Principles and Practice of Legal, Ethical and Professional Responsibility

[2018]

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EXPLANATORY NOTES

[1] Each entry in the Detailed Table Of Contents of this paper and annotated anthology—of principles and practices of legal, ethical and professional responsibility—is hyperlinked to the text of each entry included in the anthology.

[2] The text of each entry included in the anthology is, in turn—with few exceptions—hyper-linked, 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.

[3] An annotation to the text of an entry, included in the anthology, is identified by "Editor's Note".

PROGRAM PRESENTATION

Presenting at the 2018 National Family Law Program, based on this paper and anthology—as they have since 1992—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.

PROGRAM DEDICATION

The Program is dedicated to Day Q.C.'s senior partner at Lewis Day [law firm], **Hon. P. Derek Lewis, Q.C.** who, when he passed, at St. John's, NL on 19 January 2017, had continuously practiced law for 68 years, 2.5 months and subsequently served Lewis, Day as non-practising partner for 1 year.

ACKNOWLEDGEMENT

Gratefully acknowledged, for transcribing, formatting, and hyperlinking of this paper and anthology; verifying the currency of all judicial decisions, and producing the appendix is **Kelly A. Hall**, the senior legal assistant to the paper's author and anthology's editor for 21 years, and a member of the administrative staff for the 2016 and 2018 National Family Law Programs**.**

David C. Day, Q.C.

01 June 2018

PRINCIPLES AND PRACTICE OF LEGAL, ETHICAL AND PROFESSIONAL RESPONSIBILITY

[2018]

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SYNOPSIS

This paper and anthology comprise a comprehensive introductory chapter (Part I) followed (in Parts 2 to 5) by excerpts from, or summaries of, judicial and quasi-judicial administrative (i.e., disciplinary) 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 01 June 2016 to 30 May 2018

Twelve comparable previous papers and anthologies—cumulatively covering the period 03 September 1189 (the birth date of legal memory) to June 2016—are posted at: http://www.lewisday.ca/ethics.html. This anthology will, on 28 July 2018, be posted to the same Internet address.

01 June 2018

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1.0 INTRODUCTION

1. Overview

(a) Overview: Components Of Responsibility

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 the daily ritual of lawyers—the "perpetual careen from crisis to crisis"—to enable them deserve, serve, and be profitably reimbursed by, clientele (McLachlin, Beverley, *Full Disclosure* (Toronto: Simon & Shuster Canada, 2018), p. 49).

(b) Development Of Responsibility

Interpretation of, and adherence to, the responsibility trifecta—legal, ethical, professional—addressed in this Paper and 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 entitled *Ethics And Canadian Criminal Law* (Toronto: Irwin Law Inc., 2001). The title belies its much broader content (invaluable to <u>all</u> law practitioners).

At page 3, the co-authors observe:

> ... [w]hile certain … [responsibility] issues yield to reasonably clear answers, on many occasions identifying or applying the proper standards can be a maddeningly challenging exercise. Reasonable people can differ as to the proper … approach to apply in a given situation. … [Responsibility] is not an exact science, with every problem amenable to a set and indisputable resolution. What can be most frustrating about the study of lawyers' … [responsibility] is the elusiveness of a widespread consensus on many important issues.

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.

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

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 or advise, and animate, practising lawyers in discharge of their profession's duties. Those duties implore them satisfy their clients' instructions as conflict-free, competent, courteous, conscientious, committed, candid and confidences-keeping counsel.

Conduct of the law practice 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 agree being tasked with client dilemmas. Not infrequently, those dilemmas are abundantly complex; their resolution, sleep-depriving and patience-depleting; and their financial yield, parsimonious.

In Canada, as other jurisdictions, standards begotten by the three species of responsibility transcend law practice, 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 practitioner reputation in family law before appointment, in April 2010, to 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. That barrister's spouse—also a family law lawyer—was killed in 2008 by police when he threatened them with a firearm.)

(c) Zealous Practise Of Responsibility

Whether functioning as barristers or solicitors, practitioners are expected to discharge, zealously—or resolutely—their responsibilities to clients. Beseeching the practitioners so to do are codes of professional conduct which govern them, as well as common law. But their zealous (resolute) conduct of the practice of law must avoid incivility.

In honoring client instructions, lawyers are obliged to be "zealous advocates within the constraints of legality," contends Professor Alice Woolley, Faculty of Law, University of Calgary (*Understanding Lawyers' Ethics in Canada*, 2nd Ed. (Markham [ON]: LexisNexis Canada Inc., 2016), p. 2).

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

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

As a benchmark contributing to identification of boundaries of acceptable advocacy, "civility" is elusive of definition. Professor Wolley's testimony before a discipline panel in 2012 (2012 ONLSHP 94 (CanLII)), para. 43) offered her opinion criticizing (for good reason)

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

Whether a lawyer's in-court zealous advocacy warranted a discipline appeal panel affirming, with variation, a hearing panel's decision that cited the lawyer for unprofessional conduct was, on 01 June 2018, decided by Supreme Court of Canada (*Groia v. Law Society of Upper Canada*, 2018 SCC 27 (CanLII)). The Court set aside the appeal panel's decision of professional misconduct against criminal defence barrister Joseph Groia. For a majority of the Court, Moldaver J. (in a 161-paragraph judgment) cautioned (at para. 3) that

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

(Moldaver J. (McLachlin C.J. and Abella, Wagner and Brown JJ.); for separate reasons, concurring in the result: Cŏte J.; for joint reasons, dissenting: Karakatsanis, Gascon and Rowe JJ.)

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

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

The citation of Joseph Groia derived from events during a criminal trial which commenced in 1999 with pre-trial motions (and concluded, successfully for the accused, in 2007). Mr. Groia served as defence counsel, both during pre-trial and trial in-court proceedings. Law Society of Upper Canada, on 03 April 2003, began monitoring, and subsequently instituted an investigation of, his in-court defence counsel conduct. The Society had not received any complaint against Mr.

Groia. The Court, in which he defended the accused, had not censured him or sent a concerning letter to the Society. Instead, the Society was galvanized into action by having read media reports of Mr. Groia's pre-trial and trial in-court defence of his client. On 18 November 2009, the Society brought a disciplinary proceeding, rooted in alleged incivility, against Mr. Groia. The proceeding asserted six particulars of professional misconduct based on his in-court behaviour early in the criminal trial.

The disciplinary complaint was sustained by the Law Society Hearing Panel: two month suspension, $247,000 costs (2012 ONLSHP 94 (CanLII)); affirmed, in part, by the Law Society Appeal Panel: one month suspension, $200,000 costs (2013 ONLSAP 41 (CanLII)). The Society Appeal Panel determination was affirmed by Supreme Court of Ontario Divisional Court (2015 ONSC 686 (CanLII)) whose decision, in turn, was affirmed by Ontario Court of Appeal (2016 ONCA 471 (CanLII)) and reversed by Supreme Court of Canada. (Mr. Groia's lead 'discipline' counsel, Earl A. Cherniak Q.C., is reported by *The National Post* (01 June 2018) to have said , " … if you're only going to win once, the Supreme Court of Canada is the place to win.")

Unmistakably, the decision of Moldaver J. reflects his empathy for trial counsel—especially criminal defence lawyers—seeking to cope with the perplexities, pressures and provocations of their vocation. (He had earlier, for 17 years, practised criminal law in association with singular criminal counsel Arthur Martin and Marc Rosenberg (later Ontario appellate Justices), Edward Greenspan and Alan Gold.) Arguably, family law lawyers experience, with exalted intensity, the same vicissitudes of counsel work.

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

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

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

Regarding the elements of the applicable bench marks—"good faith" and "reasonable basis"—Moldaver J. (at paras. 94 to 96) wrote:

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

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

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

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

No doubt, his reasons furnish potential, nationally, (i) for Bench, Bar and academy discourse about what the reasons mean, and (ii) for salutarily influencing future lawyer (and other breeds of) disciplinary proceedings. (Meantime, Mr. Groia, a practising barrister for 37 years, was in April 2015 elected a Bencher of (what is now) Law Society of Ontario.)

Neither court supervision, nor law society discipline, of barristers for inappropriate in-court conduct was engaged in the circumstances which required the High Court of Justice of England and Wales to sit on appeal in *A v. R and Another* [2018] EWHC 521 (Fam).rtf. Rather, the focus of the appellate court was on rectifying the adverse impact, on a family proceeding, of raucous trial advocacy. Involved was a parenting dispute; then in its 10th year. Quality (if you will) of the trial advocacy caused the trial judge to have "thoroughly blotted his copy book". On appeal, Mr. Justice MacDonald, in his 21 March 2018 judgment—a paragon of judicial understatement and restraint—was prompted to write of the "concerning tendency on the part of the advocates simply to interrupt each other in an effort to advance their competing submissions". The advocacy in court, he added, descended into a "shouting match". Intermittently, the barristers were joined in

their verbal discord by one or other of the parties, and a witness. Professional discipline in the well of the court appeared to MacDonald J. "to have broken down entirely" at one point. To cure this "serious procedural irregularity", a new hearing was ordered.

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

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

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

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

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

Exercising restraint is no less important in written advocacy. Forthwith and feverish—instead of delayed and deliberate—reply to an e-mail or to a letter, or response (inappropriate as may be) to a judicial decision, can be fraught with professional peril. A member of the Barreau du Quebec suffered discipline for his expedited, incendiary written communication to a disagreeable Justice of the Quebec Superior Court. During argument, the Justice criticized the member in his role as defence counsel. In written reasons rejecting an application on behalf of counsel's client, the Justice levied further criticism, accusing counsel of using bombastic rhetoric and hyperbole, of engaging in idle quibbling, of being impudent and of doing nothing to help his client discharge his burden. Counsel, barely having time to digest the reasons, despatched a private letter to the Justice. Counsel's letter called the Justice loathsome, arrogant and fundamentally unjust, and accused him of hiding behind his status like a coward, of having a chronic inability to master any social skills, of being pedantic, aggressive and petty, and of having a propensity to use his court to launch ugly, vulgar and mean personal attacks. He copied the letter to Quebec's Chief Justice; requesting he be relieved of ever again appearing before the Justice his letter impugned. The Chief Justice, in turn, duplicated the letter to the Syndic du Barreau; responsible for discipline of Quebec lawyers. Ultimately, counsel was suspended from practice for 21 days. Quebec courts upheld the suspension.

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

> [68] Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium

> is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.
>
> [69] A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. …, such criticism, even when it is expressed robustly, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, Mr. Doré's letter was outside those expectations. His displeasure with Justice Boilard was justifiable, but the extent of the response was not.

2. This And Previous Papers And Anthologies

Comprising this 2018 document is the Paper (Part 1), an Anthology (Parts 2 to 5) and an Appendix.

The Anthology incorporates excerpts from, and summaries of, judicial and quasi-judicial 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 11,285 examined documents published, primarily, from June 2016 to May 2018. Modest editing has been performed to lend to clarity. Most citations in the Paper and excerpts and summaries in the Anthology are hyperlinked to their **Full Texts**.

Likewise hyperlinked to their **Full Texts** are contents of the Appendix: every Loss Prevention Bulletin from May 1991 to Summer 2016 when the Bulletin, published by Canadian Lawyers Insurance Association, ceased publication.

Twelve previous comparable Papers and Anthologies canvas the period from birthdate of legal memory (03 September 1189) to 2016. They are published at: http://www.lewisday.ca/ethics.html; as will be this thirteenth paper and anthology, commencing 28 July 2018.

3. Providing Legal Services

(a) Providing Legal Services: Service Personnel

The constituency of this Paper and 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 as of 31 December 2016 (other than in Nunavut which did not report) totalled 129,092 lawyers and Quebec notaries (3,402 more than in 2015); 43.42% of them female. The percentage of female lawyers and notaries increased by 0.39% over 2015. Of the 129,092 lawyers and Quebec notaries in 2016, 79.22% — 102,274 lawyers and notaries, 44.88% of them female —had practising status on 31 December 2016.

(The figures rely on the most recent (2016) Federation of Law Societies of Canada annual report. They include, nationally, such categories of lawyers and notaries—although Federation figures for them are incomplete—as "non-resident", "non-practising", "suspended", "disbarred", "retired", "life", "honorary" and "disabled".)

Of the 102,274 practising-status lawyers and Quebec notaries in 2016, 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: 42.57% in Saskatchewan; 41.26% in New Brunswick; 39.19% in Alberta; 38.86% of Quebec notaries; 37.24% in Nova Scotia; 36.15% in Ontario; 30.65% in Newfoundland and Labrador; 30.38% in Prince Edward Island; 30.34% in British Columbia; and 29.32% in Barreau du Quebec. In Yukon the largest number of lawyers had practiced 6-10 years (34.15%). In the N.W.T., the largest number had also practiced 6-10 years (29.23%). (Categories in the Federation's 2016 report are: 0-5 years; 6-10 years; 11-15 years; 16-20 years; 21-25 years, and 26 years plus.)

Lawyers who, in 2016, were practicing 26 or more years, nationally (other than Nunavut which did not report), comprised 34.56% of all lawyers and notaries with practicing status; of which 26.00% (i.e., of 34.56%) were female.

Federation 2016 report data (other than for Nunavut, which did not report) reveals male outnumbering female lawyers in all jurisdictions except Quebec where 52.42% are female. In the Chambre des Notaires du Quebec, female notaries account for 64.61% of membership.

(b) Providing Legal Services: Service Vehicles

As best can be extrapolated from Federation 2016 report figures, sole practitioners are, most frequently, the vehicle delivering legal services in Canada (Barreau du Quebec and Nunavut did not report). Sole practitioners, as of 31 December 2016, comprised not less than; 29.51% of Quebec notaries; 18.21% of lawyers in British Columbia; 15.60% in Ontario; 11.88% in Manitoba; 11.40% in New Brunswick; 8.14% in Alberta; 7.30% in N.W.T.; 7.19% in Nova Scotia; 7.10% in Yukon; 6.85% in Newfoundland and Labrador; 6.19% in Prince Edward Island, and 5.36% in Saskatchewan. (Most of these percentages understate the extent of sole practitioner service delivery. The principal reason is that available Federation 2016 statistics do not specify the number of sole practitioners who are professional corporations.)

Across Canada in 2016 (other than Barreau du Quebec and Nunavut, which did not report), 28.79% of the 59,541 entities delivering legal service were professional corporations.

(c) Providing Legal Services: Service Delivery

National mobility of the Canadian legal profession, in delivering legal services, is currently governed by three basic agreements among law societies: (i) the National Mobility Agreement, (2002); (ii) the Territorial Mobility Agreement (2006/2011), and (iii) the 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, commencing page 35—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 qualifying 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.

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, rather than temporary, basis. All law societies—other than the Chambre—have signed the Territorial 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.

Significant mobility changes are imminent under two new Agreements:

(a) 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.

(b) 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.

In 2016, 535 lawyers (50.1% male) transferred permanently; principally from one to another Canadian jurisdiction.

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

(d) Providing Legal Services: Service Costs – *Canadian Lawyer*'s 2018 Survey

The April 2018 *Canadian Lawyer* magazine's annual Legal Fees Survey (pp. 20-25), based on polling from 29 December 2017 to 25 January 2018, "indicates a more hopeful outlook for Canadian law firms as they examine their pricing structures, writes Marg. Bruineman; who added, however, that "the mood remains guarded."

As Ms. Bruineman explains,

> [n]one of the [508] respondents [to the Survey] expect to cut their legal fees in 2018. This sets a slightly more positive tone than last year [2017] when 0.6 per cent indicated they planned to cut, and it is a healthy change from 2016's three per cent. Not as many expect to increase their fees this year, however, with only 43 per cent indicating an upward trend compared to the 45 per cent last year.

Eric Gossin, lawyer, mediator and arbitrator, and a partner in Stancer Gossin Rose LLP, Toronto, told *Canadian Lawyer* that "[a]ll of us seem to be achieving a higher hourly rate in terms of what we tell the clients we are charging." His law firm, reports Ms. Bruineman, "usually … [sets rates] at the beginning of the fiscal year with the firm's financial statement, when profit goals are established and reasonable expectations on billing and collecting are examined."

Mr. Gossin, whose pragmatic views appear to reflect 41 years at the coalface of legal practice, "perceives hourly rates as something of a yardstick rather than a hard and fast tool," reports *Canadian Lawyer*. He has "always maintained that the hourly rate is a bit of a fallacy, because at the end of the day, when you look at the account, the question is really whether or not you're going to get paid for the hours that you have done or whether you have to compromise the account" by altering the hourly rate.

Derek Key, Q.C., of Key Murray Law, Charlottetown, Summerside and O'Leary, P.E.I. agrees. He told *Canadian Lawyer* that the hourly rate serves as "a baseline – a long-time metric to measure the account." Based on 36 years of practice, he views billing as more art than science: "The reality is, as a practice that has a large rural clientele, the bill that goes out the door accommodates the client's needs and the client's expectations. That may include a combination of hours coupled with being based on success or failure. It may be a fixed-fee arrangement if it's a commoditized type of serve," such as amalgamations, incorporations, wills or powers of attorney.

An unidentified Survey respondent to *Canadian Lawyer* offered that legal work itself dictates changes in fees: "[p]rices need to go up because of complexity and demand for perfection." Nonetheless, Ms. Bruineman reports the experience of yet another Survey respondent who regards "[t]he downward pressure on fees by not only clients but other lawyers … [as being] a problem. I'm not sure how clients are well served by this continual downward pressure. I'm working on improving efficiency and narrowing my practice areas, but not everyone works that way."

The 2018 Survey reports that the four types of legal work generating most revenue for responding law firms are: real estate; business law; civil litigation, and personal injury.

Garnered from the 2018 *Canadian Lawyer* Survey are the following hourly rates (*Canadian Lawyer*, April 2018, pp. 21-22):

Hourly Rates:	Called (1 yr. or less)	Called (2 to 5 yrs.)	(6 to 10 yrs.)	Called (11 to 20 yrs.)	Called (20 yrs. +)
1-4 Lawyer Firm	$208.12	$242.48	$293.94	$336.62	$390.10
5-25 Lawyer Firm	$166.38	$233.20	$296.06	$351.66	$417.64
26-50 Lawyer Firm	$198.91	$272.79	$358.54	$429.79	$497.44
51-100 Lawyer Firm	$192.37	$239.47	$309.38	$378.33	$453.82
100+	$223.89	$269.06	$323.33	$405.94	$511.47
National	$190.51	$243.12	$303.94	$357.89	$413.83
Atlantic/Quebec	$165.00	$193.20	$237.64	$272.97	$339.87
Ontario	$217.96	$267.74	$327.50	$387.02	$445.20
Western	$179.74	$244.87	$313.44	$371.44	$410.77
Business Law	$194.14	$246.53	$307.90	$368.53	$429.17
Civil Litigation	$192.70	$241.35	$305.86	$369.61	$433.43
Criminal Law	$207.33	$259.60	$347.06	$382.38	$431.01
Family Law	$199.52	$239.93	$300.17	$331.17	$382.64
Immigration Law	$201.67	$238.33	$308.33	$347.50	$416.67
Intellectual Property Law	$231.25	$278.64	$409.17	$457.22	$488.00
Labour & Employment Law	$192.27	$232.59	$302.00	$373.41	$405.14
Real Estate Law	$182.70	$239.79	$285.65	$339.47	$402.93
Wills & Estate Law	$180.37	$239.58	$281.10	$334.86	$393.11

Likewise drawn from the 2018 *Canadian Lawyer* Survey are the following global fees in family law retentions (*Canadian Lawyer*, April 2018, pp. 22-23):

Family Law	National	National (1-4 lawyers)	National (5-25 lawyers)	West	East	ON
Contested divorce	$7,500-$10,000 &10,001-$12,500 (13%)	$7500-$10,000 (14.52%)	$10,001-$12,500 (22.73%)	$10,001-$12,500 (17.5%)	$10,001-$12,500 (30%)	$7500-$10,000 (21.05%)
Separation agreement	$1500-$2000 (34%)	$1500-$2000 (38.71%)	$2001-$2500 (31.82%)	$1500-$2000 (27.5%)	$1500-$2000 (45.45%)	$1500-$2000 (37.84%)
Child custody and support agreement	$1500-$2000 (33%)	$1500-$2000 (34.43%)	$1500-$2000 (31.82%)	$1500-$2000 (30.77%)	$1500-$2000 (45.45%)	$1500-$2000 (30.56%)
Trial up to 2 days	< $12,000 (18%)	<$12,000 (19.35%) & $19,001-$20,000 (18.18%)	<$12,000 & $12,000-$13,000	<$12,000 (15%)	<$12,000 (18.18%)	<$12,000 (21.62%)
Trial up to 5 days	< $23,000 (11%)	<$23,000 (11.48%)	<$23,000 (13.64%) $35,001-$38,000 (10.26%)	<$23,000 & $26,001-$29,000 (18.18%)	<$23,000 & $50,001-$53,000 (10.81%)	<$23,000 & $23,000-$26,000
Marriage/Co-habitation Agreement	$1400-$1700 (21%)	$1400-$1700 (24.59%)	$2301-$2600 (18.18%)	$1400-$1700 & $2001-$2300 (17.5%)	$1400-$1700 (45.45%)	$1400-$1700 (16.67%)
Spousal support Agreement	$800-$1600 (27%)	$800-$1600 (33.9%)	$1601-$2000 (31.82%)	$800-$1600 (27.5%)	$800-$1600 (27.27%)	$800-$1600 (26.47%)
Division of property/ assets agreement	$1300-$1800 (20%)	$1300-$1800 (25.81%)	$2301-$2800 (27.27%)	$1300-$1800 (22.5%)	$1300-$1800 (27.27%)	$1300-$1800 & $2301-$2800 (16.22%)

More precise lawyer service remuneration data—for calendar years 2010 to 2014—is supplied by Canada Revenue Agency. The data, contained 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 (the next Commission is in 2019), was obtained by Cristin Schmitz and reported by her in the 22 April 2016 edition of *The Lawyers Weekly* (now: *The Lawyer's Daily*).

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 65th 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 75th 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 75th 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.

(e) Providing Legal Services: Service Costs – Canadian Research Institute For Law And The Family's 2018 Report

On 07 March 2018, Canadian Research Institute for Law and the Family (CRILF) released conclusions of its study founded on a survey of Canadian family lawyers about their use of (i) collaborative settlement processes, (ii) mediation, (iii) arbitration, and (iv) litigation, as mechanisms for resolution of family law disputes, and related professional costs. The study was requisitioned by the Canadian Forum on Civil Justice (affiliated with York University, in particular Professor Trevor C.W. Farrow) as part of its SSHRC-funded Cost of Justice project. The study's conclusions are stated in a 59-page report, titled 'An Evaluation Of The Cost Of Family Law Disputes: Measuring The Cost Implication Of Various Dispute Resolution Methods'. Authoring the report were CRILF's Research Associate, Joanne J. Paetsch; Senior Research Associate Lorne D. Bertrand, and Executive Director John-Paul Boyd.

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

(i) Collaborative Settlement Processes:

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

(ii) Mediation:

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

(iii) Arbitration:

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

(iv) Courts:

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

In addition to preferred options and benefits, the CRILF study provides an important new glimpse into the relative costs associated with resolving family law disputes using different processes. For example, the average legal fee to resolve low-conflict disputes through collaborative settlement processes was $6,269; the average fee to resolve high-conflict disputes

was $25,110. By comparison, in resorting to litigation the average fee to resolve low-conflict disputes was $12,400, and the average fee to resolve high-conflict was $54,400.

(f) Providing Legal Services: Service Costs − Bench And Bar Concerns

(f.1) Generally

Conversations critically assessing lawyer legal service remuneration have originated with both Bench and Bar.

"[T]here is something inherently troubling", wrote Justice Sarah A. Pepall on 01 December 2014 for a unanimous Ontario Court of Appeal, "about a billing system that pits a lawyer's financial interest against that of its client and that has built in incentives for inefficiency." Following 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 alternative dispute resolution] is reducing as the number of litigants in person increases. He acknowledged that "[t]he [2013 Lord Justice] Jackson reforms [based on Lord Jackson's 2009 and

2010 reports: *Review of Civil Litigation Costs*] are playing a vital role in trying to ensure that there is access to justice for the citizen … .” Nonetheless, mounting legal service expense continues to be an impediment to justice access.

In “The Cost Of Seeking Civil Justice In Canada” ((2015), 93 Can. Bar Rev. 641, at pp. 642-643; 644-645; 649-652), Noel Semple, Assistant Professor of Law, University of Windsor, drew these conclusions about the private financial impact on persons seeking resolution of civil ‘personal plight’ problems: (i) some accept “injustice in their lives, because they perceive that justice’s benefit to them is not worth the cost of seeking it”; (ii) “[o]thers persevere and obtain at least partial justice, but its net benefit is seriously diminished by the cost they paid to seek it.”

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

Ironically, tariffs claimed by many privately-practising lawyers for their legal services have left them under-employed.

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

> Lawyers have effectively priced themselves out of the market for many people. There may be many reasons for this, but the fact remains that, whatever the reason, many people cannot afford to be represented by a lawyer. As long as this situation

> remains and as long as lawyers have a monopoly on the practice of law and legal representation, the problem of lack of access to legal services will remain. People will either be prevented from accessing the system altogether or the outcomes they receive will amount to second-tier justice. While in theory, the courts are open to all, in practice many cannot effectively access them. As Sir James 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'.

An 84-page study published in 2016 by the Barreau du Quebec, titled "Hourly Billing: Time For A Rethink," 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 then invoiced by the hour.

The then-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."

Some law firms, having foregone purely hourly rate invoicing for legal services—much maligned both in- and out-side the Bar. They have substituted compensation schedules based on blended hourly rates, lump sum (i.e., flat) fees, and success fees.

Criticisms of legal services expense deserves tempering by several unavoidable realities. First is essential, relentlessly-mounting costs of operating law firms (not least: rent; salaries of associates, legal assistants and clerks; equipment; digital programs; practice licences and insurance; professional development; promotion (e.g., advertising); bad debts (i.e., unpaid client invoices), and inflation. Second is increasing consumption of the lawyer's stock in trade—time—in performing each retention; occasioned by heightened due diligence (directed by endless legislation; professional practice rules and advisories; court practice notes, and caselaw), and intensifying client expectations of, and insistence on, services being rendered with expedition and

perfection. And, third is time devoted by law firms in furnishing *pro bono* assistance to both clients who usually remunerate, and others, and uncompensated legal education and mentoring to Bar members and the public.

Nonetheless, financial management at some law firms—beside factoring in law firm operational costs, docketed time invested in services delivery, and unremunerative undocketed time—insist on achieving a significant annual profit margin to afford bonuses to partners and, perhaps, associates and administrative staff.

Historically, law firm bills always absorbed office operating expense in their service fees. Increasingly, some law firms purport to separate service from office administration claimed by their bills. More than a few law firms, in addition to fees set out in their invoices, separately charge for administrative costs of supplies; legal assistant salaries (sometimes calculated to the minute); and some tasks expected of legal assistants, such as file openings, document filing and management. (The writer, functioning as a Master and Taxing Officer, will not allow any law firm office administration expenses unless, generically, proven to have been orally agreed by the client, or fully-described in written retention agreements. Otherwise, office administration expenses are expected to be subsumed in legal fees.)

(f.2) Self-represented Litigants

Whatever the reason(s) for lawyers pric[ing] themselves out of the market" (Green CJN, 25 January 2016, quoted above), many persons requiring legal assistant cannot afford the involved services. Probative evidence of such is offered by Dr. Julie Macfarlane in her compelling May 2013 report: "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants" (based on interviews conducted from 2011 to 2013):

At page 33:

> Figures provided by the provincial ministries of justice show that the proportion of litigants appearing pro se in provincial family court is consistently at or above 40%,

> and in some cases far higher. In proceedings under the Divorce Act, the figures are lower but still significant.
>
> At page 34:
>
> The same trend is spreading to civil courts, with some lower level civil courts reporting more than 70% of litigants as self-represented. This goes much further than small claims courts which are designed to facilitate simple, speedy and inexpensive resolution and in which litigants have traditionally often represented themselves.
>
> At page 31:
>
> 75% of the … [self-represented litigants] in the sample [gathered for the Report] reported that the other party in their family or civil case was represented by counsel – in other words, that this was a matter in which one side was represented by counsel and the other was not.

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

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

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

Serious adverse consequences for a self-represented litigant (cited for contempt and condemned to pay $80,000.00 costs) prompted Supreme Court of Canada, in a five-paragraph decision, *Pintea v. Johns*, 2017 SCC 23 (CanLII)), to reverse a decision of Alberta Court of Appeal. Supreme Court of Canada's reasons included an endorsement of the Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused*. Subsequent

provincial superior court decisions likewise approved of the Council's Statement of Principles: *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 530 (CanLII), paras. 45-46; *Young v. Noble*, 2017 NLCA 48 (CanLII), para. 34; and *Gray v. Gray*, 2017 ONSC 5028 (CanLII), paras. 31-33. As counsel for Mr. Pintea assert, however,

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

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

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

4. Responsibility

(a) Responsibility: Sources

Informing the culture of responsibility in 'family' law practice—and, in law practice generally—are organic components that Justice Proulx and Mr. Layton characterize as "diverse and fluid". They are components which, "taken together, serve to develop and reflect the general principles that shape lawyers' actions and ideals, … ." Among them are "formal codes of professional responsibility, the views and writings of lawyers, events actually occurring in the courtroom, the demands and needs of clients, disciplinary decisions by governing bodies, judicial pronouncements, the expectations of the public, and the teachings and reflections that occur in law schools." Together with scholarship in books and journals, and to be found at other sources, they "constitute the legal culture that frames and influences ethical debate" respecting responsibility. (*Ethics and Canadian Criminal Law*, p. 3.)

To these sources must be added the ingredients of legislation and lawyer self-governance directives—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 competently respond to, legal, ethical and professional responsibility issues.

(b) Responsibility: Challenges

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

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

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

Not infrequently, "[s]uicide is a real concern", cautions Dana Schindelka, while a litigation partner at Davis LLP (and presently a partner at DLA Piper), Calgary. "Temporary insanity" 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) Does the potential client have intellectual and psychological capacity to agree, and financial means of affording, retention? (ii) Should the practitioner, in any event, agree retention (e.g., if a

potential client is assessed as unspooled or scabrous)? 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," Ontario private practitioner Mark M. Orkin, Q.C. (in 2018, 70 years at the Bar) writes, in his invaluable *Legal Ethics* 2nd Ed. (Toronto: Canada Law Book, 2011, at p. 226),

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

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

Globally, Serge Kujawa, former Director of Public Prosecutions of Saskatchewan, in a conversation in Vancouver several decades ago, offered the author 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."

(c) Legal Responsibility

(c.1) Legal Responsibility: Overview

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

(c.2) Legal Responsibility: 'Judicial' accountability to court

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

> liable to … [the court's] summary jurisdiction; they are liable on their undertakings and for contempt both of a civil and criminal nature; they are liable 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. ….

Accountability to a court does not, therefore, relieve lawyers from discipline for in-court behaviour by their Law Society, even if the Bench resiles from chastising or penalizing counsel (*Groia v. Law Society of Upper Canada*, 2018 SCC 27 (CanLII), para. 55).

Once on the record in a proceeding before a court, a lawyer requires the court's leave to withdraw; where the subject of retention is criminal (*R. v. Cunningham*, 2010 SCC 10 (CanLII)) or civil.

(c.3) Legal Responsibility: Regulatory accountability to governance authority and public

Provincial and territorial legislatures—not common law—created the right to practise law (provided law society requirements are fulfilled). Nonetheless, like courts, they have largely

delegated to law societies the governance of lawyers and their practices—including their ethical regulation and discipline—in service of the public interest.

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

Solicitor Green had, in 2012 and 2013, declined compliance with an education rule made, on authority of the Act, by Manitoba Law Society. The rule obligates its members annually perform 12 hours continuing professional development. The Society suspended him. He applied for a judicial declaration that the involved rule exceeded the Society's mandate. Both Manitoba Queen's Bench and Court of Appeal (unanimously) disagreed. Likewise did the Supreme Court of Canada (although by a 5 to 2 majority); whereupon the (suspended) solicitor retired from practise.

The Court majority reminds us that the Manitoba legislature invested the Manitoba Law Society with a broad public interest mandate, and broad regulatory powers to achieve that mandate. That mandate is to be interpreted by employing a broad, purposive approach. Empowered by statute to create continuing professional development requirements, the Society necessarily is empowered to enforce such a scheme's standards (designed to better ensure competence of lawyers rendering legal services to members of the public). Suspension of a lawyer who fails compliance with the professional development imperative serves the goal of enforcement; because suspension, in this context, seeks neither to discipline nor to cast doubt on lawyer competence. As such, a suspension is administrative in nature; therefore, within the Manitoba Law Society's mandate. Procedural rules of the Law Society, also impugned by the lawyer, reasonably do not include a pre-suspension right of hearing or appeal. The reason? Lawyers, solely, are in control of complying with the education rule reference professional development; otherwise, they risk suspension of themselves.

In Quebec, more so 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.)

Globally, (i) some provisions of legislation creating law societies, and other legislation, together with (ii) rules made by those societies, including their adaptations of the *Model Code of Professional Conduct*, crafted by the Federation of Law Societies of Canada (below section 5(d)) and (iii) common law memorialise regulatory accountability of law practitioners to the societies and the public. Conduct incongruent with required regulatory accountability exposes practitioners to investigation by, and if warranted, disciplinary processes of, the societies (not to mention, penal or criminal prosecution by the Crown).

Nationally, in 2016 (Chambre des Notaries and Nunavut not reporting) complaints, and disciplinary responses to, and other resolutions of, complaints, based on analysis of reported Federation of Law Societies of Canada statistics, totaled as follow (with 2015, all jurisdictions reporting, in parenthesis):

Complaints received: 11,149 (12,060)

Complaints screened out: 4,983 (3,570)

Informal resolutions: 1,536 (2,556)

Other dispositions (other than from informal resolutions and disciplinary charges): 5,485 (4,602)

Complaints resulting in charges: 293 (345)

Discipline panel charges hearings: 410 (409)

Acquittals of charges: 33 (28)

Charges sustained: 212 (194)

Disbarments: 40 (46)

Suspensions: 68 (84)

Resignations (including 435 from Barreau du Quebec): 452 (540)

Custodial orders: .....23 (44).

(Note that the statistics show complaints received in 2016, and one or another disposition resulting from complaints received in 2016 or in earlier years.)

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

> In December [2017], a British disciplinary tribunal suspended a barrister for six months because he gave £2,300 ($3,930 CDN) to a legal aid client who had told him that she could not afford food or electricity. The barrister, who had recently reported earnings of £787,000 ($1.3-million CDN) a year from legal aid, told the disciplinary panel that he wanted to help the woman, who struggled with drug addiction, "turn her life around."
>
> The panel found that the barrister had compromised his independence, and that his conduct was "likely to diminish the trust and confidence which the public place in the profession".
>
> The disciplinary tribunal's decision can be explained in part by the differences between the British and Canadian systems of legal regulation; in Britain the bar has traditionally enforced a more stringent view on the distance required between lawyers and clients. The penalty was also influenced by the panel's finding that the barrister had failed to co-operate with the regulator.
>
> Nevertheless, the panel's conclusion is dubious or worse. The barrister's decision to give money to a struggling client for food and shelter was "likely to diminish the trust and confidence which the public place in the profession"? Really? The opposite is true.
>
> . . . .
>
> In Canada, the enabling statutes of law societies impose on our regulators an overarching duty to protect the public interest. That is, no doubt, a weighty and difficult challenge.

But have Canadian law societies lost sight of what the public really values? Are our regulators addressing the issues that truly matter to the public? A few well-publicized decisions cause us to wonder.

Is the public's trust and confidence in the profession enhanced when a law society, without receiving a complaint, initiates discipline proceedings for a lawyer's "incivility" in his aggressive in-court conduct in defence of a client facing serious criminal charges? (This saga is now in its ninth year, at untold expense [now concluded with the Supreme Court of Canada's decision in *Groia v. The Law Society Of Upper Canada* 2018 SCC 27 (CanLII)].)

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

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

(c.4) Legal Responsibility: Civil accountability to clients

Common law and equity, and retention agreements (in Quebec: mandates and related civil law)—as well as instruments (e.g., codes of conduct) prescribing professional accountability—define practitioner civil legal accountability to their clients; whether in tort (e.g., negligence, fraud, deceit), under contract, or by fiduciary obligation. They are fulsomely detailed by Madam Justice Sheilah L. Martin (since 18 December 2017, a Supreme Court of Canada Justice), in her 587-paragraph, 24 March 2016 Reasons For Judgment (essential reading) which decided a lawyer's civil accountability, in *Luft v. Zinkhofer* (2016 ABQB 182 (CanLII); appeal dismissed: 2017 ABCA 228 (CanLII); application for leave to appeal to S.C.C., File No. 37805, dismissed: 07 June 2018).

Another noteworthy recent civil legal 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 (including family law) legal responsibility to account is furnished by the 2017 annual report of LawPRO (Lawyers' Professional Indemnity Company) which, in 2017, underwrote errors and omissions coverage for over 26,000 Ontario lawyers. Open claims files as of 31 December 2016 totalled approximately 3,727, estimated to have a gross value of $472.2 million.

"Family law," reported Susan T. McGrath, Chair, and Kathleen A. Waters, President and CEO, of LawPRO, in September 2017, "is responsible for less than 15 per cent of our gross incurred claims costs and less than 18 per cent of claims by count. Using data from recent years in addition to our actuarial projection, LawPRO's analysis of risk-taking results has shown that total premiums attributable to the [Ontario] Family Law bar meet the expected loss and related costs in an acceptable fashion to consider the goal of risk-taking to be achieved." They continue:

> Furthermore, within the category of family law-based claims, analysis resulting from enhanced claims coding practices has shown that family litigation-related errors are responsible for fewer claims than other types of family law errors.
>
> In other words, while civil litigation broadly defined [including family law] is a high-risk practice area from a claims point of view, family law litigation, as a subcategory of litigation, is not. In recognition of our new appreciation of this lower claims exposure, lawyers who initiate family law proceedings will no longer be required to pay [higher] civil transactions levies.

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) Ethical Responsibility: Overview

Informing—although not solely—the three components of legal responsibility (i.e., 'judicial', regulatory and civil accountability) is ethical responsibility. Currently, the template for authorship of codes of ethical responsibility is the Federation of Law Societies of Canada's *Model Code of Professional Conduct*. Historically, reliance was had on Canadian Bar Association's

comparable code. Provincial and territorial law societies have adopted or, at least, reflected both these codes in their respective ethical responsibility instruments (which are comprised of ethical codes and other rules, complemented by some provincial or territorial legislation).

As national organization of law societies, the Federation is composed of 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] premier provider of personal and professional development and support for all members of the legal profession; … [and to promote] fair justice systems,… [facilitating] effective law reform,… [advancing] equality in the legal profession and … [being devoted] to the elimination of discrimination."

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

Judicial accountability is impacted by ethical codes and other responsibility instrument standards of the respective law societies only in the sense of being significant public policy. 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. ….

Regulatory and civil (unlike judicial) accountability, however, are instrumentally influenced by standards of ethical codes and other responsibility instruments.

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 (paras. 55-58), that if the legal matter involves a civil action for damages against a lawyer, more than serving as a public policy statement (as in judicial accountability), regulatory professional standards may contribute to, 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), and *Canada (Attorney General) v. Chambre des notaries du Quebéc*, 2016 SCC 20 (CanLII)).

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

(d.2) Ethical Responsibility: Code of ethical responsibility − Federation of Law Societies of Canada

(d.2.1) Federation's *Model Code of Professional Conduct*

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

The *Model Code* has since been amended in December 2011, December 2012, October 2014, and March 2016. Resulting amendments included alterations to Code provisions addressing conflict of interest (e.g., acting against former clients); the 'future' harm' exception to solicitor-client privilege; communicating with witnesses; and the duty to report another lawyer (among other amendments). In February 2017, the Federation (based on a 31 January 2017 Consultation Report) commenced a public consultation dedicated primarily to identifying issues, deserving of Model Code amendments, relating to technological competence, and return to law practice of former judges.

Commencing in 2010, the Model Code—not itself binding on law societies of the provinces and territories—has, with modifications, been adopted by all save the Chambre des notaires du Quebec in ethical codes of provincial and territorial law societies. Their respective memberships must adhere to such codes.

Consideration by the Federation of further amendment of its Model Code, or of publication of guidelines, is warranted to provide for ethical direction of lawyers—retained by parents—

devoted to interests of the children of those parents. Compelling arguments for so undertaking is advanced in "*Ethical Duties Of Lawyers For Parents Regarding Children Of Clients: Being Child-Focused Family Lawyers*" by Nicholas Bala, Patricia Hebert and Rachel Birnbaum (2017), 95 Can. Bar Rev. 3.

(d.2.2) Federation's Rules and Standards Supplementing *Model Code of Professional Conduct*

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 maintenance of records of such 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. Both of these Model Rules have been wholly or largely adopted by the Provinces and Territories. In largely adopting the 'record keeping' Model Rule, Quebec 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. The Model Rule has been adopted, in whole or part, by most, if not all, Canadian jurisdictions.

Considerable revisions to both these Model Rules are included in a 02 October 2017 Consultation Report by the Federation. Consultations on the Report with Canada's legal profession ended on 15 March 2018.

The Supreme Court of Canada, on 13 February 2015, dismissed an appeal by Canada (2015 SCC 7 (CanLII)) from the decision of British Columbia Court of Appeal (2013 BCCA 147

(CanLII)). The Court of Appeal had upheld the Federation's challenge of certain provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, as amended (the *Act*) and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, as amended (the *Regulations*), on the basis they were inconsistent with the Constitution of Canada to the extent that they applied to lawyers. The impugned provisions of the *Act* and *Regulations* required Canadian lawyers to (i) establish record keeping and client identification requirements for financial services providers and other persons or entities that engage in businesses, professions or activities that are susceptible to being used for money laundering or the financing of terrorist activities, and (ii) to report suspicious financial transactions and cross-border movements of currency and monetary instruments, in relation to such clients.

The Federation had objected to the involved legislative provisions on the basis the *Act* and *Regulations* violated solicitor-client privilege; unlike the Federation's own Model Rules (i) on cash transactions—including money-laundering—and record-keeping, and (ii) on client identification and verification. Those Model Rules, approved by the Province and Territories, materially influenced the 2015 Supreme Court of Canada decision.

Parliament of Canada is presently engaged in a statutory review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and related *Regulations*. Extensive revisions of the Regulations have been drafted. Views of the legal profession relating to the review were, on 21 March 2018, communicated to the Finance Committee.

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 of and compliance with, the Standards by law societies.

Currently also being considered by the Federation is a Model Rule on "Trust Accounting".

(d.3) Ethical Responsibility: 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 "*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 adoption or adaptation by law societies of the Federation's *Model Code of Professional Conduct*, approved in 2009 (as since amended in 2011, 2012, 2014 and 2016), the Association's Code will not be further amended or revised. Nonetheless, it will serve invaluable advisory functions; for example, 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* guidelines which in turn, in 2015, was replaced by *Legal Ethics in a Digital World*.

Association publications also include*: Assessing Ethical Infrastructure in Your Law Firm: A Practical Guide (2015); Ethics and Professional Responsibility*; *Tax Matters Toolkit For [Family Law] Lawyers; Tax Matters Toolkit For Clients*, and a *Child Rights Toolkit*.

(d.4) Ethical Responsibility: Other Canadian ethical responsibility sources

Besides adopting or adapting—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. The Standards are current to 08 September 2017.

Somewhat comparable to commentaries integral to professional conduct codes are practice bulletins published, from May 1991 to Summer 2016, by Canadian Lawyers Insurance Association; tabularized in the Appendix to this Paper and Anthology.

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

(d.5) Ethical Responsibility: 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 (1969) U.S. *Model Code.* The *Model Rules* underwent major revision based on the November 2000 proposals of the ABA Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct, as adopted, then amended, by the ABA House of Delegates in 2002; resulting in the 2004 *Model Rules of Professional Conduct*. (Courts—instead of lawyer governing bodies, as throughout Canada—are, largely, responsible for lawyer discipline in many United States' jurisdictions.)

(d.6) Ethical Responsibility: Access to Codes of ethical responsibility

Access to documents elucidating ethical responsibility is provided by the Federation of Law Societies of Canada; the Canadian Bar Association (CBA); and American Bar Association Internet sites. Responsibility issues are also addressed by the Canadian Association for Legal Ethics.

(d.7) Ethical Responsibility: Reception to Codes of ethical responsibility

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

(e.1) Professional Responsibility: Overview

A helpful definition of the distinction between the concepts of aspirational 'professionalism', on one hand, and 'legal' and 'ethical' responsibility (considered above at pages 30 to 44 on the other, was provided by the (now-former) State of Delaware Chief Justice, E. Norman Veasey, when he was Chair of the National Conference of Chief Justices of the United States. He wrote:

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

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

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

> almost an inspiration which gives to all work that finish which is almost art—which *is* art."

(Conrad was there writing about yacht racing; although his sentiment is known to serve as credo of Honorable William J. English (a Provincial Court Judge in 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., chap. 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, …. .

(e.2) Professional Responsibility: Civility Among Lawyers

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

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

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

All responsibility–professional, not to mention legal and ethical—is perceived by some lawyers as comprising mere aspirational goals; which they honor in the breach. The *modus operandi* of their law practices signifies mental hard drives assembled from jet fuel kinetic materials. However, judicial attitudes toward that misguided approach are changing. Delaware 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."

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 contributed to activist challenges to the legal profession. Citing 'family' lawyers in particular, Kendyl Sebesta reported, 19 March 2012, in *Law Times*, 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 … court system." (Not a few of the Reform membership are, of choice, former and current self-represented litigants.)

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

Certainly, Canada's legal profession—and the judiciary—have been resolute in efforts to curtail incivility. A signal initiative has been the publication of *Principles of Civility for Advocates* by The Advocates' Society. 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."

(e.3) Professional Responsibility: Civility Toward Judges

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."

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

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

The temptation, for involved counsel, to continue remonstrating with the obnoxious Court, was palpable. He, appropriately, did not. He "moved on". When the Court reserved decision in the proceeding, counsel prepared a short written argument on the point he was precluded, by the Court, from advancing orally. Authoring counsel served the written argument on opposing counsel, and convinced the Court Registry to accept and file it. He needed "make a record" in discharging his legal duty of care to the client. The written argument appeared to have been considered in the subsequent decision. In responding, as he did, to the Court, he avoided the potential for Court censure, a Court complaint referral to his Law Society, and civil action by his client. Had such occurred, he probably would have successfully overcome them. But, the involved substantial 'tax'

on his professional time and personal pocket would have been largely, if not entirely, unrecoverable.

(e.4) Professional Responsibility: *Pro Bono*

Aspiring to render, and performing, *pro bono* legal services is often cited as integral to deportment of professional responsibility. Privately-practising lawyers attest to challenges extended by habitues of the bench (e.g., when investing them as Queen's Counsel), the bar, and the legal academy to deliver unremunerated legal assistance. Most private practitioners correctly regard the challenges as redundant. Rarely does a month elapse in which they do not provide un-invoiced legal advice; either to an otherwise-paying client or to a person who, absent appointment, loiters in their law chambers. In so practising *pro bono*, they do or should understand a confidential solicitor-client relationship is created, freighted with the potential for legal liability.

Pity the Newfoundland barrister whose annual December 25th feast has, not infrequently, been punctuated by *pro bono* candidates. On 25 December 1979, at 10:30 AM, for example, he was telephone-requested by a federally-appointed Justice (to whom he had never spoken outside a courtroom) to present at his residence at 2:15 PM. The purpose, stated the Justice, was to brief him and his spouse on implications of the provincial marital property legislation; assented to 14 December 1979, to take effect 01 July 1980. The barrister obliged (attired in Supreme Court chambers dress, at the Justice's request). The service was entirely *pro bono*. As the barrister departed the Justice's matrimonial home at 4:30 PM, he declined an invitation to select a bottle of wine or more potent intoxicant from the Justice's 'bar'; which occupied the floor, exclusively, of each of the two closets in the home's front vestibule.

(When the same barrister, in October 1980, next appeared before that Justice—in court, rather than at a private residence—another responsibility challenge presented. The challenge proved much more confounding than decision-making, in the Justice's home, to decline spirituous beverages. The Justice unsteadily mounted the Bench in a District Court and slumped into his judicial chair. His head and hands thudded onto the Bench table. In that posture, the Justice remained motionless for several minutes. What to do? The barrister's activity of jettisoning several

volumes of the English Reports and both volumes of a ninth edition of *Williams' Law of Executors and Administrators* (1893) from counsel table to floor startled the Justice. Abruptly, he rose, took possession of his Bench Book and strode from the courtroom. The barrister and opposing counsel, now a Supreme Court Justice in St. John's, settled the case scheduled for hearing before the Justice.)

5. Practising Responsibility

(a) Practising Responsibility: Generally

(a.1) Documenting

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

(a.2) Dealing with third parties

On occasion, most important documenting by a lawyer may involve, not her or his client but communications with the 'other' party(ies).

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

rhetoric. If, unavoidably, 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-represented party.

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

More than a few family law litigants supplied state-funded legal aid and many litigants who self-represent are, by accident or design, indifferent to accumulating legal expense of their spouses—ineligible to seek, or denied, legal aid—who personally underwrite their legal representation. Some state-funded litigants engage in countless applications, eschew settlement initiatives, and generate prolix court hearings. In court, tolerance of counsel for paying spouses is severely tested. Out of court, patience of such counsel is constantly tried by complaining clients whose financial resources to pay for representation are dwindling. And, if those financial resources are exhausted, the result is that: (i) one spouse continues to benefit from state-funded representation, and (ii) the other spouse commences to be represented by the same—now unpaid—counsel (unless that counsel is able to obtain judicial leave to withdraw from the record, or unless—time permitting—her or his client can qualify for legal aid).

(a.3) 'Bullying'

Exceptional challenges to practicing responsibility are presented to counsel by litigants—both represented (including their own clients) and self-represented—engaged in 'legal bullying.' The concept was defined, in 2003, by Esther L. Lenkinski, certified family law specialist; Barbara Orser, an Associate Business Professor, and Alana Schwartz, a law student. In the family law context,

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

Legal bullying includes conduct of litigants who

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

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

The authors propose a range of mechanisms to ameliorate—if not eliminate—the impact of legal bullying (subsets of which they identify as 'court harassment', 'court-related harassment' and 'legal harassment'). Although not specifically prescribed by them, the cardinal response of counsel to legal bullying is industrial strength patience and restraint, allied to initiatives to enforce compliance. (Such measures could include requests (i) for case management; (ii) for security for costs (*Nassr v. Vermette*, 2016 ONCA 658; application for leave to appeal to S.C.C., File No. 37232, dismissed, 09 February 2017); (iii) for pleadings to be struck; (iv) for the Justice presiding to remain, pre-trial, seized of the case (*Peters-Webb v. Cloutier*, 2017 ONSC 6139 (CanLII)); (v) for contempt citation, and (vi) (maybe) for fines (*Hutcheon v. Bissonnette*, 2017 ONSC 1108; but see: *Osborn v. Gagne*, 2017 ABQB 438).)

(b) Practising Responsibility: Retention

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

Terms of retention should—nay, must—be reduced to writing and signed. (For precedents, see: *CBA Task Force on Conflicts of Interest, Conflicts of Interest: Final Report, Recommendations & Toolkit* (Ottawa: Canadian Bar Association, 2008), pp. 206-225.) All too

frequently, practitioners—regrettably and inexplicably—default to informal oral solicitor-client service arrangements.

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

> [46] …. In order for a fee agreement to be upheld, it must be fair and reasonable. The onus of establishing that such an agreement is both fair and reasonable rests with the lawyer.
>
> [47] First, the agreement must be fair. The fairness test relates to the circumstances surrounding the making of the agreement and whether the client fully understood and appreciated its nature and effect. If the agreement is found to be fair, then the question becomes whether it is reasonable. Reasonableness relates to the fee charged. Factors relevant to that evaluation are well established and include, but are not limited to, the time expended by the lawyer, the legal complexity of the matter at issue, the results achieved, and the risk assumed by the lawyer … [*Raphael Partners v Lam* (2002), 2002 CanLII 45078 (ON CA), 218 DLR (4th) 701 at para 37].

Written retainers are especially important in family law matters that involve parenting issues. The fairness test requires special attention when crafting conditions of the retention agreement. Candidly describing such are Morag MacLeod Q.C. and Trudi Brown Q.C., authors of an address on 03 March 2016 in Vancouver to the Program: 'Family Law 2016: A Focus on Children and Parenting Issues'. In their address (unpublished)—'Ethics in Parenting Cases: What Are We Doing Wrong"—these two senior, Canadian family law barristers and mediators state:

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

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

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

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

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

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

(c) Practising Responsibility: Digital Technologies

Advent of digital technologies—fostering social media—has confronted lawyers with countless additional responsibility issues. Those issues present ethical and practical dimensions.

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

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

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

Practically, digital technologies have enhanced capability of clients, if not emboldened them, to covertly record private telephone conversations and *in personam* consultations with their lawyers. These communications may eventually be disseminated via social media platforms (perhaps permanently) by a disagreeable or deficiently-represented client; be used by a client as evidence to resolve solicitor-client disputes about instructions and fees, or be replayed by a client to inveigh or intimidate an estranged spouse. (Most effective digital device for clients wanting to furtively make a record of consultations with a lawyer is the Milton 1270p [Color] Super HD Hidden Camera Low Light Video Recording Pen, manufactured by Zetronix; retailing at US $179.99.)

Practitioners must be alive to potential for, and implications of, intrusion, by these technologies, on communications between solicitors and clients. As they are expected, in any event, lawyers need be circumspect in discussions with clients. Essential is that they avoid (i) fatuous assurances of success; (ii) denigration of the client's spouse or lawyer, or the court; (iii) affirmation of expressed client intentions to engage in 'legal bullying' (considered above at pages 51 to 52); and (iv) obscure or illegal (e.g., contingency) arrangements about legal services compensation.

Adamant cautioning of a client is advised regarding prospects of prejudice, to her(his) case, from any discussion via the Internet (e.g., e-mail or social media) or in person with her (his) spouse or with a potential agent provocateur of that spouse.

Practitioners should be aware of expectations of them and their clients under the *Digital Privacy Act* (S.C. 2015, c. 32), some provisions of which took effect 18 June 2015, and others which will come in to force 01 November 2018 (see 26 March 2018 Order In Council under section 27 of the Act: PC 2018-0369; bringing into effect, on 01 November 2018, Section 10 of the Act that requires reporting of data breaches).

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

6. Authors

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

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

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

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

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

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

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

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

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

(9) Woolley, Alice, *Understanding Lawyers' Ethics in Canada*, 2nd Ed. (Markham [ON]: LexisNexis Canada Inc., 2016);

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

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

(12) Armstrong, Stephen V. and Terrell, Timothy P., *Thinking Like a Writer. A Lawyer's Guide to Effective Writing and Editing*, Third Edition (New York: Practising Law Institute, Inc., 2009).

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.

[Editor's Note: This (2018) is the seventeenth 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. The author of this Paper and Anthology claims exception under the *Copyright Act*, R.S.C. 1985, c. C-42, ss. 29, 29.1 (as amended to 01 June 2018).]

2.0 SOURCES AND STANDARDS OF RESPONSIBILITY

2.1 Legal Responsibility

Luft v. Zinkhofer

2016 ABQB 182 (CanLII), Sheilah L. Martin J.
(appeal dismissed: 2017 ABCA 228 (CanLII); Application for Leave to Appeal to S.C.C., File No. 37805, dismissed: 07 June 2018)

[**Editor's Note:** A lawyer's duties under retention arrangements, contract and tort (particularly negligence) law are "to exercise the standard of care of a reasonably competent member of the profession in similar situations" (para. 51). A former client suing a lawyer may instead, or in addition, sue in tort for fraud or deceit (para. 52). Lawyers "also owe certain fiduciary obligations to their clients under the law of equity (para. 53). As members of a self-governing profession, lawyers "are also expected to conduct themselves with high ethical standards"; for which codes of professional conduct afford guidance (para. 55).]

[Full Text]

2.2 Ethical and Professional Responsibility

"Legal aid veteran now champions causes for impoverished pro bono"

Moulton, Donalee, *The Lawyer's Daily*, 20 November 2017
[Excerpt]

For 31 years, Vince Calderhead worked for Nova Scotia Legal Aid helping individuals living in poverty address a diverse and dire range of legal issues. He retired earlier this year — and almost immediately went to work in private practice with Pink Larkin. That work, however, is unique in Canada. Calderhead, who is counsel in the Halifax law firm, does not charge for his services.

[Full Text]

"Should lawyers have a monopoly over the provision of legal services?"

McKenzie, Gavin; McKenzie, Brooke, *CBA/ABC National*, Winter 2016, Volume 25, No. 4, p. 40
[Excerpt]

Is there a good reason to allow non-lawyers to provide legal services?

Lawyers' education and training is superior. Admission standards are high. We are bound by codes of conduct and must be insured. Lawyers who breach professional duties may be disciplined. Why should anyone with lesser qualifications be inflicted on the public?

The short answer is that lawyers do not and cannot fill the public's need for legal services. According to the 2009 Ontario Civil Legal Needs Project, lawyers provide advice and representation for only 11.7 per cent of what the study called "justiciable events:" issues relating to consumers, employment, debt, social assistance, housing, disability pension, discrimination, family law, and hospital treatment issues, among many others.

As Ontario bencher Malcolm Mercer has pointed out, lawyers don't necessarily perceive the extent to which the public's legal needs are unmet. We tend to see the access to justice problem strictly from our own professional perspective. And as Professor Gillian Hadfield has noted, the problem is aggravated by the fact that the employer, the bank, or the business on the other side [of] the legal issue, does have access to expert legal advice.

The alternative to ignoring the 88 per cent of the public's needs that go unmet is to allow qualified non-lawyers to fill much of that huge gap.

[**Full Text**]

"Seismic changes"

Thompson, Elizabeth, *Canadian Lawyer*, November/December 2016, pp. 22-23
[Excerpt]

Sitting in the chambers he had occupied for nearly eight years, former Supreme Court Justice Thomas Cromwell was reflecting on some of the challenges that lie ahead for the court he is leaving behind.

. . . .

One of the areas where Cromwell would like to see the legal profession more engaged is on the cost of legal services.

"I think that one of the big pieces of access to justice is the gap that we have between the need for legal services and their availability. It's not only a poverty issue. I'm certainly not making light of the needs of the poor and disadvantaged but I think it is important to realize that our gap in legal services goes way beyond that."

Cromwell says one solution being discussed is unbundling. In unbundling, lawyers provide services for part, but not necessarily all, of a legal matter.

"I think most places now have a regulatory framework for that to happen. But my sense of it is that it's not having much impact on the ground. The clients don't really understand it, lawyers maybe are reluctant to use it and so maybe we need some further training on how to make money doing unbundling of services. How to serve your clients better through unbundled services. There may be an education piece to it."

Legal insurance is another possible solution, he says.

"I also think in the long term legal expense insurance has got to be a piece of the solution. Why is it that Europeans by the millions have legal expense insurance and, outside of Quebec, [in] Canada it's a very small market?"

"Lawyers face many challenges, but use strategies to help"

Mitchell, Gary, *The Lawyers Weekly*, 20 January 2017, p. 21
[Excerpt]

As a lawyer you have to agree that you and your colleagues are a "tough crowd." Consider the common personality traits and practice challenges that you face. Many of you are introverted and hate networking. You are perfectionists which often prevents you from trying new things for fear of failing. Being highly risk-averse adds to that fear. You frequently procrastinate. You are highly intellectual and often overthink things. And to top that all off, it's in your nature to be highly skeptical.

Then there are the challenges you face in your practice. You are under incredible pressure to produce, living your life and career in six-minute increments. If it's not the billable hour, then it's your workload and the constant struggle to find time for business development.

To effectively deal with these challenges, I've created a methodology for business development specifically for lawyers. It's called TST: targeted, strategic and tactical. You must produce the best results in the least amount of time possible.

[**Full Text**]

"Get the most out of your feedback"

D'Amours Kestler, Jillian, *The Lawyers Weekly*, 17 February 2017, pp. 20, 21
[Excerpt]

If you shy away from feedback, you're only cheating yourself.

That's the bottom line, according to Kimberley Neeson, president of Neesons, a court reporting, transcription and legal services company.

"Sometimes we're afraid to hear it. We like the way we're doing things, or we're afraid of what is coming next, but if we don't seek out that feedback or that information, how can we make good business decisions?" Neeson said.

Whether it's asking a manager or colleague for advice on how to tackle a large file, or seeking an unfiltered response from a client after a case has concluded, asking for constructive feedback can be tricky.

And opening yourself up to criticism is never easy, no matter what profession you're in.

But it may be even more difficult for lawyers, who are trained to show professional confidence and assuredness and may sometimes be cocooned into thinking they always know best, said Steve Prentice, founder of The Bristall Group and an at-work productivity expert.

"If that [confidence] is not checked against a peer or a mentor, including your manager, it can sow the seeds of destruction," Prentice said.

So how do you deliver — and receive — constructive feedback?

[**Full Text**]

"Many large law firms averse to innovation, study finds"

Macaulay, Ann, *The Lawyers Weekly*, 17 March 2017, p. 10
[Excerpt]

A recent study warns large law firms that they must embrace innovation, radically change and develop creative strategies in order to promote access to justice, cope with the civil justice crisis and remain viable in the business landscape. But the study's results indicate that while firms often talk about innovating, it's not actually happening at many of them.

The Illusion of Innovation at Canadian Law Firms, out of McGill University's Faculty of Management, points to a big disconnect between how associates and partners perceive innovation at their firms. The survey of 105 lawyers found that 84 per cent of partners and senior managers agreed that innovation was one of the highest strategic priorities at their firm. But only 42 per cent of associates agreed with that statement.

The study's author, McGill law and MBA student Aly R. Háji, said he doesn't see much innovation taking place and adds that if law firms don't change, "their future does not look bright." He pointed to two underlying factors that explain his findings. The partnership model "promotes a kind of organizational groupthink and inhibits creative innovation and thinking" and the billable hour model is "purposely incentivizing a lack of innovation. It promotes inefficiency."

[**Full Text**]

Proposed ethics rules for former judges stir debate

Schmitz, Christin, *The Lawyers Weekly*, 03 March 2017, pp. 3, 10
[Excerpt]

Legal ethics professors are applauding the Federation of Law Societies of Canada's (FLSC) proposal that legal regulators create a new rule barring ex-judges from advocating in court and from disclosing confidential information obtained on the bench.

But not everyone is on board. "I find the proposed rule to be troubling," says Charles Husband, a litigator with Winnipeg's Taylor McCaffrey, of the advocacy ban. "It assumes that the courts will play favourites — that the courts will lean towards counsel with whom they have had a past association," said the former Manitoba Court of Appeal judge. "I do not share the view that judges are so fragile that they might depart from their pledge to uphold and enforce the law with absolute impartiality.

[**Full Text**]

"Anxiety Management For Lawyers"

Cho, Jeena, *CBA/ABC National*, Summer 2016, pp. 27-28, at p. 27
[Excerpt]

If anxiety is, or is becoming your constant companion, it's time to make it your friend as well.

You're probably thinking "why on earth would I befriend my anxiety? I want it to go away." I get this feeling. But hear me out. Anxiety is something that lives inside of you. It's an internal reaction to some actual or imagined external threat or situation.

The word anxiety comes from the Latin word "angere." It means choke, distress or trouble. This physiological reaction is part of the body's natural fight-or-flight response and it's there to protect you!

Frequently, when we experience anxiety, our first reaction is to ignore, dismiss, or deny it. This, it turns out, only makes the anxiety worse. If, on the other hand, we try to learn more about it, to find out what makes it tick, we come a step closer to robbing it of its power over us.

The key is to slow down enough to notice and tune in to our internal state [which] makes a difference. It's hard work but certainly no more difficult than peeling back the layers of a complicated client matter. A final word about the process of understanding our anxiety – there is a certain degree of surrender that must take place. Unlike book learning, there is an organic unfolding that you must allow. Practise being gentle with yourself and your anxiety.

[**Full Text**]

"All stressed out and nowhere to go"

Elie, Pascal, *Canadian Lawyer*, July 2016, p. 8, 9
[Excerpt]

Quebec lawyers are more stressed than ever before, according to a study presented at the 84th meeting of the Association francophone pour le savoir (Acfas), a non-profit dedicated to the advancement of science in Quebec and French Canada.

The study, led by Universite de Sherbrooke professor Nathalie Cadieux reveals a 483-per-cent surge in calls to the Programme d'aide aux members du Barreau du Quebec, a support

program for lawyers in distress, over the last 10 years. Despite this huge rise, very few studies were devoted to the legal profession, says Cadieux.

The research was based on interviews with 22 Quebec lawyers. It analyzes the multiple stress factors that affect lawyers.

The Barreau du Quebec declared that it is tackling the issue.

"Keeping boundaries"

Slayton, Philip, *Canadian Lawyer*, October 2016, p. 16-17
[Excerpt]

A friend of mine runs a children's rights centre in San Francisco. The centre has a professional staff of about 30. It's a mix of lawyers and social workers. I asked my friend what differences she found between the two professions. Boundaries, she said. Social workers understanding boundaries. Lawyers don't get it. Social workers are taught about boundaries right from the beginning. No one ever talks about boundaries in law school. It's a problem for lawyers, my friend told me. In her view, not having a clear sense of boundaries makes lawyers less effective in their work.

I think there are two kinds of boundaries, active and passive. Active boundaries govern the interaction between professionals and their clients and are driven by the fiduciary nature of the relationship. They are easily expressed as rules or guidelines. For a long time the medical profession has been particularly sensitive to active boundaries in a therapeutic setting. There is substantial literature on the subject. The list of exhortations to doctors and nurses seems endless. No sharing of personal information. No nicknames or dearments. No romantic or sexual involvement. The list goes on and on. Active boundaries have been similarly explored in the teaching profession. Don't be Facebook friends with a student. Don't send a student a personal e-mail. Don't drive him home after class. No touching. Etc. etc.

Then there are passive boundaries. These are subtler and cannot easily be expressed in rules. They are the boundaries that allow professionals to prevent their work-related concerns intruding on and damaging their personal life. Don't bring your clients' problems home with you. Don't treat your loved ones as if they were patients or clients or pupils. Have an autonomous life. Distance, distance, distance. Who could survive as a pediatric oncologist without well-developed passive boundaries, without leaving the illness and death of children at the hospital door, heartless as that sounds?

"Study shows law firm senior leadership still largely white and male"

Brown, Jennifer, *Canadian Lawyer InHouse*, 17 January 2017
[Excerpt]

Despite much talk over the last decade around boosting diversity and inclusion in law firms, women and racialized lawyers continue to be under-represented in the Canadian legal profession with Caucasian men continuing to far outnumber those two groups in senior leadership roles, according to a study from the Canadian Centre for Diversity and Inclusion [CCDI].

In fact, the study shows Caucasian men who responded to the survey have the greatest odds of being an equity partner, and they are seven times more likely than racialized women to be an equity partner.

The study, "Diversity by the Numbers: The Legal Profession," conducted by the CCDI in partnership with the Canadian Bar Association, shows the representation of minority groups in the legal profession has not changed substantially over the last three years that the CCDI has been collecting data. In 2014 and 2015, 73.99 per cent and 76.88 per cent of senior leader respondents were men. In 2016, 75.34 per cent of senior leader respondents to the survey were men and 90.78 per cent of senior leaders were Caucasian.

In 2014 and 2015, 89.28 per cent and 88.91 per cent of senior leader respondents were Caucasian respondents, respectively. Another statistic of note is that 81.9 per cent of senior leaders are equity partners.

"Results from 2014, 2015 and 2016 do not show a shift towards a more diverse and inclusive workforce, particularly in partner and leadership roles," the report states.

[**Full Text**]

"Western Canadian Lawyers Quietly Acknowledge PTSD in Their Ranks"

Canadian Lawyer, October 2017, p. 10
[Excerpt]

Post-traumatic stress disorder—or PTSD—is generally associated with the military or with the front-line emergency workers such as police, fire or ambulance crews who can be exposed to horrific life-or-death situations. While it is something most lawyers do not want to talk about it, is now becoming increasingly apparent that members of the legal professional, particularly those

who work in criminal or family law, may also be subject to PTSD. The Canadian Bar Association has acknowledged that lawyers are significantly more likely to suffer mental health issues than the general population and one of the issues is post-traumatic stress. The CBA says there is a stigma surrounding mental illness in the professional and that "a fear [among lawyers] of being seen as weak and potentially putting their jobs at risk leads them to suffer in silence".

[**Full Text**]

"Legal profession overdue for #MeToo movement to end 'inappropriate' conduct by judges, lawyers: litigator"

Schmitz, Cristin, *The Lawyer's Daily*, 01 March 2018
[Excerpt]

The legal profession needs to mobilize against sexual remarks and other "inappropriate" workplace conduct by judges and senior lawyers who exploit the vulnerability of junior lawyers and law students, says a feminist lawyer who fights to advance the rights of women and LGBTQ people.

[Full Text]

" 'Don't worry your pretty little head over it' "

The Times [London], 24 March 2018
[Excerpt]

Harassment is "all too prevalent", with women prevented from complaining by the close-knit character of the Bar, says a report. Only two of those who said in a survey that they were subjected to sexual and misogynistic behaviour had reported incidents, leading to claims that more had taken place.

In an article to be published by *Counsel*, the magazine of the Bar Council, Selena Plowden and Kate Brunner, QC, accept that many barristers experience "no overt discrimination".

They conclude, though, that sexual harassment remains prevalent. "It is perpetrated in the overwhelming majority of cases by men and it is particularly directed at the younger members of our profession, who need the most help to speak out."

[… One example is] a barrister being propositioned by a circuit judge while training. [Another example is a] male barrister in court [who] told a female colleague before a case: "Don't worry your pretty head over it."

[Yet another example is a …] judge who had complimented a barrister's appearance [and] asked a male barrister in court whether he was "enjoying the view", gesturing towards her.

"Research Finds Lawyers Can Do Harm in Sexual Assault Cases"

Canadian Lawyer, February 2017, p. 7
[Excerpt]

Lawyers involved in sexual assault trials have ethical obligations to their clients, the judicial system and the complainants. Often, that obligation is not met, says Dr. Elaine Craig, an associate professor at the Schulich School of Law in Halifax.

"The research I have done indicates that while many lawyers do a good job, problematic practices such as the use of inadmissible prior sexual history evidence, reliance on stereotypes about sex and gender and unnecessarily aggressive cross-examinations of complainants remains a common problem", says Craig, who delivered the 26th Annual FB Wickwire Memorial Lecture at Dalhousie University.

The issue is not moot, she adds. "Lawyers contribute to the harms experienced by some sexual assault complainants when they attempt to undermine or circumvent legal rules such as the rape shield provisions, or when they are disrespectful to sexual assault complainants, or when they, as Crowns, fail to object to questions that are rooted in rape mythology."

There are four primary ethical duties for defence counsel involved in a sexual assault trial, and they are the same as in any other case. These comprise ensuring loyalty and resolute advocacy to clients; asking questions or pursuing a strategy only if there is a good-faith basis; avoiding discrimination; and taking care not to mislead the court. Crown attorneys have a duty to ensure a fair process for everyone involved. "In sexual assault trials, this would include a duty to prepare complainants and a duty to protect them from unfair, overly aggressive or discriminatory questions", notes Craig, … .

In an article on the issue published in the *Osgoode Hall Law Journal*, Craig notes that, "lA]ll lawyers should agree that it is unethical to distort the truth-seeking process by involving the baseless assumptions that women who did not fight back secretly wanted it, that women who fail to raise a hue and cry are lying, or that women become untrustworthy and indiscriminate in their sexual choices once they have lost their chastity."

[**Editor's Note:** See: Craig, Elaine, *Putting Trials on Trial [:] Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018).]

"First come; first served: Revisiting the cab rank rule"

MacKenzie, Gavin and MacKenzie, Brooke, *CBA/ABC National*, Summer 2017, pp. 40-41
[Excerpt]

Lawyers agree about the importance of competent legal representation for accused persons in criminal matters even when the charges relate to the worst offences imaginable. But do Canadian lawyers have any responsibility to represent unpopular parties in civil cases?

In Britain, barristers are bound by the "cab rank" rule: barristers, like taxis, must accept work on a 'first-come, first-served' basis. Barristers must accept matters appropriate for their experience irrespective of the client's identity, the nature of the case, or "any belief or opinion which [they] may have formed as to the character, reputation, cause, conduct, guilt, or innocence of the client".

Canadian lawyers are not subject to the cab rank rule per se. We are entitled – in criminal and civil cases alike – to decline a retainer because we disagree with a client's cause or conduct, but our regulators discourage this.

The Model Code of Professional Conduct acknowledges a "right to decline representation", but encourages a cab rank approach, stating: "Generally, a lawyer should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious..."

The cab rank rule is designed to ensure that even unpopular parties can secure legal representation, and that lawyers who act for them are not unfairly criticized for doing so.

The courts, however, distinguish between lawyers representing unpopular parties, and lawyers advocating unreasonable positions. Indeed, lawyers who advance unreasonable positions may be vulnerable to costs awards against them personally.

In 2016, the Ontario Court of Appeal upheld an $84,000 costs award in Best v. Ranking against a plaintiff's counsel personally on the basis that he had allowed his client to take unreasonable positions [2016 ONCA 492 (CanLII)].

The Court rejected counsel's argument that he was being punished for taking on a weak case. It highlighted the vexatious nature of the proceeding, and held that "the fact that a lawyer starts an action which is unlikely to succeed is not, on its own, a basis to award costs personally against that lawyer."

But it may be challenging for counsel to draw the line between a weak case and one that may be deemed "vexatious".

[**Full Text**]

"Standing up for vulnerable litigants"

Ha-Redeye, Omar, *CBA/ABC National*, Summer 2017, pp. 44-45
[Excerpt]

It is very easy to turn a blind eye to areas of law that fall outside of our professional expertise. This is especially true of family law – but it would be a mistake to do so because we have a shared interest in ensuring the system functions properly.

By all accounts, family law is in crisis right across Canada; some courts report that between 60 and 70 per cent of litigants represent themselves. As the CBA's Equal Justice Report notes, self-represented parties typically experience poorer outcomes. The cost of family law trials, however, means litigation is inaccessible for everyone except the very rich or the very poor.

[**Full Text**]

"Law firm launches diploma in psychological supervision of family lawyers"

Hilborne, Nick, *Legal Futures*, 22 May 2018
[Excerpt]

A law firm in London has launched what it believes is the first training scheme in psychologically based supervision to help family lawyers manage work-related stress.

[**Full Text**]

"Defending those we detest"

Slayton, Philip, *Canadian Lawyer*, Nov./Dec. 2017, pp. 16-17
[Excerpt]

Do lawyers have an ethical obligation to defend the expression of opinions they (and other right-thinking people) despise? The answer is an unqualified yes.

[**Full Text**]

"Are solicitors obliged to question ethics of clients' conduct? Leading academic suggests they may be"

Rose, Neil, *Legal Futures*, 08 August 2016
[Excerpt]

Solicitors may have a regulatory obligation to question the ethics of what their clients are doing or proposing to do, a leading academic has suggested.

Dr Steven Vaughan of Birmingham University, who has authored several pieces of research on lawyers' ethics in recent years, said the new SRA [Solicitors Regulation Authority] Competence Statement required competent solicitors to be alive to ethical issues "which are far wider than their own professional responsibility obligations – and far wider than what went before the Competence Statement."

He continued: "It is arguable that this extends to those lawyers being obliged, where it seems relevant, to enter into moral dialogue with their clients."

[**Full Text**]

"[Family] Law firm's ballet dancers advert was 'mild innuendo' and not sexist, advertising watchdog rules"

Rose, Neil, *Legal Futures*, 12 October 2016
[Excerpt]

An advert for family law services featuring the torsos of four female ballet dancers with their arms crossed over the chests with the tagline 'Protect your assets', was "mild innuendo" and not offensive, the Advertising Standards Authority (ASA) has ruled.

[**Full Text**]

"Judicial bullying – and how to complain about it – under the microscope again as more barristers speak out"

Hilborne, Nick, *Legal Futures*, 21 March 2018
[Excerpt]

The issue of judicial bullying has come up again, with more barristers outlining the behaviour they have faced in court and the Bar Council chairman condemning "bullying or inappropriate treatment" by judges.

One barrister has outlined her lack of confidence in the Judicial Conduct Investigations Office (JCIO) to handle issues of this nature, while the leader of the Northern Circuit has advised using informal lines of communication through heads of chambers to [at least] handle examples of bullying that is not "egregious".

[**Full Text**]

"… [L]aw firms [told] not to use non-disclosure agreements to hide misconduct"

Rose, Neil, *Legal Futures*, 12 March 2018
[Excerpt]

Law firms must not use non-disclosure agreements (NDAs) to prevent the reporting of professional misconduct – including sexual harassment or misconduct towards other employees or clients – the Solicitors Regulation Authority (SRA) warned today.

A warning notice published today recognised that NDAs have a legitimate role in the commercial world but noted "widespread reporting of the perception that NDAs, alongside cultural issues within some firms, are resulting in low levels of reporting of inappropriate sexual behaviour".

[**Full Text**]

"A solicitor's integrity means ethical rather than just honest behaviour, says [United Kingdom] Court of Appeal"

Hilborne, Nick, *Legal Futures*, 08 March 2018
[Excerpt]

The Court of Appeal yesterday spelt out the higher standards to which solicitors are held in defining what "integrity" means for the purposes of disciplinary action.

It said integrity "connotes adherence to the ethical standards of one's own profession" and involved "more than mere honesty".

The issue has come to the fore with conflicting High Court rulings, one of which – where lack of integrity was held to be synonymous with dishonesty – was before the Court of Appeal.

. . . .

Jackson LJ was giving the lead judgment on two appeals involving lack of integrity and solicitors, *Wingate and Evans v SRA*, and *SRA v Malins*.

[**Full Text**]

"Lawyers aim to 'intimidate' clients who complain, says report"

Bindman, Dan, *Legal Futures*, 06 November 2017
[Excerpt]

Some clients worry about being "bamboozled by legal jargon" if they complain to their lawyers, a fear that can be borne out by responses that are "seeming calculated to 'overwhelm' or 'intimidate' the customer", according to new research.

Instead, lawyers dealing with complaints should apologise where appropriate and be reassuring they are taking the matter seriously.

[**Full Text**]

" 'Massive memory test' preventing Bar students from understanding ethical values"

Hilborne, Nick¸ *Legal Futures,* 22 June 2017
[Excerpt]

Bar students are struggling to understand ethical values because of the "massive memory test" awaiting them in the examination room, a senior lecturer has claimed.

William Ralston, a former barrister based at Northumbria University, also questioned why anti-money laundering training does not feature in the Bar professional training course (BPTC) exam.

Mr Ralston said "urgent work" was needed so that Bar schools and students had the "time and space" on the course to understand the ethical values underpinning the code and guidance.

[**Full Text**]

"Family law firms finding ways to help clients afford their services"

Bindman, Dan, *Legal Futures*, 02 March 2017
[Excerpt]

The vast majority of family law firms are offering alternative ways to pay legal fees post-LASPO [Legal Aid, Sentencing and Punishment of Offenders Act 2012] – such as unbundling and monthly payment plans – meaning that more than eight out of 10 clients were able to find the money themselves rather than rely on friends and family, a survey has revealed.

[**Full Text**]

3.0 APPLICATION OF STANDARDS OF RESPONSIBILITY

3.1 Relationships with Clients—Retainer and Authority

Melendy v. Drodge

2015 CanLII 37193, NLSC[TD](G), Butler J.
[Para. 42 (in part)]

[42] While I agree with Mr. Dicks, Q.C. on the relevant dates, I conclude that evidence of mental acuity, cognitive function, general nature, wit, and demeanour described by witnesses who had exposure to the testatrix before and after April 25 to 27, 2011 are nevertheless relevant to this assessment. At paragraphs [23, 24 and 30] *Coleman v. Coleman Estate*, 2008 NSSC 396 (CanLII), Warner, J. cited Ian M. Hull in his textbook Challenging the Validity of Wills (Carswell: 1996) on the treatment of evidence from lay witnesses and solicitors on this issue …

[**Full Text**]

42662871 Investments Ltd. v. Jomha

2016 ABCA 120 (CanLII), Berger, Rowbothan and Schutz JJ.A.
The Lawyers Weekly, 03 June 2016, p. 20
[Headnote]

[Facts:] Appeal by the plaintiffs, Khanna and his numbered company, from a pre-trial determination that their action was statute barred. The defendant, Jomha, was a barrister who used to represent the plaintiffs. In October 2006, the plaintiffs sued the defendant for damages for professional negligence in connection with the purchase of a gas station business. The defendant issued a statement of defence in 2007. He denied being retained by or acting for Khanna. He pled that he … [filed notice of ceasing] to act for the numbered company in October 2004. The parties sought a pretrial determination of whether the Limitations Act provided the defendant with a complete or partial defence. The chambers judge found that all of the information relied upon in the statement of claim was known to the plaintiffs no later than the end of March 2004. The chambers judge found insufficient evidence of a disability that would postpone the running of the [two year] limitation period. The action was dismissed. The plaintiffs appealed.

Held: Appeal dismissed [2016 ABCA 120 (CanLII)]. The chambers judge properly rejected the plaintiffs' argument that the two-year limitation period commenced running when the defendant filed the notice of ceasing to act for the numbered company in October 2004. The plaintiffs' decision to defer termination of the solicitor and client relationship with the defendant could not operate to extend a limitation period. The limitation period commenced running at the time the plaintiffs knew or ought to have known of the negligence and the resulting damages in March 2004. The chambers judge did not err in characterizing Khanna's evidence of a disability as self-serving and insufficient. The judge's conclusion was within the range of reasonableness and did not warrant appellate intervention.

"Top judges push for unbundled legal services"

Macaulay, Ann, *The Lawyers Weekly*, 02 December 2016, p. 4
[Excerpt]

Following the November launch of the National Database of Professionals Assisting SRLs, University of Windsor professor Julie Macfarlane hopes lawyers will see the benefits of offering unbundled legal services to self represented litigants.

Macfarlane, director of the National Self-Represented Litigants Project, said an increasing number of litigants come to court without a lawyer. "As many as 80 per cent of Canadians in family court are standing up alone in front of a judge, whereas 20 years ago, this number was just 1 per cent."

The database is intended to help the public find affordable lawyers and to encourage more lawyers to step forward and openly offer limited-scope services on a fixed-fee basis, both as a sign of their commitment to access to justice and as a marketing opportunity.

[**Full Text**]

"Limited scope retainers, fixed fee options needed to stem tide of self represented litigants"

Vire, Patricia, *The Lawyers Weekly*, 02 September 2016, p. 16
[Excerpt]

Increasing numbers of civil litigants are self-represented, especially in family cases. Many people start out with a lawyer, but faced with insurmountable costs, people of modest means are increasingly choosing to represent themselves. Yet somehow, for lawyers, the legal pie is shrinking. Increasing numbers of lawyers are underemployed.

The average person does not quality for legal aid but cannot afford a lawyer. For these people there is no real access to lawyers, to the legal system, to justice.

. . . .

While more people represent themselves in court, the affluent are opting out of the public system by purchasing expensive private arbitration or mediation. This has negative implications for the development of the jurisprudence because privately arbitrated cases are being decided without the benefit of a public hearing and the judicial reasons that would otherwise follow.

. . . .

For the sake of all of the constituents—clients, lawyers, the courts and administration of justice—lawyers need to adapt. All-or-nothing retainers are a deterrent to ordinary people seeking the assistance of a lawyer. The limited scope retainer is a flexible service option that can make legal services accessible again. Value-based billings and block fees rather than time-based billings will bring more certainty and affordability and will appeal to clients who might otherwise have foregone some form of legal assistance.

For lawyers, the offering of unbundled legal services and limited scope retainers will require careful attention to professional liability hazards.

[**Full Text**]

Meehan v. Good

2017 ONCA 103 (CanLII), Simmons, Brown and Roberts JJ.A.
[Headnote (*The Lawyers Weekly)*]

[**Facts:]** Appeal by the Meehans from the summary dismissal of their claim against their former lawyer, Cardill. The Judge found that the Meehans retained Cardill only with respect to the assessment of the accounts of another former lawyer, Good, who had represented the Meehans in the settlement of their tort and accident benefits claims arising from a motor vehicle accident. She found that the Meehans had not retained Cardill in relation to any possible negligence action they might have against Good. She found that Cardill had advised the Meehans on a number of occasions to seek legal advice regarding the negligence issue, and that Mr. Meehan confirmed that they had received this advice. She found no issue requiring trial with respect to Cardill's [alleged] duty of care to advise the Meehans about the limitation period in relation to the possible negligence action.

Held: Appeal allowed. The Meehans' action was directed to proceed to trial. The judge erred in determining that Cardill met his burden to establish that there was no genuine issue for trial about whether he had a duty of care to advise the Meehans about the limitation period. The determination of Cardill's duty of care required an examination of all of the surrounding circumstances defining the relationship between the Meehans and Cardill The judge focused only on the written retainer agreement [to have Good's accounts to the Meehans assessed] [;] neglecting to consider the change over the course of the retainer of Cardill's view on the competency of Good's representation of the Meehans and his advice to them to consult other counsel about whether they might have a negligence claim against Good. She failed to take into account all materials facts in concluding there was no issue for trial.

[**Full Text**]

"Can A Lawyer's Duty To His Client Extend Beyond The Scope Of His Retainer?"

Schein, A. Irvin, *mondaq*, 14 March 2017
[Excerpt]

In the recent case of *Meehan v. Good* [2017 ONCA 103 (CanLII)], the Ontario Court of Appeal dealt with a situation in which a lawyer was retained to represent a client with respect to the assessment of the accounts of the client's former lawyer.

The former lawyer had represented the client in the settlement of a personal injury action and had rendered an account which the client wished to challenge by way of assessment.

The client entered into a written retainer agreement with the new lawyer that specified that the new lawyer was being retained to conduct the assessment proceeding. Nowhere in the retainer agreement was there any mention of a duty on the new lawyer to advise the client about a possible negligence action against the former lawyer, or any limitations issue in that connection (i.e., any time limit on the bringing of a negligence action against the former lawyer).

[**Full Text**]

"Unbundling [and legal coaching] for the underserved family law client"

Hendry, Mallory, *Canadian Lawyer*, March 2017, pp. 45-49
[Excerpt]

Family law lawyers have access to an untapped market, and many of them aren't taking advantage of it.

That's the argument being made by proponents of legal coaching, which Nikki Gershbain, national director of Pro Bono Students Canada, describes as a hybrid of unbundling and self-help.

There's this large cohort of individuals who have no intention of hiring a lawyer, Gershbain says, but by promoting unbundled services, "what we're talking about is an expansion of legal need not a narrowing" and savvy lawyers will offer this as a service knowing there is a market of people who "otherwise wouldn't bother doing it at all."

It's amazing how many people would do a good job of moving cases forward if they had support [i.e., coaching] at key moments," she adds, noting legal aid thresholds—even with recent increases—are so low very few are eligible, and yet the cost of legal services continues to increase, becoming increasingly out of reach for ordinary Canadians.

. . . .

Philip Epstein, senior partner at Epstein Cole LLP in Toronto, encourages lawyers at his firm to offer unbundling, sayings it's desperately needed.

"Lawyers can coach—explain to the client what they need to do and don't need to do," he says.

. . . .

Nancy Merrill, second vice president of the Law Society of British Columbia, who practises family law at Merrill Long & Co. in Nanaimo, B.C., says inconsistent terminology is a challenge.

"I've seen it referred to as limited-scope legal services. It's called a la carte legal services in the U.S. I think there should be a universal term," she says. "We all need to get on the same page."

Epstein says another concern lawyers may have is insurance, but he says courts have sanctioned carefully drawn legal retainer agreements [for unbundled services] and as long as they are properly drafted, "fears of wider liability are illusory." He cites a 2016 British Columbia Supreme Court case, *Heppner v. Heppner* [2016 BCSC 2111 (CanLII)], where the … [Master],

Robert McDiarmid, wrote that "limited retainers, such as is the case here. . . facilitate access to justice and it is my view that the courts should encourage that."

McDiarmid goes on to write that "concerns that might arise hypothetically from limited retainers are generally dealt with by the body of ethical rules governing the conduct of lawyers." In this case, it's the Law Society of British Columbia's Code of Professional Conduct.

[**Full Text**]

Heppner v. Heppner

2016 BCSC 2111 (CanLII), R.W. McDiarmid, Master
[Headnote (Carswell)]

[Facts:] Wife failed to attend at examination for discovery in family law proceedings — Wife wished to retain counsel on limited basis to conduct examinations and applied for order permitting retainer of counsel on limited basis.

Held: Application granted — Wife had right to retain counsel on limited retainer basis — Counsel was entitled to attend at examinations for discovery and ask questions on wife's behalf — Order was made scheduling examinations of both parties and requiring wife to bring documents requested by husband.

[**Full Text**]

"The case for limited-scope retainers"

Cheung, Kevin, *Law Times*, 13 February 2017
[Excerpt]

Whether your practice is transactional or litigation-focused, one area of burgeoning opportunity is in providing limited-scope legal services.

The legal market is increasingly competitive. Online legal services providers are growing in number, law offices are opening up in Wal-Mart and, in some jurisdictions, paralegals are moving to expand the services they can offer. These examples demonstrate a trend toward more cost-conscious legal services.

The legal marketplace is crowded due, in part, to lawyers providing similar services delivered in the same way. Limited-scope services offer a way to target unmet legal needs.

What is a limited-scope retainer?

A limited-scope retainer is a term commonly interchanged with targeted legal services, unbundled legal services and discrete legal services. It is the provision of legal services for part, but not all, of a client's matter, as agreed to between lawyer and client. Examples of such services include assisting in a case conference or mediation, appearing on a motion or drafting or reviewing a document such as a purchase and sale agreement.

[Full Text]

"Beware of rogue clients"

Middlemiss, Jim, *Law Times*, 14 May 2018
[Excerpt]

Litigator Gavin MacKenzie notes that "there is no foolproof way of avoiding taking on rogue clients."

He says that professional obligations require lawyers to gather information about clients and companies, as well as comply with laws regarding money laundering. Rules of conduct, MacKenzie says, also "require lawyers to be alert to and avoid unwittingly becoming involved with a client or any other person who is engaged in unlawful conduct."

[Full Text]

Ferreira v. St. Mary's General Hospital

2018 ONCA 247 (CanLII), Juriansz, Miller and Nordheimer JJ.A.
[Para. 1]

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[1] Ms. Masgras is a lawyer. She purports to bring this appeal on behalf of Mr. Ferreira. As the background to this matter demonstrates, this is an unusual case that arises out of an unfortunate factual situation. The case revolves around a lawyer's claim of authority to take steps on behalf of a client who is incapacitated. Mr. Ferreira was the client and Ms. Masgras was his lawyer. Ms. Masgras purports to appeal the order of Marrocco A.C.J.S.C. (the "reviewing judge") as it relates to a decision to set aside an interim injunction that prohibited the removal of Mr. Ferreira from life support. She also appeals the costs order made against her personally by Arrell R.S.J. (the

"application judge"). As I shall explain, while she has the right to do the latter, she does not have the right to do the former.

[**Full Text**]

Parsons v. The Law Society of British Columbia

Supreme Advocacy LLP, Issue #53, 28 September 2017
(Application for Leave to Appeal to S.C.C., File No. 37610, dismissed)

The Respondent, Law Society of British Columbia, sought an order under s. 85(6) of the *Legal Profession Act* to prohibit the Applicant, Mr. Parsons from commencing, prosecuting or defending any proceeding in any court, other than representing himself as an individual party to a proceeding. Mr. Parsons is not a lawyer and is not a member of the Law Society. He has not represented himself as a lawyer, but he provided legal assistance to others in various matters over the years. He does not charge for his services. An injunction application was brought by the Law Society of British Columbia after Mr. Parsons became involved in and prosecuted legal proceedings on behalf of the owner of a dog that had been taken into custody by the SPCA. Mr. Parsons was found to have contravened s. 15(5) of the *Legal Profession Act* and was permanently prohibited and enjoined from commencing, prosecuting or defending a proceeding in any court in the name of another person. The C.A. dismissed Mr. Parsons' appeal [2016 BCCA 435 (CanLII)]. "The application for leave to appeal...is dismissed with costs."

"Unbundling Project In Alberta Will Measure Success"

Ellwand, Geoff, *Canadian Lawyer*, June 2017, p. 11
[Excerpt]

Some lawyers call it unbundling and a new Alberta-based project wants to find out if it really does reduce legal fees, improve access to justice and even boost lawyers' bottom lines.

Unbundling involves a lawyer accepting a limited retainer from a client, who only pays the lawyer for the steps the lawyer completes. Advocates say it is the next logical step in providing legal services.

But the evidence for those claims is mostly anecdotal.

So, in an effort to develop an empirical baseline to gauge just how effective unbundling is, a pilot project has been launched in Alberta. It is funded by the Law Foundation of Ontario and is

overseen by the University of Calgary-affiliated Canadian Research Institute for Law and the Family.

"Retainer agreements – what are they?"

Shawyer, Robert, *Canadian Bar Association*, 01 June 2017
[Excerpt]

Common questions that clients have but seldom ask a lawyer when they go to see a lawyer for the first time is "what is a retainer?", "How do retainers work?" and are there different types of retainers?" While most lawyers think that the answers to these basic client questions are self evident, the answers are not really self evident to clients or potential clients looking to engage the services of a lawyer, especially those contemplating retaining a lawyer for the first time. Therefore the purpose of this paper in a very general way is to explain what retainers are and the different types of retainers that lawyers can offer to perspective clients.

[**Full Text**]

"Regulator highlights unbundling negligence risk but promotes new ways to tackle unmet legal need"

Hilborne, Nick, *Legal Futures*, 06 July 2017
[Excerpt]

The Solicitors Regulation Authority (SRA) has warned solicitors that professional negligence claims based on unbundled services have fuelled a "rapidly developing area of case law".

[**Full Text**]

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2016-47, 28 November 2016 (introducing his summary of and opinion reference *Henderson v. Henderson*, 2016 SKQB 282 (CanLII))

There are 7 million cats in households across Canada and 6.4 million dogs. There are approximately 75,000 divorces in Canada each year and the last Statistics Canada measurement with respect to divorce showed that the percentage of marriages in a given year that will end in divorce before their 30th wedding anniversary was 40.7 per cent. The divorce rate for first marriages is lower than the divorce rate for all marriages and first marriages have a 67 per cent chance of lasting a lifetime. 20 per cent of all divorces in Canada are a repeat divorce for at least one of the spouses and 42 per cent of all divorces finalized over the last few years were from marriages that lasted nine years or less. Finally, the median age of men divorcing was 44 years old, while the median age of women was 41 years old.

3.2 Relationships with Clients—Conflicts Of Duty

3.2.1 Generally

"Navigating conflicts of interest"

Dvorkin, Anatolly and Rendely, Matthew, *The Lawyers Weekly*, 14 October 2016, pp. 12-13
[Excerpt]

All lawyers are duty-bound to avoid conflicts of interest. However, this task is not always as easy as it may seem. In our view, the practice area that is most fraught with potential conflicts is business law. Lawyers who engage in drafting business agreements, deal with mergers and acquisitions and who act for corporate clients must be extra vigilant in avoiding conflicts of interest. To do so, the lawyer's first and most important task is to identify precisely who the client is and who the client is not.

This task is complicated by the very nature of a corporation. A corporation is a legal person that is incapable of making decisions or instructing its lawyer without the involvement of its human principals. As such, the law provides for officers, directors, shareholders, employees or agents to make decisions on behalf of a corporation. Herein lies the potential for conflict: when retained by a corporation, do the instructing parties (and other stakeholders of the corporation) know and understand that counsel is retained to act for the corporation only and for no other party? It is the lawyer's job to make this crystal clear but even if the lawyer has done so, the instructing individual(s) may expect the lawyer to prefer their personal interests over the corporation's or over other stakeholders in the corporation based on a pre-existing lengthy business relationship. This is

but one obvious example of the type of conflict of interest that business lawyers are required to navigate on a daily basis.

Further, unlike in litigation matters, where it is obvious that the same lawyer cannot represent two parties who are directly adverse in interest to one another, it is less clear in business law matters, where parties to an agreement or a transaction often appear to have common goals and interests (such as the shareholders of a corporation who are working toward arriving at a shareholder agreement).

[**Full Text**]

"Potential client met with top family law solicitor 'to conflict him out' of acting for other side' "

Rose, Neil, *Legal Futures*, 20 November 2017
[Excerpt]

A leading family law solicitor's meeting with a [representative of a] potential client was for the purpose of conflicting … [the solicitor] out of acting for the other side, the High Court has said as it rejected an application to stop him from doing just that.

Mr Justice Williams found that though the meeting with Raymond Tooth – the senior partner of Sears Tooth, famously nicknamed 'Jaws' – took place, the representative of the husband involved did not impart confidential and privileged information. [Tooth subsequently was retained by the husband's spouse.]

The judge said the meeting, and two others on the same day with Mishcon de Reya and Stewarts Law, "were at least in part motivated not by a genuine consultation but a conflicting exercise".

[**Full Text**]

3.2.2 Conflict found

Ontario v. Chartis Insurance Co., of Canada

2017 ONCA 59 (CanLII), Sharpe, Pepall and Hourigan JJ. A.
[Headnote]

[Facts:] Appeal by the defendants from an order allowing the plaintiff's appeal from the refusal to remove counsel for two of the defendant insurers, Chartis Insurance Company and American Home Assurance Company, based on an alleged conflict of interest. The respondent, the Province of Ontario, sued the appellants as a result of an insurance coverage dispute. Ontario was represented by an outside law firm. One of the lawyers at the firm, Foulds, who had been working closely with senior counsel to Ontario on the dispute, moved to the firm representing the appellants and was working closely with counsel for the appellants. Counsel for the two parties discussed the apparent conflict before Foulds took up his new position. An ethical screen was implemented at the law firm representing the appellants, which included all of the measures suggested by the Law Society Guidelines. Those measures included Foulds having no involvement in the action, or discussing the action with lawyers in the new firm, and being physically and electronically segregated from the file. Foulds and the appellants' lawyers and staff involved in the coverage dispute gave undertakings to comply with the terms of the screen. In addition, a senior partner in the firm was appointed to supervise the screen. Ontario continued to oppose counsel for the appellants continuing to act. Ontario argued that despite the ethical screen, there was a possibility of inadvertent disclosure due to the close working relationship between the lawyers at issue in the context of working at a small law firm. The appellants brought a motion for a declaration that the ethical screen was sufficient to prevent disclosure of the respondent's confidential information and that it was in the interests of justice that they continue to act. The respondent brought a cross-motion for the removal of appellants' counsel. The motion judge concluded the appellants' counsel had been pro-active in minimizing the risk of disclosure of confidential information and that the ethical screen was comprehensive. He found that it was in the interests of justice to allow the appellants' counsel to continue to act. Ontario appealed. The Divisional Court overturned the decision and disqualified the appellants' firm from continuing to act. The appellants appealed, arguing that the Divisional Court applied the wrong test.

Held: Appeal dismissed. Foulds had received confidential information attributable to a solicitor-client relationship relevant to the matter at hand. He had a close working relationship with the appellants' lawyer such that the potential for inadvertent disclosure was great; in fact, the most striking feature of the case was that Foulds spent 50 to 60 per cent of his time working with the appellants' counsel [in other matters]. In the face of that fact, it could not be said that there was clear and convincing evidence that all reasonable measures had been taken to ensure that no disclosure would occur by Foulds to the appellants' counsel. Any such disclosure had the potential to be very prejudicial to the respondent. The reasonably informed person could not be satisfied that no use of confidential information would occur.

[**Full Text**]

"Master bars lawyer from case involving his own firm"

Robinson, Alex, *Law Times*, 15 January 2018
[Excerpt]

A lawyer is warning that solicitor-client privilege may be threatened by a master's decision that barred him from representing his own firm in a dispute over a wrongful dismissal claim.

In *Teixeira v. Hamburg Olson LPC* [2017 ONSC 7532 (CanLII)], Master Priti Sugunasiri, of the Ontario Superior Court, removed Toronto lawyer Samuel Kazen from representing Hamburg Olson Law PC — a practice purchased by his own firm in 2017 — against a wrongful dismissal claim brought by a law clerk, Nilton Teixeira.

Sugunasiri found the lawyer was too closely involved in the litigation, as he had "entered the fray as an effected participant" and could not be an impartial advocate.

[Full Text]

Brittain v. Petit

2017 SKQB 46 (CanLII), G.D. Dufour J.
[Headnote (Carswell)]

[Facts:] On first day of custody trial mother recognized lawyer JC, one of lawyers representing father, as lawyer who had represented her in different custody dispute involving different parties ten years earlier — JC had worked for several law firms in intervening years and did not recognize mother's name or remember his previous representation of her until eve of trial — Mother brought application to disqualify law firm representing father on ground of conflict of interest.

Held: Application granted — JC represented mother in another custody action and that former action was sufficiently related to this action — Mother imparted confidential information to JC at time — JC was disqualified from acting for father in this action — As JC's senior colleague at firm, JR, did not find out about potential conflict until after he and JC discussed trial it was too late to erect wall of silence — Although conflict arose unintentionally, JC and JR's law firm was disqualified from acting for father — Fact that JC did not recall what mother told him ten years ago and fact that JR did not think he received any confidential information that was reposed in JC was of little consequence — Need to preserve public confidence in administration of justice trumped father's interest in maintaining relationship with counsel that had represented him for

several years — Mother was not aware that JC was member of law firm representing father until she recognized him at trial and did not delay in bringing application.

[**Full Text**]

D.(S.) v. D.(J.)

(2016), 83 R.F.L. (7th) 75 (N.B.Q.B.), Tracey K. DeWare J.
[Headnote (Carswell)]

[Facts:] Mother and father had ongoing matrimonial litigation since approximately 2006 — Mother was initially represented by solicitor JL, who was employed with provincial Legal Aid Commission — In 2007, mother and father entered into consent order regarding custody, access, and child support — Mother retained another solicitor in 2011 to complete divorce proceedings but became self-represented in 2014 — Mother learned JL was [now] working at same law firm as father's solicitors — Mother brought motion for order removing father's solicitors and law firm from record.

Held: Motion granted — Mother's failure to raise issue previously did not preclude ability to raise question now — Mother had previously been overwhelmed while representing herself and had simply not thought to raise issue during prior hearing — There was no issue but that JL had confidential information that arose from solicitor-client relationship with mother regarding same matter — Father's solicitors and law firm had failed to honour spirit of provincial law society's rules and guidelines in regards to conflicts of interest — Father's solicitors had neither sought mother's consent nor responded to mother's inquiry concerning conflict, and JL had not confirmed that no confidential information had been or would be disclosed.

[**Full Text**]

Babich v. Babich

2016 SKQB 327 (CanLII), J.A. Tholl J.
[Summary]

[Facts:] Parties were involved in divorce proceedings and wife changed counsel and retained lawyer H of HD law firm to represent her — Husband had previously spoken to lawyer P at HD law firm when he was considering changing counsel, and P confirmed she spoke with man and made notes about conversation but she no longer worked for law firm and her notes could not be located — Husband applied for order removing HD law firm as wife's counsel.

Held: Application granted — While husband did not formally retain HD law firm, solicitor-client relationship arose between P and husband as result of husband having lengthy conversation with P where he provided details of his situation, aspirations in litigation and was provided with legal advice — Reasonable person, properly informed, would conclude that solicitor-client relationship had arisen with regard to matters that were in dispute between parties — Husband provided specific confidential information with respect to parenting, financial information, property and his strategy, goals and position, and P received confidential information from husband relevant to matter at hand within confines of solicitor-client relationship — While H had no communication with P regarding her conversation with husband and H had not accessed any of P's notes, there was no clear and convincing evidence that all necessary reasonable measures were put in place in advance to ensure that there would be no sharing of confidential information … —, and all of lawyers at HD law firm had access to confidential information — There was no risk of ongoing communication between P and other lawyers at HD law firm because P had left firm, but there was reasonable possibility that P communicated to other lawyers at firm before her departure and there was likelihood that her notes continued to exist at law firm — Informed member of public would perceive that there was reasonable possibility confidential information imparted to P could cause prejudice to husband's interests in litigation — Husband had not contacted HD law firm for tactical purpose of manufacturing conflict to prevent wife from retaining any of firms he contacted, and wife still had other law firms to choose from — HD law firm had disqualifying conflict of interest.

[**Full Text**]

3.2.3 Conflict not found

Sikes v. EnCana Corp.

2017 FCA 37 (CanLII), Noel CJ and Boivin and De Montigny JJ.A.
The Lawyers Weekly, 17 March 2017
[Headnote]

[Facts:] Appeal by Sikes and two companies from a Federal Court decision affirming a Prothonotary's refusal to have Smart & Biggar removed as solicitors of record for the respondents, Encana, Cenovus and FCCL. In 2008, Sikes communicated with eight different law firms, including Smart & Biggar, seeking legal representation to enforce the appellants' rights associated with a pending patent. Smart & Biggar declined to represent the appellants, citing a conflict of interest. In 2014, Smith & Biggar was appointed as the respondents' solicitor. In 2015, the appellants filed a motion for removal of Smith & Biggar on the basis of the 2008 interaction with Sikes. The appellants submitted confidential information was imparted by Sikes and that legal advice was provided. The prothonotary, acting as the case management judge, dismissed the motion on the basis of the unchallenged evidence that the information communicated by Sikes was

non-confidential and that no legal advice was provided. The Federal Court dismissed the appeal, finding no basis for interference with the prothonotary's conclusion that no solicitor and client relationship materialized. The appellants appealed to the Court of Appeal.

Held: Appeal dismissed. Sikes conveyed information to Smart & Biggar in the context of exploring a possible solicitor and client relationship. A presumption of confidentiality arguably extended to the information conveyed. Assuming the prothonotary recognized the presumption favoured the appellants, the decision turned on the clear and unchallenged evidence of Smart & Biggar, contrasted with the misleading evidence of Sikes. The prothonotary's conclusion that no relevant confidential evidence was provided by Sikes did not result from improper application of the presumption and was available on the whole of the evidence. It followed that the Federal Court had no reason to intervene with the prothonotary's finding.

[**Full Text**]

"Quebec lawyer fails to bump former firm off case representing ex-nanny"

Robinson, Alex, *Law Times*, 04 November 2016
[Excerpt]

A Quebec lawyer has been denied leave by the Supreme Court of Canada in a motion to have her former firm barred from representing her former nanny *pro bono* in a $24,000 lawsuit.

Jacqueline Sanderson sued her former live-in nanny and then filed a motion to bar her former firm from acting *pro bono* for the nanny.

Jacqueline Sanderson was denied leave on Thursday for her motion to remove a lawyer from Davies Ward Phillips & Vineberg LLP, where she worked for seven years, off the case in which she sued her former live-in nanny.

Sanderson argued that having the Davies lawyer, Leon Moubayed, act on the case was a conflict of interest.

[Full Text]

"Master refuses to bar Ontario lawyer from personal injury case"

Robinson, Alex, *Law Times*, 19 January 2018
[Excerpt]

A master of the Ontario Superior Court has refused to remove defence counsel for an alleged conflict of interest in an unusual personal injury case.

In *McCoy v. Loveday* [2018 ONSC 3 (CanLII)], Toronto lawyer Joel McCoy, the plaintiff in the case, tried to have lawyer Harvey Klein barred as acting as defence counsel because of conversations he had with other lawyers at Klein's firm, Benson Percival Brown LLP.

The underlying action was against the driver of a vehicle in a 2014 accident that allegedly left McCoy with serious injuries. McCoy and his firm have been retained to represent other plaintiffs in a separate action arising out of the same accident.

McCoy had a number of conversations with lawyers at Klein's firm, including one who had worked directly under Klein, about the companion action before filing his own statement of claim.

In an affidavit, McCoy claimed he was "provided with legal insight" pertaining to issues he discussed with one of the lawyers. In more than three conversations, he said the two discussed the circumstances, facts and legalities around his case.

. . . .

Master Donald Short, however, found that such informal conversations at such an early stage did not warrant Klein being removed from the case.

[Full Text]

McCain v. Melanson

2016 ONSC 6350 (CanLII), Kitely J.
[Headnote (Carswell)]

[Facts:] Wife applied for annulment claiming husband deliberately misrepresented himself and tricked her into marrying him — Husband retained lawyer whom wife claimed had consistently and repeatedly acted against wife in custody and access proceedings with her former spouse and had acted against two of her siblings in contentious family law disputes — Wife

claimed lawyer obtained great deal of relevant confidential personal information, including information wife had disclosed to therapists, mediators and parenting coordinators and [report on] assessment that had been conducted by psychiatrist pursuant to s. 30 of Children's Law Reform Act — Wife brought motion for order disqualifying husband's lawyer and law firm from continuing to act as counsel for husband.

Held: Motion dismissed — Wife had not met onus on establishing sufficient relationship between wife and husband's lawyer or his law firm — Legal issues in this proceeding were unrelated to legal issues in other proceedings, as there were different parties, different legal issues and different factual issues — Wife claimed that psychiatrist's reports would take central role in proceeding was not realistic, as nothing psychiatrist said over 11 years ago about wife's parenting capacity could be relevant to whether she could prove her allegations of misrepresentation and deceit — Wife never retained lawyer and he was always adverse to her, and it was hard to accept that communications she made to other professionals that became known to lawyer could constitute sufficient relationship — Information wife communicated to professionals did not create expectation of confidentiality that could be relied upon to disqualify lawyer for her former spouse from acting for her current spouse — … [The fact] lawyer acted against wife's siblings did not establish sufficient relationship because wife was not party to proceedings and was not directly involved, and wife provided no evidence as to extent to which issues in those matters bore any relationship to this proceeding — While lawyer had acted for husband's former spouse, wife was not involved in that proceeding and former spouse waived right to challenge retainer — Husband did not have to offer explanation for retaining lawyer and allegation that lawyer was retained to intimidate wife was not accepted because her actions did not demonstrate that she was intimidated — Husband's retainer of lawyer did not raise concerns of unfairness, and public confidence in integrity of justice system was not engaged.

[**Editor's Note:** Leave to appeal to Ont.C.A. refused: 2017 ONSC 375 (Ont.Div.Ct.).]

[**Full Text**]

Leach v. Leach

2016 ONSC 6140 (CanLII), McDermot J.
[Headnote (Carswell)]

[Facts:] Wife's lawyer acted for her in negotiating spousal support and in settling terms of separation agreement — Wife had worked part-time in lawyer's office as receptionist, but was then hired full-time — Husband brought motion to remove wife's lawyer from record.

Held: Motion dismissed — Husband failed to demonstrate, on balance of probabilities, that reasonably informed person would find conflict of interest or ethical breach arising from

employee/employer relationship between wife and her lawyer — Standard for determining whether there was conflict was objective, as court must take care to guard against party seizing upon alleged conflict to get rid of opposing lawyer who he believed might be standing in way of reasonable settlement — Husband failed to demonstrate change in lawyer's conduct after wife became employed with her, and it was clear that husband did not like lawyer at any time — Employee relationship between wife and lawyer did not give rise to perceived conflict — If lawyer became potential witness then she must remove herself from record to give evidence, but there was no benefit of employment to warrant lawyer being called as witness — There was no evidentiary foundation for finding that wife was enjoying fee waiver or reduction through her employment with lawyer that constituted benefit from employment for spousal support purposes, and only reason to make lawyer witness would be for purposes of fishing expedition — It was not foreseeable that lawyer would be witness and she was not disqualified based on that possibility.

[**Full Text**]

Raabe v. De Jong

2016 BCSC 1861 (CanLII), Skolrood J.
[Headnote (Carswell)]

[Facts:] Parties were involved in family law matter, including dispute over parenting arrangements for parties' son — Husband's sister was married to husband's lawyer — Wife claimed that lawyer had attended at family dinners, and spent social time with husband and parties' son — Wife claimed that husband's sister had partisan view of litigation, and had sent text messages to her against her position — Wife claimed that lawyer was in conflict of interest — Wife applied to have lawyer removed as counsel for husband.

Held: Application dismissed — Wife did not intend to call lawyer as witness — Wife intended to cross-examine husband's sister, but did not indicate that she would be witness — It was not clear that lawyer would have material information to provide, if called as witness — Lawyer possessed no confidential information that would disqualify him — There was concern over lawyer acting for brother-in-law in family matter — However, prejudice to husband at late stage of litigation outweighed possibility of conflict.

[**Full Text**]

Elliott v. Elliott

2017 ONSC 527 (CanLII), L.E. Fryer J.
[Headnote (Carswell)]

[Facts:] Following separation in 2012 parties retained lawyers who were collaborative practitioners and members of practice group — Parties and counsel executed collaborative participation agreement which prohibited collaborative lawyers from acting for parties in litigation — Wife's lawyer left private practice and wife retained lawyer M, who was also collaborative lawyer — Husband also retained new collaborative lawyer H — H sought to have new participation agreement signed but M refused — [Consequently there was no written understanding that lawyers retained for collaborative dealings would not litigate involved marital issues] — M commenced application on behalf of wife — Husband brought motion to have M removed as solicitor of record for wife.

Held: Motion dismissed — M clearly … [conducted practice of law as a] collaborative lawyer — Husband did not meet high standard for order removing M but, in light of M's stated commitment to collaborative practice, M should have considered stepping aside rather than acting as litigation counsel when collaborative process broke down.

[**Full Text**]

3.3 Relationships with Clients—Rendering Services

3.3.1 Generally

"Giving clients emotional support"

Teggart, William, *The Lawyers Weekly*, 26 June 2015, p. 13
[Excerpt]

While a lawyer's primary goal may be to serve their clients through recovering compensation, completing a real estate transactions or drafting wills, today's clients want and deserve more from their law firm. It is no longer enough to simply provide advice and respond to telephone calls. Clients want someone who listens, and who can empathize, support and empower them. Today's clients are seeking an emotionally intelligent (EI) law firm.

Despite this, the majority of lawyers continue to speak to the thinking brain by ignoring or

avoiding the powerful emotions that they may be confronted with during client sessions. Thus, these meetings can often end in frustration and confusion on both sides, with several questions going unanswered. Today's clients are seeking advice, but also support. It's time lawyers polish their EI skills by learning to give the client not only what they require legally, but as a supportive service provider.

"The truth about false memory"

Layne, Julie, *The Lawyers Weekly*, 22 July 2016, p. 15
[Excerpt]

Two differing versions of the same event can often lead to high conflict and prolonged litigation in family law cases. The parties' convictions that they are telling the truth fuel the conflict. As it turns out, people actually often believe their own "lies." The fact is that our memories are often false. This little bit of information may help family lawyers take a step back from their case in an effort to reach a resolution to the conflict.

A review of pleadings and affidavits in almost any family law case will reveal how vastly different the parties recount events that took place during their relationship. I once appeared before a justice who remarked that he was often struck by the same thing, stating he wondered if the parties were even in the same family. When we meet with our clients and they recount to us various events that took place in their relationship, their conviction and passion can make it difficult to doubt their version of events.

[**Full Text**]

"Don't let clients play the waiting game [:] Customer service takes on great importance in law"

Cameron, Grant, *The Lawyers Weekly*, 26 August 2016, p. 23
[Excerpt]

When it comes to running a law practice, providing solid legal advice is, without doubt, an essential ingredient for success. After all, clients these days expect nothing less from their lawyers.

However, legal skills will only take you so far. To keep clients happy, lawyers must also incorporate some sort of palatable bedside manner and beef up their customer service skills.

Those who've started their own legal businesses or law practices maintain that, in addition to doing good work, lawyers need to develop a personal connection with clients, be honest and respectful, provide timely communications and ensure expectations are clear.

[**Full Text**]

"Henson trust not just for special needs families"

Pope, Kenneth, *The Lawyers Weekly*, 02 December 2016, p. 15
[Excerpt]

Many lawyers and families know that Henson trusts are uniquely useful for families with members with disabilities and special needs. Many more don't realize the other uses for Henson trusts for those who don't have disabilities and or special needs.

[**Full Text**]

"Ontario law society launches Coach and Advisor Network"

Moulton, Donalee, *The Lawyers Weekly*, 20 January 2017, p. 2
[Excerpt]

Traditionally as part of their day to-day work, young lawyers turned to more senior members of their firm when they needed answers to thorny legal questions and guidance on building a successful practice. Times have changed. Today client demands for rapid-fire service, the growth of large national, even multinational law firms and increasing numbers of people entering the profession have combined to make informal mentoring much more difficult.

Most law societies in Canada have put in place a formal mentoring program to fill the gap. Now the Law Society of Upper Canada (LSUC) has gone a step further and launched the Coach and Advisor Network (CAN), the country's first program for lawyers and paralegals that brings together formal mentoring and coaching for members. "We are a regulator that is required to ensure competence. This is a way to ensure and enhance competence," said LSUC treasurer Paul Schabas in Toronto.

[**Full Text**]

"Too many trying to balance too much"

Kestler-D'Amours, Jillian, *The Lawyers Weekly*, 24 March 2017, pp. 21-22
[Excerpt]

Between recruiting new clients, securing office space, hiring staff and completing actual lawyer duties like filing briefs or preparing for court, to say that lawyers at small law firm and solo practitioners have a lot on their plates may be an understatement.

"Everything falls onto your shoulders," said Jordan Furlong, a consultant and legal market analyst with Law 21 in Ottawa.

"You're not just practicing law, but you're running a business and you're keeping the books, and you're managing supplies, and you're answering e-mails and you're making phone calls. And it's just one thing after another."

And often, those seemingly never-ending to-do lists can be overwhelming—not to mention can keep lawyers from using their time to complete law-related tasks that bring in money and new clients.

Lawyers in solo practices, and small-and medium-sized law firms, generally spent just over two hours, or only 28 per cent, of their eight-hour workday on billable activities, according to a recent report on legal trends published by law management software firm, Clio.

And on average, law firms will collect payment on only 1.5 hours of billable time each workday, the report found.

According to Furlong, it's critical that lawyers take the time to complete "an honest inventory" on how they are spending their time throughout the day. That can help identify which tasks can be delegated and ultimately, better maximize a firm's overall productivity.

"Making that decision to delegate and outsource, and then holding true on it, that's a management decision," he said. "A lawyer who is going to be a good manager makes a decision to say, I should be maximizing the percentage of my time that's going into actual lawyer work."

It could mean hiring an assistant or secretary to handle administrative duties in the office, even on a part-time basis. Or, if the budget doesn't allow for new hires, firms can use a virtual assistant or online services to handle some of those tasks, Furlong suggested.

"The elder law boom"

Bradbury, Danny, *Canadian Lawyer*, October 2016, pp. 42-45, at p. 42
[Excerpt]

If you thought that legal issues for older people revolved only around wills and estates, it's time to broaden your understanding. For the past 15 years, the profession has been working to refine the nuances of working with an older client base, and it has led to an exciting and relatively young practice area: elder law. An older client base offers opportunities to lawyers who want to learn more—and could represent a risk for those that don't take the time to investigate their particular needs.

"What called upon the creation of not just the practice but a new field of law was the number of issues arising for people who were living a very long life", explains Ann Soden, executive director of the National Institute of Law, Policy and Aging. "They are facing new challenges that we weren't seeing, in numbers that we hadn't seen before." This drove Soden to found the National Elder Law section of the Canadian Bar Association in 2002, putting it on the agenda for the legal profession.

[**Editor's Note:** See: Soden, Ann, Ed., *Advising the Older Client* (Markham: LexisNexis Canada Inc., 2005).]

[**Full Text**]

"Your career: Seeking client feedback"

Covert, Kim, *CBA/ABC National*, Winter 2016, Volume 25, No. 4, p. 29
[Excerpt]

What does your client think about the service you provide? Have you asked?

Clients like being asked for feedback, says Mark Howe, Director of Client Relations for Thompson Dorfman Sweatman.

In fact, Howe said during a PD session at the CBA Legal Conference in Ottawa in August, it's usually the lawyers in the firm who need to be convinced that asking clients what they think is not a bad idea.

Lawyer buy-in is one of two principle challenges to getting effective client feedback, says Sandra Goodwin, Managing Director of Client Development and Service at McInnes Cooper in Halifax, Howe's co-presenter.

"People worry about what the response will be," says Goodwin, but adds that in her experience, where there are opportunities for improvement in the service provided, clients are quite diplomatic in expressing their dissatisfaction.

The second main challenge is following up on any criticism; "It's better to not even ask for qualitative information than to ask and then not act on it," she says.

[**Full Text**]

"Wills: Why you should send clients detailed reporting letters"

Rock, Nora, *The Lawyer's Daily*, 14 February 2018
[Excerpt]

While the will itself is the product of the collaboration between lawyer and client, the reporting letter serves a separate purpose: it's the record of the context. To the extent that the reporting letter documents the process of crafting the will, it can bolster validity, shield the lawyer from malpractice allegation and demonstrate the value that legal advice brings to the task.

Reporting letters from wills lawyers are sometimes brief and perfunctory. But they shouldn't be.

[Full Text]

"Wellness: Being a witness turned me into a lawyer with empathy"

Singer, Darryl, *The Lawyer's Daily*, 07 March 2018
[Excerpt]

This column is about listening, learning, developing empathy and compassion as a lawyer.

[Full Text]

"Beyond evidence: How great lawyers leverage intuition"

Mercanti, Jennifer and Watson, Lisa, *Law Times*, 20 March 2017
[Excerpt]

Lawyers regularly navigate complex situations that require thoughtful and strategic decision-making. While knowledge, experience and research are essential to this process, an important and often overlooked tool is inner knowing, or intuition.

As coaches, we regularly help others to learn how to leverage their intuition in their work and personal lives. We believe that intuition is an especially powerful tool for the legal profession.

[Full Text]

"Damages for spousal abuse are on the rise after several years of neglect in family court"

Pawlitz, Laurie H., *The Financial Post*, 22 February 2016
[Excerpt]

The world of family law peers behind closed doors and reveals the most intimate of details. Most often, courts decide issues of custody and access, spousal support and property. These issues require a recitation of the private details of a couple's life together: who managed the household, who went to the children's doctor's and dentist's appointments, who looked after the finances and what the family's spending pattern was.

The evidence required to determine support and property issues, however, pales by comparison to the gut-wrenching evidence necessary to prove a claim for damages for spousal assault.

Periodically, in a family law case, one spouse may seek damages in addition to her or his claims for support and for property. When a spouse does so, she or he may seek special damages, general damages, aggravated or punitive damages.

"Domestic Contracts To Protect Family Wealth: Unassailable Or Not?"

Hamilton, Emma, *mondaq*, 18 December 2017
[Excerpt]

When family wealth is at stake, parents may wish to encourage their children to enter into a domestic contract with their partners. The purpose may include to protect significant gifts and inheritances, a home owned at date of marriage, or a family business. With divorce rates at an all time high and the largest anticipated wealth transfer in Canada's history of approximately $750 billion to millennials over the next several decades, these issues are a growing concern for many families.

[**Full Text**]

"The Devil is in The Drafting: Is An Estate Entitled To Spousal Support Payments?"

Tomic, Predraq, *mondaq*, 01 December 2017
[Excerpt]

The recent Alberta Court of Queen's Bench decision in *Marasse Estate (Re)*, 2017 ABQB 706 is yet another reminder that drafting legal documents must be done carefully and with a view to their long-term effect. The main issue in this case was whether the surviving ex-spouse was obligated to continue paying spousal support to his deceased ex-spouse's estate.

[**Full Text**]

"The First Meeting with Your Family Law Lawyer"

Samuels, Genevieve, *mondaq*, 22 August 2017
[Excerpt]

Meeting with a lawyer for the first time can be a daunting prospect, especially in the context of any family law issue; moreover, when you first need a family law lawyer, many issues or problems you are experiencing will likely be affecting much of your day-to-day life making an appointment with a lawyer even more overwhelming or confusing. Fortunately, there are things

you can do to make your first appointment and consultation with a lawyer productive and, hopefully, easier on yourself.

[Full Text]

"Releases mean What They Say and 'All Claims' Means All Claims"

Pleet, Erin, *mondaq*, 05 October 2017
[Excerpt]

In its recent decision of *Biancaniello v. DMCT LLP* [2017 ONCA 386 (CanLII)], the Ontario Court of Appeal confirmed that a release for "any and all claims" arising from the provision of services included a claim unforeseen by either party. The use of "boilerplate" language in the release did not negate its effect on existing claims unknown at the time the release was executed.

[Full Text]

"Pension Blunders Botch Up Divorce"

McMillan, Jenn, The Ross Firm, *mondaq*, 07 November 2016
[Excerpt]

Financial shenanigans during divorce are not atypical, especially where property division is at stake. Undisclosed facts, false numbers, hidden assets – they might be no surprise coming from one's ex-, but when the government is the culprit, the result can be a colossal bureaucratic mess. That's what one Ottawa woman discovered when pension errors came to light only after she signed away half her property.

[Full Text]

"Independent Legal Advice May Fail To Rebut The Presumption Of Undue Influence"

Girou, Anbrie, *mondaq*, 24 August 2016
[Excerpt]

In a previous blog post, Emily Clough discussed the British Columbia Supreme Court decision in *Cowper-Smith v. Morgan*, 2015 BCSC 1170, in which the sons of the deceased

successfully set aside a joint tenancy between the deceased and her daughter on the basis of undue influence despite the fact that the deceased had received independent legal advice. The trial judge also held that one son had reasonably relied on the daughter's representation that he would acquire the daughter's one-third interest in the deceased's home if he returned from abroad to care for the deceased as her cognitive functioning deteriorated. That son had returned from abroad and the trial judge held he had done so to his detriment; therefore, the doctrine of proprietary estoppel entitled the son to acquire, and obliged the daughter to sell to him, the daughter's one-third interest in the home.

On appeal, the daughter argued that the trial judge erred in finding that (1) the legal advice the deceased had received prior to executing the joint tenancy transfers was insufficient to rebut the presumption of undue influence, and (2) the doctrine of proprietary estoppel was available in this case.

The British Columbia Court of Appeal allowed the appeal in part [2016 BCCA 200 (CanLII)].

[**Full Text**]

"How legal writing can be a communications tool"

Fortin, Genevieve, *CBA/ABC National*, Winter 2017, pp. 42-43
[Excerpt]

If you're a lawyer, you're used to reading and deconstructing long, dull and complex documents. That's what you do for a living. But how well do you tolerate complexity? How do you feel about reading the terms of your mortgage, documents from Revenue Canada, or your investment statements?

Now imagine how your clients might feel reading your letters, legal notices and contracts. Not only are they often overwhelmed by the complexity of what you've written, but many of them feel they are paying a lot for your services only to be left in the dark.

Our relationship with information is changing and we expect more of the professionals we hire. Now more than ever, your clients assess the quality of your services by placing a premium on the simplicity of the advice and documents they receive. Whether your client is an individual, an employee from another department or a business, simplicity is indicative of quality.

[**Full Text**]

"Client-care letters 'failing' consumers, research finds"

Rose, Neil, *Legal Futures*, 3 November 2016
[Excerpt]

Many client-care letters (CCLs) get the lawyer/client relationship off on the wrong foot, reinforcing preconceptions of lawyers' letters as complex and difficult to read, and not providing the information that consumers actually want, new research has found.

Commissioned jointly by the Legal Services Consumer Panel and all of the frontline legal regulators, it highlighted eight key principles to improve CCLs …which the regulators will use to inform their work.

[**Full Text**]

"Barrister … [Alternate Business Structure] offers couples 'single joint expert' approach to divorce"

Hilborne, Nick, *Legal Futures*, 15 May 2018
[Excerpt]

Two family law barristers have set up what is believed to be the first service allowing separating couples to obtain advice from a single legal expert at any point in the process.

Samantha Woodham and Harry Gates, both based at 4 Paper Buildings, are launching The Divorce Surgery as an alternative business structure (ABS) regulated by the Bar Standards Board later this week.

[**Full Text**]

"Solicitor rebuked for taking instructions from client's daughter"

Bindman, Dan, *Legal Futures*, 31 July 2017
[Excerpt]

A conveyancing solicitor has been rebuked and fined £2,000 after he dealt entirely with the daughter of the owner of a property in whose sale he acted, only for it later to emerge the seller had a lasting power of attorney (LPA) in place that named his son as his attorney.

[Full Text]

"Millennials generation 'ushers in era of demanding clients and responsive lawyers' "

Bindman, Dan, *Legal Futures*, 25 May 2017
[Excerpt]

The 'millennial' generation of legal services buyer is taking over from the 'baby boomers' and bringing a range of new expectations that lawyers must respond to, such as flexibility of service and working hours, predictable pricing, and value for money, a new report has concluded.

[**Full Text**]

3.3.2 Confidentiality and Privilege

"Move to cut breadth of privilege stopped by top court in two cases"

Schmitz, Cristin, *The Lawyers Weekly*, 09 December 2016, p. 1, 3
[Excerpt]

Counsel for the organized bar say they are pleased with separate Supreme Court judgments that robustly protect litigation briefs, and privileged lawyer-client communications, from compelled production to regulators and other state officials.

In companion judgments Nov. 25 [2016] that elaborate on solicitor-client privilege, and the scope of its less absolute sibling, litigation privilege, the top court dismissed the separate appeals of Alberta's Information and Privacy Commissioner, and Quebec's regulator of insurance adjusters, who unsuccessfully argued that their respective enabling statutes empower them to access such privileged information — even though their legislation doesn't expressly and unambiguously say solicitor-client privileged and litigation-privileged information must be produced: *Alberta (Information and Privacy Commissioner) v. University of Calgary* 2016 SCC 53; *Lizotte v. Aviva Insurance Co. of Canada* 2016 SCC 52 [(CanLII)].

[**Full Text**]

"Common interest privilege taken too far"

Gay, Alexander, *The Lawyers Weekly*, 02 September 2016, p. 14
[Excerpt]

The law as it relates to common interest privilege remains unsettled in Canadian jurisprudence and can best be described as an ill-defined legal concept that has been stretched to a point of absurdity.

. . . .

In Canada, case law provides that a party is entitled to share its privileged communications with others on confidential terms without losing privilege as against the rest of the world. The legal foundation for this proposition is the law of confidence which is anchored in equitable principles. For instance, within the accounting profession, the doctrine of limited waiver provides that a privilege holder may share solicitor-client documents in confidence with an auditor for the limited purpose of enabling the auditor to perform an audit and issue a fairness opinion. In these circumstances, the law provides that the privilege is not destroyed and that it continues to apply as against the rest of the world.

[**Full Text**]

"The state of litigation privilege after Blank"

Gagnon, Jean-Francois and Derome, Leonie (2016), 11 *Canadian Lawyer Inhouse* [Issue 4], p. 8
[Excerpt]

Ten years ago, the Supreme Court of Canada rendered its decision in *Blank v. Canada* [2006 SCC 39 (CanLII)], thereby putting an end to considerable debate among Canadian jurists regarding the scope of the litigation privilege. In that decision, the Court underlined the distinct nature of this common law privilege, which had often been wrongly confused with solicitor-client privilege.

The *Blank* decision first established that the litigation privilege differs from solicitor-client privilege in having a much broader scope. It covers not only communications between lawyer and client but also communications between a lawyer and third parties or, in the case of an unrepresented litigant, between the litigant and third parties.

[**Full Text**]

"Breaching Confidentiality"

Canadian Lawyer, May 2017, pp. 16-17
[Excerpt]

Solicitor-client privilege, an evidentiary rule that protects legal advice from forced disclosure, and the broader and related requirement that a lawyer must keep a client's affairs confidential, are deep features of Canadian law. There are many judicial statements of these principles and the reasons for them. For example, in the 2016 case of *Alberta (Information and Privacy Commissioner) v. University of Calgary*, the Supreme Court of Canada (Justice Cote for the majority) said: "Lawyers have the unique role of providing advice to clients within a complex legal system. Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive". And later: "This Court has repeatedly affirmed that, as a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary."

A lawyer's obligation to keep quiet about what a client has told them seems almost as central to the justice system as the Sacrament of Penance is to the Catholic Church. Canon law states that a priest must not reveal what a penitent has said in the confessional, even to save his own life or the life of another, to aid the course of justice or to avert a public calamity. A lawyer's obligation to say nothing might not be quite that strict, but its still powerful.

But not everything a parishioner tells a priest is told in the confessional box. There can be many kinds of communications between a priest and a member of their flock, not just outside the Sacrament of Penance but outside the scope of church and religion altogether. The strict rules of the confessional don't apply in those instances. Why should they? The same is true of lawyer and client. Is every communication with your lawyer, no matter what the context and circumstances, subject to the rules of privilege and confidentiality? Why should that be the case?

[**Full Text**]

Lee v. British Columbia (Attorney General)

Supreme Advocacy LLP, Issue #71, 14 December 2017
(Application for Leave to Appeal to S.C.C., File No. 37735, dismissed)

The Respondent, A.G.B.C., asserted privilege over 19 pages of email communications between a government lawyer and employees of a government agency, which were inadvertently disclosed to the Applicants, Ms. Lee et al., in response to an access to information request. The chambers judge held 15 of the 19 pages constituted privileged legal advice, privilege over them had not been waived, but the remaining four pages were not privileged. The B.C.C.A. allowed the appeal and varied the chambers judge's order to apply to all 19 pages [2017 BCCA 219 (CanLII)]. "The application for leave to appeal...is dismissed with costs."

"Privilege may apply to documents from which legal advice may be inferred"

Gay, Alexander, *The Lawyer's Daily*, 18 December 2017
[Excerpt]

Deciding whether to claim privilege over documents is often a judgment call. This is certainly the case with documents that on their face appear to be innocuous but that allow opposing counsel to infer the substance of legal advice that has been sought or given.

[Full Text]

"When Is Communication Between A Client's Accountant And Lawyer Privileged?"

Bower, Scott H.D. and Kruger, Russell, *mondaq*, 12 October 2016
[Excerpt]

Communications between lawyers and their clients' accountants or other non-legal professionals are not in themselves privileged but can be where the communication is in "furtherance of a function essential to the solicitor-client relationship or the continuum of legal advice provided by the solicitor", the Saskatchewan Court of Appeal recently held in *Redhead Equipment v Canada (Attorney General)*, 2016 SKCA 115 [*Redhead*].

[**Full Text**]

"Solicitor-Client Privilege: Accounting Records Exception In Income Tax Act Unconstitutional"

Morand, James G., *mondaq*, 01 July 2016
[Excerpt]

Two recent decisions by the Supreme Court of Canada considered demands for information made to lawyers and notaries issued by the Canada Revenue Agency (CRA). Information that is subject to "solicitor-client privilege" is excluded from such demand. However, specifically excluded under the *Income Tax Act* (Canada) (the Tax Act) from the scope of solicitor-client privilege is an "accounting record of a lawyer." The exclusion would thereby authorize the CRA to demand accounting records of a lawyer.

These recent decisions confirmed that the Tax Act exclusion of accounting records from the scope of information protected by solicitor-client privilege is contrary to the … search and seizure provisions of section 8 of the Charter and consequently lawyers and notaries do not have to comply with such requests from the CRA [2016 SCC 20 (CanLII); 2016 SCC 21 (CanLII)].

[**Full Text**]

"When Loose Lips Will (Or Will Not) Sink Ships: Privilege, Privacy And Wilfulness"

Kotecha, Krupa [Articling Student], *mondaq*, 25 August 2016
[Excerpt]

On July 26th, 2016, the Supreme Court of British Columbia released an interesting decision that addresses questions regarding: (1) the scope of privilege that applies to work done by lawyers in relation to judicial proceedings; and (2) the interpretation of BC's *Privacy Act* with respect to the requirements of "wilfulness"

In *Duncan v. Lessing*, 2016 BCSC 1386 [(CanLII)], the issue centered on claims brought by an individual, Mr. Duncan, against Mr. Lessing, a lawyer that represented Duncan's former wife in family litigation between the two parties. The plaintiff claimed that the defendant lawyer breached his privacy: (1) in the course of serving application materials; and (2) through the conveyance of information about the plaintiff in a casual conversation with another lawyer.

[**Full Text**]

"After IGGillis Holds: Protecting privilege when giving common legal advice"

Tonkovich , Mark and Dewey, Stephanie, *Canadian Bar Association*, 29 March 2018
[Excerpt]

The Federal Court of Appeal's recent decision in *IGGillis Holdings* [2018 FCA 51 (CanLII)] brings comfort and certainty to transactional and advisory lawyers working collaboratively in today's complex legal environment. While the case arose in the context of a tax audit, its teachings on privilege should reach all areas of practice.

IGGillis Holdings soundly affirms that sharing legal advice with other transacting parties, or working together with other parties' lawyers to develop that legal advice, will not waive solicitor-client privilege where the collaboration is done in pursuit of a transactional common interest. As explained in *CBA National* last fall, the CBA intervened in this closely-watched appeal to assist in fully canvassing the underlying issues and the common practices of the Canadian bar.

The CBA argued in its factum that "[t]he more significant and complicated a legal issue, the more likely that clients will engage teams of specialized lawyers across multiple firms to jointly provide legal advice to them." The practice of active collaboration between different parties and their respective lawyers was thrown into serious doubt by the Federal Court's earlier ruling, which held that the common interest exception to the waiver of privilege rule did not apply in the transactional or advisory (non-litigation) context. This led lawyers to step back and reconsider how best to protect their clients' privilege rights, while recognizing that clients will often have a practical interest in sharing privileged advice or directly collaborating with another party's counsel.

Some lawyers found creative solutions to the issue, such as the use of joint retainers between multiple transacting parties and joint counsel over discrete mandates. However, such solutions were not always possible and, when they were, they required additional time, effort, and communication to reach the same result that the common interest exception would have achieved directly. The added complexity in the underlying relationships also increased the burdens on lawyers in managing their professional obligations to their clients.

The Federal Court of Appeal confirmed that the transactional common interest exception is firmly established in Canadian law. It held that it was not appropriate for the Federal Court to effectively allow a decision of a New York court to overturn the relevant Alberta and BC cases that applied in the *IGGillis Holdings* case.

"[Frequently Asked Questions] about Privilege and Confidentiality for Lawyers in Private Practice"

Ethics and Professional Responsibility Committee, *Canadian Bar Association*, November 2012

[**Full Text**]

"Why lawyers should be paranoid about client confidentiality"

Matich, Teresa, *Legal Futures*, 11 December 2017
[Excerpt]

In April 2016, a lawsuit was filed claiming one Chicago-based law firm had failed to protect confidential client information.

The suit didn't accuse lawyers at the firm of inadvertently sharing client information. In fact, according to *The American Lawyer*, "[t]he complaint makes no claim that data was stolen or used against clients." The claim solely focused on the fact that lax data security could have put client information at risk.

In other words, fail to take proper precautions to protect client confidentiality, and you could find yourself in hot water – whether your lack of preparedness breaches confidentiality or not.

[**Full Text**]

"Tribunal orders law firm to disclose advice after finding client waived privilege in appeal papers"

Rose, Neil, *Legal Futures*, 07 November 2017
[Excerpt]

A law firm has been ordered to reveal to the tax man aspects of the advice it gave to a client after a tribunal found that the client had waived privilege in its grounds to bring an appeal out of time [from dismissal of the client's application with respect to its income tax liability].

[**Full Text**]

3.3.3 Negotiations

"Dispute institute launched"

Linton, Hilary and Wolfson, Lorne, *The Lawyers Weekly*, 11 November 2016, p. 13
[Excerpt]

A group of Ontario family lawyers, mediators, mental health and financial professionals has formed the first organization in the country to establish professional standards of practice and support for all those providing family law dispute resolution (FDR) services.

The Family Dispute Resolution Institute of Ontario (FDRIO), a federally incorporated not-for-profit, was created in response to the growing access-to-justice crisis in family law. We believe we are building a better model to help families resolve their disputes faster, more cost-effectively and with more information that will permit them to select the FDR process best suited to their needs, in or out of court.

[**Full Text**]

"Making a big deal about negotiation skills"

Cattell, Colleen, *The Lawyers Weekly*, 12 August 2016, p. 14
[Excerpt]

Negotiation skills are essential for lawyers. With a 98 per cent civil settlement rate, litigators are far more likely to negotiate a settlement than run a trial, and the art of the business deal turns on successfully navigating difficult negotiations to successful conclusions.

. . . .

The really skilled negotiator, however, prepares not just the content of the negotiation but also the negotiation process. This is a very different approach from our law school learning focus on *content* (what it is we are negotiating about) to a focus on *process* (how we achieve the goal we are seeking in the negotiation). Mediation, for example, is a process choice. The content of the dispute is the same but the process change creates a completely different negotiation environment — one that allows the parties to re-engage differently.

. . . .

There are several key elements to a robust negotiation strategy. The first is to make the shift from the traditional law school focus on rights, obligations, and legal remedies to analyzing the underlying needs and interests of the participants in the negotiation. What drives and motivates each of them? Do their needs and interests overlap with yours? Is there common ground? Are there creative outcomes or concessions you can make that meet the other party's needs and thereby achieve your negotiation goals?

[**Full Text**]

"Consider liability coverage when doing ADR"

Crewe-Nelson, Victoria, *The Lawyers Weekly*, 10 February 2017, p. 11
[Excerpt]

Lawyers who do mediation and/or arbitration work, whether full time or part time, are often specifically chosen because participants believe their legal experience will inform and guide the work. Of course, in other cases, participants may not even be aware that the mediator or arbitrator has a legal background.

Insurance considerations for lawyers acting as ADR professionals can be confusing as factors involving coverage application or exemption eligibility often turn on how lawyers hold themselves out to the public and related public expectations.

To determine whether the Law Society of Upper Canada professional indemnity program insurance (the LAWPRO policy) would respond similarly to the way it would if lawyers are sued by law firm clients for errors when providing legal services if the lawyer is sued in his or her capacity as a mediator or arbitrator, the specific role of the lawyer must be considered: what services are being provided by the lawyer?; why was the lawyer chosen to act?; and how do the parties view the lawyer?

[**Full Text**]

"The chosen alternatives"

Canadian Lawyer, May 2017, pp. 50-51
[Excerpt]

According to the lawyers at the arbitration chambers on the top 10 list who spoke to *Canadian Lawyer*, we're on the cusp of an alternative dispute resolution revolution.

"People are about to realize they have to be a lot more creative", says Allan Stitt, owner of ADR Chambers. "I don't mean inside the box but a lot more creative".

He says he's heard about chess clock arbitrations, Redfern schedules and how discovery is moving from where you just discover anything that could possibly be relevant, and while he calls these interesting developments, he still feels they are operating within the box and failing 98 per cent of the market. He says the vast majority of disputes don't justify a full-blown arbitrations process and there is an opportunity to start coming up with ways people can do arbitration in an expedited way.

"I think what's going to happen next is some lawyers are going to really try to be creative and other lawyers will have to be brought along kicking and screaming to say proportionality is going to have to become more important than due process in arbitration—and that's for me the crucial thing", Stitt says. "Once people take that step, then all bets are off. Anything goes."

[**Editor's Note:** The 'Redfern schedule' (originally devised by Alan Redfern) is a collaborative document, to which the claimant, respondent and tribunal all contribute. Different columns of the schedule are completed by the parties at various times.]

[**Full Text**]

"The pros and cons of using evaluations to enhance family law mediation"

Wolfson, Lorne, *The Lawyer's Daily*, 30 August 2017
[Excerpt]

The use of evaluations in mediation is controversial. Some mediators see mediation as a purely facilitative process in which parties are left free to make their own judgments about the merits of a case without interference from the mediator. Others see evaluation as a legitimate weapon in the mediator's arsenal. The controversy is even greater in judicial mediation. Some judges feel that it is improper for them to "prejudge" the case in a settlement conference, while others view evaluation as their most effective tool.

[Full Text]

"B.C. Court of Appeal confirms commitment to settlements in spousal support case"

Yousefi, Leena, *The Lawyer's Daily*, 13 November 2017
[Excerpt]

Out-of-court negotiation mechanisms must not prejudice a spouse's right to court-ordered relief, the British Columbia Court of Appeal ruled in the recent case of *Francis v. Francis*, 2017 BCCA 332 [(CanLII)]. Parties caught up in family law disputes should be able to take their time and freely negotiate settlements without fear of losing their legal rights in court, if court is the only avenue to take.

[Full Text]

"Can mediation-arbitration reduce clogged courts and improve access to justice"

Linton, Hilary, *The Lawyer's Daily*, 12 December 2017
[Excerpt]

Collaborative practice has grown out of disenchantment with the adversarial legal system's assumption that positional bargaining necessarily protects the interest of parents and their children. Family mediation has become the go-to solution for both the public, who are seeking to avoid having to pay [or, at least, minimize what they pay] lawyers, and the government, which wants to reduce the cost of providing family law justice.

In many jurisdictions, mediation-arbitration is increasingly seen as a pragmatic and cost-effective dispute resolution option for those seeking both the combined benefits of an interest-based negotiation premised on self-determination, and the backup security of a reliable and fair decision-making mechanism should negotiations fail.

[Full Text]

"Why do family law cases settle when they do?"

Wolfson, Lorne, *The Lawyer's Daily*, 10 July 2017
[Excerpt]

More than 99 per cent of family law cases settle without a trial. The majority settle prior to the commencement of any litigation. Even when litigation has been commenced, a settlement may occur after questioning, an interim motion or a settlement conference. Since most family law clients enter the process seeking an early settlement of the case, it is worth considering why more cases do not settle without the need for intervention of a third party in the form of a mediator or a court.

[Full Text]

"Why so many family law cases are difficult to settle"

Wolfson, Lorne, *The Lawyer's Daily*, 19 July 2017
[Excerpt]

There are a number of reasons family law cases are hard to settle. Here are some of the main impediments.

[Full Text]

"When couples choose collaboration, not litigation"

Macaulay, Ann, *The Lawyer's Daily*, 14 July 2017
[Excerpt]

After years of practising family litigation, Nicola Savin grew increasingly frustrated with its timelines, lack of problem-solving and copious amounts of paper production. "I felt that I wasn't part of the solution," she said. "I felt that I was part of the problem."

The partner at Birenbaum Steinberg Landau, Savin & Colraine LLP in Toronto added that in most family law situations, "if counsel are doing their job and you don't have a person who's impossible or mentally ill or can't make a decision, you shouldn't really need to go to court."

The high cost of litigation and a desire to avoid potentially nasty and damaging legal and emotional battles has prompted many people to choose the growing field of collaborative family law to resolve their divorces. Savin, who is president of the Ontario Collaborative Law Federation, said there are about 500 collaborative law professionals in the province.

[Full Text]

"Using the mediation solution to avoid the perils of litigation"

Iacono, Paul and Hyatt, Susan, *The Lawyer's Daily*, 18 May 2018
[Excerpt]

A civil lawsuit involving families is sad and damaging, and can quickly degenerate into a pathological experience. We have seen it happen. And disputes between family members are even more destructive because valuable and important relationships are at stake. Unfortunately, interfamilial disputes are becoming more common with aging baby boomers in the process of passing a huge amount of wealth — $750 billion — to the next generation over the next 10 years.

Family eldercare disputes begin to surface when decisions must be made about the physical and emotional care of an aging parent who can no longer look after themselves in their own home. A common scenario involves siblings, who have been appointed power of attorney for property and care, and what they want. They may not agree on the best course of action, so how do you get them on the same page?

[Full Text]

"Collaborative law chosen for family law battles"

Bruineman, Marg., *Law Times*, 19 June 2017
[Excerpt]

The confrontational scenario of two former lovers who are now feuding adversaries duking it out in a courtroom over children and assets is itself being increasingly challenged.

Alternative dispute resolution methods such as mediation and arbitration are prime for family law, which sees a high proportion of people trying to find resolution without the assistance of a lawyer.

But one of the lesser-known alternatives is the collaborative law practice, which allows parties to negotiate a suitable settlement while avoiding litigation, with the support of a team. It is now being taught in some law schools.

[Full Text]

"Collaborative practice comes into its own"

Hendry, Mallory, *Law Times*, 31 July 2017
[Excerpt]

Many family law disputes are better resolved with a team in a non-adversarial setting, and more lawyers are offering this kind of help.

As collaborative practice grows in popularity, a number of family lawyers across the country are working to launch Canada's first inter-disciplinary organization.

"Collaborative Practice Canada will be an organization of lawyers and other professionals working in collaborative practice," explains Jacinta Gallant, lawyer and mediator in Charlottetown, P.E.I.

[Full Text]

"Conflicts For Arbitrators And Mediators"

Holder, William D., *mondaq*, 10 November 2017
[Excerpt]

How far must an arbitrator go in disclosing a potential conflict of interest.

The B.C. Supreme Court answered this question in *Atlantic Industries Limited v. SNC-Lavalin Constructors (Pacific) Inc.* 2017 BCSC 1263. In the *Atlantic* case, an arbitrator advised the parties who had retained him that one of the lawyers in his firm had been engaged to act for SNC-Lavalin ("SNC") "a few months ago". The arbitrator himself had not been involved in the SNC work and the work itself was not connected to the dispute under arbitration. Both parties confirmed they were content to have the arbitrator continue with the arbitration.

[Full Text]

"ADR Primer: Ways To Settle Divorce – Cheaper, Faster, Better"

The Ross Firm, *mondaq*, 18 January 2017
[Excerpt]

Media influence tends to stick. It has amazing tenacity for leaving its mark on everyday lives. Take divorce, for instance. Way back in 1979, Dustin Hoffman and Meryl Streep duked it out in divorce court in the Academy Award winning film, *Kramer v Kramer.* Since then, divorce continues to conjure up images of bitter litigation. But the reality is that the vast majority of divorces don't go to trial. Our post this week provides a snapshot of a few out-of-court methods under the umbrella of alternative dispute resolution (ADR)**.**

[Full Text]

"Family Law: Frequently Asked Questions About Collaborative Practice"

Lloyd, Carolyn, *mondaq*, 02 February 2017
[Excerpt]

What is collaborative family law?

Collaborative family law is defined by three key principles:

1. The voluntary and complete exchange of financial information;
2. The pledge not to take the matter to court by way of a participation agreement signed by both the lawyers and the parties;
3. A commitment to mutual respect and cooperation to achieve a resolution by way of a separation agreement or other domestic contract.

[Full Text]

"Marriage Or Cohabitation Agreements – When They Might Be A Wise Idea"

McMillan, Jenn, The Ross Firm, *mondaq*, 11 November 2016
[Excerpt]

Go back even a quarter century. That's when marriage agreements (aka "prenups") were typically perceived as exotic, complex legal documents used only by the rich and famous. Nowadays, they're not. More and more prudent couples are discovering the benefits of these legally-binding family law instruments. Same goes for common-law couples, especially in Ontario where cohabiting spouses enjoy fewer legal protections than their married counterparts in key areas such as property division.

With about half of all Canadian marriages ending in divorce, our post this week looks at three possible scenarios in which a marriage or cohabitation agreement could prove to be a wise and foresighted investment.

[**Full Text**]

"Effective Use Of Mediation-Arbitration"

Wolfson, Lorne, *mondaq*, 06 December 2016
[Excerpt]

Over the past 15 years, mediation-arbitration (or "med-arb") has grown into a popular method of resolving family law disputes. As its name suggests, med-arb combines the most effective features of both mediation and arbitration. Why has med-arb become so popular? When does it work and when it does not? What are the ethical and practical issues that must be considered?

[**Full Text**]

Swedberg v. Swedberg

2017 SKQB 314 (CanLII), G.V. Goebel J.
[Headnote (Carswell)]

[Facts:] Parties separated in 2009 after nine-year marriage — Parties were parents of 11-year-old child — Wife commenced petition in 2011 seeking divorce, custody, child support and equal division of family property — In 2013, wife sent husband detailed interspousal draft agreement containing proposal for settlement — Negotiations continued and parties agreed on child support and parenting — Husband proposed equalization payment of $120,000, which wife agreed to accept if made by RRSP rollover, grossed up to $133,333, with no restrictions on use of funds — Husband responded that payment could be made in that way, and wife prepared draft agreement — Counsel for husband withdrew before agreement was finalized — Wife brought application for final judgment in terms of settlement.

Held: Application granted — Correspondence between parties led to conclusion there was consensus ad idem — Fact that wife was willing to engage in further negotiations to resolve implementation problems did not mean agreement was not concluded — There was no suggestion agreement was conditional upon formal execution of final agreement — Lawyers had apparent authority to bind clients — Husband failed to adduce evidence that former counsel was not so authorized, exceeded authority, failed to comply with instructions or misunderstood instructions — Settlement was clear and encompassed all material terms.

[**Full Text**]

"Enforceability of Agreement Made During 'Without Prejudice' Negotiations – The Court's Overriding Discretion to Set Aside Parenting Agreement"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2016-31, 08 August 2016

Author summarizes and opines reference *H.(S.) v. M.(A.)*, 2016 CarswellNfld 186 (N.L.T.D. (Family)), Richard D. LeBlanc J.

[**Full Text**]

"Contracting Out of Pension Division Under the Canada Pension Plan"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2016-37, 19 September 2016

Author summarizes and opines reference *Spencer v. Spencer*, 2016 CarswellNfld 280 (N.L.T.D.), Brian F. Furey J.

[**Full Text**]

"Settlement or No Settlement: That Is the Question"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2017-38, 25 September 2017

Author summarizes and opines reference *Bate v. Smith*, 2017 BCSC 1261, Greyell J.

[**Full Text**]

3.4 Relationships with Clients—Personal

"Tribunal urges … reconsider[ation of] advice on solicitors entering sexual relationships with clients"

Rose, Neil, *Legal Futures*, 04 September 2017
[Excerpt]

The Solicitors Regulation Authority (SRA) should reconsider the advice it gives to solicitors who enter into sexual relationships with clients, a tribunal has said as it fined one £8,500 [CDN $14,777.54] for the conflict of interest such a relationship caused.

[**Full Text**]

"Solicitor misled court because judgement was 'affected by personal relationship with client' "

Rose, Neil, *Legal Futures*, 31 August 2017
[Excerpt]

A solicitor whose judgement was affected by the fact he was in a personal relationship with his client has been fined by the Solicitors Disciplinary Tribunal (SDT) for misleading a court.

The SDT warned that such relationships are "potentially fraught with difficulties, even if entered into with a good understanding of those difficulties".

[**Full Text**]

3.5 Relationships with Clients—Special Cases

"Retaining wills and estate planning documents: Welcome to my nightmare"

Wahbi, Mary, *The Lawyer's Daily*, 14 November 2017
[Excerpt]

Like most of my estate planning colleagues, I retain the originals of my clients' wills (encompassing wills and other estate planning documents, such as powers of attorney) as a matter of course in my "vault." In addition to wills I've prepared, I've also inherited those prepared by my retired or deceased partners.

This practice may have started when will drafting was a "loss leader" — with lawyers charging nominal fees for the will in the hope of getting the more lucrative estate administration work. Given the degree of technical skill [currently] required and exposure to liability in drafting wills, that approach has fallen by the wayside and retention is generally provided as a courtesy to clients.

Retention by the lawyer ensures the safekeeping of these important documents against destruction, loss or other potential disasters, such as handwritten changes by clients on their original documents, but it also imposes onerous obligations on the lawyer. Section 3.5-2 of the *Rules of Professional Conduct* [Ontario] requires the lawyer to "care for the client's property as a careful and prudent owner would when dealing with like property."

[Full Text]

"10 ways to deal with difficult clients"

Cheung, Kevin, *Law Times*, 10 October 2016
[Excerpt]

The Pareto principle states that 80 per cent of results are derived from 20 per cent of input. This 80/20 rule can describe difficult clients: 80 per cent of your grief will come from 20 per cent of your clients.

Knowing how to handle that 20 per cent is imperative to a healthy practice.

[Full Text]

"When your client sees red"

Luu, Molly, *Law Times*, 08 August 2017
[Excerpt]

It's Sunday night and the kids are finally in bed. You are enjoying the precious last moments of your weekend. As soon as you put your feet up, your (silenced) mobile's indicator light taunts you. Resistance is futile; you check your messages.

Margaret, the CEO of a medium-sized company, has emailed twice and left two messages. "It's urgent," she says. You detect a hint of anger in her voice.

You arrive at the office Monday morning struggling with the weight of a cup of coffee the size of your head. You call Margaret, and she explains that her CFO (let's call him Judas), who happens to be her close friend, resigned from his job and, contrary to his non-compete, opened a competing business within her business' local territory. Worse yet, Judas poached one of Margaret's superstar sales managers, along with her client list. Margaret estimates that if half of her clients leave, her damages will be approximately $400,000. Margaret is hurt, somewhat worried about her company's future business prospects, but, most of all, blind with rage. She wants justice; she wants revenge; she wants to sue — NOW!

As a litigator, you quickly learn that hell hath no fury like a woman scorned … or a man double-crossed, or a general contractor with an unwarranted construction lien on the property, or, well — you get the idea. When people feel wronged, they get angry. Most of the time, they get very angry. In these initial moments of rage, clients often say that they do not care what it costs; instead, they say, "It is about the principle."

"Signing Documents As A Power Of Attorney"

Hamilton, Mary and Girou, Aubrie, *mondaq*, 09 January 2018
[Excerpt]

If you are appointed as an attorney under a power of attorney instrument, any documents you sign in your capacity as an attorney should be signed with the name of the adult who gave the power of attorney and your name. We typically recommend the following procedure:

1. First, sign the name of the adult who appointed you;
2. Second, write "by" and then sign your own name; and
3. Third, add the following qualification, "attorney-in-fact" after your signature.

[**Full Text**]

"The high-conflict separation: Managing client expectations"

Williams, Cheryl Suann, *The Lawyer's Daily*, 20 February 2018

[**Full Text**]

"Diagnosing high-conflict spouses in separation and divorce"

Williams, Cheryl Suann, *The Lawyer's Daily*, 28 February 2018

[**Full Text**]

"Techniques for handling high-conflict clients in separation and divorce"

Williams, Cheryl Suann, The Lawyer's Daily, 20 March 2018

[**Full Text**]

"What does a high-conflict separation and divorce look like?"

Williams. Cherly Suann, *The Lawyer's Daily*, 12 April 2018

[Full Text]

"How high-conflict separation leads to higher fees and delays in settlement"

Williams, Cheryl Suann, *The Lawyer's Daily*, 30 April 2018

[Full Text]

3.6 Relationships with Third Parties

"Lawyers get new training regimen"

Moulton, Donalee, *The Lawyers Weekly*, 19 August 2016, p. 4
[Excerpt]

Lawyers in Nova Scotia will face a learning curve this year. Under a new rule put in place by the provincial barristers' society, all lawyers must prepare a continuing professional development (CPD) plan that spells out their training for the next 12 months.

The new requirement was implemented following a recent review the Nova Scotia Barristers' Society (NSBS) conducted into its continuing professional development program, which required lawyers to complete 12 hours of training or other educational endeavours. What was missing was relevancy, said Jacqueline Mullenger, the law society's director of education and credentials in Halifax. "Because people were scrambling to get their hours they would take whatever they could at the end [of the year]."

The NSBS wanted lawyers to spend less time tallying hours and more time focusing on learning that would improve their lawyering. "We want lawyers to think about this," said Mullenger. "We wanted them to stop and think 'What do I need this year?' "

Such educational forethought, she added, should enhance practice. "You'll get a much better experience and do things that are better for you and your clients. It's not a knee-jerk reaction."

[Full Text]

"Preparation essential when using an expert witness"

Stevens, Stacey; Brown, Craig, *The Lawyers Weekly*, 03 February 2017, p. 12
[Excerpt]

Trial preparation is a daunting task. Particularly so, if you accept conventional wisdom that there is a direct and proportional relationship between the amount of work put into preparation and the probability of success at trial. Briefing lay witnesses, particularly the parties, is very time consuming. More challenging from an advocacy point of view is the preparation and briefing of expert witnesses. It is important to keep in mind that from the advocate's point of view the purpose of calling an expert is to persuade the court of the merit of the expert's opinion on relevant issues in the case. There is significant tension between that purpose and the expert's obligation to the court to be objective. The resolution of this tension is the high art of advocacy.

[**Full Text**]

"SCC to hear novel case on lawyers' liability for client referrals that go bad"

Schmitz, Cristin, The Lawyer's Daily, 22 October 2017
[Excerpt]

The Supreme Court of Canada has announced it will address for the first time the legal jeopardy and financial liability faced by lawyers when their referrals of clients to other service providers turn sour.

On Oct. 12, the top court granted leave to appeal in the Quebec case of *Salomon v. Matte-Thompson* — a case of importance to the bar across Canada because it raises issues of lawyers' standard of care in advising clients, and the nature and scope of their civil liability, when they make referrals to others, such as financial advisers, estate administrators, or other lawyers. No matter how the top court ultimately views the contested facts in the *Salomon* litigation, the case is a cautionary tale for legions of lawyers who have referred clients to service providers. The court is expected to set out some guidelines for such referrals.

[Editor's Note: Supreme Court of Canada (File No. 37537), following oral argument on 19 March 2018, reserved Judgment.]

[Full Text]

"The problem with guardians"

Mayeski, Alexandra, *The Lawyers Weekly*, 02 December 2016, p. 11, 12
[Excerpt]

Disputes about the appointment of a guardian of property and/or personal care for incapable individuals are on the rise. With an aging population, these types of disputes made under the [Ontario] *Substitute Decisions Act* (SDA) have become much more prevalent, but they are by no means limited to the elderly. This type of litigation is often very emotionally charged with litigants losing sight of the best interests of the incapable person. Sadly, cases often involve family members battling for power and control. Some may argue it is the "new" family law.

It is often the case that guardianship disputes arise in the context where the incapable person has suffered or is at risk of suffering harm as a result of an attorney or guardian's misconduct or neglect. The overarching factor that courts must consider in appointing a guardian, or having one replaced or removed, is what is in the best interest of the incapable person.

Justice David Brown in *Abrams v. Abrams* 2010 ONSC 1254 [(CanLII)], expressed the court's intolerance of families fighting in the context of guardianship proceedings … .

[**Full Text**]

"What Chuvalo decision says about litigation guardianships in family law"

Webb, Graham and Srebrolow, Miera, *The Lawyer's Daily*, 01 February 2018
[Excerpt]

The use of a litigation guardianship in family law proceedings has recently come into the limelight through recent news about Canadian boxing legend George Chuvalo, now 80 years of age [2018 ONSC 311 (CanLII)].

Although Chuvalo is famous for never having been knocked down in any of his 93 fights, he has significant cognitive impairments stemming from years of enduring blows to the head. While Chuvalo lives in an Ontario long-term care home separately from his wife, an application for divorce was initiated by his adult son and daughter as his litigation guardians. They acted under a continuing power of attorney, the validity of which is now challenged by his wife, who also seeks his court-appointed guardianship in a separate proceeding.

[Full Text]

"When to use a financial divorce specialist"

van Rhijn, Judy, *Law Times*, 20 June 2016
[Excerpt]

The increase in grey divorces is driving the growth of financial forecasting as a tool in property arrangements. While family lawyers can divide a couple's assets equitably at a set point in time, specialized financial professionals can make projections that show how that division translates into long-term income. Their use is already well accepted in collaborative circles, but practitioners hope they will become an integral part of mediation and general practice as well.

[Full Text]

"Disclosure Of Expert Retainer Letters"

Bromiley, James D., *mondaq*, 05 May 2017
[Excerpt]

The issue of whether a party must produce a lawyer's 'instructional letter' when retaining an expert was considered by the Ontario Superior Court in *Nikolakakos v. Hoque*, 2015 ONSC 4738 [(CanLII)]. This case involved an action for damages arising from personal injuries sustained in a motor vehicle accident in August 2012. Following examinations for discovery held in August 2014, the Defendants requested that the Plaintiff attend a defence medical examination with an orthopaedic surgeon. The Plaintiff agreed to attend the medical examination *on the condition* that the Defendant's lawyer provide a copy of the letter of instruction to the orthopaedic surgeon *in advance of the assessment*. The Defendant's lawyer refused and a motion was brought to determine whether the Defendants had to provide the Plaintiff with a copy of the letter of instruction prior to and as a condition of the Plaintiff agreeing to attend the proposed medical examination.

[Full Text]

"Expert Witness Immunity: No, You Cannot Sue Your Own Expert For Negligence"

Horst, Roger, *mondaq*, 03 January 2017
[Excerpt]

Every day, experts prepare reports for lawyers so that they can be qualified to give expert opinion evidence at trial. Almost all these experts are insured under errors and omissions policies. Many of these experts are indirectly retained by insurance companies. Most of the experts never give evidence at trial. But their reports are relied on to settle cases. What if the expert makes a mistake or their client thinks they made a mistake? Can the expert be sued by their client for the error or is the expert and their report protected by witness immunity?

That was the question posed in *Paul v. Sasso et al.*, 2016 ONSC 7488 [(CanLII)]. In this precedent setting case, Justice Dunphy held, on a motion for summary judgment, that a party cannot sue their own expert with respect to their report or their trial evidence.

[**Full Text**]

"Views of the Child / Emails Rule the Day"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2017-42, 23 October 2017

Author summarizes and opines reference *Clark v. Moxley*, 2017 ONSC 4971 (CanLII), L. Sheard J.

[**Full Text**]

"When is communication between a client's accountant and lawyer privileged?"

Bower, Scott H.D. and Kruger, Russell J., *Bennett Jones [Law Firm]*, 11 January 2017

Communications between lawyers and their clients' accountants or other non-legal professionals are not in themselves privileged but can be where the communication is in "furtherance of a function essential to the solicitor-client relationship or the continuum of legal advice provided by the solicitor," the Saskatchewan Court of Appeal recently held in *Redhead Equipment v Canada (Attorney General)*, 2016 SKCA 115.

[**Full Text**]

"Solicitor reported after personal relationship with witness raises conflict concern"

Rose, Neil, *Legal Futures*, 07 February 2017
[Excerpt]

A solicitor acting for a father in a [child] care case has been reported to the Solicitors Regulation Authority after it emerged she was in a personal relationship with a witness.

Her Honour Judge Cameron in Medway Family Court said it was the third occasion such an instance had occurred with the unnamed solicitor.

[**Full Text**]

3.7 Relationships with Other Lawyers

"Adaptability essential for co-counsel success[:] Stability comes from knowing role, place"

Chernos, Saul, *The Lawyers Weekly*, 25 November 2016, pp. 21-22, at p. 21
[Excerpt]

Co-counsel arrangements are common in many areas of practice, from criminal trials and litigation, where there's significant court work, to complicated paperladen negotiations [such as in Family Law].

But can too many hands on deck sink the ship? Insiders who have worked collaboratively with other lawyers recommend respecting boundaries, working as a team and striving for harmony all while focusing on the needs of the client.

[**Full Text**]

"The lawyer vs. the law firm"

Furlong, Jordan, *CBA/ABC National*, Fall 2016, pp. 42-43, at p. 42
[Excerpt]

"Clients hire lawyers, not firms," is the oldest line in the business development handbook. Law has long been a personal services business with a strong relationship component: clients come to rely not only on a lawyer's expertise, but also on his or her judgment and advice. By contrast, the law firm is equally far away from the client, normally present as just a name on a letterhead or an invoice. Most of a law firm's clients deal primarily, if not exclusively, with one lawyer or small group of lawyers and staff.

[**Full Text**]

"Tax treatments of sole proprietorships and associations"

Rotfleisch, David. *The Lawyer's Daily*, 20 September 2017
[Excerpt]

The choice of business structure for any venture affects how the owners are taxed. This is as true for lawyers as for any other entrepreneur or professional; different law firm structures have different tax treatments. Furthermore, if a lawyer does not like the tax treatment of their current structure, a reorganization on a tax-free basis is usually possible.

This article outlines the taxation of different types of law firm structures. Part one of this three-part series will address the traditional sole proprietorship and association. Part two will look at general partnerships arrangements and limited liability partnerships. In part three, I will discuss professional corporations and reorganizations to change operating structures.

[**Editor's Note:** See next two entries for parts two and three of this article.]

[Full Text]

"Tax treatments of partnerships and LLPs"

Rotfleisch, David, *The Lawyer's Daily*, 28 September 2017
[Excerpt]

This is part two of a three-part series about the tax treatment of various forms of operation for law firms. Last week's article was on sole proprietorships and associations.

The other historical, and previously only method of operation of a law firm with multiple equity owners, is a general partnership. Partnerships are creatures of the common law, although the rules have now been codified in statute, and exist whenever persons carry out business in common with a view to profit. While a partnership is not a separate person in law, unlike a corporation, it does have an existence separate and apart from the individual partners. The accounting and taxation are more complex.

[Full Text]

"Tax treatments of professional corporations: How to change"

Rotfleisch, David, *The Lawyer's Daily*, 11 October 2017
[Excerpt]

This is the last part of a three-article series reviewing the tax implications of different kinds of law firm structures.

Professional corporations allow lawyers to enjoy the tax benefits of a small business corporation, although not the limited liability protection. The professional corporation is the most tax efficient structure available for a sole proprietorship or small partnership.

[Full Text]

"How to say goodbye to your law firm"

Namkung, David, *The Lawyer's Daily*, 11 January 2018
[Excerpt]

In 2010, Steven Slater, a JetBlue flight attendant, made the news for his outrageous resignation. As his plane was taxiing, he reportedly had an altercation with a passenger, which was the final straw for an already disgruntled Slater. This incident prompted him to spew a string of

profanities into the plane's PA system, declare "... And that's it, I'm done," before grabbing two beers and triumphantly exiting by way of the plane's emergency inflatable slide.

His story went viral as the public celebrated his cathartic departure. His resignation was epic, but it had consequences — Slater was later arrested and charged for a number of offences.

Depending on the circumstances, giving notice to an employer can often be multifaceted, anxiety-provoking and sensitive for both parties, so it is key to mindfully prepare for this discussion. As the one resigning, the way you approach this conversation can be pivotal for your [future] career as how you say goodbye is often the most powerful and lasting impression you leave. To the extent possible, it is ideal to maintain bridges (and avoid criminal charges!) as past colleagues may refer you work down the road or, who knows, you may even return to the employer if circumstances change. Accordingly, here are some tips we suggest to departing lawyers in advance of resigning.

[Full Text]

"Court of Appeal ruling highlights perils of firms 'practicing in association' "

Jerome, Amanda, *The Lawyer's Daily*, 20 April 2018
[Excerpt]

The Ontario Court of Appeal recently wrestled with the issue of liability in a defamation claim that arose between two law firms. The complicating factor was that the lawyer alleged to have made the defamatory comments worked in "association" with one of the firms bringing into question the firm's liability in the action.

In *Wallbridge v. Brunning*, 2018 ONCA 363 [(CanLII)], the court heard that Wallbridge, Wallbridge, a partnership of lawyers with offices throughout northern Ontario, issued a statement of claim alleging that a lawyer named Fay Brunning had made defamatory comments regarding its representation of former residential school students [and, in addition to Brunning, named Williams-Litigation Lawyers as a defendant].

Brunning, whose practice includes representing residential school claimants, works "in association" with Williams-Litigation Lawyers (Williams), a partnership of lawyers in Ottawa.

According to court documents, Brunning's practice is separate from Williams, but she pays the firm a monthly rental fee to use its office space. Therefore, Brunning has the same contact information and front desk receptionist as the Williams lawyers. Williams also authorized Brunning to use its letterhead [which lists Brunning as "practicing, in association, not in partnership"].

[Full Text]

"When is a Lawyer a Partner or Employee"

Supreme Advocacy LLP, 11 October 2017
[Excerpt]

The Appellant, Julie Daniel, practises law in the City of Windsor in the specialty of commercial and financing transactions. The Appellant joins the Respondent law firm as an associate in March, 2000. In 2006, the Appellant is elevated from the status of an associate lawyer and accepted as a "Salaried International Principal". Following dissolution of the law firm, the Appellant is not offered a comparable position or remuneration elsewhere, nor is she offered a severance package.

The Appellant claims she was an employee and that, under the circumstances, termination of her employment amounts to a constructive dismissal, without notice. The Respondent firm's position is that, when the plaintiff became a "Salaried International Principal", she became a partner and as a partner cannot maintain an action against the firm. (For more background information see *Daniel v Miller, Canfield, Paddock and Stone LLP*, 2016 ONSC 5712 (CanLII).).

The Trial Judge determines the Appellant is a partner of the firm. On appeal, the Court of Appeal confirms the decision, finding no palpable and overriding error [2017 ONCA 697 (CanLII)].

3.8 Relationships with Courts

Hardwick v. County of Orange

(2017), U.S.C.A. [Ninth Cir.]
[Excerpt]

[**Editor's Note:** Legal counsel for Respondent County of Orange, California, attempted (unsuccessfully, in the result) to argue that its employees (social workers) enjoyed a qualified immunity from the legal implications of committing perjury, falsifying documents, and concealing evidence. From the transcript of oral argument before United States Court of Appeal [Ninth Circuit]:]

> **Trott J**: How in the world could a person in the shoes of your clients possibly believe that it was appropriate to use perjury and false evidence in order to

impair somebody's liberty interest in the care, custody and control of that person's children? How could they possibly not be on notice that you can't do this?

Lin: I understand.

Trott: How could that possibly be?

Lin: I understand the argument that it seems to be common sense in our ethical, moral . . .

Trott: It's more than common sense. It's statutes that prohibit perjury and submission of false evidence in court cases.

Lin: State statutes.

Trott: And you're telling us that these officials [weren't] on notice that you can't commit perjury and put in false evidence?

Lin: I understand broadly the principle that common sense tells us that lying is wrong and lying to….

Trott: Yeah, but it's more than common sense. We're using statutes against this kind of behavior.

Lin: I, uh, I don't. I was not presented [sic]. I have not been seen [sic] any federal law or case law or law that tells me that in this situation that we were faced in that, which is what we have to look at…. [in advising County employees that they enjoyed a qualified immunity from engaging in perjury, falsification of documents, and concealment of evidence].

"Access to justice? Expert says there should be an app for that"

Schmitz, Cristin, *The Lawyers Weekly*, 21 October 2016, pp. 1, 3
[Excerpt]

Litigants are more aptly seen as customers than as passive participants in the justice system, said Ontario Superior Court Justice Frances Kiteley [speaking at a conference on Civil Justice economics 07 October 2016, organized by the Canadian Institute for the Administration of Justice]. "If we treat the people who come to court like customers, we have to respond to their circumstances, their way of functioning in society, and provide access to justice in a way that responds to those needs, meaning we need to use technology, and [courts and judges] need to get behind that so it doesn't get foisted on us as an unwilling organization," she advised. "We need to

partner with the other stakeholders, including Ministry [of the Attorney General] and courts administration people to make that happen willingly," she told *The Lawyers Weekly*.

[**Full Text**]

"Appeal court orders retrial due to Crown actions"

Benedict, Michael, *The Lawyers Weekly*, 23 September 2016, p. 5
[Excerpt]

A Crown prosecutor's trial behaviour has resulted in a retrial order. The Ontario Court of Appeal in *R. v. Dhaliwal* 2016 ONCA 652 [(CanLII)], found two separate examples of Crown trial misconduct that was "sufficiently prejudicial that it deprived the appellant of a fair trial."

. . . .

Under cross-examination, the Crown repeatedly pressed Dhaliwal to explain how he thought the guns came into the possession of family members. At one point, the Crown asked, "What's your theory now? That [Bakshish] had this stuff planted…" Although defence counsel objected to the question, Superior Court Justice David Price allowed it.

That was a critical mistake, according to the appeal court. "Asking the appellant, in front of the jury, to provide his 'theory' of the case or to explain the evidence against him undermined the presumption of innocence," Strathy [J.A.] wrote.

. . . .

Later, during a recess with the jury absent, before resuming cross-examination of Bakshish, who was also absent, the Crown placed a phone call in the courtroom to India on a loudspeaker to the man allegedly involved in the affair. Relying on that conversation, clearly audible to the defence and others in the courtroom, the Crown challenged Bakshish's earlier testimony.

In his Aug. 31 [2016] ruling, Strathy [J.A.] found the Crown's behaviour in this regard "entirely improper" and "short of the standard expected of the Crown." He labelled the phone call a "deliberate ploy to influence the evidence of Bakshish, an important defence witness who was in the middle of cross-examination, through communications that were not part of the court record."

[**Full Text**]

"High-profile lawyer avoids contempt finding"

Robinson, Alex, *Law Times*, 17 July 2017
[Excerpt]

A well-known criminal defence lawyer has avoided a contempt finding after he skipped out on a sentencing hearing to attend a television interview.

[Full Text]

"Toronto lawyer alleges judge was biased"

Robinson, Alex, *Law Times*, 09 January 2017
[Excerpt]

An Ontario judge has refused to recuse herself from overseeing a dispute between two Toronto lawyers after one of them claimed the judge was biased and alleged she was [before judicial appointment] linked to surveillance of a man involved in a personal injury action.

[Full Text]

" 'Nasty' Won't Be Tolerated"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2016-24, 20 June 2016

Author summarizes and opines reference *S.(J.) v. M.(M.)*, 2016 CarswellOnt 4928 (Ont. S.C.J.), A. Pazaratz J.

[**Full Text**]

"Is it Ever Appropriate to Involve a child in Family Law Litigation Being Conducted by the Parents"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2016-25, 27 June 2016

Author summarizes and opines reference *Drouin v. Jones*, 2016 SKQB 88 (CanLII), Megaw J.

[**Full Text**]

"Application to Appoint Independent Counsel for 11-year-old Child – Transgender Issues"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2016-29, 25 July 2016

Author summarizes and opines reference *K.(N.) v. H.(A.)*, 2016 CarswellBC 1141 (B.C.S.C.), Skolrood J.

[**Full Text**]

"Qualification of Experts"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2017-3, 23 January 2017

Author summarizes and opines reference *Rosati v. Reggimenti*, 2016 ONSC 2882 (CanLII), Turnbull J.

[**Full Text**]

"Admissibility of Voice Recordings and Transcripts"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2017-24, 19 June 2017

Author summaries and opines reference *F.(A.) v. A. (B.J.),* 2017 CarswellOnt 3126 (Ont. C.J.), Melanie Sager J.

[**Full Text**]

"Can a Daughter of a Party Attend on Examinations (Questioning?)"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2017-40, 09 October 2017

Author summarizes and opines reference *Rikhye v. Rikhye*, 2017 ONSC 4722, Bloom J.

[**Full Text**]

"Should children, ages 15 and 12, be permitted to attend court in a protection proceeding and should they be entitled to receive a copy of the assessment report prepared for the court?"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2017-41, 16 October 2017

Author summarizes and opines reference *Jewish Family and Child Service of Greater Toronto v. L.R.*, 2017 ONCJ 472 (CanLII), Curtis J.

[**Full Text**]

"Admissibility of Surreptitious Records"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2017-44, 06 November 2017

Author summarizes and opines reference *St. Croix v. St. Croix*, 2017 ABQB 490 (CanLII), K.P. Feehan J.

[**Full Text**]

"Alienation – Allegations of Sexual Abuse – Inadmissible Hearsay"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2018-9, 05 March 2018

Author summarizes and opines reference *G(JD) v. G (SL)*, 2017 MBCA 117 (CanLII), B.M. Hamilton, A.D. MacInnes, and C.J. Mainella, JJ.A.

[**Full Text**]

"Evidence in Chief by Affidavit – Children's Evidence – Hearsay – How to Obtain Wishes and Preferences of Children"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2018-10, 12 March 2018

Author summarizes and opines reference *Children's Aid Society of Algoma (Elliot Lake) v. P.C.-F.*, 2017 CarswellOnt 21126 (Ont. C.J.), Kukurin J.

[**Full Text**]

United States Of America v. Bishop

Order: Case No. 8:17-cr-266-T-23JSS, 18 August 2017
[Transcript]

Definitely recurrent, sometimes consequential, and occasionally spectacular, the solar eclipse understandably occupies a provocative and luminous place in history and in art. For example, Herodotus reports that a solar eclipse during the war between the Medes and the Lydians caused the combatants, who interpreted the eclipse as a divine omen, to suspend hostilities and to negotiate peace. In Borodin's magnificent opera, an eclipse portends disaster for Prince Igor's military campaign against the Polovtsians. In a popular 1970s song, the splendid Carly Simon introduced the attendance of a former suitor (reportedly the actor Warren Beatty) at a solar eclipse as probative evidence of his putatively insufferable vanity:

Well I hear you went to Saratoga
And your horse, naturally, won
Then you flew your Learjet up to Nova Scotia
To see the total eclipse of the sun
Well, you're where you should be all the time

And when you're not, you're with some underworld spy
Or the wife of a close friend, Wife of a close friend, and
You're so vain
You probably think this song is about you

On a higher plane, Wordsworth wrote about an eclipse in 1820:

High on her speculative tower
Stood Science waiting for the hour
When Sol was destined to endure
That darkening of his radiant face

The solar eclipse is no longer mysterious, supernatural, foreboding, or ominous (or even "total"; owing to the solar corona, the darkness of a "total" eclipse is only partial). An eclipse is just another astral event, precisely predictable since the day the Babylonians discovered the governing formula (although some contend for an earlier discovery).

On this occasion, an Assistant United States Attorney boldly moves (where no AUSA has moved before) to postpone a trial because an agent of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, has pre-paid the cost of visiting the zone of "totality" of a solar eclipse that will occur on August 21 (about the eclipse, the motion oddly uses the phrase "scheduled to occur," as if someone arbitrarily set the eclipse, as an impresario sets a performer, to appear at a chosen time and place, subject always to some unstated exigency). [According to the motion of the United States, a total solar eclipse last occurred in June 1918. (Doc. 31 at 2) But total eclipses occur far more frequently than the United States claims; the National Aeronautics and Space Administration identifies six opportunities in the last decade to view a total eclipse. Eclipses and Transits, Nat'l Aeronautics & Space Admin., available at http://www.nasa.gov/eclipse.] Cruel fate has dictated that the August 21 eclipse will occur during the trial of an action in which the agent is a principal participant on behalf of the United States.

In any particular month, about four-hundred actions pend before each active district judge in the Middle District of Florida; each action typically involves several lawyers, at least two parties, and an array of witnesses. A trial prompts the clerk to summon scores of potential jurors. The present motion proposes to subordinate the time and resources of the court, of the opposing counsel, of the witnesses, and of the jurors to one person's aspiration to view a "total" solar eclipse for no more than two minutes and forty-two seconds. To state the issue distinctly is to resolve the issue decisively.

When an indispensable participant, knowing that a trial is imminent, pre-pays for some personal indulgence, that participant, in effect, lays in a bet. This time, unlike Carly Simon's former suitor, whose "horse, naturally, won," this bettor's horse has - naturally - lost. The motion (Doc. 31) is DENIED.

ORDERED in Tampa, Florida, on August 18, 2017.

"Court of Appeal: no room for 'grandiloquent, rhetorical' advocacy in modern trials"

Hilborne, Nick, *Legal Futures*, 08 July 2016
[Excerpt]

The "grandiloquent, rhetorical and at times almost facetious" advocacy style of a criminal defence barrister has no place in modern trials, the Court of Appeal has said.

. . . .

Delivering judgment in *R v Foxley* [2016] EWCA Crim 798, Davis LJ said Mr Leathley's closing speech [as Crown Counsel] at the trial, described by counsel for Ms Foxley as "put in a grossly hyperbolical as well as in an unfocused and unstructured way", led to a complaint from a juror.

[**Full Text**]

"Vexatious ex-solicitor's 'hyperbole' leaves High Court judge speechless"

Bindman, Dan, *Legal Futures*, 20 July 2017
[Excerpt]

A High Court judge has extended a general civil restraint order (GCRO) against a struck-off solicitor for a further two years after her "hyperbolic" claims rendered him almost speechless.

Extending the GCRO against Anal Sheikh – first made in 2009 and renewed every two years since – for a further two years, the maximum possible, Mr Justice Turner explained that her application for an adjournment included the statement that the case involved "the most important question ever asked in the history of civilisation since the birth of time".

This meant, Ms Sheikh said, "that all books on contract law will have to be withdrawn and rewritten and changes would have to immediately be implemented to school and university syllabuses. There should probably [be] some sort of government notice published in the UK and throughout the world".

Turner J said simply: "Comment would be superfluous."

[**Full Text**]

"High Court hears how squabbling barristers turned family hearing into 'shouting match'"

Hilborne, Nick, *Legal Futures*, 27 March 2018
[Excerpt]

There is a "concerning tendency on the part of the advocates simply to interrupt each other in an effort to advance their competing submissions", a High Court judge has said as he reviewed a hearing that turned into a "shouting match".

Mr Justice MacDonald said discipline at the hearing – the latest in a decade-long dispute between a father and mother over their now 13-year-old daughter – appeared "to have broken down entirely" at one point.

[**Full Text**]

"Munby sets aside divorce petitions because of fraud by disbarred barrister"

Rose, Neil, *Legal Futures*, 09 November 2017
[Excerpt]

The president of the Family Division has set aside 21 fraudulent divorce petitions produced by a disbarred barrister.

Sir James Munby found that, in each case, the underlying proceedings were "tainted by deception in relation to the address of either the petitioner or the respondent, and the decrees, where decrees have been granted, were obtained by deception".

[**Full Text**]

"Judge orders husband in bitter divorce case to stop emailing wife's solicitor"

Legal Futures, 14 March 2018
[Excerpt]

A High Court judge has issued a restraining order to stop a man in a long-running divorce case from contacting his former wife's solicitor on her private email address.

Mr Justice Mostyn said "it is completely unacceptable that this form of harassment should take place".

[**Full Text**]

"Barrister shatters 'taboo' by discussing emotional impact of rude judges"

Hilborne, Nick, *Legal Futures*, 12 October 2017
[Excerpt]

A senior barrister has explained why she took to Twitter to shatter a longstanding "taboo" by discussing the emotional impact on advocates of "rude" or "abrasive" judges.

Mary Aspinall-Miles, an executive committee member of the Criminal Bar Association (CBA), told *Legal Futures*: "It was time for someone to put their head over the parapet and talk about the things that upset us and acknowledge that these things hurt."

[**Full Text**]

"Judge throws McKenzie Friend out of court over 'tirade' against him and solicitors"

Rose, Neil, *Legal Futures*, 21 September 2017
[Excerpt]

A district judge has explained how he had to throw a McKenzie Friend out of his court after she disrupted proceedings and threatened complaints against him and the other side's solicitors.

Mary Bennett was aiding the husband in the final hearing of a wife's application for financial remedies in a divorce.

District Judge Nicol in Basingstoke recorded: "On the second day of the hearing, at the lunchtime adjournment, there was an outburst from her, during which she would not leave the court and threatened complaints against me, the solicitor for the wife and criminal sanctions against the wife.

"In consequence of her outburst, which was the last in a series of interruptions, I decided that her conduct disrupted the proceedings and I excluded her from the courtroom for the rest of the hearing."

[Editor's Note: *McKenzie v. McKenzie* was a 1974 divorce case in England. As a result of proceedings in the case, Levine McKenzie was judicially entitled to have a 'friend', not licenced to practise in England, sit with him in court, prompt him, take notes for him, and suggest questions he could ask his spouse. (In *Mills v McCartney*, Heather Mills dismissed her legal team and was assisted by three McKenzie friends, including her sister.)]

[**Full Text**]

"Judge warns of 'blurred lines' between lawyers and McKenzie Friends"

Rose, Neil, *Legal Futures*, 29 June 2017
[Excerpt]

The growth of 'professional' McKenzie Friends risks the boundaries between regulated and non-regulated representatives "becoming blurred", a circuit judge has warned, as she upheld a decision to exclude from a family case a man chosen by one of the parties to be their McKenzie Friend.

. . . .

She also criticised Marcus Bright, the McKenzie Friend at the centre of *H (Children: exclusion of Mackenzie friend)* [2017] EWFC B31, for describing his role as 'quasi-solicitorial'.

"There is no such thing as 'almost' a solicitor. You are either a solicitor or you are not. Significantly, if you are, you are bound by your professional duties and you are externally regulated."

[**Full Text**]

"QC reprimanded for 'offensive' remarks in court about abuse victim"

Rose, Neil, *Legal Futures*, 17 May 2017
[Excerpt]

A barrister who claims to be a "master strategist and tactician" was reprimanded last week for making "offensive" comments about a child abuse victim while her mother sat in court.

Howard Godfrey QC said the 16-year-old "was not a young and innocent girl" as he represented her attacker Simon Raglan in the Court of Appeal in August 2015.

Raglan had been jailed for two years for groping the child after plying her with home-made alcohol, a ruling upheld by appeal judges.

Mr Godfrey practises from 2 Bedford Row and has a personal website – 'bestcrimebarrister.co.uk' – that says: "Master strategist and tactician, Howard Godfrey QC is renowned as one of the UK's best criminal barristers."

He was charged by the Bar Standards Board with two counts of professional misconduct after the victim's mother complained about his submissions.

[**Full Text**]

"… No abuse of process to discipline solicitor found in breach of undertaking by court"

Hilborne, Nick, *Legal Futures*, 14 March 2017
[Excerpt]

The Solicitors Regulation Authority (SRA) has rebuked and fined £2,000 [CDN $3,477.07] a solicitor already found by the High Court to be in breach of an undertaking, rejecting the argument that this was an abuse of process.

Handing him the maximum penalty it can without a referral to the Solicitors Disciplinary Tribunal, the SRA said that Edward Abenson breached an undertaking by failing to register a legal charge within seven days of completion, and later failed to report the breach.

During the court proceedings, Judge Hodge QC described Mr Abenson, founder and managing director of Liverpool firm Abensons, as "by far the worst solicitor witness I have ever seen".

[**Full Text**]

"Lawyers increasingly regulated as debt collectors"

Sauvageau, Francois, *The Lawyers Weekly*, 14 October 2016, p. 13
[Excerpt]

There is an unanswered — and perhaps unexplored — question in the Canadian debt collection industry: must lawyers [seeking to collect their accounts for professional services] abide by the applicable consumer protection and/or debt collection legislation in their respective provinces of practice, or are they governed only by the rules and obligations established by the profession's self-governing bodies? For now, the answer is not clear.

[**Full Text**]

Fontaine v. Canada (Attorney General)

2016 ONSC 5359 (CanLII), Perell J.
The Lawyers Weekly, 14 October 2016, p. 17
[Headnote]

[Facts:] Motion by Canada for an order that the Monitor's investigation expense of approximately $500,000 be assessed and that reasonable costs be paid by the Keshen law firm. Motion by Keshen for an order requiring a public statement clearing the stain of allegations of wrongdoing and for an order that Canada pay its costs of the Request of Directions on a substantial indemnity basis. Keshen had represented claimants under the Residential School Settlement Agreement. Keshen had been suspected of misappropriating some of the settlement funds paid out to claimants. Pursuant to a Request of Directions under the Settlement Agreement, a Court Monitor was appointed to conduct an investigation of what happened with the awards and fees for Independent Assessment Process (IAP) claimants that were Keshen's clients. The Monitor's investigation revealed no wrongdoing and that Keshen had been falsely accused of misappropriating the clients' awards, which had harmed Keshen. The Monitor did, however, find that Keshen assisted a few of his clients in obtaining loans from lenders on terms that included the client's promise to repay the loans from the settlement awards in contravention of the Settlement Agreement and that Keshen's practice of reporting to clients orally in lieu of in writing did not fully meet the Law Society Guidelines.

Held: Motions dismissed. No costs of the Request of Directions were ordered. It was reasonable and necessary for the Monitor to request the court to authorize the investigation based

on complaints from claimants. While Keshen was successful in disproving the most serious allegations of fraud and misappropriation against him, his conduct in not preparing written reports that meticulously accounted for the client's award and his fees exposed him to being investigated. While he did not personally profit from it, his conduct was contrary to the Settlement Agreement which was a serious matter. The Monitor made no recommendation in its report that Keshen should be responsible for the costs of the investigation. Having regard to all the circumstances, no costs were ordered with respect to the Monitor's investigation.

[**Full Text**]

Grenon v. Canada

Supreme Advocacy LLP, Issue #30, 30 June 2016
(Application for Leave to Appeal to S.C.C., File No. 36891, dismissed)

Mr. Grenon and his former spouse separated in 1998. They had two children who were minors at the time of separation. Ms. Grenon commenced family law proceedings in 1999 over the issues of custody, child support, spousal support and division of property. When matters were settled in 2001, Mr. Grenon was required to pay child support. Throughout, he was represented by counsel and incurred legal fees. In 2001, Mr. Grenon asked to adjust his 1999 tax return to allow a deduction of $11,816.61 for legal expenses. By Notice of Reassessment, this request was denied. When Mr. Grenon filed his 2000 return, he deducted $165,187.70 in legal expenses incurred in the family law proceedings. The C.R.A. denied the deduction. Mr. Grenon appealed, challenging the denial of deductions under s. 15 of the *Charter* and as a matter of statutory interpretation. Federal Court: Applicant's appeal from decision of Minister of National Revenue dismissed. Fed. C.A.: Applicant's appeal dismissed. "The application for leave to appeal...is dismissed with costs."

[**Full Text**]

"Lawyers preparing for mandatory data-breach reporting"

Bruineman, Marg., *Law Times*, 14 May 2018
[Excerpt]

Lawyers say they are ramping up in anticipation of the rollout of new mandatory data-breach reporting rules going into effect in Canada.

The focus initially was to prepare Canadian companies doing business in the European Union dealing with its residents' data in order to be compliant with the new requirements under that continent's General Data Protection Regulation … [which came] into force May 25.

Companies are required to report a personal data breach within 72 hours of becoming aware of it.

The GDPR requires that any data breaches that risk the rights and freedoms of EU residents' data be reported, whether or not the company is based in the EU.

Canada had introduced similar legislation through the *Digital Privacy Act* in 2015 [S.C. 2015, c. 32].

In March 2018, the federal cabinet issued an order-in-council indicating that Canadian mandatory data-breach disclosure rules will go into effect in November, three years after being introduced through legislation. Chantal Bernier, who leads Dentons Canada LLP's privacy and cybersecurity practice, says she has advised her clients that they could prepare for both sets of rules at the same time.

[Full Text]

Mordwald-Benevides v. Benevides

2017 ONCA 699 (CanLII), K. Feldman, E.E. Gillese, S.E. Pepall JJ.A.
[Headnote (Carswell)]

[Facts:] In contentious custody trial, trial judge appointed amicus curiae, at expense of Attorney General, on behalf of each of mother and father — Trial judge dismissed Attorney General's motion to set aside amici orders — Attorney General appealed, and appeal judge appointed same two amici to assist on appeal, who wanted more than legal aid rates — Attorney General brought motion for order setting aside appointment of two amici on appeal, having produced list of other qualified counsel who were prepared to assist at legal aid rates — Appeal judge dismissed motion, determined he needed assistance of lawyers who were already familiar with case, and ordered stay of appeal until amici and Attorney General agreed on rates, on basis that Supreme Court of Canada (SCC) case obligated Attorney General to negotiate — Attorney General appealed appeal judge's appointment of amici and stay of appeal.

Held: Appeal allowed — Stay was set aside and matter was remitted to appeal judge to consider amici proposed by Attorney General — Majority decision in SCC case made it clear that there was no obligation on Attorney General to negotiate rates with amici — Attorney General in this case was not required to negotiate further with appointed amici, having fulfilled expectation of majority in SCC case — Circumstances did not necessitate stay — Although appeal judge's preferred counsel were not available because they would not work for legal aid rates, majority

decision in SCC case held that court was not entitled to amicus of its choice where other appropriate counsel had been made available by Attorney General — Applying "truly essential" test, there was no basis for decision that two amici were essential to assist appeal judge on appeal.

[**Full Text**]

H.(A.) v. New Brunswick (Minister of Justice)

(2016), 81 R.F.L. (7th) 92 (N.B.Q.B.), Brigitte M. Robichaud J.
[Headnote (Carswell)]

[Facts:] In January 2014, mother and children, born 2012 and 2013, were evicted from residence — As result of mother's homelessness, drug addiction history and father's incarceration, child welfare authority deemed children to be at risk and placed them with relatives — Upon father's release from prison in March 2014, authority placed children in his care subject to condition that he and mother not be together in children's presence due to risk of domestic violence — Following alleged breach of condition in May 2014, children were apprehended and placed in foster care — Authority brought application for guardianship but was withdrawn as children gradually returned to father's care — In fall 2015, parents were charged with criminal offences after authority became aware of further incidences of domestic violence and obtained custody and supervision orders and subsequently applied for guardianship — Authority indicated it intended to call several witnesses including four or five expert witnesses — Mother's application and appeal for legal aid … [were] denied as she was not custodial parent at time children taken into care — Mother applied for state-funded counsel to represent her in guardianship proceeding.

Held: Application granted — Mother had, on evidence, been actively co-parenting children at time they were taken into care and had exhausted all possible avenues to obtain state-funded legal assistance — There was no evidence to contradict her assertion she could not afford to retain counsel on her own — She had limited education, experience and training, had not been employed for several years and had no assets and given mother's vulnerabilities and authority's anticipated list of witnesses, matter would be relatively complex and would not receive fair hearing without counsel — Order for guardianship would constitute profound interference with her psychological integrity — Denial of state-funded counsel constituted infringement of mother's right to security of person under s. 7 of Canadian Charter of Rights and Freedoms and not be in accordance with principles of justice — Minister of Justice, on behalf of province, was to pay solicitor-client costs of lawyer to represent mother in guardianship proceeding.

[**Full Text**]

K.P. v. Newfoundland and Labrador (Child, Youth and Family Services)

2017 NLCA 37 (CanLII), L.R. Hoegg J.A.
[Headnote (Carswell)]

[Facts:] Mother could not afford lawyer and she had been denied legal aid — Mother brought application for state-funded legal counsel to represent her on her appeal from family division judge's decision which granted continuous custody of two children to Child, Youth and Family Services — Grandparents also brought application for state-funded legal counsel.

Held: Mother's application granted; grandparents' application dismissed — From fairness perspective, it was important that mother have opportunity to effectively present her arguments so that both she and society could rest assured that whatever final result, it was obtained by fair process — Matter was very serious, issues were tangly and mother could not effectively present appeal even with court assistance — It could not be said that appeal had no discernible merit.

[**Full Text**]

"Two law firms 'named and shamed' over minimum wage breaches"

Rose, Neil, *Legal Futures*, 17 February 2017
[Excerpt]

Two law firms have found themselves 'named and shamed' in the government's latest list of businesses that failed to pay workers the national minimum wage – although for one of them it amounted to an underpayment of 50p a week [87 cents CDN].

[**Full Text**]

"Stress relief makes for happier, healthier life"

Pinnington, Dan, *The Lawyers Weekly*, 12 August 2016, p. 16
[Excerpt]

It's no secret that lawyers work in one of the most stressful and demanding professions. While many of us seem to thrive on that stress, and some will even say they enjoy it, high amounts of stress on a continuing basis are not good for your health. Here are a few simple tips on how you can use — or not use — technology to reduce stress.

[**Full Text**]

"Appeal court says texts to recipient not private"

Presser, Jill, *The Lawyers Weekly*, 21 October 2016, p. 15
[Excerpt]

The next time you send a text message to your spouse or best friend or colleague thinking that the communication is private, think again. It may not be. The Court of Appeal for Ontario has decided, in *R. v. Marakah* 2016 ONCA 542 [(CanLII)], that the sender of a text does not have a reasonable expectation of privacy in the message in the hands of the recipient. This means that once our text messages (or any communications sent through media that create digital records of our words) arrive on the other end, they are vulnerable to search and seizure by the police. And we cannot constitutionally challenge the search, seizure, or use of those communications.

[**Full Text**]

"Ignoring digital assets in estate plans puts clients at risk"

Moulton, Donalee, *The Lawyers Weekly*, 17 February 2017, pp. 6, 9
[Excerpt]

Traditionally when lawyers and accountants assist clients with estate planning they have been concerned with real property, bank records and tax-related issues.

In today's virtual world, however, they must also be concerned with social media accounts, online credit card usage and other digital assets. For many lawyers and accountants, this is new territory.

Including digital assets in estate planning is not optional, said Jamie Hopkins, a lawyer and professor of taxation at The American College of Financial Services in Bryn Mawr, Pa. "The biggest mistake today is ignorance. Far too many attorneys and advisers ignore the topic of digital assets, putting their clients at risk."

That risk includes the inability of heirs and executors to access online accounts. "No right of survivorship currently exists in respect of digital assets. Further, many account providers do not recognize the rights of survivors to access information absent explicit consent of the account holder," noted Suzana Popovic-Montag, managing partner with the law firm Hull & Hull LLP in Toronto.

[**Full Text**]

"Beware Of Ransomware"

Kirbyson, Geoff, (2016), 6 *Forensic Accounting & Fraud* 1, at pp. 8-10
[Excerpt]

Everybody has some kind of business relationship with a bank, computer provider or courier so when a message from them or another major company pops into your inbox, it's common for your first inclination to be to follow the instructions.

The very real risk, however, is that you're opening up the latest type of computer virus and playing into the hands of a scammer halfway around the world.

It's called ransomware and it plays on the growing trust that people have with many things online. The e-mails sound sincere enough — it's your bank telling you that there's been a security breach and it's asking you to protect your account by reaffirming your password with them.

What could possibly go wrong?

By clicking on the attachment, however, you're likely unleashing malware that will infect your computer, or worse your network, and send you a message in a matter of hours or days that your data have been encrypted. The only way to retrieve it is to pay the scammer off, usually several hundred dollars. With bitcoins — which are untraceable — no less.

[**Full Text**]

"Old hardware can't hack it[:] Upgrading gives companies competitive edge"

Cameron, Grant, (2016), 6 *Forensic Accounting & Fraud* 1, at pp. 11-13
[Excerpt]

Technology is an important part of most business operations these days. Few could survive without happily humming servers, systems and software.

When it comes to upgrades, though, owners may be reluctant to make changes due to the cost of buying equipment, time it will take to train staff and fear the new tools might be disruptive or not fit with legacy programs and software the firm is using.

After all, they think, why fix something if it's not broken?

The truth of the matter, however, is that failing to keep up with the times can put a business in danger.

[**Full Text**]

"Tackling e-mail protocol in the litigation context"

Rogers, Karen M. and Baum, Daniel, 11 *Canadian Lawyer Inhouse* [Issue 3], p. 10
[Excerpt]

"Should've, could've, would've" are among the last words lawyers want to hear from their clients while in the midst of litigation.

Yet, all too often, it is only after litigation has begun that corporate parties get a crash course in the rules of evidence and procedure. In the spirit of the adage "learn from the mistakes of others, as you won't have time to make them all yourself," we have compiled a list of four internal policies that companies should consider adopting to best avoid unwelcome surprises.

[**Full Text**]

"Grappling with social media"

Chisholm, Patricia, *Canadian Lawyer*, July 2016, p. 39-41
[Excerpt]

For the children of divorce, keeping in touch with an absent parent used to mean a few fairly simple things: talking on the phone, letters, cards, and photographs sent by mail. Now, social media has opened up a treasure trove of new ways for these kids to communicate with absent parents. But at the same time, tools like texting, Skype, Facebook, Snapchat, and Instagram have created something that divorcing parents don't need — new things to fight about.

More and more judges hearing family matters are wrestling with the rage of parents frustrated by the social media disconnection. Issues range from the pedestrian — scheduling Skype calls at dinnertime — to disheartening situations, such as young children repeatedly balking at forced digital "visits" with parents they rarely see. And as with so many areas of matrimonial law, the families where conflict is already high are having the most trouble with these new tools.

[**Full Text**]

"Quebec lawyer launches new online, flat-rate family law service"

Cardwell, Mark, *Canadian Lawyer*, October 2016, pp. 8-9
[Excerpt]

A new online service that offers separating Quebec couples a fast and inexpensive path to obtaining a judgment on their separation agreement is a modern-day innovation that increases access to justice, says the Quebec City lawyer who developed it.

But at least one ranking Quebec family law expert fears the rock-bottom flat rates being charged for the service could lead to liability issues and sell short the education and experience of family lawyers in law belle province.

"Demand for cyber-insurance on the upswing"

McKiernan, Michael, *Canadian Lawyer*, October 2016, pp. 47-49
[Excerpt]

Demand for cyber-insurance products has in turn "grown exponentially," as businesses come to terms with the possibility they could be the next victim of a headline-making cyberattack, according to [Patrick] Bourk [senior vice-president of Integro Insurance Brokers, Toronto]. A recent study by PricewaterhouseCoopers attempted to put numbers to the trend, predicting annual premiums worldwide, which stand currently at around US$2.5 billion, will double to about US$5 billion by 2018 and treble to US$7.5 billion as soon as 2020.

"It's growing at a rapid clip," says John Davis, whose Toronto firm Gilbertson Davis LLP has recently formed a cyber-liability sub-specialty within its insurance and commercial litigation practice group.

And while litigation around policies in Canada is currently scarce, some firms have channelled Wayne Gretzky, developing expertise in the area in anticipation of the eventual arrival of that particular puck.

[**Full Text**]

"Lawyer Falls Prey to $1-Million Email Scam"

Canadian Lawyer, May 2017, pp. 12-13
[Excerpt]

Business email compromise scams are growing in Canada and the U.S. and a recent incident saw a Victoria lawyer lose $1 million as he followed what he thought were client email instructions to transfer funds overseas.

. . . .

Victoria Detective Sgt. Derek Tolmie of the financial crimes division says the $1-million loss by the Victoria real estate lawyer related to one single different keystroke in the email address. Police are not disclosing the name of the lawyer as the loss was handled through an insurance claim. The case involved the sale of a Victoria house with the owners, who had limited English skills, in Taiwan. As a result, the daughter in Hong Kong spearheaded the communications, with the parents copied.

"The lawyer did everything right", says Tolmie. There was a three-month closing period. "During that time, he did his due diligence. He had the contract couriered over, he got photos and passport identification on the sellers and verified they were the owners".

As negotiations were nearing the closing date, things went off rail. "Scammers somehow inserted themselves into the email correspondence and represented the lawyer to the seller and the seller to the lawyer." Tolmie says he is not aware of how it was done, but the addresses that went to each party had only a single different keystroke from the original addresses. There was only one slight indication that something was wrong. Tolmie says originally the seller's instructions had requested the lawyer transfer sales proceeds to a Chinese bank. At closing an email came to send funds to a Hong Kong bank. When the lawyer attempted via email to confirm the different bank, the reply from the scammers posing as sellers stated they had simply changed their minds. By the time the mistake was discovered and police were contacted, the funds were transferred to a number of other accounts internationally.

[**Full Text**]

"Hi-Tech: Balancing technology competence with legal work"

Benetton, Luigi, *The Lawyer's Daily*, 08 January 2018
[Excerpt]

Are you having difficulty deciding how much lawyers need to know about their technology? You aren't alone.

Joanne Humber, a U.K.-based technology skills consultant, interviewed the person who runs a law firm's document production department. "She said: 'That's all fine, we'll do it. But sometimes what they present us with is so bad that we're wasting time.' "

"The lawyers don't have enough knowledge to give document production people something in reasonably good condition," said Humber. "The specialists spend too much time correcting basic errors."

[Full Text]

"Scammers targeting lawyers with sophisticated frauds"

Moulton, Donalee, *The Lawyer's Daily*, 25 January 2018
[Excerpt]

A B.C. law firm recently paid out a six-figure sum — to a fraudster. The sophisticated scam, known as a social engineering fraud, showed the degree to which scammers today will go to swindle law firms and their clients.

[Full Text]

"The ethical dilemmas of artificial intelligence"

Swansburg, Carla, *The Lawyer's Daily*, 22 February 2018
[Excerpt]

The means of delivering legal services are quickly changing. The "new" ethical questions arising as a result are not entirely new. We simply need new and creative ways to apply the "old" answers.

Lawyers seem to fall on one side or the other of the issue of using technology in delivering legal services. They are either "deniers" who believe that delegating to technology is a breach of their ethical responsibilities; or they are "champions" who believe that a failure to deploy appropriate technology runs contrary to their ethical obligations.

[Full Text]

"[Ontario Bar Association] institute panel gives advice on avoiding social media, online problems"

Gruske, Carolyn, *The Lawyer's Daily*, 07 March 2018
[Excerpt]

Engaging with the public — and in particular, with clients or potential clients — on social media has the potential to be a minefield if lawyers aren't careful with what and how they post.

[Full Text]

"10 reasons why your lawyers should not write the content for your website"

Bramall, Sue, *Legal Futures*, 01 May 2018
[Excerpt]

"Our solicitors put lots of content on our website, but we don't get much business from it", the managing partner of a law firm said to me recently. Indeed, there was plenty of legal text on the website but there were several reasons why it was not yielding results.

Of course, all lawyers can write, so it might seem logical to think that they can write content for a website. The question that you need to ask is, how well can they write? In particular, how well can they write for the internet?

[**Full Text**]

"Three reasons why you should be more vigilant about the emails you send in 2018"

Mitchell, Ben, *Legal Futures*, 17 January 2018
[Excerpt]

In December 2017, the Information Commissioner's Office (ICO) reported that data security incidents between April and June 2017 had increased by 15% compared to the previous year.

This is nothing new – data breaches have been on the rise for years. Yet law firms are often more concerned about protecting sensitive information from external threats[,] than from a far more likely cause: human error.

[**Full Text**]

"Website to offer clients family and immigration advice from £4.99 [CDN $8.65]"

Hilborne, Nick, *Legal Futures*, 18 October 2017
[Excerpt]

A new online service for family and immigration clients is launching today, giving them access to lawyers at prestige firms such as Withers and Farrer & Co.

Founder Tetiana Bersheda, a Ukrainian lawyer based in Geneva, said she wanted LexSnap to help "thousands of people" reduce their legal costs in a "very substantial way".

[**Full Text**]

"… 'banter' warning [issued] in bid to curb offensive online comments by solicitors"

Rose, Neil, *Legal Futures*, 24 August 2017
[Excerpt]

Solicitors have been warned about what they say in emails and on social media in both their professional and personal lives, in the wake of an increase in reports about offensive and inappropriate posts.

Just last week, we reported on solicitor Majid Mahmood, who was sanctioned for "violent" anti-Semitic and anti-Zionist comments he made on Facebook.

In a warning notice published today, the Solicitors Regulation Authority (SRA) said online comments posted in a personal capacity which might be deemed offensive or inappropriate "could be classed as misconduct if the poster can be identified as a solicitor" – as was the case with Mr Mahmood.

[**Full Text**]

"Boost for legal bloggers after High Court throws out libel claim against barrister"

Rose, Neil, *Legal Futures*, 17 July 2017
[Excerpt]

The growing ranks of legal bloggers commenting on often sensitive court rulings have been given comfort after a libel claim brought against a barrister who wrote about one on his personal website was struck out.

[**Full Text**]

"The Do's and Don'ts of social media for lawyers"

Weldon, Ross, *Legal Futures*, 04 May 2017
[Excerpt]

Where are your potential clients? They're probably on social media. With Facebook alone having over 1.86bn monthly active users, businesses need to be on social media to connect with potential clients.

When it comes to social media for lawyers, however, they must follow advertising and ethics rules within their jurisdictions. They also need to be careful about interacting with specific clients – or potential clients – over social media.

[**Full Text**]

"Bar Council warns barristers against 'bending the truth' in online marketing"

Rose, Neil, *Legal Futures*, 13 March 2017
[Excerpt]

The Bar Council has warned barristers about "bending the truth" when making claims on a personal or chambers website and said they must be able to support claims that they are one of the best in their field.

[**Full Text**]

4.0 PROCEEDINGS DERIVING FROM BREACHES OF STANDARDS OF RESPONSIBILITY

4.1 Administrative: Disciplinary

McLean v. Law Society of British Columbia

2017 BCCA 388 (CanLII), Newbury, Savage and Frankel JJ.A
[Summary (Court)]

[Facts:] Mr. McLean challenges a decision of the Law Society of British Columbia Review Board overturning a Hearing Panel decision and substituting a finding of professional misconduct for his failure to promptly meet financial obligations [payment of invoices to him from Court Reporters] and reply to communications regarding those obligations in relation to his law practice. He further argues that the Review Board erred in failing to order the Law Society to disclose all complaints it had received since its inception involving the late payment of debts.

Held: Appeal dismissed. The Review Board's decision was reasonable. The Review Board correctly articulated and applied both the correct standard of review and the correct legal standard for a finding of professional misconduct. It was reasonable for the Review Board to dismiss Mr. McLean's request for document disclosure.

[**Full Text**]

Law Society of British Columbia v. Sas

2016 BCCA 341 (CanLII), Groberman, Garson and Fenlon JJ. A.
The Lawyers Weekly, 16 September 2016, p. 20
[Headnote]

[Facts:] Appeal by a solicitor, Sas, from a disciplinary decision by the Law Society of British Columbia. The appellant was a sole practitioner in the area of immigration law. In 2010, she joined a large law firm and undertook the process of closing open dormant files. The appellant found 200 files with outstanding financial balances. In a concerted effort to close the files, the appellant, through her bookkeepers, withdrew trust monies to pay fees and disbursements without having prepared and delivered bills to clients. The amounts billed and applied, and any

corresponding amounts written off, were calculated with the objective to achieve zero balances in the client files. The matter came to the attention of the Law Society and an investigation ensued. The appellant took corrective measures, delivering bills to clients, and, in some cases, returning money to trust accounts. At the ensuing disciplinary hearing, the panel found that the appellant engaged in professional misconduct, as she had known or ought to have known of the bookkeepers' activities. Sas appealed.

Held: Appeal dismissed. The panel did not misapprehend or fail to take into account exculpatory evidence of a bookkeeper. The panel specifically found no evidence the appellant instructed that particular bookkeeper to fabricate disbursements. In relation to that particular bookkeeper's [preparation of] billings [e.g., for fictional disbursements to cover small client account balances], the panel concluded the appellant ought to have recognized the irregularities. The panel cited specific evidence in support of its conclusion the appellant must have known that monies had been transferred between accounts without bills having been prepared or delivered to clients. The panel's decision did not result from unreasonable credibility assessments. Any failure to mention particular pieces of evidence was immaterial. There was nothing implausible in the panel's finding that, in other instances, the appellant had instructed fabrication of small disbursements to deplete trust funds to eliminate administrative inconveniences. The panel correctly stated and applied the test for wilful blindness in finding that in other instances the appellant deliberately ignored the suspicious circumstances surrounding her signing of trust account cheques. No denial of procedural fairness was established.

[**Full Text**]

Law Society of Manitoba v. Cherrett

[2016] M.J. No. 352 (Man. C.A.) 08 December 2016
Mitchell, Gary, *The Lawyers Weekly*, 27 January 2017, p. 18
[Headnote]

[Facts:] Appeal by Cherrett from the respondent's decision finding him guilty of misappropriating $20,000 from his trust account and disbarring him. The appellant solicitor argued that the finding of misappropriation was unreasonable, given his ill health and the effects on his state of mind. He also argued that the panel ignored some of his evidence that was relevant to whether his actions were intentional or careless in nature. The appellant had significant health issues for a number of years. After meeting with the Law Society in 2009 about the continuation of his practice, he transferred $20,000 from his trust account to a bank account in the name of a numbered company for which he was the sole director and signing authority. He then transferred this money to his personal account.

Held: Appeal dismissed. The panel acknowledged the appellant's many medical problems in its reasons. It understood, but did not accept, his argument that he misappropriated the money in a cognitive fog. The panel engaged the appellant during the hearing to ensure that the panel

understood his evidence and submissions. The panel did not accept the appellant's evidence that he was confused and careless. Given that, the finding of misappropriation was inevitable. In determining the appropriate sanction, the panel addressed the appellant's ill health and the effect on him, including psychologically and emotionally. Given the panel's findings, which were unassailable, the disposition of disbarment was well within the range of possible outcomes.

[**Full Text**]

"Telling it like it is"

Slayton, Philip, *Canadian Lawyer*, June 2016, p. 18
[Excerpt]

[Ezra] Levant was a lawyer. He was, until recently, a member of the Law Society of Alberta [LSA], although he hasn't practised law or lived in Alberta for some time, earning his living as a Toronto-based journalist. For years, he wanted to resign from the Alberta bar, but the rules made that difficult. For almost a decade, a lot of people, including other lawyers, made formal complaints to the law society about things Levant said and wrote, and in particular about his lack of "professional courtesy."

The LSA rules say that you cannot resign in the face of an unresolved complaint without special permission. Resignation without permission is regarded as the equivalent of disbarment. The argument is that to permit unilateral resignation if complaints are outstanding would allow a lawyer to escape the society's disciplinary jurisdiction. The Ontario bar, and I think the bar of every other province, has similar rules. So Levant was trapped in the unwanted and clammy embrace of the Law Society of Alberta. Quite reasonably, he said he would only resign if pending complaints against him were dismissed and he could leave the profession unbesmirched.

[**Full Text**]

"Longest Disciplinary Hearing In Nova Scotia Concludes"

Canadian Lawyer, October 2017, p. 7
[Excerpt]

The longest disciplinary hearing in the history of the Nova Scotia Barristers' Society is over at last. After 66 hearing days that spanned a year and a half and produced 12,035 transcript pages, a three-member panel has unanimously found Halifax lawyer Lyle Howe guilty of professional misconduct and professional incompetence.

According to the 140-page decision, the history-making length of the hearing was due to a number of factors. First, there were multiple charges against Howe, an African-Canadian. These included being dishonest with clients and the court, taking on too many clients and collecting retainers without doing the required work. Many of the issues that had to be addressed were also "difficult and uncommon", the panel noted. These involved allegations of perceived conflicts of members of the panel, which required three applications to address, and whether members of the judiciary were compellable as witnesses.

[**Editor's Note:** The Barrister's Society, on 28 October 2017, disbarred the lawyer and ordered him to pay $150,000 costs.]

[**Full Text**]

Byrnes v. Law Society of Upper Canada

Supreme Advocacy LLP, Issue #62, 01 December 2016
(Application for Leave to Appeal to S.C.C., File No. 37095, dismissed)

The Law Society of Upper Canada commenced proceedings against Mr. Byrnes, alleging he violated various articles of the *Rules of Professional Conduct* in respect of his work for a client on a matrimonial file — specifically, failing to keep his client informed, failing to explain the nature and effect of two irrevocable decisions signed by the client, failing to provide a written estimate of fees, and charging an amount for fees that was neither fair nor reasonable and which exceeded the reasonable expectations of his client. A Hearing Panel of the Law Society found Mr. Byrnes had in fact violated the *Rules*, and revoked his licence to practise law. An Appeal Division committee of the Law Society Tribunal upheld the decision, as did a panel of the Divisional Court of the Ontario Superior Court of Justice [2015 ONSC 2939 (CanLII)]. The C.A. refused leave to Mr. Byrnes to appeal the decision. "The application for leave to appeal...is dismissed with costs."

Landry v. Guimont

Supreme Advocacy LLP, Issue #30, 30 June 2016
(Application for Leave to Appeal to S.C.C., File No. 36842, dismissed)

The Applicant was convicted of various charges by the Barreau disciplinary council (then known as the committee on discipline), including one count under section 149.1 of the *Professional Code*. This provision allows a syndic of a professional order, by way of a complaint, to seize a disciplinary council of any decision of a Canadian court finding a professional

guilty of a criminal offence which, in the syndic's opinion, is related to the practice of the profession, in this case, the Applicant's conviction for assault on March 24, 2006. On May 6, 2008, the disciplinary council found the Applicant guilty of various counts, including one under section 149.1 of the *Professional Code*. Professions Tribunal: appeal from decision of committee on discipline allowed in part; Applicant's guilt on various counts upheld, including one count under section 149.1 of *Professional Code*. Québec Superior Court: judicial review dismissed; matter referred back to Professions Tribunal for penalty hearing on counts for which Applicant was convicted. C.A.: motion for leave to appeal dismissed. "The application for leave to appeal...is dismissed with costs."

[Full Text]

"Retired lawyer fights for costs against LSNB"

Robinson, Alex, *Canadian Lawyer Magazine*, 20 April 2018
[Excerpt]

A retired lawyer is fighting to have the Law Society of New Brunswick reimburse more than $170,000 he spent in legal costs to clear his name.

After a years-long legal battle that forced him into early retirement, Shawn O'Toole was awarded just $2,500 in costs against the provincial regulator by a law society panel — an amount far shy of what he spent to prove his innocence.

The law society launched disciplinary proceedings against O'Toole in 2011, which concerned four charges of misconduct. A client had alleged they had no recollection of signing documents that O'Toole had witnessed. The documents executed the transfer of a marital home to a spouse, and the client claimed they had not attended his office to sign them.

Three of the charges were withdrawn and O'Toole was found not guilty of the final charge at a hearing years later.

"It's been quite a battle," says O'Toole.

The New Brunswick Court of Appeal recently allowed an appeal O'Toole brought challenging the costs award of $2,500. The court sent the matter back to a new panel of the law society's discipline committee to be reassessed.

The Court of Appeal [2017 NBCA 56 (CanLII)] found that the law society's conduct arguably rises to the level of being "reprehensible, scandalous or outrageous," but that it will be up to a new panel to determine.

[Full Text]

"Case is reminder evidence can be used without consent"

Kari, Shannon, *Law Times*, 23 April 2018
[Excerpt]

A recent decision of the Ontario Judicial Council is a reminder that evidence of misconduct in a professional disciplinary hearing will likely be admitted even if it has been obtained surreptitiously by a private individual and without consent.

The four-person panel concluded that the Charter did not apply in circumstances where an individual made a copy of text messages on the phone of provincial court Justice John Keast and turned them over to the Children's Aid Society without his knowledge.

The content of the text messages formed the basis of the alleged misconduct, which ultimately resulted in the judicial council panel imposing a 30-day suspension without pay against the judge, who presides in Sudbury, Ont.

[**Full Text**]

"Quebec court treads carefully when considering disqualifying a law firm"

Urbas, Daniel, *The Lawyer's Daily*, 10 November 2017
[Excerpt]

A multidisciplinary law firm in Quebec was disqualified from a case due to the likelihood that one of its non-lawyer members, a notary, would be called upon to testify at the trial. The judge's reasons in *Coiffure Mégantic inc. v. Atelier Coiffure* 2017 QCCS 4395 [(CanLII)] provide a thorough review of the complex rules applicable to motions to disqualify lawyers.

[Full Text]

"Tribunal dismisses … [Law Society of Ontario] appeal against lawyer"

Robinson, Alex, *Law Times*, 19 March 2018
[Excerpt]

A tribunal dismissed an appeal brought by the Law Society of Ontario, which claimed a hearing panel was wrong to find a lawyer who was found in contempt of court had not committed professional misconduct.

In 2015, the Supreme Court of Canada found lawyer Peter Carey in contempt of court for having breached a freezing injunction when he returned a client's funds held in trust [2015 SCC 17 (CanLII)].

Despite this ruling, a hearing panel subsequently found that the lawyer had not committed professional misconduct as he did not intend to interfere with the administration of justice when he breached the court order.

The law society appealed the hearing panel's conclusion and a panel of four adjudicators with the Law Society Tribunal Appeal Division upheld the finding.

" . . . [T]he lawyer erred in judgment in returning trust money to his client in 2006, but did not engage in conduct that tended to disrespect or prejudice the administration of justice in a manner that brought discredit upon the legal profession," said the decision in *Law Society of Upper Canada v. Carey* [2018 ONLSTA 4 (CanLII)].

[Full Text]

"Panel hears … appeal of professional misconduct finding"

Robinson, Alex, *Law Times*, 28 March 2018
[Excerpt]

A tribunal panel heard Jeremy Diamond's appeal Wednesday morning of a finding that he had failed to co-operate with a Law Society of Ontario investigation [2017 ONLSTH 191 (CanLII)].

The lawyer appealed a hearing division decision that found he had committed professional misconduct by failing to co-operate fully with a probe into his advertising, marketing and referral fee practices.

LSO Bencher Raj Anand, who adjudicated the original discipline hearing, found that Diamond had failed to promptly provide various types of documents that law society investigators had requested. Diamond was subsequently reprimanded and ordered to pay $25,000 in costs.

. . . .

Brian Greenspan, one of the lawyers representing Diamond, contended that counsel for Diamond had responded to LSO requests promptly and that Diamond had acted in good faith.

"The only reasonable conclusion to reach from this series of exchanges shows not only co-operation but a high level of co-operation," he told the appeal panel, made up of LSO benchers Jan Richardson and Howard Goldblatt and tribunal chairman David Wright.

. . . .

In his decision, Anand found that Diamond should have known the law society's requirements to maintain proper bookkeeping and that the lawyer was aware from the outset that the regulator was investigating his referral fee practice. The subsequent correspondence "represented a 'cat and mouse game' that has no place in the relationship between licensee and regulator," Anand wrote.

[Full Text]

"Courthouse hallway comments can cost lawyers in penalties"

Sorensen, Jean, *Law Times*, 04 April 2018
[Excerpt]

While lawyers typically pick their words carefully in court, another British Columbia Court of Appeal decision underscores the need for caution when speaking outside the courtroom as well.

A Kelowna, B.C. lawyer has lost his BCCA request for a review of a Law Society of B.C. decision [*Johnson v. Law Society of British Columbia*, 2018 BCCA 40 (CanLII)] that the use of profanity during a heated exchange with an RCMP officer in a courthouse hall was professional misconduct.

[Full Text]

"B.C. lawyer fined $6,000 after challenging client to a fight"

Taddese, Yamri, *Law Times*, 22 June 2016
[Excerpt]

The Law Society of British Columbia has fined a Smithers criminal lawyer $6,000 for challenging his client to a physical fight and later sending that client's confidential information to Crown counsel [2016 LSBC 23 (CanLII)].

"The respondent's incivility is worthy of rebuke," notes an LSBC discipline panel in fining a lawyer for picking a fight with his client.

[Full Text]

" … lawyer in U.K. admits he embellished resume"

Brown, Jennifer, *Law Times*, 05 July 2016
[Excerpt]

It's a tale that reads a little like the plot to the popular legal drama, *Suits*, in which the affable former investment banker Mike Ross finds his way into the halls of big law without the appropriate credentials.

In a Solicitors Regulation Authority decision issued today in the U.K., a regulatory settlement agreement outlines how Michael McCooe, at one time employed at McCarthy Tétrault LLP's London office in 2011, has agreed to removed himself from the Roll of Solicitors.

McCooe, who now lives in Switzerland, had submitted a resume to McCarthy's in 2011, which he also gave to an employment agency. It stated that he had been admitted to professional bodies in Australia in 1980, Ireland in 1989, France in 1991 and Switzerland in 1993.

It also indicated he held an LLM in competition law from King's College, London, a PhD in international competition and trade from the University of Zurich, and a doctorate in international competition law from Trinity College in Dublin.

In fact McCooe had not been admitted to any professional bodies in Ireland, France or Switzerland — he had only practised law there. He also does not hold any qualifications from Trinity College or the University of Zurich.

He does hold a post-graduate diploma in EC law from King's College in London but does not have an LLM from that institution.

[Full Text]

"Superior Court dismisses appeal in disbarment of real estate lawyer"

Macnab, Aidan, *Canadian Lawyer*, 11 April 2018
[Excerpt]

The Ontario Superior Court of Justice has dismissed an appeal brought by a former lawyer whose licence was revoked by the Law Society of Ontario for her participation in mortgage fraud.

The appeal in *Chin v. The Law Society of Upper Canada* [2018 ONSC 2072 (CanLII)] came to the Superior Court after two law society tribunals found that Rebecca Chin had performed mortgage fraud in six real estate transactions and engaged in conduct unbecoming a lawyer for having "intentionally failed to protect her lender clients and attempted to mislead the law society," making Chin a "continuing danger to the public," according to the court's decision.

"Sex-test boss Bill Voge 'had offered Christian help to woman' "
[Excerpt]

Ames, Jonathan and Brown, David, *The Times* [London], 22 March 2018

Bill Voge resigned on Tuesday from his London-based role as global chairman of Latham & Watkins, a US firm, after admitting conduct that "involved the exchange of communications of a sexual nature with a woman whom he has never met in person".

It was claimed yesterday that Mr Voge, who is in his sixties, first had contact with the woman through the New Canaan Society, which promotes itself as "a group of men who gather together to encourage each other in friendship and faith and to support each other to be better husbands, fathers — and better men". Mr Voge was on the society's board of directors, although it is understood that he resigned in November.

The American website Law360 reported that … [the woman] and Mr Voge first exchanged messages with her consent. It said that Mr Voge had contacted her in an attempt to offer "Christian reconciliation" with another society member. Their relationship changed in November when they are understood to have exchanged sexual text messages. The website claims the relationship

soured after Mr Voge tried to persuade her to meet him at a hotel. She then shared details of the explicit messages in emails to his lawyer, partners at Latham & Watkins, and his family.

Drolet-Savoie v. Tribunal des professions

Supreme Advocacy LLP, Issue #74, 21 December 2017
(Application for Leave to Appeal to S.C.C., File No. 37666, dismissed)

The Applicant, a lawyer and member of the Barreau du Québec, practised particularly in the field of youth protection. In a case relating to a client's son, the Applicant obtained a judgment in the Superior Court setting aside various orders for foster care made by the Court of Québec, Youth Division. The Superior Court's reasons for judgment were critical of the Court of Québec judge. When questioned about this by a member of the press, the Applicant made the following remarks, which were reproduced in a published article: [translation] "It operates in a vacuum. There are always the same judges, the same counsel for the DYP, the same legal aid lawyers representing the children. The result is the DYP gets what he wants in the vast majority of cases. It's not just David against Goliath. It's David against two or three Goliaths." Hearing a disciplinary complaint against the Applicant, the disciplinary council of the Barreau du Québec found her guilty of a breach of professional ethics for expressing a [translation] "value judgment on the judicial process, whose credibility and integrity she impugned" through her "negative criticism". It fined her $2,000. The Applicant appealed to the Professions Tribunal, which upheld the conviction but, in a separate decision, replaced the penalty with a temporary striking off the roll for 30 days. The Applicant then applied to the Superior Court for judicial review of the Professions Tribunal's decisions. Québec Superior Court: judicial review of decisions of disciplinary council of Barreau du Québec dismissed. C.A.: appeal allowed in part (Professions Tribunal's decision on penalty quashed and initial penalty restored) [2017 QCCA 842 (CanLII)]."The application for leave to appeal...is dismissed with costs."

"LSBC decision highlights lawyer's duty to prevent laundering"

Sorensen, Jean, *Canadian Lawyer*, August 2017, pp. 12-13
[Excerpt]

A Law Society of British Columbia hearing decision in June for Vancouver lawyer Donald Franklin Gurney has found him guilty of professional misconduct for moving $26 million through his trust account. But is raising more questions on money laundering than it answers, claims Gurney's defence lawyer.

"It is a very disturbing ruling,", says Paul Jaffe, acting for Gurney, who plans to appeal a penalty handed down in July either before the LSBC review panel process or in the British Columbia Court of Appeal.

Jaffe challenges the LSBC's citation as abuse of power; he claims there was no evidence to support a money-laundering scheme or that trust funds were misused. He claims that although the LSBC suggested money laundering earlier in the investigation, the citation does not.

But the LSBC hearing decision, responding to the original citation on May 9, 2016, said: "In order for professional misconduct to be found, illegal activities do not have to be proven."

The LSBC's case revolves around four transactions using Gurney's trust account between May 2013 and November 2013 to receive and disburse a total of $25,845,489.87 to a company the LSBC judgment dubbed "C Inc."

LSBC spokesman David Jordan says the law society has rules in place to prevent lawyers from becoming implicated in money laundering. The LSBC's code of professional conduct states that lawyers can't engage in any activity that they know or ought to know assists in dishonesty, crime or fraud.

The LSBC case is built on the premise that Gurney ought to have known or become suspect of the use of his trust fund. The decision stated that "one would have to ignore a sea of red flags" that were raised, which included: newly incorporated borrowers, substantial offshore funds, unknown lenders, lack of security, mistakes in the line of credit agreement, loans arranged "through a former lawyer involved with past securities fraudsters," a short turnaround time and legal fees based on a percentage of flow-through funds.

[**Full Text**]

"Male solicitor struck off for discussing how young female client could pay off bill with topless photo shoot"

Rose, Neil, *Legal Futures*, 05 December 2016
[Excerpt]

A male solicitor has been found guilty of discussing with a vulnerable female client a third his age that she might make good an unpaid bill with a topless photo shoot and possibly sexual activity.

Anthony Robert Dart was also found to have watched pornography in his office with her.

The Solicitors Disciplinary Tribunal struck him off, saying "this was clearly a situation where a solicitor in a position of trust, very experienced in dealing with criminal defendants, was

in a position of significant power over an individual who owed him money and whom he believed to have mental health and other issues".

[Full Text]

"Solicitor agrees to leave profession for three years after assault conviction"

Rose, Neil, *Legal Futures*, 07 December 2016
[Excerpt]

A solicitor who did not report his conviction for assault to the Solicitors Regulation Authority (SRA) has agreed to remove himself from the profession for three years.

[Full Text]

"Solicitor sanctioned for leaving professional disbursements unpaid for five years"

Rose, Neil, *Legal Futures*, 12 December 2016
[Excerpt]

A solicitor who retained nearly £50,000 of client money for up to five years instead of paying professional disbursements has accepted a rebuke and fine to halt her referral to the Solicitors Disciplinary Tribunal.

[Full Text]

"[Solicitor struck off because he] … lied about guarantees on loans clients made to him"

Bindman, Dan, *Legal Futures*, 30 November 2016
[Excerpt]

The Solicitors Disciplinary Tribunal has struck off a solicitor who borrowed £125,000 from longstanding clients to bail out his failing business and failed to mention that his wife had a prior charge over the firm's assets.

[Full Text]

"High Court lambasts … [Bar Standards Board] for 'seriously mishandling' disciplinary case"

Rose, Neil, *Legal Futures*, 28 November 2016
[Excerpt]

The High Court has overturned a disciplinary finding against a barrister after finding that the Bar Standards Board [BSB] "seriously mishandled" the case.

It was also very critical of the disciplinary tribunal for allowing a crucial statement as hearsay evidence.

In May, [barrister] Julian Smith was fined £2,000 after being found guilty by the tribunal of not acting with reasonable competence at a family dispute resolution hearing because he told his divorce client, Keith Ashby, that his ex-wife had agreed a clean break, when actually she had not, and that it had been incorporated into the consent order, when it had not been.

Mr. Smith was also found not to have dealt with complaints promptly, courteously or in a manner that addressed the issues raised.

On appeal, the key failure identified by Mr Justice Collins was that the complaints against Mr Smith were brought by Mr Ashby's solicitors, Milton Keynes firm Jennings Solicitors, who also drafted their client's statement to the tribunal.

The BSB, he said, should have appreciated that there was a potential conflict of interest because the solicitors were vulnerable to an allegation of negligence against them. "It was in the solicitors' interest to put any blame on Mr Smith rather than on themselves," Collins J observed.

[Full Text]

"Solicitor who sent offensive … tweets accepts rebuke"

Rose, Neil, *Legal Futures*, 02 November 2016
[Excerpt]

The solicitor who caused an uproar in June when he sent out a series of tweets appearing to gloat over defeating cases brought by parents of children with special educational needs and disability, has accepted a rebuke from the Solicitors Regulation Authority (SRA).

[Full Text]

"Partner struck off after administering client's estate for benefit of his associate and lover"

Rose, Neil, *Legal Futures*, 01 November 2016
[Excerpt]

A partner at a leading law firm who did not inform the client whose will he was revising that he was in a personal relationship with one of the beneficiaries – herself an associate at the firm – and gave himself the power to grant her 11 times as much as she was due from the estate after the client died, has accepted his removal from the profession.

[**Full Text**]

"Solicitor sanctioned for 'inappropriate advances' to junior member of staff"

Rose, Neil, *Legal Futures*, 27 October 2016
[Excerpt]

The Solicitors Regulation Authority has rebuked and fined a male solicitor who made inappropriate sexual advances on a junior female member of staff.

Alan Dennis Green, formerly a partner at County Durham firm Hewitts, was fined £1,000 [CDN $1,734.06] and also agreed to pay £300 costs [CDN $520.22] and publication of the regulatory settlement agreement reached with the regulator.

It recorded that "on three occasions between 5 October 2015 and 8 October 2015, Mr. Green made inappropriate comments and advances of a sexual nature towards a junior female member of staff."

[**Full Text**]

"Sanctions for barrister who turned up in court 'drunk' and another who dodged fares"

Rose, Neil, *Legal Futures*, 27 September 2016
[Excerpt]

A barrister is to be reprimanded by the head of his circuit after turning up to court under the influence of alcohol and then leaving before a hearing had finished.

According to a ruling by a Bar disciplinary tribunal, Christopher Rhodri Ellison – who was called in 2001 – "behaved in a way which was likely to diminish the trust and confidence which the public places in the profession".

[**Full Text**]

"Rebuke for solicitor who acted for clients when they could not afford his firm"

Rose, Neil, *Legal Futures,* 21 September 2016
[Excerpt]

An associate who acted for clients in his own time because they could not afford the fees of the firm he worked at has been rebuked by the Solicitors Regulation Authority [SRA].

Abdul Barri, who was admitted in 2003, worked at Leeds firm Chapman Dhillon for a year between November 2013 and October 2014, and during that time his clients included three immigration clients.

According to a regulatory settlement agreement published this week by the SRA: "In the course of acting for Mr N, a Mrs S and a Mr K it became apparent that they could not afford the firm's fees if the firm was to act for them to completion of their matters.

"Mr Barri offered to act for them outside of his practice at the firm. He charged them lower fees than the firm's would have been. Each of these clients accepted that offer and Mr Barri did some work on their matters outside of his practice with the firm."

[**Full Text**]

"Tribunal decides against striking off solicitor who backdated court document"

Bindman, Dan, *Legal Futures*, 15 September 2016
[Except]

A solicitor has escaped being struck off by the Solicitors Disciplinary Tribunal (SDT) after admitting dishonestly altering the date on a witness statement to make it look like it met a court-ordered deadline.

Gary Parkinson, who was born in 1962 and admitted in 1988, was given a six-month suspension after the tribunal held there were exceptional circumstances that meant striking-off would be disproportionate.

[**Full Text**]

"Suspension for solicitor who allowed 'financial chaos' to reign at firm"

Rose, Neil, *Legal Futures*, 30 August 2016
[Excerpt]

A solicitor who oversaw "financial chaos" in his practice has been suspended, with a tribunal imposing conditions on his return to the profession in the future to ensure he does not hold a management position.

. . . .

The Solicitors Disciplinary Tribunal (SDT) found that "there was no proper accounting system and no proper internal controls. There was no effective financial management of the firm. The financial chaos persisted over a period of time despite the involvement of [a Solicitors Regulation Authority official] and the fact that the respondent was given a number of opportunities to put things right".

[**Full Text**]

"Solicitor leaves profession after acting for both sides in property deal, another rebuked for 'abusive language' "

Rose, Neil, *Legal Futures*, 25 August 2016
[Excerpt]

A solicitor who acted on both sides of a conveyancing transaction without written consent has agreed to leave the profession.

[**Full Text**]

"Partner who falsified divorce client's decree absolute [and misappropriated funds] struck off"

Rose, Neil, *Legal Futures*, 15 August 2016
[Excerpt]

A partner has been struck off after forging a divorce client's decree absolute, and misappropriating more than £200,000 [CDN $346,811.96] from clients to hide his inactivity on other matters.

The Solicitors Disciplinary Tribunal (SDT) said that Noel William Pugsley's motivation was "absolutely not personal financial gain. It was… to conceal his professional failings in respect of other clients".

[**Full Text**]

"Reprimand for barrister who encouraged client to seek out damaging information about fellow counsel"

Rose, Neil, *Legal Futures*, 27 July 2016
[Excerpt]

A barrister who encouraged a client to search online for damaging information about another member of the Bar, and then told her to deny that he had done so, has been reprimanded by a Bar disciplinary tribunal.

[**Full Text**]

"Solicitor who had mercy on fraudulent employee is fined £5,000"

Hilborne, Nick, *Legal Futures*, 13 July 2016
[Excerpt]

A sole practitioner who decided not to sack a fraudulent employee after discovering he had stolen almost £90,000 [CDN $156,065.38] from the firm's office account has been fined £5,000 [CDN $8,670.30] by the Solicitors Disciplinary Tribunal (SDT).

[**Full Text**]

"Solicitor suspended after accepting caution for possessing indecent images"

Rose, Neil, *Legal Futures*, 30 June 2016
[Excerpt]

A solicitor who received a caution for possessing a small number of indecent images of children has been suspended from practice for a year.

[**Full Text**]

"SDT: Solicitor's headbutt 'madness' had to lead to strike-off"

Hilborne, Nick, *Legal Future*s, 17 May 2018
[Excerpt]

Headbutting a litigant-in-person (LiP) in the High Court may have been a "moment of madness" but the solicitor involved could not stay in the profession, the Solicitors Disciplinary Tribunal (SDT) has ruled.

Philip James Saunders, now 71, argued that the headbutt, which left his victim with a broken nose, was "temporary insanity" which should result in a suspension rather than strike-off.

[**Full Text**]

"Barrister suspended for repeating false rape claims about colleague and contacting his wife"

Hilborne, Nick, *Legal Futures*, 19 April 2018
[Excerpt]

An experienced barrister has been suspended from practice for seven months for repeating false rape, assault and conspiracy to murder claims about a fellow barrister in the robing rooms of Crown Courts.

He also contacted that barrister's wife, a solicitor, on LinkedIn, and suggested that her husband was in trouble.

[**Full Text**]

"Conveyancer banned for covering up mistakes with her own money"

Rose, Neil, *Legal Futures*, 27 March 2018
[Excerpt]

A conveyancing fee-earner who covered up her mistakes by paying two lenders what they were owed out of her own pocket has been banned from working in the profession.

[**Full Text**]

"Solicitor who lied about property during own divorce is struck off"

Hilborne, Nick, *Legal Futures*, 21 February 2018
[Excerpt]

A partner in a South Yorkshire law firm who failed to disclose on the financial statement for his own divorce proceedings ownership of a second property has been struck off by the Solicitors Disciplinary Tribunal (SDT).

[**Full Text**]

"City partner who lied about presence of client when signing papers is struck off"

Hilborne, Nick, *Legal Futures*, 16 February 2018
[Excerpt]

A partner at a City law firm who said a client had signed documents in his presence when she was actually abroad has been struck off by the Solicitors Disciplinary Tribunal (SDT).

[**Full Text**]

"… [M]ental health warning to employers in case of solicitor under billing pressure"

Rose, Neil, *Legal Futures*, 10 January 2018
[Excerpt]

The Solicitors Disciplinary Tribunal (SDT) has decided against striking off a solicitor it found had created and backdated correspondence and lied to both her client and her employer, after finding that a root cause of her misconduct was the firm's culture and the pressure it exerted on her to meet billing targets.

[**Full Text**]

"Support staff member banned from profession for forging solicitor's signature"

Rose, Neil, *Legal Futures*, 04 December 2017
[Excerpt]

A non-lawyer working at leading Welsh firm Hugh James who forged a document in the name of an assistant solicitor has been banned from working in the profession.

[**Full Text**]

"Solicitor who made client agree not to complain to the authorities suspended"

Bindman, Dan, *Legal Futures*, 09 November 2017
[Excerpt]

A solicitor who was "over his head" in running his own firm, and used a settlement with a vulnerable client to prevent … [the client] complaining to the Solicitors Regulation Authority (SRA) or Legal Ombudsman (LeO), has been suspended from practice.

[**Full Text**]

"Rebuke and fine for solicitor who handled clients' divorces through unregulated company"

Rose, Neil, *Legal Futures*, 24 October 2017
[Excerpt]

A family law solicitor who held out his unregulated company as being an authorised law firm has been sanctioned by the Solicitors Regulation Authority (SRA).

It is the second such case in a matter of weeks and it has again been resolved by way of a regulatory settlement agreement, which means Anthony Gary Vingoe will not face a disciplinary tribunal.

[**Full Text**]

"Hefty fines after Chinese wall failure sees solicitor disclose wife's address to violent husband"

Rose, Neil, *Legal Futures*, 04 October 2017
[Excerpt]

An assistant solicitor and his firm have been handed hefty fines after the failure of a Chinese wall between two clients, a woman and her abusive husband, led to the man being told her new address against her specific instructions.

[**Full Text**]

"Solicitor who overcharged by 574% struck off"

Bindman, Dan, *Legal Futures*, 07 September 2017
[Excerpt]

A solicitor has been struck off after being found by the Solicitors Disciplinary Tribunal to have dishonestly charged an estate "manifestly excessive" fees for probate work – almost nine times the agreed amount.

[**Full Text**]

"Family law solicitor 'fabricated and backdated' letters to cover up lack of progress on cases"

Hilborne, Nick, *Legal Futures*, 22 August 2017
[Excerpt]

A family lawyer found to have fabricated and backdated letters across of host of cases – including child contact and domestic violence matters – has been struck off by the Solicitors Disciplinary Tribunal (SDT).

The SDT said "significant harm" had been done to the reputation of the profession and of the firm, Bridge McFarland, where she was an associate in the Lincoln office.

[**Full Text**]

"Solicitor sanctioned for acting in transaction after lending client money"

Rose, Neil, *Legal Futures*, 03 August 2017
[Excerpt]

A solicitor has been sanctioned over the potential conflict of interest of acting where he stood to financially benefit from the proceeds of the transaction he was dealing with while working at a leading London law firm.

Allan Hudson, who was a consultant solicitor at Howard Kennedy between 2012 and 2014, was rebuked and fined £1,500 [CDN $2,420.92] under a regulatory settlement agreement with the Solicitors Regulation Authority (SRA) that means he will not face a disciplinary tribunal.

The SRA said that Mr Hudson loaned his long-standing clients Mr and Mrs B £30,000, to be repaid when they remortgaged their home.

[**Full Text**]

"Family lawyer who confessed 'within hours' to faking letter is fined £2,000"

Hilborne, Nick, *Legal Futures*, 27 July 2017
[Excerpt]

A solicitor who confessed to his law firm that he had faked a letter "within hours" of sending it to a client, has been fined £2,000 [CDN $3,227.89] by the Solicitors Regulation Authority (SRA).

Ian Giddings, based at the Warwick office of national family firm Woolley & Co, admitted creating and backdating the letter[,] in a regulatory settlement agreement.

The SRA said Mr Giddings had acted for a husband, referred to as Mr H, in a financial dispute following a divorce, which required the valuation of the former matrimonial home.

"Mr H wanted that valuation to be carried out by a valuer who was a member of the Royal Institute of Chartered Surveyors. The wife (Mrs H) did not.

"On 21 March 2016, Mr. Giddings told Mr H that he had sent a letter to the court explaining Mr H's position. This was inaccurate. Mr. Giddings had not sent such a letter.

"Mr H asked for a copy of the letter. Mr Giddings created a letter, backdated it and sent it to Mr H by email.

"Mr Giddings told Woolley & Co within hours of what he had done. Woolley & Co then told Mr H that Mr Giddings had not written to the court."

[**Full Text**]

"Solicitor who admitted breaching confidentiality to help convict murderer agrees to leave profession"

Rose, Neil, *Legal Futures*, 29 June 2017
[Excerpt]

A solicitor who deliberately broke professional rules by releasing confidential client files so as to help convict a murderer has agreed to leave the law.

[**Full Text**]

"Senior partner sanctioned for 'completely unacceptable' correspondence with litigant in person"

Rose, Neil, *Legal Futures*, 07 June 2017
[Excerpt]

The senior partner of a south London law firm has been sanctioned by the Solicitors Disciplinary Tribunal for unprofessional and "completely unacceptable" correspondence with a litigant in person, in which he accused her of lying, disgraceful behaviour and arguing with a judge "like a fisherwoman".

[**Full Text**]

"Fine for senior partner who 'accidentally' discriminated against colleague on grounds of age and religion"

Rose, Neil, *Legal Futures*, 03 April 2017
[Excerpt]

A senior partner who was found by an employment tribunal to have discriminated against, harassed and victimised a former equity partner at his firm, has been fined £2,000 [CDN $3,227.89] by the Solicitors Disciplinary Tribunal (SDT), which found his culpability to be "low" as his behaviour had "just crossed the line into discrimination".

The SDT said that Anup Shah "had not intended to discriminate or victimise" his colleague [NVDB], "although this had been the outcome".

Rather, "the misconduct had arisen from a dispute between two people who had been friends but whose relationship had become rancorous".

. . . .

With relations worsening, Mr Shah sent NVDB an email two days before Christmas 2009 which included the comments, "What all this hatred? Maybe you need to seek help", and "I thought Catholic Christians would know better than to spread such hatredness (sic) especially during Christmas". The email was sent to others at the firm.

[**Full Text**]

"… [Tribunal] shows 'humanity' with low-level sanction for solicitor convicted of stalking"

Bindman, Dan, *Legal Futures*, 16 March 2017
[Excerpt]

A solicitor convicted of stalking her husband's former lover has been fined £1,000 [CDN $1,613.94] by the Solicitors Disciplinary Tribunal (SDT).

In what it described as "wholly exceptional circumstances", the tribunal said that "the reputation of the profession is enhanced by some consideration of humanity".

[**Full Text**]

"Barrister fined for pestering women at chambers summer party cleared by High Court"

Rose, Neil, *Legal Futures*, 14 February 2017
[Excerpt]

The High Court has overturned a disciplinary tribunal finding against a barrister found to have pestered three women at a chambers summer party.

Mrs Justice Lang said the medical evidence established that, on the balance of probabilities, Stephen Howd's "inappropriate, and at times offensive, behaviour was a consequence of his medical condition", exacerbated by excessive alcohol.

"In these circumstances, Mr Howd's behaviour plainly was not reprehensible, morally culpable or disgraceful, as it was caused by factors beyond his control," she ruled.

[**Full Text**]

4.2 Judicial: Penal

[No entries.]

Rusnak v. Shafir

2015 ABQB 290 (CanLII)
[Paras. 1, 10-11]

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[1] The Defendant was appointed custodian of the law practice of the Plaintiff by Order of Justice Sulyma on October 20, 2005 pursuant to s 95 of the Legal Profession Act, RSA 2000 c. L-8. The Plaintiff claims that the Defendant breached duties to him in the manner in which he conducted the custodianship of his law practice, and in particular, failed to protect his entitlement to certain accounts and failed to properly ascertain the proper quantum of trust account shortages, thereby causing him damages. The Defendant says all steps he took were in accord with his duties to the Law Society and the public pursuant to his Order of appointment or otherwise approved by orders of the court. Furthermore, he takes the position that he had no duties to the Plaintiff. The Defendant applies to strike the action pursuant to rule 3.68 as an abuse of process or frivolous and also seeks summary dismissal pursuant to rule 7.3 on the basis that the claim has no reasonable prospect of success.

. . . .

[10] Based on the foregoing, I have concluded that this action amounts to an abuse of process and pursuant to rule 3.68 the action should be struck. If that conclusion is incorrect, summary dismissal must be considered. The Plaintiff relies on an earlier test being the need to prove beyond a reasonable doubt that there is no genuine issue to be tried but that is no longer the test to be applied under rule 7.3. The test now is set out in WP v Alberta, 2014 ABCA 404 (CanLII) which says the question is whether there is in fact any issue of "merit" that genuinely requires a trial, or conversely whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily. Although I have not set out all of the facts and circumstances herein, having regard to the totality of the evidence before me and the legal arguments, I have no difficulty finding that the likelihood that the defence will succeed is very high and that there are no issues of merit that genuinely require a trial.

[11] Accordingly the action is dismissed with costs to the Defendant.

[**Editor's Note:** Appeal to Alberta C.A., dismissed; Application for Leave to Appeal to S.C.C., File No. 37028, dismissed, 08 September 2016.]

[**Full Text**]

Jarbeau v. McLean

[2017] O.J. No. 717, (Ont. C.A.) 13 February 2017,
The Lawyers Weekly, 17 March 2017
[Headnote]

[Facts:] Appeal by the defendant, McLean, from a judgment in a solicitor's negligence action. Cross-appeal by the plaintiffs, the Jarbeaus, from the judgment and costs award. The plaintiffs purchased a new home from a developer that leaked due to a failure to meet building code standards. The plaintiffs retained the defendant solicitor to sue those responsible for building and selling them a defective home. The defendant sued the developer, the City and the warranty corporation, but failed to sue the engineer within the limitation period. The defendant negligently advised the plaintiffs they did not have a cause of action against the engineer on the basis they did not have a contract with him. The engineer subsequently acknowledged he was negligent in certifying the design and construction of the home. The plaintiffs settled the first action and sued the defendant seeking damages for solicitor's negligence. On the eve of trial, the defendant admitted liability. The trial proceeded on the issues of causation and damages. A trial within the trial examined the plaintiffs' potential action against the engineer. The jury found in the plaintiffs' favour. The jury assessed the costs of repair at $433,000, and the diminution in value due to the defects at $265,000. Deduction of the $75,000 settlement of the first action resulted in a net award of $190,000. The trial judge declared the jury's cost of repair finding as perverse, but granted judgment for $190,000 as the lesser of the cost to repair and diminution of value. The trial judge reduced the costs payable to the plaintiffs despite bettering a settlement offer on the basis the jury's diminution of value finding was also perverse. The defendant appealed and the plaintiffs cross-appealed.

Held: Appeal dismissed and cross-appeal allowed. The trial judge did not err in instructing the jury on the use of a "but for" test for causation. The trial within a trial established the plaintiffs would have recovered against the engineer with 100 per cent certainty. The defendant's negligent advice precluded them from litigating that claim. The plaintiffs were accordingly entitled to full compensation for the loss without reduction for contingencies. There was an evidentiary basis for the jury's assessment of both the costs of repair and the home's diminution of value. The fairest measure of damages provided the plaintiffs what they bargained for, namely, a home free of defects. Accepting the jury's assessment that the home had no value precluded awarding the lesser diminution of value amount. The verdict was set aside and substituted with a judgment in the amount of $433,000, representing the costs of repair as assessed by the jury. There was no basis for deducting the prior settlement amount, as it could be attributed to unrelated repairs and legal fees. In assessing costs, the trial judge made unjustified criticisms of the plaintiffs' counsel and failed to give appropriate weight to their settlement offer that bettered the trial result. The costs award was set aside and replaced with an award fixed at $231,000.

[**Full Text**]

"Judge orders punitive damages to be paid"

Robinson, Alex, *Law Times*, 23 April 2018
[Excerpt]

A small claims deputy judge has ordered a lawyer to pay punitive damages after he threatened criminal charges against a physiotherapist who was bringing a civil action against him. [2017 CanLII 143128 (ON SCSM)].

Deputy Judge Roderick McDowell found that Hamilton lawyer Girolamo Falletta's conduct in a dispute over $1,300 was "wrong and deserving of condemnation." The matter started as a simple contract case involving an unpaid account the physiotherapist had charged a personal injury client of Falletta. As the client did not have the ability to pay for physiotherapy, the lawyer and his firm took an undertaking to protect the account.

When the physiotherapist contacted Falletta about the unpaid account, the lawyer responded by threatening criminal charges, which he continued to do when the physiotherapist said he would pursue a civil claim, according to the decision. McDowell found Falletta's conduct "astounding and reprehensible" as well as "wrong and deserving of condemnation."

[Full Text]

"OCA sends vicarious liability case to trial"

Robinson, Alex, *Law Times*, 23 April 2018
[Excerpt]

The Court of Appeal has opened the door to a firm possibly being found vicariously liable for the actions of a lawyer who practised in association with it.

In *Wallbridge v. Brunning* [2018 ONCA 363 (CanLII)], the court has allowed a claim against Ottawa-based firm Williams Litigation Lawyers to proceed to trial after an Ontario Superior Court judge had dismissed it.

The claim was brought by Wallbridge Wallbridge — a partnership of lawyers with offices in Northern Ontario — for allegedly defamatory statements that lawyer Fay Brunning made about the partnership in letters.

Brunning, who is the wife of Williams minority partner Eric Williams, sent the letters using the law firm's letterhead and worked out of the same office at one point, but she was not an employee of the firm.

The letters were sent to lawyers, a member of Parliament, former Wallbridge clients and a journalist who republished them on a blog.

The claim against the firm hinges on whether it can be found vicariously liable for Brunning's allegedly defamatory statements given that she used its letterhead and was practising in association with the firm. Williams brought a successful summary judgment motion to have the claim against it dismissed, arguing that Brunning was acting independently when she sent the letters and that she was not an employee.

[Full Text]

"Distributive tax knowledge will keep those negligence claims away"

Yousefi, Leena, *The Lawyer's Daily*, 25 July 2017
[Excerpt]

A tax topic that is becoming increasingly important and a fixture in family law corporate division is distributive taxes. This concept can attract negligence claims against a lawyer who does not consider them for his or her client. When it comes to division of family property, consideration of distributive taxes or lack thereof may mean gaining or losing hundreds of thousands, if not millions, of dollars for a spouse.

[Full Text]

"Firm found liable for negligence"

Robinson, Alex, *Law Times*, 16 January 2017
[Excerpt]

A judge has found a well-known firm liable for negligence after one of its tax lawyers failed to advise a client on tax consequences concerning their family trust.

In *Ozerdinc Family Trust v. Gowlings* [2017 ONSC 6 (CanLII)], Ontario Superior Court Justice Marc Labrosse found Gowling Lafleur Henderson LLP (now known as Gowling WLG) liable for negligence, for failing to advise Muharrem Ozerdinc and Marion Grimes of an impending deemed disposition on a family trust they set up for their children.

"…I conclude that none of the experts has persuaded me that the Defendants did not, at least in part, cause the Plaintffs' tax consequences resulting from the deemed disposition rule," Labrosse said in the decision.

[Full Text]

"Judge finds lawyer negligent for advice to Olympic skier"

Robinson, Alex, *Law Times,* 20 February 2018
[Excerpt]

An Ontario judge has found a Toronto lawyer and his law firm were negligent in tax advice they gave to a former Canadian Olympic skier.

Ontario Superior Court Justice Bernadette Dietrich determined that lawyer Stuart Bollefer and Aird & Berlis LLP failed to warn retired skier Katherine Pace-Lindsay about the risks of a plan they provided to limit the amount of income tax paid on assets she held in a trust.

"The defendants breached their duty to provide competent legal and tax advice," Dietrich wrote in *Lindsay v. Aird & Berlis LLP* [2018 ONSC 7424 (CanLII)].

"Mr. Bollefer breached his duty to apply reasonable care, skill and knowledge in the provision of his professional services to the plaintiff in accordance with the standards of a reasonably competent solicitor with particular expertise in income tax planning matters."

[Full Text]

Washburn v. Marshall (Representative of)

2018 ABQB 301 (CanLII), R.A. Jerke J.
[Headnote (*The Lawyer's Daily*)]

[Facts:] Application by S, counsel for one defendant, for an order striking out [plaintiff's] allegations against him in an application for summary judgment brought by the plaintiff. Application by the plaintiff for costs against S. The plaintiff sued for serious injuries suffered in a boating accident. The plaintiff sued the estate of the deceased driver and A, a passenger. S represented the personal representative of the estate until 2016. The plaintiff's claim greatly exceeded the value of the estate. In his application for summary judgment, the plaintiff claimed that S caused the estate to expend unreasonable legal costs in defending this action. S

consented in January 2015 to an order that admitted liability of the estate, subject to contributory negligence, and an assessment of damages.

Held: Application by S allowed. Plaintiff's application dismissed. S was prejudiced because a claim was being made against him when he was not a party and because he was forced to defend allegations when to do so might engage duties and obligations to his former client which he was ethically bound not to compromise. The allegations placed him in a conflict of interest with his own client. This was a very serious application to make against a lawyer, an officer of the Court, involving very strong allegations. The evidence did not establish that S had in any way undermined the authority of the Courts or interfered with the administration of justice. There was nothing to warrant a conclusion that he had engaged in any misconduct. All he had done was defend a claim brought against his client. [2018 ABQB 301 (CanLII).]

[**Full Text**]

"Exonerated lawyers sue LSUC for $22 million"

Robinson, Alex, *Law Times*, 31 March 2017
[Excerpt]

Two former Torys LLP partners exonerated of professional misconduct accusations are suing the Law Society of Upper Canada for $22 million.

Dorothy DeMerchant and Darren Sukonick have brought a lawsuit against the provincial regulator for negligent investigation and malicious prosecution after the two former lawyers successfully fought allegations they had acted in a conflict of interest when representing Conrad Black's Hollinger group of companies in the sale of its CanWest Global newspaper assets.

The two former partners, who have both since left the profession, have also claimed misfeasance in public office, abuse of process and libel.

[Editor's Note: As to "negligent investigation", however, see: *Robson v. The Law Society of Upper Canada*, 2017 ONCA 468.]

[Full Text]

"Damages awarded in legal malpractice case"

Robinson, Alex, *Law* Times, 06 March 2017
[Excerpt]

A lawyer who faced off against LawPRO in a recent legal malpractice case says the insurer was looking for a legal precedent and ultimately failed at obtaining it.

The Ontario Court of Appeal recently ruled on the case — *Jarbeau v. McLean* [2017 ONCA 115 (CanLII)]— and rejected arguments by LawPRO lawyers that damages in the claim should be determined through lost chance.

The lost chance analysis is a basis for assessing damages in which if a lawyer fails to bring a lawsuit within a limitation period, the plaintiff loses the opportunity to sue the original defendant.

This limits damages to the value of the chance that was lost, ultimately reducing the amount paid out. In this case, the Court of Appeal found this did not apply to the *Jarbeau* case.

[Full Text]

"SCC denies leave to Merchant Law Group LLP[:] $25 million fraud action will proceed"

Robinson, Alex, *Law Times*, 16 March 2018
[Excerpt]

The Supreme Court of Canada has denied leave to Merchant Law Group LLP to appeal a decision concerning a fraud action the government brought against the firm.

The Supreme Court dismissed the Saskatchewan-based firm's request for leave Thursday in the latest instalment in a long legal battle over $25 million the government was ordered to pay Merchant Law Group in 2008.

The federal government launched the civil action against Merchant Law Group in 2015 to try to reclaim the sum, which was paid to the firm for work it had done on behalf of Indian residential schools survivors. The government brought its claim after a review conducted by accounting firm Deloitte indicated Merchant Law Group had illegitimate time entries and excessive disbursements in its billing records.

The federal government claimed damages for fraud, deceit and fraudulent misrepresentation. The lawsuit alleged the firm falsely and intentionally represented it had incurred

more unbilled time than it did, modified illegitimate time entries and submitted false claims for legal fees and disbursements it was not entitled to. These allegations have not been proven in court.

Merchant Law Group moved to have the government's statement of claim struck, and a judge of the Court of Queen's Bench granted the motion in 2016, finding the action was frivolous and vexatious. The Court of Appeal for Saskatchewan, however, allowed a government appeal and set aside the judge's order to strike the claim [2017 SKCA 62 (CanLII)].

In that decision, the Court of Appeal found that the action raises serious allegations of fraud that could not be properly addressed in previous proceedings and that require a full hearing.

[Full Text]

"Judge blasts lawyers over $3,500 dispute"

Robinson, Alex, *Law Times*, 22 January 2018
[Excerpt]

An Ontario judge has criticized the conduct of two personal injury lawyers as "shameful" in a dispute over less than $3,500.

In *Cozzi v. Sidiropoulos* [2018 ONSC 309 (CanLII)], lawyer Peter Cozzi brought a claim against Joseph Sidiropoulos, alleging he had failed in an undertaking to protect his account after the transfer of a file, as … [the involved client] had not paid the account. A client had retained Sidiropoulos to take over an action in which Cozzi had previously represented the client.

Sidiropoulos argued that he understood his undertaking was contingent on Cozzi delivering a complete file on a timely basis so that the action could proceed, which Cozzi had failed to do.

Ontario Superior Court Justice Michael Quigley found that Sidiropoulos had broken his promise to pay the account, but he dismissed Cozzi's appeal, as his claim was not brought within a two-year limitation period.

[Full Text]

"Former client launches $3-million lawsuit …[:] Plaintiff claims lawyers were negligent in marriage contract"

Robinson, Alex, *Law Times*, 18 December 2017
[Excerpt]

A former client is suing Fasken Martineau DuMoulin LLP for $3 million, claiming the firm and two of its former lawyers were professionally negligent. Lisa Niblett retained lawyers Anthony VanDuzer and Catherine Binhammer in 1987 to help with a marriage contract between her and her future husband, David Niblett. After Niblett started divorce proceedings in late 2015, she alleges it became apparent that the contract was one-sided, and would result in her husband keeping most of his net family property.

Niblett claimed that the lawyers were professionally negligent and breached their contractual and fiduciary duty to her. "The defendants failed to inform Lisa that the contract was unfavourable to her while benefiting David, and that no consideration was given for the entitlements she would receive under the contract," the statement of claim said. She alleged they failed to advise her about the statutory entitlements she was giving up through the contract that she would have received under the Divorce Act and the Family Law Act.

"They failed to warn Lisa adequately or at all, about the changes in her financial circumstance that could arise from childcare responsibilities, and exit from the workforce, the economic dependency related to the marriage, and as well, from the contingencies of life including illness and disability — all of which are factors affecting Lisa today," said the statement of claim.

. . . .

In their statement of defence, Fasken and the defendant lawyers said they had fully explained Niblett's legal rights to her, as well as the extent to which she was compromising her entitlements under the contract.

"The defendants advised Ms. Niblett that the draft marriage contract was contrary to her interests and urged her not to sign it," the statement of defence said.

They said that Niblett simply chose not to follow the advice that they gave her. Niblett was insistent on signing the contract, despite the terms that were against her interests, they claimed.

When the retainer was discharged, the defendants asked Niblett if she was under any pressure to sign the contract, but she said she was not, according to the statement of defence.

[Full Text]

"Judge strikes lawyer's claim against firm[:] Independent legal advice recommended"

Robinson, Alex, *Law Times*, 20 November 2017
[Excerpt]

An Ontario judge has struck a lawyer's wrongful dismissal claim against his former firm in a decision that lawyers say shows even practitioners need legal representation.

Superior Court Justice Thomas Bielby struck lawyer Amin Sachedina's mammoth 259-paragraph statement of claim, saying it was "excessively long" and breaks the Rules of Civil Procedure.

Bielby granted Sachedina leave to amend the claim, but he urged him to get a lawyer.

"Regardless of the fact that he is a lawyer, I recommend to him, in the strongest terms, that he retain counsel, if not to draft a new statement of claim, to review any new claim drafted by him," Bielby wrote in the decision in *Sachedina v. De Rose* [2017 ONSC 6560 (CanLII)].

[Full Text]

"Case involving lawyer who borrowed from client described as 'unseemly' "

Robinson, Alex, *Law Times*, 07 July 2016
[Excerpt]

An Ontario Superior Court judge has found an Oakville lawyer inappropriately borrowed from his client and produced a document in court that was "likely not genuine."

In *Wedlake v. Richey*, Justice Douglas Gray granted a part summary judgment against Jeffrey Richey in a dispute with his client, Frances Wedlake, over unpaid debts the lawyer amassed [2016 ONSC 4262 (CanLII)].

Under the Law Society of Upper Canada's Rules of Professional Conduct, lawyers are not permitted to borrow from a client, unless that client is a relative or financial institution.

[Full Text]

"Court of Appeal Finds Claims of Solicitor's Negligence Not Appropriate for Summary Judgment"

Spry, Cynthia, *mondaq*, 28 February 2018
[Excerpt]

In *Aird & Berlis LLP v. Oravital Inc.* [2018 ONCA 164 (CanLII)], the Court of Appeal recently overturned a decision: (1) granting summary judgment to a law firm for unpaid fees and disbursements; and (2) dismissing the counterclaim by the law firm's former clients (two corporations) alleging negligent provision of legal advice and representation. The decision emphasizes that, even where all parties agree that an action is appropriate for summary judgment, it is nonetheless open to the courts to disagree and order a matter proceed to trial.

[**Full Text**]

Rider v. Grant

2015 ONSC 5456 (CanLII), D.A. Wilson J.
[Headnote (Carswell); Paras. 86-95]

[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 — 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 and solicitor's provision of legal services to husband met standard of care of reasonably competent solicitor in circumstances.

Standard of Care

86 Counsel agree that the applicable standard of care is that of a reasonably competent solicitor: *Ristimaki v. Cooper*. A lawyer who is retained must bring "reasonable care, skill and knowledge to the professional service which he or she has undertaken." As well, "a solicitor's conduct must be viewed in the context of the surrounding circumstances. The reasonableness of the lawyer's impugned conduct is judged in light of the surrounding circumstances such as the time available to complete the work, the nature of the client's instructions, and the experience and sophistication of the client."

87 The experts did not agree on whether a solicitor who holds himself or herself out as having certain expertise in a particular area is held to a higher standard of care. Mr. Morton, who testified on behalf of the Plaintiff, said Grant would be held to a higher standard and counsel cited *Confederation Life Insurance Co. v. Shepherd, McKenzie, Plaxton, Little & Jenkins*. Mr. Dart disagreed but said that even if a higher standard applied, Grant met it.

88 Without a doubt, at the time of these events, Grant was one of the foremost experts in Ontario on family law. Rider testified that he retained Grant on the basis of the recommendation of a lawyer who said Grant was the top in his field. While the Plaintiff argues that Grant ought to be held to a higher standard of care because of his expertise, there was no evidence led as to how the higher standard differed from the standard of a reasonably competent solicitor.

89 In any event, I agree with the submissions of Mr. Pape that this particular issue has little relevance to my determination of whether or not Grant was negligent. Instead, the issue of credibility is central to my determination of the negligence issue; and credibility must be decided in light of the facts which are particular to this case. The parties do not agree on what requests Rider made of Grant, what information was provided by him, what his objectives were for the marriage contract or what advice Grant provided to Rider. In short, they do not agree on why Rider sought a marriage contract and what Grant did to accomplish those objectives.

Credibility

90 In deciding issues of credibility, it is not simply a matter of accepting the evidence of one party over another based on how the witness performed in the witness box. Rather, "the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."[5]

General Comments

91 On the issue of credibility, counsel for the Plaintiff submits that Grant failed to produce notes or dockets to corroborate his version of significant events in this file and argues that where the evidence differs between the parties, it is the recollection of the client which ought to be given preference. While the Plaintiff expert, Morton, referred to *Morton v. Harper Grey Easton* as support for this proposition, I do not accept it as an accurate statement of the law.

92 Rather, the trial judge in *Morton* noted, at para. 34, "It was my view that, all other things being equal, where there is a conflict between the version of the client and the version of the solicitor, the version of the client is to be preferred." In the case before me, there are significant issues of credibility between the parties, which I will elaborate on, such that it is not a situation where "all other things are equal".

93 Grant had some notes of his meetings and telephone calls with Rider. Boulby stated that it was not Grant's practice to record every meeting or phone call with a client and Grant concurred. I reject the submission of the Plaintiff that the absence of notes by Grant during the initial meeting with Rider on February 1, 1999 is "crucially important to this case." While it would be preferable to have a written retainer or notes of the initial meeting given the disagreement of the parties as to what transpired, the absence of them does not mean that the lawyer's evidence ought to be rejected or given little weight by the court. The lack of notes is a factor to be taken into consideration, along with other factors, in determining the credibility issues.

94 It is not disputed that a lawyer who does not adequately or diligently protect the client's interest will be found negligent. What constitutes adequate protection in the circumstances will turn on the facts of each particular case. In this case, what objectives did Rider tell Grant he wanted to achieve from the marriage contract? What advice did Grant give Rider to obtain those goals? Did Rider understand the consequences of the contract he eventually signed? The evidence differs on these critical issues.

95 The three experts who testified agreed that if Grant's evidence is accepted by the court as to what transpired, the standard of care was met and he was not negligent.

[**Full Text**]

"Firm's negligent advice to divorcing husband led to 'over-generous settlement' "

Bindman, Dan, *Legal Futures*, 18 November 2016
[Excerpt]

A judge has ruled that the advice lawyers gave in ancillary relief proceedings was negligent and that if the claimant had been properly advised, he would have settled on better terms.

But he dismissed an allegation that the solicitor had fabricated her file notes.

Sitting in the Leeds county court, … Judge Behrens decided in *Hogg v Crutes LLP* [2016] EW Misc B29 (CC) that the then head of the family department at north-east firm Crutes (since merged with DWF), should have advised Brian Hogg that by offering his wife all of a £140,000 pension fund as part of a settlement, he was offering too much.

"Law firm duped by imposter successfully defends claim over £1m property fraud"

Rose, Neil, *Legal Futures*, 03 October 2016
[Excerpt]

In what is being hailed as a significant victory for conveyancers, a law firm and estate agency have defeated a claim brought against them after it turned out that the seller they acted for was a fraudster.

The fraud only came to light when the real owner walked past his property and saw builders ripping out the kitchen.

In *P&P Property Ltd v (1) Owen White & Catlin (2) Crownvent Ltd t/a Winkworth*, Robin Dicker QC, sitting as a deputy High Court judge, ruled last week that while solicitors' checks were designed to reduce the risk of fraud, they could not reasonably be thought to eliminate it.
That meant the implied warranty of authority did not mean the seller's solicitors had to establish that their client, a Mr Harper, was the true Mr Harper.

[**Full Text**]

"Leading firm faces class action over treatment of female lawyers returning from maternity leave"

Rose, Neil, *Legal Futures*, 02 May 2018
[Excerpt]

US-based international law firm Morrison & Foerster (MoFo) is facing a $100m (£73m) class action over claims that it discriminates against female staff when they return to work after childbirth.

Three female associates currently employed at the firm alleged that MoFo subjected them and other female staff to lower pay, delayed advancement, lack of professional development opportunities, higher standards and limited access to meaningful work.

[Full Text]

"Court of Appeal allows 'whistleblowing' managing partner to sue former firm for £3.4m"

Rose, Neil, *Legal Futures*, 29 January 2018
[Excerpt]

The ex-managing partner of a well-known law firm has won the right to sue his former firm for £3.4m under whistleblowing law.

Andrew Roberts claims that he was constructively dismissed by the other partners of Salisbury practice Wilsons.

The Court of Appeal said that though "the factual background is likely to be contentious in due course", it would treat them as true for the purposes of this decision.

The court said that Mr Roberts was the firm's managing partner, and held both compliance officer roles. In July 2014, the board received a complaint of bullying against then senior partner Christopher Nisbet.

Mr Roberts investigated the complaint and his report, which he first shared with the firm's board, was to be discussed at a partners meeting in October 2014.

However, a majority of the partners delivered a notice stating that they would not attend the meeting and the following month demanded that Mr. Roberts resign as managing partner.

[**Full Text**]

"[United Kingdom] Supreme Court to examine proof needed in solicitors' negligence case"

Rose, Neil, *Legal Futures*, 11 December 2017
[Excerpt]

The Supreme Court is to review what needs to be proved when a solicitor is sued for failing to advise a client of a potential claim, in the latest of a raft of cases involving Raleys, the controversial but now defunct Barnsley law firm that acted for thousands of miners.

[**Full Text**]

"Law firm insurer fails in High Court bid to recover property fraud losses from solicitor"

Rose, Neil, 17 February 2017
[Excerpt]

A highly experienced solicitor who breached the Money Laundering Regulations 2007 in a property transaction that led to a £500,000 fraud did not act dishonestly, the High Court has ruled.

As a result, it dismissed a subrogated claim brought by the insurers of London law firm Pemberton Greenish to make her cover what they had to pay out.

Mr Justice Jeremy Baker said that the various breaches of the regulations by Jane Margaret Henry were "evidence of a serious lack of professional care", while attempts to cover up her errors after the fraud had been uncovered were "dishonest".

"However, despite these matters, I am not persuaded that the defendant's actions and omissions leading up to the fraud being uncovered were dishonest." There was no suggestion she was actually part of the fraud.

[**Full Text**]

"LSUC Suspends Lawyer For Helping Friend Buy Heroin"

Robinson, Alex, *Law Times*, 11 April 2017
[Excerpt]

The Law Society of Upper Canada has issued an eight-month suspension to a Hamilton, Ont. lawyer who admitted to providing heroin to a friend that later died from an overdose.

A law society hearing panel suspended Sarah Jackson for conduct "unbecoming a lawyer" when she acquired heroin for Ed Cieslik in 2013. She also admitted she had committed professional misconduct by failing to report a number of criminal charges to the law society that she was facing in 2012 and 2013.

She was charged with manslaughter in Cieslik's death in 2013, but she was later acquitted after spending more than a year in custody.

[**Full Text**]

"Disbarred lawyer ordered to pay nearly $800,000"

McKiernan, Michael, *Law Times*, 14 May 2018
[Excerpt]

A disbarred lawyer is appealing after a judge sentenced him to seven years in jail for his role in a $1.5-million small-business-loan fraud.

In *R. v. Kazman* [2018 ONSC 2332 (CanLII); espy. paras. 547-556], Ontario Superior Court Justice Nancy Spies also ordered 62-year-old Marshall Kazman to pay almost $800,000 in combined restitution and fines in lieu of forfeiture.

. . . .

According to Spies' April 12 decision, Kazman and his co-accused Gad Levy were convicted of five counts of fraud over $5,000 in relation to loans obtained from a number of banks and one count of money laundering following a five-month trial. Kazman and Levy were also found guilty of committing the frauds for the benefit of or at the direction of a criminal organization they formed with a third person who earlier pleaded guilty, Miriam Cohen.

. . . .

One of the aggravating factors … [Spies J] considered related to Kazman's disbarment in 2006. In *Law Society of Upper Canada v. Marshall Kazman*, a 2-1 majority of the disciplinary panel stripped Kazman of his licence to practise after finding him guilty of professional misconduct over five real estate transactions.

Although Kazman did not profit from the deals outside of the fees he collected, the panel found he prepared false affidavits and that he was not a "dupe" but instead had "adverted to the probability that these transactions were fraudulent" and avoided making further inquiries "because he did not want to be fixed with actual knowledge."

Spies said it was significant that Kazman became involved in the frauds before her while appealing the penalty in his law society case.

[Full Text]

R. v. Kassam

2017 ONSC 74 (CanLII), Boswell J.
[Summary (CBC News, 11 September 2017)]

He dressed like a lawyer, talked like a lawyer and worked as a lawyer, but in reality, 34-year-old Inayat Kassam was a smooth-talking fraudster with a law degree that wasn't worth the paper it was printed on.

The Aurora, Ont., man purchased his phoney law degree online five years ago from the University of Renfrew. The school has no officially recognized accreditation and its website features a fake address in Tampa, Fla., and stock images of supposed faculty members.

Inayat Kassam purchased two degrees from online diploma mills and claimed he was a lawyer. (Facebook)

The official-looking degrees were enough to impress Dennis Yang, who was introduced to Kassam in 2014 through a trusted colleague and hired him to manage new business for his Toronto law office.

"He told me he had a law degree from another jurisdiction," Yang says. "And was currently working on getting licensed in Canada."

Yang asked Kassam to send him transcripts, reference letters and his university diplomas, which appeared to be legitimate.

"The quality that you get from those diploma mills, it was just outstanding," Yang says. "I would have thought if it was fake, it wouldn't be so nice in terms of how they've presented all the documents."

. . . .

Ontario Superior Court Judge Cary Boswell said Kassam was engaged in "a lengthy and somewhat sophisticated fraud."

[**Full Text**]

"Solicitor in jail for attempted murder of his wife handed indefinite suspension from practice"

Rose, Neil, *Legal Futures*, 20 September 2017
[Excerpt]

A solicitor jailed for the attempted murder of his wife while suffering from severe depression has been handed an indefinite suspension by the Solicitors Disciplinary Tribunal (SDT) due to the "wholly exceptional" circumstances of his case.

[**Full Text**]

5.0 FEES AND COSTS

5.1 Fees

"Third-party litigation funding"

Kari, Shannon, *Canadian Lawyer*, January 2017, p. 48
[Excerpt]

The first statutory restrictions against maintenance and champerty were enacted in England in 1305, as a result of royal officials and nobles lending their names to dubious legal claims in exchange for a portion of any proceeds. The medieval-era statutes were repealed in 1967 and, for most in the profession today, the doctrines are likely a long-ago law school memory. However, the concepts are being addressed again in courts in Canada in the 21st century, in connection with third-party funding agreements for litigation.

. . . .

In exchange for providing a financial hedge against expenses, the outside funders may receive as much as 40 per cent of any award, depending on the extent of the resources advanced and whatever is in the terms of the agreement.

Proponents say it is a way to increase access to justice given the current realities and costs involved in complex litigation. Those who are wary of the funding deals raise concerns about whether the client is best served by this type of funding arrangement and that it can raise ethical issues for the plaintiff-side lawyers.

While there may be debate about the practice of an outside investor covering costs awards, experts' fees, disbursements or even the full expense of the litigation, the relatively few decisions in Canada in this area have all said that there is no prohibition against it. Where there have been[,] differences have been in the specifics of the agreement, what is needed for court approval and what must be disclosed to a defendant.

[**Full Text**]

Sweetgrass First Nation v. Rath & Company

2014 ABCA 426 (CanLII)
[Paras. 1-7]

[1] This is an appeal from the decision of a Court of Queen's Bench judge which returned a review of a law firm's accounts back for rehearing before another review officer*:* *Sweetgrass First Nation v Rath & Company*, 2013 ABQB 165 (CanLII), 559 AR 12.

[2] The background and positions of the parties are clearly set out in the decision below and will be only briefly summarized here. The appellant Sweetgrass First Nation retained the respondent law firm Rath & Company for a variety of legal matters over several years. After retaining other lawyers, Sweetgrass sought to review a number of Rath & Company's accounts, including one covered by a written contingency fee agreement and eight other accounts for which there was no written retainer. The review officer granted significant reductions on most of the accounts, including the amount billed on the contingency fee account which was reduced by over 60%. . . . .

[3] The reviewing judge correctly noted that the review officer's decision was owed deference unless some improper principle was relied upon, the quantum was so inordinately high or low it revealed a mistaken principle, the review officer failed to consider the evidence and representations, a fact finding was clearly in error, or the review officer exceeded his jurisdiction. As set out in the Alberta Rules of Court, review officers may review retainer agreements and lawyer's charges for reasonableness, but they have no jurisdiction to interpret retainer agreements. Any question arising about the terms of a retainer agreement must be referred to the Court pursuant to Rule 10.18(1)(a).

[4] The reviewing judge concluded there was a dispute about the terms of the oral or implied retainer agreements, and therefore the review officer proceeded without jurisdiction because he had to interpret the retainer in order to assess quantum. Mindful that the review officer had stated "In my view, reasonableness is to be read into the clause as follows..." (emphasis added), the reviewing judge held that the review officer exceeded his jurisdiction by improperly interpreting the contingency fee agreement. He further noted that the reductions were prima facie inordinate and raised concerns of principle.

[5] In our view, notwithstanding the review officer's choice of words, he did not exceed his jurisdiction. He, in fact, neither interpreted the oral or implied retainer agreements nor the written contingency fee agreement. The record, read as a whole, reveals that he was well aware of the limits on his jurisdiction, and he correctly noted that he was able to review the retainer agreements and the amounts charged for reasonableness only.

[6] While some terms of the oral or implied retainer agreements may have been unspecified, that does not mean they must automatically be referred to the court for interpretation. The review officer properly concluded that the accounts could be assessed on a quantum meruit basis because the parties had not expressly agreed beforehand what the fees would be: *McDonald Crawford v Morrow*, 2004 ABCA 150 (CanLII) at para 11, 348 AR 118. The review officer's comment that reasonableness was to be "read into" the contingency fee agreement does not mean that he was interpreting that agreement. In so doing, he was simply complying with that which Rule 10.9 of the Rules of Court mandates.

[7] However, we agree with the reviewing judge that most of the reductions made by the review officer were inordinately high, revealing an error in principle. The reductions to the two Oil & Gas joint venture accounts (Invoices 2654 and 2785) are not inordinate, and the review officer's decision with respect to these accounts is restored. The remainder of the accounts are returned for a rehearing before another review officer.

[**Editor's Note:** Application for Leave to Appeal to S.C.C., File No. 36303, dismissed, 18 June 2016.]

[**Full Text**]

"What to do when other party defaults on fees"

Hanuka, Ben, *The Lawyers Weekly*, 17 June 2016, p. 16
[Excerpt]

Where one party to an existing or pending arbitration proceeding fails to pay the arbitrator's required advance on fees, what are the remedies available to the non-defaulting party?

If the innocent party is the plaintiff and it wishes to pursue the matter through arbitration — should it be open for it to pay the defaulting party's share of the advance of fees and continue on with the arbitration?

On the other hand, if the innocent party does nothing, the required advance on fees will not be fully paid, and the arbitration proceeding will not get underway. While the defaulting party essentially ends up derailing the proceeding, is it then open to the innocent party to treat the arbitration as withdrawn, or should it be required to continue with the arbitration proceeding?

[**Full Text**]

Miller, Canfield, Paddock and Stone LLP v. BDO Dunwoody LLP

2016 ONCA 281 (CanLII), Laskin, Hourigan and Brown JJ.A.
[Endorsement]

[1] The appellant law firm, Miller, Canfield, Paddock and Stone LLP, appeals from the judgment of Hebner J. dismissing its action against its client, BDO Dunwoody, for the payment of fees under the parties' April 30, 2007 contingency fee retainer agreement. Under the retainer agreement, the Law Firm agreed to act on behalf of BDO "in any and all proceedings" BDO intended to commence against certain defendants. The retainer agreement contained a provision entitled "Termination of Legal Services," which provided that the client, BDO, had the "right, with or without cause, to cancel" the Law Firm's services. In that event, BDO agreed it would be "responsible to protect and pay the value of all services to date," and the retainer agreement specified how the value of services would be calculated.

[2] A dispute arose between the parties about whether the Law Firm should pay the cost of retaining outside counsel to appeal a decision in the proceeding BDO commenced. BDO took the position that the Law Firm's refusal to accept responsibility for appeal counsel's fees amounted to a repudiation of the retainer agreement. On June 19, 2012, BDO wrote the Law Firm to advise that BDO accepted the repudiation and directed the Law Firm not to take any further steps on behalf of BDO.

[3] On April 15, 2014, the Law Firm rendered an invoice to BDO in the amount of $427,891.57 for the value of the services rendered to the date of termination of the retainer agreement. There is no dispute that the invoice accurately calculated the value of those services in accordance with the terms of the retainer agreement.

[4] BDO brought a summary judgment motion to dismiss the Law Firm's action to collect its fees. The Law Firm brought a cross-motion for judgment in the amount of the invoice.

[5] The motion judge held that the Law Firm had breached the retainer agreement and the breach amounted to a repudiation of the agreement, but BDO's acceptance of the repudiation did not amount to a cancellation of services by it.

[6] Assuming, without deciding, that the Law Firm's refusal to pay the fees of outside appeal counsel amounted to a repudiation of the retainer agreement, in our view the motion judge did not apply the proper principle of law to her interpretation of that contract. A repudiatory breach of a contract does not, in itself, bring an end to a contract. Rather, it confers upon the innocent party, such as BDO, the right of election to treat the contract at an end. As a general rule, the party not at fault must make the election and communicate its decision to terminate the contract to the repudiating party: John D. McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at p. 641.

[7] When BDO accepted the Law Firm's repudiation of the retainer agreement and told it to take no further steps in the proceeding, BDO cancelled the Law Firm's services within the meaning of the agreement's termination provision. In accordance with the terms of the retainer agreement,

BDO thereupon became responsible to pay the Law Firm the value of all services performed to date calculated in accordance with the retainer agreement.

[8] Accordingly, we grant the appeal and set aside the dismissal of the Law Firm's action. We grant judgment in favour of the Law Firm in the amount of $427,891.57, together with pre-judgment interest.

[9] We award the Law Firm its costs of the appeal fixed in the amount of $10,000, inclusive of disbursements and HST, and its costs of the motion below in the amount of $20,000, plus disbursements and HST.

"Risks of adverse cost protection"

Hu, Ian, *The Lawyers Weekly*, 24 June 2016, p. 13
[Excerpt]

Adverse cost protection is a relatively new insurance or quasi-insurance product that can help lessen the financial blow of a lost case for both the client and lawyer. It may also be called adverse cost insurance, legal expense insurance, or after the event (ATE) insurance. While there is no standard contract or policy, the adverse cost provider will generally pay some amount of costs, fees and/or disbursements should the client's case lose. The premium or cost of the contract may be paid as a percentage of the value of a resolved case, contingent on a successful resolution by way of a settlement or trial verdict. In other cases, a firm may pay a flat fee to obtain coverage for all its files.

[**Full Text**]

Clatney v. Quinn Thiele Mineault Grodzki LLP

2016 ONCA 377 (CanLII), Cronk, Epstein and Huscroft JJ.A.
The Lawyers Weekly, 15 July 2016, p. 19 [Headnote in part]

[Facts:] Appeal by the client from the dismissal of his application to refer the solicitors' accounts to an assessment. In March 2008, the appellant was seriously injured in a motor vehicle accident. The appellant retained Bertschi Orth Solicitors and Barristers LLP (Bertschi Orth) to represent him in his tort and accident benefits claims. The appellant entered into a contingency agreement with the respondent Bertschi Orth that provided for the payment of 35 per cent of damages recovered, plus disbursements and GST. The agreement also provided that if the retainer was terminated prior to the resolution of the claim, the appellant would pay Bertschi Orth all fees and disbursements for services rendered. In 2012, the appellant terminated Bertschi Orth's retainer

and hired the respondent Quinn Thiele Mineault Grodzki LLP (Quinn Thiele). The appellant entered into a retainer agreement that provided for payment of fees equal to 30 per cent of damages recovered. Bertschi Orth delivered an account to the appellant setting out $106,000 in fees and $7,000 in disbursements. The claim settled in July 2013 for $800,000, which included the Family Law Act claims advanced by the appellant's wife and children. Certain funds were distributed and the remainder, approximately $655,000 was held under a charging order pending the resolution of the accounts of the respondent Bertschi Orth for fees and disbursements. $70,000 of the $655,000 was paid into court on behalf of the appellant's children. A consent order was later issued that provided for the release of the remaining monies. The consent order specified payment to the respondents of amounts in full satisfaction of their fees and disbursements, with the remainder, $274,142, to the appellant. The appellant then brought an application for an order referring the respondents' accounts to assessment. The application judge dismissed the application on the basis that, in light of the consent order, he lacked jurisdiction to hear the matter. The appellant appealed.

Held: Appeal allowed. The application judge had jurisdiction to refer the respondents' accounts to assessment and he erred in law in holding otherwise. It was open to the application judge to consider the appellant's request to set aside the consent order notwithstanding it was relief sought within an application. The consent order, as it stood, was a bar to the application judge assuming jurisdiction to consider the request that the fee agreements be assessed. As assessment order would have amounted to an impermissible collateral attack on the consent order. However, the appellant specifically requested that the consent order be set aside, which removed any collateral attack concerns. The application judge should have considered that request and his failure to do so constitutes an error of law. Setting aside the consent order was necessary to achieve justice between the appellant and the respondents relating to the legal costs associated with the tort action. It was just to set aside the consent order. When the consent order was entered into, the appellant was in a vulnerable position as he had suffered a brain injury and he was in desperate financial straits, which was known to the respondents. Quinn Thiele increased the pressure on the appellant in a number of ways. The appellant did not have independent legal advice. The respondents would not suffer prejudice if the consent order was set aside. The fee agreements should be reopened and an assessment of the respondents' fees and disbursements should take place.

[**Full Text**]

"When judges go rogue on legal bills"

Middlemiss, Jim, *Canadian Lawyer*, July 2016, p. 46
[Excerpt]

Imagine taking a tragic medical case six years ago on a contingency fee agreement with the standard 30-per-cent payout. You do well and arrive at a $6.6-million settlement and even agree to cut your contingency fee to 25 per cent in order to facilitate the negotiations. Remember, if you lose the case, you're paid nothing. Then, at the hearing to approve the settlement, Ontario Superior Court Justice Darla Wilson decides that your $1.5-million fee is $500,000 too much, and

cuts it to $1 million, effectively rewriting the contingency fee arrangement and replacing your 30-per-cent deal with a court-imposed 15-per-cent one.

That's what happened to Toronto personal injury lawyer Joel Freedman in *Batalla v. St. Michael's Hospital* [2016 ONSC 1513 (CanLII)]. Ouch! That's more than a haircut on a legal bill, it's closer to a buzz cut. But no matter how you slice it, it's a financially painful outcome for the lawyer.

"Legal expert recommends following Alberta Law Society's lead on rules for bartering"

Burns, Ian, *The Lawyer's Daily*, 20 February 2018
[Excerpt]

The Law Society of Alberta has released a guideline that sets out rules by which lawyers in the province can engage in bartering for legal services, and a lawyer whose firm recently announced it would accept cryptocurrency for payment says other law societies would be advised to take a similar step because of a major evolution in how people pay for things.

[Full Text]

"Divisional Court reaffirms cutting lawyer's fees by $700K"

Robinson, Alex, *Law Times*, 31 July 2017
[Excerpt]

The Divisional Court has reinstated an assessment officer's decision to cut more than $1 million in legal fees down to $325,000, because the lawyer who charged the fees failed to provide evidence to support his billings [or to participate in the assessment]. [2017 ONSC 3613 (CanLII).]

[Full Text]

"Lawyers can sue clients for unpaid fees"

Robinson, Alex, *Law Times*, 13 March 2017
[Excerpt]

The Ontario Divisional Court has issued a stinging criticism of the processes lawyers have to follow to retrieve unpaid fees from clients and the provincial government's failure to address backlogs in that system.

. . . .

In a recent decision concerning a dispute between Gilbert's LLP and two clients who refused to pay their bills, the Divisional Court ruled that lawyers can bring an action in court to recover outstanding fees.

Justice Ian Nordheimer, writing on behalf of a three-judge panel, said the assessment processes are "outdated and impractical" and that the Ministry of the Attorney General's failure to properly resource the assessment office has compounded delays.

Backlogs in the assessment office at the Ontario Superior Court in Toronto have often led to waits of more than three years before lawyers seeking fees have their matters heard by an assessment officer, lawyers say.

[Full Text]

Leach v. Leach

2016 ONSC 6140 (CanLII), McDermot J.
[Summary; Para. 62]

[Facts:] A separation agreement provided that if a husband defaulted on timely payment of support, the husband must pay the wife all legal expense she would incur in collecting support arrears. Correspondence indicated the wife's lawyer was optimistic an order of costs would be made against the husband in the event of [support] enforcement proceedings, from which some or all of such legal expense would be recovered. The husband alleged that the provision amounted to a contingency fee arrangement between the wife and her solicitor, for benefit of the wife's solicitor. The husband submitted that the wife's lawyer would have an interest in enforcement litigation amounting to champerty (prohibited at common law) because she would need obtain a costs order against the husband in order to get paid.

Held: The separation agreement provision was not champertous.

[62] The fact that a lawyer suggests to her client that recovery of costs is possible, or in fact probable, does not make the fee arrangement a contingency fee. Ms. Leach's position is clear in para. 19 of her affidavit of March 21, 2016 and is not contradicted. She is hopeful that she can recover costs against Mr. Leach; if not, however, she understands that she will owe her lawyer the difference. This is not a contingent arrangement; it is similar to the position of many clients in family law litigation who hope to recover part or all of their legal costs from their spouse. Ms. … [A] may have been foolish in stating that recovery of costs was a certainty; this did not, in my view, evidence a contingent arrangement between herself and her client. It evidenced, in my view, her own misunderstanding of the terms of the separation agreement.

[**Full Text**]

Peter Cozzi v. Jeffrey Wright

2016 ONSC 2596 (CanLII), C.A. Gilmore J.
[Summary]

Facts: Solicitor retained by husband to advise on legal issues resulting from separation of husband and his wife. Solicitor subsequently retained by husband to advise on legal issues resulting from refusal of girlfriend, who supplanted wife in husband's affections, to vacate residence husband owned and had, post-separation from wife, occupied with the girl friend. (His relationship with the girlfriend subsequently sundered and she became engaged to another man. Altercation between husband and (now-former) girlfriend resulted in peace bond which prohibited husband from entering residence he had shared with the girlfriend, after which she moved horses to, and invited tenants and fiancé to join her in occupying, the residence, and attempted sale of husband's chattels at residence via Kijiji.) Solicitor rendered accounts for service to husband for representing him in respect of his (now-former) wife (totaling $47,699.37), and in respect of his (now-former) girlfriend (totaling $47,869.74). Concerned he would not be paid his accounts solicitor claimed a solicitor's lien against husband's property and applied for charging order to formalize the lien.

Held: Charging order refused in respect of account to husband reference former wife; charging order granted in respect of account to husband reference girlfriend. Decision turned on whether solicitor's services met test for charging order based on claim of solicitor's lien: the test being whether the property to be charged had been "recovered or preserved through the instrumentality of" the solicitor's claimed professional services.

[Editor's Note: Also see next entry: *Duff v. Dawe*, 2018 NLSC 3 (CanLII), James P. Adams J.]

[**Full Text**]

Duff v. Dawe

2018 NLSC 3 (CanLII), James P. Adams J.
[Headnote (by Court)]

[Facts:] The Trustee of a consumer who filed a proposal under the *Bankruptcy and Insolvency Act*, sought the return of $42,081.93 transferred by the consumer's lawyer from her trust account to her general account to satisfy an invoice for legal services rendered to the consumer. The Respondent, Jean V. Dawe, Q.C., represented James F. Duff in a matrimonial dispute in which the division of assets was the principal issue. Following presentation of an invoice for her services, she filed a *lis pendens* based on her claim for a solicitor's lien against properties of Duff. Subsequently, Duff filed a consumer proposal under the *Bankruptcy and Insolvency Act*, in which Dawe was named as an unsecured creditor. Meanwhile, subsequent to the filing of the proposal, Dawe acted for Duff on the sale of one of the properties referred to in the *lis pendens*. Following the sale, and relying on her solicitor's lien, Dawe transferred most of the proceeds of sale from her trust account to her general account in satisfaction of her invoice and retained the rest against unbilled work. The Trustee sought return of the money.

Held: The solicitor's lien is valid and created a secured debt in favour of Dawe from the date the service was provided and should have been recognized as such by the Trustee. While the self-help remedy employed by Dawe is to be discouraged (she should have applied to court for a declaration of a charge against the fund), on equitable principles this did not change the legal character of the debt or deprive her of her right to the lien. The *lis pendens* was declared invalid as it did not comply with the legal requirements therefore but operated as a valid notice of lien. The Trustee's application was denied. No order as to costs.

[Full Text]

"Premium Fee not Permitted in Ontario"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2018-19, 14 May 2018

Author summarizes and opines reference *Jackson v. Stephen Durbin and Associates*, 2018 ONCA 424 (CanLII), Benotto, Brown and Miller, JJ.A.

[**Full Text**]

"Get creative in billing clients for dispute resolution"

Semple, Noel, *Canadian Lawyer*, nov./Dec. 2017, pp. 18-19
[Excerpt]

Imagine a list of clients' top 10 pet peeves about law firms. Pre-paid, uncapped time-based billing would rank high. Why do so many firms in niches such as family law, estate litigation and employment law stick with this much-unloved system? How can these firms realistically and profitably move past it?

[**Full Text**]

"Should referral fees be regulated or prohibited?"

MacKenzie, Gavin and MacKenzie, Brooke, *CAB/ABC National*, Fall 2017, pp. 40-41
[Excerpt]

In 2002, the Law Society of Upper Canada amended its Rules of Professional Conduct to allow lawyers to pay referral fees to other lawyers. The rationale was that referral fees would encourage lawyers to refer work to lawyers better able to serve a client's interests, reducing the likelihood that the lawyer would accept a retainer to act on a matter that may be beyond his or her ability. Ultimately, it would be a "win-win-win": the referring lawyer would receive a payment, the referred lawyer would obtain a new client, and the client would be served by a lawyer well-qualified to act.

[**Full Text**]

Angleland Holdings Inc. et al. v. Gregory N. Harney Law Corporation dba, et al.

Supreme Advocacy LLP, Issue #41, 20 July 2017
(Application for Leave to Appeal to S.C.C., File No. 37325, dismissed)

Mr. Harney and his law firm represented the clients, Mr. English and the three corporations, in a foreclosure proceeding and an action in trespass. In the foreclosure proceeding, the parties had an initial retainer of $10,000 to commence work on the file, but reached no firm agreement on the fees. Mr. Harney succeeded in obtaining a stay of an order for sale of the clients' property. Mr. Harney also identified a lender who expressed interest in refinancing the property, but Mr. English declined the terms offered. The action for trespass involved a claim against BC

Hydro for damage to an old logging bridge across a stream, while BC Hydro was attempting to access lands near the clients' property. BC Hydro offered Mr. English $127K in settlement, but he contended his claim was worth significantly more. Failing to reach an agreement on the fee arrangement, the relationship between the clients and the lawyer soured. At one point, Mr. Harney sent Mr. English a bill for over $1M stamped "draft", which he later admitted was never intended to be an account. Mr. Harney rendered his account in the amount of $536,224.10. A Master of the B.C.S.C., sitting as Registrar, taxed the account and reduced it to $264,217.54. B.C.S.C.: appeal dismissed. B.C.C.A.: appeal dismissed [2016 BCCA 387 (CanLII)]. "The motion for an extension of time to serve and file the reply is granted. The motion to adduce new evidence is dismissed. The application for leave to appeal...is dismissed with costs. In view of the disposition on the application for leave to appeal, it is not necessary to consider the motion to extend time to serve and file a motion for lengthy memorandum and a motion for stay of proceedings dated March 27, 2017. It is also not necessary to consider the motion for an extension of time to serve and file the application for leave to appeal."

Pellerin Savitz LLP v. Guindon

2017 SCC 29 (CanLII), Gascon J. for the Court
[Paras. 1-3]

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[1] The question in this appeal is one that arises regularly in the courts, both in Quebec and elsewhere in Canada. However, it is rarely raised in this Court. The appellant, a law firm, frames it in terms that seem absolute: Does the prescription period for a claim for a lawyer's professional fees begin to run on the billing date, the date of termination of the mandate or contract for services, or the date of performance of the last professional service?

[2] In my view, the question can be put much more simply and does not need to be answered in absolute terms: Under art. 2880 para. 2 of the *Civil Code of Québec* ("*C.C.Q.*" or "*Code*"), what is the date on which the law firm's right to claim its professional fees arose? Framed in this way, the question requires nothing more than a factual determination based on the circumstances of the specific case before the court.

[3] In the circumstances of this appeal, the Court of Appeal answered the question correctly. Having regard to the wording of the fee agreement between the parties and the content of the invoices sent by the law firm, prescription began to run on the 31st day after each invoice was sent, not upon termination of the parties' contractual relationship. The appeal must therefore be dismissed.

[**Full Text**]

"Force family lawyers to offer fixed fees, consumer panel suggests"

Rose, Neil, *Legal Futures*, 24 August 2016
[Excerpt]

Family law specialists should be required to work under fixed fees, the Legal Services Consumer Panel has suggested as it ramped up its call for regulatory intervention to improve transparency in the market.

The panel said family law was one area where it advised that regulators "should now consider mandating fixed fees".

In its response to the Competition and Market Authority's interim report last month, the panel said it agreed with "the overall finding that competition is not working well in this market because of a chronically weak demand side".

It said: "Consumers are not empowered with the information they need to shop around or choose the most appropriate legal service provider for their needs. Consequently, their ability to drive competition is hampered…."

[**Full Text**]

"Firm that broke assurance not to act for client's ex-wife still entitled to unpaid fees, … [U.K. Court of Appeal] rules"

Rose, Neil, *Legal Futures*, 19 June 2017
[Excerpt]

A law firm that gave a client an assurance that it would not act for his ex-wife, but later handled two small matters for her, did not breach its fiduciary duty to him and could claim for [her] unpaid fees, the Court of Appeal has ruled.

. . . .

Dismissing …[the client's] appeal, Lady Justice Sharp said that the 2009 assurance gave rise to a collateral contract in relation to any contract to provide legal services – but it did not pass the "stringent test" required to imply the former's terms into the latter.

"Were it to be the case, however, that such a term was to be implied into the contractual retainer, contrary to the view that I have expressed above, I do not consider this could be characterised as a condition of the contract so as to ever trigger the right to repudiate. Accordingly, the judge's conclusion that the [firm] was *prima facie* entitled to the fees due… was legally sound."

[**Full Text**]

5.2 Costs

Best v. Ranking

2016 ONCA 492 (CanLII), Blair, Pardu and Brown JJ.A.
The Lawyers Weekly, 08 July 2016, p. 22
[Headnote]

[Facts:] Appeal by Slansky, counsel for the plaintiff, from a decision requiring him to pay costs personally. The plaintiff, Best, became Slansky's client in 2013. Prior thereto, the plaintiff was found in contempt in 2010 for failure to pay a costs award following the 2007 stay of his action on jurisdictional grounds. The plaintiff left Canada rather than purge his contempt. Upon his return, his application to purge his contempt on the basis of perjury, conspiracy and fraud was refused and he was jailed for 60 days. Slansky represented the plaintiff on appeal. The Court of Appeal refused to remove counsel for the opposing parties, affirmed the contempt finding and sanction, and awarded costs to the respondents on a full indemnity scale. Subsequent attempts at review and appeal were refused. The costs award remained unpaid. In 2014, the plaintiff commenced a new action against 39 defendants alleging various torts and conspiracies. Counsel for the respondents advised Slansky of their intent to contest jurisdiction and/or have the action struck, and requested that he not note their clients in default. Slansky proceeded to have the respondents noted in default for their failure to serve a defence and refused to agree to set aside the noting until just prior to a motion by the respondents. [By now, the respondents had given Slansky notice they intended to claim costs against both him and his client.] The respondents were awarded substantial indemnity costs due to the plaintiff's conduct. An appeal from the costs order was dismissed. The action was subsequently struck as an abuse of process. Slansky was ordered to pay costs personally, in the sum of $84,000, on a joint and several basis with the plaintiff. Slansky appealed.

Held: Appeal dismissed. The order under appeal did not result from procedural unfairness. Slansky had adequate notice throughout the proceeding of an intention to seek costs against him personally. The meritless nature of the action was but one factor in the costs award, as the finding that the action constituted an abuse of process was also cited. The motion judge exercised her discretion as to costs with extreme caution, and her decision was entitled to deference. The judge's ruling was supported by the unassailable finding that

Slansky wasted costs unnecessarily by acting on unreasonable instructions or providing unreasonable advice on the scheduling of the respondents' jurisdiction motion. There was no error in finding that the pleading included accusations of criminal misconduct against opposing counsel that had repeatedly been judicially rejected as baseless. There was no basis for interfering with the motion judge's discretionary decision to order Slansky to pay a portion of the costs wasted.

[Full Text]

Gonzalez v. Gonzalez

2016 BCCA 376 (CanLII), Bauman, Newbury and Bennett JJ.A.
The Lawyers Weekly, 07 October 2016, p. 19
[Headnote]

[Facts:] Appeal by the husband from an order striking his civil claim against his former wife and related special costs award. The parties married in 1997, separated in 2007 and divorced in 2008. The wife commenced family law proceedings in 2013 after the husband stopped making support payments contemplated by a separation agreement. Amongst other things, the husband applied to vary support. The wife filed an affidavit in response that initially included documents regarding the husband's business affairs that she had retrieved from her home computer. The husband applied to strike portions of the affidavit on the basis they were obtained in breach of his reasonable expectation of privacy over the home computer. The husband's application was dismissed. The judge found the computer was the wife's property, used by all family members before and after separation. The husband left the documents in readily accessible conditions without password protection. Any expectation of privacy was slight. The husband responded by filing a separate civil claim against the wife seeking damages for breach of the Privacy Act. The wife applied to strike the pleadings. The chambers judge concluded that the doctrine of issue estoppel applied and the husband's claim constituted an abuse of process. The claim was struck and the wife was awarded special costs. The husband appealed.

Held: Appeal dismissed. There was no need to address whether the doctrine of issue estoppel was properly engaged, as the husband's conduct amounted to an abuse of process. The question of the husband's privacy interest was paramount in the family law proceeding and the husband's separate civil claim. The documents in both cases were allegedly obtained from a computer in the wife's home. The findings in the family law evidentiary ruling concluded the husband had virtually no expectation of privacy in the documents. His pleading in his civil claim was effectively the same as his application to strike, with the only difference being the relief sought. The husband failed to establish re-litigation would enhance rather than impeach the integrity of the justice system. The claim was properly struck. There was no error in discretion in awarding the wife special costs.

[Full Text]

Quebec (Criminal and Penal Prosecutions) v. Jodoin

2017 SCC 26 (CanLII), Gascon J. for the Court
[Paras. 1, 4, 19]

[1] This appeal concerns the scope of the courts' power to award costs … against a lawyer personally in a criminal proceeding. Although the courts have the power to maintain respect for their authority and to preserve the integrity of the administration of justice, the appropriateness of imposing such a sanction in a criminal proceeding must be assessed in light of the special role played by defence lawyers and the rights of the accused persons they represent. In such cases, the courts must be cautious in exercising this discretion.

. . . .

[4] In my opinion, the appeal should be allowed. The Superior Court correctly identified the applicable criteria and properly exercised the discretion it has in such matters. The Court of Appeal should not have intervened in the absence of an error of law, a palpable and overriding error of fact or an unreasonable exercise of his discretion by the motion judge. Although the exercise of this discretion will be warranted only in rare cases, the circumstances of the instant case were exceptional and justified an award of costs against the respondent personally.

. . . .

[19] This power of the courts to award costs against a lawyer personally is not limited to civil proceedings, but can also be exercised in criminal cases (*Cronier*). This means that it may sometimes be exercised against defence lawyers in criminal proceedings, although such situations are rare: *R. v. Liberatore*, 2010 NSCA 26 (CanLII), 292 N.S.R. (2d) 69; *R. v. Smith* (1999), 133 Man. R. (2d) 89 (Q.B.), at para. 43; *Canada (Procureur général) v. Bisson*, [1995] R.J.Q. 2409 (Sup. Ct.); M. Code, at p. 122.

[**Full Text**]

"Bad behavior can turn a winning litigant in a family law dispute into a loser"

Benmor, Steven, *The Lawyer's Daily*, 25 September 2017
[Excerpt]

The general rule is that a successful party in a litigation is entitled to costs from the court action. But not always. One of the factors considered by judges who have awarded a litigant the relief that was sought at trial is whether that party behaved reasonably.

[Full Text]

"Alberta lawyer potentially facing costs"

Robinson, Alex, *Law Times*, 14 July 2017
[Excerpt]

An Alberta judge has ordered a lawyer to explain why she should not be held personally responsible for costs against her client after advancing a "futile application" on his behalf [2017 ABQB 548 (CanLII), espy. paras. 113-122].

Court of Queen's Bench Justice Denny Thomas is considering potential costs personally against Priscilla Kennedy, of DLA Piper (Canada) LLP, for advancing litigation that is "abusive and vexatious nature" and could potentially be a "serious abuse" of the judicial system.

Kennedy's client, Maurice Stoney, brought an application in *1985 Sawridge Trust v Alberta (Public Trustee), 2017* to be added as a beneficiary of a trust set up for members of the Sawridge Band along with 10 other brothers and sisters. Stoney is the son of parents who had been members of the Sawridge First Nation at one point, but gave up their status for an enfranchisement payment.

Thomas found that the courts had already decided the issue in *Stoney v. Sawridge First Nation* and that Stoney's argument had already been rejected.

[**Editor's Note:** Justice Thomas also ordered that a copy of his decision be sent to the Law Society of Alberta "for review in respect to Ms. Kennedy."]

[Full Text]

"Expensive court battles at heart of many family law disputes[:] [What courts consider in deciding costs]"

Yosowich, Miriam, *Law Times*, 18 February 2016
[Excerpt]

Going to court, especially family law court is not cheap. Add the cost of lawyers, and your bill is bound to be costly.

The question is: how do family law courts determine the issue of costs?

A recent case coming out of the Ontario Superior Court of Justice sheds some light on what courts look at when they decide on cost awards.

In *Wallegham v. Wallegham* [2015 ONSC 8066 (CanLII)] a couple had a dispute over the visitation rights of the father.

The mother had the main care of the child with the father having supervised visits. The father filed a motion to have unsupervised access with the child and to have the visitations be in London, Ont., The court ordered in June 2015 to gradually lessen the supervision of the visits and allowed for the visitations to take place in London.

After the court order the father went after the mother for costs. He claimed the decision was a success for him, which made him entitled to costs. The mother on the other hand disagreed and explained that she had tried to settle costs with the father out of court.

[Full Text]

"[Ontario Court of Appeal] … nixes cost awards against lawyer"

Robinson, Alex, *Law Times*, 15 January 2018
[Excerpt]

The Ontario Court of Appeal has reversed a judge's order that a Kitchener-Waterloo lawyer should pay $100,000 in costs personally in a child welfare case.

An appeal judge had ordered lawyer Brigitte Gratl to pay $50,000 in costs to Legal Aid Ontario and $50,000 for her client's new lawyer in the case, after determining she had provided ineffective assistance in the proceedings.

But the Court of Appeal found that the issue was moot as the original trial judge's decision, which was overturned by the appeal judge, was actually correct.

"Ineffective assistance of counsel as a ground of appeal has a very narrow application," Court of Appeal Justice Mary Lou Benotto wrote in *Children's Aid Society of the Regional Municipality of Waterloo v. C.T.* [2017 CarswellOnt 19123].

"It is a ground of appeal. It is not a springboard from which an appellate court engages in retrospective analysis of every aspect of a lawyer's conduct."

[Full Text]

Scott v. Kallur

2016 BCSC 2361 (CanLII), Skolrood J.
[Headnote (Carswell)]

[Facts:] Mother and father agreed to retain parenting coordinator S during family law litigation and to share costs — Retainer agreement provided for interest to be charged on unpaid accounts at rate of 18% per annum — Father refused to pay $14,176.33 and unsuccessfully attempted to have S's accounts taxed under Legal Profession Act — S brought action against mother and father for payment of amount owing and reached settlement with mother — S applied for judgment against father by way of summary trial.

Held: Application dismissed — Matter was not as simple or straightforward as S claimed — While retainer agreement was principle document governing relationship between S, father, and mother, S was initially appointed pursuant to court order — Court retained supervisory jurisdiction with respect to activities and decisions of S, including with respect to ensuring S's accounts were proper and reasonable — Quite independent of this supervisory function, in any contractual claim for monies owing, court had to be satisfied services rendered were within scope of contract, and that amounts claimed accurately reflected those services — Finding could not be made based on evidence presented, which merely amounted to bald assertion that S had provided services and rendered accounts — There was also issue about whether interest clause in agreement was enforceable and whether S could validly recover amount of interest claimed.

[Full Text]

Fortier v. Lauzon

2018 ONSC 946 (CanLII), Mark Shelston J.
[Headnote (Carswell)]

[Facts:] Parties married in 1999, had four children and separated in October 2014 but remained in matrimonial home together until April 2015 — Father commenced proceedings seeking various claims for relief including divorce, joint custody, order determining spousal support and sharing of extraordinary expenses, division of family property, and order seeking sale of family residence — Mother filed answer making various claims for relief including sole custody, child support, equalization of net family property, and order granting exclusive possession of family residence — Order was granted based on partial minutes of settlement which settled issues of divorce, custody, access, child support and certain other issues — At trial, father was successful in obtaining order that equalization payment owed by father to mother was satisfied by rollover pursuant to provisions of Pension Benefit Division Act.

Held: Parties were unable to resolve issue of costs and both parties provided written submissions — Mother was ordered to pay father $6,460.20 for his costs — Issues father was not successful on were significantly less in dollar value than his success on equalization being satisfied by pension rollover and requirement of mother to pay father $128,260 — Issues were important to parties but were not complex or difficult and neither party's offers to settle were close to final decision — No costs were awarded prior to father representing himself for settlement conference and trial — Reasonable amount of time to prepare and present remaining issue of trial was 50 hours and hourly rate of $100 was appropriate.

[**Full Text**]

"Interim Disbursements"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2016-36, 12 September 2016

Author summaries and opines reference *Turk v. Turk*, 2016 ONSC 4210 (CanLII), Kitely J.

[**Full Text**]

"Who Pays the Assessor in a Custody Dispute when the Evidence Is Required for Trial?"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2016-38, 26 September 2016

Author summarizes and opines reference *R.(A.) v. R.(A.V.),* 2016 CarswellBC 1765 (B.C.S.C.), Funt J.

[**Full Text**]

"Costs"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2016-49, 12 December 2016

Author, in introducing *Chomos v. Hamilton*, 2016 ONSC 6232 (CanLII), Pazaratz J., cites other noteworthy decisions on law of costs, all rendered by Sherr J., reference family law proceedings in Ontario.

[**Full Text**]

"Security for Costs in Custody and Access Disputes"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2017-7, 20 February 2017

Author summarizes and opines reference *Doncaster v. Field*, 2016 NSCA 91 (CanLII), MacDonald CJNS, Hamilton and Beveridge JJ.A.

[**Full Text**]

"Costs Claimed and Awarded Against Counsel"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2017-12, 27 March 2017

Author summarizes and opines reference *F.(V.) v. F.(J.)*, 2016 CarswellOnt 21166 (Ont. C.J.), Marvin Kurz J.

[**Full Text**]

"Costs Awarded Against the Office of Children's Lawyer"

Epstein, Philip, *Epstein's This Week in Family Law*, FAMLNWS 2017-28, 17 July 2017

Author summarizes and opines reference *Eustace v. Eustace*, 2016 ONSC 8191 (CanLII), Emery J.

[**Full Text**]

APPENDIX - LOSS PREVENTION BULLETINS

Table of *Loss Prevention Bulletin* published by Canadian Lawyers Insurance Association: May 1991 to Summer 2016 (when Bulletin publication ceased)

[*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

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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

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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

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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
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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

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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

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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

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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

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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
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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

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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
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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
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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
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November 2003	35	152	Costs Consequences	35-152
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November 2003	35	155	Client Selection	35-155

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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
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Fall 2006	38	160	I Love CanLII	38-160
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[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]

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***LOSS PREVENTION BULLETIN* EDITORS**

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September 2001 to March 2002 issues: Barry Vogel Q.C.
January 2003 to December 2003 issues: Tana P. Christianson
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