# Principles and Practice of Legal, Ethical and Professional Responsibility

**[2016]**

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## EXPLANATORY NOTES

**[1]** Each entry in the Detailed Table Of Contents of this annotated anthology—of principles and practices of legal, ethical and professional responsibility—is hyperlinked to the text of that entry included in the anthology. An annotation to the text of an entry, included in the anthology, is identified by "Editor's Note".

**[2]** The text of each entry included in the anthology is, in turn—with few exceptions—hyperlinked, by the designation [**Full Text**], to the full document from which each text was excerpted. In some instances, the full document has been reproduced in the anthology.

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## PROGRAM PRESENTATION

Presenting at the 2016 National Family Law Program, based on this anthology, will be **Trudi L. Brown, Q.C.**, Victoria Barrister and Life Bencher of the Law Society of British Columbia, and **David C. Day, Q.C.**, St. John's Barrister and Master of Newfoundland and Labrador Supreme Court.

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## ACKNOWLEGEMENT

Gratefully acknowledged, for transcribing, formatting, and hyperlinking of this annotated anthology; verifying the currency of all judicial decisions, and producing both appendices to Part 1.0 – INTRODUCTION, is **Kelly A. Hall**, the senior legal assistant of the anthology author and editor for 19 years**.**

**David C. Day, Q.C.**

**01 June 2016**

# PRINCIPLES AND PRACTICE OF LEGAL, ETHICAL AND PROFESSIONAL RESPONSIBILITY

**[2016]**

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## SYNOPSIS

*This anthology comprises a comprehensive introductory chapter followed by excerpts from, and summaries of, judicial and administrative decisions, transcripts, book and journal scholarship, legislation, reports, manuals, and media cuttings (usually omitting footnotes or endnotes) on principles and practice of legal, ethical and professional responsibility; most of which were published from June 2014 to 30 May 2016*

*Eleven comparable previous anthologies—cumulatively covering the period 03 September 1189 (the birth date of legal memory) to June 2014—are posted at: http://www.lewisday.ca/ethics.html. This anthology will, on 21 July 2016, be posted to the same Internet address.*

**01 June 2016**

**TABLE OF CONTENTS**

**(GENERAL)**

**TABLE OF CONTENTS**

**(DETAILED)**

## 1.0 INTRODUCTION

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## 1. Overview

Legal responsibility mandates what practising lawyers must do.

Ethical responsibility counsels what they should do.

Professional responsibility advocates what they could aspire to do.

This trinity of overlapping species of responsibility needs infuse lawyers' daily ritual—propelling among multiple practise crises—to enable them deserve, serve, and be profitably reimbursed by, clientele. Concurrent respect for each of the responsibility species fulfills the entreaty of former New York Yankee baseball catcher, Yogi Berra: 'when you come to a fork in the road—take it'.

Cumulatively, the three responsibility species direct, advise, and animate practising lawyers in discharge of their professional duties. Those duties implore them satisfy their clients' instructions as courteous, conscientious, unconflicted, competent, candid, constant, committed, and confidences-keeping counsel.

In honoring client instructions, lawyers are obliged to be "zealous advocates within the constraints of legality," contends Professor Alice Woolley, University of Calgary (*Understanding Lawyers' Ethics in Canada* (Markham [ON]: LexisNexis Canada Inc., 2011), p. 2).

Interpretation of and adherence to the responsibility trifecta—addressed in this anthology—is subject to a caveat. Honorable Michel Proulx, a Justice of Quebec Court of Appeal (at his passing), and David Layton, Vancouver civil and criminal litigator, articulate the caveat in

their book (invaluable to all law practitioners; though narrowly titled) *Ethics And Canadian Criminal Law* (Toronto: Irwin Law Inc., 2001, at p. 3):

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

Unmistakably clear, however, is that no algorithm exists, or is likely to be devised, capable of piloting practitioners through the intricacies which responsibility presents.

## 2. This Anthology

Comprising this 2016 anthology are, principally, excerpts from, and summaries of, judicial and administrative (i.e., disciplinary) decisions, transcripts, book and journal scholarship, legislation, reports, manuals, and media cuttings (some annotated with an Editor's Note). They were selected from 13,165 examined documents published, primarily, from June 2014 to May 2016. Modest editing was performed to lend to clarity.

Most excerpts and summaries are hyperlinked to their full texts. Likewise hyperlinked from the anthology to their full texts are every Loss Prevention Bulletin from May 1991 to May 2016 (Appendix A) and every Loss Prevention E-Byte from December 2008 to May 2016 (Appendix B) published by the Canadian Lawyers Insurance Association.

Conduct of the law vocation, like life itself, is not a dress rehearsal. Faithful heed to responsibility (and implicit accountability) in its three personalities unsullied by life's other demands—or life's vices—is paramount when lawyers are tasked with client dilemmas. Not

infrequently, those dilemmas are abundantly complex; their resolution, sleep-depriving and patience-depleting; and their financial yield, parsimonious.

Entries in this anthology are replete with law practice failings. Behaviour of not a few lawyers mirrors John Lennon's lyrics: "Life [such as in the law] is what happens to you *while* you're busy making other plans." Those law practitioners, at their peril, derogated from, or disregarded, responsibility.

In Canada, as in other jurisdictions, standards begotten by the three species of responsibility reach, beyond law practise, into a lawyer's personal life. Stated Julia Dias, Q.C., chair of England's Bar Disciplinary Council on 27 May 2012, "You are a member of a profession which is expected to adhere to higher standards than ordinary members of the public." She was penalizing a young London lawyer found in possession, in December 2011, of personal-use quantities of illegal drugs (cocaine and Ecstasy). The lawyer's father, incidentally, had been known as 'Mr. Payout' for his formidable reputation in family law proceedings before his appointment, in April 2010, to what was then Family Division of the High Court. (The father had been divorced by the young lawyer's mother after the father started a relationship with a family law barrister whose spouse—also a family law barrister—was killed in 2008 by police when he threatened them with a firearm.)

## 3. Previous Anthologies

Eleven previous, comparable anthologies canvas the period from birthdate of legal memory (03 September 1189) to 2014. They are published at: http://www.lewisday.ca/ethics.html as will be this twelfth anthology, from 21 July 2016.

## 4. Providing Legal Services

### (a) Service Personnel

The constituency of this anthology are members of the ten provincial and three territorial law societies—especially those practicing 'family' law—and the Chambre des Notaires du Quebec. Their memberships totalled—as of 31 December 2014—125,190 lawyers and Quebec notaries; 41.63% of them female (8,058 more members, male and female, than in 2013). (The figures rely on the most recent (2014) Federation of Law Societies of Canada annual report; which

includes, nationally, such categories of lawyers—although Federation figures for them are incomplete—as "non-resident", "non-practising", "suspended", "disbarred", "retired", "life", "honorary" and "disabled" and, in Quebec, 4,480 notaries.) Of the 125,190 lawyers and Quebec notaries, 82.84% — 103,714 lawyers and notaries, 41.56% of them female —had practising status on 31 December 2014.

Of these 103,714 practising-status lawyers and Quebec notaries, the largest percentage in each of the provinces and territories (other than Nunavut, which did not report, and other than Yukon and the Northwest Territories (N.W.T.)) was in the category of "26 years plus" at the Bar: 52.04% in Manitoba; 42.12% in Saskatchewan; 40.98% in New Brunswick; 38.44% of Quebec notaries; 38.21% in Nova Scotia; 36.45% in Alberta; 35.50% in Ontario; 29.45% in British Columbia; 28.75% in Prince Edward Island; 28.25% in Barreau du Quebec, and 28.10% in Newfoundland and Labrador. In Yukon the largest number of lawyers had practiced 0-5 years (30.49%). In the N.W.T., the largest number had practiced 6-10 years (28.54%). (Categories in the Federation's 2014 report are: 0-5 years; 6-10 years; 11-15 years; 16-20 years; 21-25 years, and 26 years plus.)

Lawyers practicing 26 or more years, nationally, in 2014, comprised 41.12% (42,651) of lawyers and notaries with practicing status; of which 23.90% (10,194) were female.

Incidentally, one lawyer in Canada who, in 2014, qualified—and continues to qualify—for "26 years plus" is Hon. P. Derek Lewis, Q.C. of the Newfoundland and Labrador Bar (senior partner of the anthology's editor) who will, on 14 October 2016, toll 69 years in private law practise. (Among the surely modest cadre of lawyers currently practicing longer than Lewis, Q.C., in North America, is State of Maryland attorney W. Jerome Offutt, age 98, who has practised for 77 years.)

Federation 2014 report data shows that by gender, in Canada, male outnumber female lawyers in all jurisdictions, except Quebec where 51.10% are female. In the Chambre des Notaires du Quebec, female notaries account for 62.83% of its membership.

**(b) Service Vehicles**

As best can be extrapolated from Federation 2014 report figures, sole practitioners form the most frequent vehicle for legal service delivery in Canada. (Quebec and Nunavut did not report.) Sole practitioners, as of 31 December 2014, comprised not less than; 69.98% in Ontario; 58.18% in N.W.T.; 44.73% in New Brunswick; 42.14% of Quebec notaries; 35.94% in British Columbia; 30.69% in Manitoba; 29.55% in Nova Scotia; 26.26% in Yukon; 25.33% in Newfoundland and Labrador; 21.14% in Alberta; 19.81% in Saskatchewan, and 17.97% in Prince Edward Island. (Most of these percentages understate the extent of sole practitioner service delivery. The reason is that available Federation 2014 statistics do not specify the number of sole practitioners who are professional corporations. Further, however, in Ontario, a 'sole practitioner' is determined solely by a lawyer's status and does not take into account the size of the law firm with which s(he) practises; regardless of whether s(he) practices solo or with others. In the Barreau du Quebec, which omitted to report for 2014, the 'sole practitioner' represented not less than 92.09% of service delivery entities, in 2013.

Across Canada in 2014, 34.69% of the 30,917 entities delivering legal service (other than in Quebec and Nunavut, which did not report) were professional corporations.

**(c) Service Delivery**

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

The agreements, facilitated by the law societies' federal supervisory umbrella organization—Federation of Law Societies of Canada (further addressed below in section 5(d) of this Introduction)—serve to recognize the constitutional right of Canadian lawyers to practice anywhere in the country (*Canadian Charter of Rights and Freedoms*, ss. 6(2) and (3)).

The National Mobility Agreement, made in 2002, permits lawyers to transfer, temporarily (maximum 100 days) or permanently, between Canadian common law jurisdictions (other than the three territories) based on their 'home' common law jurisdiction license, absent additional

assessment. All law societies—other than societies of the three territories and other than the Chambre des Notaires du Quebec (Chambre)—have signed the National Mobility Agreement.

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

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

The Territorial Mobility Agreement, made in 2006 and renewed in 2011, provides for reciprocity between 'territorial' lawyers and those of other Canadian common law jurisdictions on a permanent, but not temporary, basis. All law societies—other than the Chambre—have signed the Territorial Mobility Agreement.

Significant mobility changes are imminent. The National Mobility Agreement, 2013 (signed or to be signed by all societies (including the Chambre) other than the territorial law societies) extends its mobility provisions such that Canadian 'common law' and 'civil law' lawyers can transfer among each other's Canadian jurisdictions—and Quebec notaries can transfer to other Canadian jurisdictions—with ease, regardless of whether they are trained in common law or civil law. The Agreement will replace the 2002 National Mobility Agreement, and both the 2008 Quebec Mobility Agreement and its 2012 Addendum. The Territorial Mobility Agreement, 2013 (signed or to be signed by all law societies) will import provisions of the 2013 National Mobility Agreement and pertinent provisions of the replaced 2006/2011 Territorial Mobility Agreement.

The mobility agreements do not create any rights, as such, to practice outside one's province or territory. Rather, they provide a framework for each signatory to each of the

agreements to apply its own rules of implementation to lawyers commuting or re-locating between Canadian jurisdictions.

In 2014, 565 lawyers transferred permanently; principally from one to another Canadian jurisdiction.

Mobile lawyers should consult their professional liability insurers before practising outside their 'home' jurisdictions.

**(d) Service Remuneration**

In June 2015, *Canadian Lawyer* magazine published results of its national 2015 Legal Fees Survey. (Polling for the 2016 Legal Fees Survey ended in May 2016; probably to be reported during summer 2016.)

"After years of steady decline," reports Michael McKiernan on *Canadian Lawyer* magazine's 2015 Survey, Canadian litigation fees have finally returned to the heights of the pre-global recession, but Canadian lawyers aren't happy about it."

An Ontario sole practitioner, who responded to the 2015 Survey, "lamented the level of litigation fees, called them 'a shame … . I think they are high enough to keep many issues away from resolution and legal advice'." A British Columbia lawyer, practicing with a small firm in Vancouver, asserted that the price of litigation "is costing them business. 'It prevents most of my clients from enforcing commercial agreements'," the lawyer wrote.

In Alberta, Mr. McKiernan's report states, "a lawyer in a mid-size firm said the profession gets a rough deal from the public when it comes to fees: 'It's very fashionable for people to talk about them being too high, especially judges who make north of $300,000. …. I wish people knew what they actually paid their doctor or banker'."

The following table, prepared from information reported by the 2015 Survey, shows the-then hourly rates of Canadian lawyers, classified by years at the Bar, region, and law firm size:

| Hourly Rates: | Called< 1995 | Called 1995 | Called 2005 | Called 2010 | Called 2014 |
|---|---|---|---|---|---|
| **National** | **407** | **411** | **360** | **291** | **230** |
| **Atlantic/Quebec** | **327** | **382** | **303** | **263** | **204** |
| **Ontario** | **431** | **436** | **378** | **300** | **235** |
| **Western** | **416** | **415** | **364** | **295** | **233** |
| **1-4 Lawyer Firm** | **364** | **355** | **343** | **269** | **246** |
| **5-25 Lawyer Firm** | **471** | **445** | **378** | **310** | **232** |
| **26+ Lawyer Firm** | **481** | **420** | **346** | **280** | **186** |

Respondents to the 2015 Survey "were once again split down the middle on the issue of further price rises," reports Mr. McKiernan, "with just under 50 per cent opting for a freeze in the next year, and 48 per cent planning to increase fees. Just two per cent are aiming for a fee decrease. Things were different in Alberta, where the plunging price of oil has hit the economy, and respondents said lawyers are feeling the knock-on effects. In that province, about six of every 10 respondents opted for a no-change approach to what they're charging clients."

The report on the 2015 Survey explains that "[t]he most commonly cited reasons for price rises included inflation and surging overhead costs, as well as the increasing complexity of the legal work lawyers are taking on. In Ontario, one sole practitioner said their price rise was a tactic to 'weed out the chaff' from a busy practice, while an honest Alberta lawyer from a mid-sized firm said they simply 'want to make more money'."

"For those cutting and freezing rates," Mr. Mckiernan writes, "competition and client demands were the driving factors: 'Economically conditions are so tight that people generally aren't willing to pay more,' wrote one small-firm lawyer, from Ontario."

The 2015 Survey tabularizes national total-fee-for-service ranges by practice areas: civil litigation, corporate, criminal, family, immigration, intellectual property, labour and employment, real estate, and wills and estates. The Survey results for family law practice, nationally, follow:

| Family Law | Average | Minimum | Maximum |
|---|---|---|---|

| | | | |
|---|---|---|---|
| **Uncontested divorce** | **1,845** | **1,239** | **2,846** |
| **Contested divorce** | **13,638** | **6,145** | **87,974** |
| **Separation agreement** | **2,130** | **1,417** | **7,234** |
| **Child custody and support agreement** | **2,033** | **1,295** | **7,788** |
| **Trial up to 2 days** | **18,706** | **11,883** | **36,367** |
| **Trial up to 5 days** | **35,950** | **23,788** | **79,808** |
| **Marriage/Co-habitation agreement** | **1,727** | **1,239** | **4,696** |
| **Spousal support agreement** | **2,208** | **1,376** | **12,959** |
| **Division of property/assets agreement** | **2,436** | **1,720** | **14,781** |

More precise lawyer service remuneration data—for calendar years 2010 to 2014—is supplied by Canada Revenue Agency. The data, in a study by actuary Haripaul Pannu for assistance of Department of Justice Canada in its dealings with the 2015 Judicial Compensation and Benefits Commission, was obtained by Cristin Schmitz and reported by her in the 22 April 2016 edition of *The Lawyers Weekly*.

Ms. Schmitz writes: "Self-employed lawyers between the ages of 36 and 69 reported an average net professional income in 2014 of $211,730—up slightly from the year before [2013], but down from $223,020 in 2010, $216,965 in 2011 and $218,820 in 2012, … ." She continues that "[i]n 2010, the average income for lawyers in the 65$^{th}$ percentile (i.e. below which 65 per cent of lawyers' incomes fall) was $198,030, which declined 5 per cent to $188,138 in 2014. Similarly, the average income for those in the 75$^{th}$ percentile dropped 5 per cent from $274,058 in 2010 to $261,363 in 2014." However, Department of Justice analysis of the Pannu study concluded that self-employed lawyers' incomes, on average, "stagnate and/or decrease significantly" after age 56.

Among the top 5 per cent of self-employed lawyers, in 2014, Ms. Schmitz reports, "net average income maxed out at about $1.1 million in 2014, down from $1.2 million in 2010."

By city, in 2014, she states, "the average incomes of lawyers who were in the 75$^{th}$ percentile were: Toronto: $388,020; London and Hamilton $372,955; Calgary $333,815; Edmonton

$301,140; Vancouver $266,470; Montreal $261,955; Ottawa-Gatineau $240,315, and Quebec City $212,890.

Conversations about lawyer legal service remuneration have lately been joined by the judiciary.

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

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

On 01 December 2014, Justice Sarah A. Pepall for a unanimous Ontario Court of Appeal wrote that ". . . there is something inherently troubling about a billing system that pits a lawyer's financial interest against that of its client and that has built in incentives for inefficiency." Following a précis of the history of what she calls "The Rise and Dominance of the Billable Hour," she realistically portrayed hourly invoicing in less than shimmering language: " … each hour is divided into 10 six-minute segments, with six minutes being the minimum docket. So, for example, reading a one line e-mail could engender a 6 minute docket and associated fee. This segmenting of the hour to be docketed does not necessarily encourage accuracy or docketing parsimony." She continued: "In my view, it is not for the court to tell lawyers and law firms how to bill. That said, in proceedings supervised by the court and particularly where the court is asked to give its imprimatur to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable." (*Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII).)

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

Coincidentally, an 84-page study published earlier this year by the Barreau du Quebec, entitled "Hourly Billing: A Time for Reflection," urges Quebec lawyers, for "survival of the profession", to move from hourly billing to alternative pricing arrangements, to better serve their clients. About 70 per cent of Quebec lawyers currently invoice by the hour.

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

## 5. Responsibility

### (a) Sources

Informing responsibility in 'family' law practice—and, in law practice generally—are organic components that Justice Proulx and Mr. Layton characterize as "diverse and fluid"; components which, "taken together, serve to develop and reflect the general principles[,] and shape lawyers' actions and ideals, … ." Among them are "formal codes of professional responsibility, the views and writings of lawyers, events actually occurring in the courtroom, the demands and needs of clients, disciplinary decisions by governing bodies, judicial pronouncements, the

expectations of the public, and the teachings and reflections that occur in law schools." Together with scholarship in books and journals, and to be found at other sources, they "constitute the legal culture that frames and influences ethical debate" respecting responsibility. (*Ethics and Canadian Criminal Law,* p. 3.)

To these sources should be added the ingredients of legislation and lawyer self-governance rules—complementing formal codes—as well as parables of common sense and, of course, solicitor-client retention agreements (in Quebec: mandates).

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

**(b) Challenges**

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

Accounting, principally, for such issues in 'family' law is clientele described by Justice Mathew Thorpe (*Gazette* [U.K.]) on 19 January 1994, while sitting in the Family Division of what was then England's High Court (now, the Supreme Court):

> Those who undergo both marital breakdown and contested litigation in its wake are generally, if transiently, emotionally and psychologically disturbed. Being unstable they are vulnerable. A great deal of hope and faith is invested in their chosen advocate who becomes for a short phase in their lives protector and champion. The opportunity for the lawyer to abuse that dependent trust [being exposed to the risks and temptations of entanglement with a client] is obvious.

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

In such circumstances, responsibility issues abound for the practitioner. Most fundamental are: (i) should s(he) agree retention? (ii) Is the potential client capable of agreeing and affording retention? And, (iii) is the potential client, more probably than not, manageable?

"Although a lawyer's opinion of the justice of a client's case is not relevant … in the sense that it may not be injected into the case," senior Ontario private practitioner Mark M. Orkin, Q.C. writes, in *Legal Ethics* 2nd Ed. (Toronto: Canada Law Book, 2011, at p. 226),

> this should not be taken to mean that the opinion is of no consequence or that a lawyer should not consult his or her own conscience before accepting a retainer. No lawyer is required to go against the dictates of his or her own conscience, or to take a case which the lawyer personally believes not to be just.
>
> It has been said that a lawyer is under no duty to inquire as to the truth of a client's case. Yet it was also said that counsel in a divorce action is under a duty to make sure, as far as possible, that he is not being deceived by his client. If he suspects this is happening, he is under an obligation to bring his suspicions to the attention of the court [*Holowaty v. Holowaty & McDermid*, [1949] 1 W.W.R. 1064 (Sask. K.B.), at p. 1068]. However, in the absence of any evidence to the contrary, lawyers are not required to convince themselves, by something like an original investigation, that a client is in the right before undertaking the duty of acting for a client. To reject a client's story because it seems improbable would be to usurp the office of the judge and lead to great injustice. As has been said, 'Very little experience of courts of justice would convince anyone that improbable stories are very often true, notwithstanding their improbability'.

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

### (c) Legal Responsibility

#### (c.1) Overview

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

#### (c.2) 'Judicial' accountability to court

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

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

**(c.3) Regulatory accountability to governance authority, and public**

Provincial and territorial legislatures, like courts, have largely defaulted to law societies the governance of lawyers; including their ethical regulation and discipline.

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

Some provisions of legislation under which lawyers' governance societies enjoy legal standing, together with rules made by societies, and societies' adaptations of the *Model Code of Professional Conduct*, crafted by the Federation of Law Societies of Canada (further addressed below in section 5(d) of this Introduction) memorialise regulatory accountability of law practitioners to their professional societies and the public. Conduct incongruent with required regulatory accountability exposes practitioners to investigation by, and if warranted, disciplinary processes of, the societies (not to mention, penal or criminal prosecution).

Nationally, in 2014, complaints, and disciplinary responses to, and other resolutions of, them—based on analysis of reported Federation of Law Societies of Canada statistics—totaled as follow. (Chambre des Notaires du Quebec did not report.)

**Complaints received: .....10,985**

**Complaints screened out: .....3,376**

**Informal resolutions: .....2,304**

**Other dispositions (other than from informal resolutions and disciplinary charges): .....4,410**

**Complaints resulting in charges: .....251**

**Discipline panel charges hearings: .....514**

**Acquittals of charges: .....37**

**Charges sustained: .....270**

**Disbarments: .....52**

**Suspensions: .....98**

**Resignations: .....404**

**Custodial orders: .....28**

(Note that the statistics show complaints received in 2014, and one or another disposition resulting from complaints received in 2014 or in earlier years.)

### (c.4) Civil accountability to clients

Common law and retention agreements (in Quebec: mandates)—as well as instruments (e.g., codes of conduct) prescribing professional accountability—define practitioner civil accountability to their clients; whether in tort, under contract, or by fiduciary obligation. As detailed by Madam Justice Sheilah L. Martin, in her 587-paragraph (essential reading) Reasons For Judgment on 24 March 2016, in *Luft v. Zinkhofer* (2016 ABQB 182 (CanLII)), at paragraphs 51 to 58:

> [51] A lawyer's duties under the retainer, and contract and tort law, are to exercise the standard of care of a reasonably competent member of the profession in similar situations: *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 SCR 147. In a professional malpractice suit, the plaintiff must demonstrate that a

lawyer's failure was not merely an error of judgment, but must constitute actionable negligence: see *Folland v Reardon* (2005), 74 OR (3d) (CA), at para 44 [*Folland v Reardon*].

[52] In addition to actionable negligence, it is also possible, although more rare, for clients to allege that the conduct of their lawyer amounts to the tort of fraud and deceit. According to the Supreme Court in *Bruno Appliance v Hryniak*, [2014] 1 SCC 126, 2014 SCC 8 (CanLII), there are four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss: [*Bruno Appliance v Hryniak*] at para 21.

[53] Lawyers also owe certain fiduciary obligations to their clients under the law of equity. Obligations characterized as fiduciary involve three essential principles. A lawyer must represent a client with undivided loyalty, preserve a client's confidence, and make full disclosure of all relevant and material information relating to a client's interests. See *Perez v Galambos*, 2009 SCC 48 (CanLII). In *3464920 Canada Inc v Strother*, 2007 SCC 24 (CanLII), Justice Binnie, speaking for the majority stated at paragraph 1:

A fundamental duty of a lawyer is to act in the best interest of his or her client to the exclusion of all other adverse interests, except those duly disclosed by the lawyer and willingly accepted by the client. […]

[54] A lawyer's fiduciary obligations are separate from the common law duties arising in contract and tort, but there are parallels between them. This means a single course of conduct by a lawyer may give rise to liability both as a fiduciary and in negligence or breach of contract: see *Canada Trustco Mortgage Co v Bartlet & Richards*, (1991) 1991 CanLII 7336 (ON SC), 3 OR (3d) 642, 26 ACWS (3d) 1355 (Ont Gen Div), aff'd [(1996) 1996 CanLII 526 (ON CA), 28 OR (3d) 768, 62 ACWS (3d) 1222 (Ont CA). The test of liability in each category, however, is different.

[55] Lawyers, as part of a self-governing profession, are also expected to conduct themselves with high ethical standards. The conduct of lawyers in Alberta is regulated by the Law Society of Alberta Code of Professional Conduct. The Code of Conduct provides practical guidance about the rules governing ethical behaviour. There may be overlap between civil liability and professional responsibility. For example, a section of the Code can set out conduct which is also part of the retainer and/or forms the standard of care of a reasonable lawyer in like circumstances. Similarly, the professional obligation may inform the content of a fiduciary duty. However, they remain separate. Although conformity or non-conformity with an ethical rule may influence a court's decision of whether a contractual, fiduciary or negligent breach has occurred, such breaches are still distinct from breaches of the applicable code of professional conduct.

[56] The Alberta Code of Conduct requires that a lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer: The

> Law Society of Alberta, *Code of Conduct*, Edmonton: LSA, 2015 ("Alberta Code of Conduct"). Section 2.02 (1) provides:
>
> A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.
>
> [57] The commentary pursuant to section 2.02 (1) provides some examples of expected behavior including *inter alia*, keeping a client reasonably informed and taking appropriate steps to do something promised to a client.
>
> [58] When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter. A lawyer has a duty to maintain, respect and strengthen this trust. The Code provides further that a lawyer must obtain instructions from the client on all matters not falling within the express or implied authority given by the client.

Another noteworthy recent civil accountability proceeding, for damages, by a former client against a lawyer (in this instance, practicing 'family law')—which, unlike *Luft v. Zinkhofer*, was dismissed—is *Rider v. Grant* (2015 ONSC 5456 (CanLII)).

A significant indicator of financial consequences of negligent discharge by lawyers of their civil legal responsibility to account is furnished by the 2015 annual report of LawPRO (Lawyers' Professional Indemnity Company, which in 2015 underwrote errors and omissions coverage for over 25,500 Ontario lawyers). Total claims reported from 01 March 2015 to 29 February 2016—2,542—were slightly lower than during the prior 12-month period. Originating in family law practices were 6.78% of the total claims. Average cost of a fully-reserved claim was almost $40,000.00. About 220 of the claims exceeded, in value, $100,000. "We are seeing disconcertingly high levels in types [of claims] such as time management, failure to either know or apply the law, as well as inadequate investigation," reported Kathleen A. Waters, President and CEO of LawPRO.

Assessment of damages in civil claims against lawyers is addressed by Arnie Herschorn in "On The Measure Of Damages in Solicitor's Negligence Cases" ((2011), 90 Can. Bar Rev. 151).

### (d) Ethical Responsibility

#### (d.1) Overview

Informing—although not solely—the three components of legal responsibility (i.e., 'judicial', regulatory and civil accountability) is ethical responsibility. The impetus for authorship

of codes of ethical responsibility historically was Canadian Bar Association, and currently is Federation of Law Societies of Canada. Provincial and territorial law societies, in turn, have adopted or, at least, reflected such codes in their respective ethical responsibility instruments (comprised of ethical codes and other rules, complemented by some provincial or territorial legislation).

The national organization of law societies is the Federation of Law Societies of Canada. Composing the Federation are law societies of the nine provincial, and three territorial, common law jurisdictions; the civil law Barreau du Quebec, and the Chambre des Notaires du Quebec. The Federation does not have any direct regulatory authority over the legal profession. It does, however, supervise "the development of high national standards of regulation [by provincial and territorial law societies] to ensure that all Canadians are served by a competent, honourable and independent legal profession," the Federation's Internet site states.

The other national law organization is the Canadian Bar Association; a voluntary association of Canadian lawyers, students of law, law teachers and judges. Like the Federation, the Association has no regulatory authority over lawyers practicing in the provinces or territories. Unlike the Federation, the Association possesses no supervisory role; but does serve in an advisory capacity. The Association describes itself as "ally and advocate of all members of the [legal] profession [in Canada]; … the voice for all members of the profession… [whose] primary purpose is …. [to serve as being] premier provider of personal and professional development and support for all members of the legal profession; … [and] promoting fair justice systems,… [facilitating] effective law reform,… [advancing] equality in the legal profession and … [being devoted] to the elimination of discrimination."

How do the codes of ethical responsibility published by both the Federation (commencing 2009) and the Association (since 1920) affect the three constituencies of lawyer accountability?

Such ethical codes and other responsibility instruments of the respective law societies impact 'judicial' accountability only in the sense of being significant public policy.

Per Sopinka J. (for the Court) in *MacDonald Estate v. Martin* ([1990] 3 S.C.R. 1235, a decision involving the issue of conflict of duty), at para. 18:

> A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings. See, for example *Law Society of Manitoba v. Giesbrecht* (1983), 24 Man R. (2d) 228 (C.A.). The courts, which have inherent jurisdiction to remove from their record solicitors who have a conflict of interest are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy. ….

As pertains to regulatory accountability, and civil accountability, however, those ethical codes and other instruments figure instrumentally.

They are central to regulatory accountability required by law societies.

They influentially inform civil accountability to clients. For example:

(a) Martin J., in *Luft v. Zinkhofer* (2016 ABQB 182 (CanLII)) is of the view (para. 55), that if the legal matter involves a civil action for damages against a lawyer, more than serving as a public policy statement, regulatory professional standards may contribute to, or be, the standard of care.

(b) They are often pivotal in determining such legal civil matters as (i) whether costs in civil proceedings, in which practitioners are counsel, should be ordered against them personally (*Macmull v. Macmull*, 2015 ONSC 5667 (CanLII)); (ii) taxation of lawyers' invoices to clients; (iii) whether a client is competent to give instructions (*Thorpe v. Fellowes Solicitors LLP*, [2011] EWHC 61 (Q.B.) (BAILII); *Bank of Nova Scotia v. Kelly* (1973), 41 D.L.R (3d) 273 (P.E.I.S.C.)), and (iv) whether the constitutionalized solicitor-client privilege applies to particular circumstances (*Canada (National Revenue) v. Thompson*, 2016 SCC 21 (CanLII); *Canada (Attorney General) v. Chambre des notaries du Quebéc*, 2016 SCC 20 (CanLII)). They may also influence collection of fees (*Pellerin Savitz LLP v. Guindon* (S.C.C. File #36915, 09 June 2016).

### (d.2) Code of ethical responsibility: Federation of Law Societies of Canada

In the wake of the mobility agreements, the Federation of Law Societies of Canada approved, in November 2009, a *Model Code of Professional Conduct*. Development by the Federation of national standards includes, in the Federation's view, harmonization of rules of professional conduct: "With [agreements providing for] national mobility of the profession, the law societies recognize the benefit of moving toward harmonized rules of conduct so that the public can expect the same ethical requirements to apply wherever their legal advisor may practice law."

The *Model Code* has since been amended in December 2011, December 2012, October 2014, and March 2016. Resulting amendments included alterations to Code provisions addressing conflict of interest (e.g., acting against former clients); the 'future' harm' exception to solicitor-client privilege; communicating with witnesses; and the duty to report another lawyer (among other amendments). Deadline for submissions on additional contemplated Code changes was 30 June 2016.

Commencing in 2010, the Model Code—not binding on law societies of the provinces and territories—has, with modifications, been adopted by most of them.

### (d.3) Code of ethical responsibility: Canadian Bar Association

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

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

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

The Canadian Bar Association, in its advisory role, does, and will continue to afford significant other guidance to practice of law in Canada. In recognition of technology's increasing impact on Canadian legal practice, two sets of Guidelines were published by the Association: (i) *Guidelines for Practicing Ethically with New Information Technologies*, in 2008, and (ii) *Guidelines for Ethical Marketing Practices Using New Information Technologies*, in 2009. Both sets of Guidelines were authored by Canadian Bar Association's Standing Committee on Ethics and Professional Responsibility (so re-named in 2009; having formerly been called the Ethics and Professional Issues Standing Committee). Both sets of Guidelines were updated in August 2014 by a manual entitled *Practising Ethically With Technology* which in turn, in 2015, was replaced by *Legal Ethics in a Digital World.*

### (d.4) Other Canadian ethical responsibility sources

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

representation, and independent legal advice. (Chapters need be added on disengaging from clients, and negotiating settlements.) The Standards are available at: http://www.lians.ca/documents/2011%2003%2028%20Current%20Family%20Standards.pdf; http://www.lians.ca/documents/2010-06-25_StandardsIntro(2).pdf

Somewhat comparable to commentaries integral to professional conduct codes are practice bulletins of the Canadian Lawyers Insurance Association; tabularized in Appendix A, and Appendix B to this anthology.

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

### (d.5) Rules supplementing Federation's Model Code of ethical responsibility

Model Rules have been published by the Federation of Law Societies of Canada—separately from the *Model Code of Professional Conduct*—for (i) cash transactions, and (ii) client identification and verification.

The Model Rule on Cash Transactions, approved by the Federation in July 2004, recommends that "[a] lawyer shall not receive or accept from a person, cash in an aggregate amount of $7,500 or more Canadian dollars in respect of any one client matter or transaction." The stated amount has been increased by some law societies. The Model Rule on Record Keeping Requirements for Cash Transactions, also approved in July 2004, requires that records be kept for six years prior to the fiscal year of a lawyer in which s(he) destroys them, other than in Quebec where the Barreau requires such records be maintained indefinitely.

The Model Rule on Client Identification and Verification Requirements was approved on 20 March 2008, and modified on 12 December 2008, by the Federation, and has been adopted, in whole or part, by most, if not all, Canadian jurisdictions.

The Supreme Court of Canada, on 13 February 2015, dismissed an appeal by Canada (2015 SCC 7 (CanLII)) from the decision of British Columbia Court of Appeal (2013 BCCA 147 (CanLII)). The Court of Appeal had upheld the Federation's challenge of certain provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, as amended (the *Act*) and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, as amended (the Regulations), on the basis they were inconsistent with the Constitution of Canada to the extent that they applied to lawyers. The impugned provisions of the *Act* and Regulations required Canadian lawyers to (i) establish record keeping and client identification requirements for financial services providers and other persons or entities that engage in businesses, professions or activities that are susceptible to being used for money laundering or the financing of terrorist activities, and (ii) to report suspicious financial transactions and cross-border movements of currency and monetary instruments, in relation to such clients. The Federation objected to the involved legislative provisions on the basis they violated solicitor-client privilege (unlike its own cash transactions and client identification and verification model rules).

The Federation has also published National Discipline Standards to raise and standardize the bar on how law societies perform discipline functions, and how complaints are handled. They address fairness, public participation and timeliness in how the discipline process functions. The Standards were implemented by all provincial and territorial law societies effective from 01 January 2015. The Federation has also struck a Standing Committee on National Discipline Standards, whose mandate is to monitor implementation by the law societies of, and their compliance with, the standards.

### (d.6) United States Codes of ethical responsibility

In the United States, the original *Canons of Professional Ethics* (very general statements of principle) were adopted by the American Bar Association on 27 August 1908 and replaced on 12 August 1969 by the *Model Code of Professional Responsibility* (which distinguished between professional principles, and ethical rules governing discipline). The *Model Code*, in turn, on 02 August 1983, was replaced by the *Model Rules of Professional Responsibility*. The *Model Rules*, like the Federation's *Model Code* and the CBA *Code*, integrates professional principles and ethical rules and furnishes supporting commentary. About two-thirds of United States' state Bar governing bodies have approved standards based on the U.S. *Model Rules.* The other one-third of

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

### (d.7) Access to Codes of ethical responsibility

Access to documents elucidating ethical responsibility is provided by the Federation of Law Societies of Canada (www.flsc.ca); the Canadian Bar Association (CBA) (www.cba.org); and American Bar Association (www.abanet.org) Internet sites. Responsibility issues are also addressed within the American Bar Association by the Center for Professional Responsibility, whose extensive publications include *the Professional Lawyer* magazine.

### (d.8) Reception to Codes of ethical responsibility

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

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

> in terms of rules—legal ethics as the 'law of lawyering'—as well as a deep-rooted reflex to deal with problems by promulgating more of them or amending the existing ones.

**(e) Professional Responsibility**

A helpful definition of the distinction between the concepts of 'professionalism', on one hand, and 'legal' and 'ethical' responsibility (considered above in sections 5(c) and 5(d) of this Introduction), on the other, was provided by the (now-former) State of Delaware Chief Justice, E. Norman Veasey, when he was Chair of the National Conference of Chief Justices of the United States. He wrote:

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

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

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

(Conrad was there writing about yacht racing; although his sentiment is known to have served as credo of Honorable William J. English (formerly, a Provincial Court Judge at Happy Valley-Goose Bay, Newfoundland and Labrador), of many other Canadian judges, and of not a few Canadian lawyers.)

Professor Beverley G. Smith of University of New Brunswick, in his supplemented *Professional Conduct for Judges and Lawyers* (Fredericton: Maritime Law Book Ltd., chapt. 1, para. 5), has joined the debate about lawyer professionalism:

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

and

> 'The profession of law involves service as its main aim[,] and profit as an incidental.'
>
> While the debate continues, it is here submitted that the latter view is the correct one, …. .

Professionalism—not to mention legal and ethical responsibility—are perceived by some lawyers, who rarely patronize legal education programs, as being mere aspirational goals; which they honor in the breach. However, judicial attitudes toward that misguided perspective are changing. Chief Justice Veasey (as he was), when he served as Chair of the Board of the National Centre for State Courts, trenchantly wrote:

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

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

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

Leading Canadian barrister Eugene Meehan Q.C., who has written and lectured extensively about incivility, says:

> The legal profession is an adversarial profession and gladiators for justice do not always follow the motto in the Russell Crowe movie Gladiator: 'Strength and

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

Public perceptions of incivility—not to mention, self-interest—of lawyers have, doubtless, contributed to activist challenges to the legal profession. Citing 'family' lawyers in particular, Kendyl Sebesta reported, 19 March 2012, in *Law Times* [Online], that they are said—by a watchdog organization, Canadians for Family Law Reform (established April 2011)—to be "creating added conflict between former spouses in order to cash in on cases languishing in the … [broken Ontario] court system." (Not a few of the Reform membership are former and current self-represented litigants (to be distinguished from un-represented family members.)

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

Certainly, Canada's legal profession—and the judiciary—have been resolute in efforts to curtail incivility. A signal initiative has been the publication of *Principles of Civility for Advocates* by The Advocates' Society (www.advsoc.on.ca). The booklet acknowledges that counsel—"bound to vigorously advance their client's case, fairly and honourably"—fulfill a role that is "openly and necessarily partisan … ." Nonetheless, they can "disagree, even vigorously, without being disagreeable;" absent antagonism and acrimony. After all, "[c]ivility amongst … [law practitioners] entrusted with the administration of justice is central to its effectiveness and to the public's confidence" in it. When most recently revised in April 2009, the booklet was expanded to include "Principles of Professionalism for Advocates."

## 6. Practising Responsibility

Practising allegiance to responsibility—legal, ethical, and professional—(i) serves clientele' needs; (ii) enhances professional standards; (iii) augments reputation (which, more than advertising, continues to generate additional clientele), (iv) diminishes (if not eliminates) potential for court censure, regulatory discipline, and civil liability, and (v) may avoid, or at least mitigate, solicitor-client invoice asessments, nuisance complaints from 'other' parties, and media criticism. Documenting every step relating to a retention—by memoranda to file or correspondence to clients—to reflect adherence, in practice, to the creeds of responsibility and the obligations of retention is essential. So doing serves as some probative evidence of terms of retention, and of a retention's performance (including the adequacy of lawyer communication with clients).

In not a few circumstances, the most important documenting by a lawyer may relate, not to her or his client but, to communications with the 'other' party(ies). A report (one of several) by Professor Nicholas Bala, and Associate Professor Rachel Birnbaum, on their 2012 survey of Canadian judges, lawyers and litigants, states that "over half of the family cases in Canada's courts now hav[e] … one or both parties without a lawyer." Consistent with the Bala/Birnbaum report's findings are those provided by the exhaustive May 2013 Final Report—"Identifying and Meeting the Needs of Self-Represented Litigants"—by Dr. Julie Macfarlane, University of Windsor, who established and leads The National Self-Represented Litigants Project. Lest there be doubt, the lawyer's duty of care, in the context of each of the three species of responsibility, is, solely, to his or her client. An opposing litigant, either self- or un-represented—who, almost invariably, will seek guidance from counsel for represented persons—is to be treated with abundant caution. Communications with him or her should, exclusively, comprise carefully-crafted written correspondence; devoid of defensive, imperious, or otherwise incandescent, rhetoric. If, unavoidably, any verbal communication occurs, its substance should be promptly reduced to writing and sent, as confirmation of the lawyer's understanding of the communication, to the self- or un-represented party.

Such communications can prove to be the most perplexing and time-consuming of responsibility issues, which spanner efficient conduct by a lawyer of law practice. They are comparable to ditches and fences on a steeplechase course.

Perhaps Serge Kujawa, former Director of Public Prosecutions of Saskatchewan, in a private conversation in Vancouver several decades ago, offered the anthology's editor sensible advice for coping with responsibility issues: "you'll recognize a practice ethical issue when you encounter it, and your professional instinct should be energized to rightly direct you."

## 7. Authors

Substantial literature, addressing legal, ethical and professional responsibility, published in Canada, includes (reflecting, only, preferences of this anthology's editor):

(1) [Philip] Epstein's *This Week In Family Law* (Westlaw).

(2) Canadian Lawyers Insurance Association, "Loss Prevention Bulletin", May 1991 to May 2016 (Appendix A to this anthology), and "Loss Prevention *E-Bytes*, December 2008 to May 2016 (Appendix B to this anthology).

(3) Dodek, Adam M. and Hoskins, Q.C., Jeffrey G., *Canadian Legal Practice [:] A Guide For The 21st Century* (Markham: LexisNexis Canada Inc., 2009) [formerly: *Barristers & Solicitors In Practice* under editorship of founding editors Derek Lundy, Gavin MacKenzie and Justice Mary V. Newbury], supplemented loose-leaf publication;

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

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

(6) MacKenzie, Gavin, *Lawyers & Ethics* (Toronto: Carswell, 1993), supplemented loose-leaf publication;

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

(8) MacNair, M. Deborah, *Conflicts of Interest[:] Principles for the Legal Profession* (Toronto: Canada Law Book, 2011), supplemented loose-leaf publication.

(9) Smith, Beverley G., *Professional Conduct For Lawyers And Judges*, 3rd Ed. (Fredericton: Maritime Law Book Ltd., 2007), supplemented loose-leaf publication, and

(10) Woolley, Alice, *Understanding Lawyers' Ethics in Canada* (Markham [ON]: LexisNexis Canada Inc., 2011).

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

## 8. National Family Law Program History

This (2016) is the sixteenth National Family Law Program. The first Program was presented in Toronto in 1978. Since its second presentation, in 1988, in Montreal, the Program has been conducted in alternate years; twice in St. John's, NL.

## 9. Copyright Exception Claim

The author of this anthology claims exception under the *Copyright Act*, R.S.C. 1985, c. C-42, ss. 29, 29.1 (as amended to 01 June 2016).

## 2.0 SOURCES AND STANDARDS OF RESPONSIBILITY

### 2.1 Legal Responsibility

***Luft v. Zinkhofer***

2016 ABQB 182 (CanLII) (Alta. Q.B.), S. L. Martin, J., paras. 1-2, 47-58
[Excerpts]

1. Introduction

[1] Every day people turn to lawyers to help them with disputes or problems they cannot solve themselves. Every day lawyers work diligently in service of their clients and in the larger public interest. In rare cases lawyers abuse the trust reposed in them, often with wide ranging and serious consequences to the very people they have sworn to represent. This is such a case, in which a lawyer lied to his clients and failed to fulfill his duties of candour, competence, diligence and zealous advocacy.

2. Framework Facts, Procedure and Evidence

[2] This case spans almost 20 years. It involves a complex set of facts and allegations about how Mr. Zinkhofer, a lawyer, handled various legal matters for his clients, the Lufts. Unfortunately, despite a request, an Agreed Statement of Facts was not made available to the court.

. . . .

[47] Lawyers play an important role in the advancement of justice. Fundamental to that role is the requirement that lawyers conduct themselves in an ethical and professionally responsible manner. The lawyer client relationship is complex and multi-faceted. While lawyers owe duties to their clients, the courts, the profession and society at large, at the core of this important relationship is trust and candour. Lawyers are privy to confidential information and often see clients at their most vulnerable.

[48] An overview of a lawyer's duties was nicely stated: in *Barlot v Dudelzak*, 2005 ABQB 793 (CanLII) at para 15, citing Riley J in *Millican v Tiffin Holdings Ltd*, 50 WWR 673 at 674, 49 DLR (2d) 216 aff'd 1967 CanLII 102 (SCC), [1967] SCR 183, 60 DLR (2d) 469:

> The obligations of a lawyer are, I think, the following:
>
> (1) To be skilful and careful.

> (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary.
> (3) To protect the interests of his client.
> (4) To carry out his instructions by all proper means.
> (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him.
> (6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.

[49] Expectations and obligations are set out in the law of contract, tort and equity, as well as professional codes of conduct.

[50] A key feature of the lawyer client relationship is that the lawyer may speak for the client in and out of court and can affect their rights. The underlying concept is one of agency. The lawyer seeks instructions from the client. Such instructions should be the product of a well-informed client who has received the benefit of the lawyer's competent advice: outlining and explaining the strengths and weaknesses of a proposed course of conduct. As it is the client's rights at stake, it is the client's instructions that govern. Lawyers who fail to inform or consult their clients, or to carry out their instructions are in breach of their retainer, principles of contract and tort law, and are violating their professional responsibilities.

[51] A lawyer's duties under the retainer, and contract and tort law, are to exercise the standard of care of a reasonably competent member of the profession in similar situations: *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 SCR 147. In a professional malpractice suit, the plaintiff must demonstrate that a lawyer's failure was not merely an error of judgment, but must constitute actionable negligence: see *Folland v Reardon* (2005), 74 OR (3d) (CA), at para 44 [*Folland v Reardon*].

[52] In addition to actionable negligence, it is also possible, although more rare, for clients to allege that the conduct of their lawyer amounts to the tort of fraud and deceit. According to the Supreme Court in *Bruno Appliance v Hryniak*, [2014] 1 SCC 126, 2014 SCC 8 (CanLII), there are four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss: [*Bruno Appliance v Hryniak*] at para 21.

[53] Lawyers also owe certain fiduciary obligations to their clients under the law of equity. Obligations characterized as fiduciary involve three essential principles. A lawyer must represent a client with undivided loyalty, preserve a client's confidence, and make full disclosure of all relevant and material information relating to a client's interests. See *Perez v Galambos*, 2009 SCC 48 (CanLII). In *3464920 Canada Inc v Strother*, 2007 SCC 24 (CanLII), Justice Binnie, speaking for the majority stated at paragraph 1:

> A fundamental duty of a lawyer is to act in the best interest of his or her client to the exclusion of all other adverse interests, except those duly disclosed by the lawyer and willingly accepted by the client. […]

[54] A lawyer's fiduciary obligations are separate from the common law duties arising in contract and tort, but there are parallels between them. This means a single course of conduct by a

lawyer may give rise to liability both as a fiduciary and in negligence or breach of contract: see *Canada Trustco Mortgage Co v Bartlet & Richards*, (1991) 1991 CanLII 7336 (ON SC), 3 OR (3d) 642, 26 ACWS (3d) 1355 (Ont Gen Div), aff'd [(1996) 1996 CanLII 526 (ON CA), 28 OR (3d) 768, 62 ACWS (3d) 1222 (Ont CA). The test of liability in each category, however, is different.

[55] Lawyers, as part of a self-governing profession, are also expected to conduct themselves with high ethical standards. The conduct of lawyers in Alberta is regulated by the Law Society of Alberta Code of Professional Conduct. The Code of Conduct provides practical guidance about the rules governing ethical behaviour. There may be overlap between civil liability and professional responsibility. For example, a section of the Code can set out conduct which is also part of the retainer and/or forms the standard of care of a reasonable lawyer in like circumstances. Similarly, the professional obligation may inform the content of a fiduciary duty. However, they remain separate. Although conformity or non-conformity with an ethical rule may influence a court's decision of whether a contractual, fiduciary or negligent breach has occurred, such breaches are still distinct from breaches of the applicable code of professional conduct.

[56] The Alberta Code of Conduct requires that a lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer: The Law Society of Alberta, *Code of Conduct*, Edmonton: LSA, 2015 ("Alberta Code of Conduct"). Section 2.02 (1) provides:

> A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

[57] The commentary pursuant to section 2.02 (1) provides some examples of expected behavior including *inter alia*, keeping a client reasonably informed and taking appropriate steps to do something promised to a client.

[58] When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter. A lawyer has a duty to maintain, respect and strengthen this trust. The Code provides further that a lawyer must obtain instructions from the client on all matters not falling within the express or implied authority given by the client.

**[Full Text]**

**"No Paralegal Licence For [Disbarred Former Lawyer]"**

www.lawtimesnews.com/201502094468, 09 February 2015
[Excerpt]

Disbarred lawyer Harry Kopyto doesn't have the good character required to become a paralegal in Ontario, according to the Law Society Tribunal.

The law society disbarred Kopyto in 1989 after finding he had overbilled legal aid by $150,000. In recent years, he has faced the good-character proceedings as he seeks a licence as a paralegal.

According to a ruling issued by the tribunal's hearing division last week, Kopyto has admitted to practising law after his disbarment.

"Mr. Kopyto acknowledges that he is not rule-observant. As he explains this, he is governed by his conscience and refuses to obey the law when to do so would lead to an unjust result. He counsels his clients to obey the law unless a higher moral duty calls upon them to breach it. He testified that the public interest comes first, not his clients. Mr. Kopyto asks us to stand up against the narrow ideology and sanctioned perceptions of the legal profession, and to disregard his breaches of the rules governing paralegals' scope of practice. He characterizes his unauthorized practice as political activism promoting access to justice, an area where, he claims, the society has utterly failed to achieve its mandate."

Kopyto, who likened himself to rule breakers like Rosa Parks and Mahatma Gandhi, pointed to his "empathetic qualities," the panel noted. "We have no difficulty concluding that Mr. Kopyto is sincerely devoted to pursuing his clients' causes, and that he has great empathy for them. He is generous, he is appreciated by his clients, and he is dedicated to them.

"And although these qualities denote good character, they do not justify permitting an individual to provide legal services who considers himself to be exempt from applicable laws and rules, including those regulating his profession, whenever his conscience finds it to be convenient."

**[Editor's Note**: The unsuccessful paralegal applicant is quoted by *Canadian Lawyer* magazine, on 09 February 2015, as stating that he will challenge the ruling "until my last gasp. I'm outraged and I'm extremely disappointed and the decision is a litany of factual and legal errors as well as distortions of the evidence that was heard. Am I going to appeal? Does a bear defecate in the woods?"]

**"Groia challenges [findings of misconduct and] LSUC penalty at appeal court"**

Etienne, Neil, www.canadianlawyermag.com/legalfeeds/3039, 18 December 2015
[Excerpt]

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Litigator Joe Groia was back in court this past week to challenge the Law Society of Upper Canada's findings of misconduct for incivility against him following the Bre-X scandal some 15 years ago.

Seeking to overturn a February 2015 Divisional Court decision [2015 ONSC 686 (CanLII)] that dismissed his challenge of a one-month licence suspension and $200,000 in costs to the regulator. He also appealed the Divisional Court's cost decision in the matter, which added another $30,000.

[**Full Text**]

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**"SCC Recognizes A Lawyer's Duty Of Commitment To The Client's Cause"**

Thoreson, Kirsten A., *mondaq*, 20 February 2015
[Excerpt]

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… the Supreme Court of Canada has recognized a new principle of fundamental justice: a lawyer's duty of commitment to the client's cause: 2015 SCC 7 (CanLII), para. 1.

[**Full Text**]

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**"Tips for dealing with difficult people"**

Taddese, Yamri, www.canadianlawyermag.com/legalfeeds/2235, 15 August 2014
[Excerpt]

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Recently, a video of a Florida judge and a public defender getting into a heated argument before leaving a courtroom for an apparent fistfight made the rounds on the Internet.

That might be on the extreme end of workplace conflicts, but as St. John's consultant Kathy Hickman told lawyers … at the Canadian Bar Association conference, everyone could be better at dealing with difficult people at work.

Nothing will change if you have "a rocking chair mentality" toward the people who drive you nuts, Hickman told a full house of junior and senior lawyers, including [the then] Ontario ombudsman André Marin. "It's not going away," she said.

"You need to start thinking about who you find difficult. I noticed that in my workplace, the people that I found difficult . . . one of the things that I knew about them was that I knew very little about them."

Hickman added she was determined to "find goodness in them," and started noticing change in how she felt about the people she wasn't a fan of.

[**Full Text**]

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**"Lights, camera, legal ethics"**

Moulton, donalee, www.canadianlawyermag.com/legalfeeds/2335, 20 October 2014
[Excerpts]

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Legal ethics have gone under the lights – camera lights. The Canadian Association of Legal Ethics has created a series of seven videos that will make it easier for law school faculty, bar admissions and continuing professional development programs to explore contemporary legal ethics issues.

Seven issues are examined in videos that last anywhere from three to 20 minutes. They depict a variety of scenarios and ethical dilemmas commonly encountered by lawyers, highlighting the lawyer's duties of confidentiality, competence, and civility, and the duty to avoid conflicts of

interest. One scenario, for example, starts with two lawyers at a social gathering when a client issue comes up.

. . . .

The videos, funded with support from the Chief Justice of Ontario's Advisory Committee on Professionalism, Dalhousie's Centre for Teaching and Learning, and the Schulich School of Law, [Halifax] are hosted on the "Teaching Resources" portal of the Canadian Association of Legal Ethics website. They are available for use by legal educators, law societies and other non-profit groups free of charge. You will need a password though, and you can get that from This email address is being protected from spambots. You need JavaScript enabled to view it.

[**Full Text**]

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**"Are lawyers professionals?"**

Paton, Paul, *Lexpert Magazine*, November/December 2014
[Excerpt]

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Mention "professionalism" in a group of lawyers and the first reaction is likely to be a big yawn. Yet with both the August 2014 CBA *Legal Futures* [United Kingdom] report and the Fall 2014 LSUC report on alternative business structures recommending fundamental changes to the way lawyers can do business in Canada, and whether they can partner with non-lawyers or investors to do it, the question of whether the law is a profession or a business is once again front and centre. Is it all just existential angst, or what exactly does it mean to be a "professional"? Do lawyers have any particular monopoly on the term? And how can notions of "professionalism" be reconciled with what is clearly a business imperative?

[**Full Text**]

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**"Is there a new view on defence ethics?"**

Slayton, Philip, www.canadianlawyermag.cpm/5906. 01 February 2016
[Excerpt]

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What are the ethical boundaries for a lawyer defending someone accused of a sex crime? Is he a hired gun, expected to do everything legally possible to win the case, concerned only about the fate of his client, free to attack the complainant unreservedly in cross-examination, dedicated

— as it is sometimes put — to proof, not truth? That, I think, was the old idea, unchallenged for many years.

Or does the defence lawyer have broader social obligations that mitigate his or her responsibility to the accused, obligations that include not embracing myths and stereotypes about women and sex and giving special consideration to the complainant? That is more modern thinking, let's call it the "new view," born of high-minded concern for the well-being and rights of those alleging sexual assault, and promoted by a new generation of academics and ethicists.

[**Full Text**]

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**"Legal advertising under the microscope"**

Folkins, Tali, www.lawtimesnews.com/201507134807, 13 July 2015
[Excerpt]

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Darcy Merkur has had enough. Whether it's misleading information about the amount of experience a law firm has on display with apparent pride on the side of a bus or phallic innuendo suggestive of big settlements strategically placed above men's urinals at the Air Canada Centre, legal advertising in Ontario, in his view, has gotten out of hand.

"It's everywhere. It's misleading at various times regarding trial experience, overall experience. It's a real problem," says Merkur, a personal injury lawyer and partner at Thomson Rogers.

"We think the public has been misled. We'd love some solutions."

The problem is particularly acute in personal injury law, he says, because of the frequency of contingency-fee arrangements in that area. Generating new files becomes extremely important to firms, leading to intense competition for clients and, in turn, advertising that some lawyers believe has spun out of control.

The worst offenders, in Merkur's view, are firms that boast about extensive trial experience when in fact they have very little.

[**Full Text**]

**"Religious Lawyering"**

Paton, Paul, *Lexpert Magazine*, July/August 2015
[Excerpt]

How can lawyers reconcile their religious or spiritual beliefs with what they encounter in the office? That question was front and centre again earlier this year, when a *New York Times* headline read "The Case Against Gay Marriage: Top Law Firms Won't Touch It." While the article tracked a shift in favour of equal marriage rights, an important subtext suggested that lawyers with religious leanings were being "bullied into silence."

[**Full Text**]

**"Suspended bâtonnière calls for inquiry on leaked shoplifting allegations"**

Dias, David, www.canadianlawyermag.com/legalfeeds/2846, 18 August 2015
[Excerpt]

Lu Chan Khuong, the suspended bâtonnière at the Barreau du Quebec, has come out swinging against new reports over the weekend relating to an incident last year in which she is alleged to have shoplifted two pairs of high-priced jeans.

The Saturday report by *La Presse* is based on a confidential declaration that shows Khuong accepted a "non-judicial decision" in the incident, wherein the Crown decides not to lay charges despite convincing evidence.

The incident occurred on April 17, 2014, in a Simons clothing outlet in a Laval, Que., shopping mall. As Khuong left the store, security guards confronted her and asked her to step into their office. Khuong was found with two pairs of jeans worth approximately $455.

[**Full Text**]

**" 'Unbalanced promotion of competition' puts lawyers' ethical standards at risk"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 26 November 2014
[Excerpts]

The "unbalanced promotion of competition" in the legal services market "carries dangers" and puts ethical standards at risk, a major report based on a survey of 966 solicitors and barristers has concluded.

. . . .

The study, entitled *Virtuous Character for the Practice of Law*, was produced by the Jubilee Centre for Character and Virtues, based at Birmingham University's education department.

It argued that commoditising legal services could be "destructive of legal ethics", and that, worse than removing the personal element to lawyer-client relations, is "allowing price, competition and deal-making to be the principal tests of success".

[**Full Text**]

**"CBA course puts focus on mental health"**

Moulton, Donalee, *The Lawyers Weekly*, 30 October 2015, p. 4
[Excerpt]

The Canadian Bar Association has introduced an online educational course that focuses the spotlight on an issue lurking too often in the shadows of the legal community: mental health.

"This program is long overdue," said Michele Hollins, past president of the CBA and spokesperson for the accredited course established in partnership with the Mood Disorders Society of Canada. Mental Health and Wellness in the Legal Profession attempts to raise awareness and give lawyers, judges and law students information about mental health and addiction, causes and symptoms, prevention, and treatment options. It is also intended to de-stigmatize the issue.

[**Full Text**]

**"Confidentiality screens rise in importance with law firms[:] In some scenarios, screen is just not enough, …"**

Moulton, Donalee, *The Lawyers Weekly*, 21 August 2015, p. 2
[Excerpt]

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In an environment where more lawyers than ever before work in practice groups, law firms have erected "confidentiality screens" to attempt to minimize the risk of ill-advised or even illegal sharing of information between colleagues.

Confidentiality screens, also called ethical screens (and until recently, a "Chinese wall," after the impenetrability of the Great Wall of China), ensure that information held by one lawyer is not shared with another where there is a potential conflict of interest — for example, when lawyers in the same firm are representing competing clients under separate retainers. The rules governing screens are spelled out in provincial law societies' codes of conduct.

"Ethical screens are a way of protecting a client's confidential information. They arise in circumstances where this may be in jeopardy," said Harvey Morrison, a partner with McInnes Cooper in Halifax. "The object is to prevent a screened lawyer from gaining access to confidential material another lawyer at the firm may have."

The need for ethical screens often arises when lawyers move from one firm to another. Malcolm Mercer, a partner with McCarthy Tétrault in Toronto, recommends the hiring firm conduct a conflict search and generate a report that identifies where client matters may overlap.

"It shows steps have been taken in a timely way to protect information," he said.

The files of a transferring lawyer's current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons, said Susan Tonkin, spokesperson for the Law Society of Upper Canada.

. . . .

Timing is critical. According to the Canadian Bar Association, which has prepared a tool kit for lawyers on the topic of confidentiality screens, law firms should not wait until conflicts arise.

"To be effective, the confidentiality screen must be part of the firm's institutional fabric. Management should circulate among all firm members (not just lawyers) a general memorandum reminding firm members of their ethical obligations concerning screens and revise it regularly," the CBA states in its tool kit.

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**"Look left, look right, one of you drinks too much"**

Schofield, John, *The Lawyers Weekly*, 18 March 2016, pp. 5, 10
[Excerpts]

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The largest study ever conducted into substance abuse and mental health issues in the American legal profession has found that fully 21 per cent of licensed, employed attorneys in the United States qualify as problem drinkers, and the rate is likely similar in Canada, say addiction experts who focus on the Canadian legal community.

Based exclusively on the volume and frequency of alcohol consumed, the study found, more than one in three practising attorneys are problem drinkers.

The research by the renowned, Minnesota-based Hazelden Betty Ford Foundation and the American Bar Association commission on lawyer assistance programs, also found that 28 per cent of U.S. attorneys struggle with some level of depression and 19 per cent demonstrate symptoms of anxiety. The study, recently published in the Journal of Addiction Medicine, involved about 15,000 attorneys in 19 states across the U.S.

. . . .

Excessive drinking among lawyers is driven in large part by the high level of stress brought on by the intensity and difficulty of the work, the long hours, the extremely competitive environment, and the insecurity that can breed, said Doron Gold, a former lawyer, and now a psychotherapist and staff clinician at Homewood Health.

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**"Sexual harassment lingers: LSUC counsel"**

Benedict, Michael, *The Lawyers Weekly*, 17 October 2014, p. 4
[Excerpt]

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While female judges and senior partners are becoming more and more common, women in the legal profession still too frequently experience sexist behaviour from male colleagues and too many male lawyers still cross the line when dealing with female clients, according to a recent study.

"It's disheartening that all these years later there is still a high proportion of sexual harassment complaints," said Cynthia Petersen, discrimination and harassment counsel for the Law Society of Upper Canada, who recently released her latest six month report.

Petersen, who handles complaints about legal and paralegal behaviour from the public and the profession, has been reporting biannually to the law society since 2002, shortly after it established the arms-length office. A year ago, she released a 10-year review that, like her most recent six-month report, shows that half of all complaints are gender related.

"It's a persistent problem, unfortunately," she said.

During the six-month period ending on June 30, [2014] 113 people contacted Petersen's office. Forty of them made a specific complaint, with 37 of those against lawyers and three against paralegals. Those numbers, as well as the breakdown in the nature of complaints, follow the 10-year pattern. The constant volume — about 20 contacts per month — is also troubling for Petersen. "I had hoped we would be getting fewer," she said.

Unlike the law society itself, the discrimination and harassment counsel's office does not conduct investigations or impose discipline. "We're interested in resolving issues, not fact-finding," said Petersen, a lawyer at Sack Goldblatt Mitchell in Toronto who works part-time as counsel. "I don't look for fault. I don't assume the person complained about is in the wrong. I am not an advocate for the complainant. I'm neutral."

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**"The worldwide web can catch unsuspecting lawyers"**

Careless, James, CBA PracticeLink, August 2014
[Excerpt]

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On the internet, "there is really no such thing as privacy," said Kirsten Thompson, counsel with McCarthy Tetrault's National Technology Group in Toronto. "Given the fact that anything put onto the web has the potential to go public, you have to assume this to be the case with all of your online communications, and act accordingly. In other words, when you're online and a lawyer, you are always wearing the robes; even on your personal Facebook and Twitter accounts."

Here's where things can become even more confusing: "Just because the internet is new technology, doesn't mean that there are new rules governing its use by lawyers," Fraser said. "In fact, the old longstanding rules of professional conduct and responsibility still apply."

**[Full Text]**

**" 'Good fences make good neighbours' – Bad Neighbours and their Behaviours Examined"**

Epstein, Philip, *Epstein's This Week in Family Law*, 2014 No. 25, 24 June 2014
[Excerpt]

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*Morland-Jones v. Taerk*, 2014 CarswellOnt 6612 (Ont. S.C.J.) [2014 ONSC 3061 (CanLII)]: This erudite and witty judgment of Justice Ed Morgan of the Superior Court of Justice in Ontario has received some wide spread publicity. Although it is not technically a family law case, I comment on it because it is a delightful read and has some lessons for family law lawyers. When parties go to the court to seek "justice", they sometimes get exactly what they deserve. That is exactly what has happened in this case. To tell you how these neighbours treated each other over a significant period of time would require me to issue a "spoiler" alert and I decline to do so. I do, however, urge you to read about inappropriate behaviour, think about how, as lawyers, we could have handled this case otherwise. To give you a taste, however, of what Justice Morgan had to say, I extract some quotes from his judgment. He noted as follows:

"In my view, the parties do not need a judge; what they need is a rather stern kindergarten teacher. I say this with the greatest of respect, as both the Plaintiffs and the Defendants are educated professionals who are successful in their work lives and are otherwise productive members of the community. Despite their many advantages in life, however, they are acting like children. And now that the matter has taken up an entire day in what is already a crowded motions court, they are doing so at the taxpayer's expense. ….

The action was dismissed and the parties were required to bear their own costs. Not since Justice Joseph Quinn penned *Bruni v. Bruni*, 100 R.F.L. (6th) 213 (Ont. S.C.J.) have we seen such a neat dissection of human behavior and such a demonstration of our human failings. Kudos to Justice Morgan for calling it as he saw it.

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**"The Road Not Taken[:] Is it time to re-evaluate your choices?"**

Fenaughty, Jill, *CBA/ABC National*, Fall 2015, p. 34

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Life is a path with many forks and branches. Sometimes we second-guess the choices we make and the roads we take years after the decision is made. I've seen that kind of inner conflict surface regularly over my years of working in Lawyers' Assistance and now as a practising clinician providing counselling and psychotherapy to legal professionals.

Sometimes the conflict arises from the way we came to the decision, if it was made half-heartedly, or was influenced by values or circumstances that no longer pertain. Some choices are

thrust upon us — lawyers may downsize their practice or even leave law for family reasons, mental health or physical health issues, lack of firm or external supports, or other reasons beyond their control.

For many of the lawyers I've met, the road not taken represents an element of unfinished business. They have not fully accepted that the path they followed was a choice — even if the situation thrust an unappealing choice upon them — and that every choice we make has consequences. Many lawyers feel shame and a sense of failure if their lives are not measuring up to their initial expectations or the expectations of family and society. But those expectations can be unrealistic, or rooted in external or material measures of success, and often they fail to factor in the complexities of life.

My message is to shake it off and walk on. Be mature enough to accept that the rewards (status, money) of Bay Street may not be yours if you choose a path that guarantees fewer hours and more time with family. Recognize that money and external rewards are not the only currency in life. We make choices based on circumstances and values which change over time. The particular situations which might have once forced us onto a particular path can also change in time and new opportunities can present themselves. So hit the reset button and re-evaluate your career choice. If for whatever reason you're not happy with the road you took, don't just think about the other path — explore it, see if it really is where you'd rather be. That's what I did: I left law for family reasons, became a clinician and now have a practice working with lawyers. The past is behind us; what we do with the days ahead is indeed within our control.

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**"Tripping Up Your Time Trolls[:] Take control of your time and productivity"**

Covert, Kim, *CBA/ABC National*, Winter 2015/2016, pp. 32-33, at p. 32
[Excerpt]

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In the Norweigan fairy tale *The Three Billy Goats Gruff*, a fearsome troll living under a bridge is outsmarted and defeated by the quicker-witted and more nimble goats.

The trolls that suck away your time at work are likewise easily vanquished, says Andrea Verwey, a Vancouver-based lawyer coach and consultant. Even if, as she says, "Often the troll is you."

So how do we steal time away from ourselves?

Verwey says there are two main categories of time trolls: those that keep lawyers from getting the work they've done down on their time sheet; and those that keep lawyers from getting down to work at all.

Making sure that you record every bit of work you do – those three calls you made from the train on your way to work, or the half-hour you spent on a file after dinner – can add as much as an hour a day to your billings, says Verwey, who was a presenter at the November [2015] CBA Leadership Conference for Professional Women in Vancouver.

"For a lot of people that's the difference between going home at 6:00 to their kids or drifting another hour until 7:00."

As for not getting down to it, Verwey says the biggest problem is the legal profession's "open-door phenomenon." Being available to colleagues and clients all day makes it hard to focus.

She suggests pinpointing your most productive time of day, say between 8 a.m. and 10 a.m., and closing the door – to people, to phone calls and to emails, except for emergencies – during that time.

"Two-thirds of lawyers are introverts and yet we've created this culture where everybody is supposed to be responding and reacting and chatting and available all the time," she says. "Giving introverts permission to carve out this little bit of quiet, reflective time every day is quite empowering, so they can be fabulous and chatty the rest of the day."

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**"Confronting the problem[:] Lawyers suffer from depression more than any other profession so practitioners and regulators should be open about it"**

Slayton, Philip, *Canadian Lawyer*, October 2014, pp. 16-17
[Excerpt]

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Lawyers suffer from what some call "the terrible melancholy" more than any other professional group. A frequently cited 1991 John Hopkins study found that lawyers suffer from major depression disorder at a rate 3.6-times higher than non-lawyers who share their socio-demographic traits. The search "lawyers + depression" produces 13 million hits on Google. There is even a web site *lawyerswithdepression.com*. The well-publicized suicide this past summer of Cheryl Hanna, a prominent law professor at the University of Vermont, reminded us of this awful problem. Hanna, who had been hospitalized for depression, left her psychiatric hospital, bought a gun, and shot herself. She was 48 years old.

Why write about lawyers and depression in a column about ethics? Depression is a disease, you might say: it's a serious illness, not a moral quandary. But depression dulls the moral senses. It impedes rational and responsible decision-making. The depressed person may no longer be able to make sound ethical judgments, or may simply not care about ethical issues. He may indeed, interact on the surface with clients, but his psychology is undermined and his judgment impaired. And depressed people often "self-medicate" with alcohol or drugs which, of course, just makes

everything worse. Depression in lawyers may be the legal profession's biggest underlying ethical issue.

[**Full Text**]

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**"Ethics in the last half century[:] After 50 years, the profession still has some way to go"**

Slaton, Philip, *Canadian Lawyer*, April 2016, pp. 16-17
[Excerpt]

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The legal profession has made a mess of self-regulation. For one thing, we've forgotten that lawyers judging other lawyers is contrary to the basis precepts of justice; it's a system that should be replicated. Discipline of lawyers is weak and capricious. Law societies are widely and justifiably seen as legal trade unions, protecting their own and proceeding opaquely, rather than transparent organizations that promote the public interest. This has been the case throughout my half-century legal career and shows no sign of changing.

The answer? Lawyer regulation should be removed from lawyers and given to a body independent of both the legal profession and the state. Preposterous, you say? Exactly that preposterous thing happened in England in 2007. Since then, the legal profession in England and Wales has been overseen by something called the Legal Services Board, which has a lay majority chaired by a non-lawyer and is accountable not to the government but directly to Parliament.

[**Full Text**]

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**"Quebec Lawyers Get New Code of Ethics"**

Elie, Pascal, *Canadian Lawyer*, July 1015, pp. 8-9

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It was high time for a thorough review of the *Code de deontologie des avocats* to happen, according to Madeleine Lemieux, who led the task force in charge of the reform. Over the years, only a few changes had been made to Quebec's code of ethics just to keep up with new court decisions.

New elements include:

- The explicit definition of "client", which includes a person who consults a lawyer and who has "reasonable grounds to believe that a lawyer-client relationship exists."

- The codification of the limits on free speech when commenting in the media on pending cases. It includes the use of social media. The practitioner must not make public comments

or divulge information that could affect the authority of the courts or one's right to a fair trial.

- The issue of limited scope representation (or unbundling of legal services) when a lawyer provides partial legal services, not covering all of the client's legal matters (providing drafting assistance or making limited appearances in court, for example). The practitioner who takes on a limited-scope mandate is still fully liable regarding all his legal duties, including giving the client a clear definition of the mandate's limits. In other words, limited scope does not mean limited liability.

In an interview with the *Journal du Barreau*, Lemieux mentioned that other improvements brought by the new code also included measures concerning communications with the client. There is a duty to make sure the client understands the lawyer, and a special attention is given to persons who are vulnerable because of their age or their health, she said.

The Barreau du Quebec has set-up a mandatory three-hour interactive online training based on the new code of ethics, at a cost of $10, and aimed at all 25,000 members. Training in class is also available, on demand, for firms, government departments, or organizations. Members of the bar … [had] until March 31, 3016 to complete their training.

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**"Reconciling rhetoric and reality[:] Lawyers must operate effectively in a harsh world but not forget bigger ethical purposes and obligations"**

Slayton, Philip, *Canadian Lawyer*, February 2015, 16-17
[Excerpt]

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Do lawyers really do the highfalutin stuff they claim they do? Does the reality measure up to the rhetoric?

The rhetoric, in its purest form, is impressive (if just a little vague). The Canadian Judicial Council, for example, answering the question "what do lawyers do," says on its web site, "lawyers play a critical part in the justice system". A mediation web site I picked at random says, "Lawyers are agents of peace and order in the society." The United Nations has described lawyers as "essential agents of the administration of justice." Finding extravagant quotations of this kind is like shooting a fish in a barrel. And, of course, woven through all the *ex cathedra* pronoucements is a lot of palaver about lawyers serving the public interest.

Pardon my cynicism, but I don't think very many lawyers show up for work in the morning thinking, "I'm an agent of peace, and today I will play a critical part in the justice system and also, while I'm at it, serve the public interest." (Although, they might make claims like these at a dinner party, after several glasses of wine.) Along with everyone else in the work force, lawyers show up for work, often dispirited, with particular tasks to perform, tasks frequently dull and pedestrian. They also show up worried about whether they can cobble together six or seven billable hours for

the day, fretting about where the next lot of clients and files are coming from, and wondering why their partners aren't pulling their weight.

[**Full Text**]

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**"Vicarious Trauma [-] The Cumulative Effects Of Caring[:]**
**For many the violent, disturbing reality they witness inside**
**and outside the courtroom can be debilitating"**

Moulton, donalee, *Canadian Lawyer*, February 2015, pp. 24-31
[Excerpts]

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Vicarious trauma, also called compassion fatigue, is a form of post-traumatic stress disorder. "You can suffer from PTSD if you experience a life-threatening event or you are exposed to a life-threatening event. You end up with the same symptoms," says Peter Jaffe, a psychologist and professor in the Faculty of Education at Western University in London, Ont.

The seeds of vicarious trauma are sown as legal professionals start to relive the experience of helping clients and the evidence involved in a case or cases. In doing so, they may become overwhelmed, isolated, distant, anxious, and more. "As a helping professional, you become a reservoir of other people's trauma — first-person accounts, crime scenes, autopsies. Pretty soon you start to have the same PTSD your clients have. Feelings get transferred," Jaffe notes.

. . . .

Vicarious trauma prevents individuals struggling to move on from regaining their former sense of self. The condition can also affect an individual's ability to effectively practise law or sit on the bench. "You become a perfectionist. You start not meeting your own expectations," notes Murray. "That's part of the retreat. 'If I can't do it perfectly, I won't do it at all, and I resent your asking.'"

[**Full Text**]

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***DeMaria v. Law Society of Saskatchewan***

Supreme Advocacy LLP, 14 April 2016, pp. 15-16 (S.C.C. File # 36759)
[refusing leave to S.C.C. to appeal from 2015 SKCA 106]
[Edited Summary]

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In 2008, Mr. DeMaria was an articling student with Merchant Law Group. Along with another student it was determined by the Law Society of Saskatchewan that he had cheated on the Bar Admissions Course. In September 2009 the Admissions and Education Committee of the Law Society ordered him to redo portions of the bar course. In May 2010, Mr. DeMaria successfully completed the bar course modules and in July 2010, he tendered his application for admission as a lawyer to the Law Society. The Law Society referred his application to the Admissions and Education Committee and Mr. DeMaria was served with a Notice of Hearing. A three day hearing ensued in which it was decided that Mr. DeMaria would not be admitted to the Law Society because he had not satisfied the Committee of his good character. Benchers on Review: Applicant's application for review dismissed. Court of Queen's Bench of Saskatchewan: Applicant's application for judicial review and for orders of *certiorari,* mandamus and injunctive relief dismissed. C.A.: Applicant's appeal dismissed. "The application for leave to appeal...is dismissed with costs."

## 3.0 APPLICATION OF STANDARDS OF RESPONSIBILITY

### 3.1 Relationships with Clients—Retainer and Authority

**"Does a recorded phone call count as a contract?"**

Takach, George S., *Lexpert Magazine*, October 2014
[Excerpt]

To answer the question as to whether an electronically recorded voice signature is enforceable, it is worth considering first principles under the common law. There are multiple cases dealing with whether a particular new set of circumstances, or technologies, can create a binding contract. Judges have been confronted with this bedevilling question in the context of novel fact situations precipitated by the telegraph, fax and email, to mention just three of the key contractual communications technologies over the past 150 years.

[**Full Text**]

**"Contract interpretation is no longer a question of law"**

Waddell, Margaret L., www.canadianlawyermag.com/5230, 11 August 2014
[Excerpt]

The standard of appellate review for contract interpretation has been redefined by the Supreme Court of Canada. Buried in the depths of summer and delivered in the context of an appeal from an arbitral award, Justice Marshall Rothstein's decision in *Sattva Capital Corp. v. Creston Moly Corp.* [2014 SCC 53 (CanLII)] may have gone unnoticed by many, so I am taking this opportunity to focus the spotlight on it. The decision is of seminal importance, not just for appeals in the arbitration context, but also for all common law proceedings where the interpretation of a contract is under appeal.

[**Full Text**]

**"Time for contingency fees in family law?"**

Folkins, Tali, www.lawtimesnews.com/201506084735, 08 June 2015
[Excerpt]

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Ending Ontario's ban on contingency fees in family law cases is probably not the best way to help people who are unable to afford counsel, some Ontario family lawyers say.

"If it comes down to a conversation of access to justice, it's something that's great to be thinking about, but I don't think contingency fees are going to be the right way of going about it," says Katherine Robinson, an associate at the Shulman Law Firm PC and a member of the Ontario Bar Association's family law section.

The comments follow a letter recently sent to the provincial government by a group of 11 Greater Toronto Area lawyers who are calling on Queen's Park to legalize contingency fees in family law matters. A current regulation banning the practice is "severely misguided" and out of date, the lawyers argued. Ontario, the only province in Canada with such a ban, "desperately needs to catch up with the rest of the country," they suggested.

[**Full Text**]

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**"Bell starting to toll on billable hour"**

www.canadianlawyermag.com/5654. July 2015
[Excerpt]

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The bells may have finally started tolling for the billable hour, according to the results of *Canadian Lawyer*'s 2015 Compensation Survey.

[**Full Text**]

**"Can retainers include lawyers' authority to withdraw from a family law case?"**

Kauth, Glenn, www.canadianlawyermag.com/legalfeeds/2792, 13 July 2015
[Excerpt]

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Can family lawyers include a provision in their retainer agreements giving themselves discretion to withdraw from the case for non-payment of legal fees?

That was one of the issues in a Law Society Tribunal case in which the panel made findings of professional misconduct against a Whitby, Ont., lawyer who acted for a client in her matrimonial dispute. [2015 ONLSTH 124 (CanLII)]. At the very least, a lawyer must advise the client about obtaining independent legal advice, the tribunal found.

**[Editor's Note**: On 09 March 2016, the lawyer was (i) suspended from practice for four months; ordered to undergo psychological treatment to gain insight into his conduct with the goal of preventing recurrence of his behavior impugned by the Law Society of Upper Canada, and (iii) ordered to pay costs of $15,000.00 over three years: 2016 ONLSTH 47 (CanLII).]

[**Full Text**]

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**"Lawyer out $44K in dispute over pro bono retainer"**

Folkins, Tali, www.lawtimesnews.com/201508244880, 24 August 2015
[Excerpt]

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To anyone who may have had doubts, a Superior Court judge has issued a clear statement on the difference between *pro bono* and contingency-fee arrangements in a case that underlines the need for written retainer agreements.

In a decision earlier this month, Justice Mario Faieta ruled in favour of a man who took his former lawyer to court after he presented him with numerous invoices for what the client said he thought was *pro bono* work. The lawyer, Andrew MacDonald of the Barristers Group, will have to pay $43,991.19 to the man plus costs of $1,684.57.

**[Editor's Note**: On 16 April 2016, Ontario Court of Appeal dismissed the lawyer's appeal from the decision of Ontario Superior Court of Justice: 2016 ONCA 319 (CanLII).]

[**Full Text**]

**"Small law firm partners charging only £50 per hour, survey finds"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 13 July 2015
[Excerpt]

Some partners in small law firms are charging £50 per hour – only £10 more than the lowest paid fee-earners, a survey has found.

In a number of firms equity partners actually took home less money than salaried partners and fee-earners despite risking their own capital, the research by Cheshire-based accountants Booth Ainsworth revealed.

Gary Cook, head of the firm's professional practices team, said: "Increasingly, firms are facing the challenge of high-performing fee-earners wishing to remain in salaried, non-ownership positions, rather than take on the risks and responsibilities of becoming a principal for potentially limited extra rewards."

The *Legal Financial Benchmarking Survey 2015* involved 127 SME law firms in England and Scotland, broken into three groups – annual fee income of less than £500,000, up to £1.5m and over £1.5m.

[**Full Text**]

**"Lack of clarity on [family lawyer] fees causes one in four complaints, major [Legal Ombudsman] … survey finds"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 20 May 2015
[Excerpt]

More than a quarter (26%) of complaints to the Legal Ombudsman (LeO) are triggered by lack of clarity on fees, a major internal survey has found.

The study of 4,307 complaints received by LeO between 1 June 2014 and 31 January 2015 showed that family law was by far the biggest source of complaints about unclear pricing, followed by wills and probate.

Family work accounted for 23% of these complaints, followed by wills and litigation, both with 14%. Residential conveyancing was the next biggest offender, with 13%.

Only 6% of complaints were caused by personal injury matters, and 5% by crime and employment.

[**Full Text**]

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**"Do clients actually need face-to-face advice? Legal aid research suggests they often don't"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 15 December 2014
[Excerpt]

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Users of the civil legal … [assistance] telephone gateway who sought face-to-face advice "often did so out of preference as opposed to need", a review has suggested.

The gateway referred only 177 people for face-to-face advice in the 12 months from 1 April 2013, despite receiving almost 190,000 enquiries, according to a report by the Ministry of Justice (MoJ).

[**Full Text**]

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**"Internet overtakes friends and family as main way to find a solicitor"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 17 July 2014
[Excerpt]

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Clients are significantly more likely to find a solicitor through the internet than by asking friends or family, a major study of over 2,000 people has found.

The survey – conducted for the recent *Legal Futures* [United Kingdom] 'From Click to Client' conference – indicated that 36% of consumers use the internet compared to 30% who would prefer to rely on friends or relatives.

[**Full Text**]

**"'Deplorable' Legal Fees Agreement 'Settlement-Driven' and 'Fundamentally And Profoundly Unacceptable'"**

Radnoff, Brian N. and Case, Rebecca, *mondaq*, 10 December 2015
[Excerpt]

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In a recent settlement and fees approval motion in *McCallum-Boxe v. Sony*, 2015 ONSC 6896 (CanLII), Justice Belobaba had to determine the reasonable amount of fees and disbursements to which plaintiff's counsel was entitled. This was an aspect of the parties' settlement agreement. To accomplish this task, he quite reasonably asked about the nature of plaintiffs' counsel's contractual entitlements. He was shocked to learn that there was no written retainer agreement, that the class was not obliged to pay any fees or costs, that there was no contingency fee arrangement and that class counsel intended to recover their fees "as part of the (hoped for) settlement". Class counsel further advised that it had similar arrangements in many of their class actions, which Justice Belobaba found disturbing.

[**Full Text**]

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**"End Of Life Health Care Planning – Be Careful What You Wish For"**

White, Geoffrey W., *mondaq*, 10 August 2015
[Excerpt]

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Here is one statistic you can rely on: 100% of Canadians will die. Benjamin Franklin said it first, "In this world nothing can be said to be certain, except death and taxes." Yet more than 80% of Canadians have never considered the need to plan ahead for decisions about their health care at the time of their death. The legal rules about "health care decision making" are complex, and have been significantly affected by recent court cases. No matter the size of their estate, wealthy or modest, Canadians are becoming more concerned about the need for not only a good life, but also a good death.

Two of the most important recent cases are: a decision by the Supreme Court of Canada about physician assisted death in *Carter v. Canada* (Attorney General), 2015 SCC 5 (CanLII); and a decision about the refusal of end of life care by the BC Court of Appeal in *Bentley v. Maplewood Seniors Care Society*, 2015 BCCA 91 (CanLII).

[**Full Text**]

**"Tips on nailing the initial client meeting[:] It's all about patience, setting expectations, being a good listener – and paperwork"**

Logel, Lindsey, *The Lawyers Weekly*, 07 November 2014, pp. 12 and 13, at p. 12
[Excerpt]

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Initial meetings with potential personal injury clients can be exciting and overwhelming. It's exciting because you are hopefully gaining business, and overwhelming because it's your chance to build the potential client's trust and confidence in you and your firm. The following are some tips to help you with your initial client meeting.

[**Full Text**]

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**"Get it in writing for law a la carte[:] It is important to define the scope of work in the retainer agreement"**

Kirbyson, Geoff, *The Lawyers Weekly*, 14 August 2015, pp. 1 and 3
[Excepts]

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Limited-scope representation, or the unbundling of legal services, is following the trend in other industries, whether it's hospitality or financial services, where consumers can pick and choose what they'd like to pay for.

But just like getting your steak with the baked potato and without the salad when you wanted it the other way around, problems can arise in the legal profession if there are communication breakdowns.

A conversation between a client and a lawyer could mean two very different things to both sides in terms of representation so it's imperative that lawyers literally spell out what they will and won't do.

The most critical component when unbundling services, according to Andrew Feldstein, Toronto-based founder of Feldstein Family Law Group, is defining the scope of work to be done in the retainer agreement.

. . . .

Dan Pinnington, Toronto based vice-president of claims prevention and stakeholder relations for the Lawyers Professional Indemnity Company, says as the malpractice carrier for Ontario, he has some concerns about limited-scope referrals.

"In a world when lawyers agree to do a whole matter for a client and there is confusion over what was said or agreed to be done, there's at least an equal if not greater risk of confusion over what the lawyer agreed to do or not to do in a limited scope situation," he says. "We've seen malpractice claims in the U.S. in those scenarios."

Just because the individual work may not be as lucrative as taking a client from start to finish in a matter, lawyers need to be careful they don't confuse a limited-scope retainer with lower quality service.

"You still have to properly advise the client on all of the issues," he says.

Pinnington believes family law is the most suitable for unbundling because there are … [discrete] parts of a matter that can be easily broken out, such as an application for custody or a divorce.

**[Full Text]**

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**"Capacity to instruct a question with aged clients"**

Moulton, Donalee, *The Lawyers Weekly*, 13 February 2015, p. 9
[Excerpt]

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Lawyers can only act for clients if clients can lucidly instruct them and as Canada's population ages, questions about their capacity to instruct are expected to increase.

**[Full Text]**

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**"Getting in step, gradually, with new clients"**

Moulton, Donalee, *The Lawyers Weekly*, 02 October 2015, p. 27
[Excerpt]

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Converting a prospective client into an actual customer is a dance of courtship. It starts with that first, tentative foray on to the dance floor and progresses as partners become more aware of each other's skills and more comfortable with one another until there is a seamless movement from acquaintance to colleague to trusted advisor.

It also takes time. Unlike a disco inferno that builds and burns quickly, a smooth waltz is required to convert a prospect into a client. Try to rush the process, experts warn, and you're likely to take a tumble.

[Full Text]

**"The art of client dismissal"**

Guly, Christopher, *The Lawyers Weekly*, 10 April 2015, pp. 11 and 27, at p. 11
[Excerpt]

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The grounds for dismissing a client should no longer play second fiddle to a client's unfettered right to dismiss counsel, according to leading academic and former practitioner Trevor Farrow.

The Osgoode Hall Law School professor says modifications to the Law Society of Upper Canada's Rules of Conduct reflect the legal profession's unfortunate ongoing "obsession" with client rights. Among the changes implemented last October are several related to withdrawal from representation that clarify when and how it should be done.

[**Full Text**]

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**"Appeal decision protects solicitor offering 'unbundled' advice"**

Smith, Chloe, [United Kingdom] *Law Gazette*, 17 November 2015

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Solicitors instructed on a limited retainer do not have a broader duty of care to their clients, the Court of Appeal has ruled, asserting the importance of ensuring that lawyers can offer unbundled services.

The ruling came in *Minkin v Lesley Landsberg* [[2015] EWCA Civ 1152 (BAILII) (17 November 2015)], a case in which a client claimed that her lawyer was negligent in the advice she gave during divorce proceedings.

[**Full Text**]

***Scarlett v. Farrell***

(2014), 47 R.F.L. (7th) 481 (Ont. Ct. J.), S.B. Sherr, J.
[Edited Headnote]

**[Facts:]** Parties were parents of seven-year-old child who lived with mother. Father had only seen child once in past three years and had not seen child for over two years. Mother was seeking custody of child, order of no access to father, restraining order against father and child support. Father was seeking order for custody of child and, in alternative, generous specified access. Mother said she could not afford lawyer and that Legal Aid Ontario would not provide her with certificate for lawyer. Mother brought motion pursuant to s. 4(1)(c) of Family Law Rules, seeking court's permission to have her step-father represent her in case that was scheduled for trial starting on April 28, 2014. Mother sought adjournment of trial in event that representation motion was denied.

**[Held:]** Motion dismissed.

**[Reasons:]** Adjournment granted to July 2014. Step-father was lawyer who had not practised law in many years and was not authorized to practise law by Law Society of Upper Canada. Step-father was seeking to do at trial what Law Society specifically prevented him from doing, namely practising law and conducting trial. Step-father had been suspended twice by Law Society after discipline proceedings. Step-father lacked requisite degree of independence and detachment to appropriately represent mother at trial. Court did not have confidence that step-father would be able to maintain his objectivity.

**[Editor's Note:** For additional reasons, see: 2014 ONCJ 376 (CanLII).]

**[Full Text]**

## 3.2 Relationships with Clients—Conflicts Of Duty

### 3.2.1 Generally

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**"[Solicitors Disciplinary Tribunal] … fines … solicitor over fee deal …"**

Bindman, Dan, *Legal Futures* [United Kingdom], 29 January 2016
[Excerpts]

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A solicitor involved in the 2011 litigation between Russian oligarchs Boris Berezovsky and Roman Abramovich has been fined £50,000 by the Solicitors Disciplinary Tribunal (SDT) for entering into what was then an unlawful contingency fee agreement, under which he would have netted tens of millions of pounds had Mr Berezovsky succeeded.

. . . .

As well as paying the firm in the usual way, Mr Lindley entered into an agreement with Mr Berezovsky that would have seen him receive 1% of any winnings. The solicitor's wife, a business adviser to Mr Berezovsky since the 1990s, had the same agreement.

[**Full Text**]

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**"Tactic putting lawyers in tough spot[:] Potential clients are calling around to create conflicts of interest"**

Cameron, Grant, *The Lawyers Weekly*, 29 August 2014, pp. 20 and 21
[Excerpt]

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Divorces that end up in the courts can turn into nasty, mud-slinging debacles, especially if there's disagreement over finances, business assets and the custody of children.

With emotions running high, litigants will often go to great lengths to get a leg up on their partner, and that usually means trying to secure the best lawyer in the business.

However, legal experts say some litigants are taking it a step further by calling all the top legal firms or lawyers to discuss their case, then providing confidential information — thereby disqualifying the lawyer or firm from representing the spouse.

In essence, they're setting up a conflict-of-interest situation before stepping into the courtroom.

**[Editor's Note**: In Newfoundland and Labrador—and, perhaps, in parts of other Provinces and in parts of the Territories—some lawyers are, occasionally, offered moneysums by a solicitor for one spouse in consideration of agreeing not to accept retention by the other spouse. Although not expressly prohibited by legislation in the Province and Territories, the *Model Code of Professional Conduct*, adopted with modifications in the provinces and territories, discourages such under Rule 2.1-1.]

[**Full Text**]

### 3.2.2 Conflict found

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***Dungate v. Dungate***

**(**2015), 70 R.F.L. (7th) 151 (B.C. S.C. [In Chambers]), Gray, J.
[Edited Headnote]

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**[Facts:]** Parties separated in 2012 following 46-year marriage. Husband practiced law with his two sons before he retired. One of sons, T, asked court for permission to represent his mother in three applications in family litigation between parties. Husband applied for order barring T from representing wife.

**[Held:]** Application granted. Court declined to hear T as representative of wife.

**[Reasons:]** T and his brother had attempted to settle litigation by meeting with husband in June 2015. It was not clear to husband at that time that T was representing wife. Husband's understanding was that any information discussed in that meeting would be kept confidential. T was also referred to by wife as potential witness at trial. Wife sought to add T as party to lawsuit. Thus it was not appropriate for T to act as counsel for wife. It would also be contrary to Code of Professional Conduct. Code specifically talked about avoiding relationships that would affect lawyer's professional judgment, including those involving relative.

**[Full Text]**

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***Lutoborska v. Nyquvest***

(2014), 58 R.F.L. (7th) 433, 2014 BCSC 2541 (CanLII) (B.C. S.C. [In Chambers]), Gropper, J.
[Edited Headnote]

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**[Facts:]** Woman alleged that she was in marriage-like relationship with man from September 2009 to August 2014. Man set date for summary trial regarding issue of nature of parties' relationship. Woman brought application to disqualify man's counsel, D, and law firm, B Corp., on basis that firm was in conflict of interest.

**[Held:]** Application granted.

**[Reasons:]** Woman was client or near client of B Corp. in relation to incorporation of holding company and purchasing of property in Mexico. That asset was in issue in these family law proceedings, and so they were related. Another lawyer at B Corp., G, provided legal advice to woman in informal settings through his personal relationship with her. Involvement of D in giving

legal advice to man about cohabitation and separation date, and fact that man shared that legal advice with woman, compounded situation.

**[Editor's Note:** For additional reasons, see: 2015 BCSC 557 (CanLII).]

**[Full Text]**

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***Malkov v. Stovichek-Malkov***

2015 ONSC 4836 (CanLII) (Ont. Sup. Ct. J.), S.E. Healey J.
[Edited Headnote]

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**[Facts:]** Husband commenced family law proceedings in which ownership of matrimonial home was major issue. Husband's father, M, had commenced separate civil proceedings in which he claimed that he was sole legal owner of parties' matrimonial home. Husband and his father were both represented by lawyer A. Wife brought motion for order that A be removed as solicitor of record for husband and as solicitor of record for M in family law proceedings and in civil action. Wife claimed that on September 19, 2014 she was asked to attend at A's office. Her lawyer was not invited to meeting despite [fact] that A knew that wife was represented by lawyer in matrimonial proceedings. At meeting, wife was asked to sign agreement acknowledging that M was sole legal owner of matrimonial home. Wife said she refused to sign document and left meeting. Wife argued that by convening meeting in her office, at which wife's lawyer was not invited or present, A became potential witness.

**[Held:]** Motion granted.

**[Reasons:]** Rules of Professional Conduct made it clear that lawyers should act in way which would inspire confidence in community at large and avoid even appearance of impropriety. Test was whether fair-minded, reasonably informed member of public would conclude that proper administration of justice required removal of lawyer. Such hypothetical person would be alarmed by notion of family litigant, who had retained her own lawyer, being invited and allowed to come into contact with lawyer for her estranged spouse, without her own lawyer being informed in advance and providing permission. That was particularly so where meeting had something to do with major issue in dispute in litigation. A's direct contact with wife was breach of R. 7.2-6 of Rules of Professional Conduct, however well-intended. A was to be removed as solicitor of record for husband and M.

**[Full Text]**

***Snider v. Snider***

(2015), 58 R.F.L. (7th) 370 (Ont. Sup. Ct. J.), M.E, Vallee, J.
[Edited Headnote]

**[Facts:]** Parties were involved in matrimonial litigation. Lawyer K was solicitor for wife. Lawyer G, K's former partner, had provided advice to company partly owned by parties with respect to termination of wife's employment. Husband brought motion to have K removed as solicitor of record.

**[Held:]** Motion granted.

**[Reasons:]** Information G received in order to advise company was confidential and entirely relevant to wife's application for spousal support. There was strong inference that lawyers who worked together shared confidences.

**[Full Text]**

### 3.2.3 Conflict not found

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**" 'Minor' advantage not enough to disqualify former in-house lawyer from case"**

Taddese, Yamri, www.canadianlawyermag.com/legalfeeds/3010, 02 December 2015
[Excerpt]

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A British Columbia Supreme Court judge refused to disqualify a lawyer from a case this week even though the lawyer was previously in-house counsel for the company his current client is suing.

The Manufacturers Life Insurance Co. argued its former in-house counsel Jan Fishman should be removed as counsel of record for the plaintiff in an insurance matter because he has knowledge of Manulife's business practices, litigation strategies, and how claims personnel perform in examinations for discovery.

Although Fishman worked at Manulife for 10 years, the company did not argue he had anything to do with the plaintiff's case during his time there. In fact, the plaintiff did not submit an application for long-term disability benefits until 13 months after Fishman's departure from Manulife.

"Manulife's application hinges on Mr. Fishman having insight into the personalities and practices of the company. Whether confidential or otherwise, some or all of them would not be known by someone who had not worked at Manulife. The case therefore depends on a nuanced analysis of the potential use of confidential information," Justice Elliott Myers said in *McMyn v. The Manufacturers Life Insurance Company* [2015 BCSC 2205 (CanLII).]

[**Full Text**]

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***MTM Commercial Trust v. Statesman Riverside Quays Ltd.***

2015 ABCA 142, 21 April 2015
*The Lawyers Weekly*, 29 May 2015, p. 19
[Edited Headnote]

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**[Facts:]** Appeal by Bennett Jones LLP from a decision finding it breached its duty of loyalty to Statesman, and prohibiting it from acting for any party in a dispute involving Statesman, Matco and their respective principals. The firm acted for Matco and its principal for many years prior to Matco entering into a joint venture with Statesman. When Statesman and Matco became involved in a dispute against the general partner of the joint venture, the firm agreed

to act for both parties, but made it clear that it did so on the understanding that it would continue to act for Matco in the event of any future disagreement with Statesman. Statesmen signed an agreement to this condition. Such a disagreement formed the basis of an oppression action against Statesman. The firm refused to remove itself as counsel for Matco at Statesman's request. Despite finding that the firm never held any confidential information belonging to Statesman, a judge found that the firm had to be disqualified from acting for any party to the oppression action to maintain the public confidence in the administration of justice.

**[Held:]** Appeal allowed.

**[Reasons:]** Given its consent to the firm acting for Matco in the case of any future dispute with Statesman, Statesman could not reasonably claim it expected the firm to owe it an exclusive duty of loyalty and to refrain from acting against it in the oppression matter. There was no evidence the firm failed to perform its duty to Statesman as a client in the unrelated matter.

**[Editor's Note:** Leave to appeal to S.C.C. refused, 15 October 2015.]

**[Full Text]**

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***Sampley v. Sampley***

(2015), 59 R.F.L. (7th) 23 (B.C. C.A. [In Chambers]), Groberman, J.A.
[Edited Headnote]

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**[Facts:]** Plaintiff father obtained relief under Hague Convention on the Civil Aspects of International Child Abduction, 1980. Before [Convention] litigation commenced, plaintiff consulted with counsel, with view of having her represent him. Defendant [mother] commenced appeal and retained same counsel with which plaintiff [father] had consulted as her appeal counsel. Plaintiff brought application for order that defendant's counsel withdraw from case on basis that counsel was in conflict of interest.

**[Held:]** Application dismissed. Counsel was allowed to continue to represent defendant, but only for purposes of present appeal.

**[Reasons:]** Declaration was granted that counsel found herself in position of having obtained confidential information which precluded her from involvement in this matter beyond current appeal. There was conflict of interest, but counsel was allowed to continue as it was in interest of justice to do so, and dangers of misuse of confidential information were minimal. Counsel took on case in good faith and there was urgency in having matter heard.

**[Full Text]**

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***Matthews v. Matthews***

(2014), 48 R.F.L. (7th) 254 (B.C. S.C.), G.P. Weatherill, J.
[Edited Headnote]

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**[Facts:]** Parties were involved in matrimonial litigation. Husband's current lawyer, W, had helped wife address previous family law matter approximately 12 years ago. W swore that he had absolutely no recollection of any confidential information or any facts relating to that first retainer. Wife brought application to remove W as counsel of record.

**[Held:]** Application dismissed.

**[Reasons:]** There was no evidence that demonstrated that W had "relevant" information that would be prejudicial to wife. There was no point of connection between first retainer and second retainer that was sufficient to establish possibility of mischief. W did not remember wife's case, his involvement was relatively minor, and he could not access files.

**[Full Text]**

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***Stimson v. Stimson***

(2014), 49 R.F.L. (7th) 342 (Alta. Q.B.), J.H. Langston, J.
[Edited Headnote]

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**[Facts:]** Parties married in 1992, and divorced in 2013. Issues of property division and support remained to be finalized. Parties had long history of commencing proceedings and then reconciling. Parties had negotiated, through counsel, two spousal support and property agreements in 2000 and 2002. Wife had, for most part, been represented in all legal matters by lawyer A. Husband was currently represented by lawyer H. A and H had shared office space in 1999, when husband's earlier claim for divorce was commenced. Husband and wife brought applications to have other party's lawyer removed from record.

**[Held:]** Husband's application granted; wife's application dismissed.

**[Reasons:]** Based upon wife's own evidence and nature of solicitor-client relationship between A and wife, A had relevant evidence on wife's state of mind and legal knowledge she possessed when executing 2000 and 2002 agreements. Wife was compellable witness at trial. Wife made no allegation that H had any confidential information from time he shared office space with A.

**[Full Text]**

## 3.3 Relationships with Clients—Rendering Services

### 3.3.1 Generally

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**"Bearing bad news"**

Levy, Zohar, www.canadianlawyermag.com/5881, 11 January 2016
[Excerpt]

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We all lose sometimes. My first big loss was after a full trial where we had a very strong case, both on the facts and the law.

While technically the client was the one who "lost," it still felt like an intensely personal defeat when the trial judge decided against us in a short and almost incomprehensible endorsement. That loss taught me that sometimes even my best was not good enough because of all the unpredictable factors at play in litigation. It was a hard pill to swallow.

[**Full Text**]

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**"Lawyer appreciation 101"**

Daigneault, Pascale, www.canadianlawyermag.com/5882, 11 January 2016
[Excerpt]

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There are poorly represented clients who think they have received the best service, and there are those that receive excellent service but believe they were poorly served.

While the first scenario is shameful, the latter is simply tragic.

In the second scenario, the praiseworthy lawyer has not taught his or her client to appreciate efforts on his or her behalf. Teaching appreciation is part of client management. We all acknowledge its importance, but sometimes fail to implement it.

But failing to foster an appreciative relationship can jeopardize a file. The client may lose trust in you, and become less motivated to co-operate or pay your invoice.

[**Full Text**]

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**"Case assessments: do them early and often"**

Speigel, Allison, www.canadianlawyermag.com/5928, 22 February 2016
[Excerpt]

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The great Yogi Berra once said, "If you don't know where you are going you'll end up someplace else."

All too often, lawyers fail to heed this advice. They move cases forward before really evaluating the merits of the claims. They are often on auto-pilot: Draft the pleading, bring preliminary procedural motions, start the document collection process, etc. The problem with this approach is that a lot of time and money is spent before the lawyers have actually determined whether the claims or defences are likely to succeed.

Ultimately, they have started the client's litigation journey without a clear destination in mind.

A lawyer should be conducting case assessments at every stage of the proceeding.

[**Full Text**]

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**"Family lawyer touts ABS [Alternative Business Structures] despite resistance from many colleagues"**

McKiernan, Michael, www.lawtimesnews.com/201504134597, 13 April 2015
[Excerpt]

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Members of the family law bar should open their minds to the prospect of alternative business structures in Ontario, says an Ottawa lawyer championing looser rules for law firm ownership.

Julie Audet, one of the founders of the boutique firm Family Law in a Box, sat on the County of Carleton Law Association's alternative business structures working group as it prepared a submission to the Law Society of Upper Canada on proposals to allow non-lawyer ownership of law firms. She found a high level of skepticism towards the idea among her fellow family lawyers.

[**Full Text**]

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**"Client-Centred Law Firm Marketing"**

Burton, Brian, www.lexpert.ca/article-print, 20 April 2015
[Excerpt]

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Legal marketing takes many forms — but the care and feeding of client relationships comes first, law firms insist. The best marketing, they say, is the kind that reinforces vital client connections.

[**Full Text**]

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**"Case thrown out due to duty counsel's rudeness"**

Taddese, Yamri, www.canadianlawyermag.com/legalfeeds/2700, 15 May 2015
[Excerpt]

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Legal Aid Ontario says it's investigating a duty counsel who was admonished by a judge this week for his "yelling, angry, and rude" attitude with a Toronto woman on the night of her arrest, a behaviour that contributed to her acquittal this week.

[**Full Text**]

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**"Lawyer should have warned client about mounting costs"**

Taddese, Yamri, www.canadianlawyermag.com/legalfeeds/2848, 19 August 2015
[Excerpt]

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The Ontario Divisional Court has refused to allow the appeal of a disbarred Toronto lawyer who was found to have "churned" [charged fees not justified in] a family law file. [2015 ONSC 2939 (CanLII).]

Lawyer Roderick Byrnes, who had previous professional misconduct convictions, should have warned his client about the "mounting costs" he was incurring while pursuing matters like divvying up household chattels and his preference to not have his spouse smoke in front of their children, Justice Janet Wilson ruled for the Divisional Court panel.

**[Full Text]**

**"Professional negligence barristers get the most complaints, [Bar Standards Board] … report finds"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 25 February 2016
[Excerpt]

Barristers specialising in professional negligence are more likely than colleagues in any other area of law to generate complaints, a report by the Bar Standards Board (BSB) has found.

The report also found that when factors such as area of work and gender were taken into account, ethnicity "no longer predicts" which barristers receive the most complaints.

After professional negligence, family law barristers were the most complained about. They were followed by barristers working in the fields of employment, commercial litigation and personal injury.

[**Full Text**]

**"Law firms should be forced to publish details of complaints and prices, consumer panel says"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 02 February 2016
[Excerpt]

Law firms should be required by their regulators to publish details of complaints and average prices on their websites, the Legal Services Consumer Panel has said.

The panel said it would also like to see "more sector-specific information" about legal services, such as litigation outcomes and success rates.

The lack of information to help consumers choose lawyers has been a long-running theme of the panel, and in a report entitled *Opening up Data in Legal Services*, it said legal regulators should "make the collation and publication of first-tier complaints a regulatory requirement and mandate for its publication".

[**Full Text**]

**"[Legal Services Board] …: Regulators need to get tough with lawyers over poor complaints handling"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 03 March 2016
[Excerpt]

The Legal Services Board (LSB) is set to instruct the frontline regulators like the Solicitors Regulation Authority and Bar Standards Board to get tough with lawyers who do not handle client complaints properly.

Draft guidance published for consultation yesterday said that they could stage "supervisory interventions" to improve a firm or individual lawyer's complaints-handling procedures.

[**Full Text**]

**"… [D]isconnect between lawyers and clients over purchase of legal services"**

Rose, Neil, *Legal Futures* [United Kingdom], 29 September 2015
[Excerpt]

At a time when "the cost of legal services has generally been allowed to rise to unsustainable levels", lawyers and the clients need to reconnect the four key ingredients that go into the purchase of legal services – cost, price, value and relationship – Professor Stephen Mayson has argued.

A key element is that law firms must "constantly work and innovate to keep their costs as low as possible, consistent with their intended client-base and position in the market".

This did not mean it was just about efficiency, he continued. "But it certainly all starts with efficiency: without it, a firm will not have kept its cost-base within reasonable bounds, or then its pricing within market expectations; and without cost-efficiency, there is little scope for client perceptions of value for money, or a sound basis for a continuing relationship."

[**Full Text**]

**"Lawyers urged to play it cool with litigants in person"**

Rose, Neil, *Legal Futures* [United Kingdom], 04 June 2015
[Excerpt]

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Solicitors, barristers and legal executives have been told by their professional bodies to be polite and non-judgemental when dealing with litigants in person (LiPs), and take "extra care to avoid using inflammatory words or phrases".

Joint guidance issued by the Law Society, Bar Council and Chartered Institute of Legal Executives highlighted the fine line lawyers need to tread between their duties to clients and to the court.

For example, it said that if negotiating a settlement, it would be more appropriate to say 'are you prepared to agree to…' rather than 'the courts in this situation would never agree to x, so I suggest that you agree to….'. "The latter approach might be seen as unfair to the LiP, even if legally accurate," it said.

More generally, the guidance advised solicitors to adopt "a professional, co-operative and courteous approach at all times".

[**Full Text**]

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**"Clio's five quick tips for solicitors to increase focus and productivity"**

*Legal Futures* [United Kingdom], 20 May 2015

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[Five suggestions to increase efficiency in delivery of competent legal services.]

[**Full Text**]

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**"[Solicitors Regulation Authority] … warns litigators not to become 'hired guns'"**

Bindman, Dan, *Legal Futures* [United Kingdom], 23 March 2015
[Excerpt]

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Litigation solicitors were today warned by their regulator not to prioritise the client's interest over their other duties, stressing that they are not "hired guns".

Balancing conflicting pressures in litigation was an occupational hazard for solicitors and clear cases of "excessive zeal" were "relatively rare", the Solicitors Regulation Authority acknowledged in its 15-page report, *Walking the line: the balancing of duties in litigation*.

But solicitors' duties to the court, third parties and the public interest should be balanced against fearlessly advancing their clients' cases, it said.

[**Full Text**]

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**"Law Society sets out groundrules for offering unbundled services"**

*Legal Futures* [United Kingdom], 20 March 2015
[Excerpt]

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There is a wide range of practice areas where solicitors can offer unbundled legal services, from actions against the police to civil litigation, the Law Society has suggested.

It said firms could also use paralegals to act as McKenzie Friends in court.

The society has updated a two-year-old practice note on unbundling in family law to encompass the practice more widely, recognising that "there is no inherent reason why unbundling should be limited to family law".

While cautioning that solicitors must always consider the "appropriateness of unbundling in relation to the complexity of the case, the client's needs, and their ability to benefit from unbundled services", the society provided a non-exhaustive list of areas of law where it may be appropriate to offer them, including small personal injury claims, actions against the police, consumer claims and general civil disputes, family law, housing law and immigration.

**[Editor's Note**: A McKenzie Friend is a person, not a lawyer, who assists a litigant in court. The term derives from a 1970 divorce proceeding in England. In *McKenzie v. McKenzie*, the 'Friend' was an Australian barrister not licenced to practice in the United Kingdom.]

[**Full Text**]

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**"The ultimate one-stop shop? [Quebec family] Lawyer offers [unbundled services comprising] divorce advice, anti-ageing cream and sex therapy"**

*Legal Futures* [United Kingdom], 26 February 2015
[Excerpt]

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An international lawyer is bringing new meaning to the idea of a multi-disciplinary practice after launching a business in London that combines legal advice for … [do it yourself] divorce clients with anti-ageing serums and sex therapy.

Cià Gabriella Manes is a Canadian lawyer who was originally a biologist and also has a therapy qualification. She calls herself 'the beauty lawyer' and offers other related legal services, such as acting on cosmetic surgery negligence claims.

[**Full Text**]

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**"It's harder on the phone"**

Hamilton Shaw, Helen, *Legal Futures* [United Kingdom], 26 November 2014
[Excerpts]

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It's been nearly two years since we launched our Excellence Mark programme of client service support for LawNet member firms. And during this time we've completed over 1,000 mystery shopping exercises which have revealed some interesting insights for our firms.

. . . .

…, one of the things that stands out is the discrepancy that still exists between the scores achieved for the walk-in mystery shopping enquiries and those made on the phone.

Last year there was a 10% difference in the overall average score between this two. This year that has narrowed slightly to 9% but it's still a significant difference. And one worth thinking about in more detail.

Why is this so important and what can firms do about it?

Well, the 'why' should hopefully be obvious. The first point of contact that many clients and prospective clients will have with your firm will be on the telephone, yet our statistics show us that it's much harder to provide high levels of client service over the phone.

[**Full Text**]

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**"Sole practices responsible for 45% of claims on compensation fund"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 06 May 2014
[Excerpt]

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Sole practices are responsible for 45% of the latest claims made on the Solicitors' Compensation Fund (SCF), despite making up only around a third of firms at the time, research for the Solicitors Regulation Authority (SRA) has found.

However, City consultancy Economic Insight found that the average size of claims paid by the fund on behalf of sole practices, at just over £100,000, was smaller than for other kinds of firm.

[**Full Text**]

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**"Ethical Considerations When Representing A Client Who Is 'Under A Disability'"**

Danon, Beth A., [2002] Vt. Bar L. J. 1
[Excerpts]

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An attorney is subject to specific ethical requirements when representing a client whose decision making capacity is impaired whether due to a psychiatric disability, cognitive impairment, minority, or problems associated with aging.

. . . .

**Agency Relationship**

The attorney's relationship to her client is one of agency. Therefore, it is generally acknowledged that an attorney cannot represent a client's interest without her informed and competent consent. As with a physician, an attorney must be satisfied the client has the capacity to make critical decisions concerning the client's affairs. Lacking a client's valid, informed consent, the attorney has no authority to act on the client's behalf. Therefore, "a client's disability will have a bearing upon whether a lawyer-client relationship exists at all."

**Judging Capacity**

A person may be incompetent in fact, but not in law, and may also lack a guardian or authorized legal representative. Under these circumstances, an attorney must first determine if the client has the capacity to be a client. Under exigent circumstances, …ethical considerations may

still require the attorney to represent an incompetent client, but otherwise the attorney will not have the proper authority under principles of agency to provide representation. However, an attorney must be careful not to confuse eccentricity, life-style choices, imprudence, or differences in core values with incompetence. Furthermore, clients "may be competent for some matters, but incompetent for others." For example, a client might have the capacity to execute a Durable Power of Attorney to designate an attorney-in-fact to sell her home, but lack the capacity to understand the financial complexities of the transaction.

Attorneys also should be mindful not to fall into the trap of presuming that individuals lack capacity to make decisions about their lives solely because they have a cognitive impairment or psychiatric disability. On the contrary, most clients with these kinds of disabilities are acutely aware of their needs and desires. Their difficulty is in trusting an attorney to act in accordance with those expressed needs and desires as opposed to the attorney's, or, indeed, society's, paternalistic presumptions. Often it is simply a matter of taking the time needed to develop a rapport with the client that will allow the attorney to better appreciate and understand what the client is trying to communicate.

Once she has agreed to represent the client, however, what is the attorney's ethical obligations if she later determines the client's "ability to make adequately considered decisions in connection with the representation is impaired?"

. . . .

In maintaining a normal client-attorney relationship, the practitioner must take the time to assess the client's stated goals and unearth the motivations underlying them. This is referred to by some commentators as the "counseling process." It is tempting for an attorney to substitute her own judgment for that of her clients, or impose what she feels is in the client's best interest, and then to try to convince the client of her position. Either approach, while perhaps more economical, risks depriving both the client and the practitioner of the rewards of actually forming a relationship, as opposed to the ungratifying experience of just going through the formalities. The attorney's role in the counseling process is to help the client identify the needs and fears out of which her goals are formulated, examine the various options, and, together, decide the best course of action. In this manner, an attorney will be more successful in maintaining a "normal" client-attorney relationship with all of her clients, but especially those clients who may have a diminished mental capacity to make decisions.

## Conclusion

The counseling process is advantageous for all clients. However, for clients with cognitive impairments or psychiatric disabilities, this model is imperative. The needs and fears of most of these clients are likely to be born out of a life-long struggle for autonomy and a long-suffering absence of choice in determining their own lives. Only the counseling process can address these needs and fears. If, as advocates, we do not honor their struggle and allow their voices to be heard, who will?

**"Judiciary To the Bar: Make Contemporaneous Notes And Take Written Instructions"**

Elmaleh, David and Samuel, Aryeh, *mondaq*, 28 January 2016
[Excerpt]

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You get to your office bright and early with a long list of tasks to complete for the day. Before even taking a sip of your morning coffee, the phone rings. A client wants your advice on something pressing. You convey your suggestions to him over the phone. Just as you are getting off the phone with that client, your colleague walks in and has a question on an area of law you specialize in. You sit and chat with your colleague and the conversation meanders from topic to topic. Just as she leaves your office, your assistant reminds you that you have a firm practice group meeting starting in 5 minutes that your attendance is required. Before you know it, your morning is gone. Does this sound familiar?

*R. v. Shofman*, 2015 ONSC 6876 (CanLII), is a cautionary tale. In a very recent summary conviction appeal decision out of the Ontario Superior Court, Justice Kenneth Campbell in Shofman stressed the importance of a lawyer's "contemporaneous, reliable, objective records."

[**Full Text**]

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**"Online And Social Media Evidence In Family Law"**

Black, Adam and Himelfarb, Jenna. *mondaq*, 26 January 2016
[Excerpt]

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What steps should family law lawyers be taking and what advice should they be giving to their clients to address the growing regularity of online evidence admitted and considered in court proceedings? Adam Black examines the implications of the Court of Appeal's decision in *R. v. Marshall* [2015 ONCA 518 (CanLII)].

[**Full Text**]

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**"Thinking about feelings in decisions[:] Emotions are 'critically important,' says lawyer"**

Hally, Simon, *The Lawyers Weekly*, 29 January 2016, pp. 21, 22
[Excerpt]

When you have to make a difficult business decision, are you able to detach yourself emotionally from the matter at hand and come to a decision using only logic and reason?

If your answer to that question is "yes" or even "sometimes," then you are, regrettably, wrong. The human brain is constructed in such a way that our decisions are inextricably linked to our emotions.

[**Full Text**]

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**"Working longer brings diminishing returns"**

Moulton, Donalee, *The Lawyers Weekly*, 12 September 2014, p. 26
[Excerpt]

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Working nine to five is not a refrain familiar to most lawyers. However working 10, 12 or more hours a day is not good for productivity. In fact, long hours at the office can actually make you much less effective, according to leadership expert and author Tasha Eurich.

"We actually get stupider when we work too much," said the Denver-based author of the new book Bankable Leadership: Happy People, Bottom Line Results, and the Power to Deliver Both.

[**Full Text**]

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**"Lawyer's misconduct finding upheld"**

Benedict, Michael, *The Lawyers Weekly*, 16 January 2015, pp. 1 and 27
[Excerpt]

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Ontario lawyers who creatively skirt the *Criminal Code* prohibition against no-contest pleas risk professional discipline, according to the Law Society Tribunal, Appeal Division.

The "postscript" to a recent decision is in stark contrast to an earlier Ontario Court of Appeal judgment that found there is nothing inherently illegal about a person pleading guilty while maintaining his or her innocence. The apparent conflict between the law and professional rules of conduct puts lawyers, at least in Ontario, on the horns of a dilemma when clients wish to plead guilty despite claiming their innocence.

[**Full Text**]

**"Ending well means starting right"**

Wolfson, Lorne, *The Lawyers Weekly*, 14 November 2014, p. 13
[Excerpt]

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The most critical step in any family law case is when clients meet with prospective counsel. That meeting establishes the nature of the relationship, a preliminary game-plan, and each party's expectations of the other.

[**Full Text**]

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**"Flexible hours create unpredictable days[:] Being available anywhere and anytime can stress out professionals"**

Alcoba, Natalie, *The Lawyers Weekly*, 13 March 2015, pp. 20 and 22
[Excerpt]

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The legal profession isn't immune to the reality that being on call is simply part of the job now. The Canadian Mental Health Association warns about the importance of creating "balance" by creating a buffer between work and home, but Steve Prentice, an expert in workplace productivity, says the number of people across professions being "overrun by expectations" has hit "pandemic" proportions.

"It's a double-edged sword," says Andrew Feldstein, founder of the Markham, Ont.-based Feldstein Family Law Group, of the tools that allow him to sometimes work remotely while at home with his children. As a result, the expectations of clients have also changed. "If this was 10 years ago, they would send you a letter by fax," Feldstein notes. Now, clients expect a response to an e-mail the same day or the next.

[**Full Text**]

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**"The 'wrongfully removed' child[:]**
**[Application of Hague convention on the Civil Aspects of International Child Abduction]"**

Chaiton-Murray, Erin, *The Lawyers Weekly*, 20 February 2015, p. 13
[Excerpts]

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Parental abduction of a child is an urgent and time-sensitive matter. All applications for the return of a child pursuant to the Hague Convention are intended to be brought to a quick resolution. To achieve this goal, a focus on timing at various stages is required by all parties and by the courts. The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty signed by Canada in 1980 …

. . . .

… Many of the key aspects of the convention and some leading principles are set out in *Thomson v. Thomson* … [1994 CanLII 26 (SCC)].

. . . .

First, the "left-behind" parent who is seeking the return of the child must act quickly to avoid any claim being made by the other parent that they have acquiesced to the child's relocation, or otherwise consent to the removal in any way. That parent must immediately commence an application in the jurisdiction to which the child has been taken seeking an order for their return. Delays in doing so or in filing the required documents in support of the application could have a detrimental effect on the outcome of the case. It is not clear exactly how quickly courts reasonably expect the left-behind-parent to act; however, in *Cohen v. Cohen (Winnipeg Centre)* … [2013 MBQB 292 (CanLII)], Manitoba Court of Queen's Bench Justice Robyn Diamond noted that a 3 ½ month delay in filing materials was significant.

[**Full Text**]

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**"Set boundaries in setting up home office[:]**
**[Informing factors are professional access, peace, and privacy]"**

Moulton, Donalee, *The Lawyers Weekly*, 04 December 2015, pp. 5 and 27, at p. 5
[Excerpt]

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Home is where the heart is, and for more and more lawyers it's also where their office is.

But having a home office either on a full-time or part-time basis carries practical, psychological and legal implications, and requires more than merely clearing out a corner in the basement.

[**Full Text**]

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**"Starting out, on a wing and a prayer[:] 'It's not what you make, it's what your expenses are'"**

Kirbyson, Geoff, *The Lawyers Weekly*, 04 December 2015, pp. 22 and 25, at p. 25
[Excerpt]

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[Employment lawyer Doug] MacLeod says some lawyers may be more open to working for a fixed fee shortly after hanging up a shingle so they can lock in some much-needed cash flow.

"Normally it wouldn't be done that way but you want the income certainty. If a file takes more time than I expect, I'll eat it. At least I'll have enough money to pay the rent this month," he says.

When you're starting out and your expenses exceed the meager income that you're bringing in, it's tempting to take on any and all work that you can scrape together. If at all possible, veterans who have been there recommend sticking to your guns and not trying to be all things to all people.

"When I went out on my own, people said, 'you won't get to do what you want to do. You'll do whatever work comes in the door.' I said, 'no I won't,' " says Rotfleisch.

He certainly felt the financial pressure but he didn't give in when a real estate transaction came his way. He bit his lip and referred it out — and he's glad he did.

"On the face of it, it looked like a simple transaction but it was a problem deal. If I had done it on my own, I probably would have gotten into trouble and could have been sued. I certainly would have needed assistance. It had the potential of leading to malpractice and negligence," he says.

[**Full Text**]

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**"Dawning of the divorce selfie"**

Marchetti, Christine, *The Lawyers Weekly*, 13 November 2015, p. 13
[Excerpt]

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With more clients exploring resolution outside of the courthouse, our role as family counsel evolves too and we find ourselves drafting more agreements, scheduling more all-party meetings and attending more mediation.

There will always be a place and a need for litigation, but a resolution that clients have had a hand in is much more likely to succeed because the client is invested in that success.

[**Full Text**]

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**"Avoiding the misstep of miscommunication[:] If you can't get your message across, 'brilliant skills don't matter'"**

Hally, Simon, *The Lawyers Weekly*, 30 October 2015, pp. 23 and 25
[Excerpt]

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A common difficulty for lawyers when communicating with clients is a tendency to speak down unintentionally, or use legal terminology that means something else to a layperson, says Michelle Causton, a professor at Canadore College in North Bay, Ont., who has extensive experience in communication and governance. The interpretation of words as basic as "justice" and "innocence," for example, can vary widely, depending on the extent of legal knowledge of the person using them.

[**Full Text**]

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**"A firm handshake for unsure times[:] Trust is no longer assumed–lawyers need to earn it"**

Bekhor, Sandra, *The Lawyers Weekly*, 30 May 2014, pp. 23 and 26, at p. 23
[Excerpt]

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Lawyers and firms … can no longer take it for granted that trust will be afforded to them as a given. They will benefit, as a result, when they provide clarity to colleagues and clients on how their trust will be earned, reciprocated and enhanced. They can do so by being accountable and transparent — by delivering on promises made and by committing to repair and rebuild each and every time there has been a challenge.

[**Full Text**]

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**"Coming back from defeat[:] Mental toughness helps lawyers 'shake it off' and look forward"**

Cameron, Grant, *The Lawyers Weekly*, 23 January 2015, pp. 20 and 21, at p. 20
[Excerpt]

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Marcy Segal can still remember how she felt 15 years ago when one of her clients was convicted and received a lengthy sentence for importing a narcotic.

"I recall crying with the client in the cell," says the criminal defence lawyer, convinced to this day her client was innocent.

"I am not sure I will ever forget the reaction on his face and how crushing it was for him.

"I think about this case less often but it never leaves me."

With 24 years of experience, Segal is better prepared to deal with courtroom setbacks.

"With experience comes the ability to compartmentalize losses and appreciate that you should learn from them," she says. "Sometimes the file is just against you so you've got to be able to deal with that. As long as you feel every day that you've put in 100 per cent you should feel proud of the work you've done."

Losing a criminal or civil trial can be tough on lawyers, who have to find the mental toughness to bounce right back for their next client.

[**Full Text**]

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**"Delicately handling the demanding client[:] Set out clear expectations from the beginning, lawyers advise"**

Alcoba, Natalie, *The Lawyers Weekly*, 03 April 2015, pp. 20 and 22
[Excerpt]

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Generally speaking, people don't look up securities litigator Greg Temelini because they're happy. In fact, they're probably stressed. Maybe they're being sued, or want to sue, and they're hoping he can help.

It's the kind of situation that could lend itself to volatile reactions, especially on the part of clients navigating unfamiliar waters.

Whether it's being on the receiving end of abusive language, fielding calls from micro-managing clients or those who like to shop around for advice from neighbours and the like, lawyers are bound to encounter tough customers in their careers. But how much should they be expected to put up with in the name of a case? And is there a way to turn a prickly situation into a banner one?

[**Full Text**]

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***Letoria v. R.***

2015 CarswellNat 4358, 11 September 2015 (T.C.C.), Campbell J. Miller, J., at para. 15
[Excerpt]

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[15] It is regrettable that those involved in counselling couples on breakup and drafting their agreements or orders are not intimately familiar with … [such income] tax provisions [as *Income Tax Act* ss. 118(5) and 118(5.1)] to ensure their clients get the credits they deserve.

**[Full Text]**

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**"Expectations and feedback[:] Know what clients want and always follow up so you know if your firm is providing it"**

Bruineman, Marg., *Canadian Lawyer*, May 2016, pp. 21-23, at p. 21
[Excerpt]

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When Laura Williams launched her new firm, she wanted to ensure she was hitting the mark. So she hired a company to find out what existing clients wanted. They were asked to outline what they liked about the service they had received, what was important to them, and to provide some insight on their expectations.

What came back was a clear desire for responsiveness and availability from their lawyer from whom they also sought practical solutions. "What I've seen right across the board … is there is a heightened expectation for responsiveness, and that can be a real challenge from a practitioner's standpoint", says Williams, principal of Williams HR Law PC in Markham, Ont. "Throw the 9-to-5 regular business hours out the window. Clients expect lawyers, their service providers, to be much more responsive."

**[Full Text]**

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**"Custody Assessments – Use of Illegally Obtained Evidence and Hearsay – Joint Custody In High-Conflict Case"**

Epstein, Philip, *Epstein's This Week in Family Law*, 2015 No. 25, 22 June 2015
[Excerpt]

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*U. (A.J.) v. U. (G.S.)*, 56 R.F.L. (7th) 284 (Alta. Q.B.): This is a rather remarkable judgment penned by Madam Justice D.L. Pentelechuk of the Court of Queen's Bench of Alberta. It demonstrates a thorough understanding of the problems and pitfalls of the adversarial family law system, displays very considerable insight into the role of custody assessors, and demonstrates keen insight into human behaviour particularly in a high-conflict case. This is a must read for all those who engage in custody disputes in high-conflict cases. It is also a case of paramount importance to custody assessors and third-party professionals who come in contact with children of divorcing parents. It is one of the highlight cases of the year.

**[Full Text]**

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**"Expert Evidence – Admissibility – Bias"**

Epstein, Philip, *Epstein's This Week in Family Law*, 2015 No. 28, 13 July 2015 2015
[Excerpt]

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*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 CarswellNS 314 (S.C.C.) [2015 SCC 23 (CanLII)]: Expert evidence is frequently called in family law cases. The most common expert is a business valuator and, frequently, the business valuator works with the lawyer that proffers his or her evidence in order to produce a report, but also gives advice about potential outcomes. The issue then arises as to whether the expert has crossed the line and become an advocate as opposed to an expert and whether the close relationship between a valuator and the lawyer disqualifies the expert from giving evidence.

This issue is comprehensively canvassed in the recent Supreme Court of Canada decision in which Justice Cromwell, speaking for a unanimous court, sets out the rules and standards for the admissibility of expert evidence and reviews potential problems of bias, independence and impartiality.

**[Full Text]**

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**"Is there a new view on defence ethics?"**

Slayton, Philip, *Canadian Lawyer*, February 2016, pp. 16-17, at p. 16
[Excerpt]

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What are the ethical boundaries for a lawyer defending someone accused of a sex crime? Is he a hired gun, expected to do everything legally possible to win the case, concerned only about the fate of his client, free to attack the complainant unreservedly in cross-examination, dedicated — as it is sometimes put — to proof, not truth? That, I think, was the old idea, unchallenged for many years.

Or does the defence lawyer have broader social obligations that mitigate his or her responsibility to the accused, obligations that include not embracing myths and stereotypes about women and sex and giving special consideration to the complainant? That is more modern thinking, let's call it the "new view," born of high-minded concern for the well-being and rights of those alleging sexual assault, and promoted by a new generation of academics and ethicists.

[**Full Text**]

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**"Divorce funding firm is planning to open a Toronto office"**

Macaulay, Ann, *The Lawyers Weekly*, 27 May 2016, pp. 3, 11
[Excerpt]

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Novitas, a company that provides divorce funding, will soon be coming to Canada. Based in Britain with operations in the U.S., it plans to set up a Toronto office by early fall, making it the first lender of its kind in this country.

The company lends funds to individuals rich in assets, such as real estate or a business, but who lack access to the money they need to fund a divorce and cover personal living expenses. "We're designed to level the playing field when it comes to divorcing," said Nicole Noonan in New York, who started the company's American branch just over a year ago. "We're there to help the lesser-moneyed spouse." She added that the company has been very well received in the U.S.

**[Full Text]**

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***Noy v. Noy***

(2014), 50 R.F.L. (7th) 118 (Ont. Sup. Ct. J.), Kitely, J.
[Edited Headnote]

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**[Facts:]** Parties were married in 1971 and divorced in 2006. Consent order required husband to pay spousal support in amount of $6,000 per month, subject to review upon wife receiving material inheritance from her mother's estate. When wife's mother passed away in 2013, husband sought disclosure and counsel entered into consent order. Parties provided some disclosure but there was high degree of conflict. Wife brought motion for order requiring husband to make further disclosure and to re-attend for cross-examination or have his pleadings struck out. Husband brought cross-motion for order striking wife's pleadings or to freeze spousal support, compel wife to make further disclosure, and attend at examinations.

**[Held:]** Wife's motion dismissed; husband's cross-motion granted in part.

**[Reasons:]** There had been considerable disclosure. Counsel had lost sight of fundamental issues and broadened demands for disclosure in way that was disproportionate to matters at stake. Conduct of both counsel had effect of rendering solicitor-solicitor relationship so dysfunctional that both were incapable of promoting primary objective. Parties were to proceed to cross-examinations on disclosure each now had, except that wife was ordered to comply with earlier order to provide details of any inheritance she received from her mother's estate.

### 3.3.2 Confidentiality and Privilege

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**"Appeal judges limit professional privilege where lives are at risk"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 10 August 2015
[Excerpts]

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Legal professional privilege can be qualified in the "rare circumstances" where it is necessary to impose a requirement that other people are present at discussions between lawyers and clients, the Court of Appeal has ruled.

The case involved a mentally ill man who was already serving life sentences at Rampton Hospital for attempted murder when he attacked another patient, after admitting that he "contemplated killing his solicitor".

. . . .

The Court of Appeal heard that in advance of his most recent trial for attempted murder, Edward Brown's solicitor wrote to the court to enable him to consult with his lawyers from a secure dock.

However, on the first day of the trial at Nottingham Crown Court, Rampton Hospital applied for an order that Mr Brown was to be accompanied by at least two nurses and handcuffed to them during any conferences with lawyers.

Mr Brown objected, on the grounds that he had "an absolute right to confidential communication with his lawyers", but the judge agreed with the hospital.

[**Full Text**]

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**"Does 'Privilege Of The Law Of Evidence' Include Solicitor-Client Documents?"**

Chisholm, Adam and Koczerginski, Mitch, *mondaq*, 25 November 2015
[Excerpt]

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A recent appellate—*University of Calgary v. R.(J.),* 2015 ABCA 118 (CanLII)—case holds freedom of information rulings cannot override a party's claim of solicitor-client privilege. The Supreme Court of Canada has granted leave to appeal. Will the Supreme Court empower Alberta's Information and Privacy Commissioner or, instead, buttress protections of privilege?

[**Full Text**]

**"Disputants Await Clarification Of Mediation Privilege's Boundaries"**

Schatz, Julia and Beaulne, Gannon, *mondaq*, 22 November 2014
[Excerpt]

Mediation works best when parties are assured that their discussions will remain confidential. In *Union Carbide Canada Inc. v. Bombardier Inc.*, the Court confirmed that settlement privilege—a class privilege—protects all communications exchanged by mediating parties for the purpose of settling a dispute. But other cases confirm that settlement privilege does not necessarily protect everything that might be said or done at mediation. For example, parties have tried to compel mediators to testify to prove the existence or terms of an alleged settlement. [2014 SCC 35 (CanLII).]

[**Full Text**]

**"Don't Give The Game Away – Tips On Maintaining Litigation Privilege"**

Alexander, Mark, *mondaq*, 13 July 2015
[Excerpt]

Courts have long recognized the origin and rationale of solicitor-client privilege as a necessary and essential tool for the effective administration of justice. A related but conceptually distinct protection is that of litigation privilege. While both forms of privilege serve a common cause and have often been thought of as branches of the same tree, they are driven by different policy considerations and generate different legal consequences.

[**Full Text**]

**"But whose privilege is it?[:]**
**'Solicitor-client privilege' has become a uniquely Canadian term, and**
**a uniquely Canadian doctrine. It has become 'the privilege' in Canada"**

Dodek, Adam, *The Lawyers Weekly*, 14 August 2015, p. 13
[Excerpt]

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Solicitor-client privilege occupies such an exalted status under Canadian law that it's a misnomer to any longer conceive of it as merely an evidentiary privilege. The Supreme Court [of Canada] recognized solicitor-client privilege over two decades ago as a "fundamental civil and legal right" of Canadians, and over the last 16 years it has constitutionalized the privilege. While it is nowhere mentioned in the *Canadian Charter of Rights and Freedoms*, solicitor-client privilege boasts stronger constitutional protection in Canada than that which exists for most rights explicitly enumerated in the Charter.

With these developments, Canada has gone its own way. No other common law jurisdiction has protected solicitor-client privilege to this degree. In fact, no other country uses the terminology that we do. "Solicitor-client privilege" has become a uniquely Canadian term, and a uniquely Canadian doctrine. It has become "the privilege" in Canada because it has no equals either at home or abroad.

**[Editor's Note**: University of Ottawa Professor of Law Adam Dodek is author of the invaluable, perhaps seminal, *Solicitor-Client Privilege* (Markham: LexisNexis, 2014), conferred the prestigious, $10,000 Walter Owen Book Prize in 2015 by the Foundation For Legal Research.]

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**"Litigation privilege afforded more protection**"

Millan, Luis, *The Lawyers Weekly*, 13 March 2015, p. 10
[Excerpt]

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The Quebec Court of Appeal appears to have granted litigation privilege the same protections afforded to solicitor-client privilege in the case of a provincial regulator seeking documents from an insurance company in the course of an investigation.

[**Full Text**]

**"Hunter sees victory for clients as SCC enshrines independence[:] Ruling strikes down lawyers' role in anti-money laundering regime"**

Schmitz, Cristin, *The Lawyers Weekly*, 27 February 2015, pp. 1-2, at p. 1
[Excerpt]

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The Supreme Court has quashed the latest bid to enlist lawyers in Ottawa's anti-money-laundering regime, ending a 14-year legal battle waged by law societies in the name of defending solicitor client privilege and the independence of the bar.

On Feb. 13 [, 2015] in *Canada (Attorney General) v. Federation of Law Societies of Canada,* … [2015 SCC 7 (CanLII)], seven judges ruled unanimously that 2008 federal regulations requiring financial intermediaries to verify clients' identities and record and retain their information for scrutiny by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), as well as statutory provisions from 2000 authorizing the federal agency to search offices and computers and seize information during compliance audits, are unconstitutional as they apply to Canadian lawyers and law firms, including Quebec notaries.

The ruling "confirms the importance of a lawyer's undivided loyalty to his or her client," and for the first time elevates that duty of "committed client representation" to a s. 7 Charter-protected principle of fundamental justice, said John Hunter of Vancouver's Hunter Litigation Chambers, counsel for the FLSC, umbrella group for Canada's 14 law societies that launched the test case in 2001.

[**Full Text**]

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**"Privilege's public safety exception an ethical grey area[:]**
**[Extremely rarely will exception require disclosure; decision to so do must be driven by facts of particular circumstances]"**

Moulton, Donalee, *The Lawyers Weekly*, 01 May 2015, pp. 5 and 10
[Excerpts]

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The test for disclosure is spelled out in *Smith v. Jones* … [1999 CanLII 674 (SCC)], a case involving a psychiatrist, hired by the defence to evaluate a man accused of aggravated sexual assault, who became concerned and convinced the defendant would abduct, rape, and murder prostitutes in Vancouver, and believed this information should be factored into the sentencing decision.

"As a general rule, the privilege is to be set aside if there is an imminent risk of serious bodily harm or death to an identifiable person or group," says Megan Schwartzentruber, a criminal defence lawyer with Cooper, Sandler, Shime & Bergman in Toronto.

. . . .

However, she adds, "the court has suggested that it will be extremely rare that the public safety exception will require disclosure."

Law societies have embraced this position. The Law Society of Upper Canada's rules of professional conduct, for example, state that in "very exceptional situations" disclosure without the client's permission might be warranted for public safety reasons.

Several law societies have made the decision potentially more difficult by making disclosure discretionary. Lawyers in B.C., Nova Scotia, Quebec, Ontario, Alberta, Newfoundland and Labrador, and P.E.I. "may" break privilege under their codes of conduct. In all other provinces and territories, they "must" break privilege when public safety is threatened.

The ambiguity inherent in the optional "may" puts lawyers in a thorny situation.

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**"Professional Conduct Rules And Confidential Information Versus Solicitor-Client Privilege: Lawyers' Disputes And The Use Of Client Information"**

Mercer, Malcolm 2015, 92 Can Bar Rev. 595
[Article Summary]

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Solicitor-client privilege and law society codes of conduct do not perfectly overlap in terms of the scope of protected client information. In some contexts, codes of conduct permit lawyers to use protected information where solicitor-client privilege does not. The codes of conduct should be amended to clarify that they do not authorize use or disclosure of privileged information that is not permitted by law.

In client/lawyer litigation, solicitor-client privileged information is sometimes admitted on the basis of waiver of privilege. This is inappropriate. Client/lawyer litigation should instead proceed on the basis that no issue of privilege arises as between client and lawyer in respect of information that is not confidential as between them. However, care should be taken in client/lawyer [communications] to protect privileged information from disclosure to third parties by sealing and other protective orders.

***Warde v. Slatter Holdings Ltd.***

(2016), 71 R.F.L. (7th) 253 (B.C. C.A.), Neilson, Goepel and Savage, JJ.A.
[Edited Headnote]

**[Facts:]** Claimant and B began living in marriage-like relationship around 1992, married in 1994 and separated in 2013. Claimant and B had been officers and directors of S Ltd.. Claimant filed notice of family claim naming B and S Ltd. as respondents. Claimant obtained order restraining disposal of property. S Ltd. issued number of cheques, with respect to some of which solicitor-client privilege was asserted. Claimant brought application resulting in finding of breach of order, and chambers judge directed S Ltd. to pay into court all funds in its bank accounts or under its control. Chambers judge found that S Ltd.'s claims of solicitor-client privilege had to fail. S Ltd. appealed.

**[Held:]** Appeal allowed.

**[Reasons:]** Privilege was not lost. Given this court's findings that order was not breached, alleged breach could no longer form basis for order that solicitor-client privilege had been waived. Taking position in litigation that it was entitled to use funds in its bank account could not form basis for loss of very privilege S Ltd. was seeking to protect. Order that solicitor-client privilege over impugned cheques and banking documents was displaced had to be set aside.

**[Full Text]**

***S. (T.), Re***

(2013), 40 R.F.L. (7th) 479 (Alta. P. Ct.), V.T. Tousignant, P.Ct.J.
[Edited Headnote]

**[Facts:]** Two child protection proceedings were commenced in Alberta Provincial Court (APC) under Child, Youth and Family Enhancement Act (CYFEA). Practice Note 2 of APC requires all parties to complete trial readiness form, which contains questions to be answered by respondents (TRF questions). TRF questions include whether respondent is guardian of child, whether respondents are living separate and apart, and whether respondent is in reasonable contact with his or her counsel. In child protection proceedings at bar, issues arose regarding APC's ability to control its process and meanings of solicitor-client and litigation privilege. Parties made submissions on these issues.

**[Held:]** Ruling issued. APC has statutory authority to control its own process. CYFEA and Court Rules and Forms Regulation allow for development of pre-trial protocols. APC has authority, as part of controlling its child protection process, to compel information from

respondent to more accurately determine number of trial days required. This requirement in no way shifts onus of proof from Director of Child and Family Services to respondent.

**[Reasons:]** Fact that child protection hearings are in nature of inquiry further supports APC's authority to compel information from parties. Requirement that counsel provide responses to TRF questions does not call for breach of either solicitor-client or litigation privilege. TRF questions are generally related to acts or facts, unrelated to giving or receiving of legal advice. Solicitor-client privilege does not attach to responses to TRF questions. Furthermore, responses to TRF questions are required by APC in form of Practice Note. Even if information were privileged, its divulgation is required by APC and is therefore permissible under R. 2.03(1) of Law Society of Alberta's Code of Conduct.

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***Bortnikov v. Rakitova***

**(**2015), 58 R.F.L. (7th) 71, 2015 ONSC 1163 (CanLII), (Ont. Sup. Ct. J.), Penny, J.
[Edited Headnote]

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**[Facts:]** Litigation privilege. Husband retained real estate valuator to appraise property. Husband disagreed with appraisal report and decided not to call valuator as witness at trial. Wife brought motion for order allowing her to call real estate valuator as witness at trial.

**[Held:]** Motion granted.

**[Reasons:]** There is no property in a witness. Wife was aware that valuator had been retained and when asked to produce valuator's report husband willingly complied. Any claim to work product privilege was unambiguously waived. There was no evidence that valuator was involved in confidential discussions or litigation planning. Valuator's evidence was relevant to important issue in proceeding and was potentially helpful to court. There was no property in valuator's status as witness to facts he observed and his own independent opinions based on those facts. There was no basis for disqualifying valuator as witness able to be called by wife, subject to his being properly qualified at trial.

**[Full Text]**

### 3.3.3 Negotiations

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**"Avoid common ADR pitfalls"**

Mann, Arshy, www.canadianlawyermag.com/5218, 04 August 2014
[Excerpt]

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Compared to the combat of litigation, alternative dispute resolution might seem to some like a pleasant alternative. But mediations, arbitrations, and their various brethren come with pitfalls of their own that can ensnare an unwary lawyer. Whether it's your first time working through a labour mediation or you're a jet-setter representing global multinationals, make sure to avoid some of the most common errors that plague ADRs.

[**Full Text**]

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**"Lawyer alone authorized to make settlement offer: …"**

Taddese, Yamri, www.canadianlawyermag.com/legalfeeds/3125, 17 February 2016
[Excerpt]

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A Toronto lawyer says he feels vindicated by a recent Divisional Court decision [2015 ONSC 6697 (CanLII)] that overturned a two-year-old ruling against him over a settlement agreement.

"I find that the motion judge erred in law and made factual findings unsupported by the evidence on matters of fundamental principle," said Divisional Court Justice Anne Molloy, who penned the ruling on the court's behalf.

In 2014, a motion judge had deemed a settlement agreement, to which lawyer Joseph Zayouna agreed, was unenforceable because Zayouna didn't have instructions from his client to accept the deal.

[**Full Text**]

**"Commentary on the Compact[:]**
**[Practise procedures for marriage contracts and cohabitation agreements]"**

Siegel, Brahm, www.canadianlawyermag.com/5592, 18 May 2015
[Excerpt]

… [A] simple set of standard procedures I propose be used in all cases involving marriage contracts and cohabitation agreements. They are nothing more than seven steps to be followed by lawyers retained on these sorts of files.

[**Full Text**]

**"When true collaboration will be embraced by the legal profession"**

Melnitzer, Julius, *Lexpert Magazine*, July/August 2015
[Excerpt]

Despite lawyers' continuing resistance to the idea of working in teams, there have been gradual advances on the collaboration front.

**[Full Text]**

**"Barrister and solicitors cleared of negligence over court doors settlement"**

Rose, Neil, *Legal Futures* [United Kingdom] [United Kingdom], 02 February 2016
[Excerpt]

A barrister's advice to a claimant to settle her case at the doors of the court after a key witness failed to appear was not negligent, the High Court has ruled in a claim brought nearly six years after the consent order was made.

It has been described as good news for the profession given "a climate of post-settlement remorse" among claimants.

However, Mrs Justice Laing said that if she was wrong and counsel was negligent, then so were the claimant's solicitors for having sent a trainee solicitor to court who was "out of his depth". *Dunhill v W Brook And Co & Anor* [2016] EWHC 165 (QB) (BAILII).].

[**Full Text**]

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**"[London law firm] … pioneers fixed-fee divorce arbitration service"**

*Legal Futures* [United Kingdom], 22 December 2014
[Excerpts]

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London firm Hodge Jones & Allen has launched a fixed-fee arbitration service for divorcing couples in the wake of judicial support for such a move to keep costs down.

. . . .

HJA said the new service will appeal to middle-income families for whom the value of their property is likely to be their biggest asset. The arbitration fee will be a "fraction" of the cost of going to court and the regime is expected to reduce the amount of time taken to reach a financial settlement from around a year to four months.

[**Full Text**]

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**"Can A Mediated Settlement Agreement Be Set Aside?"**

Schein, A. Irvin, *mondaq*, 10 October 2014
[Excerpt]

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Mediators and lawyers go to great lengths to protect themselves from parties who agree to settlements at mediation and later have a change of heart. The courts are just as vigilant in preserving the settlement agreements themselves and requiring parties to abide by them. Under what circumstances would a court agree to set aside a mediated settlement agreement? The recent case of *Rawlins v. Rawlins* [2014 ONSC 5649 (CanLII)] provides us with some guidance.

[**Full Text**]

**"Crafting a marriage contract that sticks"**

Benmor, Steven, *The Lawyers Weekly*, 26 September 2014, p. 13
[Excerpt]

Marriage contracts, or "prenups," are meant to be relied upon when a couple separates. But how likely are they to be upheld?

[**Full Text**]

**"Start by picking the right resolution method[:]**
**[Courts show considerable deference to family law arbitrator decisions]"**

Wolfson, Lorne, *The Lawyers Weekly*, 26 September 2014, p. 15
[Excerpt]

Family lawyers have available a broad array of dispute resolution options, including collaborative negotiations, mediation, arbitration, mediation/arbitration, arbitration/mediation, or litigation. Determining the best option to recommend to one's client is often the most important decision that the family law lawyer must make.

[**Full Text**]

***Bhasin v. Hrynew***

2014 SCC 71 (CanLII), Cromwell, J. for the Court, paras. 1; 92-93
[Excerpts]

[1] The key issues on this appeal come down to two, straightforward questions: Does Canadian common law impose a duty on parties to perform their contractual obligations honestly? And, if so, did either of the respondents breach that duty? I would answer both questions in the affirmative. Finding that there is a duty to perform contracts honestly will make the law more certain, more just and more in tune with reasonable commercial expectations. It will also bring a measure of justice to the appellant, Mr. Bhasin, who was misled and lost the value of his business as a result.

. . . .

[92] …at this point in the development of Canadian common law, adding a general duty of honest contractual performance is an appropriate incremental step, recognizing that the implications of the broader, organizing principle of good faith must be allowed to evolve according to the same incremental judicial approach.

[93] A summary of the principles …

(1) There is a general organizing principle of good faith that underlies many facets of contract law.

(2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.

(3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

[**Full Text**]

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**"Did the Supreme Court clarify or muddy the duty of good faith?"**

Melnitzer, Julius, www.lexpert.ca/article-print, 25 May 2015
[Excerpt]

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In *Bhasin v. Hrynew*, [2014 SCC 71 (CanLII)] the SCC tried to make Canadian contract law more settled, fair and closely aligned with parties' reasonable expectations. But does the decision clarify the law or muddy the waters?

To the extent that clients want a simple answer to everyday legal problems, the Supreme Court of Canada's landmark decision in *Bhasin v. Hrynew* – despite the unanimous court's protestations to the contrary – hasn't done much to help them.

"I think the judgment is disingenuous because the court says it won't change anything, when in fact it changes everything," says Nicholas Kluge of Gowling Lafleur Henderson LLP in Toronto.

For the first time in common-law Canada, the court recognized that contracting parties have a legal duty to perform their contractual obligations honestly and with regard to the legitimate expectations of the other parties. The origin of that duty could be found in a general "organizing principle" of good faith performance.

[**Full Text**]

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**"Crossing the line on legal advice[:] [when acting in role of mediator]"**

Edwards, Valerie, *The Lawyers Weekly*, 18 September 2015, p. 13
[Excerpt]

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When I attended the Harvard mediation course many years ago, the instructors presented the class with an ethical problem and asked us for our views. Here it is, modified for a 2015 Canadian readership:

The plaintiff is suing for the breach of a supply agreement. The damages are easily $750,000. The equities favour the plaintiff, but pinning down the cause of action is a challenge. During the first caucus, plaintiff's counsel frankly admits that he has a serious uphill case on the law. The financially strapped client, who believes the odds are firmly against him, intimates that he would settle for whatever the defendant was willing to pay.

The mediator then goes into caucus with the defendant, whose counsel makes a passionate argument that the plaintiff's case has no merit. However, the defendant "might" be prepared to pay a "nuisance" amount.

"But what about *Bhasin v. Hrynew*?" [2014 SCC 71 (CanLII)] the mediator asks. "Doesn't that change the landscape? The plaintiff isn't arguing it, but the judge could go there. The court's not going to like those e-mails — doesn't the other side have a decent bad faith argument?"

"They aren't arguing Bhasin because they don't know about it yet, and don't you say anything. They came to settle."

The Harvard instructors asked, "What should the mediator do? He believes that the plaintiff's case has some merit and may have a decent settlement value, but suspects that the plaintiff will jump at a nuisance offer if he thinks this is the best he can do. If the mediator raised the Bhasin case with the defendant, should he mention it to the plaintiff? Or should the mediator consider withdrawing from the mediation?"

[**Full Text**]

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**"Expanding the duty of good faith[:] SCC has blown wide open the grounds for a contractual dispute"**
**[*Bhasin v. Hrynew* 2014 SCC 71 (CanLII)]**

Lederman, Eli, *The Lawyers Weekly*, 30 January 2015, pp. 10 and 11, at p. 10
[Excerpt]

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The Supreme Court of Canada's landmark decision in *Bhasin v. Hrynew* … [2014 SCC 71 (CanLII)], makes it clear that there is now a common law duty to act honestly in the performance of all contractual obligations. Previously, duties of good faith had been recognized in particular types of contracts (for example, in employment, insurance and franchise agreements), with respect to particular types of contractual provisions (as in contractual clauses which provide for the exercise of discretionary powers) and in particular types of contractual relationships.

The court found that this approach to good faith performance of contracts was piecemeal, unsettled and unclear. As a result, the court recognized a "general organizing principle" of the common law of contract that parties expect that contractual obligations will be performed in good faith. It recognized and affirmed existing lower-court good faith jurisprudence, but did so ambiguously. On the one hand, the court left the door open to extending the concept of good faith where the existing law is "found to be wanting." On the other hand, the court recognized that in commercial contractual relationships, a party "may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest and that the principle of good faith must not veer into a form of ad hoc judicial moralism or 'palm tree' justice."

In spite of this cautionary language, the decision in *Bhasin* is groundbreaking in two respects. First, the court explained the "organizing principle" of good faith in terms that transform good faith from being a gap-filling doctrine into a positive obligation to pay "appropriate regard" to the other party's interests in the exercise of a contractual right. Unfortunately, the Supreme Court did not define "appropriate regard" and instead held that it will vary depending on the context of the contractual relationship. As a result, the grounds for a contractual dispute have been blown wide open as strict compliance with a contractual term is now no longer the end of a contractual dispute.

Second, in addition to consolidating and extending previous good faith jurisprudence, the court went on to impose, on all contracts, a duty to act honestly in the performance of all contractual obligations.

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**"Facing up to the nuances of negotiating[:] Understanding the limits, setting strategy starts well before sitting at the table"**

Kirbyson, Geoff, *The Lawyers Weekly*, 09 October 2015, pp. 23 and 26, at p. 23
[Excerpt]

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With most deals, there are formal discussions in the negotiating theatre and informal talks, most likely in a coffee shop or pub. The latter can be particularly useful in trying to narrow down the issues or get an understanding of what the other side … [is] thinking.

When clients are sitting among their lawyers during a negotiation, it's not uncommon for bluster to replace more measured discussion as lawyers try to impress their own clients, the other lawyers and their clients, too.

"There may be a bit of posturing going on that doesn't lend itself to coming to a solution," says Mark Katz, a Toronto-based lawyer in the competition and foreign investment review group of Davies Ward Phillips & Vineberg. "If you can get around that, it can be helpful. To stage-manage the discussions, a lot of discussions are going on outside of the boardroom. To some degree, they're scripting what is unscripted."

[**Full Text**]

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**"Collaboration thrives when litigation off the table[:]**
**Through exploring shared and divergent interests, we create ways in which the parenting or financial 'pie' can be expanded. It's always easier to divide a pie that just got a bit bigger"**

Savin, Nicola, and Graham, Deborah, *The Lawyers Weekly*, 24 July 2015, p. 14
[Excerpt]

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Collaborative lawyers have removed a significant tool from their negotiation toolbox — they do not go to court for their collaborative clients. Without the option of litigation or the threat of litigation, collaborative lawyers are focused on settlement every step of the way. Thus they have developed a set of tools, protocols and skills that increase the likelihood of a timely, durable and cost-effective settlement. Many of these tools and skills are helpful in non-collaborative files, whether traditional negotiation or litigation.

Collaborative lawyers focus on interest-based negotiation. Each lawyer works with his or her client to "mine for interests." The lawyer asks questions to move beneath positions and understand the goals, concerns, fears and values of their client. The lawyer also helps the client to prioritize their interests. Exploring interests often yields possible solutions or restructuring of proposals and counter-proposals that increase the likelihood of settlement. Through exploring

shared and divergent interests, we create ways in which the parenting or financial "pie" can be expanded. It's always easier to divide a pie that just got a bit bigger.

Collaborative lawyers don't write a lot of letters. Some don't write any. There is no need to "have a paper trail" since none of the letters can be used in any subsequent process without both parties' consent. As a result, collaborative lawyers pick up the phone and call each other. A letter often serves to inflame or polarize. A phone call tends to build understanding and possibilities. The next time you are about to write a letter to the other lawyer on the phone, try calling them.

[**Full Text**]

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**"How family disputes are really settled[:] Adversarial nature of the court process called toxic"**

Birnbaum, Rachel, and Bala, Nicholas, *The Lawyers Weekly*, 10 April 2015, pp. 12 and 16
[Excerpt]

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While public perceptions and much academic writing about family disputes is premised on resolution by an adversarial trial, most experienced lawyers know the actual process of dispute resolution rarely involves a trial. We report here on preliminary findings on our study of the experiences of Ontario family justice professionals with the realities of dispute resolution. Our research reveals that there are diverse paths through the family justice process, but most cases are resolved by negotiation. The study has interesting findings about a range of issues, including perceptions of gender bias in the family justice system.

[**Full Text**]

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**"Mediation plus arbitration a one two punch[:]**
**[Brings finality to proceeding in cost-effective way]"**

Worsfold, Richard, *The Lawyers Weekly*, 10 April 2015, p. 16
[Excerpt]

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Family law practitioners in Toronto have long embraced the mediation/arbitration process as a preferred method of resolving family law disputes. Med/Arb provides a timely resolution to difficult disputes before a knowledgeable third party.

With the increasing delays in our court system, and the ever present uncertainty of result, it may well be time for civil practitioners in all areas to seriously consider Med/Arb as an alternative for their clients.

In a mediation/arbitration agreement, the parties agree to use a third party neutral as a mediator, and if the mediation is not successful, to employ that same third party as an arbitrator to finally resolve the dispute within a defined arbitration process.

A Med/Arb agreement will usually provide that the arbitration phase is to commence within a specified time after the failure of the mediation (typically 30 or 60 days). This focuses the minds of the participants in the mediation and provides a quick determination of the outstanding issues in the event that mediation is unsuccessful.

The mediator/arbitrator will accordingly need to make it clear to the parties that his or her decision, if one is required, will be based solely on the evidence presented within the arbitration phase.

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**"In family law, the path to resolution is case specific"**

Ferrier, Lee, *The Lawyers Weekly*, 01 April 2016, p. 13
[Excerpt]

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Family law disputes are particularly suited for resolution by mediation and, in some cases, by arbitration. However, a failed mediation is often predictable and arbitration can be the wrong way to go.

My comments here pertain to support and property issues. Custody and access disputes are best resolved through negotiation and mediation, often with the assistance of experts in the social services. Arbitration of these disputes can be prohibitively expensive, requiring several days of hearings.

Most Canadian jurisdictions have provision for "judicial mediation" in some form. This can be very effective, but in some circumstances judges' dockets do not permit them to devote the time required for effective mediation and some judges will acknowledge that they either do not like mediation work or they do not have the requisite skills. Those judges who have the time and the requisite mediation skills must often do so over frequent periodic attendances by the parties and counsel — at great expense in legal fees.

Private mediation can provide a better alternative in these circumstances. Parties can choose their mediator, and bookings can be readily obtained and easily arranged.

Even with the added expense of a private mediator, parties can save costs compared to the costs incurred in frequent appointments with a judge.

In my experience of over four years as a private mediator, most cases are settled in one day. Even if the mediation fails, the expense is often worth the try as mediation frequently results in a narrowing of the outstanding issues.

Nevertheless, some things bear remembering when engaging in mediation. Financial disclosure is often problematic in family law matters.

It is usually a waste of time and money to mediate before adequate disclosure has been provided. With a few rare exceptions, one cannot effectively negotiate without knowing the essential financial details.

Mediation will only work if both sides exhibit a genuine desire to settle the matter.

**[Editor's Note**: Lee Ferrier was a partner in MacDonald & Ferrier, Canada's first law firm devoted to family law practice; co-author, with his law partner, of the first Canadian divorce law and practice looseleaf manual (Toronto: The Carswell Company Limited, 1969), and recently retired from the bench of the Superior Court of Justice of Ontario. On a spring evening, near dusk, in 1969, in the shadows of a lane off Yonge Street, Toronto, he was gifted his first flask of the elixir, Newfoundland Screech, by this anthology's editor; who understands Mr. Ferrier's penchant for the fluid never rivaled his passion for law.]

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**"Alberta Judges Can Refer To Informal Settlement Offers"**

Flanagan, James and MacLean, Andrea, *mondaq*, 07 October 2015
[Excerpt]

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Alberta Courts may continue to take into account informal settlement offers made "without prejudice" and not in compliance with the Alberta Rules of Court ("Rules") when determining costs awards thanks to a recent Alberta Court of Appeal decision: *Chisholm v. Lindsay*, 2012 ABQB 81 (CanLII).

[**Full Text**]

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**"Arbitrator's removal reignites debate over med-arb"**

Taddese, Yamri, www.lawtimesnews.com/201503024522, 02 March 2015
[Excerpt]

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A mediator-arbitrator removed from a case for apprehension of bias says he was simply giving the parties what people sign up for when they choose that particular method of alternative dispute resolution.

People who enter into mediation-arbitration want clarity on what the outcome of arbitration could be from the person who presided over the mediation phase of the same dispute, says mediator-arbitrator Gary Direnfeld.

"That is the reason to enter mediation-arbitration. And at the end of the day, if you don't want that, don't enter into mediation-arbitration whatsoever, quite frankly," he says.

In *McClintock v. Karam* [2015 ONSC 1024 (CanLII)] Superior Court Justice Douglas Gray removed Direnfeld from the matter for creating an impression he "had already made up his mind on issues that were very contentious" prior to an arbitration hearing.

[**Full Text**]

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**"Empowering clients dealing with a separation"**

Sayer, Audra, *Possibilities* [Canadian Bar Association Alternate Dispute Resolution Section Newsletter], August 2014
[Excerpt]

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… the lawyers in B.C. now have a positive obligation encoded in legislation to explain what options are available outside of the litigation process for resolving family law issues/conflict. These options include mediation, arbitration, med/arb, [arb/med], collaborative law, cooperative law and negotiation.

It is important to understand the differences in these processes and that the client demands education, guidance and empowerment from his/her lawyer during the interview process not only with respect to expectations for outcome but also with respect to the process itself. The client is entitled—and ought—to expect that the lawyer will schedule a meeting/consultation to educate and guide them with respect to the available processes to resolve family conflicts, with a goal of reducing anxiety and uncertainty about process. The lawyer must take the time to go through the available options for process in basic terms and to answer any questions or concerns that the client may have.

Once the client and lawyer have agreed on a process, the client must be sure to check in often with the lawyer. The lawyer ought to check in with the [lawyer of the client's] former partner … . The client ought to be encouraged to communicate with their former partner early in the process as well. The lawyer must be consistently checking in as to the client's view and with the other lawyer on the next step of the process and to discuss the parties' respective and mutual goals. This will empower each of them and give them a sense of control over the process which they are using to make important decisions for themselves and their family.

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**"Parties Have Mediation/Arbitration Agreement and Court Action is Thus Stayed – Arbitration Agreement May Be Temporarily Suspended in the Best Interests of the Children"**

Epstein, Philip, *Epstein's This Week in Family Law*, 2015 No. 24, 15 June 2015
[Excerpt]

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*Parker v. Pal*, 55 R.F.L. (7th) 91 (Ont. S.C.J.): In this high-conflict dispute, Justice Trimble of the Ontario Superior Court of Justice is required to determine whether the court has jurisdiction to deal with the matter, or whether the parties are bound to proceed to arbitration in accordance with the mediation/arbitration agreement.

**[Full Text]**

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**"Rectification – Unilateral Mistake – Settlements at the Court House Door"**

Epstein, Philip, *Epstein's This Week in Family Law*, 2015 No. 24, 15 June 2015
[Excerpt]

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*McCabe v. Tissot*, 2015 CarswellOnt 7860 (Ont. S.C.J.): This was a motion for rectification of the minutes of settlement. The motion became necessary because the mother's position was that an essential term had been left out of the minutes of settlement as a result of an inadvertence by her own counsel.

**[Full Text]**

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**"Admitting Surreptitious Recordings as Evidence"**

Epstein, Philip, *Epstein's This Week in Family Law*, 2015 No. 01, 05 January 2015
[Excerpt]

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*Scarlett v. Farrell*, 2014 CarswellOnt 13816 (Ont. C.J.) [2014 ONCJ 517 (CanLII)]: Justice Robert Spence of the Ontario Court of Justice makes a ruling mid-trial on the admissibility of video recordings sought to be introduced by the father in an access dispute. In so doing, he canvasses all of the major cases when video recordings should be permitted into evidence.

**[Full Text]**

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**"Setting Aside Separation Agreement for Non-disclosure"**

Epstein, Philip, *Epstein's This Week in Family Law*, 2014 No. 48, 01 December 2014
[Excerpt]

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*Reid v. Reid*, 48 R.F.L. (7th) 263 (B.C. S.C.): Notwithstanding that the Supreme Court of Canada has weighed in on the effect of separation agreements in *Miglin v. Miglin*, 34 R.F.L. (5th) 255 (S.C.C.) [2003 SCC 24 (CanLII)], *Rick v. Brandsema*, 62 R.F.L. (6th) 239 (S.C.C.) [2009 SCC 10 (CanLII)] and notwithstanding its refusal to grant leave to appeal in *LeVan v. LeVan*, 51 R.F.L. (6th) 237 (Ont. C.A.) [2008 ONCA 388 (CanLII)] and its extensive remarks about agreements, albeit a prenuptial agreement in *Hartshorne v. Hartshorne*, 47 R.F.L. (5th) 5 (S.C.C.), it is an industry in Canada to attack separation agreements and marriage contracts.

[**Full Text**]

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**"What Constitutes a Settlement?"**

Epstein, Philip, *Epstein's This Week in Family Law*, 2014 No. 40, 06 October 2014
[Excerpt]

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*Halpern v. Halpern*, 2014 CarswellOnt 10258 (Ont. S.C.J.) [2014 ONSC 4246 (CanLII)]: This decision of Justice Stevenson of the Superior Court of Justice briefly reviews the law on what constitutes a settlement. The parties negotiated in a four-way meeting, and subsequently the husband took the position that there had been a binding settlement. The wife vehemently disagreed. Justice Stevenson had to sort out whether a settlement had been concluded. She decides that there was no such settlement. This requires her to carefully review what occurred between the parties and the relevant cases such as *Andrews v. Lundrigan*, 64 R.F.L. (6th) 25 (Ont. C.A.) [2009 ONCA

160 (CanLII)], *Halliwell v. Lazarus*, 2011 CarswellOnt 178 (Ont. S.C.J.) and *Cole v. Cole*, 2011 CarswellOnt 8459 (Ont. S.C.J.). ….

**[Full Text]**

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**"B.C. family lawyers opting out of court work"**

Sorenson, Jean, *Canadian Lawyer*, June 2014, pp. 12-13, at p. 12
[Excerpt]

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A growing number of family law lawyers in British Columbia are saying no to court work and going home happy. The reason? They are turning to collaborative law and mediation as a lower cost and less stressful alternative for both lawyers and family members involved.

Kelowna family law lawyer Bev Churchill, a 23-year veteran who now practices collaborative law and mediation told new clients two years ago she would no longer do family law courtroom work. "I thought I would be sitting around twiddling my thumbs," she says. That hasn't been the case. The new B.C. Family Law Act, passed in November 2011 and in full force by March 2013, stresses mediation before court action, but it has also made many families aware of alternatives such as collaborative law and out-of-court options.

In collaborative law, each party is represented by a lawyer, agrees not to go to court, information divulged in the process cannot be used in any subsequent court action if collaboration doesn't work out and lawyers work as a team, often with other family professionals, towards a settlement in the best interest of all family members. "Most people do not want to get involved with litigation," Churchill says, adding many of the family law practitioners in her area are just opting out of the traditional style of settlement through court litigation.

She says the adversarial system simply does little to smoothly move clients through divorce, separation, and child custody where settlements need to be achieved. In addition, these individuals often need other kinds of counselling such as mental health couselling, financial information, or support with children who are struggling with the family's break up. "We as lawyers are not equipped to do that," she says, adding that is why she belongs to the Okanagan Collaborative Law Group, an association of professionals (including 15 lawyers) that can deal with all facets of divorce or separation.

Having a collaborative approach to dealing with the whole realm of difficulties in a divorce or separation makes the lawyer's job much easier. The lawyer also goes home less stressed, happier, and, like the client, more in control of the situation, she notes.

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**"Agreeing to disagree on cohabs[:] Some family law lawyers asked to draw up 'unfair' cohabitation agreements are saying enough is enough"**

Brown, Jennifer, Canadian Lawyer, July 2015, pp. 47-49, at pp. 47-48
[Excerpts]

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Mostly, these individuals don't intend to marry and want to set out all their financial obligations or lack thereof from the start, no matter how long they live together. "It becomes readily apparent it's a modern kind of relationship. It's not business, and it's not an old fashioned marriage either," says Stewart, a partner with Lerners LLP and a certified specialist in family law. "There are a lot of young people moving in together who were friends; maybe they had sex together, then decide to move in together. They may or may not love each other."

. . . .

It's the type of agreement family law lawyer Gary Joseph says he is also "really reluctant" to draw up — a document he says could be viewed as "significantly unfair" down the road and come back to bite all involved — including the lawyers. "I think it's consistent with the whole trend of young people who don't want to assume responsibility for anything," says Joseph, managing partner of MacDonald & Partners LLP in Toronto. "We're writing cohab agreements now that say the individuals are co-tenants for as long as it lasts and when it's over it's over, no strings attached."

Joseph says a "prominent family lawyer" in Toronto just finished a two-week trial in which the lawyer was being sued by an unhappy client based on a marriage contract he drafted. "There's not enough insurance to protect yourself against the claims that can arise out of these contracts."
[**Full Text**]

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**"High stakes bring high emotions[:] Anger can be neutralized and used effectively"**

Chernos, Saul, *The Lawyers Weekly*, 27 May 2016, pp. 21, 22
[Excerpt]

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Nathalie Boutet, a family lawyer in Toronto, was working with opposing counsel to draft a separation agreement when she began feeling flustered. "It was a very difficult file," Boutet recalls. "It had been over a year, trust between the two clients had eroded, and it was getting late. We were arguing over a point, and she (the opposing counsel) was starting to go into a cycle."

Feeling on edge herself, Boutet recognized the need to avoid an escalation.

"I wanted to get excited back at her, but I saw that," says Boutet, whose practice focuses on advocacy and mediation outside the courtroom.

"I simply said I needed a break. I knew I needed to walk away from the situation and bring myself to a different place."

After a few minutes apart and drinking water to rehydrate, the two lawyers returned productively to the task at hand.

In the throes of a demanding negotiation, Boutet found herself in a situation familiar to lawyers — the thermometer rising rapidly to the boiling point.

Taking a break worked. The two lawyers kept their cool, and the water provided a welcome recharge.

**[Full Text]**

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***Yin v. Liu***

(2015), 57 R.F.L. (7th) 289 (B.C. S.C. [In Chambers]), Leask, J.
[Edited Headnote]

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**[Facts:]** Parties were involved in litigation regarding family law issues, including whether marriage should be terminated by annulment or divorce, and division of family property in British Columbia and China. At settlement conference shortly before commencement of trial, parties resolved nearly all outstanding issues. One issue that was not resolved was husband's right to claim indemnity against wife in action that had been commenced against him in Chinese courts. Husband wanted clause giving him this right of indemnity (indemnity clause) included in settlement agreement, and wife did not. On April 10, 2014, after start of trial, wife's counsel sent husband's counsel a draft consent order that included indemnity clause (wife's draft order). Parties' counsel had further discussions regarding wording of indemnity clause but no wording was agreed. Husband brought application for declaration that settlement of all issues was reached on or about date that wife's counsel sent wife's draft order.

**[Held:]** Application dismissed.

**[Reasons:]** Case at bar was similar to previous decision in which alleged settlement of marital proceeding was held not to be concluded settlement because security arrangements were not satisfactory to spouse. Issue of indemnity clause was as important to parties in case at bar as security clause was in previous decision. Wife's draft order was less definitive than response of counsel to alleged settlement in previous decision. In case at bar, exchange of drafts between counsel and discussions in court did not result in agreement. Words "indemnity clause" were inherently ambiguous, and discussion of different possible formulations of indemnity clauses revealed that, at most, there was agreement to agree. Whether binding agreement was reached did

not depend on subjective views of counsel or parties, but on what reasonable third-party observer would conclude.

[**Editor's Note**: Appeal dismissed: 2015 CanLII 98223 (BC CA).]

**[Full Text]**

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***Pinder v. Woodrow***

(2015), 71 R.F.L. (7th) 380 (Alta. Q.B.), M. David Gates, J.
[Edited Headnote]

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[**Facts:]** Parties sought divorce and ancillary relief. Parties entered into arbitration agreement. Settlement agreement was reached and arbitrator was obliged to terminate arbitration and record settlement in form of award. Wife brought application to arbitrator on basis that arbitration had been adjourned and that it was still open to arbitrator to issue final award. Arbitrator issued written decision indicating that settlement agreement was final award. Husband brought application to enforce arbitration award, and wife brought application for leave and to appeal arbitrator's subsequent decision.

**[Held:]** Husband's application granted; wife's application dismissed.

**[Reasons:]** There was no merit to arguments challenging agreement as constituting valid arbitral award within meaning of Arbitration Act. Requirement for arbitrator to give reasons does not apply where parties settle matters. Agreement complied with other requirements of s. 38 of Act, namely that it be signed by arbitrator and indicate date and place where it was made. Wife's counsel was present throughout proceedings, including period of wife's apparent absence. Parties consented to process shifting from arbitration to mediation. Absence of formula in statute for shift was consistent with objective of providing flexible mechanism to resolve dispute. Arbitrator lost jurisdiction over matter and/or was functus, and subsequent decision was of no legal significance or consequence. Thirty-day appeal period commenced on or about date of settlement/award. Application for leave and appeal was not brought within 30-day appeal period.

**[Full Text]**

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***Kohut v. Kohut***

(2015), 55 R.F.L. (7th) 347 (Alta. Q.B.), C.S. Phillips, J.

[Edited Headnote]

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**[Facts:]** Parties divorced in 2008, and father began paying child support pursuant to divorce and corollary relief order. Father's income rose, and mother sought to vary child support. In 2012, parties executed agreement appointing Y as parenting coordinator to decide all outstanding issues, and this agreement was incorporated into court order. In 2013, Y withdrew as parenting coordinator, and mother commenced application to appoint another parenting coordinator. In 2014, order was issued appointing F as parenting coordinator. Father brought application for order finding that F lacked jurisdiction to deal with variance of child support.

**[Held:]** Application dismissed.

**[Reasons:]** F's powers set out in 2014 order were not limited or narrowly defined. 2014 order appointed F as sole arbitrator to decide "all outstanding issues" between parties. Mother's application and affidavit in support, which gave rise to 2014 order, made it clear she sought to replace Y with new parenting coordinator with authority to determine child support issues. If father wished to limit F's authority over child support to narrow interpretation he now sought, his counsel ought not to have approved appointment of F on same terms as Y by endorsing 2014 order. There was nothing unusual about parties' agreement to mediate/arbitrate child support before parenting coordinator as set out in 2014 order. Appellate decision had endorsed arbitrator's jurisdiction over child support. Public policy required that agreements between parties to resolve disputes by mediation/arbitration be honoured and respected. This was not question of contracting out of s. 17 of Divorce Act, but rather it was case of having granted jurisdiction to parenting coordinator with arbitration powers to deal with any such application.

**[Full Text]**

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***Toscano v. Toscano***

(2015), 57 R.F.L. (7th) 234 (Ont. Sup. Ct. J.), Blishen, J.
[Edited Headnote]

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**[Facts:]** Parties were married in September 1993, and separated in July 2011. Parties had two children, J, born in May 1995, and B, born in March 1999. Eleven days before their wedding, parties signed marriage contract, which provided that they would be separate as to property. Parties' claims regarding setting aside marriage contract, spousal support and child support proceeded to trial.

**[Held:]** Marriage contract was not set aside.

**[Reasons:]** Stress due to planning large wedding did not mean wife was incapable of understanding or assenting to contract. Wife freely negotiated agreement with assistance of independent legal counsel. Wife was not subject to intimidation or illegitimate pressure.

**[Editor's Note:** For additional reasons, see: 2015 ONSC 5499 (CanLII).]

**[Full Text]**

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**"The importance of taking a proper affidavit"**

Paul, David A., www.canadianlawyermag.com/5238, 15 August 2014
[Excerpt]

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During your career, you may be called upon by a friend, cousin, brother, sister, mother-in-law, or others you have known for a long time to swear an affidavit or notarize a document. On many occasions, their requests may not be aligned with the law society rules and other legal or ethical obligations incumbent on us. As lawyers we must follow, without exception, rules incumbent to our integrity in those circumstances — even if doing so might offend the person seeking your assistance.

[**Full Text**]

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**"[Solicitors Regulation Authority] … to probe [family law] solicitor in relationship with client during 'shameful' contact battle"**

Rose, Neil, *Legal Futures* [United Kingdom], 01 July 2015
[Excerpts]

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A solicitor who is in a relationship with his client while she goes through an acrimonious contact dispute is to be investigated by the Solicitors Regulation Authority (SRA), with a High Court judge saying that the lawyer is "in a situation where he cannot give independent professional advice".

. . . .

*K v D (Parental Conflict)* [2015] EWFC 49 [BAILII] involved what Mr Justice Peter Jackson described as a "shameful" level of conflict between the parents. In the ruling he recorded a warning from a CAFCASS officer about the impact it was having on the children in capital letters "in case the parents will now decide to pay attention" to it.

[**Full Text**]

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**"Suspension reduced for MD who married ex-patient"**

Guly, Christopher, *The Lawyers Weekly*, 12 September 2014, pp. 5 and 27, at p. 5
[Excerpt]

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Alberta physicians [and all lawyers] might want to read a recent case involving one of their own who unsuccessfully appealed a finding of professional misconduct to the province's highest court.

The College of Physicians & Surgeons of Alberta suspended Dr. Graham Hunter last year after its hearing tribunal and its council, which hears appeals, found that the longtime family physician breached a sexual boundary violations provision — standard 37(3) (c) of the Standards of Practice — which prohibit a doctor from terminating a physician patient relationship to pursue a sexual or personal relationship.

Hunter married his former patient, whom he had known for decades and previously dated, less than three months after he terminated the physician-patient relationship with her.

Ten days after the couple married, the college received an anonymous complaint, resulting in the disciplinary proceedings against Hunter. He argued there was no breach of the standards since his erectile dysfunction resulted in a non-sexual relationship with his now-wife. The college's two disciplinary bodies said it was, since the relationship was still "personal."

In *Hunter v. College of Physicians & Surgeons of Alberta* … [2014 ABCA 262 (CanLII)], the Alberta Court of Appeal held in a 2-1 decision that the college had not committed a reviewable error and dismissed Hunter's appeal.

[**Full Text**]

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**"Lawyers worry about misuse of prior capable wishes by doctors"**

van Rhijn, Judy, www.lawtimesnews.com/201410204260, 20 October 2014
[Excerpts]

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There's growing frustration among patient advocates over the depth of misunderstanding in the medical system regarding the prior capable wishes of patients who now require others to make their decisions for them.

Not only are substitute decision-makers unsure of how to handle these wishes, but the medical profession often ignores them or applies them without any input from the patient or the personal attorney and it sometimes does so completely out of context. So can lawyers do anything about it?

. . . .

[Jasmine Sweatman of Sweatman Law Firm, Oakville, ON] … recommends lawyers remind substitute decision-makers that while they have an obligation to honour a grantor's prior capable wishes, they also have a duty to continue to communicate, to the extent possible, with an incapable person and at least take into consideration the current wishes [of the client] when determining what they believe to be their best interests.

[**Full Text**]

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**" 'We Win Or It's Free' Ad[vertisement] Criticized"**

www.lawtimesnews.com/201502234495, 23 February 2015
[Excerpt]

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The Law Society Tribunal has disciplined a Toronto paralegal for advertising that declared "We win or it's free" on his web site.

Paralegal Benito Zappia's web site made the promise "without clarifying that he charged a small non-refundable administrative fee and that the offer of a contingency fee did not include criminal clients' matters," a hearing panel found.

"Mr. Zappia also admitted he did not use a trust account to hold money from clients on account of fees and disbursements not yet rendered," wrote panel chairwoman Barbara Murchie.

"The panel agreed that he had engaged in professional misconduct, as alleged."

The hearing panel reprimanded Zappia and ordered him to pay $2,500 in costs.

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**"Judge takes aim at litigant who sued lawyers for years"**

Taddese, Yamri, www.canadianlawyermag.com/legalfeeds/2135, 13 June 2014
[Excerpt]

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A Nova Scotia judge has made two rulings this week aimed at protecting court resources following what he describes as a spate of unmeritorious lawsuits in that province.

Nova Scotia Court of Appeal Justice Edward Scanlan ordered a man to pay a security for costs before he pursues yet another appeal after suing several lawyers for conspiracy. A day later, the judge dismissed another appeal citing waste of court resources.

In *Tupper v. Nova Scotia (Attorney General)*, [2014 NSCA 60 (CanLII)] the plaintiff Thomas Tupper has blamed everyone from his girlfriend to lawyers and the courts for the fallout of an accident that took place 20 years ago. He was found 75 per cent guilty of a motorcycle accident in which he injured a pedestrian, but according to Tupper, the victim had intentionally placed himself in front of the motorcycle.

"In Mr. Tupper's mind, each of the lawyers who participated in his trial and [lawyer Bob] Stewart were aware, by virtue of their legal training, that damages should be awarded only to victims of genuine accidents," Scanlan wrote. "Accordingly, Mr. Tupper asserts that these lawyers became party to the insurance fraud by allowing him to be victimized by the pedestrian."

Tupper has left a trail of unpaid costs in his wake. Now, Scanlan has restricted him from pursuing another appeal unless he pays $2,250 in security for costs to the respondents, four of whom are lawyers.

[**Full Text**]

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**"Family law can be a dangerous job"**

Folkins, Tali, www.lawtimesnews.com/201507134806, 13 July 2015
[Excerpt]

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When Christine Marchetti first heard about the explosion that seriously injured Manitoba lawyer Maria Mitousis, one thought went through her head.

"I thought for sure that's criminal or family counsel," says Marchetti, a lawyer at Stanchieri Family Law in Toronto. Marchetti says it wasn't surprising that Mitousis practises family law given the violent passions cases can give rise to.

Mitousis suffered serious injuries on July 3 [, 2015] after opening a parcel bomb in her Winnipeg office. Guido Amsel, who's facing charges of attempted murder and aggravated assault related to that incident as well as two others that week, is the ex-husband of a woman Mitousis represented as a divorce lawyer.

Although she says she's fortunate to have avoided the kind of attack that befell Mitousis, Marchetti has had at least one experience that left her feeling threatened and shocked. Early in her practice, she entered an elevator after a proceeding to find herself next to the wife of the man she was representing. Looking at her, the woman drew her fingers across her own throat in a slitting motion.

Marchetti says she now avoids getting on elevators until the other party has clearly left. During proceedings that make her feel particularly uncomfortable, she chooses a seat next to the court officers.

[**Editor's Note**: Among mail awaiting Maria Mitousis, Winnipeg family law lawyer, when she arrived at her office on 03 July 2015 from an early morning golf game, was a package. When she opened the package, the voice recorder inside exploded, causing her serious injury (including loss of her right hand). Charged with attempted murder is the spouse of a woman Ms. Mitousis represented in a divorce, financial support and property proceeding. Accused is also charged with attempted murder of his own lawyer whose office received a similar package which was defused. Ms. Mitousis, as of May 2016, had commenced gradually resuming law practice.]

[**Full Text**]

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**"Lawyer and notary die following … afternoon shooting"**

CBC News, 04 July 2015

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A lawyer and notary shot at a Terrebonne, Que., law office have died, according to provincial police.

Lawyer Benoît Côté, 51, and notary Marie-Josée Sills, 30, died in hospital after being shot at work on Thursday afternoon.

Côté was at one time the lawyer for Michel Dubuc, a man found dead in his home in Boucherville, Que., on Friday morning. The bodies of Dubuc's two sons, 21-year-old Jérémie and 19-year-old Gabriel, were also found in the home.

In 2013, Dubuc filed a $1.2-million lawsuit against Côté in relation to a failed business venture. The most recent court date in the case was last Monday.

On Friday, Quebec provincial police confirmed that the incidents in Terrebonne and Boucherville were related.

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**"Law firms 'getting even worse' at handling telephone enquiries, says mystery shopper"**

Rose, Neil, *Legal Futures* [United Kingdom], 17 March 2015
[Excerpt]

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The way law firms handle telephone enquiries from prospective clients is so bad that "it's as if every managing partner in the land met up at a secret location and agreed the worst way possible to deal with them", a leading consultant has claimed.

[**Full Text**]

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**"Devil can be in details when drafting wills"**

Benedict, Michael, *The Lawyers Weekly*, 28 November 2014, p. 4
[Excerpt]

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When drafting a will, don't rely on an assistant or secretary to gather information from your client — if mistakes are made you could be liable for negligence.

[**Full Text**]

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**"The delicate art of giving, and receiving, gifts[:] Exchanging presents a fine tradition, but best to keep things modest"**

Chernos, Saul, *The Lawyers Weekly*, 11 December 2015, pp. 24 and 26
[Excerpt]

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The Model Code of Professional Conduct, published by the Federation of Law Societies of Canada, stipulates that "a lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice."

This raises the question, though — what exactly is "nominal"?

Harvey Morrison, a partner at McInnes Cooper in Halifax, says his firm's code of conduct sets the bar at about $200, and specifies that gifts given or received cannot be cash or cash equivalents such as gift cards.

What's should a lawyer do if a received gift clearly exceeds nominal value?

"Speak to the managing partner to get some guidance," Morrison recommends. "Depending on the nature of the gift, the firm might say it's far too much and they can't accept it. But then you're in the awkward predicament of trying to determine how to return it."

Morrison adds that a popular and reasonable gift in Atlantic Canada is smoked salmon.

[**Full Text**]

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**"Second opinions should be handled with care[:]**
**[Common for clients in high-conflict divorce cases to retain multiple lawyers; often not listening to advice and seeking lawyer giving them answer they want]"**

Schofield, John, *The Lawyers Weekly*, 28 August 2015, pp. 5 and 9
[Excerpt]

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In a legal career spanning more than two decades, Toronto family law specialist Steve Benmor has learned to approach clients seeking second opinions with a certain degree of caution. He knows some can be more challenging than others.

"In high-conflict divorce cases, it is completely common for clients to go through multiple lawyers," says the past chair of the Ontario Bar Association's family law executive. "Often times they don't listen to advice, and they'll look for a lawyer who gives them the answer they want to hear."

Second opinions are a timehonoured tool in the lawyer's chest — but one best marked "handle with care." In the Internet age, when legal information is at every client's fingertips, it's a phenomenon lawyers may be facing more often.

[**Full Text**]

**"Don't discount the power of second opinions"**

Penney, Craig, *The Lawyers Weekly*, 24 October 2014, p. 12
[Excerpts]

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Over the years, I've noticed two problems in criminal law: first, lawyers tend to be reluctant to provide second opinions, lest they be seen as scoopers; and secondly, lawyers are reluctant to send their clients for second opinions, lest they be scooped.

. . . .

In giving second opinions, here are a few guidelines to separate the sage from the scooper … ."

[**Full Text**]

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***Aggio v. Rosenberg***

(1981), 24 C.P.C. 7 (Ont. S.C.), Master Sandler
[Excerpt]

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[**Editor's Note:** In *Aggio v. Rosenberg* the plaintiff changed lawyers prior to trial. A direction was sent to the former lawyers requesting that they deliver the contents of their file to the new lawyer. The former lawyers did not claim a solicitor's lien, but took the position that the plaintiff was not entitled to correspondence to or from the law firm, memoranda of law and copies of cases in the file. The court dealt with the issue of who has authority over documents upon the termination of a retainer, Master Sandler states at page 4:]

"As to what the law in Ontario is, I adopt the law as set out in Cordery [Cordery, Law Relating to Solicitors (6th ed.)] as follows:

'Documents in existence before the retainer commences and sent to the solicitor by the client or by a third party during the currency of the retainer present no difficulty since their ownership must be readily apparent. The solicitor holds them as agent for and on behalf of the client or third party, and on termination of the retainer must dispose of them (subject to any lien he may have for unpaid costs …) as the client or third party may direct.

'Documents which only come into existence during the currency of the retainer and for the purpose of business transacted by the solicitor pursuant to the retainer, fall into four broad categories:

i. Documents prepared by the solicitor for the benefit of the client and which may be said to have been paid for the client, belong to the client.
ii. Documents prepared by the solicitor for his own benefit as protection, the preparation of which is not regarded as an item chargeable against the client, belong to the solicitor.
iii. Documents sent by the client to the solicitor during the course of the retainer, the property in which was intended at the date of dispatch to pass from the client to the solicitor, e.g., letters, belong to the solicitor.
iv. Documents prepared by a third party during the course of the retainer and sent to the solicitor (other than at the solicitor's expense), e.g.,, letters belong to the client.' "

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**"High Conflict Dispute – Court Appoints *Amicus Curiae* Orders Appointing Counsel To Represent Litigants at the Expense of the Attorney General"**

Epstein, Philip, *Epstein's This Week in Family Law*, 2015 No. 49, 07 December 2015
[Excerpt]

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*Morwald-Benevides v. Benevides*, 2015 CarswellOnt 14834 (Ont. C.J.) [2015 ONSC 7290 (CanLII)]: This is a ground[s] breaking case. It is the first known case in Canada where a trial judge in a family law dispute has made *amicus curiae* orders appointing counsel to represent the litigant parents for the purposes of assisting the court on a variety of issues including the best interests of the children [other than in *A. (A.) v. B. (B.)*, 35 R.F.L. (6th) 1 (Ont. C.A.) in which the Court appointed an amicus on a very narrow legal issue].

**[Full Text]**

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**"The accessibility gap[:] *Pro bono* work is a time-honored tradition in the legal profession. But is it the best way to meet the essential legal needs of people who can't afford a lawyer?"**

Covert, Kim, *National*, pp. 28-33, at pp. 28, 30
[Excerpt]

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"Are there any family lawyers in Nova Scotia doing any pro bono cases?" a broke single father asked a legal information website, a day before he had to appear in family court. He'd been told, erroneously, that he didn't have the right to appear without a lawyer.

"Any idea if this concept still exists?"

That plaintive post on justanswer.com sums up two of the key difficulties with pro bono legal services — they are not available with any degree of consistency on a national level. And

even when they are, people don't know where or how to find them, especially in the Atlantic provinces, Manitoba and the territories, where there are no formal pro bono organizations. Or they might not be able to find pro bono lawyers offering the expertise they need.

**[Full Text]**

## 3.6 Relationships with Third Parties

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**"Lawyer Ordered To Pay Worker $57K"**

www.lawtimesnews.com/20141204348, 01 December 2014

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The Ontario Superior Court has ordered a Gravenhurst, Ont., lawyer to pay $57,000 to a former clerical worker after a judge found he shut down his practice without proper notice to her.

Virginia Zeats, who worked for lawyer Lyle Sullivan for 33 years, took him to court alleging lack of notice and vacation pay owed to her.

Despite the lawyer's argument that Zeats should have seen "the writing on the wall" about the firm's impending closure, Superior Court Justice Margaret Eberhard found Zeats should get 18 months' notice.

"The statement of defence asserts that the plaintiff should have known the office was necessarily going to close as the defendant declined in his involvement and that this should have been notice to her," wrote Eberhard in *Zeats v. Sullivan*. [2014 ONSC 6686 (CanLII).]

"I have no authority to support the assertion that a loyal employee should have seen the 'writing on the wall' and that the notice period should thereby be reduced.

"To the contrary, authority cited by the Plaintiff included numerous cases where the termination was in the context of a shutdown of the business, albeit for financial not personal reasons. Neither the financial performance of the business nor the employer's subsequent bankruptcy reduce the notice period."

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**"HRTO applies Penner in letting case proceed despite earlier LSUC dismissal [Lawyer faces full hearing before Ontario Human Rights Tribunal on former employee's workplace allegations]"**

McKiernan, Michael, www.lawtimesnews.com/201501054393, 05 January 2015
[Excerpt]

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A Toronto lawyer has failed to quash a former employee's discrimination complaint at the Human Rights Tribunal of Ontario even after a Law Society of Upper Canada investigation cleared him in regards to the same allegations.

The interim ruling, the first to apply the Supreme Court of Canada's *Penner v. Niagara (Regional Police Services Board)* decision in a human rights case involving a lawyer, means Jayson Schwarz, the principal at Schwarz Law LLP in Toronto, must now prepare for a full hearing of the allegations made against him by his former bookkeeper, Leslie Ormesher.

Ormesher filed her Human Rights Code application in February 2013 after her termination from the law firm. She alleged she experienced a poisoned working environment throughout most of her employment there. Ormesher also claimed in the application that Schwarz had sexually harassed her and other female employees. None of the claims have been proven.

Schwarz denied all of Ormesher's allegations in a response filed with the tribunal and instead raised concerns about her work performance.

[**Full Text**]

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**"Ruling against prominent lawyer a cautionary tale about accepting funds from third parties [regarded as relating to representation of a client]"**

Melnitzer, Julius, www.lawtimesnews.com/201508174873, 17 August 2015
[Excerpt]

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Even experienced lawyers, it seems, can run into problems when accepting funds from a third party regarding a client matter.

That's one of the key lessons from a recent Divisional Court of Justice decision [2015 ONSC 4945 (CanLII)] involving one of Canada's most prominent criminal lawyers, Clayton Ruby of Ruby & Shiller in Toronto.

"Lawyers just can't be too careful that people who are providing funds clearly understand the circumstances under which they might be entitled to get refunds," says an expert in legal ethics who spoke on condition of anonymity.

[**Full Text**]

**"Judge orders removal of defamatory references to law firm on Solicitors From Hell copycat website"**

Bindman, Dan, *Legal Futures* [United Kingdom], 17 September 2015
[Excerpt]

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A High Court judge has ordered the take-down of pages of an anti-solicitor website that contain defamatory statements about a law firm, after a litigation opponent alleged their publication was "evidence that the firm was disreputable".

Although the operators of the SolicitorsFromHellUK.com (SFHUK.com) website could not be identified, Mr Justice Warby granted injunctive relief to niche City firm Brett Wilson after defamatory statements appeared on the site.

[**Full Text**]

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**"High Court awards £50,000 damages to lawyer libelled in online review"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 09 March 2015
[Excerpt]

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An American lawyer has successfully sued over an online review posted by a British man, winning £50,000 damages at the High Court.

Timothy Bussey, a criminal law attorney based in Colorado, found himself the target of a review attached to his firm's Google Maps profile which claimed he "pays for false reviews" and "loses 80% of his cases".

Mr Justice Eady said there was never any suggestion that the allegations were true. After commencement of libel proceedings, the posting was "voluntarily removed" after Mr Bussey traced the author, Jason Page, by instructing California lawyers to obtain a subpoena of Google's records.

**[Editor's Note**: On 20 February 2015, *Legal Futures* [United Kingdom] website reports: "Lawyers are increasingly using threats of libel action to intimidate clients into taking down negative reviews from comparison websites, … ."]

[**Full Text**]

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**"Law firm 'named and shamed' for failing to pay minimum wage [to apprenticed legal assistants]"**

Rose, Neil, *Legal Futures* [United Kingdom], 24 February 2015
[Excerpt]

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A law firm 'named and shamed' today by the government for failing to pay the minimum wage has hit back strongly.

The Department for Business, Innovation and Skills (BIS) included Hampshire-based Rowe Sparkes in a list of 70 employers because it "neglected to pay £530.96 to a worker".

**[Editor's Note**: United Kingdom minimum wage depends on whether a person is an apprentice or is in one or another of four age brackets (under 18; 18-20; 21-24, or 25 and over). In 2014, an apprentice legal assistant's annual minimum wage (based on 35 hours weekly) was CDN$9,464.00; in 2016: CDN$11,429.60. In 2014, the annual minimum wage of a legal assistant, 25 years or older was CDN$11,830.00; in 2016: CDN$13,104.00. More than a few United Kingdom law firms pay minimum wage.]

[**Full Text**]

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**"No evidence of alternative business structure savings in key areas: study"**

Schmitz, Cristin, *The Lawyers Weekly*, 06 February 2015, p. 3
[Excerpt]

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No empirical support exists for claims that non-lawyer ownership of law firms boosts the affordability or availability of legal services in family, employment and other under-serviced areas of the law, says a new study commissioned by Ontario's personal injury bar.

University of Windsor law professor Jasminka Kalajdzic's study …. takes particular aim at the suggestion by ABS [Alternate Business Structure] proponents, including in a discussion paper by LSUC's working group on ABS, that non-lawyer ownership enhances access to justice. "No empirical data" supports that assertion in the U.K. and Australia, the two jurisdictions that permit ABS, Kalajdzic concludes.

"Competition and consumer rights have gradually displaced professionalism and lawyer independence as core values in the U.K. and Australia," Kalajdzic asserts.

[**Full Text**]

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**"Reversal means counsel can assist expert witness"**

ten Cate, Evelyn, *The Lawyers Weekly*, 27 March 2015, p. 13
[Excerpts]

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The Ontario litigation bar breathed a collective sigh of relief with the release of the Court of Appeal's controversial *Moore v. Getahun* decision dealing with experts.

At trial ([2014] O.J. No. 135), Justice Janet Wilson held that it was improper for counsel to assist an expert witness in the preparation of the expert's report. Justice Wilson took particular exception to the fact that the defence's expert testified that he had produced his final report following a 90-minute conference call with counsel.

Despite the fact that plaintiff counsel did not pursue the issue, the judge asked the expert to provide the court with his draft reports. After counsel had completed their examinations, she proceeded to question the expert about his draft reports, the meetings he had with defence counsel, and any changes that he had made to his reports as a result.

When the expert indicated there was another file that he did not have with him, she directed him to produce all instructing letters and records of any conference calls, and asked the expert to return to court the next day. She then conducted a detailed review of the draft reports and scrutinized the notations and changes he made as a result of discussing his draft reports with his instructing counsel.

. . . .

In the appeal court's Jan. 29[, 2015] ruling [2015 ONCA 55 (CanLII)], Justice Robert Sharpe, writing for the unanimous panel of three, accepted the view of the interveners that the trial judge's approach was "unprecedented, unsupported in law and seriously flawed" as expressed by the Canadian Defence Lawyers Association.

[**Full Text**]

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**"Counsel's advocacy crosses legal line in dispute[:] Lawyer forced to withdraw after asserting personal opinions that would more properly come from client"**

Lublin, Daniel, *The Lawyers Weekly*, 04 March 2016, p. 15
[Excerpt]

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A recent Ontario decision confirms that taking advocacy too far may result in a lawyer being forced to withdraw.

. . . .

This very issue was recently canvassed by Master Dash of the Ontario Superior Court in *Forsyth v. Blue Rock Wealth Management Inc*. … [2015 ONSC 6666 (CanLII)]. In this case, Forsyth alleged that she was terminated by Blue Rock and that it was improperly motivated by her disability leave and status as a mother, contrary to the *Ontario Human Rights Code*.

[**Full Text**]

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**"Weird cases: ['whoremaster'] – opinion or defamation?"**

Slapper, Gary, *The Times* [London], 05 February 2015
[Excerpt]

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Over the centuries, some of the most curious defamation cases have involved insulted lawyers. The good supply of such cases stems from the fact that, in the fields of social discourse, derogatory remarks about lawyers are not as rare as four-leaf clovers.

In a case in 1594, where a defendant had said of a lawyer that he "hath as much law as a jack-an-ape", the lawyer won the then enormous sum of £20.

Later, in 1667, the protection of lawyers' reputations were philosophically enhanced when it was ruled to be a tort to say of an attorney "he hath no more law than Mr C's bull" even if Mr C had no bull.

The most noteworthy ruling on the vilification of lawyers came in a case in 1693. It was held to be unlawful to call a lawyer "a rogue, rascal, whoremaster, and son of a perjured affidavit-bitch." The statement was defamatory, the court helpfully explained, because the word "whoremaster" went too far.

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**"Advice from the EXPERTS: Justice Jim Williams"**

*National*, June 2014, p. 8
[Excerpt]

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Justice Jim Williams, Supreme Court of Nova Scotia, Family Division

"Ensure that as a speaker you have a clear understanding of what you have been asked to do, for who, and in what context: are there other speakers; is there a desire to create some controversy; is there a question period or other form of audience participation; are there particular sensitivities? Having a clear understanding of the expectations of the organizers and context of the

speaking engagement are good first steps in considering whether to speak, what to say and how to say it."

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**"Not all experts are created equal[:] When it comes to hiring either a forensic accountant or an investigator, make sure the numbers will add up"**

Benedict, Michael, *Forensic Accounting & Fraud*, 2013, pp. 29-30, at p. 29
[Excerpt]

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Recently, an Ontario Superior Court judge launched a devastating attack on one of the country's leading forensic accountants as part of his written decision. The biting comments of Justice George Strathy have reinforced dramatically to lawyers and accountants that they can be playing with fire when it comes to expert witness testimony.

The case last September, *Gould v. Western Coal Corp.* [2012] O.J. No. 4291, was a class action by Western Coal shareholders who alleged that the company artificially drove down the share price to their detriment. Justice Strathy threw out the action and blasted Toronto forensic accountant Al Rosen, who acted for the plaintiffs and is one of the country's leading practitioners and a respected academic. Strathy said Rosen engaged in "blatant advocacy, making exaggerated, inflammatory and pejorative comments and innuendos, which were argument rather than evidence."

Under Canadian law, an expert witness such as Rosen owes a duty to the court to be fair, balanced and thorough to the extent that he must bring forward all relevant facts and information, even if it detracts from the case presented by the lawyer who hired him. Rosen, according to Strathy, failed in this duty.

**[Editor's Note:** Also see: "Breaking up is hard to do[:] Divorce can bring out the worst in people. Add a spouse's business into the dividing up of assets, and it can get extremely nasty", Cameron, Grant, *Forensic Accounting & Fraud*, 2013, pp. 18-21.]

**[Full Text]**

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**"Thunder Bay Lawyer Wins $10K Damages In Defamation Suit"**

Kauth, Glenn, *Canadian Lawyer*, August 2014, at p. 10
[Excerpt]

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Conservation officer Randy Tippin said he just wanted to ensure a man facing charged under the Fisheries Act knew about a looming deadline to accept or reject a plea offer, but he and the Ontario government have instead ended up on the hook for $10,000 in damages over a voicemail he left for the accused disparaging his lawyer.

**[Full Text]**

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**"All in the family[:] Becoming a trusted adviser to your client's other family members takes time and effort"**

Moulton, donalee, *Canadian Lawyer*, July 2015, pp. 20-21, at p. 20
[Excerpt]

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Traditionally lawyers build business and relationships one client at a time. Success in the contemporary market, however, may require expanding the focus from a single client to include their entire family. In an aging demographic, lawyers want to ensure spouses and children continue to turn to them for advice and counsel even after their original client has passed on. "Some lawyers focus entirely on the senior client, and that's short sighted," says Susan Van Dyke, a legal marketer in Vancouver. "Some non-billable time spent developing relationships with other key members is critical."

[Full Text]

## 3.7 Relationships with Other Lawyers

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**"Lawyer's correspondence doesn't meet threshold for incivility: hearing panel"**

Taddese, Yamri, www.canadianlawyermag.com/legalfeeds/2324, 10 October 2014
[Excerpt]

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A Law Society of British Columbia hearing panel has found a Surrey lawyer did not act unprofessionally when he wrote a letter calling a paralegal "an uneducated person striving to be what she is not."

**[Full Text]**

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**"A not-so-simple tale of practising together but not as partners"**

Mann, Arshy, www.canadianlawyermag.com/legalfeeds/2352, 28 October 2014
[Excerpt]

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An upcoming lawsuit in the British Columbia Supreme Court may serve as a crash course for lawyers about the problems that can arise when practising outside a formal partnership.

The trial, …, centres around whether or not the plaintiffs, a pair of lawyers who practised together but were not partners, are owed legal fees by the defendants, their former clients. [The lawyers functioned under a cost-sharing agreement, conducted separate practices, but represented their respective law corporations as a single firm, employing their respective surnames, called "Josephson Angus Barristers".]

[Full Text]

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**"Court rejects attempt to blame articling student for delay"**

Taddese, Yamri, www.lawtimesnews.com/201502234499, 23 February 2015
[Excerpt]

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Highlighting the relationship between lawyers and their articling students, a Superior Court master, in upholding an order dismissing a personal injury action as abandoned, has taken issue with a law firm that laid blame on a student with mental-health issues.

The student "was, after all, a student, and one who was not well, a fact known to his firm," wrote Superior Court Master Joan Haberman in *Nadarajah v. Lad* on Feb. 10 [, 2015]. [2015 ONC 925 (CanLII).].

"It is the firm that has carriage of the action and lack of activity by the firm, not simply the student, is the critical factor and where the court's focus must be."

[**Full Text**]

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**"Lawyer facing discipline for internal e-mails"**

Etienne, Neil, www.lawtimesnews.com/201602015193, 01 February 2016
[Excerpt]

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A lawyer who has raised eyebrows with some choice words directed at the Law Society of Upper Canada's disciplinary tribunal in the past is now defending against allegations of unprofessional misconduct and abusive behaviour for a series of e-mails exchanged with two other lawyers.

[**Full Text**]

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**"Lawyers sexually harassing articling students is a thing"**

Flett, Ted, www.canadianlawyermag.com/5640, 29 June 2015
[Excerpt]

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It's an inconceivable thought for some, including this naïve columnist: a supervising lawyer sexually harassing an articling student. Members of a profession that protects one's rights violating earnest newcomers.

[**Full Text**]

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**"Law firm partners can bring human rights claims, adjudicator rules"**

Kauth, Glenn, www.lawtimesnews.com/201508174874, 17 August 2015
[Excerpt]

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The Human Rights Tribunal of Ontario [2015 HRTO 1011 (CanLII)] has rejected a law firm's attempt to dismiss a founding partner's human rights claim after finding significant

distinctions in Ontario's Human Rights Code from the B.C. statute considered by the Supreme Court of Canada in *McCormick v. Fasken Martineau DuMoulin LLP*. [2014 SCC 39 (CanLII).]

[**Full Text**]

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**"[Mandatory retirement:] Good intentions, but what about practical implications of Swain?"**

Hnatiw, Gillian, www.canadianlawyermag.com/5756, 14 September 2015
[Excerpt]

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Mandatory retirement policies are touchy subjects for most equity partnerships. On the one hand, they can result in partners who built a firm, or at least made it run for many decades, being forced out. On the other hand, they help ensure there is room in the partnership for upcoming legal talent who will sustain and grow the firm's business for years to come.

[**Full Text**]

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**"The danger of instant e-mail replies as [Solicitors Disciplinary Tribunal] … reprimands solicitor who called opponent 'a plonker'"**

Bindman, Dan, *Legal Futures* [United Kingdom], 20 July 2015
[Excerpt]

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The Solicitors Disciplinary Tribunal (SDT) has reprimanded a solicitor for calling his opponent in litigation, among other things, a "complete plonker" [forever drunk on cheap wine] – conduct which it said would diminish the trust of the public in the profession

In a ruling that highlights the dangers of replying to e-mails instantly, the tribunal did not take the view that serious harm was caused by the behaviour, judging it to have been of "a low level of seriousness".

[**Full Text**]

**"Law firm replaces annual leave entitlement with groundbreaking 'paid time-off' policy"**

Rose, Neil, *Legal Futures* [United Kingdom], 13 February 2015
[Excerpt]

East Anglian practice Ashton KCJ has become what is thought to be the first law firm in the UK to introduce a 'paid time-off' (PTO) policy, which focuses on productivity rather than time in the office by allowing all salaried employees to take the holiday they need without the constraint of a set number of days per year.

[**Full Text**]

**"Complaints against other solicitors—legitimate reporting or cutting out the competition?"**

*Legal Futures* [United Kingdom], 22 October 2014
[Excerpt]

The Solicitors Regulation Authority (SRA) recently published data showing a 47% increase in the number of solicitor-on-solicitor complaints received in 2013 (2,698); it also provided data that showed a four-fold increase in the number of self-reports made (1,019).

It is worth noting that the solicitor-on-solicitor complaints were part of a total of 12,000 complaints received by the SRA, which suggests that a significant number of firms will be on the SRA's risk centre radar for one reason or another.

The number of self-reports, which includes whistleblowing by staff, also indicates that staff are taking their compliance responsibilities seriously.

[**Full Text**]

**"Economics forcing firms to cut ties[:] 'De-equitizing' boosts profit per partner"**

Cameron, Grant, *The Lawyers Weekly*, 05 December 2014, pp. 20-21
[Excerpt]

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The recent recession and increased competition have forced law firms to take a closer look at their books. One consequence, legal recruiters say, is that some firms are de-equitizing partners and hiring non-equity associates in an effort to improve their bottom line.

[**Full Text**]

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**"Retreats are still vital to a firm's success"**

Smith, Warren, *The Lawyers Weekly*, 16 October 2015, p. 21
[Excerpt]

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Why do retreats matter? Let's start with the fact that they energize your team. Firm retreats create a rare opportunity to bring the team together, giving people an opportunity to properly appreciate the full potential (and size) of the entire organization. For lawyers, it is easy to lose sight of just how powerful and diverse your firm is when the vast majority of your time is spent in one office, on one floor (and often in one corner) of your firm.

[**Full Text**]

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**"Delegation can be a delicate topic with clients"**

Moulton, Donalee, *The Lawyers Weekly*, 03 April 2015, p. 23
[Excerpt]

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Lawyers looking to give delegation a try need more than enthusiasm. First, they need an effective process. Handing work over to an associate is not delegation; it is simply clearing your desk of additional paperwork. The best starting point is identifying what work can most easily and appropriately be given to someone else because they do not require your specialized skills.

[**Full Text**]

**"Barrister faces 'career suicide' for exposing lawyer's sexist remark"**

Elgot, Jessica, *The Times* [London], 10 September 2015
[Excerpt]

The barrister at the centre of a sexism furore over a complimentary LinkedIn message from a solicitor 30 years her senior has said she is facing a professional backlash over her decision to speak out.

Writing for *The Independent*, the human rights lawyer Charlotte Proudman said she did not regret her decision to make public a message from Alexander Carter-Silk that commented on her "stunning" photograph, because it had led to an outpouring of similar experiences from other women.

Proudman said she had named Carter-Silk because she believed the public interest in exposing the "eroticisation of women's physical appearance" by an influential and senior lawyer was greater than his right to privacy.

"If people don't experience the repercussions for their actions, which are plainly wrong, then their behaviour will not change, and neither will sexist culture," she wrote. "All too often, women are afraid to speak up about these small but significant comments on their appearance, which happen every single day."

Proudman said the bar was home to "rampant sexism" and said she was facing "career suicide", with solicitors informing her they would no longer instruct her.

"I have received messages saying: 'You have ruined your career. You have bitten the hand that feeds you. There go your instructions from solicitors,'" she told *The Daily Mail*.

The furore began when Proudman, 27, who is on sabbatical from the chambers of the radical QC Michael Mansfield while she studies for a PhD at Cambridge University, asked to "connect" with Carter-Silk on LinkedIn, a business-oriented social network. In his reply, Carter-Silk said: "I appreciate that this is probably horrendously politically incorrect but that is a stunning picture."

Carter-Silk, an expert in intellectual property and a partner at the London firm Brown Rudnick, added: "You definitely win the prize for the best LinkedIn picture I have ever seen."

**"Am I My Partner's Keeper? The Duty To Report A Colleague"**

Chapman, John 2015, 92 Can. Bar Rev. 611
[Article Summary]

The obligation to report to a law society a breach by another lawyer of ethical standards has traditionally been confined to the most serious forms of violations, such as theft. The obligation has been expanded under the recent Federation of Law Societies Model Code, now in force in many [if not all] provinces. Under Rule 7-1-3(e) of the Model Code there is an obligation to report conduct that raises a "substantial question" with respect to a lawyer's honesty, integrity or competence. A combination of Rule 7-1-3(e) and the availability of detailed information on the activities of firm members may mean that those in management roles at law firms will increasingly be under an obligation to report matters which up to now have not been frequently reported.

Curiously, Ontario has decided not to include the Model Code's Rule 7-1-3(e) its new Rules. However, it is submitted that even given this absence, the fact that power to discipline is linked to the wide phrase "professional misconduct" means that law firms in Ontario are also obliged to report conduct of their members that raises a "substantial question" with respect to that member's honesty, integrity or competence. Still, it would be better if Ontario's Rules were amended to include the Model Code's 7-1-3(e) and to make the issue more clear.

**"City lawyer 'in limbo' on sex charge"**

Brown, David, *The Times* [London], 26 April 2016
[Excerpt]

A city lawyer is in legal limbo after a senior barrister who admitted having sex with him outside Waterloo station later claimed she was the victim of a sexual assault, a court heard yesterday.

Graeme Stening, 52, of Windlesham, Surrey, denies outraging public decency after he was allegedly seen in a rush-hour encounter with the QC, who had her underwear around her ankles.

The woman swiftly accepted a criminal caution for the offence but then complained to police when she discovered that Mr Stening was going to trial and she might be identified, Camberwell Green magistrates' court was told.

She claimed that she was too drunk to have consented to sex so must have been the victim of a sexual offence.

Her accusation gives her anonymity but has meant that Mr Stening, general counsel at Doughty Hanson private equity, has spent six months waiting for the change to clear his name.

Amarjit Bhachu, representing Mr Stening, told the court that he would be complaining to the director of public prosecutions about the slow progress in the case. Mr Bhachu said: "My client is the one who is suffering."

District Judge Louise Balmain said that she did not understand why it was taking so long for a decision on possible further charges. She ordered the case to be listed for a hearing on May 4.

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**"Peering into the old partnership agreement[:] Usually left to gather dust, the oft-forgotten document really requires regular review"**

Kirbyson, Geoff, *Succession Planning*, 2014, pp. 24-27, at pp. 25-26
[Excerpt]

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If the partnership agreements at most businesses were the office pet, they'd be long dead by now, having starved from a lack of attention.

It's not that these documents aren't deemed important by partners at various types of firms across Canada. Rather, due to the everyday challenges of work life, they tend to fall behind even the back burner. Everybody is so busy putting out fires that partnership agreements are ignored and collect dust, often for years.

There will come a day, though, when the partnership agreement will be needed. When that day comes — much like the fire extinguisher that's been sitting in the closet since the Chrétien administration — you're going to need it to work when you pull the trigger or you're in for big trouble.

The best time to create or update a partnership agreement is when everybody is getting along, and there's no reason to be talking about the document at all. Conversely, the worst time to put pen to paper is when there are real issues on the table, such as one partner being unhappy about the division of profits, or several partners expressing discontent about a peer just going through the motions.

"It's much harder to deal with those issues when somebody has a stake in them and they're not theoretical. In many ways, it's like doing your will," says Bill Northcote, Toronto-based head of the business law group at Shibley Righton.

He has come across far too many examples of large professional firms that don't have partnership agreements at all. "If you're a lawyer, you're busy being a lawyer, not looking after your own affairs. It's the equivalent of a shoemaker's kid needing shoes," he says.

To keep them as up to date and relevant as possible, partnership agreements should be revisited whenever an event occurs that causes change at the firm, such as a new banking relationship, the arrival of new partners or the retirement or death of older ones.

"Every three to five years is a good time to review it. It may well be that you review it every three to five years and say, 'we don't need to change anything,' " Northcote says.

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**"Flushing toxic partners"**

Middlemiss, Jim, *Canadian Lawyer*, March 2016, p. 46
[Excerpt]

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Every law firm has one — a toxic partner whose mere presence disrupts the workplace. They might be rude, abusive, or bullies. Maybe they make suggestive comments or engage in inappropriate sexual banter. Usually, they are overconfident and self-regarding. At the same time, they are often productive, good at bringing in clients, and big billers, so law firm management will look the other way and tolerate their inappropriate antics. We have all seen it.

However, are toxic superstars really worth the pain? Not according to a Harvard Business School working paper, entitled "Toxic Employees." Researchers Michael Housman and Dylan Minor found that toxic employees do more harm to the workplace than good.

[**Full Text**]

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***Simaei v. Hannaford***

2014 ONSC 7075 (CanLII) (Ont. Sup. Ct. J.), Master D.E. Short, paras. 1-12
[Excerpts]

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Preamble

[1] Pursuant to rule 25.11 of Ontario's Rules of Civil Procedure, the court may strike out all or part of a pleading or any other document with or without leave to amend on the ground that the pleading or document is scandalous or vexatious or an abuse of the process of the court. Rule 25.11 considers the substantive adequacy of the pleading and whether it conforms to the formalities of a proper pleading.

[2] In this case, the defendants move for a number of headings of relief, but primarily to strike large portions of the plaintiff's statement of claim.

I. Overview

[3] This case has presented number of difficulties for me. When members of the bar feel obliged to litigate with each other in their personal capacities, unique difficulties may arise.

[4] Both parties have very skilled and experienced counsel and their advocacy, while focusing on all the salient arguments, having made my decision process somewhat more difficult.

[5] The motion, originally took more than a full day with counsel obliging me by arguing the concluding portion of the motion by an international telephone link on a weekend.

[6] From the parties' perspective, the foregoing preamble is further exasperated by the systemic difficulties with scheduling this Toronto Long Motion which had to be addressed before the materials ever reached my bench.

[7] Against that background I now turn to endeavouring to resolve the issues raised on this motion.

II. Background

[8] The plaintiff, Golnaz Simaei was called to the bar in Ontario in 2008.

[9] From May 1, 2009 to March 2013, she was employed by the defendant firm JK Hannaford Barristers ("JKHB"). Her employment was terminated on or about March 18, 2013.

[10] A Notice of Action was issued less than a month later, on April 8, 2013 based on a claim of wrongful dismissal. That Notice set out a number of heads of damage with claims totalling in excess of 2.1 million dollars asserted against Julie Hannaford and the firm JKHB.

[11] A Statement of Claim was then issued in early May 2013. The text of the first paragraph, including the following:

> "The Plaintiff claims against the Defendants, the following:
>
> (a) $350,000 in wrongful dismissal damages;
>
> (b) $250,000 for damages for intentional or, alternatively, negligent infliction of nervous shock;
>
> (c) $100,000 for conversion of her personal e-mails and documentation;
>
> (d) An Order that the Defendants deliver to the Plaintiff all of her personal documents and personal e-mails, and any other belongings of the Plaintiff, and thereafter delete the Plaintiff's personal documents and personal e-mails from the Defendants' computer system;
>
> (e) $250,000 in *Honda* damages;

(f) $250,000 in moral damages;

(g) $250,000 in aggravated damages;

(h) $400,000 for defamation;

(i) $250,000 in punitive damages;

(j) Reimbursement for any and all expenses the Plaintiff incurs in an effort to mitigate the damages arising from the loss of her employment; accordance with the Courts of Justice Act, R.S.O_ 1990, c. C43, as amended; …"

[12] The defendants served a Notice of Intent to Defend on May 21, 2013.

**[Editor's Note**: For additional reasons, see: 2015 ONSC 5041 (CanLII). The claims alleged in this proceeding are being vigorously denied by the Defendants.]

**[Full Text]**

## 3.8 Relationships with Courts

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**"Appeal court raps Crown for inflammatory closing"**

Kari, Shannon, www.canadianlawyermag.com/legalfeeds/2524, 04 February 2015
[Excerpt]

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The Ontario Court of Appeal has concluded a senior Crown attorney acted improperly in a closing address to a jury when he compared the defendant to religious terrorists, mass murderers, and notorious cult leaders.

The actions of Mark Poland "fell well below the standard expected of Crown counsel," said the court in ordering a new trial for a Kitchener-area man convicted of orchestrating a plan to have his three children kill his estranged wife.

[**Full Text**]

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**"Court chides practice of using affidavits by staff"**

McKiernan, Michael, www.lawtimesnews.com/201503094528, 09 March 2015
[Excerpt]

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Refugee lawyers say they won't shy away from filing affidavits from their employees in legal proceedings despite a Federal Court judge's criticism of the practice as he rejected a bid by a failed refugee claimant to defer his deportation to Sri Lanka.

Federal Court Justice Peter Annis made his comments in the case of *Peter v. Canada (Public Safety and Emergency Preparedness)*, a judicial review of the Canada Border Services Agency's refusal to postpone Emilian Peter's removal from Canada following his failed refugee claim.

[**Full Text**]

**"Judge castigates 'by far the worst solicitor witness I have ever seen'"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 22 May 2015
[Excerpt]

A judge has launched an extraordinary attack on "by far the worst solicitor witness I have ever seen giving evidence in the witness box".

[**Full Text**]

**" 'Big, inflated ego' turns clients away[:] Sometimes, it's a sign of insecurity, lawyer coach says"**

Chernos, Saul, *The Lawyers Weekly*, 19 February 2016, pp. 21-22
[Excerpt]

Case No. 1: Kristine Anderson, a litigation lawyer with Basman Smith in Toronto, is waiting patiently to file a motion when the interaction between another lawyer and the judge becomes increasingly tense.

The lawyer, clad in suit and tie rather than the appropriate gown, is insistent, deeming the court responsible for any confusion regarding the nature of his appearance that day. Exercising initial restraint, the judge finally invokes his authority to maintain courtroom decorum and orders the lawyer to leave the room.

Legal Eagle loses here, because the lawyer's headstrong ego has cost the client anything which might have been gained from that day's appearance.

"There's a way to handle it," Anderson says. "If you apologize right away, before the judge even looks up to notice, and you ask for permission to be heard, 9.9 times out of 10 you'll be able to go on and deal with your matter. But this fellow could not let it go, insisting it was the court that messed up."

Case No. 2: Joseph Neuberger, a criminal lawyer with Neuberger and Partners in Toronto, is arguing his point and finding the judge overbearing and unpleasant.

"It was a jury case and he may have thought I was some young upstart trying to pull the wool over their eyes," Neuberger says.

"But I didn't see it that way.

"I had a job to do and I really believed in the merits of my client's defence. So while I stood my ground at times, I let my work speak for itself and just hunkered down and made sure everything I did in that courtroom was absolutely right."

Legal Eagle wins in this instance because the judge's perceptions, whatever they may have been, mattered little when the jury delivered an acquittal.

The key, Neuberger says, was to keep his own ego in check and not engage with a potentially adversarial judge.

[**Full Text**]

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**"Scathing ruling means new murder trial[:]"**
**[Trial Justice Boilard's conduct unbecoming toward defence lawyer]**

Millan, Luis, *The Lawyers Weekly*, 29 August 2014, pp. 3 and 23, at p. 3
[Excerpt]

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In a ruling that lawyers say appears to lower the bar over what constitutes a partial and unfair trial, the Quebec Court of Appeal has ordered a new trial due to the trial judge's unbecoming conduct toward the defence lawyer of a man found guilty of first-degree murder.

[**Full Text**]

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***Cabana v. Newfoundland and Labrador***

[2014] N.J. No. 293 (Nfld.C.A.), 03 October 2014
*The Lawyers Weekly*, 28 November 2014, p. 18 (headnote, in part)

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**[Facts:]** Appeal by Cabana from the dismissal of his application to have the judge recuse herself from presiding over his application for interim declaratory relief due to a reasonable apprehension of bias. The appellant was self-represented. He filed a claim against the Crown, an energy company and a first nation regarding the development of hydro-electric power without first holding a provincial referendum.

**[Issue:]** Leave was granted to appeal the recusal decision. The appellant argued that the judge ought to have recused herself, as her husband was a partner in a law firm that was acting against the appellant in another matter, that she had done work for Labrador Hydro prior to her

appointment and because she made political donations prior to her appointment. In addition, the appellant alleged her conduct of the hearing raised an apprehension of bias.

**[Held:**] Appeal allowed.

**[Reasons:]** The fact that the judge's husband was a partner at a law firm that was representing parties in an unrelated action against the appellant did not raise a reasonable apprehension of bias, as there was no connection between the judge and that case or the law firm. The fact that the judge previously represented Hydro did not raise a reasonable apprehension of bias, as the work the judge did had no direct relationship to the issues in this case. The solicitor-client relationship was limited and there was a long cooling off period. However, it would have been preferable had the judge disclosed that fact. In addition, the judge's pre-appointment political donations did not raise a reasonable apprehension of bias. While it was understandable that the judge was offended by the appellant's attempt to use her preappointment political donations as a basis for reasonable apprehension of bias, by her words, she demonstrated what could reasonably considered to be an animus against the appellant.

**[Full Text]**

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**"Reflections from both sides of the bench[:] A judge who was a lawyer advises litigators to be bold, concise, respectful and avoid showing off in the courtroom"**

Goodridge, William, *The Lawyers Weekly*, 14 August 2015, p. 14
[Excerpt]

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When I was a lawyer I was critical of judges. But now that I am a judge, I am critical of lawyers.

The point is that one's perspective can change and bring to view things that were previously hidden. My background as a lawyer was almost entirely in civil litigation, spanning 25 years. I thought I was a good advocate in the courtroom, but after eight years as a judge, I see ways that I could have been a lot better.

**[Editor's Note**: Justice William Goodridge of Newfoundland and Labrador Supreme Court [Trial Division] was preceded to the Bench by his father, Noel Goodridge, a Justice of the Court, 1975 to 1986, and Chief Justice of the Court, 1986 to 1996. Chief Justice Goodridge's judgment-authorship was profoundly articulate and sublime.]

[Full Text]

**"Ontario judge's actions in spotlight again"**

Schofield, John, *The Lawyers Weekly*, 12 December 2014, p. 3
[*Hazelton Lanes Inc. v. 1707590 Ontario Limited* 2014 ONCA 793 (CanLII)]
[Excerpt]

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An Ontario judge has, for the second time in his career on the bench, come under scrutiny for an apparent lack of impartiality. In a decision released Nov. 12[, 2014] in *Hazelton Lanes Inc. v. 1707590 Ontario Limited* … [2014 ONCA 793 (CanLII)], the Court of Appeal for Ontario ruled that Superior Court Justice Ted Matlow showed a reasonable apprehension of bias in a 2013 trial that was scheduled for three days but dragged on for 50. The appeal court ordered a new trial before a different judge and made no order as to costs.

[**Full Text**]

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**"Retiring Rothstein warns against legal blinkers**"

Schmitz, Cristin, *The Lawyers Weekly*, 11 September 2015, p. 5
[Excerpt]

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Former Supreme Court Justice Marshall Rothstein says the worst advocacy he saw at the top court emanated from blinkered lawyers who failed to "come to grips" with their opponents' arguments.

"The worst thing that can happen is counsel that's unprepared," says the Manitoba jurist, who was the high court's third most senior member when he retired Aug. 30 [, 2015].

"Counsel somehow sees the case through their own blinkers, through their own vision, and they just don't see the other side of it, or they don't come to grips with the arguments made by the other side, and they may think that they're prepared, but they've got to contend with what the other side is saying," he said in a recent exclusive interview marking his departure.

After all, he notes, "the judge looks at both sides, and sees a strong point in one side that refutes something that the other side is saying, and he wants to know why that's wrong. And counsel either has to say why it is wrong — the judge thought it was right, counsel has to convince him he's wrong — or he doesn't. And if he doesn't, then he's got a problem."

[**Full Text**]

***Bossé et al. v. Lavigne***

2015 NBCA 54 (CanLII), 27 August 2015
*The Lawyers Weekly*, 09 October 2015, p. 21 (headnote)

**[Facts:]** Motion by the appellants for recusal of the members of the appeal panel due to apprehension of bias. The appellants appealed the dismissal of their action against a lawyer—who was now a Queen's Bench judge—as being statute-barred. The appellants argued that an apprehension of bias existed because two members of the panel had previously heard matters involving the appellants and family members. The appellants argued that none of the New Brunswick superior court judges could ethically hear this matter and that only a court composed of out-of-province judges would be competent to hear their appeal.

**[Held:]** Motion dismissed.

**[Reasons:]** There was no subjective reason for the judges to recuse themselves as none of them had any stake in the outcome or any personal relationship with any of the parties. The fact that one of the parties to the appeal was now a judge was irrelevant. To suggest the panel would let the current status of a litigant interfere with the fulfillment of the judges' oath of office was devoid of any merit. No cogent evidence had been adduced to overcome the high threshold of displacing the presumption of impartiality. The reasonable and well informed person would not find in these facts any apprehension of bias, let alone a reasonable one.

**[Full Text]**

**"Weird cases: when offending the judge proves costly"**

Slapper, Gary, *The Times* [London], 26 April 2016

While it is virtuous for lawyers to be bold, it is unprofessional to be grossly offensive to a judge. Most lawyers draw the dividing line in the right place.

In Sydney, a solicitor who had appeared unsuccessfully for a client in a tax case drew the dividing line in the wrong place when he told the judge what he thought of him, and he has now been ordered to be retrained in the geometry of legal ethics.

After losing a case in 2014, Michael Anthony Griffin thought it was simply bold to write to the judge accusing him of being "vindictive" and "immature", of having an "infant school" understanding of language, and of presiding "without good faith and with bias".

Mr Griffin, who had a theatrical career before becoming a solicitor, did not avoid dramatic language in his letter to Justice Lindsay Foster. He told the judge that "the Australian public and democratic values" demanded a better standard of judicial work than that which was given to him and his client.

In his denunciation of Judge Foster, Mr Griffin took particular offence at having been accused of "errors of expression" in his submissions.

Mr Griffin contended that he could not have made errors of expression because "no such thing exists". He informed the judge that legal language is a "subjective" field, and declared "you are not an expert in the English language and not qualified to make such a comment or give such an opinion while I have an honours degree with distinction including honours cognates in English".

Mr Griffin said the judge's remarks about his language arose from "a purile [sic] and petty intention".

In an ensuing misconduct case before a tribunal in New South Wales, Mr Griffin described his castigation of the judge as merely "a breach of etiquette". The tribunal, however, thought a lawyer who excoriates a judge for alleged vindictive bias is breaching more than etiquette.

Mr Griffin was found guilty of professional misconduct, reprimanded, and ordered to take, and pass, an approved course in legal ethics.

Historically, in most jurisdictions, lawyers who wrote personally to a judge condemning his mind or motives did not receive a postcard of capitulation by return.

In the US, appeal courts in various contempt cases confirm that it is not a good idea for a lawyer to write to a judge accusing him of "outrageous, persistent, continued, illegal, and unlawful rulings", or of acting with other attorneys in a "diabolical plot" that was "a malicious, vindictive, corrupt concoction", or to tell him he is "not only a blockhead" but also "the most corrupt man. . . that was ever elevated to judicial position".

Sometimes, however, the reasons for a lawyer being censured will be puzzling to many observers. A case in point arose earlier this year in Houston, Texas, when a federal judge issued an "order of ineptitude" against unnamed "pretentious lawyers" from Washington. The order condemned what the judge regarded as failures in communication.

Judge Lynn N Hughes was presiding in a terrorism case when Kashyap Patel, a prosecutor from the department of justice in Washington DC, arrived to join the prosecution team.

Attacking Mr Patel for being "just one more non-essential employee from Washington", and accusing him of "being a spy for a bunch of other people", Judge Hughes asked how he had registered to join the case. When told by a local US attorney that he had allowed Mr Patel to use his account login details to register, the judge disapproved of this assistance to Washington's legal elite, saying, "Don't let those sons of bitches use your account."

Across the world, lawyers are usually left suitably confuted if rebuked from the bench. Seeing the judge look at his watch in one London case, counsel realised how long he had been speaking, and said "I am sorry, my lord, if it is thought that I am being prolix, I noticed your lordship was looking at the time." The judicial correction came immediately, "I was not looking at the time, I was looking at the date."

But it is not always the judge who prevails in episodes of repartee.

In 19th-century America, when many judges saw themselves as beyond criticism, a judge became incensed by an audacious remark of the eminent advocate Joseph Choate.

JUDGE: If you say that again, Mr Choate, I shall commit you for contempt.

COUNSEL: I have said it once, it is therefore unnecessary to say it again.

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***Van Wieren v. Bush***

(2015), 65 R.F.L. (7th) 463 (Ont. Sup. Ct. J.), G.A. Campbell, J.
[Edited Headnote]

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**[Facts:]** Parties were involved in eight-day trial regarding custody of child. Father alleged that trial judge conducted trial in such manner as to give rise to reasonable apprehension of bias against him. Father appealed.

**[Held:]** Appeal dismissed.

**[Reasons:]** Reasonable person would not have concluded that trial judge was predisposed to decide issues before her in favour of mother. Trial judge interrupted, frequently took over from counsel, and sought clarification of ambiguous answers or oblique obfuscations, but was not biased. Trial judge's reasons for judgment were fulsome and explanatory. Trial judge treated both parties and their witnesses similarly.

**[Full Text]**

## 3.9 Relationships with State

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**"Crown wins full hearing over merit pay denial due to poem"**

McKiernan, Michael, www.lawtimesnews.com/201411104311, 10 November 2014
[Excerpt]

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Can the province [of Ontario] deny a merit increase to a Crown prosecutor for reading a rhyme during closing arguments? An Ottawa assistant Crown attorney will soon find that out as he seeks to challenge the Ministry of the Attorney General's denial of merit pay that could leave him out of pocket by as much as $70,000.

[**Full Text**]

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**"Law firms miss advantage of professional corporations"**

Melnitzer, Julius, www.lawtimesnews.com/201601045138, 04 January 2016
[Excerpt]

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Since 2001, incorporation for law firms has been a possibility. Despite its advantages, only a relatively small proportion of law firms that could benefit from incorporation have in fact done so.

"It's hardly new," says David Rotfleisch of Rotfleisch & Samulovitch Professional Corporation in Toronto. "Lawyers have always been notorious for their lack of tax planning."

There are both tax and non-tax reasons for lawyers to consider incorporation, Rotfleisch points out.

[**Full Text**]

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***Guindon v. Canada***

2015 SCC 41 (CanLII), Rothstein and Cromwell JJ. for the Court
[Headnote Excerpt]

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The Minister of National Revenue assessed G [an Ottawa lawyer] for penalties under s. 163.2 of the *Income Tax Act* for statements she made in donation receipts issued on behalf of a charity, which she knew or would reasonably be expected to have known could be used

by taxpayers to claim an unwarranted tax credit. G appealed the Minister's assessment to the Tax Court of Canada. In her oral submissions, she argued that the penalties imposed under s. 163.2 are criminal and that she is therefore a person "charged with an offence" who is entitled to the procedural safeguards of s. 11 of the *Charter* . In her notice of appeal, however, she did not raise any *Charter* issue and did not provide notice of a constitutional question to the attorneys general as required by s. 19.2 of the *Tax Court of Canada Act* . The Tax Court accepted G's argument and vacated the penalty assessment. The Federal Court of Appeal set aside that decision and restored the assessment against G.

[The S.C.C. dismissed the appeal, with two judges writing joint reasons for judgment (that two other judges concurred with), and two other judges writing joint reasons concurring that the appeal be dismissed but dissenting as to whether the court should exercise its discretion to address the merits of the constitutional issue.]

[**Full Text**]

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**"Spouses warned against spying on former partners"**

van Rhijn, Judy, www.lawtimesnews.com/201502234496, 23 February 2015
[Excerpt]

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While the use of social media in family law cases is common, questions linger over a spouse's access to other digital information relating to a former partner as privacy and evidentiary considerations make snooping on someone's online world a tricky and potentially costly exercise.

William Abbott, a partner at MacDonald & Partners LLP, says rulings in the privacy law sphere are finding ready acceptance in the family law arena. "As we get more and more into the electronic age, we will see an expansion of the *Jones v. Tsige* doctrine of intrusion upon seclusion. It will be far easier to install tracking and recording devices, but that infringes on people's privacy and there is very low benefit." [2011 CanLII 99894 (ON CA).]

[**Full Text**]

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**"… [Lawyers as] online sleuths"**

Kari, Shannon, www.lawtimesnews.com/201512145119, 14 December 2015
[Excerpt]

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In the United States, …, the model rules of professional conduct issued by the American Bar Association refer to the ability to conduct searches of publicly accessible information as an obligation for a lawyer. The same model rules suggest it would be improper though to set up a fake account on Facebook, for example, to try to "friend" an individual and access information from that person's account.

While the Law Society of Upper Canada's professional conduct rules do not address this scenario explicitly, [Toronto lawyer David] Brown believes setting up a fake account would be improper. "That is the bright line. We are not allowed to encourage dishonesty to obtain evidence," says Brown.

[**Full Text**]

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**"Who gets your digital accounts when you die?"**

Yosowich, Miriam, http://findlaw.ca/blog/legal-life, 19 January 2016
[Excerpt]

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A situation that few want to think about but that is occurring more often as we are increasingly more reliant on technology is: who inherits your digital assets (including account and password information) after you die?

Logically, it should be the person(s) to whom you designate your estate, which often is either a spouse and/or family member.

If the deceased's will doesn't make mention of his or her digital assets, the person who inherits your estate may run into trouble when trying to access these accounts.

[**Full Text**]

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**"Apps can unchain lawyers from desk: developer"**

Bruineman, Marg., www.lawtimesnews.com/201602155222, 15 February 2016
[Excerpt]

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Smartphones have ushered in a new area of connectivity and an increasing number of mobile applications are being developed, influencing the way lawyers work.

Apps are also being designed to bring justice into the hands of more people and those who need it.

[**Full Text**]

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**"Facebook – why your firm should 'like' it"**

Daigneault, Pascale, www.canadianlawyermag.com/5752, 14 September 2015
[Excerpt]

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Many years ago, lawyers pondered whether their firms needed a web site, something nowadays as ubiquitous as photocopiers. The question now is, to Facebook or not to Facebook?

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**"SearchFlow responds to Law Society's findings on law firms targeted by scammers"**

*Legal Futures* [United Kingdom], 03 May 2016
[Excerpt]

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The Law Society's annual professional indemnity insurance survey, which looked at insurance claims among law firms of up to 25 partners, reveals that almost a quarter of law firms have reported being targeted by scammers in the last year.

Greg Bryce, managing director of SearchFlow, comments: "This is an alarmingly high level of reported fraud attempts and it clearly illustrates the extent of this problem. In particular, the conveyancing sector, where large sums of money are transacted, remains a primary target for criminals.

[**Full Text**]

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**"Ex-partners fined for exchanging offensive e-mails [about some of their colleagues]"**

Rose, Neil, *Legal Futures* [United Kingdom], 27 November 2015
[Excerpt]

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The Solicitors Disciplinary Tribunal (SDT) has fined three former partners who sent each other emails containing offensive comments about colleagues over several months.

[**Full Text**]

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**"6 reasons to take your law firm paperless"**

*Legal Futures* [United Kingdom], 26 June 2015
[Excerpt]

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We're often told that going paperless is a necessity for most modern law firms without a real examination of why, beyond "it's good for the environment." But really, what have the trees done for you lately? Clio discuss the business benefits that stem from creating a paperless law firm.

[**Full Text**]

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**"Is this the best viral marketing stunt by [family] lawyers ever?"**

Rose, Neil, *Legal Futures* [United Kingdom], 25 June 2015
[Excerpt]

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A YouTube video of an angry man slicing household goods and a car in half in response to separating from his wife – which has been viewed more than six million times and been covered by media outlets across the world as he sought to sell his share on eBay – has been revealed as a stunt by lawyers.

[**Full Text**]

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**"Law firms' cyber security plans becoming number one issue for indemnity insurers"**

Bindman, Dan, *Legal Futures* [United Kingdom], 06 May 2015
[Excerpt]

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Cyber security is becoming a central issue for professional indemnity insurers, and firms will in future need to demonstrate what protections they have against cyber criminals before they are offered cover, a leading broker has predicted.

Speaking at the *Legal Futures* [United Kingdom] Regulation & Compliance Conference in London last week, Richard Brown, an executive director at Willis, said the issue of cyber security was fast becoming the "number one" issue of underwriters.

Third-party losses from cyber security breaches were covered under indemnity policies, he said. "I think more and more insurers are going to be looking at you to tell them what you are doing about cyber and your cyber protections."

[**Full Text**]

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**"10 tech mistakes that solicitors make"**

Fitzpatrick, Derek, *Legal Futures* [United Kingdom], 01 May 2015
[Excerpt]

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[Ten mistakes made by solicitors in practicing with digital technologies which may result in breaches of solicitor-client privilege and shortcomings in legal services delivery.]

[**Full Text**]

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**"[Exclusion of coverage for most cyber claims]"**

Canadian Lawyers Insurance Association, 25 May 2016
[Excerpts]

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… [the] Lawyers' Professional Liability Insurance Group Policy with the Canadian Lawyers Insurance Association has what is generally referred to as a "cyber coverage" exclusion.

. . . .

CLIA has recently clarified what this policy exclusion means. Essentially there is no coverage for most cyber claims, including claims where the law firm itself suffers damage as a result of unauthorized interference from things like cyber-attack, computer melt-down due to viruses, theft, or hacking of electronic equipment or data. Further, there is no coverage where a client suffers damage as a result of the theft, cyber-attack or hacking of your firm's computers.

What does this mean for you if you are insured under such a policy? If you lose your cell phone, your laptop is stolen from your vehicle or computers or servers are taken from your office in a break-in, your professional liability coverage will not respond. Likewise, if you are a victim of "hacking" – like the recent well-publicized cyber-attack on Bay Street firms involved in the unsuccessful Potash Corp sale – damage suffered by the firm or its clients would not be covered.

So, what should you do to protect yourself from exposure to claims arising from lost equipment or compromised data? You may find some coverage for theft or cyber-attacks in your

existing general office liability policy. Read that policy carefully and check on your coverage limits for lost or stolen devices and data interruption at the same time. There are also some commercially available cyber policies specifically designed to cover "hacker" and "cyber-attacks". Check those out with your insurance broker.

More importantly, do what you can to prevent cyber-attacks, and consult with a computer security expert about firewalls, encryption, anti-virus software, secure passwords, intrusion detection systems and other ways to protect your equipment and your clients' information. Protect your portable devices with secure passwords, and keep them locked and stored in a safe place when you are not using them. And ensure all your electronic data is backed up.

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**"Online criminals take aim at lawyers[:] From the Trojan Banker virus and ransomware to disgruntled employees, fraud never sleeps"**

Leclair, Ray, *The Lawyers Weekly*, 15 August 2014, p. 17
[Excerpt]

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Lawyers and law firms are targets for cybercriminals and fraudsters. Lawyers offer three key attractions: confidential and commercially valuable client information, large sums of money concentrated in few bank accounts, and generally lax technology security.

[**Full Text**]

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**"Chasing the paperless office[;] Electronic document systems save time and money, but require careful planning"**

Cameron, Grant, *The Lawyers Weekly*, 06 March 2015, pp. 20 and 21
[Excerpt]

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On Jan. 3, 2011, … [Felstein Family Law Group] officially went paperless, with all documents saved electronically and searchable by keyword via document-management system Worldox. The system enables lawyers to instantly view any document, form, pleading or e-mail associated with a specific client, even if the person who created it has left the firm.

Feldstein says the firm still keeps some paper — signed separation agreements, final court orders, retainer documents and the like — but going otherwise paperless has saved the firm time and money, and has made life easier for lawyers and staff.

**[Editor's Note**: See, also: Benetton, Luigi, "Managing all those files", *The Lawyers Weekly*, 06 March 2015, p. 22.]

[**Full Text**]

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**"Surveillance disclosure tightens[:]**
**[*Iannarella v. Corbett* envisions exclusion of highly relevant evidence unless disclosed before trial]"**

Kolenda, Brian, *The Lawyers Weekly*, 01 May 2015, p. 15
[Excerpts]

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The Court of Appeal for Ontario recently released an important decision on the admissibility of surveillance evidence at trial in *Iannarella v. Corbett* … [2015 ONCA 110 (CanLII)].

. . . .

The Court of Appeal took a strict view of the rules, reminding litigants and counsel that they not only have a positive obligation to disclose the existence of surveillance evidence, but that they must also continuously update this disclosure as surveillance is gathered.

[**Full Text**]

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**"Reduced paper can also mean reduced risk[:]**
**[Paperless office can help avoid lawyer/client communication-related errors; accounting for a third of malpractice claims]"**

Hu, Ian, *The Lawyers Weekly*, 02 October 2015, p. 15
[Excerpt]

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A paperless office can help to avoid lawyer/client communication-related errors, which account for one out of three malpractice claims. These claims include the failure to follow through on the client's instructions, taking action without the client's consent, and confusion between the lawyer and client about who is doing what. Electronically document your communications. Create a note in the file every time you call a client. Write follow-up letters simply by referring to your electronic notes.

[**Full Text**]

**"Data disasters are waiting to happen"**

Benetton, Luigi, *The Lawyers Weekly*, 26 September 2014, p. 24
[Excerpt]

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Ben Sapiro well knows the meaning behind the metaphor "like closing the barn door after the horse escapes." When lawyers call him about disaster recovery, it's usually because something has already happened.

"Very often, questions come after a business continuity issue occurred," says the KPMG risk consulting senior manager.

[**Full Text**]

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**"CBA report highlights technology risks"**

Cameron, Grant, *The Lawyers Weekly*, 03 October 2014, p. 11
[Excerpts]

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A Canadian Bar Association report has identified key ethical risk areas for lawyers in using new technological tools, including confidentiality and cloud computing.

The CBA's ethics and professional responsibility committee's 17-page report, Practising Ethically with Technology, was released recently and identified five key areas where lawyers most often face ethical risks — confidentiality, security, marketing, providing services electronically, and accessibility. Although codes of professional conduct don't explicitly spell out how technology should be used, the report notes that lawyers should understand how to use technology responsibly and ethically.

. . . .

Allan Oziel, a business and technology lawyer at Oziel Law in Toronto, said the use of technology is basically a requirement for lawyers, as they have to provide timely and cost effective services and also protect client information.

"If a lawyer does not fully understand the technology that they're using they're obviously putting their client's information at risk of being disclosed to unintended parties," Oziel said. "A failure to understand how the technology works, I think, opens up your practice to the risk that you may divulge confidential information unintendedly."

[http://www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-(1)/Resources)]

**"Are platforms coming to legal?"**

Simpson, Kate, *Canadian Lawyer*, April 2016, pp. 18-19, at p. 18
[Excerpt]

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Much has been written recently about "platforms" and their impact on the legal industry. And by platforms I'm referring to the digital business model rather than the shoes (sadly). Avvo, Rocket Lawyer, and LegalZoom are touted as the next platforms for legal, and I want to delve into this proposition a little.

So what is platform technology? The best definition I've found is in the Deloitte Business Trends Report on "Business Ecosystems" from 2015: "platforms are layers of infrastructure that impose standards on a system in which many separate entities can operate for their own gains."

[**Full Text**]

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**"Taming The Digital Chaos[:]**
**Law firms must turn their minds to better information governance**
**to not only protect client information but make internal systems more efficient and safer"**

Millan, Luis, *Canadian Lawyer*, November/December 2014, pp. 20-39, at pp. 38-39
[Excerpt]

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Legal observers are … convinced that law firms — large, small, and solo practitioners — are at the very least starting to pay closer attention to information governance. Ironically, more and more law firms are advising clients over the merits of information governance. "Litigators within firms are very well versed with what can happen when client's records are a big mess," says Manning. "Whether or not that translates into law firms themselves having their records in good order is probably hit and miss." Some law firms, especially the bigger ones, no longer seem to have a choice. Requests for proposals that firms rely on for getting new work are taking into consideration whether law firms have in place information governance methodologies.

[**Full Text**]

**"Cloud Computing"**

Law Society of British Columbia, January, 2013

For a comprehensive—and essential—Practice Resource on Cloud Computing for the legal profession go: https://www.lawsociety.bc.ca/page.cfm?cid=356&t=Technology

## 4.0 PROCEEDINGS DERIVING FROM BREACHES OF STANDARDS OF RESPONSIBILITY

### 4.1 Administrative: Disciplinary

**"Lawyer who posted Crown disclosure online admits 'terrible mistake'"**

Small, Peter, www.lawtimesnews.com/201407074068, 07 July 2014
[Excerpt]

An Ottawa lawyer has made an emotional apology to the Law Society of Upper Canada for "foolishly" posting Crown disclosure from a client's criminal case on the Internet.

**[Full Text]**

**"Lawyer who overbilled LAO spared disbarment"**

Taddese, Yamri, www.lawtimesnews.com/201412084364, 08 December 2014
[Excerpt]

A Law Society of Upper Canada tribunal hearing panel has decided not to disbar a Grand Bend, Ont., lawyer found to have overbilled Legal Aid Ontario after concluding his actions weren't intentional.

"It underlines that there must be some sort of dishonesty, theft or fraud before revocation can be ordered," says Lerners LLP's Brian Radnoff, who represented lawyer William Kennedy.

"Carelessness alone should never amount to disbarment; that's not fair in most situations," he adds.

[Full Text]

**"Calgary lawyer's brawling, axe wielding lead to reprimand"**

Ellwand, Geoff, www.canadianlawyermag.comlegalfeeds/2475, 09 January 2015
[Excerpt]

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Two immigration lawyers with seperate offices just a door apart on the second floor of a strip mall in northeast Calgary have had their disagreements. Perhaps that is not so unusual for two direct competitors but remarkably the rivalry ended up in a fist fight in the parking lot and the appearance of at least one of the lawyers before a Law Society of Alberta disciplinary hearing.

Calgary police investigated the incident but no charges were laid.

The two brawling barristers are Surinder Randhawa and Dalwinder Hayer. Randhawa has been a practising lawyer in Alberta since 1989 and Hayer since 1994. They have known each other for 27 years and have occasionally done business. They both serve primarily the Indo-Canadian community and focus on immigration and real estate.

Randhawa was publically reprimanded by the Law Society of Alberta for his bad behaviour. The discipline committee included Douglas R. Mah and Amal Umar.

. . . .

The law society states that about a year before the April 2011 parking lot brawl Randhawa took a rock, and, a week later, an axe into the ground floor of Hayer's office unit "in an apparently threatening manner." It also found that in the fist fight Randhawa received some unspecified injury and his eyeglasses were broken.

According to Hayer, Randhawa started the fight by pushing Hayer apparently over a disputed parking spot in the shopping mall. "Naturally I had to defend myself," says Hayer.

[**Full Text**]

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**"Suspension After $150K Taken From Orphans"**

www.lawtimesnews.com/201502234495, 23 February 2015

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The Law Society Tribunal has suspended a lawyer on an interlocutory basis for misappropriating funds belonging to orphaned children.

**[Editor's Note:** On 05 February 2016, Mr. Borkovich's licence was revoked: 2016 ONLSTH 23 (CanLII).]

**[Full Text]**

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**"Lawyer disbarred for writing fake orders"**

Taddese, Yamri, www.lawtimesnews.com/201404134603, 13 April 2015
[Excerpt]

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The Law Society Tribunal disbarred a Mississauga, Ont., lawyer last week after he admitted to fabricating numerous court orders, endorsements, e-mails, and notices. [2015 ONLSTH 110 (CanLII).]

A thick booklet containing the fake documents showed lawyer Brian Nicholson wrote elaborate endorsements, sometimes with addenda, signed under the names of actual judges in Ontario. He then forwarded the endorsements to his client.

[**Full Text**]

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**"Hamilton Lawyer Disbarred [For Failing To Serve Client]"**

www.lawtimesnews.com/201506154745, 15 June 2015

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The Law Society Tribunal has disbarred a Hamilton, Ont., lawyer found to be ungovernable.

On June 2, [2015] the hearing division ordered the revocation of James William Scott's licence after finding he had failed to co-operate with an investigation by the Law Society of Upper Canada; failed to serve a client by not filing an application of appointment of estate trustee with a will or not obtaining one; failing to maintain himself in a way that maintains the integrity of the profession by misleading a client; misappropriating funds given to him in trust; failing to account for money given to him in trust to prepare a statement of defence; and failing to file a compliance report within 30 days of the start of his suspension.

Besides revoking Scott's licence, the tribunal ordered him to pay costs of $13,167.

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**"Careers derailed"**

Makin, Kirk, www.canadianlawyermag.com/5655, 06 July 2015
[Excerpt]

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After five years spent at ground zero of a spreading financial disaster known as the Hollinger newspaper swap, Elizabeth DeMerchant was acutely aware of its toxicity. As the Torys LLP counsel watched from the sidelines, the reputations of one director, auditor, or legal counsel after another had been laid waste by scandal or suspicion.

[**Full Text**]

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**"Making lemon aid[:]**
**[A journey from disbarment to redemption]"**

Bruineman, Marg., www.canadianlawmag.com/5651, 06 July 2015
[Excerpt]

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When Vassilios Apostolopoulos had fallen to the lowest depth of his life, he didn't have to go back to law, after all he had made mistakes, given up practising, and been disbarred. He could have chosen to take other routes on the road to rebuilding his life. He had other interests, other degrees — he had been working on his doctorate in political science when he switched to law. But to not go back wasn't an option for him.

[**Full Text**]

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**"Divisional Court finds hearing panel was demeaning to lawyer"**

Etienne, Neil, www.lawtimesnews.com/201510265008, 26 October 2015
[Excerpt]

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A lawyer says he feels vindicated after the Divisional Court found a Law Society of Upper Canada hearing panel made "demeaning" findings against him.

Despite the court's findings in his favour, Roy D'Mello says he's unhappy with how the law society handled a key piece of evidence in the investigation against him. "One thing that I felt was really terrible was for them to come out and say there's no air of reality to you thinking the letter was backdated when the evidence proves exactly the opposite," says D'Mello of his concern that someone had submitted backdated correspondence to further the case against him.

The comments follow the Divisional Court's Oct. 16 [, 2015] ruling on D'Mello's appeal in *D'Mello v. The Law Society of Upper Canada* [2015 ONSC 584 (CanLII)]. "In my opinion, these unfair findings tainted the reasonableness of the hearing panel's decision about penalty," wrote Justice Paul Perell in a decision that set aside two $10,000 cost decisions against the Oakville, Ont., lawyer and found the penalty of a one-month suspension was excessive and should have been a reprimand.

[**Full Text**]

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**"Solicitor who brought 'cataclysm' upon himself is struck off"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 18 February 2016
[Excerpt]

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A sole practitioner who brought a "cataclysm" upon himself by failing to protect the interests of children when acting as a trustee, leading to them not receiving the legacies they should have done from two wills, has been struck off and ordered to pay £65,000 in costs.

The Solicitors Disciplinary Tribunal (SDT) said the children involved "did not even know" that Timothy John Wilkinson, a private client specialist, was a trustee and "he did not look after their interests at all".

[**Full Text**]

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**"Tribunal fines barrister who pestered women at chambers summer party"**

Rose, Neil, *Legal Futures* [United Kingdom], 09 May 2016
[Excerpt]

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A barrister who pestered three women at a chambers summer party with suggestive movements and comments has been fined £1,800 by a Bar disciplinary tribunal.

Stephen Howd, formerly of Zenith Chambers in Leeds, failed to act with integrity and behaved in a way likely to diminish the trust and confidence the public places in a barrister or in the profession, according to the ruling published last week.

[**Full Text**]

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**"Solicitor who overcharged his clients 'in the most despicable way' is struck off"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 08 April 2016
[Excerpt]

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A solicitor who charged one client 50 times the estimate of £2,000 and another £100,000 in fees on a probate matter on which he could "recall no detail at all", has been struck off by the Solicitors Disciplinary Tribunal (SDT).

[**Full Text**]

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**"[Solicitors Regulation Authority] … fines solicitor who failed to report 'serious misconduct' by colleagues"**

Rose, Neil, *Legal Futures* [United Kingdom], 18 April 2016
[Excerpt]

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A solicitor who failed to report "serious misconduct" by other members of staff at former Yorkshire firm Legal Development Partners has been fined £2,000 by the Solicitors Regulation Authority (SRA).

[**Full Text**]

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**"Solicitor fined for inappropriate text messages to client"**

Bindman, Dan, *Legal Futures* [United Kingdom], 22 April 2016
[Excerpts]

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The Solicitors Disciplinary Tribunal (SDT) has fined a solicitor £5,000 for misconduct after he sent inappropriate texts to a vulnerable client who was the victim of domestic abuse.

. . . .

For instance, one text sent by Mr Lee read: "I am full of admiration for you. Just wanted you to know that you're wonderful xx".

[**Full Text**]

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**"'It was too good to be true': [Solicitors Disciplinary Tribunal] … strikes off solicitor scam victim who raided client accounts"**

Bindman, Dan, *Legal Futures* [United Kingdom], 11 February 2016
[Excerpts]

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A sole practitioner who was the victim of fraudsters and raided his clients' money to pay them off, has been struck off by the Solicitors Disciplinary Tribunal.

John Randall Slade claimed he had been threatened by the fraudsters.

. . . .

He claimed he became involved with fraudsters "masquerading as Google", after receiving an unsolicited telephone call from a company offering to advertise his business on the internet with a view to increasing his client base.

. . . .

He explained that he had made payments for advertising, website production and domain name purchases, and an initial up-front payment of £6,000-£7,000.

The tribunal recorded: "Having made the initial payment, the respondent was then informed that he had subscribed to their services and was required to pay regular instalments. He would receive demands for cash over the telephone and a representative of DB [the company] would attend his home to collect the money.

"The respondent stated that he had been taken in by the individuals representing DB; however, he explained that he had also suffered from injury and ill health, and that had affected his judgement."

Mr Slade had paid £50,000 of his own money and continued to do so as he was told [by DB] that his websites could be sold in part or whole for a profit. He signed a contract for the sale of his website for £428,000, but it did not complete, with the company telling him there had been complications surrounding the copyright.

Mr Slade was asked to make further payments, which he did. When he ran out of personal funds, he dipped into client account.

[**Full Text**]

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**"Solicitor agrees to leave profession over rule breaches"**

Rose, Neil, *Legal Futures* [United Kingdom], 27 January 2016
[Excerpt]

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A solicitor who was unaware of what he should do after he failed to secure professional indemnity insurance has agreed to remove himself from the profession.

[**Full Text**]

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**"City solicitor accepts fine from [Solicitors Disciplinary Tribunal]… over assault conviction"**

*Legal Futures* [United Kingdom], 15 January 2016
[Excerpt]

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A City law firm partner has been fined by the Solicitors Regulation Authority (SRA) after an assault conviction following a "domestic incident".

Darren James Wall, a commodities partner in the City office of Hill Dickinson, pleaded guilty to common assault at Basingstoke Magistrates' Court in 2014, and was in total sentenced to a 12-month community order with requirements of 12 months' supervision, 20 sessions of an 'integrated domestic abuse module' and 80 hours of unpaid work.

According to a regulatory settlement agreement reached between the SRA and Mr Wall – which means the case does not get referred to the Solicitors Disciplinary Tribunal – Hill Dickinson "are aware of the conviction and have confirmed their support for him".

[**Full Text**]

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**"Solicitor admits breaking professional rules to help get murderer convicted"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 12 January 2016
[Excerpt]

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A former partner in a criminal law firm has described how he deliberately broke professional rules to get a murderer convicted.

Steve Chittenden, who retired at the end of last month after 40 years as a criminal lawyer, told *Legal Futures* [United Kingdom]: "I don't think the rules are in any way wrong. The dilemma is between the rules and natural justice.

[**Full Text**]

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**"Solicitor who paid clients 'compensation' from his own bank account is struck off"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 26 October 2015
[Excerpt]

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A solicitor who failed to issue proceedings, fabricated settlement offers and paid clients "compensation" from his own money has been struck off.

[**Full Text**]

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**"Criminal lawyer struck off after failing to report drink-driving conviction"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 13 October 2015
[Excerpt]

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A criminal lawyer who failed to report a drink-driving conviction to the Solicitors Regulation Authority (SRA) has been struck off by the Solicitors Disciplinary Tribunal (SDT).

[**Full Text**]

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**"Solicitor who forged client's signature on witness statement struck off"**

Rose, Neil, *Legal Futures* [United Kingdom], 24 September 2015
[Excerpt]

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A solicitor who forged his client's signature on a witness statement has been struck off, even though the client himself expressed surprise that disciplinary action had been taken.

[**Full Text**]

**"Solicitor fined £10,000 for being 'less than frank' about disciplinary record while on oath"**

Bindman, Dan, *Legal Futures* [United Kingdom], 23 September 2015
[Excerpt]

A solicitor who was "less than wholly frank" about his disciplinary record while on oath in the High Court has escaped with a fine from the Solicitors Disciplinary Tribunal (SDT).

The tribunal accepted that William John Gregory Osmond's action had done "little harm" in the proceedings.

[**Full Text**]

**"Barrister loses appeal against disbarment for misconduct over illness claim"**

Bindman, Dan, *Legal Futures* [United Kingdom], 15 September 2015
[Excerpt]

The Visitors of the Inns of Court have thrown out appeals by a barrister against three disciplinary tribunal rulings, including one which disbarred him for seeking an adjournment of his case on grounds of ill-health, although he was found acting in a trial just days later.

[**Full Text**]

**"[Solicitors Disciplinary Tribunal] … rejects plea to avoid strike-off from solicitor convicted of possessing indecent images"**

Rose, Neil, *Legal Futures* [United Kingdom], 10 July 2015
[Excerpt]

A solicitor convicted of child pornography offences has been struck off after his plea to be suspended instead so that he might retain some dignity and as an acknowledgement of his efforts in the profession was rejected.

The Solicitors Disciplinary Tribunal (SDT) said that Hugh Alexander Jackson had sullied the reputation of the profession.

[**Full Text**]

**"[Family law solicitor] … agrees never to practise again in deal struck with … [Solicitors Regulation Authority]"**

Rose, Neil, *Legal Futures* [United Kingdom], 02 July 2015
[Excerpt]

A [family law] solicitor whose firm was shut down last year after failing to effect an orderly wind-down has agreed never to practise again in a deal struck with the Solicitors Regulation Authority (SRA).

[**Full Text**]

**"[Family law solicitor] … escapes lack of integrity charge by pleading incompetence"**

Bindman, Dan, *Legal Futures* [United Kingdom], 29 June 2015
[Excerpt]

The Solicitors Disciplinary Tribunal (SDT) has allowed a [family law] solicitor to continue to practise despite the fact he used "his incompetence as a shield" against the lack of integrity that was alleged, after he unwittingly facilitated a mortgage fraud that cost his lender client £744,000.

[**Full Text**]

**"Immigration lawyer who lied to High Court is struck off"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 26 May 2015
[Excerpt]

A solicitor who lied to the High Court and was found guilty of contempt – leading the now Lord Chief Justice to refer him to the Solicitors Regulation Authority (SRA) – has been struck off by the Solicitors Disciplinary Tribunal (SDT).

[**Full Text**]

**"Solicitor fined £305,000 by [Solicitors Disciplinary Tribunal] … was motivated by 'desire to help'"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 22 April 2015
[Excerpt]

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Nigel Harvie, the solicitor fined a record £305,000 by the Solicitors Disciplinary Tribunal (SDT) last month, argued that he was motivated by a "desire to help", it has emerged.

Mr Harvie took control of a vulnerable old woman's house in return for paying her care and living expenses, in what the tribunal said was a serious breach of trust. The previous highest fine for a solicitor was £40,000.

[**Full Text**]

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**"Struck off and now disbarred: lawyer who defrauded the Law Society"**

Rose, Neil, *Legal Futures* [United Kingdom], 27 March 2015
[Excerpts]

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A former solicitor and non-practising barrister who was convicted of a string of offences – including assaulting two police officers and defrauding the Law Society of £23,000 while a member of its council – has been disbarred two months after she was struck off the roll of solicitors.

. . . .

In December 2013 she was convicted of fraud for making £22,847 in false expenses claims to the Law Society. She was sentenced to 15 months' imprisonment, suspended for two years.

[**Full Text**]

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**"Bankrupt barrister subject to five-year restrictions order"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 19 March 2015
[Excerpt]

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A barrister from Essex has been given a five-year bankruptcy restrictions order for neglecting his business affairs.

[**Full Text**]

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**"Barrister to be disbarred over tax fraud"**

Rose, Neil, *Legal Futures* [United Kingdom], 29 May 2014
[Excerpt]

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A barrister who avoided paying over £77,000 in income tax and VAT was yesterday ordered to be disbarred.

**[Full Text**]

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**"Past comes back to haunt struck off barrister turned Russian commentator"**

Sawer, Patrick, *The Daily Telegraph,* 21 May 2016
[Excerpt]

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Disbarred for making a series of outlandish assertions - including the claim that he had been kidnapped and blackmailed by one of Britain's most senior judges - former barrister Alexander Mercouris' credibility had surely hit rock bottom.

Indeed the Bar Standards Board described his behaviour as "unhelpful and profoundly dishonest".

Within a few years however Mr Mercouris had managed to reinvent himself, using his powers of persuasion to become a commentator on world affairs for Russian TV news outlets and websites.

He is regularly interviewed by the pro-Putin news channel RT, which is funded by the Russian government, for his views about topics such as the Ukraine crisis, the defection of US whistle-blower Edward Snowden and Syria.

But his past is now threatening to come back to haunt him.

One of Mr Mercouris's former legal clients is suing him for damages over his "appalling" behaviour towards her in the case which led to him being struck off.

Lorna Jamous is taking the former barrister to court, claiming he caused her psychological and financial damage after lying to her in an action she brought against Westminster Council after her son was taken into care for a year.

Mrs Jamous had been offered a £5,000 settlement by the council over the treatment received by the 10-year-old.

In October 2009, however, Mr Mercouris, who was representing Mrs Jamous, persuaded her to turn down the offer, later claiming he had managed to get the settlement increased to £983,000.

As a result the mother of two [children] began making plans – borrowing money, treating herself and her children to a holiday and looking for a property to buy.

When she began questioning Mr Mercouris as to why the money had not materialised he embarked on what the Bar Standards Board (BSB) would later describe as a series of "bizarre assertions to hide the truth".

To convince Mrs Jamous, he showed her a letter purporting to be from Baroness Hale, Justice of the Supreme Court, expressing concern that the payment had not arrived.

The letter turned out to be a forgery.

Mr Mercouris then told Mrs Jamous he had applied for an interim £50,000 payment, before claiming his brother had stolen the entire £983,000 [settlement].

He then made what the BSB described as "the most peculiar allegation" of all, that bogus police officers kidnapped him and took him to a meeting with Lord Phillips of Worth Matravers, the then Lord Chief Justice of England and Wales.

Mr Mercouris claimed Lord Phillips had pleaded with him to drop the case in exchange for a £50,000 bribe.

He also alleged that Lord Phillips threatened to have his 102-year-old grandmother put into a care home.

At a hearing in March 2012 Stephen Mooney, the BSB's counsel, described the lies as an "extremely convoluted story" of "tortuous deceit".

How can he have any sort of credibility when he was discredited for making up such incredible stories in my case? Lorna Jamous says.

Mr Mercouris, 55, a former Citizens Advice Bureau worker who had also worked in the Royal Courts of Justice for 12 years before being called to the bar in 2006, was struck off and banned from practicing law.

In mitigation he said he had had been diagnosed with depression after a nervous breakdown in 2007, due to the strain of caring for his sick grandmother, and that he was "very sorry" for what he had done.

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***Green v. Law Society of Manitoba***

2015 MBCA 67 (CanLII), 02 July 2015
*The Lawyers Weekly*, 04 September 2015, p. 20 (headnote, in part)

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**[Facts:]** Appeal by Green from a decision dismissing his application for a declaration that the rules of the Law Society requiring him to attend continuing professional development programs and exposing him to suspension if he did not do so were illegal and invalid. The appellant, a lawyer with 60 years' experience, argued that there was no statutory authority under the Legal Profession Act (Act) allowing the Law Society to do so and that a suspension of his right to practice without a hearing or a right of appeal was contrary to the rules of natural justice and procedural fairness.

. . . .

**[Held:]** Appeal dismissed.

**[Reasons:]** The Act was a public interest statute, not a penal one as submitted by the appellant. The purpose of the statute was not to preserve a monopoly for the members of the Law Society, but to provide protection for the general public that sought the services of lawyers. The Law Society had the power to make rules with respect to setting up a continuing professional development program. To make such a program mandatory for its members was well within the purview of the benchers of the Law Society. Having the power to make it mandatory, the Law Society clearly had the power under s. 65 of the Act to also make rules establishing the consequences, such as suspension, for failing to meet the requirement. The suspension was a result of an administrative decision and did not require the implementation of an involved type of hearing which the appellant claimed must be commenced by the Law Society in order to suspend him.

**[Editor's Note**: Leave granted to appeal to Supreme Court of Canada, 10 December 2015.]

[**Full Text**]

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**"Lawyers Accountable For Billing Procedures"**

Sorenson, Jean, *Canadian Lawyer*, June 2015, p. 13
[Excerpts]

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A disciplinary panel of the Law Society of British Columbia has affirmed that lawyers are responsible for monitoring the practices of their legal staff and will have to pay the price for billing procedures outside accepted standard practices.

The panel found Vancouver immigrations lawyer Catherine Sas had committed professional misconduct for billing irregularities that were discovered in trust accounts. Sas, who told the disciplinary hearing billing errors were her staff's fault, has been found guilty of improperly billing clients and misappropriating money. The funds total less than $5,000 and in some incidents the amount is less than $1. The panel's 52-page decision relates to events in 2011. [2016 LSBC 3 (CanlII).]

. . . .

"Since the decision by the hearing panel in *Law Society of BC v. Martin* [2005 LSBC 16 (CanLII)]… the vast majority of panels have adopted as a test for professional misconduct whether the conduct of the member in question exhibited a 'marked departure' from the standard of conduct the Law Society expects of lawyers," the disciplinary decision reads. The disciplinary panel found that conduct that may be a "marked departure" from the conduct expected by the LSBC isn't just limited to the conduct of the lawyer. "It may also include conduct of persons for whom the lawyer is responsible. Similarly, persons who have fiduciary duty cannot avoid that duty by delegating it to an employee or other person," the decision found. No date has been set for a penalty hearing.

***Merchant v. Law Society of Saskatchewan***

[2014] S.J. No. 245 (Sask. C.A.)
*The Lawyers Weekly*, 20 June 2014, p. 19 (headnote)

**[Facts:]** Appeal by Merchant from a finding he was guilty of conduct unbecoming of a lawyer, and from the penalties imposed of a three month suspension from practice and a costs award of $28,869 against him. Merchant was a partner at a law firm bearing his name, and was counsel for MH in a claim that was settled for $100,000. MH was also represented by other lawyers at the Merchant firm in a family law matter, in which an order was made requiring MH to pay into court the first $50,000 of any settlement he received to cover child support payment arrears. The same order required the firm to ensure funds held in its trust account were paid. Merchant thought it was inappropriate for the court to make an order binding his firm to do something when the firm was not a party to the action. He made arrangements for MH to receive his settlement cheque in his name, not the firm's name. He took over carriage of all MH's files from other firm lawyers. He had MH sign a contingency agreement providing the firm with a 30 per cent share of the settlement. Merchant then used the settlement funds to pay his firm's account and released the remaining funds to MH, purportedly as a loan, which was immediately deemed repaid. Merchant's appeal from the order in the family proceedings was ultimately allowed and the term in the order requiring the firm to pay money into court from its trust account was deleted. MH's former [spouse] partner pursued contempt proceedings against MH, and a complaint against Merchant with the Law Society. It was not until 81 months later that the Hearing Committee of the Law Society found Merchant guilty of conduct unbecoming for both breaching the order, and for counseling his client to act in defiance of the order.

**[Held:]** Appeal dismissed.

**[Reason:]** The reasons of the hearing committee were sufficient to disclose how it came to its conclusions and support the reasonableness of those conclusions. The harsh potential penalty lawyers faced for conduct unbecoming did not warrant including a mens rea element into the offence. Strict liability standards were properly applied to Merchant's case. There was no way Merchant thought that what he was doing was not a breach of the order in the family law proceedings. He was also aware that MH had no intention of using funds released to him to satisfy the family law order. That order did not place Merchant in a conflict position with his client MH. Merchant had a duty to obey the law, a duty that could not be supplanted by his perceived legal duties to MH. However, Merchant was not entitled to a stay of the Law Society proceedings based on delay, as he was not prejudiced by the delay and the Law Society was not primarily responsible for the delay. The sentence, while harsher than those imposed in similar cases, was not unfit. Merchant's conduct was in breach of his obligations to the court, to his client and to his client's former spousal partner who was claiming child support arrears. A sentence of more than two

months' suspension was reasonable because of the elaborate calculation and planning involved. The discipline committee was entitled to consider Merchant's 2000 conviction for conduct unbecoming. Merchant's lack of remorse was also an appropriate factor considered in imposing sentence.

**[Full Text]**

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***Peet v. Law Society of Saskatchewan***

2014 SKCA 109 (CanLII), 28 October 2014
*The Lawyers Weekly*, 12 December 2014, p. 18 (headnote, in part)

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**[Facts:]** Appeal by the solicitor from a decision of the Law Society finding the appellant guilty of conduct unbecoming a lawyer. The appellant, a sole practitioner, was an estate lawyer. Two clients filed complaints in 2008 alleging the appellant failed to communicate with them promptly and failed to work on the files in a diligent manner. The Law Society also filed a complaint alleging the appellant failed to reply promptly to its communications. A formal complaint was issued and the Hearing Committee was struck in 2010. However, the Hearing Committee proceedings did not begin until 2012. The Committee found that the appellant had failed to serve two different clients in a conscientious, diligent and efficient manner and that he had failed to reply promptly to communications from the Law Society. The appellant had a prior disciplinary record. The Discipline Committee ordered that the appellant be suspended for 30 days and that he pay costs in the amount of $16,216.80. The appellant argued that the proceedings against him should have been stayed due to the long delay which violated his right to be tried within a reasonable time. He also submitted the delay amounted to an abuse of process which warranted the grant of a stay on administrative law grounds. He argued that the evidence did not support the Committee's findings and that the suspension imposed was unreasonable.

**[Held:]** Appeal dismissed.

**[Reasons:]** Although the delay in dealing with the complaints against the appellant was long, disciplinary proceedings of the sort in question here did not engage s. 11(b) of the Charter. The fine complained of by the appellant was not being aimed at redressing a wrong done to society, but represented no more than an attempt by the Law Society to recoup the cost of conducting the disciplinary proceedings in this case. The delay did not affect the fairness of the proceedings before either the Hearing Committee or the Discipline Committee. The delay in advancing the complaints to a hearing did not … result in a breach of administrative law principles. The appellant failed to demonstrate significant prejudice or stigma. He had not shown the sort of personal impact that would offend the public's sense of decency and fairness.

[Full Text]

***Kay v. Law Society of British Columbia***

2015 BCCA 303 (CanLII), 02 July 2015
*The Lawyers Weekly*, 28 August 2015, p. 20 (headnote)

**[Facts:]** Appeal by Kay from a decision of the Benchers of the Law Society of British Columbia setting aside a decision granting his application for reinstatement as a lawyer. Kay was a successful lawyer until he ran into financial problems and left Canada in 1999. He did not close his practice properly, leaving outstanding debts to a client and the bank. Kay returned to Canada in 2010 and soon declared bankruptcy. He received his absolute discharge in July 2012 and afterwards applied to be reinstated as a lawyer. A Hearing Panel of the Credentials Committee of the Law Society Law reinstated Kay on conditions. The Hearing Panel found that Kay regretted his actions and was truly remorseful for the manner in which he dealt with his client and creditors. The Panel was satisfied Kay had learned from his mistakes and was currently of good repute. A notice of review was issued by the Law Society in January 2014. The Benchers set aside the Hearing Panel's decision in August 2014. The Benchers found that Kay's apology for his misconduct was not enough to show he had rehabilitated himself. They noted that Kay had made no attempts to make restitution, and found that Kay had failed to satisfy them that he was extremely unlikely to misconduct himself again if readmitted to the bar.

**[Held:]** Appeal dismissed.

**[Reasons:]** The Hearing Panel erred in failing to apply the "extremely unlikely to misconduct himself" criteria. Given that Kay left the country fully aware of his debts and the difficult position in which he was leaving his clients, the Benchers came to a reasonable decision in finding that he should not be reinstated. Kay had failed to address his misconduct in 1999, and that misconduct remained un-redressed.

**[Full Text]**

**"[Solicitors Disciplinary Tribunal] … anonymity ruling 'breached principle of open justice', High Court rules"**

Rose, Neil, *Legal Futures* [United Kingdom], 18 January 2016
[Excerpt]

A decision by the Solicitors Disciplinary Tribunal (SDT) to grant retrospective anonymity to a solicitor who had only been found guilty of a technical rule breach flouted the principle of open justice, the High Court has ruled.

Mr Justice Nicol, sitting with Lord Justice Burnett, said the tribunal decision in the case of Richard Spector was "wrong in principle and not one which it could rationally make".

[**Full Text**]

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**"High Court finds abuse of process in how law firm sued fellow solicitors"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 08 January 2016
[Excerpt]

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The High Court has found a Newcastle law firm's conduct an abuse of process after it repeatedly failed to pay the proper court fees when it issued claims.

[**Full Text**]

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**"Barrister who 'abused position' by threatening to sue dentist loses appeal against misconduct finding"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 20 October 2015
[Excerpt]

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The High Court has rejected by an appeal by a barrister against a finding of a Bar disciplinary tribunal that he abused his position by threatening to sue a dentist.

[**Full Text**]

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**"High Court backs decision not to strike off solicitor who lied to avoid speeding penalty"**

Rose, Neil, *Legal Futures* [United Kingdom], 14 September 2015
[Excerpt]

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The High Court has rejected a Solicitors Regulation Authority (SRA) bid to increase the sanction for a solicitor who committed perjury to avoid a speeding fine from a suspension to a striking-off.

Mr Justice Dove found that it could not be said the two-year suspension handed out by the Solicitors Disciplinary Tribunal (SDT) earlier this year to Mohammed Imran was "clearly inappropriate".

[**Full Text**]

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**"High Court: Tribunal right to disbar barrister who drafted false grounds of appeal"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 19 May 2015
[Excerpt]

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The High Court has upheld the disbarment of a barrister accused of drafting false grounds of appeal for a client found guilty on drugs charges.

Lord Justice Beatson and Mr Justice Nicol held that the "heart of the case" against Rabi Sukul was that he had prepared grounds of appeal which he knew were false.

[**Full Text**]

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**"High Court halves solicitor's 'excessive and inappropriate' suspension"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 06 May 2015
[Excerpts]

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A decision by the Solicitors Disciplinary Tribunal (SDT) to suspend a solicitor for two years has been reduced to one by the High Court, which described the penalty as "clearly excessive and inappropriate".

. . . .

[The solicitor] … was accused of failing to act in the best interests of clients, breaches of the Accounts Rules, failing to co-operate with the Solicitors Regulation Authority, failing to report that the firm was in 'serious financial difficulty' or make sure it had qualifying insurance.

[**Full Text**]

***Carey v. Laiken***

2015 SCC 17, Cromwell J. for the Court
[Edited Headnote]

**[Facts:]** I brought contempt proceedings against lawyer C, alleging that he had breached the terms of a *Mareva* injunction by returning over $400,000 to his client S for whom he was holding it in trust. The injunction was issued in the course of litigation between L, S and related parties. It enjoined any person with knowledge of the order from disposing of, or otherwise dealing with, the assets of various parties, including those of S. The motions judge initially found C in contempt. She was satisfied that the injunction was clear and that C had knowingly and deliberately breached it by transferring the funds. When the parties reappeared before the motions judge for determination of the appropriate penalty, C moved to reopen the contempt hearing. He filed new evidence in support of his assertion that he had acted in a manner consistent with the practice of counsel generally, and he testified about what he perceived to be his professional obligations and his motivations in dealing with the trust funds. Based on the new evidence, the motions judge set aside her previous finding of contempt. The Court of Appeal allowed the appeal and restored the initial contempt finding.

**[Held:]** The appeal should be dismissed.

**[Reasons:]** The law does not require that a person breach an injunction contumaciously or with intent to interfere with the administration of justice in order to satisfy the elements of civil contempt. All that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in breach of a clear order of which the alleged contemnor has notice. Contumacious intent or lack thereof goes to the penalty to be imposed following a finding of contempt, not to liability.

Furthermore, there is no principled reason to depart from the established elements of civil contempt in situations in which compliance with a court order has become impossible either because the act that constituted the contempt cannot be undone or because of a conflicting legal duty. Where a person's own actions contrary to the terms of a court order make further compliance impossible, it is neither logical nor just to require proof of some higher degree of fault in order to establish contempt.

**[Editor's Note**: A Mareva injunction is a judicial order which freezes assets: *Mareva Compania Naviera SA v. International Bublecarier SA*, [1975] 2 Lloyd's Rep. 509 (June 1975). Incidentally, Mareva is the most popular Cuban cigar size.]

**[Full Text]**

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**"Judge tosses out lawyer's 'unmeritorious' claims against colleagues"**

Taddese, Yamri, www.canadianlawyermag.com/legalfeeds/2370, 07 November 2014
[Excerpt]

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A Superior Court judge has thrown out a Weston, Ont., lawyer's claim against several other lawyers and a Law Society of Upper Canada bencher on the basis that it is "utterly unmeritorious." [2014 ONSC 6333 (CanLII).]

Justice Deena Baltman said lawyer Robert Nobili's claims against the new lawyer of his former clients and several others were "a complete waste of time and resources for both the court and numerous defence counsel involved."

[**Full Text**]

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**"Critical rulings show risks of going paperless, lawyer says"**

McKiernan, Michael, www.lawtimesnews.com/201501124402, 12 January 2015
[Excerpt]

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A Hamilton, Ont., personal injury lawyer says his firm is the "poster child" for the risks of going paperless after ending up on the receiving end of a series of critical rulings from local judges.

Last month, in the case of *Hernandez v. Lariviere*, Ontario Superior Court Justice Thomas Lofchik refused to reinstate the claim of a Ferro & Co. client after the registrar issued an order dismissing the action for delay. Lofchik wrote that the firm's principal, Lou Ferro, had displayed inaction that could "fairly be interpreted as both intentional and deliberate."

[**Full Text**]

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**"Limitation period a poor defence for legal malpractice"**

Dias, David, www.canadianlawyermag.com/legalfeeds/3249, 05 May 2016
[Excerpt]

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Personal-injury lawyers who advise their clients to settle for amounts that are alleged to be improvidently low could face malpractice claims many years after the settlement

That's the key takeaway from this week's decision in *Lauesen v. Silverman*, [2016 ONCA 327 (CanLII)] in which the Ontario Court of Appeal posed this tricky (and sensitive) question: "When is it reasonable for a lay person to know that she should sue her lawyer?"

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**"Appeal court upholds defamation finding in law prof case"**

Taddese, Yamri, www.canadianlawyermag.com/legalfeeds/2738, 09 July 2015
[Excerpt]

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The Ontario Court of Appeal has upheld a defamation finding against former University of Ottawa professor Denis Rancourt, who called Joanne St. Lewis, a law professor at the same university, "a house negro" in a 2011 blog post. [2015 ONCA 513 (CanLII).]

[**Full Text**]

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**"Conveyancers on both sides held liable for fraud in landmark case"**

Rose, Neil, *Legal Futures* [United Kingdom], 18 April 2016
[Excerpt]

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The conveyancers on both sides of a property fraud have been found jointly liable for the £470,000 loss suffered by the buyer.

The ruling of His Honour Judge Pelling QC, sitting as a High Court judge, is the first authority on the obligations owed by a seller's solicitor to a purchaser, and specifically the reasonableness of his actions when he had been duped as well.

*Purrunsing v A'Court & Co (a firm) & Anor* [2016] EWHC 789 (Ch) [BAILLII] concerned the purported sale of a property in south London by a fraudster who claimed to be, but was not, its registered owner.

[**Full Text**]

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**"High Court: Wrong to assume it is 'more improbable that professionals will be dishonest"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 26 January 2016
[Excerpt]

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It would be wrong to assume that it is "inherently more improbable" that a professional person will be dishonest than anyone else, the High Court has said.

Ruling on a negligence claim, HHJ Saffman, sitting as a High Court judge, found that … sole practitioner Baljinder Hayre had misrepresented "the true position".

Judge Saffman said the claimant's position was that Mr Hayre was "essentially being dishonest" in denying he had attached the wrong plan to a property transfer form, reducing the value of part of the land.

"This is not a case where matters can be determined on the basis that one or other party had 'misremembered' or otherwise made an innocent error," Judge Saffman said.

He said it was proper to ask whether it was any more likely that the claimant, Raj Khan, would seek to "dishonestly mislead" the court than the solicitor.

[**Full Text**]

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**"Client fails to defeat firm's fees action with negligence counterclaim"**

Rose, Neil, *Legal Futures* [United Kingdom], 07 January 2016
[Excerpt]

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A Midlands law firm making a claim for fees against former husband-and-wife clients has successfully applied for … [the former client's] £2.5m negligence counterclaim to be struck out.

The court emphasised that a breach of fiduciary duty by a solicitor does not necessarily mean their entitlement to be paid is forfeited.

[**Full Text**]

**"Professional negligence warning over PI, commercial and family work"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 08 December 2015
[Excerpt]

Personal injury, commercial and family work will all fuel negligence claims against lawyers, insurance specialist BLM has warned in a white paper.

[**Full Text**]

**"High Court judge castigates senior property partner 'who cut corners all the time'"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 30 November 2015
[Excerpt]

A High Court judge has launched an extraordinary attack on a senior property partner, saying that although he was "on the whole" an honest witness, he "plainly cut corners all the time in his practice".

However, although he had made a mistake in drafting a bank guarantee, she found that it did not cause any loss.

[**Full Text**]

**"[Court of Appeal] … adds extra negligence finding and £375k damages on top of High Court's £1.6m … ruling"**

Rose, Neil, *Legal Futures* [United Kingdom], 12 November 2015
[Excerpts]

The Court of Appeal has made an additional finding of negligence against leading London law firm Withers over its drafting of an LLP agreement and increased the £1.6m in damages awarded in the High Court by a further £375,000.

. . . .

Nugee J ruled that the solicitor involved "must have either misunderstood the instruction [of WP's principal owner Rupert Channing], or noted it down wrong, or when he came to redraft misremembered what he had been instructed".

[**Full Text**]

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**" 'Negligent' firm escapes payout after court finds no causation"**

Bindman, Dan, *Legal Futures* [United Kingdom], 01 July 2015
[Excerpt]

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The High Court has dismissed a claim of professional negligence against a firm of solicitors because, although the claimant successfully established liability, no loss or damage was found to have been caused.

[**Full Text**]

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**"Appeal court surprised by solicitors' partnership agreed 'in the pub'"**

Bindman, Dan, *Legal Futures* [United Kingdom], 12 June 2015
[Excerpt]

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The Court of Appeal has upheld a High Court decision against one solicitor in favour of her former partner, after expressing surprise that the pair had no more than a verbal agreement made in the pub over a drink.

In *John Bottrill v Julia Harding* [2015] EWCA Civ 564 [BAILII]– a case in which a partner claimed an agreement existed to have the capital in his capital account paid to him on retirement – Lord Justice Longmore said that given the case involved two solicitors, it was "surprising" that no agreement had been documented and "even more surprising that they choose to litigate the matter as far as this court rather than resolve their difference by mediation or even arbitration".

[**Full Text**]

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**"Court of Appeal warns solicitors over standards of 'commoditised' services"**

Rose, Neil, *Legal Futures* [United Kingdom], 29 April 2015
[Excerpt]

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Economic pressures forcing solicitors to 'commoditise' their advice "throw into sharp focus the need for standard form letters of advice to be clear in their exposition", the Court of Appeal warned yesterday.

The warning came as the court upheld a finding of professional negligence in the way Yorkshire firm Raleys handled a miner's compensation claim.

[**Full Text**]

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**"Montreal firm on its own to defend five lawsuits[:] No liability insurance coverage in Ponzi scheme fallout, court rules"**
**[*Kaufman Laramee, l.l.p.. c. Fonds d'assurance responsabilitie professionnelle du Barreau du Quebec*]**

[2014] J.Q. No. 3450 (Que. C.A.)]
Millan, Luis, *The Lawyers Weekly*, 20 June 2014, p. 22

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A Montreal law firm caught in a tangled web of complicated lawsuits after a former partner allegedly orchestrated a multimillion-dollar Ponzi scheme through his lawyer's trust account has lost a key legal battle before the Quebec Court of Appeal. In a ruling that has shaken the Montreal legal community and underscores the exposure law firms face when dealing with rogue lawyers, well-regarded firm Kaufman Laramée faces at least five lawsuits arising from the alleged fraud by former clients of Dany Perras, a lawyer who resigned abruptly from the roll in October 2011 after the Barreau du Québec launched an investigation into the misappropriation of funds allegedly committed by Perras. The former Montreal lawyer, who briefly practised at Kaufman Laramée for six months in 2011, faced a hearing … in January [2014] before the society's disciplinary council. A decision is expected shortly.

The plaintiffs claim they were approached by the lawyer Perras to participate in business opportunities that required them to make short-term loans to be held in trust accounts operated by the firm and Perras before paying out a pre-determined rate of interest. One group of investors suing Kaufman Laramée for a total of $1.65 million alleges that the firm was negligent because it failed to inform them that Perras was no longer a partner when they made the deposits, said the plaintiff 's counsel Sylvain Deslauriers, head of Montreal law firm Deslauriers & Co. While the law firm and Perras ended their partnership in June 2011, Perras was allegedly allowed to maintain

an office until September, during which time he held himself out as a Kaufman partner and allegedly continued to receive deposits from the plaintiffs.

In light of the actions against it, Kaufman Laramée turned towards the Professional Liability Insurance Fund of the Barreau du Québec. But the Quebec professional liability insurer denied coverage and refused to defend Kaufman and its partners because it felt the coverage claim did not derive from performance of professional legal services. The Quebec Court of Appeal endorsed that position in a succinct nine-page ruling in *Kaufman Laramée, l.l.p. c. Fonds d'assurance responsabilité professionnelle du Barreau du Québec* [2014] J.Q. no 3450.

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**"Loose ends can wipe out comprehensive settlements"**

Merkur, Darcy, *The Lawyers Weekly*, 27 June 2014, p. 13
[Excerpt]

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Failure to obtain court approval of the settlement of a minor's modest *Family Law Act* claim as part of a comprehensive personal injury settlement can result in the nullification of the entire settlement, according to Justice Gregory Mulligan of the Ontario Superior Court of Justice in his April 28[, 2014] decision in *Downing v. Reynolds* … [2014 ONSC 2520 (CanLII)].

[**Full Text**]

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***Dhillon v. Jaffer***

2016 BCCA 119 (CanLII)
[*The Lawyers Weekly*, 29 April 2016, Headnote, p. 24]

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**[Facts:]** Appeal by Mr. Dhillon from judgment dismissing his application … against Jaffer under to Rule 9-5(1) of the Supreme Court Civil Rules for the summary trial of his claim for breach of fiduciary duty. Jaffer was a solicitor who acted for Mrs. Dhillon on the closing of the sale a house. Jaffer payed from trust to Mrs. Dhillon the entire net proceeds of sale of a house that had been owned by Mr. Dhillon. Although she was not the registered owner, Mrs. Dhillion used a fraudulent power of attorney purportedly granted by Mr. Dhillion to effect the sale. The Court granted specific performance to the purchasers on the closing. Mr. Dhillon's action against Mrs. Dhillon was allowed, and he was awarded damages and a declaration that Mrs. Dhillon held in trust for Mr. Dhillon a house she had purchased with the proceeds of sale. Mr. Dhillon commenced an action against Jaffer alleging breach of contract, negligence and breach of fiduciary duty. In a later … [action], he sought an accounting of the funds received in trust by the solicitor in connection with the specific performance action, restitution, a declaration of trust and special and general damages for loss of enjoyment of the amenities of life. The trial judge found that Jaffer

could not have been expected to be aware of the fraud and that he had been led to believe Mrs. Dhillon was to receive the proceeds of sale as beneficial owner of the property. The Court found that Jaffer had not owed a duty of care to Mr. Dhillon. On appeal, it was held that Jaffer had been negligent in releasing the proceeds to his client without obtaining Mr. Dhillon's consent. Having found liability in tort, the Court found it unnecessary to deal with Mr. Dhillon's alternate claim of breach of fiduciary duty [or contract]. The quantum of damages for negligence was remitted to the trial court. Mr. Dhillon's damages were assessed for the loss of the sale proceeds at $187,200, for the damages for loss of opportunity at $5,000, and for general damages at $40,000. Jaffer's appeal was allowed, and the award of damages was set aside except for the $5,000 awarded for loss of opportunity. The chambers judge struck Mr. Dhillon's application for summary trial for breach of fiduciary duty as res judicata and
an abuse of process.

**[Held:]** Appeal dismissed.

**[Reasons:]** It was plain and obvious Mr. Dhillon could not succeed in pursing Jaffer further. Res judicata and the doctrine of merger applied as the causes of action were merged into the damages judgment on negligence. This was so even though he sought a different remedy. Even if a fiduciary duty existed, Mr. Dhillon would not have been able to recover equitable compensation greater than he recovered in negligence, or to benefit from any other equitable doctrine affecting the trial of the claim. All of these remedies Mr. Dhillon currently sought were effectively given to him. An accounting of the funds was provided at trial where there was argument as to the various costs that had been paid by Jaffer from his trust account in accordance with the statement of adjustments at the time of closing. Even assuming that Jaffer owed a fiduciary duty to Mr. Dhillon, he was not aware that the funds he held in trust had been wrongfully obtained by Mrs. Dhillon, and could not have been expected to be aware of her fraud. He made no secret profit and received no personal benefit aside from his fees. Thus the prophylactic principle of restitution was not properly engaged. Moreover, no issue of causation, foreseeability, intervening acts, or remoteness arose in this case.

**[Full Text]**

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**"All in the family didn't work here"**

Arnott, Kim, *The Lawyers Weekly*, 04 March 2016, p. 4
[Excerpt]

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A small-town Ontario lawyer who represented both parties in a family share purchase transaction has been ordered to pay $200,000 in damages after the Ontario Court of Appeal found him liable for negligence and breach of fiduciary duty.

While Allan Brock perceived a 1992 transaction he arranged to be essentially a gift of shares from a father to his daughter and son in-law, the Court of Appeal unanimously found he misunderstood the financial transaction, failed to recognize the potential conflict of interests between the parties, and didn't recommend independent legal advice.

The decision in *Roth Estate v. Juschka*, … [2016 ONCA 92 (CanLII)] is a caution for lawyers who may be "lulled into" problematic situations by ongoing legal relationships with groups of family members, said Toronto estate lawyer Ian Hull.

[**Full Text**]

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**"Court rejects client's claim lawyer is to blame"**

Arnott, Kim, *The Lawyers Weekly*, 06 November 2015, p. 11
[Excerpts]

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An appeal from a woman who blamed her two forgery-related convictions on her lawyer's performance has been rejected by the Court of Appeal for British Columbia.

. . . .

On appeal, De La Boursodiere claimed her lawyer Milan Uzelac disobeyed her instructions to obtain an expert opinion on the authenticity of the signature, or alternately, that his advice not to pursue an expert opinion amounted to ineffective assistance of counsel that caused an unreliable verdict at trial.

In dismissing the appeal, Justice David Harris, in *R. v. De La Boursodiere* … [2015 BCCA 429 (CanLII)], found the allegation that Uzelac had disobeyed instructions to be "wholly without merit."

[**Full Text**]

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**"Cassels Brock to appeal $45-million damages in GM dealer case"**

Brown, Jennifer, www.canadianlawyermag.com/5659, 13 July 2015
[Excerpt]

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Justice Thomas McEwen found Cassels Brock owed contractual and fiduciary duties to some or all of GM dealers in the class. One of the lawyers representing GM dealers in the class action against law firm Cassels Brock & Blackwell LLP says the case represents "the conflicts issue in a perfect storm."

"When you look at what went on in May 2009 and the need these dealers had to be represented, then layer on to it the conflict of interest, it was going to be two trains coming down the same track and that's why there was a significant damages award made," says David Sterns, a partner with Sotos LLP in Toronto.

Last week, an Ontario Superior Court judge awarded damages against Cassels Brock in the amount of $45 million for breach of fiduciary duty, breach of contract, and professional negligence.

In his 160-page decision issued July 8 in *Trillium Motor World Ltd. v. General Motors of Canada Limited*, [2015 ONSC 3824 (CanLII)] Justice Thomas McEwen found that Cassels Brock owed contractual and fiduciary duties to some or all of the class members in the case and breached those duties. As well, he found it also owed a duty of care, which was also breached.

[**Full Text**]

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***Pilotte v. Gilbert, Wright & Kirby Barristers & Solicitors***

[2016] O.J. No. 370 (Ont.Sup.Ct.J.), S. Chapnik J., 22 January 2016
*The Lawyers Weekly*, 26 February 2016, p. 21 (headnote)

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**[Facts:]** Action for negligence and breach of fiduciary duty against a solicitor. The plaintiff was seriously injured in a motor vehicle accident in Jamaica in 1993. The plaintiff's insurance policy contained a Territorial Restriction limiting the insurer's liability to accidents occurring in North America. In 1994, about 21 months after the accident, the plaintiff contacted the defendant, an expert in insurance and personal injury law, to ascertain whether insurance coverage existed to assist her with her ongoing treatment and expenses. At the time of the accident, there was no jurisprudence or legal authority which raised any question as to the legality, validity, or enforceability of the territorial restriction in the Policy. The defendant concluded that any claim for benefits under the plaintiff's policy would therefore be unsuccessful since the accident had occurred in Jamaica. The defendant claimed he explained to the plaintiff what her rights would have been under the Policy had the accident occurred in North America, and his opinion that in this case any claim against the insurer would be unsuccessful. The plaintiff denied that he did so. The defendant did not apply for accident benefits under the Policy within the two-year limitation period. Due to new and unexpected developments in the case law in 1996 and 1997, the defendant contacted the plaintiff to advise her of these developments, and that he had made an application to the insurer on her behalf for accident benefits. The claim was refused as being out of time.

**[Held:]** Action dismissed.

**[Reasons:]** The defendant's conduct did not fall below the standard of care of a reasonably competent lawyer with expertise in personal injury and insurance law litigation. A

lawyer specializing in personal injury and insurance law at the relevant time would have accepted that the Territorial Restriction contained within the standard insurance policy was applicable in this case and that no claim for accident benefits could be successfully brought. The defendant properly explained to the plaintiff what her rights to accident benefits were or would have been under the insurance policy. The defendant acted as a prudent, reasonable and competent solicitor in his dealings with the plaintiff throughout this matter. His interpretation of the relevant legislation was reasonable. His opinion and advice to the plaintiff was reasonable, proper and appropriate and consistent with the custom in the insurance and personal injury bar at the time. The defendant consulted the most appropriate sources, correctly identified the relevant provisions in the statute and the client's car insurance policy, described their import and coverage details to the plaintiff, applied the provisions and his findings appropriately to his client's circumstances, and advised the plaintiff accordingly. Given the clear and unambiguous provisions under the standard policy and its Regulations and the expert evidence, had the defendant, with or without his client's instructions, sent the insurer an application for accident benefits within the two year limitation, it would have been denied. Further, an action brought pursuant thereto would likely have proceeded in summary fashion, and been ultimately unsuccessful.

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***Mitchinson v. Baker***

Supreme Advocacy LLP, 14 April 2016, p. 9 (S.C.C. File # 36823)
[refusing leave to appeal from 2015 ONCA 623]
[Edited Summary]

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The Respondent, David Baker represented the Applicant, Elisabeth Mitchinson in a human rights complaint that she brought relating to the termination of her employment. He settled the complaint on terms that were favourable to Ms. Mitchinson. Ms. Mitchinson was unhappy with Mr. Baker's fee, which was more than the estimate that he had given. As a result, she ended the retainer before the settlement was finalized and then took steps to have his account assessed. Ms. Mitchinson and her husband, the Applicant Mr. Timothy Mitchinson commenced proceedings against Mr. Baker and the Respondent, Lawyers' Professional Indemnity Company ("LPIC"), alleging LPIC was an "accessory after the fact" to Mr. Baker's alleged fraudulent misrepresentation. LPIC brought a motion to strike the statement of claim against it on the basis that it disclosed no reasonable cause of action and Mr. Baker moved to have the action dismissed as against him on the basis that it was frivolous, vexatious, and an abuse of process of the court. The motions judge granted both motions. The C.A. dismissed the appeal. "The motions for an extension of time to serve and file the application for leave to appeal are granted. The application for leave to appeal...is dismissed with costs."

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***Simpson Wigle Law LPP v. Lawyers' Professional Indemnity Company***

2014 ONCA 492 (CanLII) (Ont. C.A.), Gillese J.A. for the Court, paras. 1-5
[Excerpt]

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[1] Simpson Wigle Law LLP ("Simpson Wigle") is a law firm that is insured under a policy of insurance issued by the Lawyers' Professional Indemnity Company ("LawPro" or the "respondent"). The LawPro insurance policy (Policy No. 2004-001) has a limit of liability of $1 million per claim, with an aggregate limit of $2 million (the "Policy").

[2] The appellants brought an application for a declaration that the allegations in an underlying action against them constituted two separate claims under the Policy, rather than a single claim (the "Application"). A statement of claim and an amended statement of claim (together the "Statement of Claim") have been filed in the underlying action.

[3] The application judge found that the allegations made in the Statement of Claim were "related" and that, as a result, they constituted one claim for the purposes of the Policy. By judgment dated December 20, 2013 (the "Judgment"), he declared that the Statement of Claim contains a single claim.

[4] The appellants ask this court to set aside the Judgment and declare that the Statement of Claim discloses more than one claim, within the meaning of the Policy.

[5] For the reasons that follow, I would allow the appeal and make the requested declaration.

[**Editor's Note:** Application for leave to appeal to S.C.C. refused, 29 January 2015.]

**[Full Text]**

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***Bohémier v. Barreau du Québec***

Supreme Advocacy LLP, 15 January 2015, pp. 10-11 (S.C.C. File # 36006)
[refusing leave to appeal to S.C.C. from 2014 QCCA 961]

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In 2005, the assistant syndic of the Barreau du Québec lodged two disciplinary complaints against the Applicant with the Barreau's Committee on Discipline (the Committee); each of the complaints involved a number of charges. The assistant syndic alleged that between 2003 and 2005, Ms. Bohémier (the Applicant) had sent letters to various judges, lawyers and members of the provincial and federal governments that contained comments that were uncalled-for, hurtful, ill-timed, discourteous, undignified and immoderate. The assistant syndic also filed a motion for a provisional order striking the Applicant off the roll. Two months later, the Committee – the members of which were the Respondents Bélanger, Panet-Raymond and Sauriol – ordered the

Applicant be provisionally struck off the roll. A year later, the Professions Tribunal quashed the Committee's decision, finding bias on the part of its members. The tribunal ordered the Applicant be re-entered on the Roll of the Order of Advocates. In 2013, the disciplinary complaints, which remained pending, were withdrawn and the file closed. The Applicant then brought a motion in the Superior Court to claim damages ($1,170,655) from, among others, the Barreau and the members of the Committee that had provisionally struck her off the roll. The Superior Court dismissed the Applicant's action on the basis she had failed to show the members of the Committee had acted in bad faith, and the latter were accordingly shielded from prosecution by s. 193 of the *Professional Code*. The C.A. dismissed her appeal. "The application for leave to appeal...is dismissed without costs."

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**"No interest on litigation loan for injured woman"**

McKiernan, Michael, www.lawtimesnews.com/201605305433, 30 May 2016
[Excerpt]

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A woman who suffered a brain injury in a car crash will not have to pay the interest on a litigation loan made by the wife of her former personal injury lawyer after the Divisional Court declared the agreement "unconscionable."

Marta Narbutt was 17 when she hired Niagara Falls, Ont. lawyer Ashley Gnyś' firm Sharpe Beresh Gnyś on a contingency fee agreement shortly after the 2004 accident that killed her boyfriend when their car was struck by another vehicle. According to the Divisional Court, between 2008 and 2009, Gnyś arranged three loans for his client totalling $13,500 with a company called Health Services Recovery Network.

However, Gnyś did not tell Narbutt that HSRN was owned and operated by his wife Valerie Gnyś, who, according to the firm's web site, has worked as a paralegal there since 1986, and had done work on Narbutt's file. Nor did he explain that Timothy Beresh, the man who talked Narbutt through the loan documentation, was actually working for both the law firm and the litigation loan company and not for her.

**[Full Text]**

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***Rider v. Grant***

(2015), 67 R.F.L. (7th) 309 (Ont. Sup. Ct. J.), D.A. Wilson, J.
[Edited Headnote]

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**[Facts:]** Husband retained solicitor to draft marriage contract in 1999 for his third marriage. Husband married wife in June 1999 and contract was signed in December 1999. Husband was adversely affected by financial downturn in 2008. In July 2009, wife advised that she was leaving marriage. Solicitor did not know extent and nature of husband's wealth. Husband commenced action for damages against solicitor.

**[Held:]** Action dismissed.

**[Reasons:]** Husband was not prepared to make financial disclosure to wife or to solicitor, and there was nothing in evidence to suggest that husband gave solicitor detailed information about nature of his investments such that solicitor ought to have discussed with him use of downside risk clause. Husband was extremely successful, self-made man who made own decisions about investments. It was not incumbent upon solicitor to tell husband that financial success may end. For someone of solicitor's experience, explanation of equalization of property and net family property would be part of routine speech to client. Solicitor was advised shortly before wedding of serious concerns that wife had regarding contract, and solicitor would have had to discuss contents of letter with husband. Issue of security for payment of lump sum to wife would have to have been discussed then, and solicitor's evidence that he suggested that husband set aside three million dollars to allay that concern was accepted. Husband's evidence to effect that he thought that assets he brought in to marriage would remain his alone, and that he would only be obliged to make lump sum payment to wife in event that his wealth increased beyond $40 million was not accepted. Husband negotiated contract with wife and there was no evidence to suggest that he requested variation clause despite his knowledge of such clauses. Solicitor admitted that he did not discuss form of protection from contract were husband's assets to diminish. Under circumstances, husband was in best position to postulate on what may happen to his assets in future. Standard of care did not demand that solicitor advise wealthy client that he was at risk of having to pay significant amounts under contract if market declined or wealth diminished. Solicitor's obligation was to explain law and not to advise client on how to manage his investments. Solicitor explained to husband how Family Law Act worked and husband determined quantum of lump sum he was prepared to pay without solicitor's input. Contract was clear about terms of when payment was due in event of marriage breakdown and husband's evidence to effect that he did not understand that he was required to make lump payment to wife in event of marriage breakdown, regardless of his financial circumstances, was not accepted. Applicable standard of care did not require solicitor to advise husband that he could include downside risk clause. Solicitor's provision of legal services to husband met standard of care of reasonably competent solicitor in circumstances.

**[Full Text]**

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**"Disbarred Lawyer's Arrest Ordered"**

www.lawtimesnews.com /201407074063 07 July 2014

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A B.C. judge has ordered the arrest of a former Ontario lawyer who has been practising law without a licence.

The court had found former lawyer John Gorman, previously disbarred by the Law Society of Upper Canada, in contempt in 2011 after he continued to practise law in British Columbia.

At the time, B.C. Supreme Court Justice John Savage had imposed a two-week incarceration and a $5,000 fine against Gorman, but the former lawyer never served the sentence or paid the money owing, according to a recent ruling in *The Law Society of British Columbia v. Gorman*.

The B.C. law society learned Gorman had left the province but he returned in 2012 and again practised law without a licence, the same judge has now found.

Savage ordered authorities to "arrest Mr. Gorman and bring him promptly before this court at 800 Smithe Street, Vancouver, B.C., and unless otherwise ordered, deliver him to the warden of the Surrey Pretrial Centre."

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**"Lawyer convicted in $1.9M gold case"**

Etienne, Neil, www.lawtimesnews.com/201502284949, 28 September 2015
[Excerpts]

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In a case that reads like a mystery novel and leaves a number of key questions unanswered, a court has found a Toronto lawyer and two co-accused guilty in a nearly $2-million fraud of the Royal Bank of Canada to purchase unique gold bars.

Where those bars are now remains a mystery, but Ontario Superior Court Justice Alfred O'Marra ruled Sept. 8 [2015] that Remy Boghossian, a corporate-commercial lawyer and sole practitioner at Boghossian Legal PC on Don Mills Rd., along with Raffi Ebrekdjian, and Siva Suthakaran were guilty of defrauding the bank of an amount in excess of $5,000. He further found Boghossian and Ebrekdjian guilty of possessing gold bars knowing the property was obtained by

the commission of an indictable offence. The court has tentatively scheduled sentencing for Dec. 4, but Boghossian is preparing to appeal.

. . . .

The judge … found … . "I do not accept Remy Boghossian's evidence that he was a dupe manipulated by Ebrekdjian and others," wrote O'Marra in *R. v. Boghossian et al.* on Sept. 8. [2015 ONSC 4851 (CanLII).]

"I am satisfied beyond a reasonable doubt that Remy Boghossian was a knowing participant in the presentation of the fraudulent bank draft to the Royal Bank of Canada on February 10, 2011 and subsequently possessed gold knowing it had been obtained by a criminal offence."

[**Full Text**]

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**"Kidnapping 'most terrifying nightmare': wife of City of Oshawa solicitor tells court"**

Brown, Jennifer, www.canadianlawyermag.com/5914, 08 February 2016
[Excerpt]

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The wife of Oshawa's city solicitor says that on the night three years ago that her husband David Potts was kidnapped at gunpoint by a former councilor, she feared she might never see him again.

At a sentencing hearing Thursday for his abductor, Robert Lutczyk, Potts attended with 15 family members including his four children and wife Maureen, who read an emotional half-hour-long victim impact statement to the court on behalf of the family.

**[Editor's Note:** Sentence imposed, 26 February 2016: eight years and four months incarceration, of which three years and four months remaining to be served after taking into account pre-sentence time in custody.]

[**Full Text**]

**"Convicted lawyer may gain pardon"**

McKiernan, Michael, www.lawtimesnews.com/201602225234, 22 February 2016
[Excerpt]

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A disbarred lawyer will get a new shot at a pardon for his criminal fraud convictions after a Federal Court judge ruled the Parole Board of Canada acted unreasonably in denying him one. [2016 FC 87 (CanLII).]

[**Full Text**]

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**"Quebec City lawyer assaulted cat food thief, judge rules"**

Cardwell, Mark, www.canadianlawyermag.com/legalfeeds/2641, 14 April 2015
[Excerpt]

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A Quebec City lawyer's video of his aggressive citizen's arrest of an elderly woman he caught stealing cat food on the porch of his home in early February 2013 went viral. He's now been found guilty of assault, in part because of the video evidence.

[**Full Text**]

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**"Solicitor taken in by 'Pope's banker' conman escapes prison sentence"**

*Legal Futures* [United Kingdom], 09 March 2016
[Excerpt]

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The solicitor who safeguarded more than £100,000 of stolen cash for a charismatic conman posing as the Pope's banker was last week spared jail after a judge heard the stress of the case has robbed her of the chance of conceiving a child.

Buddika Kadurugamuwa, 46, transferred £111,400 into an HSBC account in her husband's name on 5 September 2013 when fraudster Luis Nobre told her he was closing down his account and needed to move the money.

[**Full Text**]

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**"'Chemsex' convicted barrister accepts career is over"**

The Brief, *The Times* [London], 16 May 2016
[Excerpts]

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Henry Hendron—a one-time controversial high-flyer of the young Bar—fully expects his legal career to be finished after receiving a community sentence for pleading guilty to supplying illegal drugs that killed his teenage boyfriend.

The junior barrister from Strand Chambers in London is awaiting a decision on disciplinary action from the Bar Standards Board after sentence was handed down last week. So far, the regulator has declined to comment on whether it will seek to disbar Hendron.

However, the barrister—who only a year ago was planning a campaign for election to the Bar Council—told *The Times* on Saturday that his legal career was "all now gone".

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***R. v. Gillis***

2014 CarswellNB 441 (N.B. C.A.), Drapeau C.J.N.B. for the Court
[Leave to appeal to S.C.C. refused, 05 March 2015]
[Edited Headnote]

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**[Facts:]** FB was general manager of forest product marketing board. The Board terminated FB's employment for cause. FB was charged with cause-related offences under Criminal Code. FB brought action for wrongful dismissal and defamation. Accused was lawyer for FB. AL became general manager for board. Accused delivered settlement proposal to AL concerning civil lawsuit. AL alleged that accused clarified meaning of phrase "Criminal . Offer No Evidence" by stating "They're your witnesses, make sure they don't testify and Crown won't have case". Accused denied making any such statement. Accused was convicted on charge of attempting to obstruct justice by attempting to dissuade person from giving evidence. Accused appealed.

**[Held:]** Appeal allowed; conviction quashed; new trial ordered.

**[Reasons:]** Significant errors of fact and law cumulatively deprived accused of fair trial and brought about miscarriage of justice. Trial judge misapprehended record in concluding that accused and his counsel raised issue of his own character and integrity. Trial judge's statement that breaches of professional conduct were not denied by accused was unreasonable having regard to his plea of not guilty, his testimony, and Crown counsel's instruction that he not comment on applicability of rules put to him during cross-examination. Reversible error tainted several of constituent elements of trial judge's fallback rationale for disbelieving accused's testimony. None

of negative characterizations of accused's testimony were supported by anything in record. Trial judge did not direct his mind to possible unfairness of disbelieving accused on basis of perceived contradiction that he was not given chance to explain while testifying. Accused did not offer sum of money to secure withdrawal of charges against FB. Trial judge erred in allowing his finding of violation of rules of professional conduct to weigh in balance against accused's credibility on key question of whether accused made alleged incriminating statement.

**[Full Text]**

## 5.0 FEES AND COSTS

### 5.1 Fees

**"Alternative firm gives clients chance to change the bottom line"**

Brown, Jennifer, www.canadianlawyermag.com/5224, 04 August 2014
[Excerpt]

It's not uncommon for clients to do a double take when they open a bill from their law firm, but for those who use Conduit Law Professional Corp., any shock and awe over last month's invoice wasn't because of the amount due — it was probably about the line inviting them to change the price.

When their invoices went out in July, alternative services provider Conduit Law included a "client value adjustment" line just above the "total amount due," which invited clients to change the amount of the invoice to reflect their opinion of the value they received for the firm's services.
[**Full Text**]

**"Certification of class action over legal fees rejected"**

Taddese, Yamri, www.lawtimesnews.com/201408114129, 11 August 2014
[Excerpts]

About 6,000 clients of Neinstein and Associates LLP, spearheaded by Cassie Hodge of Brooklin, Ont., took the personal injury law firm to court on the basis that it unlawfully included costs in its contingency-fee payment arrangements among other alleged breaches of the Solicitors Act. None of the allegations have been proven in court.

. . . .

But he suggested there might be other remedies for the applicants. "Ms. Hodge and the putative class members have remedies for the alleged wrongdoings of the respondents but not included among them is a class proceeding based on a free-standing strict liability cause of action suitable for a class proceeding."
[**Full Text**]

**"Lawyer ordered to pay back almost $500,000"**

McKiernan, Michael, www.lawtimesnews.com/201604115332, 11 April 2016
[Excerpts]

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A lawyer facing criminal charges related to his bankruptcy has been ordered to repay almost $500,000 in overcharged legal fees to several members of a Fort Erie, Ont. family.

But Calin Lawrynowicz's former clients, the Marino family, could struggle to collect on the judgment after Ontario Superior Court Justice Paul Perell ruled they could not rely on an assessment officer's findings of fraud to ensure the debt survives any discharge from bankruptcy ultimately granted to Lawrynowicz.

. . . .

Though it may sound on its face like a straightforward lawyer-client dispute, Perell points out early in his judgment in *Calin A. Lawrynowicz Barristers & Solicitors v. Marino Estate* that the case is far from normal, lamenting an "execrable matter" that has dragged on for more than a decade, and identifying a "hidden agenda" in the latest appeal. [2016 ONSC 2065 (CanLII).]

[**Full Text**]

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**"Detailed notes help vindicate lawyer in fee dispute"**

Etienne, Neil, www.canadianlawyermag.com/legalfeeds/3130, 19 February 2016
[Excerpt]

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Well-known veteran lawyer George Walker says he has been vindicated following the release of an Ontario's Superior Court ruling in a lengthy battle against a former client seeking to assess the lawyer's accounts

"Counsel can never be too careful in documenting instructions received from a client or steps taken on a client's behalf," says Walker, a 45-year veteran of law and certified criminal law specialist who once represented Karla Homolka.

Earlier this week Superior Court Justice Catrina Braid released her decision in *Tsigirlash v. Walker*, dismissing a former client's efforts to assess Walker's accounts. [2016 ONSC 968 (CanLII).]

[**Full Text**]

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**"The journey from the billable hour to value-based flat fees"**

Speigel, Allison, www.canadianlawyermag.com/5600, 25 May 2015
[Excerpt]

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Most lawyers will tell you it is impossible to bill on a flat-fee basis. They will claim "our work is too customized" or "there are far too many unknowns to ever predict cost." Surprisingly, these same lawyers also pitch that they "are experts in their field" and "have handled many cases just like yours."

This has never made sense to me. On the one hand, they cannot possibly know the future of your case. On the other, you should trust them with it *because* they know what to expect and how to deal with it.

This dichotomy raises obvious questions. Why are non-legal businesses capable of setting fixed fees despite the fact every business deals with unknowns? Are legal fees incapable of being fixed or are lawyers afraid or unwilling to take the risk that they cannot accurately predict what will transpire?

The answer lies in a related tension. Most lawyers will tell you their fees are calculated based on hours worked, not the result obtained. Yet, in the same breath, they also assure you they intend to be your partner in the matter. Can lawyers ever be true partners if they have no skin in the game?

[**Full Text**]

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**"Clients charged fixed fees in almost half of all transactions, survey finds"**

Hilborne, Nick, *Legal Futures* [United Kingdom], 23 May 2014
[Excerpt]

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Clients are paying law firms fixed fees in almost half of all transactions, while unbundling is becoming a significant feature of the market place, a survey for the Legal Services Consumer Panel has found.

[**Full Text**]

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***Stevens v. Stevens***

2012 ONSC 6881 (CanLII), R. John Harper J., paras. 39-42

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**Lawyer's Rates**

[39] Mr. Smith, on behalf of Joel [the husband], argues that I should not consider the rates charged by Mr. Grant and his associates [representing the wife]. As a proper measure of lawyer rates that should be allowed by a court, he submits that Mr. Grant's hourly rate of $750 per hour is far in excess of the Cost Grid that was removed from the Civil Rules in 2005 and replaced with an "Information for the Profession". Those rates set a counsel fee of more than 20 years experience at $350 per hour. Mr. Smith submits that I should be guided by this grid in assessing the reasonable and fair rate to be allowed.

[40] I do not agree that the "Information for the Profession" is a cost grid that is to be followed by a court. That Information for the Profession is a "guide" that was set out in the Civil Rules over 7 years ago and has not been updated. I find that it of very little assistance to a court in today's reality.

[41] However, I am guided by the factors that are set out in the *Family Law Rules*, Rule 24 and by the Ontario Court of Appeal's comment in *Boucher v. Public Accountants Council (Ontario)* (2004), 2004 CanLII 14579 (ONCA), 48 C.P.C ($5^{th}$) 56, 2004 CarswellOnt 2521 at para 26:

> "… the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant."

[42] Joel's Counsel also submitted a Bill of Costs to assist the court in a determination of what Joel's expectations were with respect to costs. Joel paid his lead counsel $685 per hour compared to Mr. Grant whose rates charged to Pamela were $750 per hour. I find the rates paid to Mr. Grant in comparison to Mr. Thacker, within the range of acceptability. Mr. Grant is a very experienced lawyer who has devoted most of his years in practice as a specialist in family law. Pamela had to retain such an experienced counsel in order to deal with the multiple and complex issues. My consideration is more directed to what counsel brought to the process. I find that both Mr. Grant and Ms. Kerr were extremely thorough and of great assistance to their client and this court. I have reviewed the Bill of Costs of all counsel. Although Mr. Grant, Ms. Kerr and their assistants spent more time on giving legal services to their client than Mr. Thacker and his assistants, that time was needed due to the nature of what they had to accomplish and the added hurdles of struggles with disclosure that were placed in their way by Joel.

[**Editor's Note:** Affirmed: 2013 ONCA 267 (CanLII).]

**[Full Text]**

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[35] …., in actual practice, time spent, that is, hours spent times hourly rate, has tended to be the predominant factor in determining the quantum of legal fees.

[36] There is a certain irony associated with this dichotomy. A person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover, there is something inherently troubling about a billing system that pits a lawyer's financial interest against that of its client and that has built-in incentives for inefficiency. The billable hour model has both of these undesirable features.

***(c) The Rise and Dominance of the Billable Hour***

[37] For many decades now, the cornerstone of legal accounts and law firms has been the billable hour. It ostensibly provides an objective measure for both clients and law firms. For the most part, it determines the quantum of fees. From an internal law firm perspective, the billable hour also measures productivity and is an important tool in assessing the performance of associates and partners alike.

[38] The billable hour traces its roots to the mid-20th century. In 1958, the American Bar Association ("ABA")'s Special Commission on the Economics of Law Practice published a study entitled "The 1958 Lawyer and his 1938 Dollar". The study noted that lawyers' incomes had not kept pace with those of other professionals and recommended improved recording of time spent and a target of 1,300 billable hours per year to boost lawyers' profits: see Stuart L. Pardau, "*Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of its Demise May be Greatly Exaggerated*" (2013) 50 Idaho L. Rev. 1, at pp. 4-5. By 2002, in its Commission on Billable Hours, the ABA revised its proposed expectation to 2,300 hours docketed annually of which 1,900 would represent billable work: see Pardau, at p. 2. And that was in 2002.

[39] Typically, a lawyer's record of billable hours is accompanied by dockets that record and detail the time spent on a matter. In theory, this allows for considerable transparency. However, docketing may become more of an art than a science, and the objective of transparency is sometimes elusive.

[40] This case illustrates the problem. Here, the lawyers provided dockets in blocks of time that provide little, if any, insight into the value provided by the time recorded. Moreover, each hour is divided into 10 six-minute segments, with six minutes being the minimum docket. So, for example, reading a one line e-mail could engender a 6 minute docket and associated fee. This segmenting of the hour to be docketed does not necessarily encourage accuracy or docketing parsimony.

. . . .

[45] In my view, it is not for the court to tell lawyers and law firms how to bill. That said, in proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, *all* the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* [(1983), 44 N.B.R. (2d) 248 (C.A.), para. 9] require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

**[Full Text]**

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***Samson Cree Nation v. O'Reilly & Associés***

2014 ABCA 268 (CanLII), 26 August 2014
*The Lawyers Weekly*, 10 October 2014, p 22 (headnote)

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**[Facts:]** Appeals by the client from the decision of a Queen's Bench judge declining to extend the time for taxation of most of the disputed bills and dismissing most of the appellant's complaints. The appellant retained the respondent law firms in 1989 to commence and run a very complex aboriginal and treaty lawsuit against the federal Crown. In 2009 the appellant sought to re-open all the past legal bills of both respondents back to the late 1980s, have the fees reduced, and get a refund. Prior to 2009, the appellant never raised any concerns with the bills and paid most of them. The Queen's Bench judge found that the appellant and respondents had agreed that fees would be based on hours worked and nothing else, accounts would be issued at frequent intervals and paid promptly and that those various accounts would each be final as to the work billed and that there could be no later bonuses or deductions. The appellant argued that the amount of time spent at trial leading evidence on general and historical matters about treaty and aboriginal rights was disproportionate to the results achieved at trial and that the number of hours spent on an appeal to the Supreme Court of Canada exceeded the estimate given earlier by one of the respondents. During most of the lawsuit, the executives of the appellant client knew of the suit and its progress and were happy with them. But a new Chief was elected in 2008, and in 2009 he persuaded the new Council to seek to tax the accounts. The appellant argued that the Queen's Bench judge erred in his interpretation of the fee agreements between the parties and that counsel breached their duties of advising the appellant that it had the right to tax the bills at the end of the lawsuit and that the effect of the fee contracts was to remove as a basis for billing most of the factors in Rule 613.

**[Held:]** Appeals dismissed.

**[Reasons:]** The appellant wished in effect to bypass the Queen's Bench Judge's fact findings and the fee agreements between the parties. There was no basis for overturning the judge's findings regarding the fee agreements between the parties. Injecting any degree of pay for results or poor pay for poor results was directly contrary to the fee contracts which allowed neither upward nor downward adjustment for results in court. The evidence proving the finality of the fee contracts was substantial, and there was no evidence to the contrary. The evidence of the appellant largely was to the same effect. The clear fee contracts governed, and were not overridden. The appellant had no reasonable expectation that a taxing officer would disregard the fee contracts here. The fee contracts were the product of full discussion with a very sophisticated client. The appellant had no right to tax the accounts on some different basis, such as the results of the lawsuit. The appellant was not being asked to waive such a right. This was not a case in which the client had initially retained either lawyer on a broader or unstated basis and then later the lawyers wished to change the basis. The client lived and worked under the fee contracts for a generation, getting experience and independent accounting and legal advice many times throughout. It could at any time have dismissed one or both law firms, or asked for a different fee contract as a condition of continuing to use their services but did neither. The respondents had already explained what they had explained to the appellant before the fee bargains were made, and the appellant client fully understood and knew all that it had to about taxation.

**[Full Text]**

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**"When the client won't pay up[:] Legal fees can be high, but there are ways to ensure you get what is owed"**

Alcoba, Natalie, *The Lawyers Weekly*, 10 October 2014, pp. 24 and 25, at p. 24
[Excerpt]

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When someone enlists a lawyer to draw up a will or undertake a corporate file, they have probably thought about what it will cost.

But not everyone in need of legal services can plan ahead, and sometimes settling a bill, in the words of one solicitor, can feel like being struck in the head by a brick that dropped out of the sky.

"People don't budget for being charged with a criminal offence," says Steven Benmor, of Benmor Family Law. But there are ways to mitigate the blow of high legal fees and ensure that clients honour what they owe.

[Full Text]

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***Speciale Law Professional Corporation v. Shrader Canada Limited***

Supreme Advocacy LLP, 12 May 2016, p. 6 (S.C.C. File # 36851)
[refusing leave to appeal from 2015 ONCA 856]

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The Applicants [including Mr. Speciale] acted as counsel to the Respondent and from 2009 to 2013, Mr. Speciale was also the president and CEO of the Respondent. In July 2013, the Respondent obtained, pursuant to s. 3 of the *Solicitors Act*, the Registrar's *ex parte* order for assessment of the Applicants' accounts. All accounts had been on the firm's [law corporations] letterhead, signed by Mr. Speciale, and had been paid by the Respondent. In October 2013, the Applicants' counsel informed the Respondent they intended to bring a motion to challenge the order for assessment. In May 2015 the Applicants brought an urgent motion to adjourn or stay the assessment, and to quash the Registrar's order (scheduled to proceed June 1, 2015) on, the basis, *inter alia*, that: the majority of accounts were in relation to management services rather than legal services; the accounts had been paid; the retainer was in dispute; and the order was made outside the time periods required under ss. 3(b) and 4 of the *Solicitors Act*. The Ontario Superior Court of Justice dismissed the motion to quash the Registrar's order for an assessment of the solicitor's accounts and denied the request for an adjournment of the assessment. The C.A. dismissed the appeal. "The motion for an extension of time to serve and file the application for leave to appeal is granted. The application for leave to appeal...is dismissed with costs."

**[Full Text]**

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**"Justice Denied: Huge legal bills push many to self-represent in court"**

Ballingall, Alex, *Toronto Star*, 11 April 2016
[Excerpts]

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A few years after her divorce, Jana Saracevic owed her lawyers more than $100,000. She was still fighting her ex in court and had drained her savings and borrowed thousands to keep it up.

Tapped out, she found herself challenging her legal bill at a special hearing in Milton. Unable to afford counsel, Saracevic, like an increasing number of Canadians in her situation, chose to represent herself.

"I actually froze," she recalled in an interview with the Star. "I was sweating, I was hyperventilating, I couldn't speak … I had to fight against my whole body shutting down."

The experience was part of a years-long nightmare dealing with immense legal bills and representing herself when she couldn't afford them. Her divorce file finally closed last year, but she says she is still paying off that big fee she challenged (the matter was settled in mediation and she's barred from discussing the result).

Saracevic is now an advocate for supporting people, like her, who must turn to self-representation in times of legal trouble. With legal fees on the rise—the most recent survey from Canadian Lawyer Magazine shows bills for civil and family cases have jumped markedly since the global recession — there's an increasing number of people who can't afford a lawyer, according to studies by Julie Macfarlane, a law professor and researcher at the University of Windsor.

**[Full Text]**

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**"Lawyer's Fees Do Not Trump a Non-dissipation Order"**

Epstein, Philip, *Epstein's This Week in Family Law*, 2014 No. 30, 28 July 2014
[Excerpt]

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*Martino v. Zeppieri*, 2012 CarswellOnt 17514 (Ont. S.C.J.) [2014 ONSC 3102 (CanLII)]: This a troubling case about lawyers who, it appears, attempted to either secure their fees in the face of a non-dissipation order against their client, or assisted their client in avoiding a non-dissipation order by receiving payment from the client. It appears that the lawyers for the husband having been served for a motion to restrain the husband from dissipating assets proceeded to receive retainer funds in contravention of the knowledge of the pending application which conduct became exacerbated by the further receipt of funds after the restraining order was actually made. In all it seems that the funds were improperly received by the law firm and totaled in the range of $30,000. It is mind boggling why lawyers would risk their reputation for any sum, never mind a paltry sum of $30,000.

**[Editor's Note**: Upheld on appeal to Divisional Court: 2014 ONSC 3102 (CanLII).]

**[Full Text]**

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**"Feuding parents blow $500,000 on custody battle"**

Yosowich, Miriam, http://findlaw.ca/blog/uncommon-law, 10 March 2016
[Excerpt]

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"How does this happen? How does this keep happening?"

With these frustrated words, Hamilton, Ont. Judge Alex Pazaratz spoke angrily about the [$500,000] legal fees in a case that took over three years to resolve and culminated in a long 36-day trial. [2016 ONSC 1556 (CanLII).]

A former couple fought themselves all the way to financial ruin because a custody arrangement for their child couldn't be worked out, although it was the mother who refused many a settlement offer.

[**Full Text**]

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**"The fine line on contingencies"**

Sorenson, Jean, *Canadian Lawyer*, March 2016, pp. 12-13, at p. 12
[Excerpt]

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A British Columbia Supreme Court review of a lawyer's contingency fee has underscored the importance of ensuring clients understand what is covered by the contingency agreement when undertaking a case, but it also points towards the risks lawyers can become mired in when they accept such clients. "This case is a classic example of the adage that contingency fee agreements provide a key to the courthouse for impecunious plaintiffs", said District Registrar Scott Nielsen, who reviewed Daniel J. Barker and Daniel J. Barker Law Corp.'s action against client Christian Brule to obtain a certificate of fees for the $30,073.85 in fees and disbursements incurred when handling an appeal for Brule following the dismissal of a civil trial.

[**Full Text**]

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***Rocks v. Ian Savage Professional Corporation***

2015 ABCA 77 (CanLII) (Alta. C.A.), O'Ferrall J.A., paras. 1; 4; 14
[Excerpts]

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I. Introduction

[1] The applicant appeared before me in Chambers on December 3, 2014 seeking:

A. permission to appeal the decision of a Queen's Bench justice dismissing his appeal of a review officer's decision certifying lawyer's account in the amount of $4,200;

. . . .

II. Background

[4] The applicant was the client of the respondent lawyer or professional corporation. The applicant took objection to the respondent's fees. The applicant had the respondent's account taxed. The taxation went in favour of the respondent lawyer. The applicant appealed to the Court of Queen's Bench which upheld the review officer's decision on the taxation. The applicant now seeks permission to appeal to this court.

. . . .

[14] I have … reviewed the transcript of the hearing before the review officer and find that throughout the hearing the review officer acted impartially and without bias. The issue before the review officer was whether the respondent's retainer agreement or charges for legal services were reasonable. The review officer considered the retainer agreement, the amount of work done by the respondent, and the respondent's expertise in the area of criminal law in concluding the fee was reasonable. The bottom line was that the applicant agreed to the amount of the fee charged.

[**Editor's Note:** Application for leave to appeal to S.C.C. refused 01 October 2015.]

**[Full Text]**

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***Ghising v. Secretary of State for the Home Department***

[2015] EWHC 3706 (Q.B.) (BAILII)
[Summary]

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**[Facts:]** A solicitor made an agreement with a client to compensate the solicitor for professional services. The agreement covered professional services rendered by the solicitor to the client for numerous months before, as well as services to be rendered after, the agreement was made. The agreement included a success fee provision: the client would compensate the solicitor for double the compensation otherwise payable for the solicitor's services, should the subject of the solicitor's retention prove successful. Success having been achieved by the solicitor, he rendered his account on the basis of the success fee provision of the agreement. The client objected. The client's position was that the success fee provision applied only to services performed from the date of the agreement, because the agreement did not specifically state that the success fee applied to services rendered before the agreement was made.

**[Held:]** For the solicitor.

**[Reasons:]** Patterson J., overturning the decision of Master Simons, decided that the success fee provision was applicable to professional services performed by the solicitor both before and after making of the agreement. In so deciding, Patterson J. concluded that no public policy militates against a solicitor claiming a success fee.

[**Full Text**]

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***Lakhoo v. Lakhoo***

**(**2015), 62 R.F.L. (7th) 24 (Alta. Q.B.), M. David Gates, J.
[Edited Headnote]

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**[Facts:]** Advance costs. Applicant wife, aged 65, and respondent husband, aged 66, separated in November 2010 after 15 years of marriage. Wife employed as pharmacist prior to marriage but had not worked outside home for some time. Husband was president and CEO of successful commercial empire with holdings in oil and gas, hotels and real estate. Parties led comfortable but not extravagant lifestyle during marriage. When wife applied for interim spousal support, husband resisted disclosure on basis of pre-nuptial agreement exempting assets from distribution. After various hearings, appeals and orders, husband ordered to pay interim spousal support of $25,000 per month retroactive to July 2011. Wife applied for order requiring husband to pay advance or interim costs of $400,000. She was challenging validity of pre-nuptial agreement as well as husband's recent placement of assets in charitable trust, and had already spent some $376,000.

**[Held:]** Application granted.

**[Reasons:]** Rule 12.36 of Alberta Rules of Court provided court discretion to make any order it thought fit for advance payment of costs of either party. Inquiry was fact specific and dependent on changing circumstances. In family litigation, in particular, court always had power to maintain balance and fairness between parties to ensure level playing field. In this case, while

husband's financial disclosure remained incomplete, it appeared he had income of $800,000 per year and estimated net worth of some $70 million. Wife had some $700,000 in cash and investments. She clearly needed funds to level playing field and protect her interest in litigation. Husband should pay $400,000 into trust account with counsel from which wife should be reimbursed for costs every three months.

**[Full Text]**

## 5.2 Costs

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**"Rare costs order on solicitor-own-client basis"**

Taddese, Yamri, www.canadianlawyermag.com/legalfeeds/2200, 25 July 2014
[Excerpt]

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An Alberta Queens Bench judge has made a very rare cost order on full indemnity, solicitor-own-client basis after finding the plaintiffs in a matter deceived the court. The cost award scheme is reserved for the most flagrant cases of misconduct [, in *Enoch Cree Nation v. Prue*].

[**Full Text**]

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**"Litigation protection products get more elaborate"**

van Rhijn, Judy, www.lawtimesnews.com/201601115147, 11 January 2016
[Excerpt]

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Ontario courts are in the process of considering the security and treatment of "after-the-event" legal cost indemnities and insurance. These products allow litigants to protect themselves from the risk of a cost order, giving them the security to proceed to trial. They can also be provided as a blanket policy for a law firm that needs protection for its disbursements. While still relatively new in Ontario, a view is emerging that there is a duty on lawyers to advise clients of the availability of this protection.

[**Full Text**]

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**"Social Justice: Judge makes worthy but failed attempt at behavior modification"**

Shanoff, Alan, www.lawtimesnews.com/201509144917, 14 September 2015
[Excerpt]

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One of the first lessons in litigation is the principle that costs follow the event. We quickly realize, however, that costs are within the discretion of the court and judges can tailor orders in an attempt at behaviour modification.

The costs decision of Superior Court Justice Fred Myers in *Saleh v. Nebel* [2015 ONSC 3680 (CanLII)] is a worthy but failed attempt at behaviour modification. The plaintiff commenced

litigation in respect of injuries suffered during a motor vehicle accident. In finding that the plaintiff had failed to satisfy the threshold of a serious and permanent disfigurement or impairment, the judge concluded the plaintiff "will break the law and lie for money" and had "grossly exaggerated his pain."

[**Full Text**]

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**"Judge warns about meritless LSUC complaints against opposing counsel"**

Etienne, Neil, www.lawtimesnews.com/201510194986, 19 October 2015
[Excerpt]

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An Ontario Superior Court judge had harsh words in a recent cost ruling for a family law litigant who "acted unreasonably" in pursuing continued litigation of his matter and filed an unsubstantiated complaint with the Law Society of Upper Canada against the opposing side's counsel.

"Family law can be a nasty business — more often than not because of *the parties,* even though the lawyers usually get the blame," wrote Justice Alex Pazaratz in his Oct. 2 [, 2015] decision in *Scipione v. Scipione*. [2015 ONSC 5982 (CanLII).]

"Malicious or reckless personal attacks against a spouse's lawyer must be discouraged," he added.

"That sort of interference with the solicitor-client relationship strikes at the core of our justice system," he continued.

**[Editor's Note**: The decision of Mr. Justice Alex Pazaratz of Ontario Superior Court of Justice, on 02 October 2015, is essential reading. The decision begins: "Why do written costs submissions frequently try to lead us into some sort of parallel universe where losers are actually winners?"]

[**Full Text**]

**"Lawyer Who Sues Client for $4,000 is Ordered to Pay Client Nearly Twice That Amount in Costs"**

Maurer, Matt, *mondaq*, 31 December 2014

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A lawyer who sued her former client for $3,937.50 for unpaid legal fees has had $7,000 in costs awarded against her, and the matter has yet to reach trial [*Mazinani v. Clark*, 2014 ONSC 7100].

In the lawyer's Small Claims Court lawsuit, she was ordered to produce her entire file to the former client and make production of the documents in chronological order, such that it could be ascertained whether or not she had in fact produced the entire file.

For reasons that are not entirely clear, the lawyer failed to produce the file in chronological order. A Deputy Small Claims Court Judge awarded costs against the lawyer in the amount of $2,000.

The lawyer brought an application for judicial review of that decision to the Divisional Court. Unfortunately for the lawyer, the Divisional Court had no jurisdiction to hear her application which resulted in her application being dismissed and an additional $5,000 in costs being awarded against the lawyer.

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**"Conduct Of Defence Counsel: A Lesson From The Bench"**

LeDrew, David, *mondaq*, 14 July 2015
[Excerpt]

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The Ontario Superior Court of Justice recently set out a laundry list of items that counsel should refrain from doing when defending a claim.

In *Aiyub Saleh v. Ludwig Nebel*, 2015 ONSC 3680 (CanLII), Justice Myers gave defence counsel a shellacking. At 22 pages, it is a lengthy read for a costs endorsement and well worth perusing.

[**Full Text**]

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***Bui v. Alpert***

[2014] O. J. No. 3127 (Ont.C.A.), 26 June 2014
*The Lawyers Weekly*, 22 August 2014, p. 19 (headnote)

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**[Facts:]** Appeal by the client, Bui, from dismissal of his application for assessment of the bills of his solicitor, Alpert. The solicitor rendered 12 bills to the client over a four-year period in respect of legal services provided to the client in a tax matter. The client paid all of the bills. Three weeks after the last bill was rendered, the solicitor gave notice of intent to remove himself as counsel of record due to the client's failure to pay the last bill and provide certain documents. The client's new counsel negotiated a 50 per cent reduction in the final bill and it was paid as reduced. Seven months later, the client applied for assessment of all 12 bills. The application judge found no special circumstances rebutting the presumption that the client had accepted the bills as reasonable and proper based on his payment of the accounts. The judge declined to exercise his inherent jurisdiction to order assessment. The client appealed.

**[Held:]** Appeal dismissed.

**[Reasons:]** No error in principle was established. The application judge found that the evidence did not support findings that the client was billed for duplicative work or was dissatisfied with the quality of the solicitor's work. Communications by the solicitor stating that work would cease if the bills were not paid did not constitute special circumstances justifying assessment of all 12 accounts. The client's concerns regarding the accounts were required to be raised during the course of the retainer in order to establish special circumstances. The application judge's findings were supported by the evidence. Her conclusion that special circumstances were not established was not clearly unreasonable.

**[Full Text]**

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**"Plaintiff protection[:] Adverse cost insurance changes the game for clients, insurers"**

Voudouris, Alexander, *The Lawyers Weekly*, 19 December 2014, pp. 10 and 11, at p. 10
[Excerpt]

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Adverse cost insurance comes in varying names, is offered by a handful of companies, and is relatively new to the Ontario legal landscape. It has been referred to as legal costs protection, adverse cost insurance or even after-the-event insurance. Regardless of its moniker it is, in my opinion, the greatest advancement in access to justice in the personal injury field since the judicial acceptance in Ontario of contingency fees. The various products essentially provide insurance coverage to litigants who face paying costs to a successful opponent on motions right through to trial. To my knowledge, premiums range from $950 to $3,000 for coverage up to $100,000 and depending on the product, the client's lawyer's disbursements are covered as well. Usually, extra

premiums will allow for the purchase of additional coverage. Although I do not believe it has been tested in Ontario, in my opinion, the premium would be recoverable as a special damage, although I suspect attempts will be made at claiming it simply as an assessable disbursement.

[**Full Text**]

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**"B.C. appeal court rules interest charges not recoverable[:]**
**[No expectation one party would have to finance other party's bill;**
***Chandi (Guardian ad litem) v. Atwell* [2014] B.C.J. No. 2793 (B.C.C.A.)]"**

Guly, Christopher, *The Lawyers Weekly*, 12 December 2014, p. 10
[Excerpts]

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Last year, B.C.'s Supreme Court said that interest [on a loan obtained] to finance litigation is considered a recoverable disbursement under the province's Civil Rules. This year, B.C.'s appeal court said it's not.

. . . .

In *Chandi (Guardian ad litem) v. Atwell* [2014] B.C.J. No. 2793, the three-judge panel looked at whether an out-of pocket expense is a recoverable disbursement only if incurred "because of necessities arising directly from the legal and factual issues inherent" to prove or disprove a case in a particular litigation — rather than as a result of a litigant's circumstances, such as their lack of financial means — or whether any expense incurred by [the litigant] because of a litigation is recoverable as a disbursement as long as it was "necessarily or properly incurred."

[**Full Text**]

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**"Husband hit with costs for reading wife's e-mails[:]**
**[Ontario Superior Court Justice Frances Kitely freights recalcitrant spouse with full indemnity costs; *Golchoobian v. Vaghei*]"**

Schmitz, Cristin, *The Lawyers Weekly*, 24 April 2015, p. 5
[Excerpt]

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Warring spouses who deliberately spy on each other's private e-mail risk stiff punishment if they infringe solicitor-client privilege — including cost sanctions, having their claims struck out, and even having their lawyers removed from the record, according to a novel Ontario judgment.

In what is believed to be the first decision of its kind in Canada, Superior Court Justice Frances Kiteley recently slapped the respondent husband Alireza Vaghei — who deliberately read through his estranged wife's private e-mails with her lawyer — with the "full indemnity" costs of multi-pronged proceedings brought by the applicant wife, Hanieh Golchoobian.

[**Full Text**]

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**"First for self-represented litigants in Saskatchewan[:]"**
**[Costs beyond out-of-pocket expenses awarded spouse]**

Schofield, John, *The Lawyers Weekly*, 24 April 2015, p. 10
[Excerpt]

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In a first for self-represented litigants in Saskatchewan, the province's Court of Appeal has awarded costs beyond out-of-pocket expenses to a husband and his late wife in a long-running legal battle with their municipality.

The March 27 decision, in *Hope v. Pylypow* … [2015 SKCA 26 (CanLII)], written by Chief Justice Robert G. Richards, reflects the continuing effort by courts across Canada to level the playing field for self-represented litigants and brings Saskatchewan in line with other provinces. Self-represented litigants have traditionally been compensated only for their out-of-pocket expenses if they win a case.

[**Full Text**]

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**"Striking Pleadings for Failure to Comply with Disclosure Orders"**

Epstein, Philip, *Epstein's This Week in Family Law*, 2015 No. 29, 20 July 2015
[Excerpt]

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*Roberts v. Roberts*, 2015 CarswellOnt 9247 (Ont. C.A.) [2015 ONCA 450 (CanLII)]: As Justice Benotto speaking for a unanimous Court of Appeal notes: "this appeal involves the importance of disclosure in [a] family law proceeding".

**[Full Text]**

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**"Award of Costs against a Lawyer Personally"**

Epstein, Philip, *Epstein's This Week in Family Law*, 2015 No. 44, 02 November 2015
[Excerpt]

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*Macmull v. Macmull et al.*, 2015 CarswellOnt 14031 (Ont. S.C.J.) [2015 ONSC 5667 (CanLII)]: Justice Heather McGee of the Ontario Superior Court of Justice (Family Division) is well aware that under Rule 24(9) of the Ontario Family Law Rules the court may order a lawyer to reimburse a client for monies that he or she has paid in legal fees and disbursements and for costs paid to the other party. It is, in every respect, a rare and exceptional remedy and since it occurs in this case, I thought that I would bring it to your attention.

Very simply put, the husband retained the lawyer to deal with his matrimonial proceeding. The husband delivered financial material, but for reasons that are unknown, the lawyer did nothing but ask for more and more material from the husband. In the meantime, the husband was noted in default and the wife was ready to proceed with an uncontested trial. Although the husband had counsel for many months, his lawyer never thought to advise the wife's lawyer that he had been retained and did not take any steps to go on the record on the theory that he was not ready to do so until he was in a position to file a proper financial statement. Of course, that approach was foolhardy since it allowed the wife to proceed in default and put the husband in a more than precarious position. Ultimately, when the lawyer did surface and learned that the husband was in default, the husband came to realize that his lawyer had placed him in serious jeopardy. The husband fired his lawyer, paid his account of $18,000 and sought new counsel. New counsel was ultimately successful in setting aside the default, but not until the husband was ordered to pay significant costs to the other side.

**[Full Text]**

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**["Costs in Parenting Proceeding – Perils of Declining to Produce Own Invoice to Client when Objecting to Costs Claimed by Counsel for Opposing Party"]**

Epstein, Philip, *Epstein's This Week in Family Law*, 2015 No. 36, 07 September 2015
[Excerpts]

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*Goryn v. Neisner*, 2015 CarswellOnt 8562 (Ont. Sup. Ct. J.): [2015 ONCJ 318 (CanLII)]
….

. . . .

The case could have been uncomplicated, but it became a time consuming, complex and expensive exercise. Justice Spence finds that the mother acted reasonably and the father did not.

I chose to comment on this case mainly because of the issue the father made about the time the mother's lawyers spent on the case. As Justice Spence notes:

"It would be odd indeed, if a lawyer was able to successfully argue that costs should be greater because he/she provided the court with more pages of documentation, as compared to the lawyer who provided fewer pages. Getting paid for verbosity and an inability to succinctly distill an argument is not only counter-intuitive but surely must be wrong in principle. I take judicial notice that it can take as much time - perhaps considerably longer - to give reflective thought to an issue and to distill it into fewer pages, than simply throwing everything imaginable onto multiple pages of paper with the hope that something sticks to the judge's pen."

Justice Spence reminds us that there is also a residual discretion in the court to decide not only the liability for costs but also quantum. In that regard, Justice Spence has this to say about the father's argument:

"The expectation of the parties would, in this case, include the expectation of the father himself. In that regard, it might have been instructive for Mr. X to file with the court his own bill to the father. So if, for example, his total bill for all the work he performed was $2,000, he might have been able to advance the argument that the father would be "shocked" and would find it "egregious" that the opposite party was claiming seven times that amount. On the other hand, if Mr. X's bill was in the amount of $20,000, the father might be breathing a sigh of relief at the Bill of Costs submitted by the mother."

Footnote 12 says, rather cryptically, that:

"Having fully acquainted myself with the extensive materials Mr. X filed with this court in support of his client's motion, including multiple briefs of facta and authorities, I suspect his bill to the father would be much closer to $20,000 than to $2,000."

The mother receives almost all of the costs claimed because the Court finds that the father in addition to all of the other wrong roads he went down here was "a litigant with relatively deep pockets who ill advisedly decided to roll the dice instead of doing what should be done in child support cases, namely to promptly provide full financial disclosure and then make all reasonable attempts to settle".

Justice Spence has highlighted what needs to occur more frequently. If you are going to complain about the other lawyer's bill of costs after an unsuccessful day in court, then you need to produce your own client's bill of costs to see if the successful party's claim for costs is unreasonable and is outside the reasonable expectations of the parties. It does not lie in one's mouth to refuse to produce your own bill of costs and then complain that the other bill of costs is too high.

**[Full Text]**

**"*Ex Parte* Orders – Costs Consequences – Personal Cost Award against Lawyers"**

Epstein, Philip, *Epstein's This Week in Family Law*, 2014 No. 37, 15 September 2014
[Excerpt]

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*Sangha v. Sangha*, 2014 CarswellOnt 9517 (Ont. S.C.J.) [2014 ONSC 4088 (CanLII)]: In a rather stinging costs endorsement, Justice G.A. Campbell of the Superior Court of Justice awards significant costs against lawyers who wasted the court's time and put the other side to significantly increased costs. Cost awards against lawyers are rarely made (see *Bailey v. Barbour*, 2014 CarswellOnt 8412 (Ont. S.C.J.) [2014 ONSC 3698 (CanLII)], *Byers (Litigation Guardian of) v. Pentex Print Master Industries Inc.*, 2002 CarswellOnt 1082 (Ont. S.C.J.) [2002 CanLII 49474 (ONSC)] and *Schreiber v. Mulroney*, 2007 CarswellOnt 5267 (Ont. S.C.J.) [2007 CanLII 34441 (ONSC)].

This is, however, one of those rare cases where it was virtually inevitable that costs were going to be awarded against the lawyers acting for the mother in a hotly contested custody case. ….

**[Full Text]**

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***Pierce v. Baynham***

2015 BCCA 188 (CanLII), B.C. C.A., Newbury J.A. for the Court
[Edited Headnote]
[Leave to appeal to S.C.C. refused, 26 November 2015]

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**[Facts:]** Solicitors represented plaintiff P in defamation action against defendant. P was granted and *Anton Piller* order on *ex parte* basis. Defendant's computer hard drive was seized as direct consequence. Only after hard drive was seized did defendant admit authoring articles that allegedly defamed P. P obtained order for special costs against defendant because of his refusal to admit authoring and publishing impugned articles. *Anton Piller* order was subsequently set aside on basis that full and frank disclosure as required in ex parte application was not provided by P or P's counsel. Defendant obtained special costs order against P and P's solicitors on basis that, although solicitors had not acted dishonestly, their conduct was reprehensible. Solicitors appealed.

**[Held:]** Appeal allowed.

**[Reasons:]** Order of costs against lawyer personally should rarely be made and only where serious misconduct has been shown. In circumstances, it could not be said that court was misled into making *Anton Piller* order. Given chambers judge's finding that solicitors had not acted dishonestly, it could not be concluded that conduct was reprehensible in circumstances. Solicitors'

conduct did not rise to level of reprehensible that deserved rebuke by award of special costs against them. Order that solicitors personally pay defendant's special costs was set aside.

**[Editor's Note**: An Anton Piller (not 'Pillar') order is a judicial order which provides the right to search premises and seize evidence, without warning: *Anton Piller KG v Manufacturing Processes Limited*, 1975 EWCA Civ 12 (BAILII).]

**[Full Text]**

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***Fielding v. Fielding***

(2015), 70 R.F.L. (7th) 253 (Ont. C.A.), Feldman, Lauwers and Benotto, JJ.A.
[Edited Headnote]

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**[Facts:]** In context of divorce proceedings, trial judge found that each party had been successful on some issues. Trial judge rejected husband's arguments as to spousal support and rejected wife's position on unequal division, prejudgment interest and indexing of spousal support. Trial judge concluded that wife's offers to settle were unreasonable and that husband had put forward very reasonable offer. Trial judge found that husband was entitled to partial recovery of costs, but reduced them by $25,750 because of husband's delayed financial disclosure. Post-reduction order for costs payable to husband was in amount of $210,015.50. Wife appealed costs order.

**[Held:]** Leave to appeal costs award for trial on financial issues was granted but trial judge's discretionary costs decision stood.

**[Reasons:]** Quantum of costs was high. Over 85 per cent of costs awarded to husband related to trial, and trials are costly. There are resources available to assist parties to avoid trial. Where there are multiple issues, trial costs are higher. Where parties reject reasonable offers, risk of substantial costs order is assumed. There was no basis for interfering with trial judge's costs assessment.

**[Full Text]**

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***Green v. Green***

(2014), 50 R.F.L. (7th) 155 (Ont. Sup. Ct. J.), Olah, J.
[Edited Headnote]

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**[Facts:]** Husband CG and wife DG entered into separation agreement in 2006, after 48 years of marriage. DG assigned herself into bankruptcy in 2009 while her family law application proceeding was ongoing. DG's application to set aside separation agreement and for corollary relief was granted. Parties made submissions on costs. Costs awarded to DG on full indemnity basis. Trial judge ruled CG was required to pay DG $192,720.05 plus HST for legal fees on full indemnity basis after 15 per cent reduction based on complexity arising from DG's bankruptcy, and $8,684.49 plus HST for disbursements and $3,500 for costs hearing. Trial judge held that DG had been pushed into bankruptcy because of CG's actions in not paying any support and refusing to sell property. Trial judge held that throughout action, CG concealed his true financial circumstances and refused to accept favourable offers to settle or make offers to settle. CG's unreasonableness with regards to production and his deception about his financial circumstances led to trial judge making finding of bad faith. Trial judge ordered CG to pay counsel's full hourly rate without benefitting from fact that counsel had performed work at lower legal aid rates. CG appealed on number of issues.

**[Held:]** Appeal allowed in part on other grounds.

**[Reasons:]** CG's costs appeal dismissed. There was no reason to interfere with trial judge's decision with respect to amount of DG's costs. Trial lasted 15 days; litigation lasted more than five years. Even if DG's costs exceeded what CG paid his own lawyer, they were proportional to issues in dispute and length and complexity of proceedings.

**[Full Text]**

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***Reid v. Reid***

(2015), 61 R.F.L. (7th) 425 (B.C. S.C.), E.M. Myers, J.
[Edited Headnote]

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**[Facts:]** At trial, wife was wholly unsuccessful on all grounds of relief sought, and husband was successful on all grounds. Husband sought special costs.

**[Held:]** Husband was entitled to costs on basis that case was one of more than ordinary difficulty, and was entitled to double costs from start of trial.

**[Reasons:]** Case was not one where financial hardship could govern costs award. Husband had made three offers to settle to wife in advance of trial. By time of second offer, it

ought to have been apparent that there was no evidence of fraud or that husband's business was undervalued. Wife's conduct in failing to obtain her own expert opinion as to value of husband's company fell into category of claim having little merit, but did not rise to level where plaintiff continued to advance claim that had been ruled on prior motions. Unproven allegations of fraud did not warrant special costs. There were several issues at trial that did not allege fraud. It would be unfair to award special costs for whole trial, and to determine fees attributable to fraud allegations alone would be near impossible. Supreme Court of Canada had ruled that, in cases seeking to set aside separation agreement, contractual principles were not to be applied in same manner as commercial cases. It was important not to narrow opportunity, through chill factor of special costs, that Supreme Court of Canada had widened. There was nothing to merit fixing special costs. Case was complex and there were many interlocutory applications. Amount in issue was significant and amount claimed as special costs was significant. Both parties were of means.

**[Full Text]**

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***M. (C.M.) v. C. (D.G.)***

**(**2015), 65 R.F.L. (7th) 67 (Ont. Sup. Ct. J.), C. Horkins, J.
[Edited Headnote]

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**[Facts:]** Applicant 15-year-old child had brought order for interim relief against father. Some interim relief was denied and child applied for variation of order. Declaration of parentage was issued, income of $200,000 was imputed to father and father was ordered to pay child support of $1,633 per month and $50,000 for interim disbursements to cover legal and expert fees. Parties were unable to agree on costs and written submissions were exchanged. Child sought costs on full recovery basis in amount of $40,388.52.

**[Held:]** Father was ordered to pay costs fixed at $32,523.72 all inclusive.

**[Reasons:]** Child made offer to settle which was made at least one day before motion, was not withdrawn before motion and was never accepted. Orders made on motion were more favourable than terms of offer to settle. Offers to settle served by father did not meet conditions of R. 18(14) of Family Law Rules. Motion raised numerous legal issues that were important to child and motion was of moderate complexity. Amount of work involved was proportionate to number of issues and to father's reaction to motion. Father's extreme lack of financial disclosure necessitated additional work for child's counsel to support request to impute income. Fair and reasonable approach to costs was to reduce hourly rate of child's lawyer to $500 for all of his time and to reduce fees by 30 per cent for work done before offer with full recovery was awarded for period after offer.

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***Children's Aid Society of London and Middlesex v. B. (C.D.)***

(2014), 46 R.F.L. (7th) 307 (Ont. Sup. Ct. J.), R.J. Harper, J.
[Edited Headnote]

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**[Facts:]** Matrimonial dispute resulted in extremely lengthy and complex trial. After separation three children resided with father in matrimonial home. Eldest child was criminally charged with assault causing bodily harm to mother, assault with weapon and attempted murder. Children's Aid Society brought application for finding that three children were in need of protection. Society's application was dismissed and it was found that children were not in need of protection from father. Father was granted custody of children. Mother's allegations of father's abusiveness were not supported in evidence while mother manifested erratic and concerning behaviour toward children. Father sought costs on full indemnity basis from mother, Society and Office of Children's Lawyer (OCL).

**[Held:]** Father was awarded fees of $1,699,397 and disbursements of $83,725 plus HST of $231,805.86 for total costs award of $2,014,927.86.

**[Reasons:]** Society commenced and continued its protection application based on mother's characterization of events and made no effort to investigate events from child protection perspective. Society had duty to act fairly and reasonably, which extended to how it investigated its case and presented it to court. Society did not meet its statutory duty to investigate thoroughly and objectively. Society accepted mother's word without sufficient scrutiny and did not properly investigate allegations. Trial and pre-trial process was driven by mother who had multiple problems and Society blindly accepted allegations of mother without satisfying statutory duty to conduct thorough investigation in fair and objective manner. Mother and Society acted in bad faith. Mother set stage by bringing false claims but Society had statutory duty to investigate claims in thorough, objective and professional manner, which they did not do. Society became lead advocate for mother. Society drove litigation on behalf of mother and they failed to fulfill very important legal duties. Children's lawyers did not act in manner that unreasonably increased costs and no costs were awarded against OCL. Costs were apportioned 70 per cent against Society and 30 per cent against mother. This was unique case where reasonableness and proportionality were pushed beyond limits. Work done by lawyers was reasonable and appropriate. However, fees were reduced by 25 per cent to reflect duplication.

## APPENDIX A - LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| May 1991 | 1 | 1 | [Awareness of limitations; promptly communicating with client] | 1-1 |
| May 1991 | 1 | 2 | [Responsibility for unjustified litigation] | 1-2 |
| May 1991 | 1 | 3 | Testamentary Capacity | 1-3 |
| May 1991 | 1 | 4 | Legal Assistant / Para-legal | 1-4 |
| May 1991 | 1 | 5 | Can we ever be too careful? | 1-5 |
| May 1991 | 1 | 6 | [Liability for misdeeds of former law partner] | 1-6 |
| May 1991 | 1 | 7 | Preventing missed limitation periods | 1-7 |
| May 1991 | 1 | 8 | [Perils of lawyers investing in client's business ventures] | 1-8 |
| October 1991 | 2 | 9 | Admit Liability. Waive Limitations? | 2-9 |
| October 1991 | 2 | 10 | The Tender Trap | 2-10 |
| October 1991 | 2 | 11 | "I followed accepted practice" | 2-11 |
| October 1991 | 2 | 12 | To err is human. Staying involved may be dumb | 2-12 |
| October 1991 | 2 | 13 | Assist the Assistant | 2-13 |
| October 1991 | 2 | 14 | Going to the "dogs" | 2-14 |
| October 1991 | 2 | 15 | Check those assets! | 2-15 |
| October 1991 | 2 | 16 | Mind Your Own Business | 2-16 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| March 1992 | 3 | 17 | SEF 44 Family Protection Endorsement | 3-17 |
| March 1992 | 3 | 18 | Home is Where the Smart is | 3-18 |
| March 1992 | 3 | 19 | Problems that Tax Us | 3-19 |
| March 1992 | 3 | 20 | It Doesn't Always Add Up | 3-20 |
| March 1992 | 3 | 21 | Avoid Owners Boners | 3-21 |
| March 1992 | 3 | 22 | Be Clear on Instructions | 3-22 |
| March 1992 | 3 | 23 | Limitations Yet Again | 3-23 |
| August 1992 | 4 | 24 | What's in a name? Plenty! | 4-24 |
| August 1992 | 4 | 25 | Check those cheques | 4-25 |
| August 1992 | 4 | 26 | What to do when everything goes blank | 4-26 |
| August 1992 | 4 | 27 | Caution: affidavit ahead | 4-27 |
| August 1992 | 4 | 28 | "Neither a borrower nor lender be." | 4-28 |
| August 1992 | 4 | 29 | Looking after Mr./Ms. Deepockets | 4-29 |
| August 1992 | 4 | 30 | Be an undertaker without getting buried | 4-30 |
| August 1992 | 4 | 31 | Where there's a will, there's a woe (potentially) | 4-31 |
| January 1993 | 5 | 32 | How to Act when not Acting | 5-32 |
| January 1993 | 5 | 33 | A Deceptive Party? Don't Act | 5-33 |

**LOSS PREVENTION BULLETINS**

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| January 1993 | 5 | 34 | Independent Advice – Again! | 5-34 |
| January 1993 | 5 | 35 | Carefully Read. Then, Carefully Heed. | 5-35 |
| January 1993 | 5 | 36 | Matrimonial Law | 5-36 |
| January 1993 | 5 | 37 | Do it, but Do it Right! | 5-37 |
| June 1993 | 6 | 38 | It is Nine O'Clock: Do you know where your student is? | 6-38 |
| June 1993 | 6 | 39 | Don't Blame The Messenger | 6-39 |
| June 1993 | 6 | 40 | Courier Delivery | 6-40 |
| June 1993 | 6 | 41 | Undertakings/Trust Conditions – The improper request | 6-41 |
| June 1993 | 6 | 42 | Taking Care of "In Care of …" | 6-42 |
| November 1993 | 7 | 43 | The Problem Client | 7-43 |
| March 1994 | 8 | 44 | Crisis or merely a Major Problem? | 8-44 |
| March 1994 | 8 | 45 | Follow-up to Bulletin No. 42, June 1993 | 8-45 |
| March 1994 | 8 | 46 | Undue Influence | 8-46 |
| March 1994 | 8 | 47 | Execution of Wills Concerns | 8-47 |
| March 1994 | 8 | 48 | Joint and Several Guarantors | 8-48 |
| July 1994 | 9 | 49 | See you in Court | 9-49 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| July 1994 | 9 | 50 | Ricks for lawyers as escrow agents, stakeholders and trustees | 9-50 |
| July 1994 | 9 | 51 | "Am I my Brother's Keeper?" Maybe! | 9-51 |
| November 1994 | 10 | 52 | Memo The File [includes Form] | 10-52 |
| April 1995 | 11 | 53 | Expanding the Plaintiff Pool | 11-53 |
| August 1995 | 12 | 54 | Don't Put It Off | 12-54 |
| August 1995 | 12 | 55 | PPSA Registration, Be Accurate! | 12-55 |
| August 1995 | 12 | 56 | Watch Those Medical Malpractice Limitations | 12-56 |
| August 1995 | 12 | 57 | Confidentiality in Mediation | 12-57 |
| December 1995 | 13 | 58 | Hospitals' Claims, Settlement/and Lawyer Vulnerability | 13-58 |
| December 1995 | 13 | 59 | Limiting Missed Limitations | 13-59 |
| April 1996 | 14 | 60 | Re: Bulletin No. 58, Issue No. 13, December 1995 | 14-60 |
| April 1996 | 14 | 61 | Ensuring Client Confidentiality In the Electronic Age | 14-61 |
| April 1996 | 14 | 62 | Thefts from Cars and Offices | 14-62 |
| August 1996 | 15 | 63 | Update on Bulletins No. 58 and No. 60 | 15-63 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| August 1996 | 15 | 64 | Top 10 Lame Excuses For Ignoring Loss Prevention | 15-64 |
| December 1996 | 16 | 65 | Competent Independent Legal Advice | 16-65 |
| December 1996 | 16 | 66 | Rx for Trouble | 16-66 |
| April 1997 | 17 | 67 | Fee Disputes And Suits For Fees | 17-67 |
| April 1997 | 17 | 68 | Am I My Partner's Keeper? | 17-68 |
| April 1997 | 17 | 69 | Clarifying Instructions | 17-69 |
| April 1997 | 17 | 70 | Some Family Law Concerns and Tips | 17-70 |
| July 1997 | 18 | 71 | Independent Legal Advice: A Response | 18-71 |
| July 1997 | 18 | 72 | Advising the Guarantor | 18-72 |
| November 1997 | 19 | 73 | [Independent Legal Advice: Commentary and Checklist] | 19-73 |
| March 1998 | 20 | 74 | Claim for loss of a chance of future earnings survives death | 20-74 |
| March 1998 | 20 | 75 | Where there's a will there's a duty to beneficiaries | 20-75 |
| March 1998 | 20 | 76 | When are you retained on a new matter for a 'multiple-file' client? | 20-76 |
| March 1998 | 20 | 77 | Caution: friends and relatives ahead | 20-77 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| March 1998 | 20 | 78 | When a lawyer retires | 20-78 |
| March 1998 | 20 | 79 | Case on advising guarantor overturned on appeal | 20-79 |
| March 1998 | 20 | 80 | Would your file notes save you? | 20-80 |
| March 1998 | 20 | 81 | Claim all damages arising from one accident in one suit | 20-81 |
| June 1998 | 21 | 82 | Time to set our alarms for the year 2000 | 21-82 |
| September 1998 | 22 | 83 | Conflict of interest extends to legal support staff | 22-83 |
| September 1998 | 22 | 84 | Limit your exposure for tactical judgments | 22-84 |
| September 1998 | 22 | 85 | Countdown to 2000 | 22-85 |
| September 1998 | 22 | 86 | Software hits can eliminate deadline misses | 22-86 |
| September 1998 | 22 | 87 | Unintended severance of joint tenancy | 22-87 |
| September 1998 | 22 | 88 | Cash that cheque! | 22-88 |
| September 1998 | 22 | 89 | Merge all causes of action arising from one accident in one suit | 22-89 |
| December 1998 | 23 | 90 | How far does a retainer reach? | 23-90 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| December 1998 | 23 | 91 | On keeping secrets from your clients | 23-91 |
| December 1998 | 23 | 92 | Communicate your client's instructions | 23-92 |
| December 1998 | 23 | 93 | Keep computer records as evidence | 23-93 |
| December 1998 | 23 | 94 | Will others' Y2K problems 'bug' your practice? | 23-94 |
| December 1998 | 23 | 95 | Be safe: look in your filing cabinets | 23-95 |
| March 1999 | 24 | 96 | GST and residential properties | 24-96 |
| March 1999 | 24 | 97 | Should you sit on your client's board of directors? | 24-97 |
| March 1999 | Special Issue | 98 | Year 2000 has potential liability for every lawyer | Special-98 |
| June 1999 | 25 | 99 | Why in the world did we ever keep original wills? | 25-99 |
| June 1999 | 25 | 100 | E-mail neglect | 25-100 |
| June 1999 | 25 | 101 | Sending disks to clients or other lawyers | 25-101 |
| June 1999 | 25 | 102 | Vacations can cause headaches | 25-102 |
| June 1999 | 25 | 103 | Y2K and your word processing software | 25-103 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| September 1999 | 26 | 104 | Want to share space but not liability? | 26-104 |
| September 1999 | 26 | 105 | Caution! Word processor at work | 26-105 |
| September 1999 | 26 | 106 | Corporate tax laws hold traps for family lawyers | 26-106 |
| September 1999 | 26 | 107 | Tired of Y2K? | 26-107 |
| September 1999 | 26 | 108 | Be vigilant about avoiding scams | 26-108 |
| September 1999 | 26 | 109 | Declining to take a file | 26-109 |
| December 1999 | 27 | 110 | Pensions in matrimonial property division | 27-110 |
| December 1999 | 27 | 111 | Bad Company | 27-111 |
| December 1999 | 27 | 112 | Will the U.S. Y2K Act affect your practice? | 27-112 |
| April 2000 | 28 | 113 | Claims against wills and estate lawyers may increase | 28-113 |
| April 2000 | 28 | 114 | Will your on-line communications lead to claims against you? | 28-114 |
| April 2000 | 28 | 115 | No backup system? Get one today. | 28-115 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| April 2000 | 28 | 116 | Growth in condominiums presents opportunities and risks for lawyers | 28-116 |
| April 2000 | 28 | 117 | Severe penalties for misrepresentation on tax matters | 28-117 |
| July 2000 | 29 | 118 | When a lawyer leaves, does every file still have a home? | 29-118 |
| July 2000 | 29 | 119 | Who is using your letterhead? | 29-119 |
| July 2000 | 29 | 120 | Mid-career lawyers at greater risk of malpractice? | 29-120 |
| July 2000 | 29 | 121 | Environmental orders and actions affecting real estate: practitioners be warned | 29-121 |
| July 2000 | 29 | 122 | Common law, common mistakes, common claims | 29-122 |
| December 2000 | 30 | 123 | Is your limitations system complete? | 30-123 |
| December 2000 | 30 | 124 | Are you suing the right party? | 30-124 |
| December 2000 | 30 | 125 | Who is responsible, senior or junior? | 30-125 |
| December 2000 | 30 | 126 | Four tips for curing the common claim | 30-126 |
| May 2001 | 31 | 127 | Child support tax implications | 31-127 |
| May 2001 | 31 | 128 | Virus control tips | 31-128 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

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| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| May 2001 | 31 | 129 | Clients who are promoting an investment | 31-129 |
| May 2001 | 31 | 130 | New real estate process for western provinces | 31-130 |
| May 2001 | 31 | 131 | Using scanned documents | 31-131 |
| May 2001 | 31 | 132 | Do you use SupportWorks? | 31-132 |
| September 2001 | 32 | 133 | What Will It Cost To Get Out Of The Deal? | 32-133 |
| September 2001 | 32 | 134 | Are you Unful-filed? | 32-134 |
| September 2001 | 32 | 135 | Postponing The Inevitable | 32-135 |
| September 2001 | 32 | 136 | Some Taxing Problems | 32-136 |
| September 2001 | 32 | 137 | Do You Check, Mate? | 32-137 |
| September 2001 | 32 | 138 | Limitations – Again | 32-138 |
| September 2001 | 32 | 139 | There Still Is A Corporate Veil | 32-139 |
| September 2001 | 32 | 140 | Misplaced Trust? | 32-140 |
| September 2001 | 32 | 141 | Something More to Think About | 32-141 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| March 2002 | 33 | 142 | Business Advice – a risky business | 33-142 |
| March 2002 | 33 | 143 | Are You Witnessing, Notarizing or Lawyering? | 33-143 |
| March 2002 | 33 | 144 | Are Your Employees Honest? | 33-144 |
| March 2002 | 33 | 145 | It Goes Without Saying … | 33-145 |
| January 2003 | 34 | 146 | Standard Caveats | 34-146 |
| January 2003 | 34 | 147 | Ensure you're not the Insurer | 34-147 |
| January 2003 | 34 | 148 | Beware the Zebra | 34-148 |
| January 2003 | 34 | 149 | Mobility – Practising Law across Provincial Borders | 34-149 |
| November 2003 | 35 | 150 | Holidays | 35-150 |
| November 2003 | 35 | 151 | Communication | 35-151 |
| November 2003 | 35 | 152 | Costs Consequences | 35-152 |
| November 2003 | 35 | 153 | Federal Privacy Legislation | 35-153 |
| November 2003 | 35 | 154 | Taxation Of Disability Benefits | 35-154 |
| November 2003 | 35 | 155 | Client Selection | 35-155 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| December 2003 | 36 | 156 | [10 easy steps towards claims] | 36-156 |
| April 2006 | 37 | 157 | Dishonest Employees | 37-157 |
| April 2006 | 37 | 158 | Done at last! Thoughts on Proscrastination | 37-158 |
| Fall 2006 | 38 | 159 | The Rules of Non-Engagement | 38-159 |
| Fall 2006 | 38 | 160 | I Love CanLII | 38-160 |
| Fall 2006 | 38 | 161 | Pitfalls of Interjurisdictional Practice | 38-161 |
| Fall 2006 | 38 | 162 | It's Closing Time | 38-162 |
| Winter 2007 | 39 | 163 | The World at Your Fingertips | 39-163 |
| Winter 2007 | 39 | 164 | No Thanks | 39-164 |
| Winter 2007 | 39 | 165 | Helping Lawyers at Risk | 39-165 |
| Winter 2007 | 39 | 166 | 1st Rule of Loss Prevention: Document! | 39-166 |
| Summer 2007 | 40 | 167 | A Handsome High Bridge Quickly Crossed | 40-167 |
| Summer 2007 | 40 | 168 | Sharpening Your Tools: The Value of Continuing Professional Development | 40-168 |
| Summer 2007 | 40 | 169 | Slow Law? | 40-169 |
| Fall 2007 | 41 | 170 | The Screen Door Slamming | 41-170 |
| Fall 2007 | 41 | 171 | Courage! | 41-171 |
| Fall 2007 | 41 | 172 | Discovering eDiscovery | 41-172 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| Winter 2008 | 42 | 173 | Retainer Letters and Conflicts of Interest | 42-173 |
| Winter 2008 | 42 | 174 | The Challenges of Caregivers | 42-174 |
| Winter 2008 | 42 | 175 | Ten Timesaving Tech Tips | 42-175 |
| Spring 2008 | 43 | 176 | Recent Fraud Alerts | 43-176 |
| Spring 2008 | 43 | 177 | Cleaning out the Cobwebs | 43-177 |
| Spring 2008 | 43 | 178 | There Are No Guarantees | 43-178 |
| Fall 2008 | 44 | 179 | The Art of Client Selection | 44-179 |
| Winter 2009 | 45 | 180 | Loss Prevention eBytes | 45-180 |
| Winter 2009 | 45 | 181 | Fraud Targeting Lawyers – Another Version | 45-181 |
| Winter 2009 | 45 | 182 | Looking at the Sources of Legal Malpractice Claims | 45-182 |
| Winter 2009 | 45 | 183 | Crossing Borders with Client Information | 45-183 |
| Spring 2009 | 46 | 184 | Beware the Blame-Throwing Client | 46-184 |
| Spring 2009 | 46 | 185 | Top 10 Temptations to Avoid in a Recession | 46-185 |
| Spring 2009 | 46 | 186 | Book Review – *The Busy Lawyer's Guide to Success: Essential Tips to Power Your Practice* by Dan Pinnington and Reid F. Trautz | 46-186 |
| Spring 2009 | 46 | 187 | Safe and Effective Practice | 46-187 |
| Fall 2009 | 47 | 188 | Acting as an Escrow Agent | 47-188 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| Fall 2009 | 47 | 189 | Do you use Facebook? | 47-189 |
| Winter 2010 | 48 | 190 | Does a 7-Minute Call Create a Solicitor / Client Relationship? | 48-190 |
| Winter 2010 | 48 | 191 | Think Twice About Bank Drafts | 48-191 |
| Winter 2010 | 48 | 192 | Should You Have a Friends & Family Rate? | 48-192 |
| Winter 2010 | 48 | 193 | How to Annoy (or Lose) a Client in 7 Easy Steps | 48-193 |
| Summer 2010 | 49 | 194 | Defining the Standard for Costs Awards against Lawyers Personally | 49-194 |
| Summer 2010 | 49 | 195 | Lawyer's Liability as a Director of a Corporation | 49-195 |
| Summer 2010 | 49 | 196 | Are you  Clarifier or an Obfuscator? | 49-196 |
| Fall 2010 | 50 | 197 | Awesome, Interesting & Valuable! | 50-197 |
| Fall 2010 | 50 | 198 | The Importance of Managing Your Practice When You Don't Yet Control It | 50-198 |
| Fall 2010 | 50 | 199 | Helping Lawyers Cope | 50-199 |
| Spring 2011 | 51 | 200 | Best Practices: Engagement Letters | 51-200 |
| Spring 2011 | 51 | 201 | Friend or Foe?  Social Media and Lawyers | 51-201 |
| Summer 2011 | 52 | 202 | Put It in Writing! | 52-202 |
| Summer 2011 | 52 | 203 | Keeping your Client's Information Secure | 52-203 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| Summer 2011 | 52 | 204 | Engagement Letters Revisited | 52-204 |
| Fall 2011 | 53 | 205 | Planning for the Unexpected | 53-205 |
| Fall 2011 | 53 | 206 | You Have a Will, Don't You? | 53-206 |
| Fall 2011 | 53 | 207 | Notify Your Insurer! | 53-207 |
| Summer 2012 | 54 | 208 | Malpractice Avoidance – Some Friendly Reminders | 54-208 |
| Summer 2012 | 54 | 209 | Book Review: *Avoiding Extinction: Reimaging Legal Services for the 21st Century* by Mitchell Kowalski | 54-209 |
| Summer 2012 | 54 | 210 | Data Protection Tips | 54-210 |
| Fall 2012 | 55 | 211 | Your Professional Liability Insurance and Cyber Coverage By: Tana Christianson, Director of Insurance, Law Society of Manitoba | 55-211 |
| Fall 2012 | 55 | 212 | Lawyers Are Vulnerable Too | 55-212 |
| Winter 2013 | 56 | 213 | Sundogs and Getaways | 56-213 |
| Winter 2013 | 56 | 214 | Social Media and You – How to Reap the Benefits and Avoid the Risks | 56-214 |
| Summer 2013 | 57 | 215 | Back to Basics: Competence in Communications | 57-215 |
| Summer 2013 | 57 | 216 | When Work & Life Collide | 57-216 |
| Fall 2013 | 58 | 217 | Doing Nothing is Not an Option | 58-217 |

## LOSS PREVENTION BULLETINS

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Bulletin Issue No.* | *Bulletin No.* | *Bulletin Subject* | *Full Text* |
|---|---|---|---|---|
| Fall 2013 | 58 | 218 | Embracing Disruption | 58-218 |
| Winter 2014 | 59 | 219 | Limiting Missed Limitation Claims | 59-219 |
| Winter 2014 | 59 | 220 | 10 Tips for Safe Pro Bono | 59-220 |
| Summer 2014 | 60 | 221 | The Challenges of Self-Representing Litigants | 60-221 |
| Summer 2014 | 60 | 222 | Screen your clients and cases | 60-222 |
| Fall 2014 | 61 | 223 | The Future Begins Now | 61-223 |
| Fall 2014 | 61 | 224 | 10 Tips for Daily Stress Management | 61-224 |
| Spring 2015 | 62 | 225 | Navigating the Social Media Minefield | 62-225 |
| Summer 2015 | 63 | 226 | Expecting the Unexpected | 63-226 |
| Summer 2015 | 63 | 227 | Billable Hours: Is More Always Better? | 63-227 |
| Fall 2015 | 64 | 228 | Lawyer Stress 101 | 64-228 |
| Winter 2016 | 65 | 229 | The upside of redundancy | 65-229 |
| Winter 2016 | 65 | 230 | Checklists for lawyers | 65-230 |

**NOTE:** No *Bulletin* were published in 2004 or 2005

### *LOSS PREVENTION BULLETIN* EDITORS

May 1991 to November 1997 issues: Barry Vogel Q.C.

March 1998 to May 2001 issues: Peg James B. Ed., L.L. B.

September 2001 to March 2002 issues: Barry Vogel Q.C.

January 2003 to December 2003 issues: Tana P. Christianson

April 2006 to Winter 2016 issues: Karen L. Dyck

## APPENDIX B - LOSS PREVENTION *E-BYTES*

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: December 2008 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Subject* |
|---|---|
| December 1, 2008 | Welcome to Loss Prevention eBytes! |
| December 1, 2008 | Off the Cuff Remarks Do Not Create Solicitor-Client Relationship |
| December 15, 2008 | Cross-Country Fraud Check-Up |
| January 10, 2009 | Succeeding by Screening |
| February 11, 2009 | Weathering the Storm |
| February 24, 2009 | Common Sense Tips to Protect Yourself from Loss |
| March 7, 2009 | The Perils of Family Law Practice |
| March 16, 2009 | Risks Rise as Economy Plummets |
| March 31, 2009 | Lawyers Obliged to Advise Clients that Facebook Profile May Be Discoverable |
| May 2, 2009 | Better Safe than Sorry |

## APPENDIX B - LOSS PREVENTION *E-BYTES*

**Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: December 2008 to May 2016**

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

| *Date* | *Subject* |
|---|---|
| May 11, 2009 | Conflicts Ruling Extended to Experts |
| May 14, 2009 | ALERT! Equipment Loan Fraud Scheme |
| June 19, 2009 | New Fraud Targets Real Estate Practitioners |
| June 19, 2009 | Loss Prevention in a Recession |
| July 23, 2009 | Lawyers Helping Lawyers |
| July 29, 2009 | The Enemy Within? |
| August 7, 2009 | Plaintiff Must Disclose and Preserve Facebook Profile |
| October 6, 2009 | Duty of Candour in Disclosing Fees |
| October 25, 2009 | Fiduciary Must Undertake to Act for Duty to Exist |
| November 8, 2009 | No 3rd Party Claim against Plaintiff's Counsel |
| December 4, 2009 | A Family Law Twist on the Collections Fraud |

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| *Date* | *Subject* |
|---|---|
| December 7, 2009 | Harsh Words for Pre-trial Spoliation Claim |
| December 14, 2009 | Loss Prevention Blog from LawPRO |
| January 6, 2010 | Discovery of Plaintiff's Internet Account Use |
| January 12, 2010 | Keeping Your Clients |
| February 15, 2010 | CBA's New Code of Professional Conduct |
| March 2, 2010 | New Brunswick Proclaims New Limitation of Actions Act |
| March 25, 2010 | Dealing with Unexplained Trust Deposits |
| March 29, 2010 | Succession Planning for Your Practice |
| May 7, 2010 | Electronic Discovery and the Sedona Canada Principles |
| May 12, 2010 | Technology for Lawyers |
| May 12, 2010 | CBA Universal Engagement Letter Survey |

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| *Date* | *Subject* |
|---|---|
| June 4, 2010 | LIANSwers to Insurance Questions |
| June 8, 2010 | Tools to Verify a Lawyer's Identity |
| June 21, 2010 | New (Draft) Rules of Court in Alberta |
| July 21, 2010 | Summertime Long Weekend Fraud Reminders |
| July 28, 2010 | Benefits of Using Engagement Letters |
| August 17, 2010 | A Friendly Reminder about Acting for Friends |
| August 25, 2010 | Reducing Your Risk |
| September 1, 2010 | Long Weekend of Fraud Watch Reminders |
| September 15, 2010 | Free downloads – CLE Papers from CBA's 2010 Canadian Legal Conference |
| October 20, 2010 | Protecting Your Clients' Confidential Information |
| October 27, 2010 | Setting Clear Parameters for Client Expectations |

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| *Date* | *Subject* |
|---|---|
| November 24, 2010 | Free Resources from Solo Practice University |
| December 9, 2010 | Effective Delegation as a Loss Prevention Tool |
| January 8, 2011 | Lawyers on the Move |
| February 4, 2011 | Avoiding Malpractice: 5 Easy Tips to Implement Now |
| February 22, 2011 | Why Free Wi-Fi Isn't Such a Good Deal |
| March 10, 2011 | Getting It Done |
| April 7, 2011 | Smart Use of a Smartphone |
| April 13, 2011 | Another Helping of Slaw |
| April 20, 2011 | Law Firm Data is Vulnerable to Attack |
| May 4, 2011 | Title Insurance – Some Misconceptions |
| May 27, 2011 | If you Want It Done Right |

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| *Date* | *Subject* |
|---|---|
| June 1, 2011 | Risk Management – Information Security |
| June 15, 2011 | Loss Prevention for Litigators |
| July 19, 2011 | Standard of Care in Collaborative Family Law |
| July 25, 2011 | Do Unto Others… |
| August 5, 2011 | Trust is Key |
| August 15, 2011 | Think Twice Before Suing for Fees |
| August 23, 2011 | Ongoing Fraud Alerts – Variations on a Theme |
| September 1, 2011 | Are you Insured for a Data Breach? |
| September 21, 2011 | New Privacy Handbook for Lawyers |
| October 2, 2011 | A Tool for More Effective Cross-Exams |
| October 19, 2011 | Protecting Client Confidentiality Online |

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| *Date* | *Subject* |
|---|---|
| October 31, 2011 | Free New Resource from the ABA |
| November 10, 2011 | What's all this about Loss Prevention |
| November 21, 2011 | Don't Delay! |
| December 14, 2011 | Significant Costs Order Against Law Firm |
| December 28, 2011 | Continuing to Work through Conflicts of Interest |
| January 13, 2012 | Safe Travels With Your Data |
| January 27, 2012 | Law Practice Management that Works |
| February 9, 2012 | Cloud Computing, Virtual Law and Unbundled Services – Calculating the Risks |
| February 21, 2012 | Privilege and Solicitor-Client Communications |
| February 28, 2012 | Facebook in Civil Litigation |
| April 02, 2012 | Taming the Email Beast |

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| *Date* | *Subject* |
|---|---|
| April 25, 2012 | Update on Alberta's Drop Dead Rule |
| May 4, 2012 | Manitoba Actions Under $100,000 |
| May 17, 2012 | Always Use Protection! |
| May 30, 2012 | Disposing of Digital Assets |
| June 20, 2012 | Safe and Effective Passwords |
| June 28, 2012 | Time on Your Side |
| July 20, 2012 | Tips for Travellers |
| August 1, 2012 | Wiping the Data on your Smartphone |
| August 22, 2012 | Clear Communication is the Key |
| September 14, 2012 | It's All in the Details |
| September 26, 2012 | Emailing Best Practices |

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| *Date* | *Subject* |
|---|---|
| October 22, 2012 | Procrastination & Professionalism |
| November 9, 2012 | Collecting Your Fees |
| November 19, 2012 | Planning for Disaster |
| November 30, 2012 | Data Security for Law Firms |
| December 21, 2012 | Seek Advice is the Best Advice |
| December 21, 2012 | ALERT: Law Firm Falls Victim to Trojan Banker Virus |
| January 11, 2013 | Managing the Beast: Inbox Zero? |
| January 29, 2013 | Don't Be a Target |
| February 8, 2013 | Are Those Facebook Photos Relevant to your Case? |
| March 6, 2013 | Recognizing Risk in Family Law |
| March 21, 2013 | One More Reason to Password Protect your Cellphone |

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| *Date* | *Subject* |
|---|---|
| April 17, 2013 | Another Look at Cyber Security for Law Firms |
| May 1, 2013 | Clearing the (Virtual) Air |
| May 15, 2013 | Are you my client? |
| June 12, 2013 | Supporting Your Support Staff |
| June 24, 2013 | Forming Good Billing Habits |
| July 29, 2013 | Just Say No |
| August 13, 2013 | Strategies for Dealing with Difficult People |
| September 5, 2013 | Protecting Your Firm from Internal Theft |
| September 19, 2013 | Preparing for Retirement of Your Partners |
| October 7, 2013 | What's all this about the Future of Law? |
| November 7, 2013 | Pro Bono Work – Weighing the Risks |

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| *Date* | *Subject* |
|---|---|
| November 19, 2013 | New Fraud Scheme via Linkedin |
| November 29, 2013 | Can you ever be too comfortable? |
| December 10, 2013 | Managing your Risk: Support Staff |
| January 8, 2014 | Joyful Practice? |
| January 28, 2014 | Avoiding the phantoms |
| February 12, 2014 | Lies, lies, lies |
| March 4, 2014 | Brief & Useful: Slaw Tips |
| March 10, 2014 | Insuring against cyber risk |
| April 3, 2014 | (Don't) Click Here! |
| April 14, 2014 | 10 Steps to Effective Proofreading |
| May 16, 2014 | Great Expectations |

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| *Date* | *Subject* |
|---|---|
| May 28, 2014 | Just say "No, thank you." |
| June 19, 2014 | LIANSwers to your Risk Management Questions |
| August 11, 2014 | More Effective Client Communications: Engagement Letters |
| September 8, 2014 | Could this happen to you? |
| September 22, 2014 | How to Avoid Suing for Unpaid Fees |
| October 29, 2014 | Technology, Ethics and Your Practice |
| November 10, 2014 | Practical tips for keeping all the balls in the air |
| December 1, 2014 | YouTube for Lawyers and Law Firms |
| December 15, 2014 | Taming the Email Beast |
| January 5, 2015 | More on Effective Delegation |
| February 11, 2015 | Marketing Your Practice |

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| *Date* | *Subject* |
|---|---|
| February 20, 2015 | When in doubt, don't click |
| March 6, 2015 | Don't assume |
| March 27, 2015 | Client-centred law office protocols |
| April 15, 2015 | Basic Risk Management |
| May 13, 2015 | Navigating the Social Media Minefield |
| May 29, 2015 | Better Client Service from the First Contact |
| June 18, 2015 | Holding Law Firm Data for Ransom |
| July 3, 2015 | Risk Management in a Wills and Estate Practice |
| July 17, 2015 | Keeping Clients at the Centre |
| July 31, 2015 | Don't Forget the Limitation Date |
| August 28, 2015 | Mental Health & Wellness in the Legal Profession |

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| *Date* | *Subject* |
|---|---|
| September 23, 2015 | More Tools for Law Practice Management |
| October 7, 2015 | Don't let your guard down |
| October 28, 2015 | Managing in a stressful work environment |
| November 10, 2015 | Before you hit "Send" |
| November 27, 2015 | Avoiding Imbalance |
| December 11, 2015 | Risk Avoidance: Ineffective Counsel Allegations |
| January 6, 2016 | Room for Improvement |
| February 4, 2016 | Improving mental health for lawyers |
| February 17, 2016 | Risk Management Reminders |
| March 3, 2016 | Resource Tip: Attorney at Work |
| March 17, 2016 | Managing Risk in Your Law Practice |

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| *Date* | *Subject* |
|---|---|
| March 31, 2016 | Civil Communications |
| April 15, 2016 | Legal Tech Tips |
| May 4, 2016 | Closing Your File |
| May 24, 2016 | Planning for Success |