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SCRUPLES

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 03 September 1189 (birth date of legal memory) to June 1985

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1. INTRODUCTION

The mandate of this article is to canvas the manner in which we should, as professionals, practice family law; in other words, our scruples as family law lawyers.

Dean Pound, in his contribution to the *Survey of the Legal Profession*, defined a "profession" as a "group of . . . [persons] pursuing a learned art as a common calling in the spirit of public

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* This paper was delivered to a family law program of New Brunswick Continuing Legal Education, at Moncton, on October 24, 1986. As an acronym, "scruples" represents the Solicitor's Commitment to Responsibility for Undertaking Professionally and Legally - Exquisite Services; in otherwords, the manner in which we should, as professionals, conduct the practice of law.

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service,—no less a public service because it may incidentally be a means of livelihood."[1]

Barristers and solicitors comprise such a profession.

Because we are members of a profession, Henry S. Drinker, a Philadelphia lawyer, explains in *Legal Ethics* that "different standards of conduct . . . [are] applicable"[2] to us from those pertaining, for example, to business people who practice in the spirit of *caveat emptor*.

These "different standards of conduct"—or "scruples", if you will—orginated in the legal profession amongst English barristers practicing in the four Inns of Court in London, England, at least 696 years ago.[3] Similar standards were carried back to, and adopted in, the United States and Canada by law students from both countries who, historically, "read law" in England.

The fact that our vocation is a profession is not, however, the sole reason for our being governed by "different standards of conduct." More relevant is the circumstance that, as our profession is dedicated to the practice of law, our "broad contacts with the actualities of life"—especially in the practice of family law—fit us "uniquely to give wise and sympathetic advice" which, consequently, "involve unique difficulties."[4]

Such difficulties result from the fact that, in legal practice—a curious term, which means regular prosecution of, rather than rehearsal for, lawyering—the practitioner is "constantly confronted with conflicting loyalties which he must reconcile."[5]

Mr. Drinker explains:

> He is answerable not only to his client whose interest it is his primary duty to serve and promote, but also to the court of which he is an officer, and further to his colleagues at the bar and to the traditions of his profession. In addition, he is not infrequently confronted with situations where his

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1 "The Lawyer from Antiquity to Modern Times" in *Survey of the Legal Profession*, p. 5.

2 Henry S. Drinker, *Legal Ethics* (New York: 1953), p. 4.

3 See Mark M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957), p. 9.

4 Note 2, above, at p. 5.

5 Note 2, above, at pp. 5–6.

> immediate personal interest apparently must run counter to that of his client. In such cases, however, if he will but believe what his better self tells him, he will find, it is confidently believed, that not only his peace of mind and self-respect, but his ultimate well-being will best be served by subordinating what seems to be his temporary personal advantage to his . . . loyalties"[6] as a lawyer.

2. TYPES OF RESPONSIBILITY

The lawyer's resolution of such "conflicting loyalties" is today regulated by obligations of

1. *professional responsibility*, resulting largely from self-regulation by the legal community; and, oft times, described as "ethics" or "standards of professional conduct"; and
2. *legal responsibility*, developed at common law and embellished by statute; the violation of which is actionable in contract or tort for negligence, due to an error or omission.

Both the concepts, and the consequences of breach, of professional and legal responsibility overlap.

First, professional responsibility comprises a broader concept than legal responsibility; its tenets embrace the duty of care owed by a solicitor in the discharge of both professional and legal obligations.

Second, a breach—indeed a gross breach[7]—of legal responsibility may, but does not *ipso facto*, beget a concomitant failure to discharge professional responsibility. The lack of professional scruples can, but does not necessarily, constitute a breach of legal responsibility.

Third, while the usual consequence of violating professional responsibility is governing body admonishment, and the breach of legal responsibility customarily attracts liability for damages, both types of transgression have triggered obligations to pay costs.

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6 Note 2, above, at p. 6.

7 See, *e.g.*, *Re Solicitor*, (1916), 37 O.L.R. 310 (App. Div.); *In re A Solicitor*, [1935] 3 W.W.R. 428 (Sask. C.A.).

3. SOURCES AND STANDARDS OF RESPONSIBILITY

(a) Professional Responsibility

(i) *Canons of professional conduct*

The tenets of professional responsibility which currently obtain in Canada are prescribed by the *Code of Professional Conduct* (Code) of the Canadian Bar Association (C.B.A.); governing body rules; provincial legislation and regulations; and, not the least, common sense exercised with uncompromising integrity.

While reflecting customs that originated amongst English barristers some seven centuries ago, the C.B.A. Code is of recent vintage. Influenced materially by similar canons of ethics adopted in the United States in 1908,[8] the original C.B.A. Code—then entitled *Canons of Legal Ethics*—was established in Canada in 1920.

The motivation for both the American and Canadian legal codes was the influx into the legal professions of both countries persons who had scant regard for the decorous handling of the "unique difficulties" flowing from the "conflicting loyalties" encountered by the legal practitioner.

The president of the American Bar Association, in 1906, had characterized the problem as follows:

> . . . With the influx of increasing numbers, who seek admission to the profession mainly for its emoluments, have come new and changed conditions . . . the shyster, the barratrously inclined, the ambulance chaser, the member of the Bar with a system of runners, pursue their nefarious methods with no check save the rope of sand of moral suasion so long as they stop short of actual fraud and violate no criminal law. . . . Such men are . . . not true ministers of . . . courts of justice robed in the priestly

8 See Andrew J. Pirie, "The Lawyer As Mediator: Professional Responsibility Problems Or Professional Problems?" (1985), 63 Can. Bar Rev. 378 at 385–388. Entitled "Canons of Professional Ethics," this was the first formal code of professional responsibility adopted nationally by the American Bar Association. However, as Mr. Pirie points out, the first state Bar to adopt such a code was Alabama in 1877.

> garments of truth, honor and integrity. All such are unworthy of a place upon the rolls of the great and noble profession of the law. . . . [9]

In contrast, a C.B.A. report in 1920 put the concern more delicately and succinctly; stating, quite simply, that persons were being admitted to legal practice in Canada who "have not the . . . inherited traditions behind them."[10]

The C.B.A.'s *Canons of Legal Ethics* of 1920 were supplanted by the present *Code of Professional Conduct*, on August 25, 1974, in the wake of the revision of the American canons in 1969. In August, 1986, the Special Committee on Legal Ethics of C.B.A. completed the second draft of a new Code, and will submit its final draft to C.B.A.'s mid-winter meeting in Vancouver, in February, 1987.

The principal difference between the existing and the proposed Code of the C.B.A. is the addition of chapters entitled: "Conflict of Interest between Lawyer and Client" and "Public Appearances and Public Statements by Lawyers".

While the Code is "only hortative and certainly without statutory force,"[11] its legal effect has, several times, been judicially considered; for example, by the Saskatchewan Court of Appeal in *Bilson v. University of Saskatchewan*,[12] when, in 1984, an appeal

> . . . came on for argument before this court, the court, queried the propriety of Mr. . . . [B's] appearance as counsel for the . . . university since he is a partner or associate of Mr. [M], who . . . gave the impugned advice [to a university arbitration board, whose proceedings gave rise to the appeal] . . . .[13]

The Court of Appeal referred to the existing C.B.A. Code—specifically chapter 8, rule 3—and continued:

> Mr. . . . [B] suggested the rule was more honoured in its breach than in its observance: and that may be so. But we are of the opinion that so long

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9 *Ibid.*, p. 385, quoting from (1906), 29 A.B.A. Reports 600.
10 *Ibid.*, p. 387, quoting from (1920), 5 C.B.A. Proc. 108.
11 Note 3, above, at p. 10.
12 [1984] 4 W.W.R. 238 (Sask. C.A.).
13 *Ibid.*, p. 240.

> as it remains part of the profession's code of conduct it should be adhered to. . . . Mr. [B], after having an opportunity to reflect on it, acknowledged that the rule was clear, and then requested the case be adjourned to permit the university to instruct other counsel.[14]

(ii) *Governing body rules*

The C.B.A.'s Code has been incorporated by reference in, or adopted as, the Code of Ethics of the provinces and territories, supplemented by local governing body rules of one type or another, to define the professional standards of conduct required of legal practitioners.

(iii) *Provincial legislation*

Provincial statutes and subordinate legislation (as well as provincial governing body regulations) prescribe discipline procedures and penalties for, respectively, prosecuting and punishing breaches of provincial governing body ethical codes and rules. Provincial legislation also enacts penal provisions prohibiting certain types of professional misconduct (such as falsely representing oneself to be a lawyer).

(b) Legal Responsibility

(i) *Generally*

While there does not appear to be a private right of action by a client against a lawyer "based on a violation of the canons of ethics . . . , these codified ethical rules do often accurately state a common law principle, which, if breached, would then be the basis for a cause of action" against the offending lawyer.[15]

In short, an action in contract or tort against a lawyer for negligence in the discharge of his or her legal responsibility must be based on common law or statute.

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14 *Ibid.*, p. 241.

15 James J. McCabe, "Lawyer Liability" (1986), 22 Trial (No. 7, July, 1986) 45.

However, the provisions of the C.B.A. Code have been judicially-employed, civilly, in contract and tort actions against Canadian lawyers, to define the duty of care (that is, legal responsibility) owed by them to clients in performing a retainer (that is, a contract with a client to provide services).

The entire subject of lawyers' legal responsibility is copiously considered in *Cordery's Law relating to Solicitors*.[16]

(ii) *To whom duty of care owed*

Suffice it to say that, civilly, a lawyer's legal responsibility extends to the following:

1. Clients of the solicitor. The action may be in contract, based on the retainer of the solicitor by the client; or in tort; or in both.
2. Persons, not in contractual relationship with the solicitor, who have been led by him to rely on his special skill and judgment.
3. Other persons, not in contractual relationship with the solicitor, to whom he owes a duty of care.[17]

(iii) *Nature of duty of care*

The lawyer's legal responsibility flowing from a general retainer is to be skilful and careful and to protect the client's interest.[18]

What constitutes skill and care is "extremely difficult to define."[19] At common law, a solicitor contracts to be skilful and careful, for a professional man gives an implied undertaking to bring to the exercise of his profession a reasonable degree of care and skill.

The protection of the client's interests may be defined, with only slightly less difficulty. It at least requires a solicitor to

1. carry out his instructions in the matters to which the retainer relates, by all proper means;

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16 7th ed., Graham J. Graham-Green (London: Butterworths, 1981).

17 *Ibid.*, p. 149 (and authorities there cited at fns. 3, 4, 5).

18 *Ibid.*, pp. 150, 151.

19 *Godefroy v. Dalton* (1830), 6 Bing. 460 at 467 per Tindal C.J.

2. consult with the client on all questions of doubt which do not fall within the express or implied discretion left to him; and
3. keep his client informed to such an extent as may be reasonably necessary.[20]

Otherwise stated by the Supreme Court of Canada, in *Central Trust Co. v. Rafuse*:

> A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. . . . 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.[21]

(iv) *Form of civil action*

In the same decision, the Supreme Court of Canada held that if

> . . . solicitors were negligent in the performance of the professional services for which they were retained, they would be liable in tort as well as contract to . . . [their client] . . .

1. The common law duty of care that is created by a relationship of sufficient proximity, in accordance with the general principle affirmed by Lord Wilberforce in *Anns v. Merton London Borough Council*,[22] is not confined to relationships that arise apart from contract. Although the relationships in *Donoghue v. Stevenson*,[23] *Hedley Byrne*[24] and *Anns* were all of a non-contractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or independently of contract, . . . nothing in the statements of general principle in those cases [suggests] that the principle was . . . to be confined to relationships that arise apart from contracts. . . . [T]he question is whether there is a relationship of sufficient proximity, not how it arose. The principle of tortious liability is for reasons of public policy a general

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20 Note 16, above, at p. 151 (and authorities there cited at fn. 15).
21 [1986] 2 S.C.R. 147 at 208 (S.C.C.).
22 [1977] 2 All E.R. 492 (H.L.).
23 [1932] A.C. 562 (H.L.).
24 [1963] 2 All E.R. 575 (H.L.).

one. . . . [A] common law duty of care may be created by a relationship of proximity that would not have arisen but for a contract.

2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the expressed terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the expressed terms of a contract.
3. 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. Subject to this qualification, where concurrent liability in tort and contract exists . . . [the client] has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence [*e.g.*, sue in contract if an action in tort is statute-barred, and vice versa].
4. [These] principles apply to the liability of a solicitor to a client for negligence in the performance of the professional services for which he has been retained. There is no sound reason of principle or policy why the solicitor should be in a different position in respect of concurrent liability from that of other professionals.
5. The basis of the solicitor's liability in tort for negligence and the client's right in such case to recover for purely financial loss is the principle affirmed in *Hedley Byrne* and treated in *Anns* as an application of a general principle of tortious liability for negligence based on the breach of a duty of care arising from a relationship of sufficient proximity. That principle is not confined to professional advice but applies to any act or omission in the performance of the services for which a solicitor has been retained.

. . .

While the solicitor's duty of care has generally been stated . . . in the context of contractual liability as arising as an implied term of the contract

> or retainer, the same duty arises as a matter of common law from the relationship of proximity created by the retainer. In the absence of special terms in the contract determining the nature and scope of the duty of care in a particular case, the duties of care in contract and in tort are the same.[25]

(v) *Specialists*

However, this general legal duty of care is being influenced by the trend towards specialization, such as in the practice of family law. James G. McCabe, of the Pennsylvania Bar, advances the view that "lawyers who perform services in those areas that are generally considered to be the province of specialists will be held to the standard of the specialist rather than to the standard of a generalist [who may occasionally render domestic legal advice]. . . . "[26]

This prospect generates questions of the standards and mechanics for qualifying as a specialist;[27] and, even more germane to legal responsibility, whether a lawyer has held out himself or herself, and thus owes a legal duty, to a client as being a specialist. The practitioner may do so privately in dealings with a particular retainor. Or, in Alberta, Manitoba, British Columbia, Nova Scotia and—as of January 1, 1987—Ontario,[28] he or she may pub-

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25 Note 21, above, at pp. 204–206, 210. For a summary of Canadian law respecting the practitioner's duty of care to a client, see A.M. Linden, *Canadian Tort Law*, 3rd ed. (Toronto: Butterworths, 1982), pp. 131–137, 294–296. For a summary of precautions to be taken by a family law practitioner in discharging his or her duty of care, see P.M. Epstein, "Family Law and Solicitor's Negligence" in *Family Law, 1983–1984* (Toronto: Carswell 1984), c. 19.

26 Note 15, above, at p. 48.

27 The enhanced duty of care owed by a professional specialist is considered in the context of the medical Profession in Linden, note 25, above, at pp. 139–140. See also *Wilson v. Swanson*, [1956] S.C.R. 804 (S.C.C.) and *MacDonald v. York County Hospital*, [1974] 1 O.R. (2d) 653 (Ont. C.A.), affirmed [1976] 2 S.C.R. 825 (S.C.C.). For a discussion of specialist certification in the Canadian legal profession, see W.H. Hurlburt, ed., *The Legal Profession and Quality of Service*, Canadian Institute for the Administration of Justice, 1979, App. C., pp. 215–307.

28 See "The Lawyers' Weekly" (Toronto: Butterworths, 1986), vol. 6, no. 22, p. 1.

licly advertise the fact (subject to the limitations imposed under each such province's governing body rules relating to advertisement).[29]

(vi) *Burden of proof*

Whatever the standard (that is, duty of care) attributed to a lawyer who is sued, civilly, for breach of legal responsibility, the burden of proof is likely to be on him or her to establish absence of a breach, once a plaintiff has established the basic facts on which the action for legal negligence is founded.[30]

4. APPLICATION OF STANDARDS OF RESPONSIBILITY

(a) Unique Difficulties

A galaxy of professional and legal perplexities are daily encountered by solicitors, particularly family law practitioners. The following are illustrative.

A separated wife, borrows her son's key to her spouse's post office box and, on the eve of the trial of a marital property action, enters the box, purloins the husband's mail, locates documents (pertinent to the action) which he has not disclosed and, having advised her solicitor of how she came by the papers, gives them to him, to be retained in her file at his law firm.[31]

A wife, on whose behalf a marital property action has been compromised, presents herself at her solicitor's office to sign the written settlement agreement, and there and then expresses to him for the first time her relief that her estranged husband has not learned about a cache of Canada Savings Bonds she has surrepti-

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29 *Ibid.*, p. 10.

30 *Fahr v. Fahr*, [1985] 3 W.W.R. 261 at 265 (Sask. Q.B.).

31 See, *e.g.*, Criminal Code, s. 314(1) and *R. v. Burgess* (1976), 33 C.C.C. (2d) 126 (B.C.C.A.); s. 283; s. 312. See also C.B.A. Code, c. III, para. 6 and c. VIII, paras. 1, 2.

ously accumulated and secured in her safety deposit box during cohabitation.[32]

A husband, with court-ordered access rights to a child who resides with his wife, complains to his solicitor that his wife has repeatedly and harrassingly called him of late and admitted that she falsely told that his father practices witchcraft, as a result of which the boy declines to meet the husband for access. The husband wishes to tape record future conversations with his wife; better still, he proposes calling his wife and having his solicitor monitor and record such a conversation on an extension telephone in the solicitor's office.[33]

Upon being advised by her solicitor that her proposed marital property action will not come on for trial for five months, a wife, who has vacated the matrimonial home with only her clothes and is living apart from her husband, inquires if she can covertly enter the home and remove household furnishings, appliances and bric-a-brac, equivalent to about half the value of the home's contents, in order to establish a separate residence, without the bother and expense of an interlocutory application to court for that purpose.[34]

A husband informs his solicitor that, disillusioned with his marriage, he intends to unilaterally cease cohabitation and, without notice to his wife, leave the marital residence with the four- and six-year-old children of the marriage.[35]

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32 Remind client of marital property statute disclosure requirements previously brought to her attention, particularly where the client has already made a sworn disclosure statement omitting this information; and see C.B.A. Code, c. IV, and c. VIII, paras. 1(*b*) and 2. Further, advise the client of her spouse's right to set aside the settlement for failure of the client to make full disclosure (if he discovers the failure to fully disclose). See also C.B.A. Code, c. VIII, paras. 1(*b*), 1(*e*) and c. XI, para. 4.

33 See, *e.g.*, Criminal Code, ss. 178.11(2)(*a*), 178.2(1); s. 303 and *R. v. McNamara* (1975), 20 R.F.L. 218 (Sask. Dist. Ct.). See also C.B.A. Code, c. XVI, para. 4.

34 See, *e.g.*, Criminal Code, s. 289 and *R. v. Bryze* (1981), 63 C.C.C. (2d) 21 (Ont. Prov. Ct.). See also C.B.A. Code, c. III, para. 6; c. VIII; c. VIII, para. 1(*e*); and c. XII, para. 3.

35 See, *e.g.*, Criminal Code, ss. 250.2(1), 250.5 and *Cook v. R.* (1984), 39 R.F.L. (2d) 405 (N.S.C.A.), leave to appeal to S.C.C. refused 65 N.S.R. (2d) 90n (S.C.C.). See also references to C.B.A. Code, *ibid.*

A wife, following the first day of a summary maintenance hearing in which her husband testified that he did not have the energy to work because his constricted gullet prevented him from consuming solids, goes to her husband's home and, having watched him put out his domestic refuse, removes two steak bones and delivers them to her solicitor.[36]

Another woman summonses her solicitor to a public place and, advising him that she has just gotten into her husband's wall safe, passes him 34 polka-dotted condoms, a sigmoidscope and an aerosol can of a substance labelled "Extra Innings", which she requests him to arrange to photograph and return to her so she can restore them to her husband's safe-keeping.[37]

A husband advises his solicitor that he plans to have his tartish cohabitant move out during a custody trial, but that when the trial is over he intends, without informing the Court, to have her return.[38]

A wife, distraught by the prospect of lengthy separation negotiations, the alternative of testifying at a trial, and labouring under the belief her guilty conduct scuttled the marriage, is anxious to accept a settlement offer that may render her improvident.[39]

A wife, seeking evidence of her husband's infidelity, desires to place a ladder up to the bedroom window of the couple's matrimonial home (from which she is living apart), break open the window with an axe, and direct a flashlight on the bed, should she observe her husband ever enter the house with another woman.[40]

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36 See *Morris v. Morris* (1979), 24 Nfld. & P.E.I.R. 459 (Nfld. T.D.); *R. v. Pace*, [1965] 3 C.C.C. 55 (N.S.S.C.); Criminal Code, ss. 283, 312(1). See also note 34, above (references to C.B.A. Code).

37 See, *e.g.*, Criminal Code, s. 312(1). See also note 34, above (references to C.B.A. Code).

38 See, *e.g.*, C.B.A. Code, c. VIII, para. 1(*b*).

39 Endeavour to persuade the client to authorize continuation of negotiations, and that failing, the preferable recourse, in the writer's view, is to withdraw.

40 See, *e.g.*, Criminal Code, ss. 306–309, 387(1), (7), and 386(7). See also note 34, above (references to C.B.A. Code).

(b) Proceedings

Improperly treated by the practitioner, these conundrums may breed disciplinary, civil and/or criminal proceedings.

(i) *Disciplinary proceedings*

Under provincial governing body rules, breaches by legal practitioners of their professional responsibility may produce one or more of the following:

1. a reprimand from the responsible governing body;
2. a suspension of the right to practice for a stated period;
3. a fine;
4. refusal or postponement of admission to practice (for example, where moving from another jurisdiction);
5. an order requiring payment of the costs of investigation and prosecuting the offending conduct;
6. striking off the roll (of a solicitor);
7. reparations to a wronged client; and
8. disbarment (of a barrister).

As reported by Mark M. Orkin, Q.C.:

> In former days the sentence of disbarment was sometimes carried out literally by casting the offender over the bar, which, before it became metaphorized, was a substantial barrier of iron or wood sometimes fortified with spikes, separating the Court from Westminister Hall.[41]

(ii) *Penal proceedings*

Breaches of certain facets of professional responsibility are likewise proscribed under penal provisions of provincial statutes, for which a fine or, in some provinces, imprisonment, may be imposed by a court.

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41 Note 3, above, at p. 195.

(iii) *Summary proceedings*

In the exercise of its inherent jurisdiction to supervise the conduct of its proceedings, a court may remove counsel from the record or condemn him or her to pay costs. A court may also cite for contempt, although this recourse is intended not to punish an offending practitioner, but to "vindicate the authority of the Court."[42]

(iv) *Civil proceedings*

A practitioner may be sued by a client, in contract or tort, for negligence in the performance of a retainer; or by a third party, notwithstanding the absence of any contractual relationship between the practitioner and third party. In the United States, in 1982, about one of every twenty attorneys faced such civil proceedings. Ninety per cent of civil claims against practitioners in the United States from 1799 to 1979 arose in the last ten years of that period.[43]

Furthermore, a practitioner may be held liable for costs, or required to account for his or her bill for services on a taxation by a taxing master or a court.

(v) *Criminal proceedings*

Potentially more serious for a practitioner, he or she may suffer criminal prosecution and punishment.

(vi) *Public censure*

Any investigation and proceedings resulting from alleged mishandling by a practitioner of unique difficulties encountered in the legal vocation extract from an affected practitioner a toll in expense, anxiety, and unbillable time.

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42 *Ibid.*, p. 200, and *Re Schofield* (1949), 362 Pa. 210 at 214–215.
43 Note 15, above, at p. 45.

In addition to the consequences of an adverse finding, on such proceedings, the practitioner may incur a further—and perhaps, dearer—price; to wit, the diminution of reputation, the practitioner's most precious asset, occasioned by public censure. Often, a lawyer's practice miscarries—like it matures—by word of mouth from his or her clientele to potential retainors with whom they speak.

(c) Underlying Causes of Proceedings

At least three factors have fuelled the burgeoning public challenge to professional and legal scruples. First, there is "growing consumer consciousness,"[44] intelligence and expectation. Second, a stagnant economy has promoted what American attorneys describe as "second suits"—namely, legal proceedings against lawyers by their clients.[45] Third, there obtains an increased willingness amongst solicitors to sue their confreres.

Practitioners have frequently been authors of their own misfortunes: by practicing in areas of law of growing complexity in which they lacked sufficient expertise, or because they devoted insufficient time and industry to particular retainor matters.

Not infrequently, the practitioner's liability problems—both in Canada and the United States—are rooted in the failure to have a comprehensive, written retainer with the client at the outset of their professional and legal relationship. Brief reference to the legal retainer is, therefore, apropos.

(d) Retainer

(i) *Definition*

A retainer may be defined as

> a contract whereby in return for the client's offer to employ the solicitor,

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44 *Ibid.*
45 *Ibid.*

> the solicitor expressly or by implication undertakes to fulfil certain obligations. The contractural nature of retainer allows the solicitor freedom to choose his clients . . .
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> . . .
>
> The obligations deriving from the retainer and imposed upon the solicitor are:
> 1. those expressly agreed upon when the retainer was constituted or subsequently varied by mutual consent;
> 2. those which the law will imply from the circumstances where nothing has been expressly agreed; and
> 3. such obligations expressly imposed by law as are applicable to the particular retainer.[46]

ii) *Types of retainer*

There are, essentially, two types of retainers: a *specific* retainer nd a *general* retainer.

A specific retainer "is given for a particular transaction" in vhich event the retained practitioner "may transact only the busness specified in the retainer."[47] Where, for example, a practitioner s retained by a client to act on his or her behalf in a divorce proceeding, the specific retainer for that purpose would embrace applications incidental to the divorce cause, for support[48] and/or for parenting relief.[49]

A general retainer, on the other hand, "will authorise all such natters as flow from the retainer . . . ."[50] Under such a contract, wife who retains a practitioner to handle all of her legal affairs, rising from the separation of her and her husband, licenses her awyer to handle divorce and corollary relief matters as well as property division, to mention the most obvious.

The term "general retainer" is sometimes employed in the

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46 Note 16, above, at p. 49 (and authorities there cited at fns. 69–72).
47 *Ibid.*, p. 85.
48 *Re Wingfield & Blew*, [1904] 2 Ch. 665.
49 *Gordon v. Gordon*, [1904] P. 163.
50 Note 16, above, at p. 86.

additional sense that whatever the nature of the retainer, the retained solicitor has a mandate, generally, to handle the legal matters entrusted to him or her, such as by instituting litigation and/or negotiating settlement, without reference to the customary, prudent practice of taking instructions from the client before each step in legal proceedings or before writing or responding to each letter between practitioners in settlement negotiations.

Whether the retainer is specific or general, there is no implied term that the retained solicitor has a *carte blanche* to incur expense; rather, he or she is restricted, save with the client's special instructions, to incur only those disbursements that would ordinarily be made in the matter contemplated by the retainer.[51] For example, a lawyer could not recover his extraordinary travel expenses from a client who had not specifically authorized them.[52]

(iii) *Pre-retainer duties*

When consulted by a potential client, a lawyer has an obligation to assist him or her in deciding whether to retain the lawyer, by advising "of all facts which might influence" that decision;[53] for example, whether a potential or existing conflict obtains, the qualifications of the practitioner, and whether his or her calendar permits prompt managment of the legal problem presented.

The retainer may be in writing, be parol, or arise by implication (such as where the practitioner acquiesces in and adopts proceedings that have already commenced).

While a written retainer is preferable, its absence does not invalidate the retainer, but may render it substantially unenforceable in situations and jurisdictions where the law requires written evidence.[54]

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51 *Ibid.*

52 *Ibid.*

53 Note 3, above, at pp. 77–78, and C.B.A. Code, c. 3, para. 2.

54 Note 16, above, at p. 50.

(iv) *Retained lawyer seeking third party assistance.*

It sometimes happens that a retained family law practitioner solicits the assistance of other counsel or seeks to have other counsel act in his or her stead. Unless a lawyer reaches a "positive understanding with a client that . . . [the client's] relationship will be solely with the other lawyer he has recommended [or arranged], the client is still likely to regard the original lawyer as his attorney."[55]

Failure to reach such an understanding cost a Nova Scotia solicitor and his law partners, and their insurers, substantially in a civil cause, ultimately determined by the Supreme Court of Canada in 1978, which posed the issue of his legal responsibility, as solicitor, where he resorted to other counsel.[56]

By analogy, a solicitor may require—in fact, is encouraged to obtain[57]—an opinion from a professional in another discipline, such as a chartered accountant, to give advice on the income tax implications for the solicitor's client of, for example, sections 56, 56.1, 60, 60.1, 73, 74.1, 74.2 and 146(16) of the Income Tax Act, in connection with a marital property and support settlement the solicitor has negotiated. Or a solicitor may require counsel in another province to pass on the effect of a settlement respecting marital property to the extent the affected property is located in that other province. Unless the solicitor seeking third party advice leaves the ultimate approval of such other adviser to the client, and clearly establishes with his or her client that the collateral advice relating to the settlement is solely the responsibility of the third persons who were consulted, any deficiencies in such advice could cast liability upon the primary solicitor in a subsequent suit by a disconsolate client. (Of course, this would not preclude the primary solicitor, if sued, from seeking indemnity or contribution from the advisers he or she has consulted.)

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55 Note 15, above, at p. 48.

56 *Webb Real Estate Ltd. v. McInnis* (1978), 19 N.R. 608 (S.C.C.).

57 C.B.A. Code, c. II, para. 5. The consequences of failing to do so are not pretty: see, *e.g.*, *Yormak & Yormak v. Hollingworth*, "The Lawyer's Weekly" (Toronto: Butterworths, 1986), vol. 6, no. 26, p. 2.

I next address the application of standards of professional and legal responsibility to the daily practice of family law. I do so selectively. To do otherwise would be a bridge too far, for present purposes, in this expanding area of litigation.

(e) Professional Responsibility

(i) *Representing both partners*

There exists an inappropriate,[58] though widely-employed, practice amongst solicitors of acting for both marital partners in settling legal consequences of the spouses' marriage or separation. Compounding this problem is the novel, if not unrealistic, provision of the Divorce Act, 1985,[59] which endorses jointly-undertaken proceedings for dissolution and corollary relief should one solicitor act for both spouses to such a divorce cause.

As affects a practitioner's professional responsibility in this respect, a distinction is drawn between uncontentious and contentious matters. An example of the former would be the purchase by a cohabiting couple of their matrimonial home; while the latter is illustrated by the sale and division of proceeds of the sale of the home of uncoupling spouses.

Where the subject matter of a retainer is not contentious, the solicitor acting for both spouses is, nonetheless, under a "particular duty to safe guard the interests of the wife."[60] Enlarging upon this professional obligation of the practitioner is *Willis v. Barron*,[61] a 1902 decision of the House of Lords, in which Lord Davey wrote

> [I]t is a sound observation that a wife usually has no solicitor of her own apart from her husband, and I think she is *prima facie* entitled to look to her husband's solicitor, the solicitor for her husband's family, for advice and assistance until that solicitor repudiates the obligation to give such advice, and requires her to consult another gentleman.[62]

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58 C.B.A. Code, c. V.
59 S.C. 1986, c. 4, ss. 8(1), 15(2), 16(1).
60 Note 3, above, at p. 101.
61 *Willis v. Barron*, [1902] A.C. 271.
62 *Ibid.*, p. 283.

Where a potential retainer would involve the same solicitor acting for both spouses in a contentious matter, his or her course is reasonably clear: decline to do so.

Where a separation agreement was explained to a wife by a lawyer in the same firm as the practitioner retained on the separation by her husband, before she executed the agreement, she subsequently moved, in effect, for the agreement's recission on the basis she misunderstood its legal consequences for her. The Saskatchewan Queen's Bench acceded to her request, *inter alia*, on the basis that she had not received independent legal advice before she executed the instrument (even though the lawyer she first consulted sent her outside his firm to have the agreement executed). The Court remarked that

> lawyers should refuse to act for both parties, however scrupulous they are about explaining to the husband or the wife what their rights may be.[63]

(ii) *Changing partners*

Another justice of the same Court considered the issue: "Should a lawyer act for one party in a divorce and matrimonial action, and thereafter commence to act for the other party in the same cause or matter against his former client?"[64] Initially, his conclusion was unequivocably in the negative, citing as authority chapter 5, paragraph 11 of the C.B.A. Code.

He then referred to reasoning in a 1985 Saskatchewan Court of Appeal decision to the effect that, on an issue similar to that before him, "the main consideration . . . is the possibility that . . . [a solicitor] will be able to use confidential information which he has received in his prior capacity. It is not an absolute rule that he is precluded from ever acting against a former client even in regard to the same subject matter."[65] The trial justice stated, however, that "the onus should be on the solicitor, in a

63 *Crohn v. Crohn and Hamm*, [1981] 2 W.W.R. 666 at 672 (Sask. Q.B.).
64 *Fahr v. Fahr*, [1985] 3 W.W.R. 261 at 263.
65 *Carson v. Benchers of Law Soc. of Sask.*, [1975] 6 W.W.R. 544 at 554.

case such as this to satisfy the court that no such possibility exists."[66]

Finally, he adopted the reasoning of one of his brethren in a 1983 decision, who wrote that " . . . it is difficult to envision a situation where a solicitor is acting against a former client on the same or a related matter and not being privy to confidential information."[67]

Where a firm representing a wife against her husband had obtained confidential information while previously acting on the husband's behalf in another, though related, matter, the husband's application to enjoin the firm from continuing to represent his wife was granted. To do otherwise, concluded Fanjoy, Ont. Co. Ct. J., would "probably result" in "real mischief and prejudice."[68]

This concept appears to have been extended by the Ontario Supreme Court in a subsequent decision of Mr. Justice Callahan. The headnote of the decision, which accurately reflects his judgment for a unanimous Divisional Court of the Ontario High Court of Justice, reads (in part):

> The principles relating to conflict of interest protect not only individual clients but also public confidence in the administration of justice. Particularly where litigation involves a family dispute, the *appearance* of impropriety overrides any private interest . . . .[69] (Emphasis added.)

The Manitoba Court of Appeal adopted a similar apprach in 1983. Referring to chapter 5, paragraph 11 of the C.B.A. Code, the Court held (2-1) that where a solicitor may have acted for both husband and wife when they mortgaged their marital home, he was not precluded from subsequently representing the husband in a matrimonial matter, as nothing was learned from the earlier transaction "that would tempt, or appear to tempt him to divulge confidential information" to the prejudice of the wife.[70]

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66 Note 64, above, at p. 265.

67 *Schmeichel v. Sask. Mining Dev. Corp.*, [1983] 3 W.W.R. 30 at 40.

68 *Falls v. Falls* (1979), 12 C.P.C. 270 at 273 (Ont. Co. Ct.).

69 *Goldberg v. Goldberg* (1982), 141 D.L.R. (3d)133 (Ont. H.C.).

70 *Re Law Society Of Manitoba and Giesbrecht* (1983), 2 D.L.R. (4th) 354 at 360 (Man. C.A.).

In the absence of a "probability of prejudice" to a husband, his application to have his wife's firm removed from the record in her interim support application failed where the wife's solicitor, while a junior in the firm 12 years earlier, assisted in preparing a husband for litigation involving the husband and the husband's former law partner.[71]

(iii) *Retainer and authority*

This facet of professional responsibility, generally described as "retainer and authority," like other aspects of professional ethics, has features potentially germane to a practitioner's legal as well as professional responsibility.

Eleven years ago, on October 25, 1975, John Edward Pfrimmer, age 82, and Margaret, age 72, teenage sweethearts who had not seen each other for some 55 years, were married after a courtship, described by Ferg J. of Manitoba Surrogate Court[72] as being "very brief." They settled in Austin, Manitoba with John's bachelor brother, Leon, an antique machinery dealer and himself an octagenarian. Within three months—by January, 1976—Margaret (mistakenly) suspected John (whom she affectionately referred to as "Jack") of committing adultery. By the summer of the same year they parted company when Margaret told her husband, "I'm leaving you, Jack, and I am not coming back." She sought legal advice from Legal Aid Manitoba, and formed the opinion that "they never did nothing for me." To this, Ferg J. reacted, "quite understandably so." With a trunk and some wedding gifts in hand, Margaret left for Edmonton, and upon arriving there instructed counsel to settle her dower rights arising out of the marriage.

As a result of exchanges of correspondence and telephone conversations between her Edmonton lawyer and her husband's solicitor in Manitoba (at Portage La Prairie), an agreement was reached whereby Margaret would accept $5,000 in settlement of

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71 *A.M.J. v. N.M.S.J.* (1986), 49 R.F.L. (2d) 367 (Ont. H.C.).

72 *Campbell v. Pfrimmer*, [1979] 5 W.W.R. 588 at 592 (Man. Surr. Ct.).

her dower rights. Margaret then sought to repudiate the agreement, which had not yet been reduced to a written instrument or signed by the spouses. Shortly afterwards, Jack died. His estate sued Margaret for an order that she was not entitled to dower rights from his estate, in light of the solicitors' agreement. The action was successful.

Ferg J. concluded that

1. "a barrister acting under a general retainer has, in the absence of any restriction therein, full charge of the conduct of the action. It includes the right to compromise or to agree to a dismissal on terms—the client cannot therefore repudiate the settlement once agreed to.";
2. adopting the reasoning of the Lord Justice in *Harvey v. Croydon Union Rural Sanitary Authority* (headnote): "Where counsel, with the authority of his client, has consented to an order, that consent cannot be withdrawn, *even before the order is drawn up*, unless it can be shown that it was given under mistake or error." (The emphasis is that of Ferg J.);
3. "for a compromise settlement no formal documentation in writing is necessary so long as there is communication from solicitor to solicitor of the terms and an agreement made, or, if you will, an offer and acceptance."[73]

Of similar effect is *Landry v. Landry*[74] in the Appellate Division of the Nova Scotia Supreme Court, and *Pineo v. Pineo*[75] in the Trial Division of the same Court.

A like conclusion was reached by the British Columbia Court of Appeal in *Rogers v. Rogers*, even though the agreement evidenced by solicitors' exchanges of correspondence, in that case, had not expressly contemplated all of the settlement terms. The Court decided that those additional terms consisted of "other clauses which are usual in such agreements [when reduced to writ-

73 *Ibid.*, at pp. 597, 598, 599.
74 (1981), 23 C.P.C. 40 (N.S.C.A.).
75 (1981), 21 R.F.L. (2d) 261 (N.S.T.D.).

ing], including the covenant to live separate and apart . . . ," and had they been incorporated in the agreement between the solicitors, "would have been accepted" and reduced to writing.[76]

The binding effect of inter-spousal agreements achieved by solicitors was successfully challenged in *Mantha v. Mantha*,[77] a 1984 judgment of the Ontario District Court for Nipissing District. As under the provincial marital property legislation of most provinces and territories, the Family Law Reform Act of Ontario[78] provided that a domestic contract is unenforceable unless it is "made in writing and signed by the parties and witnessed."[79]

In the *Mantha* case,[80]

> solicitors for the parties in a family law proceeding negotiated an oral settlement of the matters in issue, in accordance with their clients' instructions. The solicitor for the respondent [husband] drafted minutes of settlement incorporating the terms of the agreement. When the solicitor for the applicant [wife] presented the draft minutes of settlement to his client, she refused to sign them and repudiated the settlement. The respondent moved for judgment in accordance with the terms of the agreement.

The husband's application was dismissed, Perras D.C.J. holding that the domestic agreement made between the solicitors for their spousal clients did not comply as to form with the statutory requirements of section 54(1) of Ontario's Family Law Reform Act and, hence, was unenforceable.

He allowed, however, that since the solicitors' agreement "would qualify as an agreement other than a domestic contract, it should be a factor that may be taken into account by the Judge at the trial of the issue."[81]

The lamentable state of the law as to the effect of agreements reached between litigants or their solicitors, either orally or by exchanges of correspondence or by solicitor-executed minutes of

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76 (1981), 30 B.C.L.R. 278 at 280 (B.C.C.A.).
77 (1984), 47 C.P.C. 176 (Ont. Dist. Ct.).
78 R.S.O. 1980, c. 152, rep./sub. Family Law Act, 1986, S.O. 1986, c. 4.
79 R.S.O. 1980, c. 152, s. 54(1), rep./sub. S.O. 1986, c. 4, s. 55(1).
80 Note 77, above, at p. 176 (headnote).
81 *Ibid.*, p. 180.

settlement, is illustrated by a selected quartette of judgments rendered during the eight years prior to *Mantha v. Mantha*, which are only partially reconcilable on the basis of variations in the marital property legislation of the provinces involved.

In *Rodocker v. Rodocker*,[82] the Saskatchewan Queen's Bench upheld a consent order settling marital property division, where the wife subsequently moved to set aside the order. In *Re Tuffs and Tuffs*[83] the Ontario High Court set aside a domestic settlement agreement parolly made between the spouses' solicitors, but allowed that the parol agreement "should be a factor" in judicial determination of the dispute on the basis of a provision of the Family Law Reform Act of Ontario.[84] However, the Ontario Unified Family Court at Hamilton entirely disregarded an agreement based on solicitors' correspondence settling division of certain spousal property in *Moore v. Moore*.[85] Five weeks later, the Ontario Court of Appeal held, in *Seibt v. Seibt*,[86] to the effect that an oral agreement between spouses compromising marital property division had substantial affect upon the subsequent adjudication of the matter (notwithstanding the absence of a statutorily-required written, signed and witnessed agreement between the spouses).

If, in any of the foregoing "authority and retainer" cases counsel had, unbeknowst to the other side, acted beyond the scope of his or her retainer in making an inter-spousal agreement with the opposing solicitor, the agreement negotiated by the solicitors would, nonetheless, probably stand (save where otherwise provided by statute). However, the client of a solicitor who had so acted would be entitled to sue the solicitor for exceeding his or her legal authority under the terms of the retainer.

(iv) *Confidentiality and privilege*

Dealing first with confidentiality, a wife consulted a Van-

82 (1980), 18 R.F.L. (2d) 276 (Sask. Q.B.).
83 (1978), 21 O.R. (2d) 852 (Ont. H.C.).
84 R.S.O. 1980, c. 152, s. 4(4).
85 (1980), 14 R.F.L. (2d) 63 (Ont. U.F.C.).
86 (1980), 15 R.F.L. (2d) 393 (Ont. C.A.).

couver lawyer for the purpose of obtaining a divorce. As she lacked evidence for that purpose, the lawyer introduced her to a private investigator to assist her obtain evidence of the (then) separate divorce ground of adultery.[87] In due course, the private investigator secured the necessary evidence and the lawyer commenced the wife's divorce cause. Shortly before trial of the cause, the lawyer learned from his secretary that his client had apprised the secretary of her having an "affair" with the private investigator. This concerned the lawyer because on two prior occasions the same private investigator had engaged in amorous liaisons with other wife clients referred by the lawyer to the investigator and, in fact, the investigator was now married to one of these earlier clients.

The wife's lawyer thereupon informed various authorities—the R.C.M.P., the Law Society of British Columbia, the Deputy Attorney General, the Queen's Proctor and the investigator's professional association—of the investigator's physical relations with his client. In due course, the wife was called as a witness at a hearing convened by the investigator's professional association, which resulted in the cancellation of the sleuth's licence. All of this, said the wife, occasioned her anxiety and embarrassment. Thus, she sued her lawyer for damages for breaching the duty of confidentiality he owed to her.

The trial raised, essentially, two issues: first, whether the lawyer had breached his professional responsibilities of confidentiality and/or of privilege in his capacity as her solicitor; and second, whether this resulted in his being legally responsible in damages. In the result, the Chief Justice of the British Columbia Supreme Court held that the solicitor had breached his professional responsibility of confidentiality to his client, rendering him legally liable to pay to her $500 nominal damages and costs.[88]

Here are the following conclusions of His Lordship:[89]

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87 Divorce Act, R.S.C. 1970, c. D-8, s. 3(*a*); now a species of the sole "marriage breakdown" ground under the Divorce Act, 1985, S.C. 1986, c. 4, s. 8(2)(*b*)(i).

88 *Ott v. Fleishman* (1983), 46 B.C.L.R. 321 (B.C.S.C.).

89 *Ibid.*, pp. 322, 323, 326–327.

1. "Apart from an indication of future unlawful conduct I regard it as settled law that any confidential information communicated to a lawyer and received by him in his professional capacity must not voluntarily be disclosed without either the consent of his client or a direction from the court. This is made apparent in the canons of the legal ethics which require a lawyer 'scrupulously' to guard and not divulge his client's secrets or confidences (Canon 3 [7]). . . . To put it bluntly, confidentiality prevents lawyers from talking about their client's affairs out of court."
2. "Privilege prevents lawyers from disclosing certain types of confidential information during the course of proceedings."
3. "Viewed this way, it will be seen that confidentiality is a much broader concept than privilege, and it prohibits a solicitor as a professional matter, but at pain of liability for damages or injunction, from voluntarily disclosing confidential information."
4. " . . . [I]t is not only information furnished to a lawyer by a client that is confidential. All information received on behalf of a client in a professional capacity, even if furnished anonymously, is also confidential."
5. " . . . [T]he requirement of confidentiality continues indefinitely, even though the solicitor-and-client relationship may have terminated: . . . ."
6. "Lawyers also understand that it is their responsibility to train their staff and that they may well be liable for any breach of confidentiality committed by their agents or their staff."
7. [The defendant lawyer argued that he] "had a duty to disclose this information to prevent a possible fraud upon the court by use of tainted evidence in the pending divorce trial and to prevent . . . [the private investigator] from taking advantage of other women in the position of the plaintiff. . . . It was not necessary for the defendant to make this disclosure to prevent any fraud upon the court. If he was truly concerned, as I expect he was, about the validity of the evidence he could have examined the plaintiff's husband for discovery, and if he was still concerned that the evidence was fabricated he could, with his client's permission, make a full disclosure to the court. . . . In these circumstances the court would either be

satisfied with the evidence or would not be so satisfied but the defendant would have discharged his duty as an officer of the court without prejudicing any duty of confidentiality. Failing receipt of such instructions the defendant could have withdrawn from the case and no explanation would have been required or necessary."

In like circumstances, the English Court of Queen's Bench held that where a divorce petitioner has committed adultery, "it is the duty of his counsel and solicitor to disclose the fact to the Court if they are aware of it."[90]

An English case, in 1830, holds that the practitioner's obligation of confidentiality is not limited to current or anticipated litigation, but applies to the overall performance of the retainer, whether or not any legal proceedings are ever called for.[91] Not even the fact that a person has consulted him or her should be disclosed by the practitioner "unless the nature of the matter requires it."[92]

Turning to practitioner privilege, the caselaw clearly indicates that recognition of this professional responsibility is not absolute. Where, for example, a solicitor swore that the cient's whereabouts were received in professional confidence, an order was, nonetheless, made compelling the solicitor to disclose the client's whereabouts in aid of execution of a maintenance order, because past defaults under such order suggested evasion or civil wrong on the client's part in omitting to honour the support obligation,[93] thereby disentitling him to benefit of the solicitor-client privilege.

Where, however, in an alimony application, the wife's solicitor declined to disclose, in pleadings, the address of his client, the Ontario High Court sustained his position that the information was privileged despite the fact relevant procedural rules re-

90 *Abraham v. Abraham and Harding (The King's Proctor Showing Cause)* (1919), 35 T.L.R. 371 (P.D.A. Div.).

91 *Clarke the Younger v. Clarke the Elder* (1830), 174 E.R. 2.

92 C.B.A. Code, c. IV, para. 3.

93 *Re Matson and Matson* (1980), 30 O.R. (2d) 468 (Ont. S.C.).

quired such information to be pleaded.[94] Reported, in that decision, was the fact the wife filed an affidavit which deposed that she did not want her whereabouts disclosed "because I am afraid . . . [my husband] will come there and do actual bodily harm to me . . . as he has done and threatened to do in the past." Whether this evidence influenced the court's decision is not mentioned.

The fear there expressed by the wife is one of the reasons why "whereabouts provisions" of Part I of the Family Orders and Agreements Enforcement Act[95] prevent disclosure to one spouse of the address of the other spouse, where the other spouse is located under that Act, by state-operated agencies, for the purpose of enforcing parenting or support provisions of domestic agreements and orders.[96]

No privilege was found to exist by Hollingworth J. of the Ontario Supreme Court in *Levenson v. Levenson*,[97] in determining that a person attending for discovery must answer relevant questions put to him pertaining to the husband's financial circumstances, where the person was a *client* of the *husband* who happened to be a solicitor. While such reverse privilege exists in law, His Lordship concluded that the privilege did not, in the particular circumstances of this case, extend to correspondence between the person and the husband/solicitor where litigation was not in contemplation in respect of the subject matter of the letters, which were written to the client by the husband/solicitor regarding business matters in which they were involved.[98]

(v) *Representation*

Having been retained to provide legal representation in a divorce cause, a solicitor conducted himself reprehensibly where he

94 *Werner v. Werner*, [1956] O.W.N. 2 (Ont. H.C.).
95 S.C. 1986, c. 5 (not yet in force), Part I.
96 *Ibid.*, s. 13.
97 (1982), 28 C.P.C. 263 (Ont. H.C.).
98 See, however, annotation to this decision, *ibid.*, pp. 263–264.

advised his or her client "to commit adultery and facilitate the proof thereof" in order to establish a ground for divorce.[99] Assuming a ground for divorce exists when the solicitor is retained, or a ground is legitimately established subsequently, the solicitor should not refuse to advise his or her petitioner client up to the granting of the decree *nisi* but no further until the lawyer's costs are paid.[100] On the other hand, a client can change his or her representation at will, whether or not for cause.[101]

Hallmarks of sound legal representation are control of one's client and command of his or her problem. "It is . . . [the practitioner's duty]" writes Mark M. Orkin, Q.C., "to make himself master of his client's case and in order to do so he should not be content merely with what his client tells him; he should make all necessary searches and investigations and confer personally with the witnesses. The duty of early and adequate preparation is an important one." Mr. Orkin refers to the opinion of Lord Tenterden that

> It too frequently occurs that upon a client's statement a suit is precipitately commenced without first ascertaining the evidence; and sufficient enquiry into the details of proof is not made until just before the trial, after much expense has been incurred, and then it will appear that for want of adequate evidence, the suit is not sustainable. This is grossly absurd and culpable negligence.[102]

Particular care is essential in advising a client on deposing to an affidavit, a mechanic frequently employed to make disclosure and otherwise introduce evidence in family law proceedings. Practitioner responsibility in so doing is defined, in a 56-page judgment of the English House of Lords, as follows:

> The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information

99 *Dicks v. Dicks*, [1949] 2 W.W.R. 866 (B.C.S.C.).
100 *Rose v. Rose*, [1936] 1 W.W.R. 117 (Sask. K.B.).
101 *Bailey v. Bailey*, [1868] 2 Ch. 57.
102 Note 3, above, at p. 80.

> he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to.[103]

An American lawyer whose practice was devoted almost exclusively to affidavits was Abraham H. Hummel. As recounted in *The Oxford Book of Legal Anecdotes*,[104]

> he obtained [affidavits] from ladies who reported that men, who were sometimes well-known and wealthy, had made too free with them. The . . . [man], or his lawyer, was served with the affidavit and told how much it would cost him to suppress it. [The man] usually paid up. Half the proceeds went to the girl, half to Hummel.[105]

But Hummel was "curiously scrupulous"[106] in his conduct of this business. He wanted to ensure his female clients did not consult another attorney to employ the same affidavit a second time around. To this end, Hummel explained,

> Before I hand over her share, the girl and I have a little talk. She listens to me dictate . . . [another] affidavit saying that she has deceived me, as her attorney, and that, in fact, nothing at all between the man involved ever took place; that she was thoroughly repentant over her conduct in the case, and that, but for the fact that the money had already been spent, she would wish to return it. She signs this and I give her the money. Whenever they start up something a second time, I just call them in and read them the affidavit. That does the trick.[107]

Occasionally, a practitioner's client or client's witness concedes, under cross-examination of his or her affidavit, that the practitioner failed to take the deposition on oath, or did not ensure that the affidavit had been read over to or by the dependent before

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103 *Myers v. Elman*, [1940] A.C. 282 at 322.
104 M. Gilbert, ed. (New York: Oxford University Press, 1986).
105 *Ibid.*, pp. 173–174.
106 *Ibid.*, p. 174.
107 *Ibid.*

signing, or encouraged a client or client's witness to sign the deposition despite the deponent's reservations about the complete accuracy of the document. Justices of some courts have, quite properly, encouraged practitioners to avoid personal involvement in taking affidavits from their clients and clients' witnesses, whenever feasible, to avoid such spanners, which could interfere with the practitioner's credibility or his or her continuing to function as counsel in the affected matter.

Perhaps as annoying to trial judges, as Hummel's affidavits proved to be amongst indiscreet men, is the inclination of family law litigants, during trial, to approach their counsel, dispatch them notes, or engage in facial histrionics. Counsel is obligated for the client's sake, if not professionally, to enjoin the client from such conduct. An obvious alternative, to keep solicitor and client in communication during a trial in which unanticipated *viva voce* emerges, is to have the client sedately make notes to be discussed with counsel during trial recesses.

(vi) *Advertising*

There are professional strictures on promoting oneself as being qualified to provide legal representation. The Manitoba Court of Appeal dismissed appeals by a Winnipeg solicitor from his governing body's finding of guilty against him on three counts of professional misconduct. The misconduct resulted from the lawyer's insertion of professional cards in the Winnipeg telephone directory yellow pages and in the Winnipeg Sun newspaper, without first having the insertions reviewed as to content and format, in compliance with a resolution of his governing body.[108]

While restrictions by provincial governing bodies upon lawyer advertising are gradually being reversed by judicial judgment and by voluntary decision of such bodies, more important is the impact of advertising on practitioner professional responsibility. Bluntly put, if a lawyer holds himself or herself out as being competent to practice in particular areas of law, for example, fam-

108 *Law Society Of Manitoba v. Savino* (1983), 23 Man. R. (2d) 293 (Man. C.A.).

ily law, he or she assumes a correlative duty to render the services of a specialist. The standard of professional responsibility, and the corresponding legal responsibility or duty of care, expected of such a practitioner by the client is heightened. Moreover, the client should anticipate from the specialist more expeditious legal service, involving less billable hours than might be devoted by a generalist practitioner.[109]

(vii) *Barrister's services*

As barrister, the practitioner is expected to deport himself or herself with the same standards of skill and care for the protection of his or her client's interest in the courtroom as the solicitor is required to discharge in his or her office. The failure to comply with these standards of professional responsibility may prompt judicial intervention, and could result in a breach of legal responsibility as well. A prime example is a 1978 trial in the British Columbia Supreme Court before Bouck J. His reasons for intervening in a trial speak for themselves:[110]

> The proceedings cannot continue. It is apparent to me the nature of this case is far beyond the ability of counsel for the plaintiff. It is not a difficult law suit. Unfortunately the record will show the plaintiff's representative has little comprehension of how the action should have been framed and the essential ingredients which need to be proved. Nothing will be gained by articulating these deficiencies.
>
> . . . Not only am I sworn to administer the law but I also have a duty to see that justice is done so far as the law allows. Members of the Law Society have the exclusive right to represent litigants in this Court. . . . But if a member has either been inadequately trained or is indifferent in his preparation my first duty is to the citizen and not to the lawyer.
>
> The plaintiff is entitled to far better advice. . . .
>
> . . . I am going to declare a mistrial. The defendants will recover the costs for the two days of the trial. I see no reason why the plaintiff should

109 See, *e.g.*, *Re Keenan* (1983), 124 A.P.R. 237 (N.B.Q.B.); *Re Cronkhite* (1983), 126 A.P.R. 262 (N.B.Q.B.).

110 *Brisseau v. Martin & Robertson Ltd.* (1978), 8 C.P.C. 93 at 93–94 (B.C.S.C.).

> pay these costs personally and so counsel for the plaintiff must pay them himself.
>
> Because of what has gone on here I am hopeful the plaintiff will not be burdened with an account for services rendered by his adviser to date. No bill should be sent.

While the British Columbia Court of Appeal did not rule out the right of a trial justice to comment upon the forensic performance of counsel appearing before him or her, the Court held that the circumstances of the case before Mr. Justice Bouck did not warrant his *per curiam* remarks. Further, the appellate Court regarded as inappropriate (a) the declaration of a mistrial without the trial judge having first listened fairly to the trial evidence and submissions, and (b) the penalties imposed on the Plaintiff's counsel.[111]

In Nova Scotia, counsel was chastised in the discharge of his barrister's professional responsibiity for framing his argument in terms of "my opinion", "I think" and "I believe"; and for agreeing with the trial judge's request that the barrister personally undertake that his applicant client for custody refrain from the use of narcotics.[112]

An Ontario solicitor was condemned to pay solicitor and client costs of opposing counsel when he unduly interfered in the examination for discovery of his client.[113] But a request that a solicitor be ordered to pay costs of the opposing counsel in a British Columbia custody proceeding was dismissed. While the solicitor had been "tenacious" and, at times, "stubborn" in her conduct of her client's case, and had brought multiple, though unsuccessful, interlocutory applications, she had not been discourteous during the 20-day trial.[114]

(viii) *Barrister as witness*

There are at least three manners in which a barrister may prof-

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111 *Geller v. Brisseau*, [1979] 6 W.W.R. 416 (B.C.C.A.).
112 *Bernard v. Elliott* (1984), 62 N.S.R. (2d) 287 (N.S. Co. Ct.).
113 *Sonntag v. Sonntag* (1979), 11 C.P.C. 13 (Ont. S.C.).
114 *Re D.M.L.* (1983), 49 B.C.L.R. 71 (B.C.S.C.).

fer evidence: namely, as a witness from the "well of the court"[115]; by an affidavit; and by representations to a court during argument.

Save where a client has been taken by surprise at trial, and the necessity for so doing is unavoidable, a barrister should not testify on the trial of a matter in which he or she is appearing as counsel, and, if the barrister does testify, he or she should not thereafter act as counsel on that trial.[116] Before the Alberta Supreme Court, in 1937, a trial had ended when counsel for one of the parties discovered a memorandum amongst his papers that refreshed his memory on a point germane to the matter in issue at trial—involving whether or not a gift had been made by a husband's mother to the wife. In these circumstances, the trial was reopened and counsel given leave to testify on the basis of his post-trial discovery of the memorandum.[117]

As a general rule, a practitioner acting as counsel in a court proceeding should not "submit his own affidavit,"[118] although this ethical standard is often honoured in its breach by family law practitioners. Not least of the reasons for respecting this canon of the C.B.A. Code is avoidance of the prospect of being called upon by adversaries to a proceeding to submit to cross-examination on the deposition. There are, however, legitimate exceptions to this rule, such as in *Cairns v. Cairns*, a 1931 judgment of the Alberta Court of Appeal.[119]

With respect to the making, by counsel, of factual representations to a court, the Alberta Court of Appeal, in the same case, heard such submissions from a practitioner seeking an extension of time within which to appeal from a trial judgment in domestic proceedings. The appellate Court stated *inter alia*:[120]

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115 *Hickman v. Berens*, [1895] 2 Ch. 638; *Williams v. Williams and Stewart*, [1949] 1 W.W.R. 916 (Sask. K.B.); and see note 3, above, at p. 59 (*i.e.*, "from his place at the bar").

116 *Waschuk v. Waschuk & Waschuk* (1954), 14 W.W.R. 169 (Sask. C.A.); C.B.A. Code, c. VIII, para. 3.

117 *Brett v. Brett (No. 1)*, [1937] 2 W.W.R. 689 (Alta S.C.); affirmed [1983] 2 W.W.R. 372 (Alta. C.A.).

118 C.B.A. Code, c. VIII, para. 3.

119 [1931] 3 W.W.R. 335 (Alta. S.C.).

120 *Ibid.*, p. 344.

> Turning now to the statements of fact before mentioned made to the Court by counsel for the applicant in the course of argument. It is often said that counsel before the Court as officers of the Court ar always under oath and so the Court may rely on their statements of fact. It is of course traditional that members of the Bar will not mislead or deceive the Court and counsel are frequently asked concerning matters that are of passing interest to the Court but Courts do not decide cases upon the *hearsay* statements of counsel. (Emphasis added.)

(f) Legal Responsibility

One of the outcomes of a breach by a solicitor of his or her professional responsibility may be legal liability, such as, for negligent conduct established on the trial of an action against the solicitor in contract (that is, for breach of retainer) or in tort.

(i) *Responsibility to client*

A husband, following separation from his wife, instructed his solicitor to prepare a transfer of the husband's property to his children to avoid potential marital property claims by his wife. The lawyer advised the husband that such transfers, if effected, would be illegal and might well be set aside. Nonetheless, the husband followed through and executed the property transfers, drawn by his solicitor, in favour of his children. In so doing, the husband was not advised by the solicitor that the transfers might also create a presumption of advancement of the properties in favour of the transferee children. When one of the children subsequently refused to reconvey to her father the property he had transferred to her, he sued her to obtain compliance. His action was dismissed. The husband then sued his solicitor for having omitted to advise him of the presumption-of-advancement implications of his having conveyed the property to his children, This action, based on the alleged negligence of his solicitor, was, likewise, dismissed.

Citing paragraphs 1 and 6 of chapter 6 of the C.B.A. Code, the Trial Division of the British Columbia Supreme Court concluded that the solicitor had not, in the discharge of his professional responsibility, properly advised the husband. But that fact, in the court's mind, did not render the solicitor legally liable to

the husband. Proudfoot J. held:[121]

> Regardless of what the defendant [solicitor] had done, the plaintiff [husband] would have proceeded with the transfer in any event. Therefore, the defendant's failure to advise the plaintiff regarding the presumption of advancement did not cause the plaintiff's damages. Further, even if there was a causal connection, the plaintiff could only prove damages by relying on his illegal act, and as a matter of public policy the courts would not permit him to do so.

A man and his common-law wife consulted solicitors. They followed the solicitors' advice and placed title to a home the couple were purchasing in the name of the man only, because the woman was married and the solicitors were concerned that if the property were jointly held by the couple, the woman's legal husband could claim against her interest. The man subsequently placed three mortgages on the property, only the first of which was guaranteed by his female cohabitant, and only the first two of which were known to her to have been secured against the property. By virtue of her signing the first mortgage, as guarantor, she believed she had an interest in the property. The husband eventually disappeared. All three mortgagees threatened foreclosure. The property was sold to satisfy the mortgages. The sale resulted in financial loss to the woman. She sued the solicitors. Her action was successful. The British Columbia Supreme Court held:[122]

> The defendants owed a duty to the plaintiff, who was inexperienced in business affairs, to protect her interest, . . . They had breached that duty by failing to advise the plaintiff [wife] of the risk involved in putting the property in . . . [the man's] name alone; by failing to have . . . [the man] execute a declaration of trust; by failing to satisfy themselves there was no conflict of interst in acting for both . . . [the man] and the plaintiff; by causing or permitting the third mortgage to be placed; and by failing to advise the plaintiff to seek independent advice and assistance.

A wife obtained a custody order in respect of children of the

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121 *Foster v. Barry*, [1983] 5 W.W.R. 315 (B.C.S.C.) (as summarized in headnote).

122 *Dwyer v. Spry and Hawkins* (1981), 27 B.C.L.R. 253 (B.C.S.C.) (as summarized in headnote).

marriage. She later turned over the children to her husband. The husband instructed his solicitor to take action to vary the custody order to legally vest custody of the children of the marriage in the husband. The solicitor did not do so. His reasoning, he said, was that he understood the wife was having second thoughts about what she had done, and would not consent to such a variation application by the husband. Therefore, the husband's solicitor felt, the longer the husband retained *de facto* custody of the children of the marriage, the better his chances on an eventual variation application. The children later returned, of their own volition, to the wife. The husband sued his solicitor. While the Court held that the solicitor had breached his duty to the husband by failing to promptly carry out the husband's instructions, there was no evidence the husband had suffered monetary damages and thus none were ordered.[123]

(ii) *Responsibility to third parties*

A husband approached his solicitor with a mortgage of property owned by him and his wife. His wife's signature was already on the mortgage document. He had his solicitor purport to witness her signature. The solicitor personally witnessed the husband's signature to the mortgage instrument. The husband later disappeared. The mortgagee foreclosed and the property was sold. These developments occasioned financial loss to the wife. She sued her husband's solicitor on the basis that her husband had forged her signature to the mortgage document, and the act of the solicitor in purporting to witness her forged signature facilitated the encumbrance of the property without her consent. Her action was dismissed. Although the solicitor had failed to properly discharge his professional responsibility, that failure was not the cause of the wife's loss. When the mortgage company had foreclosed, the wife requested and was permitted to sell the property herself. Further, in all of the circumstances, she would have lost the property even had the husband's solicitor not witnessed her forged signature to

123 *Beckmat Holdings Ltd. v. Tassou* (1982), 18 Alta. L.R. (2d) 300 (Alta. C.A.).

the mortgage. The defendant solicitor, therefore, was not legally responsible to his client's wife.[124]

A wife sued her husband for division of marital assets. The husband began selling some of the assets pertinent to the action. The Court ordered the preservation of the sale proceeds of such assets pending determination of the wife's action. The husband's solicitor, with knowledge of this order, subsequently acted on the sale of one of the assets and released the proceeds to his husband client. The husband, with the sale proceeds, emigrated from Canada to the United States. The wife successfully applied to join the husband's solicitor in her marital property action and to require the husband and his solicitor to pay her solicitor-and-client costs to date. On appeal, this order was vacated, the Court holding that the husband's solicitor could not be said to stand in the shoes of his client and, further, that the solicitor was not properly a party to the wife's marital property action. The Court did not, however, rule out a separate action by the wife against her husband's solicitor.[125]

On the basis of a spousal agreement, based on correspondence exchanged between solicitors of the husband and wife, the husband's solicitor was to hold proceeds of sale of the couple's home, on which he had acted, to pay agreed marital debts. Instead, the husband's solicitor released to his client the portion of the sale proceeds earmarked for one of the agreed marital debts. The wife successfully sued the husband's solicitor for loss resulting to her from the failure of the husband's solicitor to pay the debt.[126]

(iii) *Contempt*

A husband was obligated to his wife under a maintenance order. He accumulated arrears. The husband reached the brink of bankruptcy. He attempted, on the eve of making an assigment in bankruptcy, to pay his solicitor's account and, with his solicitor's assistance, to prefer debts owed by him to other creditors to the

124 *Langer v. Langer and Hawkins* (1982), 34 B.C.L.R. 340 (B.C.S.C.).
125 *Kern v. Kern* (1986), 8 C.P.C. (2d) 31 (Ont. H.C.).
126 *Watton v. Parsons* (1977), 80 D.L.R. (3d) 297 (Nfld. Dist. Ct.).

arrears of support he owed to his wife. The wife applied to have her husband and his solicitor cited for contempt. Her application failed as she had failed to discharge the burden—beyond a reasonable doubt—that either her husband or his solicitor had acted contemptuously.[127] Other solicitors have been less fortunate and were committed to jail for contempt.[128]

(iv), *Barrister's services*

A client sued his lawyer for barrister's work, alleging negligence in the discharge of a barrister's duties in representing him in a court proceeding. The House of Lords held, in 1969, 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 cause in court and the preliminary work connected therewith such as the drawing of pleadings."[129]

Eleven years later, however, the House of Lords altered its earlier position by restricting the immunity "virtually to the actual conduct of a case in Court."[130]

Because Canada does not have separate Bars of barristers and solicitors, such as are maintained in England, and for other reasons, Canadian lawyers do not enjoy the immunity afforded English counsel.[131]

However, in the prosecution of a matrimonial property action, the mere fact the wife's lawyer "did not present every item of evidence or take every objection at trial, as is perceived to be of importance to the client, did not of itself constitute a ground for a claim of professional negligence or misconduct."[132] That was an action in which a wife, dissatisfied with the outcome of her

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127 *Vance v. Vance* (1984), 50 B.C.L.R. 373 (B.C.S.C.).

128 *Pritchard v. Pritchard* (1889), 18 O.R. 173 (Ont. H.C.).

129 *Rondel v. Worsley*, [1969] 1 A.C. 191 (from headnote).

130 *Saif Ali v. Sidney Mitchell*, [1978] 3 W.L.R. 849, as interpreted by Lord Denning in *The Discipline of Law* (London: Butterworths, 1979), p. 250.

131 See note 25, above, at pp. 135–139.

132 *Garrant v. Moskal* (1985), 47 R.F.L. (2d) 1 at 4 (Sask C.A.), dismissing appeal from (1984), 42 R.F.L. (2d) 418 (Sask Q.B.).

marital property litigation, sued her own lawyer, and for good measure, also took action against her husband and his lawyer.

(v) *Costs*

More than any other facet of practitioner legal responsibility, the liability of a lawyer to have his costs (that is, his accounts for professional services and disbursements rendered to and incurred on behalf of a client) reviewed upon taxation by a Court taxing master or by a judge of a Court have been the subject of reported decisions.

Striking about many of these decisions are the facts that (a) the solicitors involved had failed to define clearly, if at all, the financial parameters of their retainer either upon commencing to represent a client or during their relationship, and further, (b) the solicitors rendered accounts for services to their clients on an hourly basis without sufficient regard to the complexity of the legal matter and the results obtained for the client.

Decisions of two Ontario Taxing Officers in point consequently reduced practitioner accounts for service: from $40,000 to $25,000 in June, 1985,[133] and from $55,000 to $22,000 in July, 1986.[134]

There follow several principles developed on the taxation of accounts of family law practitioners to their clients, which apply equally to other areas of legal practice.

1. The fact a solicitor has made an agreement with respect to services with his or her client does not, necessarily, preclude taxation of the solicitor's account at the end of the day.[135]
2. While a solicitor cannot rely on an oral agreement fixing the amount of his or her fees, and thereby avoid taxation, the client can rely upon such an agreement to limit the solicitor's fees.[136]

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133 *Cohen v. Kealey & Blaney*, [1985] W.D.F.L. No. 1978 (Ont. C.A.).

134 *Holden, Murdoch & Finlay v. Reicher*, [1986] W.D.F.L. No. 1795 (Ont. Assess. O.).

135 *Re Kapoor*, [1983] 4 W.W.R. 589 (Sask. Q.B.).

136 See, *e.g.*, *Fitch v. Fort Frances Pulp & Paper Co.*, [1927] 4 D.L.R. 811 (Ont. C.A.); *Evans, Keenan v. Paolini* (1976), 2 C.P.C. 113 (Ont. H.C.).

3. Where a solicitor and client agree upon a retainer under which the solicitor is to personally provide legal services to his or her client, and subsequently assigns part of his or her responsibility to juniors or paralegals in his or her firm or does not properly supervise them, the solicitor cannot expect to be compensated for the work of the juniors or paralegals at the same hourly rate as the solicitor quoted for his or her services to the client.[137]
4. If a solicitor, at the commencement of a retainer, provides his or her client with an estimate of anticipated professional services and disbursements, and the estimate subsequently proves to be inadequate, the client, if expected to pay higher legal fees, must be informed of the solicitor's revised calculation of legal expense.[138]
5. The fact that the practitioner's hourly rate is fair and the number of hours devoted to his or her performance of a retainer are reasonable in the circumstances, affords no assurance that the resulting account for service will be approved of on taxation. On the taxation of such an account, the taxing office may also have regard for "the responsibility assumed by the solicitors; the skill and confidence brought to the retainer by the solicitors; the amount involved; the importance of the matter to the client; the complexity of the matter; the results obtained; and the ability of the client to pay the account."[139]
6. Particularly where domestic proceedings are protracted, interim billings or periodic reporting by practitioner to client on the cost of legal representation is desirable. The failure to do so may result in taxing down of the practitioner's account. On the other hand, where a solicitor "discusses with his client, before embarking on the work, the hourly rates which the solicitor will charge and where he advises the client from time to time of what the account amounts to by interim bills, the client

137 See, *e.g.*, *Re Rice* (1983), 118 A.P.R. 90 (N.B.Q.B.); *Re Kapoor, Selnes & Associates* (1984), 36 Sask. R. 280 (Sask. Q.B.); *Dranoff & Assoc. and Cornell*, [1985] W.D.F.L. No. 629 (Ont. Assess. O.); *Elliott, Warne, Carter v. Scott*, [1984] W.D.F.L. No. 850 (Ont. H.C.).

138 *Re Jensen* (1982), 107 A.P.R. 391 (N.B.Q.B.).

139 *Dranoff & Assoc. and Cornell*, [1985] W.D.F.L. No. 629 (Ont. H.C.).

has little complaint if the interim bills are accepted because the client has had an opportunity either to object to the method of billing and the amount of the bill and, if need be, to change solicitors or to give instructions rather than incurring further costs."[140]

7. Solicitors are discouraged from paying their accounts for professional services and disbursements from settlement proceeds of an action and remitting the balance to the client, without first having the client's agreement to proceeding in this fashion.[141]
8. An account rendered by a solicitor to his client and subsequently presented for taxation must contain such descripton of the nature of the services rendered as would, in the opinion of a taxing officer, afford another solicitor sufficient information to advise the client on the reasonableness of the charges made.[142]

Factors influencing the determination of taxation of a family law practitioner's account to a client have included: the practitioner's failure to understand and exercise the requisite degree of control over a client;[143] taking more time than reasonably required to perform instructions;[144] work resulting from the practitioner underestimating a client's living expenses;[145] charging for work a client was told would not be billed;[146] charging on an hourly basis without sufficient regard for the kind of legal service being performed;[147] failure to inform a client that his or her instructions

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140 *Morscher & Fehrenback v. Fetter*, [1985] W.D.F.L. No. 1958 (Ont. H.C.); *Peikes & Halpert v. Strul*, [1985] W.D.F.L. No. 759 (Ont. H.C.).

141 See, generally, *Re Randell and Robins & Robins* (1979), 22 O.R. (2d) 642 (Ont. H.C.).

142 *Re Wright; Wright v. Wright* (1984), 48 C.P.C. 42 (B.C.C.A.).

143 *Mesbur v. Morand*, [1986] W.D.F.L. No. 570 (Ont. Assess. O.); *Re Keenan* (1983), 124 A.P.R. 237 (N.B.Q.B.).

144 *Lang, Michener and Cranston v. Newell*, [1986] W.D.F.L. No. 1897 (Ont. Assess. O.); *Re Cronkhite* (1983), 126 A.P.R. 262 (N.B.Q.B.).

145 *Dranoff & Assoc. and Cornell*, [1985] W.D.F.L. No. 629 (Ont. H.C.).

146 *Stapells & Sewell v. Elliott*, [1985] W.D.F.L. No. 1600 (Ont. S.C.).

147 *Re LeBlanc, LeBlanc v. Clarke* (1980), 32 N.B.R. (2d) 462 (N.B.Q.B.); *Re Ruddock* (1982), 118 A.P.R. 44 (N.B.Q.B.).

could be performed by the Crown without legal expense;[148] the fact an unco-operative client is an occupational hazard, the family law practitioner must accept without charging *per se* for the resulting practitioner frustration;[149] a result from which the practitioner claimed more than 50 per cent;[150] the practitioner's failure to comply with procedural rules respecting contingency fees;[151] failure to inform a client that a bonus would be billed in the event of success in litigation;[152] and, lack of adequate keeping of time-sheet records to document hours of legal services claimed.[153]

Questionable, however, is the opinion of a justice of the New Brunswick Court of Queen's Bench in *Soucy v. Lee*, in which he wrote:

> The client expects the lawyer to be a legal advisor, crying-towel and social worker all at the same time . . .
> . . . If the solicitor allows the client to take up her time for other than professional services a substantial lower fee should be chargted.[154]

In my respectful view, family law practitioners will find extremely difficult the task of identifying, on a taxation, what portion of the time spent on a client's legal matters are, strictly speaking, "professional services" rather than time occupied affording comfort and nurture to a spouse suffering rejection or experiencing guilt. The discussion of such collateral matters is usually inextricably bound up with legitimate discussion of the client's legal concerns.

A practitioner may be required by his or her own client to submit an account for services to taxation. Where the practitioner is responsible for undue delay in matrimonial proceedings, he or she may be condemned to pay the taxed solicitor and own client

148 *Michaud v. Landry* (1981), 33 N.B.R. (2d) 440 (N.B.Q.B.).
149 *Re Rice* (1983), 45 N.B.R. 90 (N.B.Q.B.).
150 *Sherman v. Lasko* (1983), 23 Man. R. (2d) 236 (Man. Q.B.).
151 *Re Solicitor* (1977), 31 A.P.R. 168 (N.S.T.D.).
152 *Gaglardi v. Gaglardi*, [1983] 4 W.W.R. 752 (B.C.S.C.).
153 *Smith, Hutchison & Gow and Patridge v. Van't Reit* (1985), 63 B.C.L.R. 41 (B.C.C.A.).
154 (1983), 134 A.P.R. 119 at 122 (N.B.Q.B.).

costs of the opposing spousal party to litigation,[155] or the practitioner may suffer party-and-party costs"thrown away by taking inappropriate proceedings."[156]

Further, a practitioner may cause a client to have a claim for costs dismissed—such as by precipitously commencing matrimonial proceedings on the client's behalf.[157]

(iv) *Criminal liability*

One further feature of legal responsibility deserves mention. That is misconduct resulting in a finding of guilt,[158] or a conviction, for a crime. In that event, civil action for breach of legal responsibility, as well as career-threatening disciplinary proceedings for trespassing upon professional responsibility are almost certain to ensue.

With increasing frequency, lawyers have been found guilty of or convicted for theft, fraud, forgery, uttering, and perjury, to cite several examples.

Perhaps most serious are breaches of legal responsibility involving criminal offences of murder, sexual assault, and aggravated sexual assault (formerly described as "rape").

In September, 1986, a London, England solicitor was charged with murdering a woman and her child and was arrested on the steeple of a church in Amiens, France.[159]

Domestically, a family law practitioner was charged with the rape of his client in his law office. The bizarre facts elicited on his trial for the offence comprise a compendium of prohibited conduct for family law lawyers in their relationships with their retainors.[160]

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155 *S. v. S.* (1978), 122 Sol. Jo. 541; *Mason v. Mason* (1982), 28 C.P.C. 249 (N.S.T.D.).

156 *Peterson v. Peterson*, [1952] O.W.N. 452 (Ont. H.C.).

157 *Beer v. Beer* (1906), 22 T.L.R. 367.

158 Criminal Code, R.S.C. 1970, c. C-34, s. 662.1 [en. 1972, c. 13, s. 57; 1974–75–76, c. 93, s. 80; c. 105, s. 20; 1984, c. 40, s. 79(2)].

159 The Times, Tuesday, September 30, 1986, No. 62,575, pp. 1, 18.

160 *R. v. Fitzgerald* (1980), 42 N.S.R. (2d) 301 (N.S. App. Div.); appl. for leave to appeal to S.C.C. dismissed (1981), 45 N.S.R. (2d) 180.

5. PROSPECTUS

For the future the most necessary innovation in family practice must be counsel's enhanced capacity to provide a palliative approach to separating marital partners, in the course of being professionally and legally "skilful and careful" while "protecting the client's interests."

I concur with Professor John H. Wade that:

> Many lawyers fail to appreciate clients as human beings who have emotional, spiritual and physical needs. Instead, the client is seen as someone with a 'legal' problem which can be 'solved' by the division of children, assets and money. Yet, at the time his marriage breaks down, a client usually experiences a deep sense of loss—of a spouse, reputation, financial security, family home, friends, pride, or hope for the future. Moreover, whether a lawyer likes it or not, it is clear that he is involved in the emotional life of his client. To ignore or resist this proposition is a financial and emotional disservice to the client.

In brief, the problems of marital parting reflect a multitude of professional and legal dimensions.

As practitioners, we must address them with patience which falls short of patronizing.

As practitioners, we must identify cases appropriate for invoking a team approach that draws on resources of counsellor and conciliator, psychiatrist and psychologist, educator and evangelical, accountant and appraiser, social and other scientist, and mediator and money manager. By so doing, we must not abdicate to resource persons any of our practitioner responsibilities.

As practitioners, we must strive to settle, without compromising our clients' legitimate entitlement to proprietary, custodial and/or financial relief.

As practitioners, we must be ever conscious of our role as legal architects of the personal and proprietary future of those who consult us.

As practitioners, we must avoid suspicion of Elton John's complaint that "the legal boys have won again," in the scruples we employ, in the quantum and quality of time we afford, and in the account we levy, our parting clients.