accepted that barrister's immunity is not part of the law of Saskatchewan.

Note 49: No distinction is drawn in Saskatchewan between barristers and solicitors. Those who practice law in this province are referred to as lawyers (see The Legal Profession Act, 1990, S.S. 1990-91, c. L-10.1, s. 87 which abolishes the distinction between barristers and solicitors). For a discussion of these issues see: Gene Anne Smith, "Liability for the Negligent Conduct of Litigation: The Legacy of Rondel v. Worsley" (1982-83), 47 Sask. L. Rev. 21.

Note 50: (1979), 21 O.R. (2d) 673 (H.C.J.).

Note 51: [1969] 1 A.C. 191.

¶ 52 There was, however, an issue as to what is the standard of care. Mr. Henderson's counsel stated the test for determining whether a lawyer engaged in civil litigation has breached the standard of care as "whether he or she has made 'a clear and egregious error.' “Mr. Hagblom's counsel argued that the standard of care was that of a reasonably prudent lawyer. The second trial judge accepted the first standard in this paragraph:

> [4] A lawyer is liable for the negligent conduct of a client's case. However, a mere error of judgment will not amount to negligence. The error must be clear and egregious before the lawyer will be found negligent: Demarco v. Ungaro et al. (1979), 21 O.R. (2d) 673; 95 D.L.R. (3d) 385 (H.C.); Garrant v. Moskal, [1985] 2 W.W.R. 80; 40 Sask.R. 160 (Q.B.); Hunter v. Roe (1990), 85 Sask.R. 199 (Q.B.). [See Note 52 below]

Note 52: … [(2000), 193 Sask. L.R. 127] at 128.

¶ 53 The Supreme Court of Canada has not considered the standard of care of a lawyer engaged in civil litigation but has considered that of a solicitor. In Rowswell v. Pettit et al., [See Note 53 below] Moorhouse J. wrote:

Note 53: [1968] 2 O.R. 81.

> ... The defendant solicitor acted in many ways that could not, in my opinion, on his own evidence, be considered as properly protecting the plaintiff's interest as I believe would have been reasonably expected of a prudent solicitor. [See Note 54 below]

Note 54: Ibid. at 85.

On appeal to the Court of Appeal [See Note 55 below] and the Supreme Court of Canada, [See Note 56 below] no issue was taken with either the statement of the standard in this manner or its application.

Note 55: [1969] 1 O.R. 22 (C.A.).
Note 56: Wilson et al. v. Rowswell [1970] S.C.R. 865.

¶ 54 In Central Trust Co. v. Rafuse, [See Note 57 below] the Supreme Court of Canada reviewed the law in this area:

Note 57: [1986] 2 S.C.R. 147 (per Le Dain J.).

> A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. See Hett v. Pun Pong (1890), 18 S.C.R. 290, at p. 292. The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor. See Mahoney, "Lawyers – Negligence -- Standard of Care" (1985), 63 Can. Bar Rev. 221....
>
> The requirement of professional competence that was particularly involved in this case was reasonable knowledge of the applicable or relevant law. A solicitor is not required to know all the law applicable to the performance of a particular legal service, ... but he must have a sufficient knowledge of the fundamental issues or

> principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points. [See Note 58 below]

Note 58: Ibid. at 208.

Justice Linden also provides this helpful summary:

> A lawyer is obliged to act like a "prudent solicitor". [Rowswell v. Pettit et al., [1968] 2 O.R. 81, at p. 85 (per Moorhouse J.); … [var'd] [1969] 1 O.R. 22; affd [1970] S.C.R. 865; P.A. Wournell Contracting v. Allen (1979), 100 D.L.R. (3d) 62, at p. 67 (per Glube J.); revd on procedural grounds (1980), 108 D.L.R. (3d) 723 (N.S.C.A.). See generally Wade, "The Attorney's Liability for Negligence" (1959), 12 Vand. L. Rev. 755, reprinted in Roady and Andersen, op. cit. supra, n. 235. Bastedo, "A Note on Lawyer's Malpractice" (1970), 7 Osgoode Hall L.J. 311; Mahoney, Note (1985), 63 Can. Bar Rev. 221.] In other words, an attorney is liable if it is shown that the "error or ignorance was such that the ordinary competent solicitor would not have made or shown it". [Aaroe v. Seymour, [1956] O.R. 736, at p. 737 (C.A.) (per LeBel J.).] The requisite standard of care, therefore, is that of a "reasonably competent solicitor" or that of the "ordinary prudent solicitor". [Central & Eastern Trust Co. v. Rafuse (1986), 37 C.C.L.T. 117, at p. 167 (S.C.C.) (per LeDain J.)] A lawyer must "bring to the exercise of his profession a reasonable amount of knowledge, skill and care in connection with the business of his client". [Hett v. Pun Pong (1890), 18 S.C.R. 290, at p. 292 (per Ritchie C.J.). See also Rafuse, supra, n. 251.] [See Note 59 below]

Note 59: A.M. Linden, Canadian Tort Law, 6th ed. (Toronto: Butterworths, 1997) at 147.

Another authoritative text in this area has distilled the statement of the standard to be: "[t]he standard of care and skill expected of a lawyer is reasonable competence and diligence." [See Note 60 below]

Note 60: S.M. Grant and L.R. Rothstein, Lawyers' Professional Liability (Toronto: Butterworths, 1989) at 13.

¶ 55 Since these statements were made in the context of a solicitor's work, the question we must consider is whether we are to draw a distinction between some types of lawyers' work and that of others?

¶ 56 In Rondel, the House of Lords held that a barrister was immune from an action for negligence at the suit of a client in respect of his conduct and management of a case in court and "the preliminary work connected therewith such as the drawing of pleadings." [See Note 61 below]

Note 61: Rondel, supra note 51 at 191.

¶ 57 In Arthur J.S. Hall & Co (a firm) v. Simons, [See Note 62 below] the House of Lords overruled Rondel and held that lawyers are no longer entitled to enjoy this immunity in either criminal or civil proceedings. One of the arguments against maintaining such an immunity was the problem in determining its outer limits. Lord Hobhouse of Woodborough wrote of this:

Note 62: [2000] 3 All E.R. 673.

> One of the problems of any immunity is determining its boundaries. In civil litigation, defining the boundaries of what constitutes advocacy and would therefore qualify for the advocacy immunity is a serious problem not capable of satisfactory solution. The position has been made more difficult by the CPR [Civil Procedure Rules]. There is not a single moment of confrontation. The exercise of advocacy extends over a series of processes of which the trial is only one and the advocacy may be conducted as much in writing as orally. Counsel for the appellants singly failed to provide a satisfactory definition or categorization of the functions to which, in civil procedure, the immunity would attach. This is a telling argument against the recognition of an immunity for advocates for civil procedure and has assisted to convince me that the immunity is not necessary or appropriate. In civil litigation the immunity is anomalous and the arguments in its favour, although they exist, do not suffice to justify its continued existence. [See Note 63 below]

Note 63: Ibid. at 743.

¶ 58 If there is one standard of care for barristers and another for solicitors, the same difficulty arises. What justifies the distinction and what is the point of demarcation between the work of the two?

¶ 59 The conduct of Mr. Henderson which was said to have been negligent is that he failed to consult an expert having regard for the nature of the suit brought against Mr. Haglom and the strength of the Patricks' case including Mr. Fairbank's report and his expected testimony. This conduct is associated with the work of a barrister in case preparation, but it is work not connected with the decision-making which takes place in the tense atmosphere of the trial.

¶ 60 In Professional Liability in Canada, [See Note 64 below] under the heading "Barrister's Liability," the following appears:

Note 64: J.A. Campion and D.W. Dimmer, Professional Liability in Canada, looseleaf (Toronto: Carswell, 1994).

> A barrister's exposure to civil liability claims depends on the type of services being performed by the lawyer. Even though Canadian courts have rejected a barrister's immunity to civil liability claims for the conduct at trial, there is still a reluctance to find liability against a barrister in these circumstances [Demarco v. Ungaro (1979), 21 O.R. (2d) 673 (H.C.); Wechsel v. Stutz (1980), 15 C.C.L.T. 132 (Ont. Co. Ct.)] and other circumstances which involve the exercise of judgment. [See the discussion below regarding errors in advising clients to settle actions. Karpenko v. Paroian, Courey, Cohen & Houston (1980), 30 O.R. (2d) 776 (H.C.)] However, there are other steps which are performed by barristers which often attract liability such as the failure to commence an action within the limitation period, the failure to diligently prosecute an action, the failure to present offers of settlement to the client and the failure to carry out a client's instructions. [See Note 65 below]

Note 65: Ibid. at 7-26.1.

And then again under the heading "Conduct at Trial":

> The availability of an action by a client for breach of contract or negligence against his lawyer for the lawyer's conduct in defending or prosecuting a civil or criminal court case is limited. Many of the decisions made by a barrister in a courtroom or in preparation for a trial involve the exercise of judgment. Although Canadian courts have rejected granting immunity to a barrister for civil liability claims in respect of the conduct of litigation, a barrister will not be found negligent for mere errors of judgment. [Blackburn v. Lapkin (1996), 28 O.R. (3d) 292 (Gen. Div.); Demarco v. Ungaro (1979), 21 O.R. (2d) 673 (H.C.); Beckmat Leaseholds Ltd. v. Tassou (1978), 14 A.R. 468 (Dist. Ct.); Karpenko v. Paroian, Courey, Cohen & Houston (1980), 30 O.R. (2d) 776 (H.C.); Pelky v. Hudson Bay Insurance Co. (1981), 35 O.R. (2d) 97 (H.C.); Garrant v. Moskal, [1985] 2 W.W.R. 80 (Sask. Q.B.), affirmed [1985] 6 W.W.R. 31 (Sask. C.A.); Boudreau v. Benaiah (1998), 154 D.L.R. (4th) 650 (Ont. Gen. Div.) (appeal allowed in part on certain damages issues (2000), 46 O.R. (3d) 737 (C.A.)); Wernikowski v. Kirkland, Murphy & Ain (1999), 181 D.L.R. (4th) 625 (Ont. C.A.) at p. 641, leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 98, (2000) 264 N.R. 196 (note) (S.C.C.)] An error must be egregious in order to constitute negligence. [Pelky v. Hudson Bay Insurance Co. (1981), 35 O.R. (2d) 97 (H.C.); Karpenko v. Paroian, Courey, Cohen & Houston (1980), 30 O.R. (2d) 776 (H.C.); Demarco v. Ungaro (1979), 21 O.R. (2d) 673 (H.C.); Garrant v. Moskal, [1985] 2 W.W.R. 80 (Sask. Q.B.), affirmed [1985] 6 W.W.R. 31 (Sask. C.A.)] In

> Blackburn v. Lapkin [(1996), 28 O.R. (3d) 292 (Gen. Div.), at 309], Borins J. summarized the standard of care expected of a barrister as follows:
>
> > ... the standard of care required of a lawyer is not one of perfection. An error of judgment alone does not constitute negligence. A lawyer, who acts in good faith, and in an honest belief that his or her advice and conduct of a client's litigation are well founded, and in the best interest of the client, is not answerable for an error of judgment. However, a lawyer is answerable to his or her client for any loss incurred by the client which results from a want of that degree of knowledge and skill ordinarily possessed by other lawyers similarly situated, or from omissions to use reasonable care and diligence, or from the failure to exercise in good faith his or her best judgment in attending to the litigation undertaken on the client's behalf. [See Note 66 below]

Note 66: Ibid. at 7-30 and 7-31.

¶ 61 The authors then go on to offer the opinion that "it will be unusual for a lawyer to be liable in respect of the conduct of a case as he will not be liable for mere errors of judgment." [See Note 67 below] To support this proposition, the authors cite many authorities including those upon which the second trial judge relied.

Note 67: Ibid. at 7-33 and 7-34.

¶ 62 The provenance of the phrase, "clear and egregious error," appears to be Demarco where Krever J. wrote:

> I have come to the conclusion that the public interest (another phrase used in the speeches in Rondel v. Worsley) in Ontario does not require that our Courts recognize an immunity of a lawyer from action for negligence at the suit of his or her former client by reason of the conduct of a civil case in Court. It has not been, is not now, and should not be, public policy in Ontario to confer exclusively on lawyers engaged in Court work an immunity possessed by no other professional person. Public policy and the public interest do not exist in a vacuum. They must be examined against the background of a host of sociological facts of the society concerned. Nor are they lawyers' values as opposed to the values shared by the rest of the community. In the light of recent developments in the law of professional negligence and the rising incidence of "malpractice" actions against physicians (and especially surgeons who may be thought to be to physicians [–] what barristers are to solicitors), I do not believe that enlightened, non-legally trained members of the community would agree with me if I were to hold that the public interest requires that litigation lawyers be immune from actions for negligence. I emphasize again that I am not concerned with the question whether the conduct complained about amounts to negligence. Indeed, I find it difficult to believe that a decision made by a lawyer in the conduct

> of a case will be held to be negligence as opposed to a mere error of judgment. But there may be cases in which the error is so egregious that a Court will conclude that it is negligence. The only issue I am addressing is whether the client is entitled to ask a Court to rule upon the matter. [See Note 68 below] ….

Note 68: Demarco, supra note 50 at 692-93.

¶ 63 In my respectful opinion, the second trial judge erred in his interpretation of Demarco. While Krever J. uses the word "egregious," this is simply an illustration of a clear case against barrister's immunity from negligence suits, rather than a statement of the standard of care expected of a lawyer. The focus of Demarco was whether barrister's immunity as set forth in Rondel exists in Canada and not as to what is the standard of care. But in any event, Krever J. did not establish a standard of care for lawyers for the management or preparation of a case. His obiter remarks are directed to the conduct of the case at trial.

. . . .

¶ 68 Thus, these cases, which cite Demarco, whose ratio does not fix a standard of care for barristers, but, rather, holds that barristers do not have immunity, cannot be taken as authority for the proposition that the standard of care for a barrister in preparing for trial is not to commit clear and egregious error. Thus, I must conclude that the second trial judge erred when he characterized the applicable test for this case to be "clear and egregious error."

¶ 69 To find a different standard of care for lawyers performing barristers' work than for those doing solicitors' work is really a means of introducing barristers' immunity in a different form, and should probably be rejected for the same reasons. But since we are not considering negligence arising during the actual running of the trial, we do not need to decide whether that conduct demands a different standard of care than that available for trial preparation. We need look no further than Rafuse and the authorities upon which it relies to establish the required standard of care in this case. The question which the trial judge should have asked himself is whether Mr. Henderson exercised reasonable care, skill and knowledge [See Note 77 below] when he undertook to perform the services required by his client and did not consult an expert.

Note 77: Rafuse, supra note 58 at p. 208 quoting from Hett v. Pun Pong (1890), 18 S.C.R. 290 at 292.

¶ 70 Nor in my view can this be considered a "mere error of judgment" as though the decision were one hastily made or in the exigencies of the moment. If the error is one which a lawyer exercising the necessary care, skill and knowledge would not make, it is difficult to conceive of it

as being a "mere error of judgment." The converse is also no doubt true. If a decision can be classified as a mere error of judgment, a lawyer would not be held to have fallen below the requisite standard of care. The decision not to consult an expert, however, in light of an expert's report from the other side fixing one's client with blame, in a fire causation case where no other evidence exists to rebut the expert's conclusion as to cause cannot be disposed of by calling it a "mere error of judgment."

¶ 71 In conclusion on this part, to determine whether a lawyer in preparing for trial has been negligent, the court does not ask whether the lawyer has committed an egregious error. The lawyer is required to bring reasonable care, skill and knowledge to the performance of the professional service which he or she has undertaken to perform.

. . . .

¶ 86 Given the nature of the cause of action and the proffering of an expert and an expert's report, the standard of reasonable care, skill and knowledge demanded that instructions be taken on the consulting of an expert and the calling of one, if necessary. Consulting with an expert was necessary to give the lawyer:

1. knowledge to understand what was being asserted;
2. an assessment by an expert of the validity and strength of … [the Plaintiff expert's] opinion;
3. the possible evidence to rebut this opinion;
4. the knowledge and expertise to test the qualifications and testimony of the plaintiff's expert;
5. assistance in putting together a defence;
6. assistance in developing questions to ask the expert; and,
7. assistance in determining what other evidence was required, for example, the need to determine precisely where in the house the fire began.

. . . .

¶ 119 In Brizak v. Needle, [See Note 123 below] the Court upheld a jury decision finding a lawyer negligent for failing to call an expert in a medical malpractice case. The appellate division of the Superior Court of New Jersey wrote as follows:

Note 123: 571 A.2d. 975 N.J. (1990), New Jersey Superior Court, Appellate Division.

> We have previously detailed the ample evidence, fully comprehensible to laymen, from which the jury could reasonably have found defendant negligent for failing to conduct a more diligent investigation. He made no effort to obtain the opinion of someone with appropriate expertise who would be willing to testify. Indeed, he spurned all sources of such experts, relying instead on the informal advice of a friend who was a radiologist but not familiar with surgical procedures, and of an orthopedist chosen at random. Furthermore, he failed to obtain plaintiff's X-rays and

> Dr. Shafi's office records. The jury could reasonably have found without the guidance of a legal expert that a medical expert would need to examine those materials to make a proper evaluation of Dr. Shafi's treatment. [See Note 124 below]

Note 124: Ibid. at 984.

¶ 120 While these authorities are not from a Canadian source, they, nonetheless, confirm my view that Mr. Henderson did not meet the standard of care required. The standard of care required Mr. Henderson to advise Mr. Hagblom of the risk he (Mr. Hagblom) was facing and suggest that an expert be consulted, and retained, if subsequent circumstances dictated the wisdom of doing so. He did not meet this standard. The instructions he received did not change this standard and the efforts that he made to put forward a defence, notwithstanding his omission to consult an expert, do not prevent this conclusion.

[**Editor's Note:** Application for leave to appeal to S.C.C (File No. 29820) dismissed, 08 January 2004.]

Turi v. Swanick

[2002] O.J. No. 3595 (QL) (Ont. Sup. Ct. J.), Spiegel J.,
paras. 1; 4-5; 6-10; 11-21; 21-22; 23; 26-32; 35; 37; 41-44; 49-53; 63

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[1] The plaintiff claims damages from the defendant, his former solicitor, for breach of contract and negligence.

. . . .

[4] On or about August 8, 1997, the plaintiff, as trustee for a company to be incorporated, entered into an offer to lease store premises in the Times Square Mall in Richmond Hill where he intended to open another clothing store (the "Times Square store"). He retained the defendant to incorporate a new company for the purpose of operating the Times Square store. On August 21, 1997, the defendant incorporated a company called Italian Trends Couture Inc. ("ITC Inc.") under the provisions of the Ontario Business Corporations Act, R.S.O. 1990, c. B.16 ("OBCA"). Shortly thereafter, ITC Inc. entered into the lease of the Times Square store premises, and operated a clothing store thereon known as Italian Trends Couture ("ITC").

[5] The plaintiff's express purpose in incorporating ITC Inc. was to avoid any personal liability for any debts or liabilities that might be incurred in the operation of the Times Square store. ….

[6] The Times Square store was not successful. By November of 1999, ITC Inc. was insolvent and made a proposal to its creditors of 30 cents on the dollar, which was not accepted. The assets of ITC Inc. were eventually sold pursuant to … [a general security agreement].

[7] 163972 Canada Inc. carrying on business as Teenflo Fashions ("Teenflo") was one of the suppliers to the Times Square store. In December 1999, Teenflo commenced an action against Mr. Turi for the price of certain goods that were allegedly sold and delivered to Mr. Turi personally (the "Teenflo action"). Nicholas C. Tibollo was the solicitor for Teenflo in this action. Mr. Turi defended the action claiming that, to the knowledge of Teenflo, all the purchases were made by ITC Inc. and that he was acting merely as a representative of the company. The Teenflo action proceeded to trial in this court before Madam Justice E.M. Macdonald and on October 17, 2000, judgment was granted against Mr. Turi in the amount of $22,427.37 together with prejudgment interest and costs.

[8] In March 2001, Mr. Tibollo, as solicitor for the plaintiff, commenced this action against the defendant for damages in the amount of $40,125.23, being comprised of the amount of the judgment, interest and costs that he was ordered to pay in the Teenflo action, and the costs of defending that action.

POSITION OF THE PARTIES

[9] The position of the plaintiff is as follows:

> (a) The defendant owed him a duty to act as a reasonably competent and diligent solicitor, and to exercise reasonable care and skill in advising him in all matters relating to the incorporation of ITC Inc. This duty arose both as an implied term of the retainer and as a common law duty of care.
> (b) In the circumstances of this case, this duty obligated the defendant to advise the plaintiff of two matters. Firstly, that the full corporate name of ITC Inc. should be used on all contracts, invoices, negotiable instruments and orders for goods and services issued or made by or on behalf of the company, and secondly, that the consequences of his failure to do so might in certain circumstances result in him being held personally liable. For the sake of convenience, I will refer to the former as "the proper use of the corporate name" and the latter as "the consequences".
> (c) The defendant breached this duty by failing to advise him with respect to either or both of these matters, or in the alternative, by failing to provide this advice in writing.
> (d) As a result of the defendant's breach of duty, the plaintiff failed to use the full corporate name of ITC Inc. in dealing with Teenflo, and was therefore held personally liable in the Teenflo action. The defendant's failure to provide the plaintiff with the requisite advice constituted both a breach of contract and negligence, and the defendant is liable for the damages incurred by the plaintiff as a result thereof, namely, the amount of the judgment, interest and costs that he was ordered to pay in the Teenflo action and his costs of defending that action.

[10] The position of the defendant is as follows:

> (a) He agrees that he owed the plaintiff a duty to act as a reasonably competent and diligent solicitor, and to use reasonable care and skill in advising him in all matters relating to the incorporation of ITC Inc.
> (b) He also agrees that his duty obligated him to advise the plaintiff as to the proper use of the corporate name, but it did not obligate him to advise the plaintiff as to the consequences of the failure. Nor did it obligate him to provide the advice in writing.
> (c) He did advise the plaintiff of both matters at a meeting at the defendant's office on October 10, 1997, and having done so, he discharged his duty of care to the plaintiff.
> (d) If he did breach his duty by failing to properly advise the plaintiff, the plaintiff suffered no damages as a result thereof, because the breach was not causally connected to the result in the Teenflo action. ….

The defendant's evidence

[11] The defendant testified that when he incorporates a company for a client, he virtually always meets with the client and discusses matters with respect to the incorporation. He discusses source deduction obligations under the various federal and provincial tax and pension statutes. He explains to the client that the corporation is a separate entity from the individual person, and that the client must maintain all the separate indicia of the corporation, such as a bank account and letterhead, and that he must use the corporate name on all contracts, invoices, cheques, and so on in a representative capacity. He tells the client that there is potential personal liability if corporate contracts are not signed properly.

[12] He testified that it was not his practice to include the matters that he discusses with his clients at the meeting in his reporting letter, because in his view the corporate reporting letter is no more than a summary of the facts that the solicitor has done. While the letter initially goes to the client, it always winds up with the corporate accountant, who wants to know the date and other details of the incorporation.

[13] The defendant testified that in accordance with his usual practice, he met with the plaintiff for the purpose of having a discussion with respect to the incorporation on October 10, 1997. The meeting took place in the boardroom of the defendant's law office. There was a whiteboard in the boardroom. He drew diagrams and made notes on the whiteboard with the use of a magic marker to illustrate some of the things discussed with the plaintiff. He discussed the concept of a discretionary trust, which turned out to be a family trust in this case. The defendant was to be the settler of the trust, and the plaintiff would be the trustee. He explained to the plaintiff that, as trustee, he had the power to appoint a replacement trustee at any time and that the beneficiaries of the trust would be the plaintiff, his spouse and his issue, and that the trust was totally discretionary, so that he would have the power to transfer income or capital to any beneficiary or beneficiaries at any time. He also discussed with him the concept of the GSA. He discussed the concept of capitalizing the company by either debt or equity, and he used the whiteboard to illustrate the relationship between the trust and the corporation and the GSA. There was also a discussion about the possibility of an Italian partner acquiring an interest in the company, if the company became successful.

[14] I will reproduce verbatim the defendant's testimony in chief in respect of what he told the plaintiff regarding the proper use of the corporate name and the consequences.

> I also wrote on the board and told him how he should sign documents. I.T.C.I. [Italian Trends Couture Inc.] per with a line, and explained to him the consequences of not so doing and that he might be held liable personally. That was also part of the discussion that involved the former lease of Italian Trends Ltd., where he had guaranteed that lease personally and I told him that there are a couple of ways that an individual who operates a business might be personally liable. One is on the guarantee, which he had executed, and two was operational, if he didn't sign documents properly.

[15] The defendant estimated that the meeting took 40 minutes. He says that he took more time discussing the trust than the proper use of the corporate name, because the trust was a new vehicle from the plaintiff's perspective.

[16] The defendant's reporting letter on the incorporation dated September 5, 1997, was filed as an exhibit; the defendant admitted that there is no mention in the reporting letter about any of the matters discussed with the plaintiff at the meeting of October 10, 1997.

[17] The defendant testified that within a short time of the conclusion of the meeting, he made a handwritten note to the file dated October 10, 1997 (the "note"). He produced a photocopy of the note, as well as a typewritten transcription of his handwriting. The note reads as follows:

> Oct. 10/97
>
> meeting with Domenic re various matter; instruction to draft trust, GSA and related documents. Advise Domenic that he must carry on business as Italian Trends Couture Inc.; separate bank account, invoices, cheques, and execute all docs on behalf of the corp. and not in a personal capacity; this confirmed advice previously given when ITCI was incorporated. All signature lines must read ITC Inc. Per_____

[18] The defendant admitted that in November 1999, when the plaintiff brought him the demand letter from Teenflo's solicitor, the defendant did not remember the advice that he had given the plaintiff in October of 1997. However, when the defendant looked at the note, it triggered his recollection, not only of what was in the note, but also of other things he told the plaintiff.

[19] When the defendant was asked why the note made no reference to the advice about the consequences, his answer was as follows:

> A: I just failed to put it in. I told him what to do. I made a note of what he was responsible for doing. I didn't make a note of what I was responsible for doing. That's the reason why I did what I did but in hindsight I should have, but I didn't.

Q: In hindsight you probably should have written the letter but that's another story.

A: Correct.

THE COURT: I'm sorry I didn't get your distinction between it was what I was supposed to do.

A: Well, the trust and the GSA, Your Honour, and the documents associated with that were my responsibility to do.

THE COURT: I understand that, but reference to the liability.

A: Well, in terms of the execution of corporate documents that's a matter within his control, not mine, so I made a note of that. In hindsight, I should have gone on to make a note of the fact that I told him that he would be personally liable, but I failed to do that.

[20] The note was written on a lined 8-1/2" x 11" sheet of paper that came from a pad of paper that he commonly used in his office. He said that he did not have the original of the note because he turned the entire file, including the note, over to Mr. Piehler, the solicitor who represented Mr. Turi in the Teenflo action. He obtained the file back from Mr. Piehler when the present action was commenced, and only the photocopy of the note was in the file. He was not able to say that the original was in the file when it was turned over to Mr. Piehler, because he did not check the file before it was turned over. The defendant says he asked Mr. Piehler for the original and as a result of his conversation with Mr. Piehler, the defendant concluded that the note "got lost in the shuffle".

[21] Mr. Piehler was called as a witness by the defendant. …. He has no recollection of seeing the handwritten note. He acknowledged it could have been there, but he did not know. He admitted he could only speculate as to what may have happened to the note. He suggested that it may have been his secretary who made a copy of the note and lost the original or the original of the note may never have been in the file. The first time the defendant asked him about the note was on the weekend prior to the commencement of the trial when the defendant told him he was looking for the original.

[22] The defendant was cross-examined at great length on the subject matter of the note. Because of the importance of this testimony, I reproduce the portions of this evidence verbatim:

MR. TIBOLLO [solicitor for the former client plaintiff]: Other than that, the note is accurate and complete.

A: Yes, it's an accurate summary

Q: All right. And it represents, as I indicated, the language that you used in advising Mr. Turi on October 10th, 1997.

A: Yes.

Q: And you agree with me that the contents of your note represented important legal advice.

A: Yes.

Q: And is it fair for me to say that Mr. Turi was looking to you for this advice?

A: Yes.

Q: As well as guidance.

A: Yes.

Q: And your evidence was that you made this either at the completion or the conclusion of this one hour meeting or approximately an hour afterwards. Is that correct?

A: Could have been an hour. Could have been two hours.

Q: Okay.

A: All on the same day within a couple hours, yes.

Q: So it could have been a couple of hours after then?

A: Yes.

Q: You didn't send a copy of this note to Mr. Turi.

A: No.

Q: And you didn't send him a memorandum confirming this advice.

A: No, I did not.

Q: You didn't feel that it was necessary.

A: Correct.

Q: Did you agree that it would have been prudent to do so?

A: In hindsight, yes.

Q: And specifically, the reason you made this note is because when you met with Mr. Turi the first time on October 10th, 1997 or, at least when you met with him at that time.

A: Yes.

Q: He struck you as a bit of what I believe you called him a coat-pocket businessman.

A: Yes.

. . . .

Q: Now the purpose of you making that note or having made that note of October 10th, 1997, from what I understood was, you made it for your own purposes, not for Mr. Turi. Is that correct?

A: Well, as I said this morning, I made it because that's the matter over which he had responsibility. I had responsibility over the other matters.

Q: All right. So it wasn't for the benefit of Mr. Turi.

A: No.

Q: It was for your benefit.

A: Correct.

THE COURT And what exact benefit would you have in making the note?

THE WITNESS: Sorry. Are you asking me, Your Honour?

THE COURT: Yes.

THE WITNESS: The benefit is a record of what I said.

THE COURT: And what is the benefit of having a record of what you said?

THE WITNESS: So that I know what I told him.

THE COURT: And what's the benefit of knowing what you told him?

THE WITNESS: Because that's the area where he -- for which he's responsible to implement and then I can be sure that I know what I've told him what he should implement. I do the other things that came out of that meeting.

THE COURT: I'm somewhat at a loss here. I could understand if someone made a checklist ahead of time before meeting to say remember to tell him (a), (b), (c) and (d), but what's the benefit of or you haven't told me yet what

the benefit is after having the discussion, noting down the things that you told him about what he has to do. You have not verbalized in my mind what the important is . . .

THE WITNESS: Well, . . .

THE COURT: . . . because all you keep saying is so that I know what I told him.

THE WITNESS: Well, if you're concerned that the client may not do what you have told him to do, once in a while in my practice, I become concerned that clients may, I guess clients may take action against you. So sometimes, not very often, I made a record of what was said because you never know what's going to happen. I mean, it's to cover . . .

THE COURT: To cover you.

THE WITNESS: It's to cover your . . .

THE COURT: Your 'a'.

THE WITNESS: Your 'a', yes.

THE COURT: C.Y.A.

THE WITNESS: Correct.

THE COURT: So that's what you seem to be sort of hesitant in saying that.

THE WITNESS: Well, I don't do it that often, Your Honour. It's not my practice to view my client as a potential enemy, so to speak. I see myself as in co-operation with my client to make the business venture succeed.

THE COURT: Well, the two concepts are . . .

THE WITNESS: Not mutually exclusive.

THE COURT: . . . are not exclusive and they're not antagonistic. In fact, they feed each other. You do your client a favour when you avoid any possibility of misunderstanding and this may be one method of avoiding a misunderstanding. There are others. So the purpose of making that note was to cover yourself in the event that there was some dispute as to what was told to the client.

THE WITNESS: Yes, Your Honour. ….

. . . .

The plaintiff's evidence

[23] The plaintiff testified that at no time did the defendant give him any advice about the proper use of the corporate name, or the consequences. He specifically denied that the defendant told him to sign on behalf of the corporation using the word "per". He says he did not know at the time he ordered the goods from Teenflo that he had an obligation to use the full corporate name. He says it was only after the Teenflo lawsuit that he discovered the consequences of not using the full corporate name.

. . . .

Argument

[26] Mr. Tibollo [solicitor for the former client plaintiff] submits that as a matter of legal principle, where there is a conflict between the version of a client and the version of a solicitor, the version of the client is to be preferred. In support of this proposition he relies on the case of Morton v. Harper Grey Easton (1995), 8 B.C.L.R. (3d) 53, [1995] B.C.J. No. 1356 (Quicklaw) (S.C.). At para. 34, Wilson J. had this to say:

> During argument, I raised with Mr. Mackie the proper approach to the resolution of conflict between the recollection of a client and the recollection of the solicitors. It was my view that all other things being equal where there is a conflict between the version of the client and the version of the solicitor the version of the client is to be preferred. That is my understanding of the principle defined in In Re Dickie (1915-16), 23 B.C.R. 538 (B.C.C.A.). In Mr. Mackie's submission, that principle is restricted to disputes between the solicitor and client upon an agreement respecting the payment of fees. I am not persuaded that the principles in In Re Dickie are so limited. Such a restriction seems to me to ignore what I consider to be the major premise of that principle, as expressed by McPhillips J.A. at pp. 541-42:
>
> I am putting both parties upon an equal ground of credibility. There runs through all the cases, that which seems right and proper in the administration of justice, that if a solicitor will make an agreement with a client, then he must be able to show what that agreement is, and if it is not in writing, then it seems to be that the client's statement must be accepted. If he makes an agreement, then let him make it in writing as a prudent solicitor with a client, disclosing all the facts and circumstances. ….

[27] Mr. Tibollo also refers to the case of ABN Amro Bank Canada v. Gowling, Strathy & Henderson (1994), 20 O.R. (3d) 779, 16 B.L.R. (2d) 305 (Gen. Div.) where Trafford J. at p. 794 O.R. makes the following statement:

> Any attempt by a solicitor to limit his/her retainer to a scope less than that required of a reasonably competent and diligent solicitor should be done in simple, concise and precise language reduced to writing. Any ambiguity in any

> such communication, whether it be written or oral, should be resolved against the solicitor.

[28] I note that in ABN Amro Bank Canada, the retainer of the solicitors was in writing. In such circumstances, I agree that it would be perfectly reasonable to require that any attempt by the solicitor to limit the scope of the retainer be supported by a clear and unambiguous written document. Similarly in Morton, the controversy involved a dispute over the terms of the solicitor's retainer. In In Re Dickie (1915-16), 23 B.C.R. 538 (C.A.) the issue was whether there was an agreement respecting fees that would normally be expected to be in writing. I am, therefore, not convinced that the principle is one that applies in every case in which there is a conflict between the evidence of a client and a solicitor. Mr. Kestenberg [representing the Defendant solicitor] argues that even if the principle is not restricted to the facts of those cases, it does not assist the plaintiff because the parties are not "on equal ground", because the note confirms the defendant's version of the advice given to the plaintiff.

[29] Mr. Tibollo urges me not to accept the note as confirmatory of the defendant's version, because the genuineness of the note is seriously in doubt. He submits that the defendant has not satisfactorily explained the absence of the original note. He suggests that the real reason that the original was not produced was to prevent it from being subjected to closer examination or forensic testing that might reveal that it was not made contemporaneously with the meeting of October 10, 1997.

[30] I must confess that initially I was troubled by the defendant's inability to produce the original note or to give any satisfactory explanation of how it was lost. The note is barely legible and admittedly makes no reference to any advice about the consequences. However, on further reflection and deliberation, I am prepared to accept the defendant's evidence that he did make the note contemporaneously with the meeting of October 10, 1997. It seems to me that if the note was a fabrication, the defendant would have produced an original that would have been more legible, and that would have made reference to the advice concerning the consequences. In short, I conclude, therefore, that the unavailability of the original note and the defects in the note are more supportive of its genuineness than the contrary.

[31] Moreover, it is a well-accepted principle that a court should take into account the gravity of the consequences of a finding of fact in considering whether the evidence reasonably satisfies the court of the existence of the fact. See Smith v. Smith and Smedman, [1952] 2 S.C.R. 312, [1952] 3 D.L.R. 449.

[32] Mr. Tibollo submits that even if I should find [that] the note is genuine and supports the conclusion that the defendant gave the advice mentioned in the note, I should find that the defendant did not give the plaintiff the advice as to the consequences, because the note does not mention such advice. I accept this submission. I find it is logical and fair that Mr. Kestenberg's submission that the note confirms the defendant's version should cut both ways. If it supports the conclusion that what is mentioned in the note was discussed, then it also supports the conclusion that what was not mentioned in the note was not discussed. This is particularly so in light of the defendant's evidence that he made the note in order to protect himself in the event that there was a dispute as to what he told the plaintiff. Under these circumstances, I find it more probable than not that if the defendant had advised as to the consequences, he would have mentioned it in the note. I

found the defendant's attempts to explain why there was no mention of the consequences in the note to be totally unconvincing.

. . . .

[35] In the result, I am satisfied on the balance of probabilities that the defendant did advise the plaintiff about the proper use of the corporate name, but did not advise him about the consequences.

. . . .

[37] The plaintiff called Mr. Wayne Gray, a solicitor, as an expert witness to express an opinion as to the appropriate standard of care to be exercised by a solicitor in the circumstances of this case. Mr. Kestenberg did not challenge Mr. Gray's qualifications or the propriety of his offering an opinion on this issue.

. . . .

[41] In his examination-in-chief, Mr. Gray expressed the opinion that the best practice is to give the advice to the client in writing. In Mr. Gray's view, a written memorandum is less prone to "go in one ear and out the other", and serves to reinforce to the client the importance of the proper use of the corporate name. However, his investigation into the practice followed both in his office and in other law offices revealed that the typical practice was to include a short statement as to the proper use of the corporate name that was generally limited to repeating the provisions of s. 10(5) of the OBCA. He concluded that while advice about the consequences is not usually addressed in a standard reporting letter, it may nevertheless be made the subject-matter of a special memorandum to a client, particularly one who might benefit from it. In none of the sample reporting letters that he had reviewed did he find a statement as to the consequences of the failure to properly use the corporate name. He did produce an example of a solicitor's letter to a client warning about the consequences of the failure to properly use the corporate name, but admitted that this letter was prompted by the solicitor learning that the client was in fact not using the full corporate name on important documents.

[42] In Mr. Gray's opinion, it would be a breach of a solicitor's duty to a high-risk client if the solicitor fails to:

> (a) advise the client on the dangers of dropping the legal element in the use of the corporate name (i.e. Inc., Ltd., or Corp.), and
> (b) warn the client of the risk of personal liability should the client fail to bring home to the opposite contracting party that it is dealing with a corporation.

[43] On cross-examination, Mr. Gray agreed with Mr. Kestenberg's suggestions that if the defendant advised the plaintiff about the proper use of the corporate name and the consequences, then the defendant went "one step beyond" what is contained in the sample reporting letters. However, he explained that the sample reporting letters were not designed specifically for the unsophisticated client, but primarily for the kind of client one typically gets in one's practice. He testified that there was a different standard applicable to the high-risk, unsophisticated client as

compared to the sophisticated client and that the means of communicating the information must be adapted to the particular client in the circumstances.

[44] Mr. Gray conceded that a failure to put the advice in writing does not, in and of itself, constitute a breach of the solicitor's duty. He stressed that it did not really matter how the information was communicated as long as the client "gets it and understands it". He conceded that it might be more effective to bring home the information to the client in a personal meeting than in a reporting letter. However, if the advice is given orally, Mr. Gray was of the opinion that it was important to see how the client reacted to it, and whether he was absorbing it and understanding it.

. . . .

[49] Mr. Gray clearly expressed the opinion that it would be a breach of a solicitor's duty to a high-risk client if the solicitor failed to advise such a client about the consequences [of failing to follow the defendant solicitor's advice]. In my view, this opinion accords with common sense and logic. It seems to me that to advise such a client about how to properly use the corporate name but not to mention the consequences of the failure to do so would not be fulfilling the duty of effectively bringing home to the client the importance of the advice. This applies with even greater force where, as in the case at bar, the solicitor is under the impression that the client was not going to follow the advice, and that the failure to do so would result in the client being exposed to personal liability, the avoidance of which was the very purpose for which the solicitor was retained.

[50] I do not agree with Mr. Kestenberg's contention that the absence of any mention of the consequences in the sample reporting letters establishes conclusively that the prevailing practice at the relevant time was not to advise high-risk clients like the plaintiff about the consequences. However, even if I did, I find this would not be determinative of whether the defendant, on the particular facts of this case, met the standard of care.

[51] In Roberge v. Bolduc, [1991] 1 S.C.R. 374, 78 D.L.R. (4th) 666, the Supreme Court of Canada considered whether a notary in Quebec was negligent when he gave his client an erroneous opinion that there was a defect in the title to a property that the client was intending to purchase. All the expert witnesses who testified at the trial expressed the view that the notary's opinion conformed to the norms of practice of a prudent and cautious notary in the same circumstances. In delivering the unanimous decision of the court, Madam Justice L'Heureux-Dubé made the following instructive statements [at pp. 434, 436-37 S.C.R.]:

> That the appellant notary acted in accordance with the then general notarial practice does not seem to be contested. Neither the trial judge nor the respondents suggest otherwise. It is not sufficient, however, in my view, that the common professional practice be followed in order to avoid liability. That practice has to be demonstrably reasonable.
>
> . . . . .
>
> This brief overview of both doctrine and jurisprudence indicates that courts have discretion to assess liability despite uncontradicted evidence of common

> professional practice at the relevant time. The standard, in regard to the particular facts of each case, must still be that of a reasonable professional in such circumstances.
>
> It may very well be that the professional practice reflects prudent and diligent conduct. One would hope that if a certain practice has developed amongst professionals in regard to a particular professional act, such practice is in accordance with a prudent course of action. The fact that a professional has followed the practice of his or her peers may be strong evidence of reasonable and diligent conduct, but it is not determinative. If the practice is not in accordance with the general standards of liability, i.e., that one must act in a reasonable manner, then the professional who adheres to such a practice can be found liable, depending on the facts of each case. ….

[52] If the prevailing practice in circumstances similar to those that exist in the present case was not to advise high-risk clients like the plaintiff about the consequences, I find that such a practice, for the reasons that I have mentioned, far from being demonstrably reasonable, would not satisfy the duty of a solicitor to act with reasonable diligence to protect a client's interests. My view is reinforced by the defendant's own evidence that it was his usual practice to advise about the consequences. … . I recognize that in some cases, the particular solicitor's usual practice may exceed the appropriate standard of care; however, I do not regard this as one of those cases.

The failure to advise in writing

[53] Even if I had found that the defendant had [verbally] given the plaintiff the advice about the consequences, it is my opinion that, on the particular facts of this case, this would not have been sufficient to satisfy the standard of care. In accordance with general principles of negligence, every solicitor owes his or her client the duty of taking reasonable care to avoid or minimize a foreseeable risk of harm to the client. See Glivar v. Noble, [1985] O.J. No. 80 (Quicklaw) (C.A.). On the particular facts of this case I find that by failing to provide the advice in writing, the defendant breached this duty.

. . . .

[63] I am satisfied that the defendant's breach of duty caused or materially contributed to the result in the Teenflo action, and that the plaintiff has, therefore, established a sufficient causal connection between the defendant's breach of the standard of care and the damages claimed.

McClenahan v. Clarke (c.o.b. Clarke & Wright)

[2004] O.J. No. 287 (QL) (Ont. Sup. Ct. J.), Aitken J.,

paras. 1-17; 26-27; 45; 48; 49; 50-51; 56; 58-63; 69; 70-76; 81; 83-88; 90-96; 98; 121-122; 128-129; 138-145; 147-150; 157-158; 160-171; 178-181; 187; 227-228; 244-254

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[1] Nature of Proceedings

¶ 1 Heather Billes is suing her former matrimonial lawyer, Colin Wright, and his partner, Harry Clarke, for damages for Mr. Wright's alleged negligence in representing her in the negotiation of a separation agreement with her former husband, David McClenahan.

¶ 2 The case raises several interesting issues, some of which are: (1) Was Colin Wright's retainer a general or limited retainer? (2) Who was Colin Wright's client or clients? From whom did Colin Wright take his instructions? (3) To what extent was Colin Wright obliged to voice suspicions with his client(s) about the veracity of information he was being provided? (4) What impact should the wealth of Heather Billes' family have had on determining her entitlement to spousal support? (5) How should a business with no current fair market value, but with recognized growth potential, be valued for purposes of calculating net family property?

[2] Background

¶ 3 Heather Billes is the granddaughter of Alfred J. Billes, one of the co-founders of the Canadian Tire Corporation (the "CTC"), and the daughter of Alfred W. Billes ("Fred Billes"), a former CTC dealer and director who is now retired and living in the Cayman Islands. At the time of her marriage to David McClenahan on August 2, 1986, Heather Billes was the beneficiary of several trusts that had been created by various members of her family and that had an estimated value at the time of $16,544,967. At the time of marriage, David McClenahan had minimal assets.

¶ 4 Prior to their marriage, David McClenahan and Heather Billes signed a marriage contract dated July 31, 1986, which purported to be entered pursuant to … s. 52 of the Family Law Act, 1986, S.O. 1986, c. 4. In the Marriage Contract, the parties waived the provisions of Part I of the Family Law Act and declared that the provisions of the Contract would govern the division of any property, whenever and however acquired by either of them, in the event of marriage breakdown. [The Contract released wife-beneficiary trusts from husband’s claims.] There was also a limited spousal support release clause. The Marriage Contract will be discussed in greater detail below.

¶ 5 The parties had two children: Alexandra McClenahan, born January 29, 1987 and Ryan Alexander McClenahan, born April 21, 1989. Throughout the marriage, Heather Billes assumed primary responsibility for the care of the children and the home. David McClenahan worked for the CTC in various capacities, first in Toronto, then in Vanier and finally in Gananoque. Mr. McClenahan's earnings from his work were modest. The family enjoyed an affluent lifestyle due to the income and capital Heather Billes received from the various trusts that had been established for her benefit, and due to gifts that she received from her parents. David McClenahan used some of Heather Billes' trust monies to purchase the Gananoque CTC dealership, at least two boats and various vehicles.

¶ 6 In approximately 1991, there were no further trust monies available to Heather Billes, either in the form of interest or capital. At that time, Heather Billes' parents undertook the support of the family and insisted that the family follow an agreed-upon budget.

¶ 7 The parties' marriage deteriorated in the early nineties. They started living separately in 1993 and separated formally on March 1, 1994. At the time, they were living in Kingston, and David McClenahan, through his holding company D.G. McClenahan Sales Inc. ("McClenahan Sales"), owned the CTC dealership in Gananoque.

¶ 8 At David McClenahan's suggestion, Heather Billes retained Colin Wright as her lawyer to assist in the negotiation of a separation agreement. Mr. McClenahan retained Harry McMurtry. Heather Billes' father, Fred Billes, was heavily involved in instructing Mr. Wright. The parties signed a separation agreement dated July 13, 1994 ("the Separation Agreement") [on July 21, 1994]. Pursuant to the Separation Agreement, the parties had joint custody of their children, with the children's principal residence being with Heather Billes. The parties released all spousal support claims and all property claims against the other. No child support was payable by either party to the other when the Separation Agreement was executed; however, it was anticipated that when Mr. McClenahan had an income, he would start to pay Ms. Billes 1% of his gross annual income per month per child as child support. Heather Billes became the sole owner of the matrimonial home, which at that time was fully encumbered. David McClenahan retained sole ownership of his shares in McClenahan Sales, his boat and his vehicle, free from any claim by Ms. Billes. Ms. Billes agreed to do her utmost to prevent any member of the Billes family from interfering with Mr. McClenahan's career as a CTC associate dealer.

¶ 9 Shortly after Heather Billes signed the Separation Agreement, she advised Colin Wright that she had made a mistake, and that she did not want to accept the deal set out in the Agreement. Colin Wright advised her that it was too late to change her mind. At this point, Heather Billes did not have sufficient monies to pay her ongoing bills, and the mortgage on the matrimonial home had already fallen into arrears. She consulted a Toronto lawyer, Kirby Chown, for a second opinion regarding her legal rights following the separation.

¶ 10 At the beginning of September 1994, Heather Billes took the children to the Cayman Islands, where her parents were residing, and where they had undertaken to support Ms. Billes and the children. She did not advise David McClenahan in advance that she was doing so, and she did not have his consent to remove the children from Ontario. Mr. McClenahan obtained an ex parte order from McWilliam J. dated September 19, 1994, granting him interim interim custody of the children and authorizing David McClenahan or someone on his behalf to apprehend the children so that they could be returned to Ontario. Upon learning of this order, Heather Billes immediately returned to Ontario with the children. By order of Byers J. dated September 29, 1994, Heather Billes was ordered to return the children to Kingston, and the children were to remain in her care until further order of the court. Joint custody was restored. David McClenahan was ordered to pay Heather Billes $2,000 in child support. A family unit assessment was undertaken by Dr. Christopher Cooper.

¶ 11 At this time, Heather Billes was receiving inadequate support from David McClenahan and no support from her family. The mortgage on the matrimonial home was several months in arrears. In January 1995, the Bank of Montreal, the mortgagee on the home, commenced an action against both Heather Billes and David McClenahan for the recovery of $380,768 plus interest. In the same

month, Ms. Billes applied for and was granted social assistance for approximately three months on the understanding that if she received monies either from her family or from David McClenahan, she would have to reimburse the government. Ms. Billes' relationship with her parents was strained from September 1994 to February 1995, and over this period, she was receiving minimal, if any, financial support from them.

¶ 12 On February 2, 1995, Lally J. made an order for interim joint custody, with David McClenahan providing the children's primary residence and Heather Billes having liberal and generous access to them. Following this decision, David McClenahan moved to Ottawa with the children where he had purchased a new CTC franchise on Richmond Road in January 1995. Ms. Billes eventually moved to Ottawa as well, at first living in an apartment, then in various rented houses, and finally in 1999 in a house in Rockcliffe Park which her family purchased for her.

¶ 13 Meanwhile in January 1996, the Bank of Montreal had signed judgment against Ms. Billes and Mr. McClenahan in the amount of $141,090.06, the shortfall incurred after the Bank had sold the matrimonial home in Kingston due to the default on the mortgage.

¶ 14 On April 26, 1996, Heather Billes commenced divorce proceedings in which she sought, in addition to the divorce, custody of the children, child support, spousal support, a declaration of resulting and constructive trust, an equalization payment under the Family Law Act, R.S.O. 1990, c. F.3 and damages for the wrongful conversion of Heather Billes' property during marriage, breach of trust and breach of fiduciary duty. On September 18, 1996, Heather Billes commenced this action against Colin Wright and [his partner] Harry Clarke seeking special damages of $1 million, general damages of $2 million, and exemplary and aggravated damages of $500,000, based on the alleged negligence of Colin Wright during his representation of Heather Billes when the Separation Agreement was negotiated and signed.

¶ 15 Heather Billes and David McClenahan were divorced on June 17, 1997, with the other issues in the divorce proceeding carrying on in the form of a corollary relief proceeding.

¶ 16 On May 28, 1998, the Bank of Montreal petitioned for a receiving order against Heather Billes. Heather Billes disputed the claim. In October 1998, Minutes of Settlement were signed pursuant to which Heather Billes paid the Bank $43,750 (with money received from her parents) and assigned to the Bank the amount of $45,848.68 from any proceeds she might receive from David McClenahan in regard to … [her] property claim in the corollary relief proceedings or as damages from Colin Wright and Harry Clarke in these proceedings.

¶ 17 Minutes of Settlement in the divorce action were signed on December 21, 1999. They provided for a Co-parenting Agreement with the children spending approximately equal time with both parents, no child support payments between the parties, the payment by Ms. Billes of various educational expenses for the children, the creation of a trust by Mr. McClenahan regarding 45% of his interest in McClenahan Sales and any interest in any other CTC dealership in favour of the children, and the creation of a further trust for the children based on Mr. McClenahan's income from his CTC dealership. More will be explained later regarding this settlement. The terms of the settlement were incorporated in the Judgment of Metivier J. dated March 21, 2000.

. . . .

[3] Negligence Claim

¶ 26 In a negligence action, the plaintiff must prove the existence of a duty of care on the part of the defendant, a breach of the standard of care, damages incurred by the plaintiff that were reasonably foreseeable when the breach occurred and a causal connection between the breach and the consequent damages.

¶ 27 Counsel are in agreement that the burden of proof lies with the Plaintiff to establish each element of the cause of action in negligence on a balance of probabilities. The legal burden never shifts to the Defendants, except in regard to the question of whether the Plaintiff failed to mitigate her damages. The Defendants are not suggesting that this was the case here.

. . . .

[4] Duty of Care

¶ 45 There is no dispute that Colin Wright owed Heather Billes a duty of care as her matrimonial lawyer in the spring and summer of 1994.

. . . .

[5] Standard of Care

. . . .

¶ 48 There is no dispute that the standard of care to which Colin Wright must be held is that of a reasonably competent, prudent and diligent generalist lawyer practicing family law in Eastern Ontario in 1994. He was required to bring reasonable care, skill and knowledge to the performance of the professional service which he had undertaken. (Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147 at 150) Mr. Wright need not have been infallible during his representation of Ms. Billes. An error of judgment or ignorance of a particular point of law will lead to a finding of negligent conduct only if it was such that an ordinarily competent lawyer would not have made or shown it. (Aaroe and Aaroe v. Seymour, [1956] O.R. 736 at 737, 6 D.L.R. (2d) 100 (H.C.J.) aff'd (1957), 7 D.L.R. (2d) 676 (O.C.A.))

¶ 49 A central question is whether the standard of care owed by Colin Wright to Heather Billes differed from that normally owed by lawyers to their matrimonial clients. The Defendants argue that Colin Wright had a limited retainer, namely to carry out very specific instructions given to him by Heather Billes, and more particularly, Fred Billes. According to the Defendants, those instructions were to get custody of the children, or at least primary residency, and to get a final release from David McClenahan in regard to all financial matters. ….

¶ 50 I find that when Heather Billes first consulted Colin Wright in March 1994, she simply indicated that she and David McClenahan had separated, and that she wanted Colin Wright to represent her in the negotiation of a separation agreement. Her primary concern at the time, as it often is with any parent immediately following a separation, was custody of the children. This remained her primary concern throughout the negotiation of the Separation Agreement.

¶ 51 On May 9, 1994, during the first conversation Colin Wright had with Fred Billes, Fred Billes indicated his goal was to get back from David McClenahan some of Heather and Fred Billes' monies that Mr. McClenahan had spent during the marriage. A second goal was to minimize David McClenahan's involvement in the lives of Ms. Billes and the children. Although the second goal was unrealistic, and Fred Billes had to be advised that was the case, there was nothing unreasonable about the first goal. Colin Wright consistently considered Fred Billes' goals to be those of Heather Billes as well.

. . . .

¶ 56 Any limitation to the scope of a lawyer's retainer should be clear and agreed to by the client, with any ambiguity being construed against the lawyer. (See ABN Amro Bank Canada v. Gowling, Strathy & Henderson (1994), 20 O.R. (3d) 779 (Gen.Div.)) The evidence does not support the Defendants' argument, or … [the] assumption [by Philip Epstein, a member of the Ontario Bar, who gave expert evidence for the Defendant solicitors], that Colin Wright had received a limited retainer from Heather Billes related to custody and a release of all other claims by David McClenahan. There was no written retainer, no written qualification to what would otherwise be considered a general retainer on a matrimonial file, and no evidence of any specific discussions where Colin Wright clarified the limited nature of his assignment. I find that Colin Wright was operating under a general retainer to represent Heather Billes in the resolution of legal issues arising out of her marriage to and separation from David McClenahan.

[6] Breach of the Standard of Care

. . . .

¶ 58 …, I find that Colin Wright was operating under a general matrimonial retainer. For the reasons that follow, I accept … [the] assessment [of Hunter Phillips, a member of the Ontario Bar, who gave expert opinion evidence for the Plaintiff wife] that in operating under such a retainer, Mr. Wright did not meet the standard of care expected of him. He did not do so because of numerous errors and omissions which were sufficiently significant in terms of potential consequences and significantly indicative of a lack of knowledge of basic principles to take Mr. Wright's conduct below what would be expected of the reasonably competent, prudent and diligent lawyer.

[6.1] Accepting Retainer to Act for Heather Billes against David McClenahan.

¶ 59 In 1994, David McClenahan went to Colin Wright's office, advising him that he and Heather Billes had separated and that they wanted Colin Wright to draft a separation agreement for both of them in accordance with the informal agreement they had negotiated, as summarized by notes Mr. McClenahan gave to Colin Wright. Quite appropriately, Colin Wright stated that he could not act for both Heather Billes and David McClenahan. Somewhat more problematically in the circumstances of this case, he said that he would act for either. Mr. McClenahan suggested that he act for Ms. Billes because she felt comfortable with him, and Mr. Wright acceded to this request. Mr. McClenahan accepted Mr. Wright's recommendation that he retain Harry McMurtry.

¶ 60 Colin Wright had first met Heather Billes in 1992 when he represented both her and Mr. McClenahan in placing a first mortgage on their Kingston property in the amount of $350,000. Later

the same year, Mr. Wright again acted for the couple in registering a new mortgage for $371,250, and discharging the previous mortgage. Mr. McClenahan had given Mr. Wright the instructions on both occasions. In 1992, Mr. Wright successfully represented David McClenahan in a Small Claims Court action that lasted over a period of approximately 10 months and eventually went to trial. In 1993, the corporate books of McClenahan Sales were sent to Colin Wright on the expectation that he might become the new corporate lawyer, though Mr. Wright did not recall doing anything subsequently in regard to the corporation. Finally, prior to March 1994, Mr. Wright had seen Mr. McClenahan at least once socially. Mr. Wright described his relationship with David McClenahan up to March 1994 as being affable and positive. Certainly Mr. McClenahan felt comfortable enough with Mr. Wright to have brought his children to Mr. Wright's house in the spring of 1994, simply to introduce them to him.

¶ 61 In circumstances where in the past Colin Wright had received all of his instructions from David McClenahan when representing both Mr. McClenahan and Ms. Billes, where he had acted for Mr. McClenahan alone on at least one occasion, where he had had some social relationship with Mr. McClenahan and where he had had minimal contact with Heather Billes, it would have been wiser for Colin Wright not to have acted for Ms. Billes against Mr. McClenahan. Mr. Wright's previous relationship with David McClenahan raises a question as to whether he came to the task at hand, namely of negotiating a separation agreement on behalf of Heather Billes, with the objectivity required. For example, despite Fred Billes' telling Mr. Wright repeatedly that in his view Mr. McClenahan was unscrupulous, I find that Mr. Wright discounted this opinion until he witnessed first-hand Mr. McClenahan's behaviour on July 19, 1994 at Mr. Wright's office. By then Mr. Wright had already advised Heather Billes against the need for financial disclosure from Mr. McClenahan.

¶ 62 Mr. Wright's acceptance of Ms. Billes' retainer showed poor judgment. It alone is not proof of negligent conduct. Nevertheless, his previous relationship with Mr. McClenahan may have contributed to a certain lack of rigor that characterized Mr. Wright's representation of Ms. Billes.

[6.2] Lack of Initial Advice Regarding Custody and Time-sharing

¶ 63 Based on the evidence of both Colin Wright and Heather Billes, I find that Heather Billes communicated to Colin Wright during their first meeting on March 4th, 1994 that her top priority was getting custody of the children. I also find that, as a result of Mr. Wright's previous interactions with the McClenahan family, as well as the communication with Ms. Billes on March 4th, he knew that Ms. Billes had been the children's primary caregiver throughout the marriage. Finally, I find that during the March 4th interview, Mr. Wright learned of Ms. Billes' intention to take a film course at Queen's University from April to July, during which time the children were going to live with Mr. McClenahan during the week and see their mother only on the weekend.

. . . .

¶ 69 …., there is no evidence from either Colin Wright or Heather Billes that Mr. Wright ever provided her with detailed information and advice regarding custody and time-sharing in March 1994; … . Unquestionably, the concept of status quo is a basic concept with which all lawyers practicing family law should be aware. Mr. Wright's omission in providing early advice in its regard, in my view, put Heather Billes at a disadvantage in the negotiation process, right from the very

beginning - a disadvantage from which she never recovered. Mr. Epstein described the disadvantage as follows:

> ...in my experience, status quo is one of the more important features of a custody dispute, particularly since custody cases usually unfold with an interim custody order and an interim custody order almost invariably follows the status quo, so if Ms. McClenahan and - Mr. and Mrs. McClenahan had gone down the slippery slope of litigation, Mrs. McClenahan's risk with respect to custody was going to dramatically increase ...

[6.3] Lack of Comprehensive Advice Regarding Rights and Obligations

¶ 70 Another point which bears note is that the evidence does not show that Colin Wright ever gave a comprehensive exposition to Heather Billes as to her rights and obligations arising out of her marriage and separation. Consequently, she did not have the legal context in which to understand whether her instructions to Colin Wright, from time to time, were reasonable in the context of a matrimonial proceeding or whether they were ill considered. It is the role of the reasonably competent, prudent and diligent matrimonial lawyer to collect pertinent information on all relevant issues in a case, to review those issues with the client, explaining the law and how it relates to the facts at hand, and then to receive the client's instructions. Otherwise the decisions of a matrimonial client, who is inexperienced in family law and matrimonial proceedings, and to whom relevant legal principles have not been explained, cannot be considered informed.

[6.4] Appreciation of Context in which Separation Agreement is Negotiated

¶ 71 It is incumbent on lawyers practicing family law to have a basic understanding of interpersonal dynamics and of how those dynamics can impact on a client's abilities and behaviour during the course of a matrimonial file. For example, if a client has suffered abuse in the past, that client may have low self-esteem, may have difficulty absorbing information, may lack confidence in making decisions, may be fearful and may be prone to anxiety and depression. Part of the role of a matrimonial lawyer is to be able to detect personal or familial circumstances that may impact on a client's ability to receive information, make decisions and provide instructions in the normal course. It may be appropriate for the family lawyer to raise concerns with a client about his or her state of mind or preparedness to finalize a separation agreement.

¶ 72 Philip Epstein agreed with the Plaintiff's counsel that one aspect of the role of a lawyer in matrimonial matters is to try to protect the client's emotional health. One way of doing this is to be mindful that the client might be under significant emotional stress, and to minimize that stress to whatever extent possible. There are many ways in which this can be done, such as referring the client to a mental health professional and being careful that the negotiation process is not proceeding at a rate ahead of the client's psychological preparedness.

(a) Relationship of Heather Billes and David McClenahan

¶ 73 The documentary evidence adduced at trial, together with the evidence of Heather Billes and Colin Wright, leads me to conclude that Mr. Wright did not assign sufficient importance to

understanding the emotional or psychological pressures on Heather Billes during the period when the Separation Agreement was being negotiated and then signed. I find that Mr. Wright did not make inquiries as to the nature of the relationship between Heather Billes and David McClenahan, and as to how Ms. Billes normally reacted to demands made by Mr. McClenahan. …. [For example], there were the events of July 19, 1994, that gave Mr. Wright an indication of how Ms. Billes reacted when faced with anger or threats from Mr. McClenahan.

¶ 74 On July 19th, Colin Wright met with Heather Billes and Fred Billes at his office, ostensibly for Ms. Billes to sign the … Separation Agreement [dated July 13, 1994]. Mr. Wright, Ms. Billes and Fred Billes reviewed the Agreement, which Mr. McClenahan had already signed. Heather Billes was not prepared to sign the document. She and Fred Billes wanted additional time to consider it, and possibly to get a second opinion. David McClenahan had agreed to return the children to Heather Billes' care on July 19th [after the April to July film course she had attended at Queen's University in Kingston]. I find that Heather Billes [afterwords, on July 19th] saw Mr. McClenahan in the parking lot of Colin Wright's office. She told him that she had not signed the Separation Agreement. Mr. McClenahan reacted angrily and said that he would not return the children to her. Ms. Billes sought out Mr. Wright. At trial, Mr. Wright described Heather Billes on that occasion as being distraught and extremely emotional. I find that Mr. Wright was shocked at the state of emotional collapse of Ms. Billes, and her apparent inability to cope with the conflict with Mr. McClenahan. He had not previously seen her so distraught and paralyzed. Mr. Wright intervened, spoke to Mr. McClenahan and negotiated the return of the children to Ms. Billes.

¶ 75 This observation, together with the knowledge Colin Wright had or should have had by this time concerning the relationship between Heather Billes and David McClenahan, should have acted as a red flag to Mr. Wright. He should have made more of an effort than he did to ensure that Heather Billes understood the consequences of the Separation Agreement, and that she was signing the Agreement through an exercise of her own free will, not through fears of reprisals on the part of David McClenahan.

¶ 76 What Colin Wright claimed he took from this encounter was a realization that Heather Billes could not have survived the emotional turmoil created by highly charged matrimonial litigation, especially that involving her children. As well, he worried that Mr. McClenahan's unscrupulous behaviour would make any trial against him very difficult. Both views reinforced his opinion that Heather Billes should sign the Separation Agreement. Although Mr. Wright's concerns were not unreasonable, he still had to consider whether Ms. Billes would be signing the Separation Agreement of her own free will, and whether she was emotionally able at that point in time to appreciate the impact of what she was doing, both for her own future and for that of the children. I do not accept Mr. Wright's evidence that on July 21st, two days after he had seen Ms. Billes totally distraught and quaking in the wake of Mr. McClenahan's threats, Heather Billes was calm, and well able to appreciate what she was doing. At trial, Mr. Wright's rather glib recounting of how all of Heather Billes' emotional turmoil had dissipated by the time of his interview with her on July 21st [when she signed the Separation Agreement], convinced me that Mr. Wright did not fully appreciate the significance of Ms. Billes' emotional state on that date.

(b) Relationship between Heather Billes and Fred Billes

. . . .

¶ 81 On July 21, 1994, it was clear to Colin Wright that Heather Billes was signing the Separation Agreement against the wishes of Fred Billes. In that on the most part Mr. Wright had taken directions from Fred Billes throughout the course of his representation of Heather Billes, and he had assumed that Heather Billes' silence was acquiescence to the views as expressed by Fred Billes, it was incumbent on Mr. Wright to explore the significance of the divergent positions now being taken by Fred Billes and Heather Billes. More specifically, Mr. Wright should have been concerned about the potential repercussions for Heather Billes if her father did not agree with her signing the Separation Agreement, and if she went ahead and did so. Was he going to live up to his earlier commitment to financially support Heather Billes, when she was not doing as he wished? This should have been explored by Colin Wright; there is no evidence that it was.

. . . .

¶ 83 Heather Billes' vulnerability in her relationship with Fred Billes should have made Colin Wright especially careful to isolate Ms. Billes' needs and not to be bowled over by Mr. Billes' desire to control events. Mr. Wright's representation of Ms. Billes did not show this level of care.

(c) Relationship between Heather Billes and Colin Wright

¶ 84 Colin Wright described how he expressed impatience with Heather Billes on July 19, 1994 because she was not prepared to sign the revised Separation Agreement which had incorporated the changes she and Fred Billes had requested during their interview [by Mr. Wright] of July 13th. He believed that he had done what he had been instructed to do; namely, to have Harry McMurtry [the husband's solicitor] amend the … draft Agreement so as to incorporate the requested changes. David McClenahan had signed the Agreement. Both David McClenahan and Harry McMurtry expected Heather Billes to sign the Agreement on July 19th. Colin Wright felt pressured by Harry McMurtry to get the Agreement finalized. As well, he had some concern that if the Agreement were not signed on July 19th, David McClenahan might start litigation.

¶ 85 Although lawyers will naturally feel impatience from time to time with their clients, they must be careful not to pressure a client into signing something as important as a final separation agreement if the client is not ready to sign it. At no time during his evidence did Colin Wright express any understanding of Heather Billes' emotional state following the separation. The separation had occurred in March 1994, negotiations regarding a separation agreement had commenced only in May, and the expression of impatience by Colin Wright occurred in mid-July. This was not a case of long-protracted negotiations, and a client changing her mind repeatedly. It was a case of a client not being satisfied with the eventual agreement, but feeling under pressure to sign it for a variety of reasons. The lawyer's function is to explain the advantages and disadvantages of signing an agreement at the particular point in time, and to facilitate the client's making her own decision in regard thereto, without having the additional pressure that the client is annoying or disappointing the lawyer through her decision. This is especially so when the lawyer knows that the client is passive, and that she is already caught between the demands of two strong-willed men.

¶ 86 Hunter Phillips [, expert opinion witness for the Plaintiff wife] expressed concern that Colin Wright gave Heather Billes and Fred Billes … [a] letter … [on] July 21, 1994 during the interview when Ms. Billes had come to sign the Separation Agreement. The letter basically said to both that if Heather Billes was not going to sign the Agreement, then she should probably seek legal assistance

elsewhere. As Colin Wright's only opinion letter to Heather Billes, it should have been provided to her in advance of any meeting to consider the terms of a separation agreement. It would have been appropriate for Colin Wright to suggest that Heather Billes seek a second opinion, if she was unsure what to do, but that is very different from a lawyer saying: "Sign the agreement I am recommending or go elsewhere." Signing a separation agreement is a major event in the life of a separated spouse, and one that has a huge impact on that person's future security. By taking the approach he did on July 21st, Colin Wright became a player in the events, rather than an impartial adviser. He added unnecessary stress to Heather Billes at a time when, to his knowledge, she was already very stressed.

[6.5] Treating Heather Billes and Fred Billes as One

¶ 87 Fred Billes came to every meeting Heather Billes had with Colin Wright, aside from the first one. It is clear from the evidence of both Ms. Billes and Mr. Wright that Fred Billes set the agenda at those meetings. Mr. Billes wrote … [a] memoranda and letters to Colin Wright summarizing his goals and concerns, and his signature is the first one appearing at the bottom. Then there appears the line: "Read and generally agreed to by Heather P.E. McClenahan" [italics added]. This presentation of directions to Colin Wright should have acted as a warning to him to be very careful to ensure that the instructions that he was receiving were the true instructions of Heather Billes and not just those of her father.

¶ 88 At trial, when asked from whom Colin Wright had taken his instructions, he stated "ultimately Heather Billes". However, Mr. Wright went on to acknowledge that Heather Billes relied on her father for support, and if Fred Billes said something, and Heather Billes did not disagree, then Mr. Wright considered the instruction came from her. Considering the dynamics between Fred Billes and Heather Billes, which should have been painfully evident to Mr. Wright, he should not have assumed Fred Billes' statements were Heather Billes' simply because she did not contradict him in his presence. A reasonably competent, prudent and diligent lawyer would not have made this assumption.

. . . .

¶ 90 I do not accept the suggestion that Fred Billes had the right to give Colin Wright instructions regarding the carriage of Heather Billes' file. The obligation was on Mr. Wright at all times to ensure that the instructions on which he was acting were in fact Heather Billes' instructions. This was especially so considering the dynamics of the relationship between Fred and Heather Billes, as I have described above.

¶ 91 …. I find that Heather Billes signed the Separation Agreement against her father's advice. (Colin Wright acknowledged that this was so.) Fred Billes was not pleased that she had done so. In the summer of 1994, Mr. Billes did not continue to pay the mortgage on the matrimonial home in Kingston. The mortgage fell into arrears and became subject of collection proceedings. By the fall of 1994, Heather Billes was without income. Fred Billes undertook to support her and the children, but only if they moved to the Cayman Islands. Without any support coming from David McClenahan, Ms. Billes felt that she had no choice but to follow her father's instructions. This eventually led to her losing primary residency for the children. When Ms. Billes returned [from the Cayman Islands] to Ontario in the fall of 1994, as a result of a court order, Mr. Billes did not provide her with financial assistance, and she ended up having to apply for welfare.

¶ 92 Philip Epstein [, called by the Defendant's solicitors, gave expert opinion testimony that] …:

> ... If I thought the father was exerting undue influence, and I thought the father was giving advice that was unreasonable, or if I thought the daughter should not take the father's advice; if I thought there was any degree of lack of unanimity of their position or any reason to be concerned about it, I would remove the father from the room while I counseled the wife individually.

¶ 93 In fact the evidence supports the conclusion that in the spring and summer of 1994, all of these reasons for concern were present and should have been evident to Colin Wright. As a basic minimum, I would expect the reasonably competent and prudent family lawyer in Colin Wright's position to have interviewed Heather Billes on her own in an effort to determine to what extent the Separation Agreement reflected what she wanted, and to what extent it reflected the views and wishes of Fred Billes. As well, and very importantly, Mr. Wright should have discussed with Heather Billes in the absence of her father the following additional matters.

¶ 94 There may have been good reasons for Heather Billes to make full financial disclosure before signing the Separation Agreement; for example, to get full financial disclosure from David McClenahan, and to help ensure that the Agreement would be final and binding on Mr. McClenahan. On the other hand, there may have been reasons why Fred Billes may not have wanted her to make full disclosure regarding the history of Heather Billes' trust funds. As well, for whatever reason, he may not have wanted Heather Billes to have that information. Finally, he may have had other personal reasons why a public revelation of the history of those funds would not have been in his interests or in Ms. Billes' interests. It was Colin Wright's role to bring to Heather Billes' attention that her interests and those of her father in regard to the issue of financial disclosure may not have been the same. Mr. Wright claimed at trial that the reason he did not recommend full financial disclosure was that he believed Fred Billes would not provide it, and he suspected Heather Billes' net worth at separation was not zero. Colin Wright was obliged to discuss these concerns privately with Heather Billes, if he in fact had them.

¶ 95 Colin Wright should have discussed with Heather Billes, in the absence of Fred Billes, the difference between her being legally entitled to certain assets or income and her receiving certain assets or income by way of gifts from family members. Mr. Wright should have discussed with Ms. Billes the fact that she had been the real owner of the 1970 Heather Patricia Elizabeth Billes Trust (the "1970 HB Trust"), which was reconveyed to her parents in 1991, and the importance of her understanding now whether or not she was the beneficial owner of any assets or trust funds located offshore. He should have explained her legal entitlement to a constructive trust claim in any assets acquired by Mr. McClenahan to which she had contributed money or money's worth. He should have explained her possible entitlement to spousal support in accordance with Mr. McClenahan's means, if she in fact had no assets and no source of income aside from gifts from her family. He should have explained that even if her father were saying things like: "I will attempt to protect Heather and the children financially", he was under no legal obligation to do so (based on the information then available to Colin Wright). Mr. Wright should have warned Ms. Billes what it might mean if she gave up any support claims against Mr. McClenahan and then became wholly dependent on her father. Fred Billes could exact conditions from her in return for providing her and the children with

support. Was she prepared to live with that potential reality? This was not a conversation that could meaningfully have occurred in the presence of Fred Billes.

¶ 96 Heather Billes claimed at trial that she went to the Cayman Islands with the children in September 1994 because her father was not prepared to support her and the children in Kingston, but he was prepared to support them in the Cayman Islands. This lead to the loss of her main objective in signing the Separation Agreement, namely being the children's primary parent. Without making any finding as to the reason why Ms. Billes took the children to the Cayman Islands, I can state that at some point prior to Heather Billes' signing the Separation Agreement, Colin Wright should have explained to her the risks she was courting by putting all of her faith in her father's largesse. Instead of doing that, Mr. Wright accepted Fred Billes' instructions that a spousal support release be given in the Separation Agreement.

. . . .

[6.6] Not Obtaining Financial Disclosure

(a) From Heather Billes and Fred Billes

¶ 98 What is evident from … [a letter from Colin Wright] to Heather and Fred Billes [on July 21, 1994], and his oral testimony at trial, is that he did not differentiate between financial disclosure to him, as Heather Billes' lawyer, and financial disclosure to David McClenahan. In order to meet his professional responsibilities to Heather Billes, Mr. Wright was obliged to make it clear to her that he required full and frank financial disclosure from her regarding her own financial position before he would be in a position to provide the best possible advice to her. If she was not prepared to give that to him, then he was severely hampered in the advice he could give to her. If Mr. Wright was under the belief that he was not receiving full and frank financial information from Heather Billes and Fred Billes, then Mr. Wright had two choices: he could make it clear to Ms. Billes that without such information, his retainer had to be considered very limited (and Mr. Wright was obliged to clarify the terms of such limited retainer) or Mr. Wright could have withdrawn from the file. The evidence does not persuade me that there were any communications, oral or written, between Colin Wright and Heather Billes or Fred Billes regarding the necessity of his having a clear understanding of Ms. Billes' financial circumstances at marriage and at separation as a prerequisite to his being able to properly advise her. The absence of such knowledge on Mr. Wright's part even hampered his ability to properly advise Ms. Billes as to whether or not she should push for financial disclosure from David McClenahan.

. . . .

¶ 121 Hunter Phillips [, expert opinion witness called by the Plaintiff wife] was shocked by the complete absence of any meaningful record on Colin Wright's file regarding the assets, debts and income of Heather Billes and David McClenahan. There were no handwritten notes of Colin Wright regarding financial disclosure, no draft or sworn financial statements, no draft net family property statements. Certain very easy steps could have been taken by Mr. Wright to get a better idea of Ms. Billes' financial picture, such as reviewing her bank records and income tax returns, and looking at the relevant land registry abstract pages for the properties she had owned. By not assuring that he had received an adequate level of financial disclosure - at least for his own purposes - Colin Wright

put himself in the position where he could not advise Heather Billes of what exactly she was giving up by signing the Separation Agreement. He did not take reasonable steps to ensure that the decision being taken by Ms. Billes was an informed decision.

(b) From David McClenahan

¶ 122 In a letter to Fred … Billes [and his wife Barbara] dated May 11, 1994, and copied to Heather Billes, Colin Wright quite appropriately raised the question of whether Ms. Billes should insist on an exchange of formal financial statements [with her estranged husband] prior to negotiating a separation agreement. He accurately set out the disadvantages as being that Ms. Billes might have to have prepared a detailed inventory of assets to which she was beneficially entitled and that Mr. McClenahan's financial statement might simply show that he had no net worth. He also accurately stated that the advantages to the exchange of financial information were that the four of them would have a better idea of the assets that Mr. McClenahan had left (the value of which might have to be shared with Ms. Billes) and a separation agreement based on full financial disclosure was more likely to remain final and binding. He concluded by recommending that a preliminary exchange of financial statements take place. Neither Hunter Phillips nor Philip Epstein found fault with this preliminary advice, and I fully accept those opinions.

. . . .

¶ 128 According to Colin Wright, by … [July 13, 1994], his main concerns [in the negotiations] were (1) custody; (2) providing Heather Billes with a clean break from David McClenahan; and (3) getting some money back from David McClenahan in regard to the funds of Heather Billes which he had used for his own purposes. He was not concerned about either spousal or child support, because Fred Billes had told him that he would look after Ms. Billes.

¶ 129 Mr. Wright was also not concerned about any property issues. He had accepted Fred Billes' assessment that Mr. McClenahan's interest in his dealership was fully encumbered, and that his other assets did not bring his net worth above zero. There is no evidence that Colin Wright sought or obtained any comprehensive explanation as to the nature of a CTC franchise, the Mobility Program for dealers, or the future prospects likely available to David McClenahan. This was so even though Fred Billes had told Colin Wright that David McClenahan's performance as a dealer had been excellent, that he had already been offered two other stores, and that his company had the potential to earn more than $300,000 annually in the future. As part of the standard of care expected of Mr. Wright, he should have ensured that he had an adequate understanding of the nature of a CTC associate dealership so that he could consider the appropriate methodology when valuing that asset (fair market value, value to owner, fair value), he could consider the significance of any constructive trust claim, he could consider if a claim for an equalization payment existed, and he could consider future support obligations.

. . . .

¶ 138 Colin Wright's allegation that he did not seek financial disclosure because of his suspicions about Fred Billes holding back information, and his concern that Heather Billes would swear a false affidavit, do not fit with Colin Wright's easy acceptance at face value of Fred Billes' information [to him] regarding David McClenahan's income and assets [that his CTC dealership was fully

encumbered and that his other assets did not bring his net worth above zero], and of his undertaking to support Heather Billes in the future. In any event, even if I were to accept Mr. Wright's evidence that he advised against disclosure because of his suspicions about assets that might exist in Heather Billes' name or about the likelihood of incomplete or misleading disclosure being provided by Ms. Billes or her father, it was incumbent upon Mr. Wright to raise these concerns with Heather Billes in 1994 when he was advising her of disclosure requirements and normal practice. His duty to his client included a duty to be honest and forthright with her in regard to the underlying reasons for his recommendations.

¶ 139 At trial, Colin Wright explained that by July 21, 1994, he was recommending to Heather Billes and Fred Billes that the second draft Separation Agreement, as amended in minor ways by Mr. Wright during the meeting of that date, was the best possible settlement that Ms. Billes could get if she was not prepared to make full financial disclosure to Mr. McClenahan. In his view, realistic goals in that context included custody of the children, a full release from Mr. McClenahan regarding financial issues and no requirement to make financial disclosure on Ms. Billes' behalf. One problem with Mr. Wright's supposed reasoning is that in exchange for releasing potential claims which she might had have, Ms. Billes was really not getting anything in return.

¶ 140 Ms. Billes was getting joint custody and primary residency. It was unlikely that she would have received anything less than the former. The latter would have been assured on a temporary basis had Mr. Wright advised Ms. Billes not to give up primary residency [with the children of the marriage] from April to July 1994 [while she attended Queen’s University, in Kingston]. On a longer-term basis, neither custody nor primary residency could ever be considered assured. Both are fluid concepts, never written in stone. They can change, based on the changing needs of the children and the changing abilities of each parent to meet those needs. As subsequent events showed, the parenting arrangements in the Separation Agreement did not last even a year.

¶ 141 There is no evidence that Colin Wright ever explained to Heather Billes that custody orders, even if final, are always subject to variation by reason of a material change in circumstances. Ms. Billes needed to be warned that by giving up everything else in the Separation Agreement in return for a particular custody and time-sharing regime was a risky business. She could be held to her releases of property and (possibly) support rights, whereas there was no corresponding expectation that Mr. McClenahan would necessarily be bound by the agreement regarding the children.

¶ 142 The second benefit secured for Ms. Billes in the Separation Agreement was a release of spousal support rights by Mr. McClenahan. I accept the opinion of Hunter Phillips that, at the time of separation, there was no evidence that Ms. Billes had any assets which could have generated a significant income for her, and therefore she had no risk at the time of being required to pay spousal support to Mr. McClenahan. Even if she had such assets, any spousal support she would have been required to pay to Mr. McClenahan would have been in the nature of transition support: it would have been time-limited. If Ms. Billes had had nothing at separation but subsequently received a gift or inheritance from her family, this would have reduced, possibly to zero, any support she was entitled to receive from Mr. McClenahan, but in all likelihood it would not have exposed Ms. Billes to a support claim by Mr. McClenahan for the following reasons. Their marriage was not of long duration. Mr. McClenahan benefited financially from the marriage, from his use of Heather Billes' capital and interest from her trusts. Ms. Billes, on the other hand, was prejudiced from the marriage because she gave up her employment to look after the children, and all of her trust monies were

dissipated during the marriage. Mr. McClenahan had the ability to be self-supporting from his CTC dealership. The only justification for Ms. Billes being required to pay Mr. McClenahan spousal support in this context would be to minimize any discrepancy in their respective standards of living, something which was only recognized as an appropriate objective of spousal support in marriages of longer duration.

¶ 143 The other key point in regard to spousal support releases is that if Ms. Billes had significant trust or other assets in 1994, and did not disclose them, the spousal support release would have been meaningless. Mr. Wright needed to advise Ms. Billes of this reality; there is no evidence that he did so.

¶ 144 The third benefit for Ms. Billes was Mr. McClenahan's release of property claims. Ms. Billes did not have any exposure in regard to a property claim, a conclusion in which both Hunter Phillips and Philip Epstein concurred.

¶ 145 In short, Mr. Wright seemed to sell Ms. Billes on the Separation Agreement in great measure on the basis of the custody regime (which was less than what she had originally wanted) and on the release from any claim relating to her trusts (which she had already secured in the Marriage Contract).

. . . .

¶ 147 There is no evidence that Colin Wright took into account, and advised Heather Billes, of the risks of not providing full financial disclosure before signing the Separation Agreement. The absence of full and frank financial disclosure is one of the easiest bases on which to have a separation agreement set aside. [See Note 2 below] Also, not making full financial disclosure to David McClenahan could have been a very short-term strategy. All David McClenahan had to do was commence divorce proceedings or proceedings under the Family Law Act in order to get child support, and financial disclosure would have been required. If not providing financial disclosure was a true goal of Heather Billes and Fred Billes, then it was incumbent on Colin Wright to fully explain to them, preferably in writing, the risks of this action and the absence of any guarantees as to its success.

Note 2: See s. 56(4) of the Family Law Act, Montreuil v. Montreuil, [1999] O.J. No. 4450 (Sup.Ct.)(Q.L.) at paras 92-118, affirmed, [2001] O.J. No. 3891 (C.A.).

¶ 148 As a final comment on this subject, Philip Epstein was of the opinion that it was in keeping with the standard of care imposed on Colin Wright for him to accept at face value Fred Billes' view that David McClenahan's CTC dealership had no value because (1) Fred Billes was well situated to know whether or not the dealership had value; (2) he had undertaken to support Heather Billes in any event; and (3) the key goal for Heather Billes was to get custody of her children (without the need of litigation). However, Mr. Epstein had to acknowledge that although Fred Billes may have known a lot about CTC dealerships, he did not necessarily know what the concept of "value" meant

for purposes of Part I of the Family Law Act, and he probably knew nothing about the concept of constructive trusts. It was incumbent on Colin Wright to explain these concepts to Heather Billes and Fred Billes, and to discuss the need for a formal valuation of the franchise, before simply accepting Fred Billes' bald statement that the corporation's shares had no value.

[6.7] Absence of Advice regarding Constructive Trust

¶ 149 Several pertinent facts called out for a consideration of a constructive trust claim on behalf of Heather Billes. Mr. McClenahan had virtually no assets at marriage, and he had a minimal income throughout the marriage. Despite this, he enjoyed an affluent lifestyle and acquired several assets through the use of the income and capital from Ms. Billes' trusts. ….

¶ 150 Colin Wright could not remember at trial whether he had ever told Heather Billes or Fred Billes that Ms. Billes had a potential constructive trust claim against David McClenahan's shares in McClenahan Sales [which operated his CTC dealership] and against his other assets [a boat and a car]. I find that at no time during his representation of her did Mr. Wright ever discuss with Heather Billes her possible entitlement to an interest in those assets based on the concept of a constructive trust. I accept Hunter Phillips' assessment that this was a breach of the standard of care applicable to Mr. Wright. Based on the evidence before me, there is no question that in 1994, Heather Billes had a claim for an interest in the shares that David McClenahan had in McClenahan Sales, and in his car and boat.

. . . .

¶ 157 Heather Billes … was not given the opportunity of giving any such instruction because she was not advised that such a claim existed, and that in her case, that claim was a very strong one. In my view, this was a fundamental shortcoming in Mr. Wright's representation of Ms. Billes.

[6.8] Absence of Advice regarding Spousal Support

¶ 158 There is no evidence that Colin Wright ever turned his mind to the issue of spousal support for Heather Billes. Throughout his representation of her, he assumed that Heather Billes would be supported in the future by Fred Billes or the Billes family, whatever that meant. Mr. Wright based this assumption on Fred Billes' statement to him that he would attempt to protect Ms. Billes and the children financially, and on the instructions that he received consistently from Fred Billes and Heather Billes not to seek spousal support from Mr. McClenahan. He accepted this undertaking without knowing anything about the Billes family fortune, about any arrangements that may have been put into place concerning Ms. Billes' support, and about the standard of living that Ms. Billes hoped to enjoy in the future. As well, he accepted, without any verification, that Mr. McClenahan did not have the means currently to pay Ms. Billes any support. He ignored the information provided to him by Fred Billes that, in the future, Mr. McClenahan could earn a high income.

. . . .

¶ 160 Hunter Phillips' opinion was that a reasonably competent, prudent and diligent family law practitioner would have advised Ms. Billes that, based on the information available to him regarding Mr. McClenahan's income and prospects, in all likelihood if she sought spousal support from Mr.

McClenahan, she would receive an open-ended award of nominal support based on Mr. McClenahan's then modest income, with a requirement of on-going financial disclosure from Mr. McClenahan. If Mr. McClenahan's income increased later, she would be entitled to seek a variation upward of her support. In these circumstances, the lawyer would not have recommended that Ms. Billes give a spousal support release.

¶ 161 Mr. Epstein was of the view that generally speaking, in 1994, in this type of matrimonial case, spousal support releases would not have been exchanged. However, he believed that in the particular circumstances of this case, and especially with the history of Fred Billes' having supported Heather Billes and her family in the past, and having undertaken to do so in the future, there was nothing unusual about her giving a spousal support release. Moreover, he believed that such a release was acceptable considering his view of the limited nature of Colin Wright's retainer. Mr. Epstein also stated, however, that in circumstances of a general retainer, it would not have been appropriate for either Heather Billes or David McClenahan to give a spousal support release. In Ms. Billes' case, she had no independent source of income and no prospects, whereas David McClenahan had some income and good prospects. From Mr. McClenahan's perspective, he did not know whether any further trust funds existed for Ms. Billes' benefit.

¶ 162 In 1994, Mr. Wright's opinion should have been informed by the principles enunciated in the then recent Supreme Court of Canada decision of Moge v. Moge, [1992] 3 S.C.R. 813, 43 R.F.L. (3d) 345. In Moge, L'Heureux-Dubé J. said that all four objectives of spousal support set out in s. 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) must be taken into account; no single objective was paramount. The economic advantages and disadvantages arising out of the marriage and the separation had to be considered; and certainly Ms. Billes had suffered significant financial losses. As well, the case of Messier v. Delage, [1983] 2 S.C.R. 401, 35 R.F.L. (2d) 337 was still good law in 1994. It stood for the proposition that courts should not guess at when a dependent spouse might become self-sufficient. If there was insufficient evidence to enable a court to predict that date with reasonable confidence, then the support order should be open-ended. If there were a subsequent material change in the circumstances of either the payor or recipient of spousal support, then a variation application could be brought.

¶ 163 Mr. Phillips likened this case to that of Keast v. Keast (1986), 1 R.F.L. (3d) 401 (Ont. Dist. Ct.), where Ms. Keast, a registered nurse, helped to put her teacher husband through medical school, only to have the marriage break down when he was ready to enter practice. Killeen J. described the husband's goal of becoming a doctor as a "joint venture" for the couple, and one that was realized only with the help of the wife. This was an important factor in awarding her support that not only took into account the wife's basic needs, her accustomed standard of living during the marriage and the husband's income at separation, but also recognized the wife's very real contribution to the husband's career and the future benefits he would be receiving as a result. Killeen J. awarded on-going indefinite support for Ms. Keast for her lifetime, but also additional support for a limited term as quasi-restitutionary or compensatory support for Ms. Keast's contributions to Mr. Keast's career. Although the specific approach in the Keast case had fallen out of favour by 1994, the sense of fairness informing the judge in that case had not. With the tools provided by the court in the Moge case, the rather unique methodology in the Keast case was no longer required.

¶ 164 I find that a reasonably competent, prudent and diligent lawyer advising Ms. Billes in 1994 would have recommended that she not release her spousal support rights. She would not have been

forced to do so by any court. In my view, a court would most probably not have awarded any spousal support at the time in view of Mr. McClenahan's child support obligations and modest income, and in view of the history of Ms. Billes having received money from her family; nevertheless, the court would have left the issue of spousal support open in case Mr. McClenahan's income increased in the not too distant future. A court would not have been obliged to award nominal support to keep the possibility of future support open, in that there was no limitation period for spousal support in the Divorce Act. The next most likely scenario would have been for a court to award nominal, open-ended spousal support. I do not believe a court would have awarded fixed-term support, not knowing what the future held for Ms. Billes. I agree with Mr. Phillips that if Mr. McClenahan's income increased within a reasonable period of time following separation, and if Ms. Billes was in need at that time, likely she would have been awarded significant spousal support for a fixed period of time, in the range of three to five years.

¶ 165 This advice should have been imparted to Ms. Billes before she signed the Separation Agreement so that she was aware of what she was potentially giving up. At the same time, Mr. Wright should have ensured to the best of his ability that Ms. Billes understood what her father was proposing to do for her financially. Most importantly, Mr. Wright should have explained to Ms. Billes the difference between her family's generosity to her and a legal right on her part to be supported by David McClenahan. Only then could she weigh her options and give informed instructions. Finally, I agree with Mr. Phillips that even if after receiving appropriate advice from Mr. Wright, Heather Billes had stuck to her initial position that she would not seek spousal support from Mr. McClenahan, Mr. Wright should have recommended against her giving a spousal support release. If Ms. Billes wanted to waive her right to minimal financial disclosure, waive her right to spousal support regardless of David McClenahan's future prospects, and rely on the generosity of her family in the absence of any legal obligation on its part to support her, then Colin Wright should have received the clearest of instructions in this regard. He did not do so.

[6.9] Absence of Advice regarding Setting Aside Separation Agreement or Commencement of Divorce Proceedings

¶ 166 Heather Billes' recollection was that she returned to Colin Wright's office [on July 22] the day after she signed the Separation Agreement and advised him that she had made a mistake and should not have signed it. He told her that it was too late; it was "a done deal". Mr. Wright's evidence, corroborated by his agenda and by the exchange of correspondence on August 3rd and August 12th between himself and Harry McMurtry, was that Ms. Billes returned to his office on August 22nd, saying that she had made a mistake and did not want to accept David McClenahan's offer. Mr. Wright described Heather Billes as being very distraught. He told her that what she had signed was a separation agreement, that it had been received back from Mr. Murtry's office, signed by David McClenahan, and that it was too late for her to get out of the deal.

¶ 167 What Colin Wright should have advised Heather Billes to do was to consult another lawyer immediately with a view to having the Separation Agreement set aside. He also could have raised the possibility of her immediately starting divorce proceedings with the assistance of that other lawyer. Finally, it would have been prudent for him to suggest that Ms. Billes speak with a counselor or physician. Merely sending Heather Billes on her way, with no suggestion of steps to take at that stage, fell below the standard of care I would expect of a reasonably competent, prudent and diligent lawyer practicing family law in 1994 in Eastern Ontario.

[6.10] Conclusion Regarding Standard of Care

¶ 168 I have reviewed at length my concerns about Mr. Wright's representation of Heather Billes in 1994. Various shortcomings, taken alone, would not have amounted to negligence. The combination of omissions and incorrect advice taken together did not meet the standard of care that was expected of Mr. Wright. In arriving at this conclusion, I do not want to ignore how challenging it must have been for Mr. Wright to try to represent Heather Billes, a very passive individual with low self-esteem, in the shadow of her powerful, opinionated and rather domineering father. Despite the difficulties, however, certain basics had to be addressed, and were not.

[7] Causation of Damages, Damages Suffered, Quantification of Damages, Mitigation

¶ 169 As emphasized in Martin v. Goldfarb (1998), 41 O.R. (3d) 161 (C.A.) (application for leave to appeal to the Supreme Court of Canada dismissed February 18, 1999), Heather Billes has the onus of proving a causal connection between Mr. Wright's negligent acts and omissions and the losses she allegedly incurred. She also bears the burden of proving those losses and quantifying them. Finlayson J.A. summarized the onus as follows, at p. 187:

> ... I have concluded that it is a well established principle that where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances. That is not to say, however, that a litigant is relieved of his or her duty to prove the facts upon which the damages are estimated. The distinction drawn in the various authorities, as I see it, is that where the assessment is difficult because of the nature of the damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resorting to guess work. However, where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best.

¶ 170 Heather Billes is seeking damages from the Defendants reflecting her alleged losses in regard to: (1) an equalization payment; (2) spousal support; (3) the Bank of Montreal mortgage action; and (4) legal costs relating to the matrimonial action against David McClenahan. The onus is on her to prove all of these damages, and to prove that they were caused by Mr. Wright's negligence.

[7.1] Signing the Separation Agreement on July 21, 1994

¶ 171 I am satisfied, based on all of the evidence, that in the absence of the negligent omissions and negligent advice provided to Heather Billes by Colin Wright between March and July 1994, she would not have signed the Separation Agreement she did on July 21, 1994.

. . . .

[7.2] Exchange of Financial Statements

¶ 178 Had Mr. Wright recommended that she and Mr. McClenahan make standard financial disclosure to each other, I find that, based on the information Heather Billes had at the time, she would have done so to the best of her ability. Her information was that she had no assets, aside from

the matrimonial home and contents, a vehicle and a very small amount of money. As far as she was aware, and still is aware, she was not entitled to any trust monies. Initial financial disclosure between the parties would have clarified whether there were any outstanding debts or liabilities of Mr. McClenahan for which Ms. Billes might have been liable, or whether there were any other assets (such as registered retirement savings plans) which might have resulted in Ms. Billes being entitled to a constructive trust interest or an equalization payment. Ms. Billes' claim to an equalization payment would have been easily established.

¶ 179 That being said, there is inadequate evidence before me that such formal financial disclosure would have brought any further information to Ms. Billes, aside from alerting her to the existence of a registered retirement savings plan in Mr. McClenahan's name in the amount of $26,000 at the valuation date. . . . .

¶ 180 Despite the limited new information that would have come to Heather Billes if financial statements had been exchanged, this formal disclosure would have had the beneficial effect of reducing the leverage which Mr. McMurtry [representing Mr. McClenahan in the family law matter] felt he had in the negotiation process, and correspondingly, of increasing the leverage available to Mr. Wright.

[7.3] Constructive Trust Claim Regarding McClenahan Shares

¶ 181 Based on the bare facts that were known to everyone at the date of separation, one of the clearest claims that could have been made by Heather Billes was for a one-half interest in McClenahan Sales. I have already found that if this possibility had been properly explained to Heather and Fred Billes in 1994, she would have insisted on some benefit flowing to her as compensation for this constructive trust claim in the business. In regard to the nature of the benefit she would have sought, I have not been persuaded on the evidence that Ms. Billes would have resorted to litigation in order to gain a constructive trust interest for herself in McClenahan Sales. I conclude that Ms. Billes would have been satisfied if one-half of the shares in McClenahan Sales had been held in trust for her children.

. . . .

¶ 187 …. This is what she successfully negotiated in 1999, though the percentage obtained was 45% instead of 50%. …. In light of … [the indication of Peter Burnet, solicitor for the Plaintiff in her divorce proceeding and in this proceeding] that damages under this heading are not being sought, I will leave matters there.

. . . .

[7.4] Net Family Property Calculation

. . . .

¶ 227 I find that, at a minimum, Heather Billes suffered a loss of $77,250 as a result of her not being properly advised of her entitlement to an equalization payment. I say, as a minimum, because

the knowledge that she also was entitled to a constructive trust interest in Mr. McClenahan's CTC dealership would have been a useful bargaining chip in regard to a financial settlement.

[7.5] Spousal Support

¶ 228 I have already found that had Heather Billes been given appropriate advice regarding her spousal support rights and regarding the risks inherent in relying on her family's generosity, she would not have signed a separation agreement in 1994 releasing her right to support. However, I also find that Ms. Billes would not have pursued litigation in order to get support from Mr. McClenahan at that time. His modest income, his obligation to support the children, and Fred Billes' constant reassurance that he would look after Ms. Billes meant that it would not have been cost-effective to litigate the spousal support issue in 1994.

. . . .

¶ 244 I find on a balance of probabilities that since the signing of the Minutes of Settlement in 1999, funds have been set aside in one fashion or another for Heather Billes by Fred and Barbara Billes, and that these funds are adequate to provide for her support and the support of the children (when they are in her care). Consequently, Heather Billes can no longer be said to be in need of financial support from David McClenahan.

¶ 245 In any event, I find that even if Heather Billes had not released her spousal support rights in 1994, and if she was in need because she was not receiving financial assistance from her father, and if she had pursued her action for spousal support against David McClenahan in 1999, in the absence of clearer evidence from the Billes family regarding Heather Billes' entitlement, if any, to a portion of the family's wealth, the likelihood was that Ms. Billes would not have received a spousal support award. Five years would have passed since the parties' separation with no spousal support having been pursued on interim motions or paid. The McClenahan/Billes marriage had only lasted eight years. The standard of living that the couple had enjoyed during the marriage had been the result of gifts or inheritances from Ms. Billes' family, and not as a result of any income available to Mr. McClenahan. In 1999, Mr. Billes' income was still modest. Any benefit from Ms. Billes' contribution to Mr. McClenahan's income-earning capabilities would have been compensated, in part, through the declaration of a constructive trust in his shares in McClenahan Sales.

¶ 246 The onus was on Ms. Billes to persuade me that she had losses caused by Mr. Wright's negligent advice or omissions relating to the spousal support issue. She has not met that onus. The evidence is inadequate to enable me to find on a balance of probabilities that, absent the incorrect or missing advice, Ms. Billes would have sought, and obtained, spousal support from Mr. McClenahan.

[7.6] Bank of Montreal Mortgage

¶ 247 Heather Billes is seeking damages relating to the monies she paid to the Bank of Montreal following the separation in regard to the mortgage on the matrimonial home. At separation, the Kingston property was registered in the joint names of Heather Billes and David McClenahan. It had a fair market value of $315,000. The outstanding mortgage was approximately $365,000, producing a shortfall of $50,000. Pursuant to the parties' Marriage Contract, they were the joint and equal owners of the matrimonial home, and therefore were jointly and equally liable for the outstanding

mortgage against it. The Separation Agreement signed by the parties in July 1994 provided that Ms. Billes would remain the sole owner of the matrimonial home and would be solely liable for the outstanding mortgage. In the years leading up to the separation, the mortgage payments had been made with funds received from Fred Billes. No mortgage payments were paid after July 1994. Heather Billes continued to reside in the home following the separation, and then abandoned it in September 1994, when she went to the Cayman Islands. The Bank took over possession of the property and sold it, resulting in a shortfall of $141,090.06 between what the Bank recovered and what Ms. Billes and Mr. McClenahan owed the Bank under the mortgage. In January 1996, the Bank of Montreal obtained a judgment against both Mr. McClenahan and Ms. Billes for this amount plus $5,059.92 in prejudgment interest. Mr. McClenahan settled with the Bank. The Bank then pursued Heather Billes, petitioning for a receiving order against her in May 1998 in regard to its claim, calculated at the time as being $90,328.28. Ms. Billes disputed the petition. A settlement was concluded in October 1998 whereby Ms. Billes paid the Bank $43,750 immediately, and agreed to pay an additional $45,848.68 if she recovered this sum either in the matrimonial proceedings against Mr. McClenahan or in these proceedings.

¶ 248 I have not been persuaded that there is any causal link between Mr. Wright's negligent advice or omissions and the losses suffered by Ms. Billes as a result of the Bank of Montreal mortgage and the Bank's action against her. Ms. Billes knew at the time of separation that there was an outstanding mortgage with the Bank of Montreal, and she knew, or had the ability to find out, the outstanding balance. She knew that pursuant to the Separation Agreement she would be liable for that balance. She also knew that if she did not pay the mortgage as and when it fell due, the Bank would have an action against her. Mr. Wright's conduct in no way caused Ms. Billes to be liable for any amounts under the mortgage for which she would not otherwise have been liable. Mr. Wright played no role in the decisions taken by Ms. Billes in regard to the defence of the Bank of Montreal action.

¶ 249 Ms. Billes' claim seems to be based on the fact that Mr. Wright knew that there was an outstanding mortgage and knew that, in the absence of funds being received from Fred Billes, Ms. Billes would not have any monies with which to pay the mortgage. Heather Billes was aware of this reality before she signed the Separation Agreement. Furthermore, I have already found that even if Mr. Wright had provided all of the advice regarding spousal support that he should have provided, Ms. Billes would not have gone to court in 1994 in an effort to secure such support. Consequently, with or without the appropriate advice from Mr. Wright, Ms. Billes would have been in the same position.

[7.7] Legal and Accounting Fees in Matrimonial Action

¶ 250 Heather Billes is also seeking the legal costs which she incurred in the matrimonial action against David McClenahan on the grounds that the action would not have been necessary had Mr. Wright not been negligent.

¶ 251 I find that Ms. Billes is entitled to be fully reimbursed for the full amount of legal fees and disbursements she paid to Colin Wright in 1994 because due to his negligent advice, she was required to consult other lawyers in order to get further and better advice regarding her legal position following separation. That sum amounts to $2,681.00.

¶ 252 I have already found that, had Mr. Wright properly advised Heather Billes, she would have proceeded with formal financial disclosure and she would have pursued her rights regarding custody, property and support issues with more resolution and vigour. Her legal fees at the time would have been significantly more than they were. Had matters resolved by way of a separation agreement, Ms. Billes in all likelihood would not have received anything for legal fees. Had Ms. Billes been required to proceed to court to secure an adequate custody or property resolution (I have already found that she was unlikely to have done so in regard to support), then her legal fees would have been higher, but, assuming her success, she would in all likelihood have received a costs award. She was put in the position of having to sue to set aside the Separation Agreement of July 1994 so that she could pursue her claim for a constructive trust interest in Mr. McClenahan's CTC franchise and an equalization payment. The fact that she signed a separation agreement in 1994 significantly increased her costs from 1996 to 1999 of pursuing her legal rights following the separation. I estimate her losses relating to her legal costs in the matrimonial proceedings to be two-thirds of what Ms. Billes was reasonably required to pay by way of legal fees and disbursements in the divorce proceedings that commenced in 1996, and her damages in regard to legal costs required to correct the results of Mr. Wright's negligence are set at this [proportional] sum. An assessment of those costs is required because Mr. Burnet's accounts relating to the matrimonial proceedings and to these proceedings are blended.

[8] Conclusion

¶ 253 The Defendants are liable for the negligent representation of Heather Billes following her separation from David McClenahan. The Defendants shall pay Ms. Billes damages as follows: (1) $77,250 on account of the equalization payment to which Ms. Billes was entitled, and which she did not receive; (2) $nil on account of spousal support; (3) $nil on account of the Bank of Montreal action; (4) $2,681 on account of legal fees and disbursements paid to Colin Wright; and (5) two-thirds of the reasonable legal fees and disbursements paid by Heather Billes to her lawyer, Peter Burnet, in the divorce proceedings commenced in April 1996, representing additional legal fees and disbursements to which Ms. Billes was put in order to mitigate her losses. Those fees and disbursements will have to be assessed.

[9] Costs

¶ 254 If required by either party, arrangements may be made through the Trial Coordinator for a hearing on the issue of costs.

Lenz v. Broadhurst Main

[2004] O.J. No. 288 (QL) (Ont. Sup. Ct. J.), Himel J.,
paras. 1-3; 8-22; 24-29; 33; 42-58; 62-64; 67-71; 80-84; 124-125

¶ 1 The plaintiff brings this action seeking damages from his former lawyer and law firm for what he alleges was negligent advice regarding a separation agreement and divorce.

I. FACTUAL BACKGROUND:

¶ 2 John Lenz (known as Jack Lenz) is fifty-four years old and has enjoyed much success as a composer and musician. He married Sharon Mitchell Lenz on June 16, 1973, and they have three children: Gabriel, born on January 21, 1975, Colby, born on October 24, 1976, and Asher, born on March 2, 1978. Mr. Lenz has been a member of the Baha'i faith since 1969 and he and Sharon Mitchell Lenz practiced their faith during the marriage. For the first six months of the marriage, Sharon Mitchell Lenz worked outside the home. However, when Mr. Lenz began working in the United States, Mrs. Lenz gave up her job in Ontario to accompany him and was unable to work as she could not obtain a work permit. When they returned to Canada, she stayed home to manage the household and raise the children. The family lived in a house in the town of Goodwood, which is near Uxbridge, Ontario.

¶ 3 In 1988, Mr. Lenz met Deborah Burton. They began a relationship in June of 1989. In February 1990, Jack Lenz separated from Sharon Mitchell Lenz. ….

. . . .

¶ 8 It was agreed that Deborah Burton would look after the wedding arrangements and Jack Lenz would look after getting a divorce. Ms. Burton arranged for the ceremony to be held at a church in their neighbourhood and for the reception to take place at McLean House at Sunnybrook Estates. She booked the date of December 20, 1992 and sent a deposit so as not to lose the venue. Meanwhile, Mr. Lenz approached his friend Don Johnson for legal assistance, but was told that he did not practise family law. Instead, Mr. Johnson introduced Mr. Lenz to Mitchell Houzer, another lawyer in his law firm.

¶ 9 Mr. Lenz was told that Mr. Houzer practiced family law. In fact, Mr. Houzer was called to the Ontario Bar in 1987. He had worked in a few small law firms for a short time before joining Broadhurst Barristers, which later became Broadhurst Main. Mr. Houzer was employed as a lawyer at the firm from 1989 to 1993, devoting 50% of his practice to family law and the balance to criminal law and other litigation.

¶ 10 Mr. Houzer met with Mr. Lenz on October 21, 1992. Mr. Lenz testified that, at the time, he had no familiarity with what was required to obtain a divorce. At the meeting, Jack Lenz said that he wanted to be divorced so that he could re-marry some time during the period between December 20 and 27, 1992, given that Ms. Burton had booked the December 20 wedding date. Mr. Lenz says that he told Mr. Houzer the reason for marrying at that time was that, during December, his children, who were attending private school out of town, could attend the wedding. The other reason was that his father was ill in Saskatchewan and Mr. Lenz wanted him to be at the wedding. Mr. Lenz testified that he did not tell Mr. Houzer that the real reason he wanted to obtain the divorce quickly and re-marry was that he and Ms. Burton were expecting a baby. He says that he was not proud of this fact and chose, instead, not to mention it.

¶ 11 Mr. Houzer told Mr. Lenz that it would be possible to secure a divorce by December 20, if there was full co-operation by both parties. According to Mr. Houzer, Mr. Lenz told him that he and his wife had an amicable relationship, that he did not want the case to go to court, and that

Mrs. Lenz's lawyer was drafting a separation agreement. Mr. Lenz told Mr. Houzer that he had an oral agreement in place with Mrs. Lenz concerning support and property issues. He told Mr. Houzer that he was paying $5,000 per month for spousal and child support, plus the cost of his son's private school education, that the matrimonial home had been sold and the proceeds had been distributed to his wife, and that the parties had a joint custody arrangement. He also said that his wife's lawyer had drafted a written separation agreement, but he did not bring it along to the meeting. Mr. Lenz provided Mr. Houzer with the particulars so that he could draft a divorce petition.

¶ 12 Mr. Houzer was retained on October 23, 1992 and he met with Mr. Lenz again on October 26, 1992, at which time they reviewed the petition for divorce. Mr. Houzer gave Mr. Lenz a blank financial statement form and said that he would need to complete it in order to advise Mr. Lenz properly.

¶ 13 On November 10, Mr. Lenz sent the draft separation agreement to Mr. Johnson who provided it to Mr. Houzer to review. Under the terms of the agreement Mr. Lenz was required to pay $4,500 per month in child support and the tax payable on that amount to his former wife, as well as any extra expenses and education costs, and $500 monthly in spousal support until either his wife remarried or her annual employment income was at least $35,000. Furthermore, Mr. Lenz was required to pay Mrs. Lenz 25% of his royalties without restriction from the date of marriage and without a termination date related to the date of separation. One-half of pension benefits were also to be assigned to Mrs. Lenz, and they would not terminate on separation. Mr. Lenz met with Mr. Houzer, who advised Mr. Lenz that the agreement was weighted in his wife's favour, that it was not a good agreement and that it was unfair.

¶ 14 Mr. Lenz says that Mr. Houzer told him that he would have to enter into a separation agreement in order to get a divorce. In his testimony, Mr. Houzer agreed that it was his understanding that Mr. Lenz would require a written agreement to obtain a divorce in order to show that there was adequate provision for the children. According to Mr. Lenz, Mr. Houzer failed to tell him that he had any other options if he wanted to get a divorce quickly. According to Mr. Lenz, had he known that there were other options available, he would have considered marrying later, because, even though it was his "preference", it was not "imperative" that he and Deborah marry in December. Mr. Houzer testified that he offered to try and renegotiate the separation agreement, but that Mr. Lenz did not want him to do so. According to Mr. Houzer, Mr. Lenz was content with the agreement, as he was determined to marry by the end of December.

¶ 15 Mr. Lenz signed the separation agreement drafted by Sharon Mitchell Lenz's lawyer on November 11, 1992. He says that he knew at the time that it was improvident and unfair. However, he says that he understood that he had to sign it to get a divorce. Mr. Houzer swore an affidavit confirming the certificate of independent legal advice.

¶ 16 In the petition for divorce, Mr. Houzer made reference to the separation agreement negotiated between the parties. In the petition, he asked that the divorce be effective as of the date of judgment. Attached to the petition was an affidavit sworn in Florida by Mr. Lenz, in which he stated that the situation was an emergency as his father had had a stroke and was ill. At trial, Mr. Lenz conceded that his father had not suffered a stroke and that he was able to attend the wedding. Mr. Lenz admitted that he had signed the affidavit, which was drafted by Mr. Houzer, because he

had been told that he needed to present a strong case. The divorce was granted on December 8, 1992. Jack Lenz and Deborah Burton were married on December 20, 1992.

¶ 17 Mr. Lenz says that he did not receive any correspondence from Mr. Houzer cautioning him not to execute the separation agreement. Mr. Houzer testified that he wrote a reporting letter, which he described as a "cover your behind" letter, but he could not produce it at trial, because he says that it was missing from his file.

¶ 18 Mr. Lenz testified that he attempted to comply with the terms of the separation agreement, but was finding it difficult to do so. The reality of the terms of the agreement had set in. Mr. Lenz was having trouble paying for the cost of the children's schools in the United States and paying support to Sharon Mitchell Lenz, as well as her taxes. He sought the advice of his accountant and then approached Sharon Mitchell Lenz's lawyer to see if something could be done to relieve him, to some extent, of his obligations. That request was refused. Instead, Sharon Mitchell Lenz took steps to have the payments of royalties made directly to her from SOCAN. That resulted in a judgment by Justice Smith dated April 18, 1994. At that point, Mr. Lenz decided to seek legal advice about setting aside or varying the separation agreement.

¶ 19 By this time, Jack and Deborah Lenz were seeing a counselor who referred them to Douglas Beamish, a lawyer practicing family law. Jack Lenz sent a copy of the separation agreement to Mr. Beamish for his review and met with him at his office on April 8, 1994. Mr. Lenz consulted with Mr. Beamish as to what, if anything, could be done about the terms of the separation agreement, which Mr. Lenz found to be onerous. Mr. Beamish testified that he explained to Mr. Lenz that the terms of the agreement had to be met, but that he was surprised by how one-sided and unfair the agreement was to Mr. Lenz. When Mr. Beamish asked Mr. Lenz why he had entered into it, Mr. Lenz replied that, "he had no choice". He told Mr. Beamish that he had been told that, to get his divorce, he had to enter into an agreement. Mr. Beamish said that that advice was wrong. Mr. Lenz says that he was then told, for the first time, that he could have applied to the court to sever the separation agreement issues from the divorce. Mr. Beamish told Mr. Lenz that he might have a cause of action against Mr. Houzer. Ms. Burton, who was also present at the meeting with Mr. Beamish, testified that Mr. Lenz was told that since he had had adequate support in place for the children, he had not needed to sign an agreement in order to get a divorce.

¶ 20 Mr. Beamish discussed the steps necessary to set aside a separation agreement, and Mr. Lenz retained him to act on his behalf. In the variation proceeding, Mr. Beamish made a claim to set aside the separation agreement under the Family Law Act, R.S.O. 1990, c. F.3, and to vary the terms of child support. The litigation proceeded through pleadings, examinations for discovery and pre-trial hearings with great difficulty. After eighteen months, the case settled just prior to trial. Although Mr. Lenz had rejected a previous offer to settle in which he was to pay $150,000 in a lump sum payment, he agreed to a settlement that involved him paying ten annual after-tax payments of $30,000 to Sharon Mitchell Lenz. Mrs. Lenz was also to receive 25% of Mr. Lenz's royalties, which were to be paid to her for her lifetime and, on her death, to the children on an "after tax" basis. In exchange, she waived her right to spousal support. The settlement was incorporated into a judgment of Justice Benotto dated August 29, 1996. The judgment provided that: spousal support would be time-limited [i.e., the ten after-tax $30,000.00 payments], royalties

would be capped at $300,000, and taxes would be paid by Mr. Lenz. Jack Lenz was also required to pay Sharon Mitchell Lenz $25,000 to cover the costs of that action.

¶ 21 In 1995, Mr. Lenz's business partnership was dissolving and he decided to create Lenz Entertainment. Mr. Lenz assumed the roles of musician, composer, and musical director in the new company. Deborah Burton joined forces with him and became responsible for the management of staff and for the production side of the business. Since then, the couple draws money from the company for living expenses that are allocated to them on an equal basis.

¶ 22 Mr. Lenz testified that, by the end of 1996, his three older children were living in the United States, he and Deborah Burton had four children together, and he had learned that Sharon Mitchell Lenz had re-married on November 9, 1996. Mr. Lens thus retained Mr. Beamish and brought a further application under the Family Law Act, R.S.O. 1990, c. F.3 to vary the separation agreement, and to claim contribution from Sharon Mitchell Lenz for the cost of educating the three children of the marriage. The action was contested. Mr. Lenz changed lawyers and hired Mr. Alan Poole to act on his behalf. Eventually, the litigation was settled by way of a consent judgment granted by Justice Speigel on May 26, 1999. The order provided that the annual lump sum payments by Mr. Lenz to Sharon Mitchell Lenz would be reduced to $20,000, but that they would be extended for one more year. Mr. Lenz was again held responsible for legal costs and had to cover $124,049, the cost of the services of Mr. Beamish. It was at that time that Mr. Lenz commenced the action against Mr. Houzer claiming damages including legal fees.

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III. POSITIONS OF THE PARTIES:

¶ 24 Mr. Lenz testified that he retained Mr. Houzer to obtain legal advice as to what would be a fair settlement so that he could obtain a divorce. It is Jack Lenz's position that Mitchell Houzer provided negligent advice or was negligent in that he failed to outline ways that Mr. Lenz could obtain a speedy divorce without entering into a separation agreement. Mr. Lenz takes the position that his damages are the direct result of Mr. Houzer's negligent advice and include: the royalty payments paid directly or indirectly to Sharon Mitchell Lenz, the judgment awarded by Justice Benotto, the legal fees incurred to mitigate Mr. Lenz's obligations under the agreement, and the costs ordered against Mr. Lenz, less any equalization payment that Mr. Lenz would have otherwise had to make.

¶ 25 In other words, Mr. Lenz's damages are to be determined by subtracting the cost to him of an agreement that would have otherwise been reached had Mr. Lenz been properly advised, from the cost of the agreement that was signed. Mr. Lenz estimates these damages to be in the range of $675,000 to $950,000.

¶ 26 It is the position of the defendant Mitchell Houzer that the nature of the retainer dictated what he was retained to do for Mr. Lenz and that he fulfilled the scope of this retainer by doing what was requested of him. Mr. Houzer testified that when he was retained by Mr. Lenz on October 23, 1992, he understood that his retainer was to review the separation agreement, advise Mr. Lenz, and then proceed with the divorce. However, he says that the retainer changed.

¶ 27 After reviewing the agreement, which he received on November 10, 1992, Mr. Houzer told Mr. Lenz that the agreement was unfair and that he should not sign it. Mr. Houzer told Mr. Lenz that he would need more time to negotiate an agreement. However, Mr. Lenz said that he was content with the agreement, and that he needed to be divorced so he wished to proceed. Mr. Houzer signed the certificate of independent legal advice and Mr. Lenz executed the agreement.

¶ 28 According to Mr. Houzer, Mr. Lenz's informed instructions were that Mr. Houzer obtain for him an immediate divorce, and Mr. Houzer succeeded at doing just that. Even though he also signed a certificate of independent legal advice regarding the separation agreement, Mr. Houzer takes the position that he was not retained for general legal advice. He says the standard of care advanced by the plaintiff is a standard of perfection, and was not the standard in place in Ontario at the time he was retained to act for him.

IV. ANALYSIS:

1. Did Mr. Houzer Meet the Standard of Care?

(a) Evidence of the Experts

¶ 29 As far as Mr. Lenz understood, he had to have an agreement in place in order to obtain a speedy divorce. There is no question that Mr. Houzer did not advise Mr. Lenz about other options regarding a divorce. In order to determine whether Mr. Houzer's advice fell below the reasonable standard of care, it is important to consider two questions. First, given the limited time-frame set by Mr. Lenz for obtaining a divorce, were other options available to Mr. Lenz such that he could obtain a divorce without entering into the separation agreement? Second, even if other options were available, did Mr. Houzer have an obligation to inform Mr. Lenz of those options?

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¶ 33 Mr. [Gerald] Sadvari [member of the Ontario Bar, who gave expert opinion evidence for the Plaintiff] concluded that, in his opinion, Mr. Houzer had breached the standard of care in his conduct of the case [i] by failing to advise Mr. Lenz that: the informal agreement between Mr. Lenz and Sharon Mitchell Lenz in 1990 was not binding, there was no need for Mr. Lenz to sign a separation agreement in order to obtain a divorce judgment, the amount of child support he was paying at the time would have satisfied a court that he was in compliance with section 11(1)(b) of the Divorce Act so that Mr. Lenz could get a divorce without executing an agreement, there were interim measures available to him that may have induced Sharon Mitchell Lenz to co-operate and facilitate the divorce, and [ii] by failing to take measures to assist Mr. Lenz in the negotiation of a more equitable separation agreement.

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¶ 42 In summary, Mr. [Alfred] Mamo [member of the Ontario Bar, who gave expert opinion evidence for the Defendant solicitors] was of the opinion that Mr. Houzer's retainer was limited to getting Mr. Lenz a divorce. Although Mr. Houzer also provided advice to Mr. Lenz about the

separation agreement, Mr. Lenz did not rely on Mr. Houzer regarding financial dealings and, instead, sought to re-negotiate the terms of the agreement on his own. Mr. Houzer thus discharged his duties by telling Mr. Lenz the consequences of signing such an agreement and by focusing on obtaining a divorce in time for December 20. Negotiating an interim agreement or severing the divorce from the corollary issues were only options had Mr. Lenz been prepared to postpone his wedding beyond December 20, 1992, something he was unwilling to do. That Mr. Lenz got what he wanted and then changed his mind is, according to Mr. Mamo, not unusual in such cases. In Mr. Mamo's view, Mr. Houzer thus met the standard of care required of him and did not fall below the standard of a reasonably prudent solicitor.

(b) The Law

¶ 43 In the landmark case on the law of professional liability, Central & Eastern Trust Co. v. Rafuse (1986), 31 D.L.R. (4th) 481 at 523 (S.C.C.), Le Dain J. described the duty of solicitors as follows: "the requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor." The solicitor is required to "bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken." The law was further clarified by Sopinka J. in [the decision of] ter Neuzen v. Korn (1995), 127 D.L.R. (4th) 577 (S.C.C.), where he stated at 590 that, "it is generally accepted that when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent." Where there is evidence of generally approved practice according to qualified and skilled professionals, compliance with this practice must be regarded as reasonable.

¶ 44 The exception to this rule, however, occurs when an allegedly negligent act is so "fraught with obvious risks" that "anyone is capable of finding it negligent, without the necessity of judging matters requiring diagnostic or clinical expertise," in which case, the standard practice can be adjudged to be negligent: ter Neuzen v. Korn, supra at 591. For example, in Winrob v. Street (1959), 19 D.L.R. (2d) 172 (B.C.S.C.), although the court exonerated a solicitor who had adhered to general practice, it cautioned, at 175, that had this practice been "inconsistent with provident precautions against a known risk", it would not have been a sufficient justification.

¶ 45 Furthermore, there are situations in which there lacks convincing evidence of a commonly accepted professional practice. In Tort Law, 3rd ed. (Toronto: Carswell, 2003), Professor Klar writes, at 353: "Mere evidence that, in the opinion of some experts, the defendant's conduct was reasonable does not necessarily establish a sufficiently authoritative practice. The fact that some professionals do one thing, and others do another, in fact works against such a presumption."

¶ 46 In summary, evidence of a prevailing or customary practice is a very relevant consideration, but it is not determinative of solicitors' negligence actions. In Roberge v. Bolduc, [1991] 1 S.C.R. 374 at 437, [1991] S.C.J. No. 15, Justice L'Heureux-Dubé wrote on behalf of the court:

> The fact that a professional has followed the practice of his or her peers may be strong evidence of reasonable and diligent conduct, but it is not determinative. If the practice is not in accordance with the general standards of liability, i.e., that

> one must act in a reasonable manner, then the professional who adheres to such a practice can be found liable, depending on the facts of each case.

¶ 47 The first source of a lawyer's duties is the retainer: the contract (preferably written) that contains the description of what work is to be done. In Spence v. Bell, [1982] A.J. No. 774 (Alta. C.A.), leave to appeal to S.C.C. refused, Haddad J.A. stated, at paragraph 23, that: "In judging the standard of care exercised by a solicitor, caution must be taken to ensure that the standard is judged within the confines of the retainer." Indeed, where there are special terms in the contract (i.e. a limited retainer), there can be no liability in tort when the solicitor performs the limited terms of the contract with reasonable care, skill and knowledge and he or she has no obligation to act beyond the instructions in the retainer. Le Dain J. wrote in Central Trust Co. v. Rafuse, supra at 522, about concurrent liability in tort and contract:

> A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.

¶ 48 In Canada Trustco Mortgage Co. v. Bartlett & Richardes (1991), 3 O.R. (3d) 642 (Ont. Gen. Div.), aff'd [1996] O.J. No. 1551 (C.A.), Flinn J. held that, where a solicitor's duties are specifically prescribed by a written retainer, the solicitor is under no contractual obligation to report beyond the terms of the retainer. Similarly, in McInnis v. Webb Real Estate, [1978] 2 S.C.R. 1357, the Supreme Court of Canada agreed with the trial judge that the terms of a solicitor's retainer were limited, and, in the circumstances, had been fulfilled even though a broader view of why the solicitor was retained might have resulted in liability.

¶ 49 Nonetheless, a lawyer may still have a duty to go somewhat beyond the terms of the retainer. In S.M. Grant and L. Rothstein, Lawyers' Professional Liability, 2nd ed. (Toronto: Butterworths, 1998), the authors state, at 3:

> As a general rule, a solicitor is not required to provide services outside the scope of the retainer. As well, the standard of care to be implied will be defined within the confines of the retainer .... However, caution should be exercised in allowing the client unilaterally to define the retainer where there are risks inherent in the client's proposed course of action of which the solicitor is or should be aware. The failure to warn of these risks may attract liability.

¶ 50 For example, in Graybriar Industries Ltd. v. Davis & Co. (1990), 46 B.C.L.R. (2d) 164, (B.C.S.C.), the plaintiff company succeeded in an action to recover damages against its former solicitor who had failed to advise it of the risks involved in dealing with a bare trustee or a shell company [which the client instructed the solicitor to facilitate]. The court canvassed the law respecting the duty to warn and interpreted it as requiring a solicitor to warn his client of risks on the basis of a reasonable knowledge of the law, facts and practical implications of the results: see also Major v. Buchanan (1976), 9 O.R. (2d) 491 (H.C.) and Glivar v. Noble, (1985) 80 A.C. 60 (C.A.).

¶ 51 It is the lawyer's duty to warn the client about potential risks. The court must assess the lawyer's conduct against the reasonable expectations of the client. However, in making a finding of

liability, the court must still consider whether a reasonably prudent solicitor would have relayed the warning in the circumstances, as the duty to warn cannot be without limits. In Piccolo v. Muroff, [2002] O.J. No. 2369 (Ont. Sup. Ct.), Abbey J. wrote, at paragraph 25: "The foundation for solicitor's negligence cannot be the failure to advise the plaintiffs in respect to steps or options which were not, in any event, practical with a view to resolving the impediment. ...."

¶ 52 While the standard of care is related to the scope of the retainer, whether a lawyer's duties extend beyond the limitations of the retainer must also be considered. Liability may hinge on the difference between a lawyer's limited duty to remain within the confines of the retainer and his broader duty to protect the interests of his client. In the decision of Elcano Acceptance v. Richmond, Richmond, Stambler & Mills, [1985] O.J. No. 271 (Ont. S.C.) (set aside by the Court of Appeal on other grounds), Smith J. stated that:

> An analysis of the cases and their majority and dissenting opinions indicates to me that in applying the reasonably competent solicitor standard to the facts of each case, the courts are really implicitly asking themselves the questions: `What did the client expressly ask for? What did the client really want?' The rule of construction the courts implicitly use is that, given the nature of the solicitor and client relationship, a court will give the client's express instructions a liberal and broad construction. ... The solicitor has a duty to advise the client whether or not his instructions are unreasonable, or unworkable, or involve certain risks and better alternatives.

¶ 53 The absence of any written documentation to confirm a limitation of the scope of the retainer is a relevant, yet not dispositive, consideration: see 669283 Ontario Ltd. v. Reilly, [1996] O.J. No. 273 (Ont. Gen. Div.). If a dispute arises as to the scope of the retainer, and it is not in writing, the onus of proof lies upon the lawyer: Bergman v. Williams (1980), 22 B.C.L.R. 317 (B.C.S.C.).

¶ 54 A lawyer's conduct must also be judged in the context of the surrounding circumstances. In Lawyer's Professional Liability, supra, at 23, the authors state: "the reasonableness of a lawyer's impugned conduct is adjudged in light of the surrounding circumstances such as the time available to complete the work, the nature of the client's instructions, and the experience and sophistication of the client." In Millican v. Tiffin Holdings Ltd., [1967] S.C.R. 183, the Supreme Court of Canada restored the trial judge's dismissal of an action against a solicitor for professional negligence where the solicitor was retained on the basis that the matter was urgent and the scope of the retainer was narrow. Similarly, in Mardling v. Malvern, [1983] O.J. No. 212 (H.C.), Trainor J. dismissed an action against a solicitor where the retainer was limited and the timing was urgent, although the solicitor had failed to put his client's instructions in writing.

¶ 55 The lawyer's ability to fulfill his obligations may be hampered by incomplete disclosure of information by the client. In Dawe v. Brown, (1995) 130 Nfld. & P.E.I.R. 281 (Nfld. S.C.), the court, at paragraph 44, found an obligation on the client in a civil action to provide his or her lawyer with information and instructions:

> It is incumbent on the client to explain the problem fully, provide all facts pertaining to the matter, including anything which might be detrimental to the

> possibility of a successful claim, and to give the lawyer instructions on proceeding after being fully advised. It is only then that a solicitor can act properly on behalf of the client.

¶ 56 In the case of Wong v. 407527 Ontario Ltd., (1991), 179 D.L.R. (4th) 38 (C.A.), the court said at 52-53:

> ... A lawyer's duty to a client will vary depending on the client's instructions and the limits on the lawyer's retainer.
>
> ... In my view, the trial judge was not sensitive enough to the limitation on Hui's retainer implicit in his being consulted after the agreement had been signed. Mr. Lamont's opinion may represent a counsel of perfection, but I find it hard to admonish him, let alone make a finding of negligence against him, for failing to try to negotiate something to which his clients had no legal entitlement. Cases may arise where a duty of this kind should be imposed on a lawyer, but the court should at least take into account the timing of the lawyer's retainer.

¶ 57 However, [i]n Jackson and Powell, Professional Negligence, 4th ed. (London: Sweet & Maxwell, 1997) at 471, the authors write:

> It is, therefore, a good defence to an action for negligence that the solicitor was acting on express instructions from the client. The defence will fail, however, where the client's instructions were the result of inadequate advice by the solicitor.

(c) Conclusions

(i) The Retainer was Limited in Scope

¶ 58 From the evidence led at trial, I am satisfied that the scope of Mr. Houzer's retainer was to obtain a speedy divorce for Mr. Lenz. The retainer did not require full financial disclosure, nor did it include the provision of advice about child and spousal support, the division of net family property, or the available options for obtaining a divorce within the desired time frame. In my view, it was not until Ms. Burton learned of the separation agreement and prompted Mr. Lenz to attempt to vary its terms that Mr. Lenz took the position that he had consulted with Mr. Houzer about the agreement as well as about the divorce.

. . . .

¶ 62 In an action for negligence, while the solicitor's standard of care is to be judged within the confines of the retainer, the lawyer is required to carry out both the express terms of the client's instructions, as well as the implied obligation to exercise reasonable skill and care: see Woodglen & Co. v. Owens, (1996) 19 O.T.C. 81 (Ont. Gen. Div.), aff'd (1999) 126 O.A.C. 103 (C.A.). In the case before me, the plaintiff asserts that the duty upon Mr. Houzer to provide advice on the separation agreement as well as to obtain a divorce for Mr. Lenz by early December 1992 was

evident because Mr. Houzer signed a certificate of independent legal advice on November 11, 1992. Lawyers are often called upon to provide independent legal advice to a client and to sign a certificate evidencing the fulfillment of that obligation. The quality of independent legal advice ("ILA") comes into play when one party to a dispute seeks to set aside a contract on a ground such as undue influence, non est factum, or duress, and the opposing party argues that the evidence that the first party obtained ILA should negate these claims. Lawyers have thus been held liable where there has been a failure to advise a party to seek ILA. Yet, there is little jurisprudence in the area of negligence arising from the failure to provide adequate ILA.

¶ 63 In certain cases, the court has commented upon the adequacy of ILA. In Halsbury's Laws of England, vol. 18 (4th ed.) (London: Butterworths, 1973-1987) it states, at paragraph 343:

> "... Where the exercise of independent legal advice is relied upon to discharge the onus, it must be shown that the advice was given with a knowledge of all relevant circumstances, and was such as a competent and honest adviser would give if acting solely in the donor's interests." In Goodman v. Geffen, [1989] 6 W.W.R. 625, (Alta. C.A.), the court relied upon the principle that "when independent legal advice is put forward it must be competent and informed": see also Murray v. TDL Group Ltd., [2002] O.T.C. 1024 (Ont. Sup. Ct.) and Scott v. Clancy (1998), 16 R.P.R. (3d) 146, (Sask. Q.B.). However, even if the legal advice given is insufficient in some way, this may not be enough to set aside a contract if the signor was well aware of his rights and signed the agreement voluntarily: Dal Santo v. Dal Santo (1976), 21 R.F.L. 117 (B.C.S.C.).

¶ 64 The fact that Mr. Houzer signed a certificate of ILA did not change the scope of the retainer. In my view, the most telling evidence of this is that Mr. Lenz retained Mr. Houzer to act on October 23, 1992, but did not bring the separation agreement to the initial meeting, nor to the follow-up meeting, and did not even send the agreement to Mr. Houzer until November 10, 1992 when Mr. Lenz wanted him to review it for a certificate of independent legal advice.

(ii) There Were No Other Practical Options Available to Mr. Lenz

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¶ 67 … In the case of MacLellan v. MacLellan, (1996) 16 O.T.C. 370 (Ont. Gen. Div.), Chadwick J. refused to grant summary divorce judgment, because there was insufficient evidence before the court to determine whether reasonable arrangements had been made for the support of the children. The fact that a separation agreement had been negotiated dealing with child support, custody and access was not adequate and full financial disclosure was required. Also, in Diplock v. Diplock, [1996] O.J. No. 4631 (Ont. Gen. Div.), the court refused summary judgment to avoid undue financial hardship to the wife.

¶ 68 The evidence in the case before me is that there were reasonable arrangements in place for support of the children and a life insurance policy to secure the obligations. There was also a provision that pension benefits acquired during the marriage were to be divided. However, on the information before me, it is not possible to tell if Sharon Mitchell Lenz's pension or other rights

could have been affected by the divorce. As the granting of a summary judgment of divorce is a discretionary matter, it cannot be assumed that severance of corollary issues from the divorce would have been given on demand.

¶ 69 Counsel for the defendant also pointed out that if Sharon Mitchell Lenz had not co-operated with Mr. Lenz regarding the divorce, she could have filed a Notice of Intention to Defend, which would have tied up the action for thirty days, and could have filed an Answer and Counter-Petition. There would have been ten days allowed for reply, and Mrs. Lenz would have had the right to cross-examine witnesses on the affidavits filed in support of the motion for severance. Despite there being substantial support in place for the children, she may have argued that reasonable arrangements were not in place, she may have raised the pension issue, or she may have alleged adultery in a counter-petition. Any of those matters would have resulted in a delay in the grant of divorce. The delay could have lasted for several months. Without her consent, it is unlikely that the thirty-day period would have been abridged; thus, the divorce would not have been effective for thirty-one days, during which time, Sharon Mitchell Lenz could have exercised her right to appeal.

¶ 70 From the affidavits filed regarding the variation proceedings, it is clear that Sharon Mitchell Lenz was prepared to assert her legal rights and it would have likely taken some time to negotiate or litigate a resolution. Therefore, based upon all of these considerations, I find that severance was not a realistic option in the circumstances of this case. Furthermore, even if Mr. Lenz had been informed about the option to sever the divorce from the other issues, I am of the view that, in light of the potential obstacles outlined above, Mr. Lenz would have still attempted to co-operate with Sharon Mitchell Lenz in order to obtain the divorce by December, which was paramount in his mind.

¶ 71 I also find that any other options such as attempting to negotiate an interim agreement in order to gain Sharon Mitchell Lenz's co-operation in procuring a speedy divorce, would not have allowed Mr. Lenz to resolve financial issues and still obtain the divorce in the time-frame set by Mr. Lenz. The options of negotiating the separation agreement or litigating were not realistic in light of both the time frame imposed and Mr. Lenz's clear instructions to avoid entering into any conflict with his wife. Mr. Houzer was never in a position to provide general advice on the separation agreement or on the equalization payment. To do that would have taken significant time, which was not contemplated.

(iii) Mr. Houzer's Conduct Met the Standard of Care

. . . .

¶ 80 …, I do find that, after having read the agreement, Mr. Houzer told Mr. Lenz that it was unfavourable. Even though Mr. Lenz was advised that the agreement was unfair, he elected to proceed. A client has the right to enter into an improvident agreement, so long as he is aware of the consequences. In Jackson & Powell on Professional Negligence, supra, at 471, the authors write:

> It is in general the client's privilege, if he so wishes, to mismanage his affairs. He is entitled to pursue litigation with little prospect of success, to lend on insufficient security, or to enter an unwise bargain, if he so chooses. The solicitor has a duty to

> advise on the legal hazards of the transaction, but no more: `It was the duty of the solicitor to inform and advise, ensuring that the information and advice was understood by the client. It was not part of his duty of care to force his advice on the client.' If that advice is disregarded he must carry out the client's instructions or else determine the retainer.

¶ 81 There is nothing in the file to suggest that the retainer changed from providing advice to simply obtain … a divorce. There is no memorandum or letter or anything to corroborate that position. I find that the retainer was always simply to obtain a speedy divorce. Had the retainer included the negotiation of a separation agreement, that would have placed a duty upon Mr. Houzer to obtain financial disclosure including receiving income tax returns, to conduct certain examinations or to seek various productions. That process would have taken a significant amount of time.

¶ 82 Applying the standard of a reasonably competent solicitor, I am satisfied that Mr. Houzer did not breach that standard. Although Mr. Houzer admitted that he never used the word "sever" with Mr. Lenz, it is my view that the failure by Mr. Houzer to advise Mr. Lenz of other options did not amount to negligence. Neither was his failure to advise Mr. Lenz that the prior oral arrangement between the parties was not binding upon them. Mr. Houzer was not required to go beyond the express instructions of his client or to exceed the scope of his retainer. That Mr. Lenz had no expertise in matrimonial law does not place a different onus upon Mr. Houzer. It is recognized that a client seeking legal assistance in a family matter will not be familiar with the law and may be emotionally upset about the subject matter. It was Mr. Houzer's obligation to find out about the December date to determine if it was a true deadline so that he could assess whether there were sufficient grounds to support a speedy divorce. He was told that Mr. Lenz wanted the divorce to accommodate his children who would be home at Christmas and his father who had been ill. Since he was not told that Ms. Burton was pregnant, Mr. Howzer did not have the duty to explore the ramifications of that nor to determine whether there was flexibility as to the date of the divorce.

¶ 83 Furthermore, while the certificate of independent legal advice required that Mr. Houzer swear an affidavit stating that he had advised Mr. Lenz about the "nature and effect of the separation agreement in every respect", within the context in which Mr. Houzer provided the independent legal advice, Mr. Houzer fulfilled that obligation as well.

¶ 84 In conclusion, in light of the particular circumstances of the case, the nature of the transaction and the client, I am satisfied that Mr. Houzer explained the agreement and the risks associated sufficiently, so that the client was able to make an informed decision about whether to proceed to obtain a divorce by the specified date. The lawyer met the standard of care with such minimal effort as was commensurate with the retainer. Mr. Houzer's conduct did not fall below the standard of care of a reasonably prudent solicitor.

. . . .

¶ 124 For these reasons, the claim of Mr. Lenz is dismissed. The claim against the law firm was not advanced at trial but, for the same reasons, the claim against the law firm is also dismissed.

¶ 125 If the parties are unable to agree on the question of costs, they may file written submissions as follows: the defendant by February 20, 2004 and the plaintiff by February 27, 2004.

"SCC Finds Notary Acting Professional In $550,000 swindle"

Schmitz, Christin, *The Lawyers Weekly*, 06 February 2004, p. 2. (in part)

The Supreme Court of Canada has ordered the Chambre des Notaires du Quebec to compensate the estate of a mentally infirm widow who was defrauded by her long-time notary.

The top court held 6-1 that the notaries' regulator was patently unreasonable in denying compensation on grounds bankrupt notary Nolan Filiatrault was acting in his personal, not professional, capacity when he had the widow sell him her house for $1, and then sold it for $550,000. He also defrauded her by collecting $17,000 of her old-age pension, sold land she owned, and forged her signature to withdraw funds from her trust account.

Filiatrault's malfeasance was only uncovered due to persistent complaints to the Chambre from her nephew and her brother.

In denying her estate's claim, the Chambre cited s. 2.01 of the regulation establishing its indemnity fund, which states the purpose is to reimburse "sums of money or other securities used by a notary for purposes other than those for which they had been delivered to him in the practice of his profession."

The fund has a $300,000 ceiling on claims, but the Supreme Court ruled this did not bar it from awarding the estate interest from the 1996 date of its patently unreasonable decision.

Lawyers for the Chambre relied without success on its strong privative clause in s. 4.03 of the [indemnity fund] regulation.

In characterizing the fraud as a personal act, the chamber "betrays a misunderstanding of the relationship, ... the duties of notaries, and the nature of the indemnity fund, and that this court cannot permit to stand," Justice Charles Gonthier wrote for the majority, which quashed the Chambre's decision, which had been upheld by the Quebec courts below [[2001] Q.J. No. 3900 (QL) (Que. C.A.)].

"One might object that it is a legal error and is shielded by the privative clause," Justice Gonthier remarked, "but it is so gross an error, predicated on such a basic misunderstanding of the professional responsibilities of notaries in Quebec law, the relationship between Mrs. Hamel and Mr. Filiatrault, and the purpose of the indemnity fund that this court cannot permit it to stand. It is a patently unreasonable result. "

One of the purposes of the indemnity fund is to protect clients from misdeeds by notaries that, because the misconduct is intentional, will not be covered by professional liability insurance.

"The case at Bar is a perfect example," Justice Gonthier remarked. The Chambre had "acknowledged the unrefuted evidence of Mr. Filiatrault's numerous false representations to Mrs. Hamel. Yet by characterizing the transaction as personal, the [Chambre] took Mr. Filiatrault's fraud outside the scope of the fund, thus revoking the very protection the fund is intended to give.

"This opens a gap between notaries' ethical obligations, as set out in s. 4.02.01(b) of the Code [of ethics of notaries, R.R.Q. 1981 c.N-2], and the remedy for breach of the obligations, which is supposed to be provided, in the last
resort, by the indemnity fund. "Not only is Mrs. Hamel left unprotected, the purpose of the fund itself is frustrated. To conclude, the transaction by which Mrs. Hamel unwittingly sold her home to her notary for the derisory sum of $l cannot in any sense be reasonably characterized as personal rather than professional."

In a lone but vigorous dissent, Justice Marie Deschamps said that despite the court's sympathy for the victim it was inappropriate for it to intervene since in her view the Chambre's interpretation of the regulation was not patently unreasonable.

[**Editor's Note:** Citation for decision: *Giguere v. Chambre des Notaires du Quebec,* [2004] S.C.J. No. 5 (QL) (S.C.C.) .]

Finney v. Barreau du Quebec

S.C.C. File No. 29344, 10 June 2004,
McLaughlin C.J.C., and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel (for Court) JJ.,
***Lang Michener Supreme Court Of Canada Newsletter,* No. 26, 10 June 2004**

[**Editor's Note:** Although indexed as *Finney v. Barreau du Quebec,* the Barreau was Appellant to the appeal in Supreme Court of Canada.]

B. was entered on the Roll of the Order of Advocates in 1978. Between 1981 and 1987, the [Appellant] Barreau's Committee on Discipline and the Professions Tribunal found him guilty on at least three occasions of disciplinary offences. In 1990, after a lengthy investigation, the Professional Inspection Committee [of the Appellant] submitted a report to the Executive

Committee [of the Appellant] concluding that B was incompetent. Two years later, the Executive Committee required that B complete a refresher training period and ordered that he practise his profession only under the supervision of a tutor. The [R]espondent's difficulties with B began in 1990. Between 1991 and 1993, she filed several complaints against B and even contacted the Office des professions to complain about the Barreau's inaction. It was not until 1994 that the ... [Barreau] served B with a request to have him provisionally struck off the Roll, which was granted by the Barreau's Committee on Discipline in May 1994. In 1998, B was found guilty on 17 counts [of professional misconduct] and struck off the Roll of the Order for five years. In 1996, the [R]espondent launched an action in damages against the Barreau for breach of its obligation to protect the public in the handling of the complaints made against B. The [Quebec] Superior Court dismissed the action. The Court of Appeal allowed the [R]espondent's appeal in part and ordered the Barreau to pay her $25,000 for the moral injury she had suffered.

[The Barreau appealed.] The Supreme Court of Canada held that the appeal should be dismissed.

Justice LeBel writes the following: "An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamenta1legal framework of Canadian society. In Canada, our tradition of allowing the legal profession to regulate itself can largely be attributed to a concern for protecting that independence and to lawyers' own staunch defence of their autonomy. In return, the delegation of powers by the State imposes obligations on the governing bodies of the profession, which are then responsible for ensuring the competence and honesty of their members in their dealings with the public (see Fortin v. Chretien, [2001] 2 S.C.R. 500, 2001 CSC 45, at paras. 11-18 and 52, per Gonthier J.). Subject to the limits defined by the applicable legal rules and principles, a law society will be liable for a breach of this supervisory duty. Such cases are indeed rare, but one has arisen in this instance.

... The issue in this appeal is the nature of the civil liability rules that apply to the activities of the Barreau, a public body with administrative, regulatory and disciplinary powers delegated by the Quebec National Assembly.
... In the case of duties relating to the management of disciplinary cases, it would be contrary to the fundamental objective of protecting the public set out in s. 23 of the Code if this immunity [for acts of the Barreau performed in good faith] were interpreted as requiring evidence [from the Respondent] of malice or intent to harm in order to rebut the presumption of good faith. Gross or serious carelessness is incompatible with good faith. It may therefore be concluded that, in the case of the exercise of these case management powers, the requirement that the performance or failure to perform an act have been committed in bad faith is not a bar to an action in damages against a professional order that is subject to the Professional Code. ... I would point out, however, that we need not make a finding as to the legal principles that would apply to the exercise of adjudicative functions by bodies such as the committees on discipline and the Professions Tribunal.

... The nature of the complaints and the lawyer's professional record in fact made it plain that this was an urgent case that had to be dealt with very diligently to ensure that the Barreau carried out its mission of protecting the public in general and a clearly identified victim in particular. Despite the urgency of the situation the Barreau took over a year to request provisional disbarment, which was in fact quickly granted by the Committee on Discipline.

... Exceptional though the case may have been, the conduct of the Barreau in this matter was not up to the standards imposed by its fundamental mandate, which is to protect the public. The virtually complete absence of the diligence called for in the situation amounted to a fault consisting of gross carelessness and serious negligence. The Barreau is liable, as held by the Court of Appeal.

... Given the circumstances of this case, I would award the [R]espondent her costs in this Court on a solicitor and client basis."

***Musser v. Provencher*,**
121 Cal. Rptr. 2d 373 (2002)
(Summary)

The California Supreme Court held that an attorney who settled a professional negligence action with a former client may seek indemnification from another attorney who helped represent the client in the matter which generated the actions.

Hudema v. Hamilton

U.S. Dist. Ct., D. Utah, No. 2:02CV-0166B, 04 June 2003
(Summary)

A woman lost legal custody of her son after she and her husband engaged in a child support and custody dispute. She sued several attorneys who had represented her in the dispute, alleging legal negligence by them. Among other things, the women alleged the attorneys had failed to conduct discover, retain property experts, and adequately prepare for trial. The suit was settled with a payment by the attorneys.

5.0 FEES AND COSTS

5.1 Fees

"Managing the Finances Of Your Practice"

Lawyers' Professional Indemnity Company
(Toronto (One Dundas Street West, Suite 2200, P.O. Box 75), 2003),
pp. 19-28 (in part)

[ADVANCE PAYMENTS]

Fee advance

Often mislabelled, a "retainer," a fee advance is payment in advance by a client to secure the immediate services of the lawyer. The unearned portion of this fee advance is always refundable. Despite being refundable to the client, the financial security of the fee advance is highly desirable. It provides assurance to the lawyer that the client desires to move forward to resolve the legal matter, and gives the client a stake in the matter.

Retainers

A retainer is a fee to ensure that the lawyer keeps time available for the client should the need arise during the period of the retainer. There is no expectation that services will be rendered, only that they will be available. This fee is usually non-refundable (not necessarily paid in advance and placed in trust). Before accepting a retainer, you should carefully evaluate the credit-worthiness of every client at the initial interview. Apply sound, objective business
judgment to the question of client's willingness and ability to pay. Before extending a significant amount of credit to a new client, obtain credit information, such as name and address of employer and bank, and amount and status of other debt. Do a credit check. Ask for credit references. This is very important as you will be investing your time and money in this client – due diligence would require that you have determined that your investment is warranted and that you will receive a reasonable return.

Get adequate fee advances, especially in litigation matters. Lawyers who fail to ask for a large enough fee in advance, for fear of scaring off the client, often end up as bill collectors. There are several types of fee advances. They include:

[1] Up-front Retainers: This is the most common type of retainer. The money is paid up-front by the client, then used by the lawyer as legal services are performed and billed. A retainer for the full amount of the services, fees and costs (disbursements) is of course the ideal. Often, however, the retainer doesn't cover the full cost of the services and is not replenished. The end of the matter approaches with a substantial account owing. The lawyer may want to withdraw, but if it is too close to trial, it may not be possible to ethically do so. If this has happened to you, consider changing your fee agreement to allow one of the next three retainer types.

[2] "Evergreen" Retainers: The client pays an initial lump sum fee advance, which is billed out for fees and costs on an ongoing basis. When it has been exhausted, the client is given 30 days notice to deposit the same amount again, failing which, subject to ethical rules, the lawyer stops working and withdraws.

[3] Security Retainers: The retainer stays in the lawyer's trust account until the end of the matter, like a tenancy security deposit. The client is billed as the work proceeds and must pay each bill; if the client does not pay a bill within 30 days, the outstanding bill is paid from the retainer and, subject to ethics provisions, the lawyer withdraws. [Alternatively, if the client pays bills as rendered] [t]he amount outstanding when the matter is completed is paid from the retainer.

[4] Split Retainers: The retainer is *split* in two; one half is used as a replenishing retainer and the other half as a security retainer. After the first half of the fee advance has been spent, the client is billed and must pay each bill. Any amount that is outstanding when the matter is completed is paid from the remaining half of the retainer.

Contingency matters

Of course, some files can be handled on a contingency basis. The key here is to select clients carefully so that you are reasonably confident that the file will be paid once the litigation is concluded.

[ENGAGEMENT]

Fee agreements should be written and comprehensive

It is important to communicate in writing with a client during (or immediately after) the initial consultation to define your professional relationship. State clearly whether or not you are acting on behalf of the client to avoid any misunderstandings about the timing, scope and cost of your legal representation. Misunderstandings about the lawyer-client relationship often led to the souring of the relationship, and to costly collection and malpractice suits. A well-written fee agreement encompasses more than your hourly, flat or contingent fee; it should define the parameters of the work to be completed, and address your obligations to the client, and the client's obligations to you. It should also address your rights (e.g., to seek withdrawal) and your client's rights (e.g., to terminate representation). Be clear in the language you choose. Avoid legalese. Use common language that is clear to your clients. Remember, because you are the person drafting this document, it is possible that any error or ambiguity may be resolved against you if a fee dispute later arises. A comprehensive written fee agreement should address the following issues:

[1] Define the scope of your services: Be specific about the legal matter on which you are representing the client. You should stipulate the exact nature of the relationship, what role you are taking, what functions you are to perform, and what your ongoing role and responsibilities will be. This is particularly important in the case of a limited retainer.

[2] Define the timing of your services: Make your services contingent on cooperation and payment from the client. If you want payment before commencing work, clearly state that your services start after the client has paid the advance or the flat fee. State that your services may cease if the client fails or ceases to pay your bill.

[3] Explain the fee arrangement: For your client's edification, explain the type of fee arrangement you are using. If it is a flat fee, expressly state that your fee is a one-time, up-front payment before services begin. For an advance fee, explain in the agreement that you will be charging your services against the advance fee on an hourly basis, and write in that hourly amount. Let the client know that when the advance fee is exhausted, you will cease to work on the file immediately, and you will require more money within a set period of time, failing which you will withdraw from the file.

[4] State examples of the services to be billed to the client: For your clients who are billed on an hourly rate basis, explain that they will be billed for your time on all aspects of the case, and cite several types of billable services, such as examinations for discovery, telephone calls, drafting correspondence, pleadings, trial preparation, etc. State the amount of your minimum time increment: one-tenth of an hour, one-quarter of an hour, etc. Clients will appreciate knowing these details in advance, and such disclosure will save you numerous headaches over time.

[5] Explain the client's obligation for costs: There are two types of costs usually billed to the client: Costs incurred in your office, such as copying charges, postage fees, long-distance telephone charges, etc., and costs billed by outside vendors, such as court filing fees, messenger services, and process fees. Some lawyers pay all costs and pass them along in their bills to the clients. Other lawyers charge clients for the in-office costs, and have the clients directly pay the costs incurred by outside entities. Still other lawyers require funds in advance from clients to pay for costs incurred during the course of the matter. Decide how you want to bill your client for costs and so state in the agreement.

[6] Explain your billing practices: Let your client know how often he or she can expect to receive your bill (preferably monthly), then make sure you stick to the promised schedule. Also explain when payment is due (upon receipt; within 30 days, etc.).

[7] Allow your client time to question your bill: Discussing your bill with your client will ease client concerns when the bills start to mount. Let your client know in the fee agreement that he or she may discuss the bill with you at any time.

Sample fee and retainer agreements are available at www.practicepro.ca/ finances booklet.

Lastly, remember that client perceptions are very important. You might consider calling your retainer agreement a "legal representation agreement."

A client-friendly label for an agreement that spells out your and the client's respective obligations and expectations will go a long way to building a better lawyer/client relationship.

Non-engagement letters

In cases where you have decided not to take on a file, send a non-engagement letter and return all documents to the person in question. Make it clear that you will not be performing any services on their behalf, and that they should immediately take all steps necessary to protect their rights as the passage of time may bar their rights.

[DOCKETING]

Docketing [generally]

Traditionally lawyers wrote out their dockets by hand, and someone else entered them on a computer. Today, modern law office accounting and practice management software products make it easy for you to directly enter your own dockets on the computer. The efficiency, extra speed and greater accuracy of electronic dockets makes this a necessity for successful law practices today. Studies have shown that lawyers gain up to 20 per cent in their billable time when time dockets are created contemporaneously with task completion. Once entered on a computer, dockets can go directly into accounting programs, correspondence or accounts as is necessary.

Docket in detail

Many accounting software programs have standard billing codes, for example, "conference with client", or "review of correspondence." While these codes are convenient, they don't include enough detail. Having detailed dockets is critical as a record of the work you did on a file, and for communicating to the client the details of that work.

A detailed docket should look something like this: "telephone conference with client re details of weekend access problems." Or, "drafting of correspondence to client confirming instructions to skip zoning search."

You will find that detailed dockets give a client much less opportunity to complain about their accounts, and you will be far more successful in defending your account in the event you end up before an assessment officer.

Docket every minute you spend on a file

Don't judge and write off time spent on a file as unnecessary by not docketing it on the day it was done. Wait until you final or interim bill the file, at which time you can properly judge all the factors that determine what should be billed, including the time that was spent on it. Trying to create dockets for work done in the distant past is very time-consuming, and not likely to be very accurate or complete.

Docket throughout the day

It is universally recognized that lawyers who contemporaneously create dockets end up capturing a significantly greater portion of the work they have done. Docket your work as you go. Spend a few minutes at the end of the day reviewing your dockets, and make any necessary corrections or additions while things are still fresh in your mind.

Docket all administrative and other non-billable time

It is important that you understand how much time you are spending on nonbillable tasks, and what they are. You can't do this without a complete record your time.

Lastly, remember that docketed hours or time is not the same as receipts. Even if you docketed 100% of your time, that amount will not be transferred to receipts. Some of the time may not be billed, and the amount that was actually billed may be further reduced by a failure to collect on the account.

[**RENDERING ACCOUNTS]**

Billing

Clients do not like surprises, especially if they relate to the size of an account. To avoid this, tell the client at the first meeting what you charge, how you charge, when you charge and what you expect from the client. Do not be afraid of scaring off the client: If they are unwilling to face the cost of a legal procedure at the outset, they are unlikely to change their mind at the end of the file. Your time is better spent marketing and attracting the type and class of client that will pay your accounts than working on a file on which you are not going to get paid.

Billing procedures

There are several methods that you can use to keep on top of your billing:

Establish billing cycles: With regular clients, check with them on how, when and in what form they prefer to receive accounts – and stick to that schedule and format (e-billing, detail of billable time, detail of disbursements, uniform task based billing system). For other clients, the common understanding is to arrange your office procedures so that accounts reach your clients on the first of the month, enabling your clients to include them in their payment cycle and to avoid the excuse that your invoice didn't reach us in time.

There may be good and valid reasons for billing on cycles that are more or less frequent than monthly. For clients whose ability to pay is in question, billing twice a month may be reasonable. Certain clients may wish to be billed every two months or even on some other schedule, but you must be reasonably assured that these are not merely methods to defeat the payment of your account.

Establish one or more systematic approaches:

• bill your clients alphabetically, billing each in turn;

• obtain a print out of your billable time, rank ordered in size, and start billing from the greatest outstanding work in progress (WIP) downwards. You could do the same using outstanding disbursements; and/or

• bill clients immediately after securing a positive result for a client, on the theory that you are then on the top of the client satisfaction curve. It is well known that the ability to collect on accounts diminishes with the passage of time after securing a positive outcome for the client; and

Consider alternative billing methods: Depending on specific circumstances, you may want to explore other options that may be more acceptable to the client such as:

• flat fees (a set amount for the complete file or each stage in the proceeding);

• contingency fees;

• results-based billing (where your final fee is based in whole or in part on the outcome of the file); or

• other alternative billing methods.

Account formats

The following items should appear on all accounts:

[1] the date, words that indicate that it is an invoice ("For Professional Services," "Statement", "Invoice"), the due date (net 10 days);

[2] the interest rate (expressed in an annual rate) that applies to overdue bills (you should ensure that your legal representation agreement mentions that your overdue accounts bear interest); and

[3] your signature (even if the ethical rules allow a secretary to sign an invoice).

[4] Your accounts should contain a detailed description of the work that was performed (use your detailed time dockets) along with a detailed description of disbursements incurred on the file, and any trust funds applied towards the payment of the account. Some lawyers believe that billing for in-office disbursements such as fax charges and photocopies only enforces the belief that lawyers nickel and dime their clients and they increase their hourly charges appropriately to cover these charges. This is a matter of personal preference.

[5] All invoices should be clear, easy to read with all calculations simple and straightforwardly set out, with delineation of sub-totals and the total amount due.

[6] Consider putting "E.&O.E." on your accounts so that you reserve the ability to correct or adjust an account if an error is discovered at a later stage.

[7] Avoid legalese – use language that sets forth the results you have achieved and your progress towards the client's goal. Before sending the account, consider … [what may occur if you were required to defend the account] at an assessment – and if there is any aspect of the account that makes you uncomfortable, make corrections before the envelope is sealed.

[PAYMENT]

Retainer replenishment

After you have clearly explained your billing practices, stick to them. Do not continue to work on a file where the client has neglected to refresh the funds in trust. Asking a client to replenish a retainer when necessary is critical for the success of your practice. You should be prepared to halt work until a retainer is replenished. Be certain to remain within your ethical requirements on withdrawing services or removing yourself from a file. If a client is truly unable to provide further funds, you need to explore what alternative arrangements can be made. If the client is unwilling to provide further retainer funds, you must be prepared to withdraw from the matter.

You or your staff person should carefully monitor the amount of unbilled work on individual files, and the sufficiency of retainers to cover that work. Many law office accounting and case management products automate this function by notifying you when billable time reaches a set limit on each file, when trust balances approach zero, and when lawyers have not billed a certain amount per month. This information should trigger an account or a warning when appropriate, and catch files on which retainers need to be replenished.

Accepting credit cards

In the past several years, the number of lawyers accepting credit cards has grown dramatically. The fee charged by credit card companies to accept such payments – between one and three per cent of each transaction – may be well worth the cost. By accepting credit card payments from clients, you shift the burden of being the client's banker over to the client's banker. Ask your banker or check the Internet about opening a "Merchant Credit Account." Also, be sure that fee advances or retainers that are paid by credit card are properly deposited into your trust account, and those payments for services already performed and billed are deposited into your operating [i.e., general] account.

Collecting unpaid accounts

If you do have an unpaid account, do something about it – quickly. Make early attempts at collection and determine whether or not further time and energy is warranted. Recall that attempting to collect an unpaid account against an unhappy client can lead to professional conduct complaints and malpractice claims – which can be emotionally and financially draining as well as public relations nightmares. By acting quickly and decisively and staying within your written credit policy, you can minimize your exposure to bad debts.

"Why the Hourly Rate Bill Is Here To Stay – ABA Studies"

Morgan, J. Harris and Foonberg, Jay G., *How To Draft Bills Clients Rush to Pay*. 2nd ed. (Chicago: American Bar Association, 2003), pp. 87-89 (in part)

I personally dislike the hourly rate bill. If it were up to me (it isn't), all billing would be done on a flat-rate or fixed-fee basis. Clients would then know in advance what the services would cost, and the lawyer would have greater opportunity to increase profits with better management of the case (assuming the lawyer knows the law and what will be required before quoting a fee).

Even though I have long championed the flat fee and others have written volumes on other alternative billing arrangements, the hourly rate appears to be here to stay as the predominant method of billing in noncontingency matters. It takes a lawyer and a client who together can be innovators to their mutual advantage to get off the railroad tracks of the hourly rate.

The ABA Commission on Billable Hours issued an extensive report on the use of the billable hour and some alternatives. The billable hour is blamed for destroying family life, turning lawyers within a firm into vicious competitors, inefficiency in doing work, inherent conflict of interest, reduced pro bono work, decreased training and instruction for new lawyers on how to become better lawyers, refusal to refer work outside the firm or to other lawyers within the firm when referral is in the client's best interest, heavy turnover-costing money to both the firm and the client, padded or false time records, suicides, alcoholism and drug problems, stress and stress-related illness and absence, trust account theft, and a host of other problems that could be avoided. Yet, notwithstanding all the negative factors inherent in hourly billing, it is here to stay. Reasons given for the permanency of the hourly rate include the following:

1. The system is simple: after the hourly rates are agreed upon, it becomes a matter of simple mathematics to calculate the bill.

2. Time records (if properly kept) can be easily converted to bills, especially with the availability of inexpensive computers, timekeeping systems, and software.

3. Lawyers are familiar with the system. Lawyers begin learning how to keep hourly records on their first jobs; many even learn this system in law school.

4. Hourly records can be used for many purposes beyond billing clients. They can be used to calculate efficiency or profit/loss by lawyer, by area of law, by department, and by case. They can also be used for giving status reports, complying with court and governmental regulations, defending ethics complaints, defending malpractice complaints, protecting clients' interests when dates of service are relevant, and similar activities.

5. Clients can compare the relative efficiency and cost of different law firms doing similar work.

6. Clients can challenge bills on an item-by-item basis. (Accordingly, lawyers must keep better time records to justify each item on a bill.)

7. Hourly records make it easy to identify who did the work and how much time and cost was required to do it.

8. If neither the client nor the lawyer has enough expertise or ability to estimate the fee, the hourly rate can be used by default.

9. Budgets can be developed for specific areas of the matter, and more or less time or money can be allocated for specific areas.

10. Sophisticated clients and law firm departments can and do get together in trade organizations, associations, and groups to formally and informally compare the costs of services for routine matters. They can agree among themselves about what a "reasonable fee" should be and use this information to "shop" lawyers and set the fees they wish to pay or charge.

11. Write-downs (not charging for time spent) and write-offs (not collecting, or making adjustments after bills are sent) can be analyzed by lawyer, by case, and by area of law.

12. In some cases, law firms can pass training and learning costs on to clients by having associates or other lawyers work on cases to learn the law or what to do.

13. The system promotes job security, in that corporate management, corporate counsel, and law firms don't have to create innovative cost controls. They can continue to do the same old things the same old way and not be criticized for a bad result.

14. By breaking matters into hourly components, well-managed law firms can project their staffing needs for months – and even years – into the future. The need for contract lawyers or lawyers with specific expertise can be anticipated, without creating a "crisis" atmosphere, inefficiency, and increased costs to both lawyer and client. Simultaneously, periods of no activity or low activity can be predicted, allowing the firm to coordinate those periods with lawyer vacations, leaves of absence, or even layoffs, with plenty of time for laid-off lawyers to preserve their careers.

In summary, I believe hourly timekeeping and hourly billing is here to stay, because hourly record keeping produces information and bills that allow overall management of legal matters by both client and lawyer.

“Time is Running Out on Billable Hours”

Wanless, Tony, Financial *Post*, 26 January 2004, p. FP.1 (in part)

When Markus Cohen left a major downtown Toronto law firm to open his own non-traditional law practice more than a decade ago, former colleagues were aghast.

Mr. Cohen opened The Virtual Law Firm, which featured low overhead, flexible pricing and outsourcing of legal work.

In those days, before the Internet was widely used, Mr. Cohen used telephones and fax machines to conduct most of his business. Now it is much easier to work using his Web site (www.thevirtuallawfirm.com) and e-mail.

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Mr. Cohen discovered some time ago what many professional service providers are only starting to learn: They operate not simply professional operations, but businesses that are customer-driven. And like most businesses, these firms are quickly learning the modern customer is more sophisticated and demanding.

Also, customers today are hard bargainers who want to know what value they are obtaining for their money. This makes the traditional "billable hours" business model increasingly difficult to sustain. As a result, many service firms are being forced to act like any other business in any other sector that has to find a price and service niche.

As the Business Development Bank explains, clients today are extremely technology-savvy, and service providers, some of whom still do not have Web sites, had better realize that is causing changes. Specifically, it is empowering potential clients to assess a provider's capability before engaging a service.

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Mr. Cohen also pioneered a billing practice that shocked many in his community. He set up a "flexi-fee" system that includes five different rates for his services, based on the skill level required for a task. The higher the fee, the more value he adds to the job, such as free consulting time. This does not surprise David Raffa, a co-founder of the Vancouver firm Catalyst Corporate Finance Lawyers (www.catalyst-law.com), which was created solely to work within this new world of professional services.

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"In professional services, you now only have two routes, to lower your rates, or add value to maintain your rates," he explains. "We can't bill for the extra services because they aren't legal-related, but they do help justify the rates in the eyes of our clients. In the legal world, the middle is disappearing and you either get bigger or specialize if you want to justify your billing.

"The reality for technical service providers is that there is a huge downward pressure on billable rates and straight billing for time. Entrepreneurs now want to know how much you can reduce their costs, and what value adds you bring to the table. Service businesses, like any other business, are now under pressure to compete on price and quality."

"Lawyers debate fee-per-service billing options"

Tibbetts, Janice, *The National Post*, 19 August 2003 (in part)

Enormous fees that mount by the hour do not help the image of the legal profession, a newly retired Supreme Court of Canada justice warned a gathering of lawyers on Monday.

Justice Charles Gonthier, who left the top court this month when he reached the mandatory retirement age of 75, decried lawyers' increasing focus on the "bottom line" and the "depersonalization" of law firms.

"Billable hours may be partially to blame," Judge Gonthier told a panel at the annual meeting of the Canadian Bar Association. "Enormous fees that mount by the hour do nothing to improve the image of the legal profession."

He proposed lawyers consider charging per service, an option that has been debated for years but has been rejected by most of the country's lawyers.

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[Judge Gonthier said] "[o]ne possibility would be to explore alternatives to hourly billing. Properly designed billing alternatives might accord more with the nature of service rendered, something that is more likely to be perceived as fair by the c1ient."

"An annual survey of lawyer's fees, to be published in the September issue of *Canadian Lawyer* magazine, will show the average hourly rate in Canada for a lawyer with 10 years experience is $220 per hour. Senior lawyers, however, can charge hundreds more dollars per hour and fees are higher than the national average in major cities.

A Canadian Bar Association report, published three years ago, estimated 97% of lawyers opt for hourly billing.

The report, published by the association's young lawyers, recommended the profession should offer billing options to clients because they are increasingly rejecting the hourly rate and representing themselves in court. Since the report was released, the hourly rate has increased.

The report noted that charging a fixed fee has its problems because it can encourage lawyers to cut corners. But the pitfalls of hourly billing are larger, the report said, because the system creates incentive for inefficiency and encourages lawyers to over-research a file.

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Judge Gonthier [said] …. "the practice of measuring one's output in terms of billable hours leads one to emphasize time spent at work to the detriment of other socially worthy activities which cannot be added to the times billed," Judge Gonthier said.

"Such socially worthy activities include not only time spent with clients, but also the mentoring of young lawyers."

"Examples of Alternative Billing Arrangements Other Than Pure Contingency or Pure Hourly"

Morgan, J. Harris and Foonberg, Jay G., *How To Draft Bills Clients Rush to Pay*. 2nd ed. (Chicago: American Bar Association, 2003), pp. 83-87

In reality, alternative billing arrangements are, in fact, alternative pricing agreements where the client wishes to shift the risk of losing or benefit of winning to the lawyer; the client is normally very willing to pay a much higher fee than hourly rates if the amount of the fee is wholly or partly based upon results.

Lawyers and consultants have written libraries about alternative fee or alternative billing arrangements. This chapter contains only a brief description of the more common methods. At one time or another I have used every one of the methods described below. Each method can be in the best interest of both the lawyer and the client, when suitable for the matter, the client, and the lawyer.

Following is a very brief description of some of the more common methods of alternative billing arrangements:

Flat Fee (Sometimes Called Lump Sum or Fixed Fee)

Under this system, the lawyer or firm charges a fixed fee for the entire matter or one stage of a matter, regardless of the time expended. To use this method, you should know what you are doing. Set the fee too low, and you take a bath; set it too high, and you might scare the client away.

A flat fee can be set per motion, per court appearance, per case, per day in court, per acquisition, per trial day, or per whatever. With this method, there is no reference to an hourly rate or to who did the work.

Piece of the Artistic or Business Action

With this method, the lawyer receives payment through items such as shares of stock, or a percentage of business receipts, business profits, or royalties. This is a risky and dangerous method that should be used only with sophisticated clients or in industries where it is common practice (such as the entertainment industry).

If what you receive turns out to be extremely valuable, the client can claim the fee was unconscionable or unreasonable, and would probably prevail in an action to convert "a piece of the action" into "quantum meruit" or, worse yet, no fee at all.

Blended Billing Rate

In a matter with a blended billing rate, all lawyers … [bill] at the same hourly rate, regardless of whether they are senior partners with very high rates or new lawyers with very low rates. The client depends upon the economics of profit-and-loss to the law firm for the most economical and effective use of lawyer time. Though it may seem that a firm would want to throw all its "newbie" lawyers on such a matter, the firm knows that new lawyers can waste large amounts of time if not properly supervised. Accordingly, new and/or lower-rate lawyers are likely to receive adequate supervision, guidance, and management from the firm. Also, though senior lawyers can theoretically get the job done in fewer hours, the firm will sometimes use lower-rate lawyers on the matter to free the higher-rate lawyers to work on matters where their experience and skills are needed.

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Volume Discount

A firm may give discounts for work in excess of a certain number of dollars or a certain number of hours. The underlying theory is that as a lawyer or firm becomes more knowledgeable about a client and the work the client needs, the lawyer or firm can afford to do the same type of work for the client in fewer hours or more efficiently and, accordingly, can discount the standard rates.

Reverse Contingency

With this method, the law firm gets a bonus in addition to – or instead of – hourly rates for every dollar less than a certain amount the client must pay. The contingency component may apply to a judgment or award or settlement, or to hourly legal fees billed, or a combination of the two.

Reduced Hourly Rate Plus Contingency

The firm may reduce hourly rates in exchange for an additional contingency fee based upon results.

Maximum Amount Against a Contingency

Under this system, the case switches from hourly rates to a contingency fee at some dollar point. A firm may bill at hourly rates with a maximum cap on fees but with a contingency component related to results, when a contingency percentage is calculated. The client gets credit for the amount previously paid. I personally have found this method to be very successful, especially when the fee is large and could be beyond the ability or willingness of the client to pay. The client can budget or set aside a certain amount for fees and know that amount will be the maximum, unless he or she prevails.

Full-Time Lawyers (and/or Legal Assistants) for the Client or the Matter

I have hired and/or used a single lawyer or two lawyers to work on only one matter. The client pays a reduced fee for that lawyer with a minimum – or even a fixed – fee per month. The fee can be less than standard hourly rates because there is no "underutilized" time for the firm to absorb. I normally pay the lawyer a good-sized bonus at the end of the case, to prevent the lawyer from feeling she worked herself out of a job by working hard to complete the case.

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Different Fee Arrangements for Different Types of Work

A client and firm may agree that the client will pay different prices for different types of work. The same lawyer may be charged at significantly different rates for the same client, depending upon the nature of the work done. A lawyer might do appellate work, tax work, trial work, and contract work for the same client at different rates.

Fixed Fee for Fixed Task

I have had great success using this method. Clients like it. It works extremely well when the type of work done for the client tends to be repetitive. For example, all complaints in a given area of law (such as collection, foreclosure, and subrogation, for example) cost the same regardless of the time spent. All answers, depositions, interrogatories, court appearances, acquisitions, and contracts are at a fixed price regardless of the time devoted. Clients understand this method and sometimes will ask that something be done or not be done because they know in advance what it will cost. As the lawyer gains expertise in a given area of law or for a specific client, the lawyer will feel more comfortable using this method, which can be extremely profitable for the lawyer while giving the client a feeling of control over costs.

Minimum/Maximum Fee

Clients like this system because it provides them with a sense of certainty. The client knows that the fee will be not less than a certain amount or more than a certain amount.

"Value Billing"

"Value Billing" is a term that covers many types of billing outside of pure hourly billing. One must decide if "value" means value to the client (possibly nothing on a lost case) or value to the lawyer (the lawyer's costs and profits regardless of efficiency or good case management).

The Pure Retainer

The Pure Retainer is sometimes more accurately called the "availability-only retainer." The firm (or lawyer) gets paid a certain amount every month or year and commits itself to be available for any work the client wants, when the client wants it. The firm is also automatically conflicted out

of any matter in which the retainer client is the adverse party. There are no exceptions for Chinese Walls, Cones of Silence, former employees, former employers, lawyers, nonlawyers, partners, staff, nonpartners time elapsed, or anything else. The retained firm is automatically conflicted out of work adverse to the retained client. In addition to paying the retainer fee, the client is charged for any work done. Unfortunately, the word "retainer" is also used to describe any payment in advance for payment for fees to be earned in the future, which in law is just an advance deposit for future work to be done.

"How To Draft Bills Clients Rush To Pay"

Foonberg, Jay G., in: Morgan, J. Harris and Foonberg, Jay G., 2nd ed.
(Chicago: American Bar Association, 2003),
pp. 47; 48; 52-53; 56; 61-62; 63

Cover Letters for Bills

Many lawyers send a cover letter with a bill, briefly discussing the bill, the present status of the matter, and the next step(s) to be taken.

I personally do not send these cover letters unless there is something unusual in the bill or something unusual to be expected in the next bill.

One of the side benefits of sending a cover letter is that the letter will be dated with the actual date of preparation. Invoices prepared by computers often show a statement date being the cut-off date for all time on the matter. This "statement date" is often weeks – or, in some cases, months – before the actual mailing of the bill. The discrepancy in dates is often a source of anger in clients. The client is questioned about nonpayment of a bill to and including September 30th, the date on the statement, when in fact the bill did not get mailed until November 12th, the date of the letter.

If you do send a cover letter you may wish to send it separately along with an explanation: "Under separate cover we are sending you an invoice for payment. Please file this letter in your attorney correspondence file. Please do not attach it to the bill, as the bill itself may be subject to discovery and this letter, being an attorney-client legal communication on a legal matter, should be protected by the attorney-client privilege and not subject to discovery."

Lawyers who do send cover letters tell me they get paid faster with fewer questions about the bill or the matter.

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Small Refunds

Sending the client small or even negligible refunds from time to time when an error is found or when an adjustment is made can please a client and go a long way toward establishing trust and confidence in the lawyer and the accuracy of the lawyer's billing and accounting system.

Sending a refund check can be more effective than simply crediting the next bill. The client will have to classify the check and process the check, thus reminding the client of the refund.

If you are refunding unused cost money from the trust account, you should do so immediately upon realizing you won't need the money. Again, this gives the client confidence in your honesty and integrity.

Although some effort will be required on your part, the effort will be well worth it in terms of client confidence. Surveys have repeatedly shown that clients want honesty from their lawyers. Refunding money is a good indication of your honesty.

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Discounts

Everybody likes receiving discounts. Many people will buy services or goods if they perceive a discount gives them a bargain and makes a purchase affordable.

As with any form of price break, the discount is usually offered to keep good clients or to get new clients. Often a discount is really a price reduction. The label for the discount is up to you. A few samples follow.

Professional Courtesy Discount This discount can range from 25 to 100 percent. You might discount a bill to an accountant, a lawyer, or a doctor to keep the goodwill of someone who refers a lot of clients to you. Make the discount subject to timely payment and be sure the client knows the discount will be lost if the bill is not paid on time.

Family Discount This discount usually ranges from 50 to 100 percent. When you know you are not going to get paid by the relative, you give the 100 percent discount to let the relative know the value of what was done for him or her. If you are hoping to get paid, then giving a discount of 50 or 75 percent will hopefully get you the balance, at least. Again, make the discount subject to timely payment (except in 100 percent discount matters).

Hours Discount The client is given a discount from "standard rates" for all hours billed and paid in excess of a certain number of hours. The discount is usually 5 to 15 percent and can be applied to hours on a matter or hours in a year or other period of time. This can be considered an alternative billing arrangement. This discount should also be subject to timely payment.

Amount-of-Fee Discount This is really an alternative billing arrangement. All fees in excess of a certain number of dollars are discounted. This discount can be based upon fees per matter or a period of time. The discount is usually 5 to 15 percent and is also subject to timely payment.

Early Payment Discount This discount tells the client the bill can be discounted 2 to 5 percent...if paid within five business days of receipt.

If you know you are going to reduce or discount a bill, show the amount of discount on the bill. Do not simply net the bill excluding reference to the reason for – and the amount of – the discount. Showing the amount of the discount on the bill shows the value of what the client received and makes the client feel he or she has received something special not generally available to others.

You can also be creative in giving discounts. You can give the client a "Happy Holidays Discount" or a "Happy Birthday Discount" if you feel the discount will enhance your relationship with the client or get you paid sooner.

The Bill as a Periodic Progress or Status Report

Clients often want periodic status reports but don't want to pay for them.

A well-prepared bill can also serve as a status report on a case. This is especially true if the monthly bills are kept together, thus allowing the client to go back (if necessary) to the first bill and read each succeeding bill until the last one received has been reviewed.

When clients ask for period status reports, you can respond that the invoices are basically status reports that they get for free as a benefit of the billing system. Suggest they try the system of looking at the bills and incoming copies of documents, and if that is not sufficient, that you would be happy to provide additional information on status or progress reports that meet their needs.

In many instances, the position or office of the client receiving the status reports has no real interest in seeing them or need for them and they go unread. By not sending status reports beyond the bills, you'll make that person happy by giving him or her less work to do and at the same time remove an impediment to rapid payment by getting more rapid approval.

Frequency of Billing

The more frequently you bill, the more frequently you will be paid and the more frequently you will receive new matters. Studies reveal that customers most often use those companies that bill most often. Companies that bill every two weeks will be called upon by their customers more often than companies that bill monthly, I don't know if the reason is that customers see the companies' names more often when they receive, process, approve, and pay the bills, or if they tend to accept the companies and bills as part of their own routine workings. Perhaps it's because the bills are smaller when they are more frequent.

Regardless of the reason for this phenomenon, the end result is that the more frequently you bill, the more frequently you will get paid and the more frequently you will be called upon for more work.

Regardless of the method or combination of methods used for billing, a bill should be sent as soon as possible after the services are performed, while the services received are fresh in the mind of the client and fresh in the mind of the lawyer, in the event there is a problem concerning some aspect of the bill.

There are several factors to consider in determining the frequency of billing:

Monthly Billing. Most businesses budget for monthly expenses and have systems for approving and paying bills monthly. Individuals are accustomed to monthly payments for items such as mortgages, rent, utilities, debt payments, and credit cards. Except for some important reason, billing should be no less frequent than monthly.

Billing in Synchronization with the Client's Cash Flow. Many clients, both individual and business, have predictable cash flows. Common examples are paychecks, rental or investment income, receipt of inheritances or loans, or completion of matters. By synchronizing the frequency of billing and the frequency of the client's ability to pay, the client knows that money is due you upon receipt of the bill.

On Account Billing. Although payment may be on a cash flow, delayed, or other agreed-upon basis, the bills describing the services should be sent as frequently as possible and the "on account" bill requesting periodic payments should include the words "on account"- or "now due" or other words to that effect.

Daily or Weekly Billing of Large, Nonprepaid Amounts. During litigation and negotiations it is common to have periods of great activity, especially at the inception and end of matters. The large amounts of fees for these services may not present problems if there are funds in the trust account for prepayment. However, if there is going to be a problem with payment, the sooner you and the client find out, the better for both of you.

If there is any concern on your part about getting paid these large amounts, you may want to bill daily or weekly to prevent surprises to you or the client. Weekly billing allows you or your staff to prepare bills over weekends.

Timeliness of Billing. …, it is critical to get the bill describing services to the client as rapidly as possible after the service is rendered. Not only will you be able to spot problems, statutes of limitation for malpractice or breach of contract may begin to run.

No Fee, Zero-Balance, and Paid-in-Full Bills

When you willingly work for free, you should still keep accurate time records and send bills showing the value of the work done and the amount of the discount bringing the bill down to zero. There are several reasons for doing this:

1. The client knows the value of the work done and can use this figure in referring others to you when the others have fee-paying ability. You don't want referrals based upon a view that your services are "cheap" or "free."

2. The client knows the value of what he or she has received. Many of these clients want to somehow "earn" the discount and refer you fee-paying clients to repay you for your kindness. Many of my most active referral sources are people to whom I once gave free services.

3. If no bill is sent, the client may think you forgot to bill and won't come back to you with a good matter, fearing you will “discover" your error and then seek money.

4. Even though you did the work for free, you will have malpractice responsibility and may need to have communicated with the client.

A paid-in-full bill should always be sent along With a cover letter telling the client the bill is paid and the matter is closed, and thanking the client for the opportunity to have been of service. Adding the words "Paid in Full" on subsequent bills may be helpful in commencing the statutes of limitation for malpractice purposes.

Sending a bill every month showing a zero balance due is a reminder to the client that you have successfully completed the matter and are available for other matters.

Research of nonlegal relationships shows that the frequency of billing affects how often clients use service providers. The more frequently you send bills, the more likely clients will use you for their next matters. Accordingly, sending a bill every month showing a zero balance might get you more work from a client. You can decide to send the zero-balance bill for three to six billing cycles, or until year-end. If, however, you send too many zero-balance bills, the client might think you are inefficient and wasteful of time and money.

Forrest Gray Lewis & Blaxland v. Tam

[2003] B.C.J. No. 2280 (QL) (B.C. S.C.), Barber, Registrar
(Summary)

Facts: The law firm sued for payment of the balance of its account. The firm had been retained by the client in a wrongful dismissal action. It had agreed to charge the client a fee for service plus a bonus on factors that had been set out in a letter to the client. The client sent the law firm a cheque covering the fee for service only, and a letter indicating that if the law firm cashed the cheque, it was thereby agreeing that the client’s account was paid in full. The firm cashed the cheque.

Decision: Action dismissed.

Reasons: The client sent the law firm a letter and cheque with respect to the fees owing. The firm's action of cashing the cheque was an acknowledgment that the account was paid in full at that time.

Georgialee Lang & Associates v. Wigod

[2003] B.C.J. No. 1792 (QL) (B.C. S.C.), Neilson J.
(Summary)

Facts: Application by the client, Wigod, to set aside a Certificate of Fees. The client retained the solicitor, Lang, to represent him for part of extended matrimonial litigation. During the course of the litigation, the client disobeyed a court order regarding dissipation of his assets and failed to confide in or follow the solicitor's advice. Due to the reduction in assets and the increasing complexity of the matter, the lawyer met with the client and asked him to execute a Certificate of Fees for approximately $70,000. She agreed to complete some further work for him at no charge and waive any interest in exchange for the Certificate. The client obtained independent legal advice and signed the Certificate a few weeks later. A few months later, the client decided to act for himself at trial and was relatively successful in the litigation. He now applied to set aside the Certificate so that he could proceed with taxation of the solicitor's accounts. He argued that he signed the Certificate as a result of duress or undue influence, and that the solicitor misled him as to the effect of the Certificate. The solicitor sought dismissal of the application and special costs due to the client's allegations of dishonesty.

Decision: Application dismissed.

Reasons: There was no evidence of physical or economic duress, and the solicitor rebutted any presumption of undue influence. The client had independent legal advice, he did not protest the Certificate or the amount of fees initially, he took several weeks to consider his position before signing the Certificate, instead of resorting to alternative courses open to him. Nothing suggested that the solicitor did anything to contribute to any misapprehension by the client or that she took unfair advantage of his ignorance. The allegation of dishonesty arose in an offhand manner during cross-examination and did not play a role in the proceeding, so special costs were not justified.

Pullman v. Pullman

[2002], 25 R.F.L. (5th) 157 (B.C.S.C. [In Chambers]), McKinnon J.,
paras. 3; 6; 7; 8; 9-10; 14-16; 19

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[3] Mr. Pullman's former solicitor seeks an order that he has a solicitor's lien attaching to funds obtained from sale of certain [corporate] shares [which had been jointly owned by the Pullmans and treated by them as divisible family assets] held by Mr. Pullman and that he has priority to these funds over the judgment obtained by Mrs. Pullman at trial.

. . . .

[6] Mr. Linde, counsel for Mr. Pullman at trial, obtained a certificate of fees pursuant to s. 72 of the *Legal Profession Act,* S.B.C. 1998, c. 9 in the amount of $15,038. Thereafter he instructed bailiffs, pursuant to a Writ of Seizure and Sale, to effect sale of Mr. Pullman's interest in the shares. That was accompanished ….

[7] Mrs. Pullman's counsel was informed of the seizure and sale by Mr. Linde who sought her consent to payment out to him on the strength of his claim of priority under s. 79 of the *Legal Profession Act*. She declined to consent, issuing instead her own Writ of Seizure alleging a claim to the entire balance to satisfy the judgment [against Mr. Pullman] obtained at trial. ….

[8] An application to determine the issue of priority was first brought before Clancy J. in the Vancouver Registry. ….

[9] In *Hosseini v. Oreck Chernoff* (1999), 174 D.L.R. (4th) 685, 1999 BCCA 386 (B.C. C.A.), the court was concerned with legislative changes to the *Legal Profession Act* and whether these changes altered the ratio of Esson J.A. in Wilson, King & Co. v. Lyall (Trustee of (1987), 12 B.C.L.R. (2d) 353 (B.C. C.A.). Esson J.A. stated a p. 360:

> ...The object of s. 100 is to give the lawyer the extraordinary privilege of a lien in order to protect him against the unfair result of having by his efforts preserved assets for the benefit of all; and of getting no benefit from those efforts. But where, as here, the element of preservation, if it existed at all, was merely technical, there is no unfairness in refusing to grant a priority for legal fees.
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> It is quite irrelevant that the lawyers acted with complete propriety in discharging their professional obligation to their client: It is not a case of their being deprived of a lien by some fault upon their part. It is rather a case of not qualifying for the extraordinary privilege of a lien because they cannot meet the test of satisfying the court that they preserved property and that it would be just and proper to grant that privilege.

[10] In *Hosseini*, the Court of Appeal determined that the conclusion of the trial judge that subsequent legislative changes effectively overruled the decision of Esson J .A. was incorrect. The trial judge had held that (1) the lien was a matter of right, and (2) it could attach to any property at issue in the action regardless of ownership and whether or not the solicitor achieved anything for the client in preserving or recovering the property. Donald J.A. for the majority concluded at para. 26:

> In my judgment the parallel structure of the language must be given some meaning. A lawyer employed to prosecute a claim regarding property seeks to recover that property; a lawyer employed to defend the claim strives to preserve it. The relationship between the words connects the lien with the lawyer's employment. In other words, the lien must relate to what the lawyer was hired to do and what the lawyer accomplished; it can only go against the property that the lawyer recovered or preserved as the case may be.
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> . . . .

[14] Nothing done at trial resulted in "recovery or preservation" of the … [corporate] shares. I cannot use the word "consent" in regard to the disposition of that asset, but no argument arose about it at trial. I left that asset intact for the parties to deal with in a businesslike way. Indeed, Mr. Pullman subsequently had his shares sold on the application of his solicitor. Mr. Pullman does not appear to have taken any objection to the process and certainly benefited in the sense that it would reduce his indebtedness for fees.

[15] I conclude that the property in issue has not been "recovered" and therefore Mr. Linde does not have a solicitor's lien. He is, insofar as Mrs. Pullman is concerned, an "ordinary creditor" as that term is described in s. 26(5) of the *Family Maintenance Enforcement Act,* R.S.B.C. 1996, c. 126. Mrs. Pullman is entitled to priority. There will be an order directing payment of the funds held, either by Mr. Linde or the Bailiff, to Mrs. Pullman's solicitor. These will be net funds, after payment of all fees and disbursements incurred by both the Bailiff and Mr. Linde in the recovery process.

[16] If I am wrong in my conclusion that no lien exists, I would decline to order priority to the solicitor on the basis that it would not be 'just and proper" in the circumstances.

. . . .

[19] The overwhelming inference I draw from all of the material is that Mr. Pullman prefers to pay his lawyer before his ex-spouse and children. This evokes the comments of Catliff J., the trial judge in *Hosseini,* [1999] B.C.J. No. 247 (B.C. S.C.) (Q.L.), accepted by Donald J.A.

> The result in the present case is that the wife will forfeit a substantial amount of the assets she recovered in the litigation in order to satisfy the fees of the husband's lawyers. This seems particularly unfair when those fees were increased because of the husband's "outrageous" conduct.

Taylor v. Taylor

[2002] O.J. No. 2313 (QL) (Ont. C.A.),
Abella J.A. (for the Court), Charron and Cronk JJ.A.,
paras. 1-4; 6-19; 26; 29-30; 33-34; 41

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[1] Christine Mary Taylor was the petitioner in a divorce proceeding. She owes her lawyer a substantial amount of money for years of legal services. After judgment was obtained, her lawyer obtained a charging order under s. 34(1) of the Solicitors Act, R.S.O. 1990, c. S.15 against all sums receivable by her in connection with that judgment. The issue in this appeal is whether such an order can be made against spousal support.

[2] Gary L. Petker represented Ms. Taylor in an acrimonious and protracted divorce proceeding from 1996 to 2001. During that time, he billed a total of $145,404.25 in legal fees.

Recognizing that the breakdown of her marriage had left Ms. Taylor in a precarious financial situation, Mr. Petker agreed to continue to act as her lawyer, as long as she made some effort to pay his fees and disbursements as the litigation progressed. He informed Ms. Taylor that all legal fees would eventually have to be paid, regardless of the outcome of the litigation. As of August 21, 2001, when Mr. Petker ceased to act for Ms. Taylor, she still owed him $112,619.21.

[3] In the divorce judgment dated March 7 and June 12, 2001, Whitten J. awarded Ms. Taylor $3,500 per month in spousal support commencing October 9, 1996, plus arrears, minus certain deductions for child support owed by Ms. Taylor to Mr. Taylor. The total amount of arrears for spousal support owing to Ms. Taylor as of the date of the judgment was jointly calculated by the Taylors' lawyers to be $69,241.77.

[4] Ms. Taylor was also awarded an equalization payment of $273,802.79, costs on a solicitor and client scale plus a ten per cent premium, and costs in the amount of $10,348.88 representing the fees of the expert accountant who testified in the divorce proceeding.

. . . .

[6] The spousal support arrears were sent to Mr. Petker's office on June 25, 2001 and were deposited into his trust account rather than with the Family Responsibility Office because of prior failures on the part of that Office to enforce the spousal support order against Mr. Taylor. Mr. Petker undertook to hold the funds in escrow pending delivery of a release from Ms. Taylor for the support arrears to Mr. Taylor's lawyer.

[7] Mr. Petker called Ms. Taylor on June 26, 2001 to inform her of the cheque's arrival and to arrange a meeting so that she could sign the release and they could discuss what portion of the funds would go towards payment of his legal fees. Ms. Taylor indicated in that conversation that she also wanted to pay the accountant's bill out of the money.

[8] On July 13, 2001, Ms. Taylor sent Mr. Petker a letter stating:

> As you suggested, it would be good for us to meet and sign any documents as well as the disbursement to you and Mike Johnson [the expert accountant]. At this time, I do not know the exact amount of the check at your office, but was basing my calculations on $69,000. However, to the best of my knowledge I do know what my indebtedness is. It is my intention to clear up Mike Johnson's bill with interest …
>
> . . .
>
> Perhaps I have misunderstood what my indebtedness is to you and I apologize. In reading the documentation I understood that Mike Taylor would have to pay all and forward legal fees from 1999. (This being the result of the excessive time spent in relation to Mike Taylor) I will have time on holiday to look at my statements.
>
> . . .

> Gary, I want to clear up this situation by arriving at an amount that will be satisfactory to us both. And want you to know that I appreciate all your endeavours to bring closure to this case as soon as possible.

[9] On July 18, 2001, Mr. Petker sent a letter to Ms. Taylor confirming that he had paid the accountant and suggesting that $30,000 of the balance of the trust funds be paid to him on account. He transferred $10,000 to his general account, believing that he was entitled to transfer these funds to himself because he had submitted interim accounts to Ms. Taylor and because of signed authority, since misplaced, that he had received from her.

[10] On July 26, 2001, Ms. Taylor met with Mr. Petker. She wanted the balance of the remaining money (after the deduction of the $10,000 already transferred) to be paid to her, based on her understanding that it was Mr. Taylor who was required to pay all her legal fees and disbursements. Since the property judgment he obtained for Ms. Taylor was stayed pending Mr. Taylor's appeal of the equalization payment ordered, Mr. Petker found Ms. Taylor's refusal to pay him after his considerable efforts on her behalf to be sufficiently troubling to suggest that she talk to another lawyer for advice on this issue.

[11] Despite the dispute over fees, Mr. Petker continued to act for Ms. Taylor. During the July 26, 2001 meeting, Ms. Taylor informed Mr. Petker that she had reason to believe Mr. Taylor was selling his home. Mr. Petker asked her to get proof, and then scheduled a date for settling the divorce judgment. He left for holidays the next day.

[12] When Mr. Petker returned on August 13, 2001, he found a letter from a lawyer, Anthony T. Keller, dated August 2, 2001, in which allegations of breach of trust were made against him by Ms. Taylor. The letter demanded that Mr. Petker pay the funds in his trust account to the Family Responsibility Office, and that he proceed to assess his costs against Mr. Taylor. Mr. Keller also stated that Ms. Taylor wished to continue retaining Mr. Petker as her lawyer.

[13] Mr. Petker replied to the letter, correcting what he believed to be several inaccuracies. In addition, he set out conditions for his continuing to act for Ms. Taylor, including an acknowledgement from her that his fees were due when his accounts were delivered, that $35,000 towards his existing bill be paid, and written confirmation that she had authorized the payment to the accountant. The balance of the money was to be paid to Ms. Taylor.

[14] Mr. Petker attended court on August 14, 2001 to settle the trial and divorce judgments. On August 16, 2001, Mr. Keller advised Mr. Petker that he would be delivering a notice of change of solicitors and would hereafter represent Ms. Taylor. Ms. Taylor did not provide Mr. Petker with the requested acknowledgement and authorization.

[15] In his correspondence with her new lawyer, despite the dispute with his former client, Mr. Petker provided advice to Mr. Keller to advance Ms. Taylor's interests.

[16] Ms. Taylor brought a motion against Mr. Petker on August 23, 2001, requesting that the arrears of spousal support be paid to her or, in the alternative, to the Family Responsibility Office;

that Mr. Petker give his file to Mr. Keller; and that he be ordered to prepare and deliver the solicitor/client costs assessment against Mr. Taylor.

[17] Mr. Petker brought a cross-motion requesting a lien on the moneys held by him in trust and further seeking a charging order on any receivables to be paid pursuant to the divorce judgment. Mr. Taylor also brought a cross-motion seeking an order declaring that he had discharged his obligation for arrears of spousal support with his cheque for $69,241.77.

[18] On August 23, 2001, Justice Festeryga ordered that all of the spousal support arrears be paid to the Family Responsibility Office, and that Mr. Petker deliver his file to Mr. Keller. He also granted Mr. Taylor's cross-motion.

[19] On August 30, 2001, Justice Festeryga granted Mr. Petker a charging order on all sums receivable by Ms. Taylor under the divorce judgment, including moneys held by the Family Responsibility Office and any further receivables, until the assessed bill for services was paid. He held that the term "property" in s. 34 of the Solicitors Act should be given the widest possible meaning to include anything, in whatever form, recovered in an action or proceeding for the benefit of a client.

. . . .

[26] My sympathy is with Mr. Petker, but the law is not. As a matter of both law and public policy, it is my view that charging orders should not be made against support payments.

. . . .

[29] Historically, courts have exercised their discretion liberally in favour of charging orders, which are said to benefit both the lawyer and the client, since they encourage lawyers to represent clients who are unable to pay as their cases progress. As noted by Lysak and Sossin in Barristers and Solicitors in Practice, at para. 13.39, this may particularly affect women:

> Women in family cases often fall into this category. Unless lawyers know they can confidently look to funds to be created by orders for the division of family assets, they will understandably be reluctant to commit themselves to anything but simple cases, and men with ready resources could use them to advantage.

[30] I do not, however, accept the submission that the term "property" should be given the widest possible meaning to include spousal support. Although "property" is not defined in the Solicitors Act, its treatment in the Family Law Act, R.S.O. 1990, c. F.3, demonstrates that property is different from and, by implication, does not include support. Support and property are dealt with in entirely different parts of the Family Law Act and support payments are not included in the Act's net family property calculations. As this court observed in Moog v. Moog (1985), 50 O.R. (2d) 113, 44 R.F.L. (2d) 301 (C.A.), property division and support payments involve the consideration of different and distinct issues and interests.

. . . .

[33] If I am wrong in interpreting the word "property" in s. 34 of the Solicitors Act as excluding support, I am nonetheless of the view that the unique perch justifiably occupied by support in our legal system argues in favour of its protection from charging orders on the grounds of public policy. That public policy is reflected in both statutory and case law.

[34] Charging orders are clearly discretionary. There is no right to a charging order, and the court will order one only if there is evidence that the lawyer was instrumental in securing the judgment and will likely not be paid without the order. Further, courts are required to balance the circumstances and equities of each case and client.

. . . .

[41] I do agree, however, that the charging order made by Justice Festeryga can be applied against any equalization payment received or to be received by Ms. Taylor [in her successful companion legal proceeding for division of family property], …. including any sums received pursuant to the order of Simmons J.A. (See Kleinman v. Zaldin & Zaldin, [1999] O.J. No. 2830).

Mix v. Murphy

[2003] N.B.J. No. 403 (QL) (N.B. Q.B. [T.D.]), Rideout J.
(Summary)

Facts: Application by Mix for directions regarding his solicitor's lien. Mix is a Nova Scotia lawyer. He was retained by a New Brunswick resident who had been injured in a motor vehicle accident in New Brunswick. The client terminated her association with Mix after several months because of a disagreement over fees. The client retained the respondent, lawyer Murphy, to represent her. Mix retained the client's original file, but sent the client copies of everything in it. The claim was settled. Murphy did not retain funds in trust on account of Mix's potential claim for fees but paid the funds (less his fees) to the client. Mix had his account for representing the New Brunswick resident taxed in Nova Scotia. The taxation allowed Mix $3,700 for fees and disbursements. Mix wanted to know if he could proceed with a claim against Murphy for Murphy's failure to protect Mix's charge or lien.

Decision: Application allowed.

Reasons: Mix had a potential lien or charge on the client's file and on the client's recovery. He was entitled to proceed with his claim against Murphy.

"Raise the Roof [:] Quality Clients Rarely Balk When Legal Fees Increase"

Hansen, Mark, (2003), 89 *ABA Journal* (December 2003), p. 36

Do you have more business than you can reasonably handle? Do your clients constantly comment on your reasonable fees? Do other lawyers send you work they could easily do themselves? Then it might be time to raise your fees.

Knowing when to raise fees is as much an art as it is a science, says Reid Trautz, practice management adviser for the District of Columbia Bar. The science part is figuring out how much you need to charge to make what you want to make. The art part is figuring out what the marketplace – and your clients – will bear.

When you raise your rates, some clients may leave, Trautz says. But the clients who remain will willingly pay your higher rates because they understand the value of the services you provide them.

Mark Rubin, a Tucson, Ariz., solo, says deciding when to raise fees has always been sort of an intuitive process for him. He may have a conversation with somebody who says his fees seem awfully low, he says. Or he'll come across an affidavit showing how much a competitor is charging.

"Something will trigger in my mind the idea that I ought to be thinking about raising my fees," he says. At that point, Rubin says, he will start asking some of his colleagues about their rates. Rubin says he tries never to raise his fees by more than $25 an hour at any one time to avoid giving his clients what he calls "sticker shock."

Rubin says he also tries to give clients as much notice of a rate increase as possible, and he generally doesn't ask his existing clients to pay the higher rate on an ongoing matter. But he doesn't give special billing treatment to longtime clients – even those who have been with him for 10 or 20 years. As long as it's not a quantum leap, he says, they have never had a problem paying the going rate for his services.

Rubin also says he never charges clients for such incidental expenses as long distance calls, copies or faxes. "The result is they get a nice clean bill, and I can charge them a rate that's more advantageous to me," he says.

At the end of the day, Rubin says, most clients just want their legal problems solved without having to spend a lot of money. "It's pretty simple when you get right down to it," he says. "If you give them good value, they'll come back. If you don't, they won't. "

. . . .

Summerfield, Fla., solo practitioner Ronald A Jones says he raised his fees last year by $25 an hour because he was getting a lot of relatively small legal matters that required a fair amount of his time but didn't produce much in the way of revenue. But Jones says he is now trying to move to a value system of billing. So recently, he adopted a new policy of not taking on most new matters unless they generate at least $500 in fees.

"If it's not worth $500 to the client, it's not worth it to me to handle," he says.

Melissa A. Shomber, of counsel to the three-lawyer Oklahoma City firm Schneider & Labarthe, says she got so busy last May she raised her rates by $15 an hour.

"I thought the higher fees would discourage some clients from hiring me, but it didn't seem to have any effect," she says.

So Shomber raised her rates a second time, this time by another $10. And once again, her business remained steady. Shomber says she has now settled on a new hourly rate that she believes is reasonable compensation for somebody with her expertise and experience. The new hourly rate also seems to say something to her clients, she says.

"It tells them I'm worth it.".

"Lawyer's £2,000 'working lunch' "

***Metro* (London, England), 14 October 2003, p. 5**

A solicitor enjoyed a lavish meal and then sent a bill for £2,000 to his client, claiming it was a work meeting, a tribunal heard yesterday.

David Hayes charged a football club for the meal in Mayfair and £1,625 in legal fees, travel from Coventry and his hotel bill.

The 53-year-old ran up a £230 bill after a four-hour lunch with two business associates.

He was celebrating the payment [to him and two other solicitors] of more than £100,000 for legal work done [by them] for … [a soccer club] director Michael Peden, it was claimed.

The solicitor's tribunal heard Mr. Peden, who was not at the lunch, later discovered the invoice and complained to the Law Society.

Hayes, who is attending the hearing, denies overcharging and misleading a client. He claims the meal was a business meeting to discuss work matters.

Stephen Battersby, for the Office for the Supervision of Solicitors, said: 'What is in dispute was the purpose of the meeting in November 1998 and what happened there. We have a stark difference in evidence.

"The Law Society says this was not a business meeting and therefore it wasn't something Mr Hayes was entitled to charge for.

"My two witnesses say it was a celebratory lunch to mark the fact bills owed to the three of them [apparently Hayes and his two lunch companions] had been paid by Mr. Peden.

"On the other hand, what Mr. Hayes says is: 'It was a business meeting. I was working. I did not consume a great deal of alcohol. Business was discussed. I therefore feel justified in charging'."

The hearing continues.

Treen v. Treen

[1991] 2 W.W.R. 483 (Sask. Q.B.), Maurice J. (in part)

COSTS [Legal fees and disbursements]

This matter came before me without the holding of a pre-trial conference. Why this was so results from a rather unique set of circumstances: the parties originally made their applications in chambers before Mr. Justice Wimmer. He ordered a trial of an issue and directed the local registrar to set a settlement pretrial conference before Mr. Justice Gerein. Prior to the pre-trial conference, Mr. [E.F.A.] Merchant, counsel for the father, sent a without prejudice letter to Ms. [L] Greenhorn, counsel for the mother. Paragraph one of the letter reads as follows:

> I have not discussed this matter with my client. This letter is written on a without prejudice basis. The proposed arrangements may not be acceptable to my client, but if we can agree I will recommend the arrangements to him. Mr. Justice Wimmer indicated that he was of the view that neither application had merit. Essentially therefore he was saying that our application to reduce the support beneath $600.00 should be dismissed. He was also saying that your application to increase support above $600.00 should be dismissed. Indeed, in delivering Judgment he went on at some length to so state. Mr. Justice Wimmer and Mr. Justice Gerein are friends. I noticed that Mr. Justice Gerein was in the Court house. It is more than mere convenience that Mr. Justice Wimmer directed that there be a Settlement PreTrial Conference before Mr. Justice Gerein. I expect they have discussed the matter. We are going to North Battleford for virtually nothing.

In my opinion, this paragraph conveys an unfounded supposition that Mr. Justice Gerein would preside at the pretrial conference with a predetermined disposition to have the parties settle on terms allegedly articulated by Mr. Justice Wimmer during the course of the chamber hearing. This was unwarranted speculation on the part of Mr. Merchant and there was no need for him to convey it to Ms. Greenhorn.

On receipt of Mr. Merchant's letter, Ms. Greenhorn claims she had an apprehension of bias; she said she feared Mr. Justice Gerein would not act as an impartial mediator facilitating a settlement between the parties. Without consulting Mr. Merchant, she sent a copy of his letter to Mr. Justice Gerein and requested that he recuse himself from the pre-trial.

Ms. Greenhorn badly overreacted to Mr. Merchant's letter. Firstly, there was no basis for her fears other than the unfounded speculation of Mr. Merchant, and, secondly, Mr. Justice Gerein had no power to affect the legal rights of the parties at the settlement pre-trial conference. Neither party was under any obligation to settle. And if a settlement could not be reached, either party had the right to request a trial before another judge.

At the request of Ms. Greenhorn, Mr. Justice Gerein … [recused] himself and directed the local registrar to arrange a settlement pre-trial before another judge. Ms. Greenhorn filed an appeal of this order. (I wasn't able to understand why she did this.)

In any event, another settlement pre-trial conference was set before Mr. Justice Kyle. Ms. Greenhorn refused to attend this pre-trial suggesting that all proceedings were stayed until the appeal was heard. In the absence of Ms. Greenhorn, there was no pre-trial and Mr. Justice Kyle directed the matter be set for trial.

As a result of the novel machinations of counsel, the parties were denied a settlement pre-trial conference and proceeded to trial. The parties opportunity to settle their differences was lost and the expense and stress of a trial resulted. The conduct of counsel was not beneficial to their clients. I order that Mr. Merchant and Ms. Greenhorn make no charge to their clients for any services provided to them during the course of these proceedings and that they bear all the expenses and disbursements of then proceedings. Hopefully counsel will let common sense prevail in the future.

“Appeal court restores sharp reduction of solicitor’s accounts”

Jaffey, John, *The Lawyers Weekly*, 09 August 2002, p. 8 (in part)

The Ontario Court of Appeal has reversed a motion judge's order that allowed a solicitor to rely on two technicalities to prevent his accounts from being sharply reduced in an assessment. [*Price v. Sonsini*, [2002] O.J. No. 2607 (QL) (Ont. C.A.), Sharpe J.A. (for the Court), McMurtry C.J. and O’Connor A.C.J.]

"Public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for the assessment of a solicitor's bill," said Justice Robert Sharpe. "As a general matter, if a client objects to a solicitor's account, the solicitor should facilitate the assessment process, rather than frustrating the process."

Siding with the client, the court held that a one-month limitation period for bringing an assessment does not begin until the final account has been rendered. It also held that solicitors must

raise procedural objections in a timely manner, rather than waiting until after the assessment officer has given them the bad news. Otherwise they could create, in Justice Sharpe's words, "a jurisdictional time bomb to be exploded at any time, at the whim of the solicitor, to demolish the proceedings, whatever stage they have reached."

In 1994, Nino Sonsini retained David Price for family law litigation. In a 12-month period ending Sept. 18, 1995, Price rendered four interim accounts and a final account totaling $133,350. Sonsini paid the first three and part of the large ($75,500) fourth account. Then the lawyer-client relationship deteriorated and Sonsini refused further payment. Price asked him to waive his rights to an assessment and to direct proceeds from the sale of the matrimonial home to himself. Sonsini refused, and Price refused to continue to act.

Sonsini obtained an *ex parte* registrar's order for assessment of all five accounts. Four years later, after a five-day assessment hearing, the assessment officer reduced Price's accounts [from $133,350.] to $47,819. Price was left owing Sonsini $19,712, in addition to $6,000 prejudgment interest and $10,000 costs.

Price moved to quash both the assessment officer's report and the registrar's order for assessment. The motions judge acceded, ordering the registrar's order set aside for faulty procedure – evidence showed that Sonsini had proceeded not by requisition but by application, and untimeliness – the four interim accounts fell outside the one-month limitation period in s. 3(b) of the *Solicitor's Act.*

Justice Sharpe disagreed with both reasons. He found the procedure for taking out the assessment was not defective, pointing out that the motions judge based her ruling on a file notation indicating the order for assessment had been granted on "application." The file itself, having since been found …, showed that Sonsini had proceeded correctly, by requisition. Justice Sharpe added that this technicality did not justify setting aside the assessment.

Regarding the limitation period, Justice Sharpe relied on *Lang, Michener, Cranston, Farquharson & Wright v. Newell,* [1985] O.J. No. 272, which established that limitation periods for assessment dealing with a single retainer begin to run from the date of the final account, even if some of the interim accounts have been paid.

Justice Sharpe found that interim accounts "are necessary as a matter of commercial reality. ... Clients should not be forced to choose between harming the solicitor-client relationship and foregoing the right to have an interim account assessed."

He also found that Price's failure to challenge the order for assessment until years later, after he had suffered an adverse result, "would be contrary to the law and to common sense."

R.J. Sawers & Associates v. Lacey

[2003] A.J. No. 81 (QL) (Alta. Q.B. [Calgary]), Sullivan J.,

¶ 1. This matter comes before me by way of an appeal of a taxation. The facts simply put are that the lawyers, the respondents, were retained by Mr. Lacey [the appellant] on April 18, 2002. The client [Mr. Lacey] says that he requested that the law firm prepare a Statement of Claim and no other action be taken by the firm. The client filed a Notice of Motion on October 30, 2002 alleging the following:

> AND FURTHER TAKE NOTICE that the items objected to are:
>
> 1. The amount of the Bill of Costs awarded
>
> AND FURTHER TAKE NOTICE that the grounds upon which the appeal is brought are that:
>
> 1. Counsel was requested by the Client to make up a Statement of Claim.
>
> 2. Counsel did not produce a Statement of Claim . . .

¶ 2. In his affidavit filed, the Client swears to the following:

> 1. That R. J. Sawyers and Associates was retained by me on April 18, 2002.
>
> 2. That Robert Sawyers requested and was given a retainer in the amount of $1,500.00 (Fifteen Hundred Dollars).
>
> 3. That I was provided with a letter from Robert Sawyers on April 18, 2002 confirming that R. J. Sawyers and Associates had been retained by me and further providing information and practices regarding fees and billing. ….
>
> 4. That I requested that Robert Sawyers make up a Statement of Claim in the Action. A Statement of Claim was never produced.
>
> 5. That I did not request any other action on the part of Robert Sawyers.
>
> 6. That phone calls made by me to Robert Sawyers were repeatedly unanswered and unreturned.

¶ 3. The client was provided with a retainer letter dated April 18, 2002 directed to Mr. Lacey and signed by the respondent lawyer, Robert J. Sawers. The retainer letter contained the following paragraph:

> Unless special arrangements are made, we require clients to pay a retainer to cover the fees and disbursements for the next block of work to be done. This money is kept in a 'trust account', is used for disbursements as they are incurred, and is applied to payment of fees when an account is rendered. When an account is rendered, you may be asked to bring the retainer back up to its previous level. We confirm that you have provided us with an initial retainer of $1,500.

¶ 4. On June 17, 2002 the client received a bill from the law firm in the amount of $5,029. The client states that special arrangements were not made and the law firm does not dispute that there was discussion with respect to fees being on a contingency basis after the Statement of Claim was prepared, however the firm states in their submission that they had to do research and prepare an opinion for the client prior to the preparation of the Statement of Claim and that the bulk of the fee is relative to preparation of the opinion letter. The client states that there was never any request for an opinion.

¶ 5. The retainer paragraph states in its opening words, "unless special arrangements are made". There is no dispute by the parties that no special arrangements in this case were made. It also states "we require clients to pay a retainer to cover fees and disbursements for the next block of work to be done" and it confirms that they had been provided with an initial retainer of $1,500. The client says that he was clear on the understanding after reading the paragraph that the extent of his liability at this stage to the law firm would be at the maximum $1,500. The firm disputes that interpretation of their letter and of their paragraph and takes the position the paragraph in no way is intended to limit the extent of the fees that they are to charge before they receive a further installment of trust funds.

¶ 6. In my view respectfully the retainer paragraph is at least ambiguous, if not fully capable of supporting the interpretation given by the client. The paragraph was drafted by the law firm. The letter does not, in my view, cover the intent of the firm or what they expected the paragraph to say or to the extent of comfort that they say it was to give them. Any ambiguity in this regard, of course, has to be resolved in favour of the client.

. . . .

¶ 8. Having indicated above that I am satisfied that the client has been successful with respect to his interpretation of the retainer agreement, I am therefore satisfied that the ambiguity, as I have indicated, must be resolved in his favour and order the taxation of the account to be varied to the amount of $1,500 on this issue alone; but that does not end the matter. The client instructed the law firm to prepare a Statement of Claim. I find as a fact that the client was led to believe that he would receive a Statement of Claim for $1,500 and the failure to recognize this fact by the taxing officer constitutes an error of principle. They are, therefore, on the evidence before me not entitled to any fee. The law firm advertises itself as experienced in employment law, wrongful dismissal, severance packages, breach of contract and employment agreements. They have not produced the Statement of Claim. They have not performed. Having advertised themselves as having this expertise the client would not normally expect to be billed for briefing and research on employment related issues as straightforward as this one.

¶ 9. In the result the account is taxed to $0.00.

Collins v. Ouellette

[2003] A.J. No. 1093 (QL) (Alta. Q.B.), Kenny J.
(Summary)

Facts: Appeal by a solicitor from assessment of her account. The solicitor represented the client with respect to the breakdown of a common law relationship, addressing issues including a restraining order, child and spousal support, custody and access. She rendered an account of $7,400 that was reduced by the Taxing Officer to $1,200. On appeal, the solicitor argued that the Taxing Officer erred by making findings of fact on disputed evidence, by drawing conclusions inconsistent with the evidence, by failing to provide full reasons for many of the amounts taxed off the account, and that the result of the taxation was patently unreasonable.

Decision: Appeal allowed in part.

Reasons: The taxation downward was so significant that a review was necessary. What the solicitor called evidentiary disputes were actually differences in the positions of the solicitor and the taxing officer. The taxing officer appeared to have reduced the account based on services that should have been performed and were not, rather than whether the charges were reasonable for the work done. Fees of $3,200 and disbursements of $250 were allowed.

Beckwall v. LeClair

[2003] B.C.J. No. 1400 (QL) (B.C.S.C.), Bishop, Registrar
(Summary)

Facts: Application by the client for review of four of the solicitor's accounts. The client retained the solicitor to assist with a matrimonial matter. The client executed a written retainer agreement that included an explanation of the limitation periods for the assessment of accounts. The accounts totaled $11,000. The client paid the first three, but before paying the fourth, consulted relatives and other solicitors and decided that she had been overcharged throughout the process. The solicitor argued that the accounts were reasonable and the limitation period prevented the review of the first three accounts because they had been paid more than three months before the application was brought.

Decision: Application allowed in part.

Reasons: The solicitor put a considerable effort into the file with little tangible result to the client. The client was aware of the limitation period with respect to the first three accounts and they could not be reviewed. The solicitor overcharged for some necessary services in the last account, and it was reduced from $2,000 to $800. The client was also allowed $720 in costs for the taxation hearing, filing fees of $50, and $950 for disbursements.

Matt v. Mair Jenson Blair

[2003] B.C.J. No. 2411 (QL) (B.C. S.C.), Hyslop, Master
(Summary)

Facts: Solicitor Kasian represented Matt in a matrimonial matter. Kasian's services involved advising Matt, negotiating on his behalf, attending a chambers application and attending a judicial case conference. Under the retainer agreement, Matt agreed to pay Kasian's hourly rate of $140. He agreed to pay $90 for work by a legal assistant, $45 per hour for word processing and $0.35 per page for photocopying. Matt was charged the $0.35 for photocopying plus the time of the legal assistant to make the photocopies. He was charged for the work of another lawyer on the file while Kasian was out of town. Kasian's accounts were assessed.

Decision: The account was reduced by $306.

Reasons: The legal assistant's time charges were not justified in addition to the per page photocopying charges. The charge for the time of the other lawyer on the file was reduced. Otherwise, the account was allowed as billed.

Judd v. Bergen

[2003] M.J. No. 253 (QL) (Man. Q.B.), Sharp, Master
(Summary)

Facts: Judd retained Bergen as her family law counsel at a difficult, critical, and extremely important stage in her divorce proceedings requiring urgent resolution of custody, access, and support issues to be considered at a pre-trial conference. Bergen disclosed his hourly fee to Judd and a relative. The relative assured Bergen that he would be responsible for Bergen's fees. Bergen postponed the pre-trial conference and negotiated with Judd's husband for him to undergo psychological assessment, make financial disclosure, and pay child support prior to exercising any rights to access. The husband failed to make financial disclosure and Bergen obtained an

adjournment of the pre-trial conference. Judd's relative then informed Bergen he would not be responsible for his account and Judd was financially unable to commit to pay it. Bergen withdrew from the file and billed Judd $3,300. Judd commenced representing herself. The Law Society Rules required fees to be disclosed, fair, and reasonable. Bergen supplied a report from a family law expert concluding his strategy and services put Judd in an extremely favourable position to argue a "status quo" advantage in custody, access, and child support issues. Judd contended Bergen did unnecessary work and charged too much as demonstrated by her obtaining all she wanted at the short pre-trial conference. Bergen's account was assessed, on application by Judd.

Decision: Bergen was awarded the fees he billed Judd.

Reasons: Bergen's expert's report showed an extremely favourable outcome to Judd in her bid to obtain custody, child support, and supervision of the husband's access as a result of Bergen's diligence. Judd's perceptions that she had obtained her goals at the adjourned pre-trial conference demonstrated her flawed understanding of the legal process and Bergen's work, and that she was unqualified to evaluate it. Bergen had demonstrated his fees were disclosed, fair, and reasonable.

Polacik v. Symington

[2004] B.C.J. No. 48 (QL) (B.C. S.C.), Groves, Master
(Summary)

Facts: Solicitor Symington prepared a will for Polacik, who then asked him to assist her regarding a child support dispute with her former husband. Polacik and Symington agreed that a fee of about $5,000 would be adequate, unless matters became more complicated. Symington informed Polacik that his hourly rate was $200. Subsequently, the moderately simple application inflated into a wider-ranging dispute about support and access rights, as well as related matters. Symington, who had 31 years of experience at the bar, was successful on all aspects of the litigation. Total fees charged were $28,854, and he estimated the monetary benefit to Polacik of being $39,600. Polacik had paid all but $4,232, having stopped making payments when Symington refused to accept post-dated cheques for the balance. Symington's accounts were taxed, on application by Polacik.

Decision: Application allowed.

Reasons: Symington was to return to Polacik $4,675. It had soon become clear that the matter was messy, as the parties described it. Symington was experienced and very skilled, with a good reputation in the profession, and he was altogether successful on the file. The matter was serious to the client, but the fees billed were disproportionate to the gain. As well, the amounts Symington charged for preparation on certain matters were clearly excessive, particularly regarding preparation for a cross- examination on an affidavit.

Pijek v. Burke Law Corp.

[2004] B.C.J. No. 66 (QL) (B.C. S.C.), Hyslop, Registrar

Facts: Piljek retained the Burke Law Corp. firm to commence an action for trespass and fraud. A written retainer agreement provided that a junior solicitor would be the principal lawyer on the file. The agreement further provided that Piljek would provide a $5,000 retainer, and that an account would be sent when it reached the $5,000 range and the retainer would be replenished. The action was to be commenced immediately with a legal opinion to follow. The junior solicitor commenced the action, dealt with the pleadings, did legal research, and reviewed lists of documents. Two accounts totaling $5,200 were issued and paid. The junior solicitor left the firm, and the senior solicitor took carriage of the file. The matter continued through examinations for discovery. After discoveries, the senior solicitor provided an opinion that the client's claim was worth, at best, $2,500, and sent an account for $27,000. The client paid $15,000 of that account, but did not pay the balance. The law firm took out an appointment to assess the account. The senior solicitor conceded that he should not have charged the client 10 hours to familiarize himself with the file. The client argued that the firm had failed to provide him with a timely opinion and had failed to inform him that he would be paying the senior solicitor's rate for all work done after the departure of the junior solicitor.

Decision: The account was assessed at $10,500.

Reasons: The client should have had an opinion of the case earlier and accounts should have been sent every time they reached the $5,000 range. The time and disbursements would have been decreased by half if the client had received a timely opinion, and if the client did not agree to pay the senior solicitor's rate after the junior left the firm. The number of hours left after deduction of the 10 hours already conceded were reduced by half, the disbursements were reduced by half, and the hourly rate was reduced to the junior's rate. This left an account of $10,500. After deducting the amount already transferred from trust to pay the two earlier accounts and the client's $15,000 payment, the law firm was ordered to refund $9,200 to the client.

"How can you get paid when your client goes bankrupt?"

Brett Harrison, Associate, McMillan Binch LLP, Toronto

What happens when a solicitor lets a client postpone payment for services because of hard times? Must the solicitor stand in line with other unsecured creditors while the client slips into bankruptcy?

Fortunately, the answer is no, but it is a qualified no. Although solicitors can recover payment, recovery is limited to the extent that they have protected or preserved their client's property through their own efforts, and for only the value of that property.

At common law (which most jurisdictions have codified), solicitors have the right to a charging lien for the "fruits of litigation," including the assets or stream of income the solicitor was instrumental in creating or preserving. Recognized and enforced through the court's equitable jurisdiction, this right allows solicitors to ask courts to exercise their discretion and direct that the property stand as security for the solicitor's fees.

Courts do not create the charging lien; the lien is an inchoate right created by the solicitor's actions and crystallized by the court's order. The lien attaches to the property or fund the moment the property or fund is created, rather than when the court acknowledges it.

But, this inchoate right is not absolute. A charging lien cannot be applied to funds subject to a trust in a third party's favour. Consequently, a deemed or constructive trust that the solicitor's efforts brought about on a client's behalf are not subject to a charging lien.

Moreover, courts only exercise their discretion to recognize the lien when to do so would be just and proper. In *Foley v. David* (1996), 93 O.A.C. 114, the Ontario Court of Appeal dismissed a motion for a charging lien because the fund the solicitors sought to charge consisted of court-ordered child and spousal support, the solicitors could recover the fees from other parties, and the individual whose funds the solicitors hoped to charge had in no way benefited from the litigation.

When a court is persuaded to recognize the lien, the court may also grant the solicitor priority over secured creditors' claims, even where the secured interest arose before the solicitor rendered services, and the solicitor knew about the pre-existing security. (See *Budinsky v. Breakers East Inc.* (1993), 15 O.R. (3d) 198 (Gen. Div.)).

The bottom line is that when a solicitor's efforts create or preserve a bankrupt client's property, the solicitor may enlist the court's assistance in granting a charging order over the bankrupt's assets related to the services rendered. The solicitor should appear before the bankruptcy court, not the ordinary civil court, to seek relief against the bankrupt's property.

Even if a solicitor does not fulfill the requirements for a charging lien, the nature of the property can affect whether a solicitor's claim is dischargeable. In *Lang v. Soyatt* (1988), 68 C.B.R. (N.S.) 201 (Ont. Bkty. Ct.), the court held that cost orders granted in alimony proceedings receive the same protection as alimony and are not discharged in bankruptcy. ….

A solicitor may also claim a retaining lien over a client's personal property in the solicitor's possession. A retaining lien attaches to all papers, documents and other personal property that comes into the solicitor's possession with the client's approval.

The few exceptions include a client's will, original court records and a corporate client's books, records and articles of incorporation, unless the solicitor's office is the corporate registered office.

A retaining lien has little value if the client is insolvent; the lien is passive and provides the solicitor with no special rights in a bankruptcy. The solicitor may withhold the property from the client, but generally not from a trustee or receiver, and may not dispose of the property.

Under s. 16(5) of the *Bankruptcy and Insolvency Act*, no person may set up a lien or right of retention on any papers or documents or electronic material, relating to the bankrupt's accounts or trade dealings.

. . . .

Rule 68(4) of the *Orderly Payment of Debts Regulations* provides that documents subject to a solicitor's lien must be returned to the solicitor once administration of the estate is complete. However, by that time the documents would likely be of little use to enforce payment of fees.

Because the solicitor's right to a retaining lien is only as great as the client's right, the lien is also not effective against third parties with a right to seize the client's property, including receivers.

. . . .

Since retaining liens have little value in insolvency, the best advice for those who do not fulfill the requirements of a charging lien is to require the client to execute a security agreement, subject to relevant fraudulent conveyances legislation.

Otherwise, a solicitor could end up with nothing but a few cents on the dollar and a file full of useless documents after a client declares bankruptcy.

[**Editor's Note:** Brett Harrison is an associate at McMillan Binch LLP in the litigation and corporate restructuring groups.]

"Number of QCs burning £1m a year up by 25%"

Dyer, Clare, *The Guardian*, 22 October 2003, p. 7

Forty QCs are now earning more than £lm a year, and their charges are rocketing too, with top hourly rates for tax QCs having risen in the past two years from £1,000 to £2,000, according to the latest survey of barristers.

The elite "million-a-year-club" has grown by a quarter since 2001-2, when only 32 made the grade. The survey also shows that top hourly rates for commercial QCs have risen from £850 to £1,000.

Among the QCs is Jonathan Sumption, who represented the government at the Hutton inquiry, and is thought to gross around £2m a year.

Mr. Sumption's cross-examination skills at that inquiry drew less than favourable reviews from newspaper sketch writers, but Chambers UK, the annual guide to the legal profession, ranks him at or near the top in eight practice areas. He is outshone only by Michael Briggs, whose court performances are "so blindingly good that they often turn his opponents to stone". Mr Briggs does not appear in the "million-a-year club.

The highest earners, their names largely unknown to the public, practise mainly in the tax and commercial fields, particularly in banking. The tax bar is the best-paid field. Criminal QCs are comparatively poor relations, with annual earnings of £200,000 to £425,000 and a top rate of £400 an hour.

A number of QCs specialising in tax, commercial law, and chancery (wills, property and trusts) pocket as much as £2m a year.

“Clients' willingness to pay such large fees is based on a belief that such consummate ability is essential for 'bet-the-company cases’," says the guide, whose 30 researchers carried out more than 10,000 interviews.

Of Mr. Sumption, the guide says: "Year on year, [he] applies his towering intellect to the legal cause celebre of the day... coming up trumps against gifted opponents."

The list includes two women: Barbara Dohmann, who has "no airs and graces, just 100% commitment”, and Elizabeth Gloster, a "punchy" but graceful cross-examiner, who "shells the opposition trenches mercilessly".

5.2 Costs

MacRae v. Simpson

[2003] O.J. No. 407 (QL) (Ont. Sup. Ct. J. [Fam. Ct.]), G. Campbell J. (endorsement) paras. 1-3; 6-8; 10-11; 13; 14; 16-20; 22

¶ 1 I have received and considered counsels' written costs submissions that were submitted as directed. Both counsel recognize the presumption that successful litigants are entitled to their costs; subrule 24(1) of the Family Law Rules, O. Reg. 114/99. Mr. Simpson was successful. He is entitled to the reasonable costs of his motion for judgment [heard at London, Ontario].

¶ 2 I agree with Mr. [Alfred A.] Mamo's submission [on behalf of Mrs. MacRae, applicant] that the motion was fact driven, not particularly difficult, nor complex, especially in light of the case law. …

¶ 3 I also agree with Mr. Mamo's view that Mr. Simpson's counsel's claim for a costs award of $27,162.49, for what was essentially a half-day motion is both "extravagant and excessive in the extreme". I adopt the observations of Justice Mary E. Marshman in her costs endorsement in Hamacher v. Hamacher (2000), 96 A.C.W.S. (3d) 414, [2000] O.J. No. 1379, 2000 CarswellOnt 1346 (Ont. Fam. Ct.):

> [8] ... We frequently hear and read of complaints from family law litigants about the cost of litigation. Solicitors should be attuned to the cost consequences to their clients of continuing litigation. It is totally unreasonable to expend vast amounts of time of relatively minor issue. ... The times expended on the file were outrageous, given the issues involved and the means of the parties. For example, the solicitor suggests that 19.6 hours of solicitor's time and 4.7 hours of law clerk's time were spent on the preparation of cost submission alone. Her claim in that regard was for $3,586.50. This represents three months of net income to her client.
>
> . . . .

¶ 6 The issue now to be decided is the reasonableness of the huge costs claim of Mr. Simpson. The court should not merely rubber stamp whatever dockets are presented to it, since many lawyers and clients enter into financial arrangements whereby a law firm may invest many hours in a file but agree to offer a discount or an accommodation as its bill to a colleague, friend, neighbour or family member for the time spent. Just because the time is invested and disclosed to the court does not necessarily translate into an actual final bill to the client. The court may not necessarily agree that the time invested was reasonable, if the matter is straightforward. Just because a particular litigant may be "high maintenance" or unduly anxious and requires an inordinate amount of attention or hand-holding does not create a responsibility in the opposing

litigant for that expense, unless a clear connection can be established between her unreasonable behaviour towards him and his need to over-prepare or take up too much of his lawyer's time.

¶ 7 Three areas in Mr. Simpson's counsel's submission for costs require attention:

> (a) the hourly rate claimed by Toronto counsel for a motion in London.
> (b) the claim for Mr. Simpson's own time at $200 to $300 per hour;
> (c) the reasonableness of the amount of time apparently invested by three lawyers and a clerk in this motion;

(a) The Hourly Rates Claimed

¶ 8 I agree with Justice Marshman where she observed in the case of Deelstra v. Van Osch, [2003] O.J. No. 273, 2003 CarswellOnt 204 (Ont. Fam. Ct.), that … :

> It is becoming more and more popular for counsel and judges to refer to the Costs Grid of fees and disbursements allowable pursuant to the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. However, in preparing their submissions, counsel seem to neglect the use of the words "up to" in referring to any given hourly or daily rate. It is to be remembered that the costs grid is applicable to lawyers from all over the province and includes court cases from the most simple to the most difficult of civil litigation cases. In my opinion, the highest rate should be reserved for the most experienced counsel conducting the most complex cases. While family law must never be looked at as being less important than other fields of practice, a judge assessing costs in a family law matter must review the complexity of the issues in determining an appropriate hourly rate and not simply the years of practice of counsel. A senior practitioner arguing a complex matter involving several areas of family law, including equalization and support issues, would no doubt be entitled to the maximum rate. However, the case at hand was one where custody was virtually the only issue. There were no assessments, nor was there any involvement of the Office of the Children's Lawyer. The minimal case brief … was helpful but custody issues are almost always fact based. There were no complicated issues of law and the support issue was dealt with by me with little input from counsel.
>
> . . . .

¶ 10 I agree with Mr. Mamo's submissions that, although a talented and experienced litigator, Mr. Dickie is not entitled to the level of costs that he seeks. Mr. Mamo submits correctly that:

> Mr. Dickie has not been practicing matrimonial law since 1977. He is engaged in the practice of commercial and insurance cases. The compensation for Mr. Dickie's work in a matrimonial file should not be commensurate with his expertise in commercial and insurance cases, but in family law matters, in which he admittedly does not have any recent experience. An hourly rate of $390.00 an hour is by far higher than the senior matrimonial lawyers charge

> their own client in the London area and it is inappropriate for that amount to be paid on a London file when assessing costs between litigants, as opposed to a solicitor and client assessment.

¶ 11 I dare say that Mr. Beamish [a lawyer who assisted Mr. Dickie in his representation of Mr. Simpson] would not take anywhere near 30 hours to prepare this simple motion. Ms. MacRae should not have to absorb the cost of Mr. Dickie's re-acquainting himself with the specialty practice of family law, from which he has been removed for over 30 years.

(b) Mr. Simpson's Claim for His Own Costs

. . . .

¶ 13 Mr. Mamo's submissions on this point are persuasive:

> Even though Mr. Simpson is a lawyer, he is before the court as a litigant who is represented by counsel. As such, he is not entitled to any compensation for any time that he might have spent in instructing his lawyer or in making notes for his lawyer's consideration in the drafting of documents. This exercise is one that every litigant goes through irrespective of their profession or line of work and is not compensable when deciding costs. ...
>
> . . . .
>
> An analysis of the case law (see the Fellowes case [(1997), 37 O.R. (3d) 464 (Ont. Gen. Div.)] commencing at the bottom of page 467) indicates that the courts have segregated litigants into three categories. Number One is the represented litigant who is compensated for both costs and counsel fees. Number Two is the litigant who is a barrister who recovers all costs with counsel fee being in the court's discretion. Number Three the totally lay litigant who is representing himself.
> Mr. Simpson, in this case is attempting to create new law and establish a fourth category which is that of a litigant who is represented by counsel but is entitled to personal compensation because he is a lawyer. This would bring in a whole new aspect of costs in litigation since, if the same rationale is applied, there is no reason why a self-employed doctor, business person etc. should then not be compensated for the time that they would spend in their lawyer's office either in having office attendances, making notes for the lawyer or preparing for trial.
> In preparing notes for his lawyer Mr. Simpson was acting as a client just like any other client. The fact that he is a lawyer is no more relevant than a client who is an accountant helping his lawyer with financial information, or a social worker being able to better advise his/her lawyer about the child's needs. Mr. Simpson is not out any money from his regular job and as such is not distinguishable from any other client and no amount of compensation is appropriate in the determination of costs. ….

¶ 14 I disallow entirely that portion of the claim for costs that is sought to be included to reimburse Mr. Simpson for his own time.

. . . .

(c) The Time Spent

¶ 16 I find that the facts of this motion do not warrant such micro-management by so many specialists. It is certainly not appropriate, as Mr. Mamo argues, that the court expect Ms. MacRae to reimburse Mr. Simpson for:

(a) time spent by Mr. Dickie[Mr. Simpson's Lawyer] because he is not familiar with the file
(b) time spent by Mr. Dickie with Mr. Beamish because he is not familiar with family law;
(c) time spent by Mr. Dickie in becoming familiar with the Family Law Rules;
(d) time spent by Mr. Dickie in familiarizing himself with matrimonial litigation;
(e) time spent by Mr. Dickie in traveling to and from Toronto;
(f) time spent by Mr. Dickie and Mr. Beamish with respect to the case, and that is not specific to the motion before the Court.

¶ 17 Mr. Beamish's involvement in the file is both curious and confusing. Perhaps his involvement falls within the "anxious client" description. In any event, I find his assistance and the inclusion of his time as part of the claim for costs sought to be paid by Ms. MacRae entirely over-kill and totally inappropriate. As Mr. Mamo submits:

> Mr. Beamish's involvement in this file was to discuss "overall strategy for the bringing of the motion and relevant tax aspects". There were no tax aspects to the bringing of the motion. If Mr. Simpson really thought that an agreement had been reached on April 23rd, 2001, then there was no need to discuss strategy as to the timing of the motion and that the motion would be brought as soon as possible. In any event, even if there had to be some discussions around that, surely it would not have taken 1.5 hours, especially when considering that when Mr. Dickie and Mr. Beamish are talking to each other they are charging a total of $790.00 an hour.

I disallow entirely the claim for Mr. Beamish's time invested on this matter.

¶ 18 It is not revealed how long the law clerk, Ms. Patterson, has worked in her position. But regardless of that omission, I accept that a reasonable fee for her services could realistically be charged at between $80 and $100 per hour in Toronto. That rate is almost double what would be allowed in London. …. I agree with Mr. Mamo's argument, that:

> The nature of the work as described in dockets seems to be work of a secretarial nature which is part of the law firm's overhead not to be charged separately to a client. The rate of $115.00 an hour for Ms. Paterson is commensurate with that which a new lawyer charges and is far in excess of the basic legal aid tariff for a lawyer in family law matters which is $67.00 an hour. Unless there is proof to the contrary it is safe to assume that Ms. Paterson is not being paid $115.00 per hour.

> Lawyer's hourly rates are usually justified on the basis of expertise but also the cost of doing business which includes the office staff.

I also disallow that part of the claim attributable to Ms. Paterson.

¶ 19 Other areas of the claim for costs objected to by Mr. Mamo, and with which I agree, include:

> Mr. Dickie has docketed 8.2 hours for the preparation of the notice of motion and affidavit. After receiving Mr. Simpson's draft documentation and detailed notes, this amount of time is wholly unreasonable in that it constitutes a full day just to put together an affidavit which primarily consists of exhibits.
>
> On September 6th, Mr. Dickie charges $234.00 for dictating a letter to Mr. Mamo. An experienced lawyer should not have taken more than five minutes to dictate such a letter, let alone 35 minutes as billed.
>
> Douglas Beamish on the 27th of September and 30th of September charges a combination of $200.00 an hour simply to receive a phone call from Mr. Simpson to deliver a notice of change of solicitors, and then to prepare such a notice of change. This work has nothing to do with the motion itself not to mention that charging $120.00 for an ordinary notice of change of solicitors form is out of line.
>
> On November 14th, 2002, Mr. Dickie charges $390.00 for one hour with respect to "telephone call Mr. Mamo: arranging for court attendance". The telephone call with Mr. Mamo consisted of a five-minute telephone call wherein Mr. Mamo advised Mr. Dickie that he was prepared to act as his agent at the assignment court the next day [15 November 2002] which Mr. Dickie respectfully declined. There is no information as to why 55 minutes would have been spent in "arranging for court attendance"

¶ 20 Mr. Dickie's claim that he spent almost 38 hours on this motion bursts the bounds of what is reasonable. He claims a whopping $1,872 for the one unnecessary trip to London on 15 November 2002 to "speak to" the matter at an assignment court. That charge is generated at the top rate of $390 per hour, while he was driving his car. Lawyers cannot expect to be paid their in-court, face-time, at their top-billing rate when performing mundane, everyday tasks such as travel, having lunch while out of town or delivering a letter. Inter alia, I disallow the entirety of the $1,872.00 claim.

. . . .

¶ 22 With regard to expenses claimed for copying materials, I agree with Justice Marshman in her endorsement in Deelstra v. Van Osch, supra, that:

> ... a more reasonable charge for photocopies would be 25[cents] per copy, especially in light of the legal aid rate which is 10[cents] per copy.

[Editor's Note: In the result, Ms. MacRae was ordered to pay Mr. Simpson costs in the sum of $5,874.50.]

"Bad faith not a pre-requisite for ordering costs payable by counsel personally: court"

Jaffey, John, *The Lawyers Weekly*, 19 September 2003, pp. 1, 19 (in part)

An Ontario Superior Court judge has ordered costs against a solicitor personally and, in a novel interpretation of a Supreme Court of Canada ruling [*Young v. Young*], has held that bad faith is not a prerequisite for doing so.

Justice Joseph Quinn applied rule 57.07 of Ontario's Rules of Civil Procedure, which states: "Where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order ... requiring the solicitor personally to pay the costs of any party."

In ordering Toronto lawyer Paul M. Feldman to personally pay costs of $6,527, Justice Quinn wrestled with the top court's finding that has usually been interpreted as requiring a lawyer to have acted in bad faith in the course of proceedings before he or she should be required to pay costs personally.

In Young v. Young (1993), 108 D.L.R. (4th) 193, Justice Beverley McLachlin, as she then was, wrote: "Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay."

Justice McLachlin explained that courts "must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. "A lawyer should not be placed in a situation where ... fear of an adverse order of costs may conflict with these fundamental duties of his or her calling."

However, Justice Quinn found that the passage has been applied too broadly. "I do not think Young v. Young was intended to be a cross-country comprehensive assault on the statutory jurisdiction of a Superior Court to order a solicitor to personally pay costs."

Although conceding that the discretion available to him should be exercised with the utmost care and only in the clearest of cases and that any doubt should be resolved in favour of the solicitor,

he said that what should have been the routine winding up of a $1.4 million estate had become "an expensive merry-go-round."

[**Editor's Note:** Citation for decision: *Belanger v. McGrade Estate*, [2003] O.J. No. 2853 (QL) (Ont. Sup. Ct. J.).]

"Lawyer in Natives' lawsuit ordered to pay costs personally"

Jaffey, John *The Lawyers Weekly*, 24 October 2003, p. 3 (in part)

An Ontario Superior Court judge has ordered a Thunder Bay lawyer to pay more than $5,500 in costs personally to the Attorney General of Canada, being the fees and disbursements for two aborted examinations for discovery in Northern Ontario.

The motion for costs was made by the federal Department of Justice in the context of a residential schools litigation against the Anglican Church of Canada and the Government of Canada, which Morris commenced on behalf of 22 plaintiffs in May 2000.

All of the plaintiffs live in remote northern communities. They are old, sick and poor. The lawyer, Stanley Morris, has neither a secretary, a computer nor even voice mail, and has moved his office at least three times since the action began.

A case management conference in August 2001 gave counsel three weeks to set up a timetable for delivery of affidavits of documents and examinations for discovery. Defence counsel proposed that productions be completed by the end of the calendar year, and discoveries by May 31, 2002. Morris eventually agreed.

However, by July 2, 2003, Morris had not yet delivered the affidavits of documents of two of his clients, nor completed their examinations for discovery.

Despite numerous attempts by government lawyers to prod Morris to complete these matters, he did not. Instead, he persistently failed to reply to their letters and phone calls.

The judge said four examinations for discovery were set up for one of the clients and three for the other, to no avail.

"The solicitor's conduct goes beyond mistake, inadvertence or error in judgment," wrote Justice Helen Pierce. "There is a pattern of conduct here, evidencing disregard for case management directives, for the orderly process of the case and for professional obligations of courtesy and civility to other lawyers."

She blamed Morris's conduct on an inability to control his clients: "Counsel has a duty to offer direction and guidance to his client with respect to the procedural elements of litigation," she

wrote. "If there has been a breakdown in the solicitor-client relationship, such that a client will not accept the lawyer's advice, the lawyer should apply to be removed as solicitor of record. A lawyer cannot serve a client who neglects or refuses to follow his or her advice, whatever the reason."

Justice Pierce also analyzed the apparent inconsistency between Ontario's Rules of Practice and the Supreme Court of Canada's directive in Young v. Young, [1993] 4 S.C.R. 3.

Rule 57.07(1)(c) states: "Where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence, or other default, the court may make an order ... requiring the solicitor personally to pay the costs of any party."

But, in Young, Justice Beverley McLachlin, as she then was, held that bad faith or reprehensible behaviour was a necessary ingredient of a personal costs order.

Justice Pierce concluded that an order for costs against a solicitor personally does not require a standard of misconduct higher than mere negligence. Quoting extensively from Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham (1998), 16 C.P.C. (4th) 201, she held that "different standards apply depending on whether the court disciplines a lawyer pursuant to its inherent jurisdiction or under Rule 57.07."

She concluded, nonetheless, that courts should exercise restraint in making costs orders against counsel: "Lawyers must have the freedom to pursue a client's case to the fullest extent of the law, though the cause is novel or unpopular, without the chill that the risk of a costs order may evoke."

[**Editor's Note:** Citation for decision: *Beardy v. Anglican Church of Canada,* [2003] O.J. No. 3940 (QL) (Ont. Sup. Ct. J.).]

Children's Aid Society of the City of St. Thomas and County of Elgin v. L.S.

[2004] O.J. No. 289 (QL) (Ont. Ct. J.), Schnall J.
(Headnote)

[Facts:] Before a child protection trial started, all the parties had signed a consent resolving all issues that would result in a finding of protection against the parents and a supervisory placement of the child with the paternal grandparents. Only the local lawyer for the Office of the Children's Lawyer, representing the child (who was technically not a party), did not join in the consent, did not approve of the settlement and seemed intent on promoting the interests of the foster parents. What should have been a half-day proceeding was turned into a 6-day trial by the insistence of the child's lawyer that the children's aid society establish its case in detail.

In fact, other than proposing witnesses whom the court rejected because they turned out to have information that was inadmissible hearsay or irrelevant, the child's lawyer had no information

from any independent investigation and appeared to be using the trial as a fishing expedition in the hope of exposing some pivotal weaknesses or frailties in the society's plan of care. The child's lawyer painstakingly cross-examined the evidence of the consenting parties, but turned up no new relevant evidence and was unable to undermine the society's case. In the end, the court's final order was almost identical to the terms of the consent, and even somewhat less restrictive in terms of access.

The legally represented parties then made a motion for their costs of the six-day hearing against the Office of the Children's Lawyer. An in-house lawyer for the Office of the Children's Lawyer from Toronto appeared on the motion to oppose the request for costs.

[Decision:] The Office of the Children's Lawyer was to pay the costs of the children's aid society for 5 1/2 days of the hearing on a "full recovery" basis. It was also ordered to pay the costs of the grandparents, the mother and the self-represented father for the entire hearing on a "full recovery" basis.

[Reasons:] The new reality instituted by and underlying the Family Law Rules is the management of the high demand on limited court and judicial resources and the increasing costs of litigation. These rules impose a positive obligation on lawyers and parties to assist the court in the pursuit of this objective. The rules therefore attempt to encourage settlement and discourage unnecessary or prolonged litigation and unreasonable behaviour on the part of litigants and their lawyers that is wasteful of resources, time and money. Those who thwart this primary objective may find themselves accountable in the form of costs.

The child in a child protection case is not party but, by statute, the child's lawyer enjoys all of the procedural benefits enjoyed by lawyers for real parties, including the benefit of making a claim for costs. Indeed, according to the case law, some of these costs claims in child protection cases have been successful. The reverse side of the coin is that the child's lawyer is burdened with all of the procedural liabilities facing lawyers for real parties, including the prospect of being responsible for and being exposed to a claim for costs by others, in an appropriate case.

Towards the child, the child's lawyer has a fiduciary solicitor-and-client relationship, no different than that owed by members of the private bar toward their clients. By reasonable extension, the child's lawyer should behave as a member of the private bar toward other lawyers in the case and toward the court. The child's lawyer should be expected to meet the same standards as other lawyers in terms of competency, understanding of the law, understanding of the rules of evidence and proficiency in the courtroom. Lawyers who engage in litigation must be able to analyze the case, formulate a theory of their own case and organize the presentation of their evidence in a cogent and coherent manner.

In this case, the position advanced by the child's lawyer was lacking in common sense and was internally inconsistent. It also betrayed a poor understanding of the child's needs, the role of the children's aid society and the requirements of the Child and Family Services Act and of the Family Law Rules. The position of the child's lawyer was unfocused and its presentation served to complicate a simple case and obfuscate the real issues. It had no merit and, if it did, the lawyer's presentation fell short of identifying it.

Worse yet, it forced the parties into a fruitless and unnecessary 6-day trial that they had legitimately tried to avoid by having negotiated a reasonable disposition for the child's benefit. The tactics of the child's lawyer were ineffective, time-consuming, unproductive and wasteful of the court's time and resources -- a breach of the obligation to assist the court in fulfilling the primary objective of the rules and for which the Office of the Children's Lawyer had to be held accountable.

Sharp (c.o.b. Sharp & Co.) v. Hamilton

[2003] B.C.J. No. 2048 (QL) (B.C. Prov. Ct.) (Meyers Prov. Ct. J.)
(Summary)

Facts: Action by Sharp, a certified general accountant, for payment of fees she claimed were owed to her by Hamilton, a lawyer. Hamilton retained Sharp in writing to prepare her law firm accounts for the British Columbia Law Society. She specifically had Sharp write into the retainer agreement that Sharp's hourly rate was $75 per hour. Hamilton said that she explained to Sharp that she had been charged $800 for such services in the past and that she was having financial difficulties. Sharp denied that Hamilton explained any of this. When Sharp rendered her account of $3,586 in addition to the $500 retainer, Hamilton objected that the fee was outrageous and that 51 hours was excessive for accounting on her small, mostly legal aid, family law practice.

Decision: Action allowed.

Reasons: Hamilton was to pay Sharp the amount owing plus interest. If Hamilton had required an estimate on the work or a cap on time spent, she was obliged to specify so. There was no evidence that Sharp performed the work incompetently or deceitfully.