# Principles and Practice of Legal, Ethical and Professional Responsibility

**[2014]**

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## EXPLANATORY NOTE

Each entry in the Detailed Table Of Contents of this annotated anthology—of principles and practices of legal, ethical and professional responsibility—is hyperlinked to the text of that entry. Annotations to some of the text entries are identified by "Note".

Each text, in turn—with few exceptions—is hyper-linked, by the designation "Full Text", to the source of that text. The exceptions are a few entries in the anthology designated "No Full Text", and Appendix C.

## PROGRAM PRESENTATION

Presenting the 2014 National Family Law Program, based on this anthology, will be **Trudi L. Brown, Q.C.**, Victoria Barrister and Life Bencher of the Law Society of British Columbia, and **David C. Day, Q.C.**, St. John's Barrister and Master of Newfoundland and Labrador Supreme Court.

## ACKNOWLEGEMENTS

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**15 June 2014**

# PRINCIPLES AND PRACTICE OF LEGAL, ETHICAL AND PROFESSIONAL RESPONSIBILITY

**[*2014*]**

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**DAVID C. DAY, Q.C.**
**Newfoundland Bar**

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## SYNOPSIS

*This anthology comprises excerpts from, and summaries of, judicial and administrative decisions, transcripts, book and journal scholarship, legislation, reports, manuals, and media cuttings (usually omitting footnotes or endnotes) on principles and practice of legal, ethical and professional responsibility; most of which were published from June 2012 to June 2014*

*Ten comparable previous anthologies—cumulatively covering the period 03 September 1189 (the birth date of legal memory) to June 2012—are posted at: http://www.lewisday.ca/ethics.html. This anthology will, on 21 July 2014, be posted to the same Internet address.*

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# 1.0 INTRODUCTION


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## 1. Overview

Legal responsibility mandates what practising lawyers must do.

Ethical responsibility counsels what they should do.

Professional responsibility advocates what they aspire to do.

This trifecta of overlapping species of responsibility should infuse lawyer's daily ritual scampering from one practise crisis to another—to deserve, to serve, and to be profitably reimbursed by, clientele.

Cumulatively, the three species of responsibility are designed to inform, govern, counsel, and inspire practising lawyers in discharge of their fundamental duties. Those duties are to represent their clients as unconflicted, candid, and loyal, counsel; that is, as "zealous advocates within the constraints of legality," contends Professor Alice Woolley, University of Calgary. The species of responsibility "should be assessed based on the extent to which they foster or undermine lawyers' accomplishment" of their goal: responsibly fulfilling client's instructions (*Understanding Lawyers' Ethics in Canada* (Markham [ON]: LexisNexis Canada Inc., 2011), p. 2).

Assessment of the three species of responsibility—addressed in this anthology—is subject to a caveat. Honorable Michel Proulx, of Quebec Court of Appeal (at his passing), and David Layton, Vancouver civil and criminal litigator, articulate the caveat, in *Ethics And Canadian Criminal Law* (Toronto: Irwin Law Inc., 2001, at p. 3):

> ... [w]hile certain … [responsibility] issues yield to reasonably clear answers, on many occasions identifying or applying the proper standards can be a

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

## 2. Anthology

Comprising this 2014 anthology are excerpts from, and summaries of, chosen judicial and administrative decisions, transcripts, book and journal scholarship, reports, manuals, and media cuttings. They were published, primarily, from June 2012 to June 2014.

(Involved footnotes and endnotes are omitted. Modest editing lends clarity. Each entry listed in the anthology's Detailed Table Of Contents is hyperlinked to the text of that entry. Annotations to a text are identified by the term "Note". In turn, each text—with few exceptions—and Appendices A and B are hyperlinked to the source document(s) of that text or Appendix. Each text is an excerpt from, or summary of, source document(s). )

Conduct of the law vocation is not a dress rehearsal. Disciplined regard for the three species of responsibility (and, implicitly, accountability) unsullied by life's other demands—or life's vices—is paramount when lawyers are addressing client dilemmas. Often, those dilemmas are abundantly complex; their resolution, sleep-depriving; and their financial yield, parsimonious.

Entries in this anthology are replete with law practice failings. Conduct of not a few lawyers mirrors John Lennon's lyrics: "Life [such as in the law] is what happens to you *while*

you're busy making other plans." Those law practitioners derogated from, or disregarded, the species of responsibility.

In Canada, as in other jurisdictions, standards begotten by the species of responsibility impact a lawyer in his or her personal life (e.g., the subject of a complaint to a law society). 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 'sentencing' a young London lawyer who, in December 2011, was found in possession of personal-use quantities of illegal drugs (cocaine and Ecstasy). The lawyer's father, incidentally, had been known as 'Mr. Payout' for his formidable reputation of succeeding in family law proceedings, before his appointment to the High Court's Family Division in April 2010. (The father had been divorced by the young lawyer's mother after the father started a relationship with a family law barrister whose spouse—also a family law barrister—was killed by police when he threatened them with a firearm in 2008.)

## 3. Previous Anthologies

Ten previous, comparable, anthologies canvas the period from birthdate of legal memory (03 September 1189), to 2012. They are published at: http://www.lewisday.ca/ethics.html; as will be this eleventh anthology, commencing 21 July 2014.

## 4. Providing Legal Services

### (a) Service Personnel

The constituency of this anthology (especially those practicing 'family law') comprises—as of 31 December 2011—114,380 lawyers (5,991 more than in 2010). (This most recent Federation of Law Societies of Canada statistical report figure includes, nationally, such categories of lawyers—although figures for them are incomplete—as "suspended", "disbarred; "retired", "life", "honorary" and "disabled".) Of these 114,380 lawyers, 79.7% —91,252 —had practising status on 31 December 2011.

Of the 91,252 practising-status lawyers, the largest percentage in each of the reporting provinces and territories was in the category of "26 years plus" at the Bar: 48.7% in Manitoba;

42.6% in Saskatchewan; 39.2% in New Brunswick; 34.5% in Alberta; 30.8% in Ontario; 26.5% in Barreau du Quebec; 26.1% in British Columbia; 25.7% in Prince Edward Island, and 24.7% in Newfoundland and Labrador. (Among the provinces, Nova Scotia did not report.) Only in Yukon and N.W.T. (Nunavut territory did not report) was the largest percentage of practising lawyers in a category for less than 26 years' experience at the Bar. (Categories in the Federation's 2011 statistical report are: 0-5 years; 6-10 years; 11-15 years; 16-20 years; 21-25 years, and 26 years plus.)

Incidentally, one lawyer qualifying for "26 years plus" in Newfoundland and Labrador (Hon. P. Derek Lewis, Q.C., senior partner of the anthology's editor) will, on 14 October 2014, toll 67 years in private law practise. (Among the cadre of lawyers currently practicing longer than Lewis, Q.C., in North America, is State of Maryland attorney W. Jerome Offutt, age 96, who has practised for 75 years.)

By gender, in Canada, male members outnumber female in all reporting jurisdictions, except in the Chambre des notaires du Quebec whose membership is comprised of 56.5% women. Bar societies in two jurisdictions have close to equal gender membership: Barreau du Quebec (48.75% female), and Yukon (49.7% female).

**(b) Service Vehicles**

Although difficult to extrapolate, with precision, from available Federation data, sole practitioners, clearly, do form the most frequent vehicle for legal service delivery in Canada. Sole practitioners, as of 31 December 2011, comprised not less than 65.8% of Yukon law practises; 61% in Ontario; 48.5% in Newfoundland and Labrador; 48.1% in Chambre des notaires du Quebec; 43.2% in New Brunswick; 42.4% in Yukon; 39.7% in British Columbia; 32.5% in Manitoba; 29% in Prince Edward Island; 26.8% in Saskatchewan, and 22.2% in Alberta. (Barreau du Quebec, Nova Scotia, and Nunavut Territory did not report.)

Cumulatively, in the 11 (of 14) Canadian law societies reporting on the subject (including, in Quebec, Barreau du Quebec, and Chambre des notaires du Quebec), 36.3% of law firms are professional corporations.

### (c) Service Delivery

Changing realities and the need to break down interprovincial barriers have led Canada's law societies—facilitated by the Federation of Law Societies—to recognize the credentials of members of the legal profession, wherever they were initially admitted to practice. National mobility of the legal profession is currently governed by three basic agreements among law societies: (i) National Mobility Agreement; (ii) Quebec Mobility Agreement and Addendum, and (iii) Territorial Mobility Agreement.

Members of the profession interested in transferring to another jurisdiction on a permanent or temporary basis should contact the law society of the province or territory where they wish to transfer for complete information.

The National Mobility Agreement is the blueprint for the mobility regime. The current agreement facilitates temporary and permanent mobility of lawyers between all common law provinces in Canada. Under the agreement's 'temporary' provisions, lawyers in the common law provinces may practise for up to 100 days a year in any other common law province. Or, they can transfer, permanently, between jurisdictions with ease.

Mobility to and from Quebec is currently governed by the Quebec Mobility Agreement and the Addendum to that Agreement. These agreements permit lawyers in common law jurisdictions wishing to practise in Quebec, and lawyers and notaries from Quebec wishing to practise in any of the common law jurisdictions, to acquire restricted practise rights. Known as, 'Canadian Legal Advisors' they are able to practise federal law, the law of their home jurisdiction and public international law.

In 2013, law societies struck a new mobility agreement, governing both temporary and permanent mobility. That agreement—the **National Mobility Agreement 2013**—was signed on 03 April 2014. It will extend the mobility provisions to permit Canadian lawyers to also transfer

between Quebec and the common law provinces, regardless of whether they are trained in Canadian common law or civil law. The agreement takes effect only once implemented by each law society, and will replace the existing National Mobility Agreement, the Quebec Mobility Agreement, and the Addendum to the Quebec Mobility Agreement. It is likely to come into force in late 2014.

The Territorial Mobility Agreement currently governs permanent mobility, only, for the three northern jurisdictions: the Yukon, the Northwest Territories and Nunavut. The **Territorial Mobility Agreement 2013**, signed on 03 April 2014, will come into force once implemented by each law society. It will permit the transfer of lawyers, permanently, between the territories and the common law provinces and, in addition, between the territories and Quebec regardless of whether they are trained in Canadian common law or civil law.

The mobility agreements do not create any rights, as such, to practice outside one's province or territory. Rather, they provide a framework for each signatory to each of the agreements to apply its own rules of implementation to lawyers from other Canadian jurisdictions.

Mobile lawyers need consult their professional liability insurers before practising outside their 'home' jurisdictions. Additional or, if moving between Quebec and a province or territory, separate, coverage will probably be required.

### (d) Service Remuneration

Admittedly outdated, in 2005—the most recent year for which Canada Revenue Agency data is available—the median income of Canada's lawyers and notaries was $96,527.00 (up from $84,120.00 in 2000). Data on the median income of 'family law' lawyers was not procurable.

In June 2013, *Canadian Lawyer* magazine published results of a national 2012-2013 Legal Fees Survey. Based on a sample of 231 respondents, law firm partner annual incomes was reported, by the magazine, as being: up to $50,000 – 5% of respondents; $51,000 to $100,000 – 14%; $101,000 to $150,000 – 18%; $151,000 to $200,000 – 16%; $201,000 to $250,000 – 10%; $251,000 to $300,000 – 10%; $301,000 to $350,000 – 6%; $351,000 to $400,000 – 6%;

$401,000 to $450,000 – 2%; $451,000 to $500,000 – 2%; $501,000 to $600,000 – 1%, and $600,000 and over - 9%.

Meantime, associates' compensation has largely declined from 2005 (median: $118,500) to 2012 (median: $66,000); based on a sample of 207 *Canadian Lawyer* respondents.

"2013 looks set to be a crunch year for Canadian law firms," writes Charlotte Santry" in reporting on *Canadian Lawyer's* Legal Fees 2012-2013 Survey. While many increased their fees in 2011 and 2012 to reflect [upwardly] spiraling overheads, there now seems to be a broad recognition the market cannot tolerate further successive price rises. The majority (56 per cent) of respondents to *Canadian Lawyer's* latest … Survey plan to freeze fees this year. This is a significant jump from last year, when only one per cent indicated they would do so."

Ms. Santry reported on an interview with Salima Alibhai, managing consultant at ZSA Legal Recruitment, who believes that the widespread decision of law firms to freeze their fees is a product of "belt-tightening by clients … [stemming] from concerns about gloomy economic growth forecasts, … . In April [2013], the Bank of Canada sharply lowered predicted growth in 2013 by half a percentage point to 1.5 per cent. The economy isn't expected to return to full speed until mid-2015, largely due to sluggish growth in China and the prolonged European financial crisis."

*Canadian Lawyer* (Ms. Santry) concluded that "[m]any respondents [to the Survey] appear to believe that, after several years of fee increases, the market simply won't put up with further fee hikes. A sole practitioner in Ontario said 'There is only so much I can charge my clients. Even as my overheads continue to increase, I have to respect my clients' ability to pay.' A senior lawyer in a rural area felt fees had 'hit a ceiling,' while a lawyer in a mid-sized firm in British Columbia said: 'We are pricing ourselves out of the reach of ordinary people and their disputes.' One respondent, from a firm of more than 100 lawyers, said: 'I think fees will be static for quite some time. We need to compete with in-house counsel.' "

Nonetheless, 41 per cent of firms surveyed plan to raise fees, "though," Ms. Santry reports, "for the most part by only a relatively small portion. Nearly three quarters of the firms planning fee increases envisage rises of up to five per cent; 18 per cent are pushing them up by between five and 10 per cent; and nine per cent expect an increase of 20 per cent or more."

"Higher overheads," reports *Canadian Lawyer (Ms. Santry)*, "continue to be a major factor in firms' decisions to raise fees, though some …, … referred to the increased complexity of their work." Only three per cent of Survey respondents plan to reduce fees; principally to maintain clients.

Consistent with a trend evident, Canada-wide, for several years, "[m]any clients," says Salima Alibhai, in the *Canadian Lawyer* interview, "are also demanding different structures, with some refusing to pay for work unless it's on a flat-fee basis." "This," writes Ms. Santry, "is borne out in the [S]urvey, in which block fees, unbundling [of legal services], capped hourly rates, means-tested, and contingency fees all emerged as popular alternatives to billable hours."

Ms. Santry reports that "[m]ore than half (55 per cent) of respondents [to the Legal Fees Survey] offered free initial consultations, though the second biggest proportion—14 per cent—charged between $201 and $300. Only three firms charged more than $500 for an initial consultation." Opinions of Survey respondents, she writes, "differed widely on the benefits of free consultations. A sole practitioner in Ontario said: 'I have found that offering free consultation[s] … brings in a lot of 'tire kickers'—people shopping for the best deal. By charging for a consultation, you get people who are seriously looking for legal advice and who more often than not retain you.' " However, a lawyer in a mid-sized Alberta firm maintained that first consultations 'should usually be free as part of our mandate to serve the public, … '."

As to legal fees, generally, the size of a law firm may affect the precise legal fees it charges, in delivering services, according to Canadian Bar Association's first vice president (now president) Fred Headon. But, he "believes the financial pressures, and the need to change pricing structures, are being felt by the whole profession." He added, the Legal Fees Survey report states, that "firms are realizing fees need to reflect the actual value of work done, and that may

involve reducing the rates of more junior lawyers. But [he cautioned] … this is 'only the first step' in a series of more sweeping changes. …. 'Clients aren't just asking for a cheaper cost but will ask for new practices, for example, involving non-lawyer professionals, or automated work.'"

Although Statistics Canada reported, in April 2012, that new divorce proceedings had decreased 2 per cent, nationally (most notably, in Nova Scotia), in each year since its annual—2006-2007—data-keeping period, 'family law' practitioners need not despair. The figures do not include the three provinces with lowest unemployment: Alberta (where new divorces doubled over the involved period), Manitoba, and Saskatchewan. And, recessionary factors fueling decline in new divorce proceedings in most other Canadian jurisdictions are, currently, in abeyance. (Of interest, divorce among gay couples is less than one-half that among heterosexual spouses.)

## 5. Responsibility

### (a) Sources

Informing responsibility in 'family law' practice—and, in law practice generally—are components that Justice Proulx and Mr. Layton characterize as "diverse and fluid"; components which, "taken together, serve to develop and reflect the general principles[,] and shape lawyers' actions and ideals, … ." Among them are "formal codes [and rules] 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 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 may be added the ingredients of uncodified common law; customs manifesting common sense, and some legislative provisions.

Adequately understood and appropriately applied, these components of responsibility should, with experience, eventually impress law practitioners with the ability, in practice, to

instinctively identify, and to respond competently to, legal, ethical and professional responsibility issues.

**(b) Challenges**

Issues of responsibility present, meddlesomely—not to mention, potentially expensively—for those lawyers who practice what customarily, if not curiously, is called 'family law'; although more accurately, the 'law of uncoupling'.

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

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

"Suicide is a real concern", cautions Dana Schindelka, a litigation partner at Davis LLP, Calgary. "Temporary insanity" is, in the view of John Wade, director of the Dispute Resolution Centre, Bond University, Australia, the *persona* presented by some 'family law' clients.

Otherwise expressed, 'family law' clientele often feel hopelessly freighted with demanding, dismaying, domestic dissent and disagreement.

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

> this should not be taken to mean that the opinion is of no consequence or that a lawyer should not consult his or her own conscience before accepting a retainer. No lawyer is required to go against the dictates of his or her own conscience, or to take a case which the lawyer personally believes not to be just.

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

### (c) Ethical Responsibility

#### (i) Introduction

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

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

Provincial and territorial legislatures, like courts, have largely defaulted to governing bodies the discipline of lawyers.

Consequently, practice of law in Canada is, principally, self-governing. The machinery of provincial and territorial law societies is employed to govern conduct of lawyers (their discipline, and other supervision). In Quebec, more than elsewhere in Canada, government has scripted a role for itself in lawyer governance. Quebec's Office des professions du Quebec (R.S.Q., c. C-26), in effect, polices the Barreau du Quebec, the province's law society, in the discharge, by the Barreau, of its mandate of superintending Quebec's avocats. (A separate society, likewise subject to the dictates of the Office des professions du Quebec, governs Quebec notaries.)

National co-ordinator of law societies is the Federation of Law Societies of Canada. Comprising the Federation are law societies of the nine provincial, and three territorial, common law jurisdictions, and the Barreau du Quebec and the Chambre des notaires du Quebec. The Federation does not have any direct disciplinary or other supervisory authority over the legal profession. It does, however, lead "the development of high national standards of regulation to ensure that all Canadians are served by a competent, honourable and independent legal profession," the Federation's Internet site states. Development of national standards, in the Federation's view, includes harmonization of rules of professional conduct: "With [agreements providing for] national mobility of the profession, the law societies recognize the benefit of moving toward harmonized rules of conduct [via the *Federation's Model Code of Professional Conduct*] so that the public can expect the same ethical requirements to apply wherever their legal advisor may practice law."

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 supervisory jurisdiction over lawyers practicing in the provinces or territories. 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] promoting fair justice systems,… [facilitating] effective law reform,… [promoting] equality in the legal profession and … [being devoted] to the elimination of discrimination."

In common, both the Federation (since 2009), and the Association (since 1920) have published ethical codes of responsibility.

### (ii) Code of ethical responsibility: Federation of Law Societies of Canada

The principal national code of ethical responsibility is authored by the Federation of Law Societies of Canada, in the wake of its mobility agreements. The Federation, in October 2009, adopted a draft national *Model Code of Professional Conduct*; amended 13 December 2011. Further amendments may include provisions about (i) expanding the 'future harm' exception to solicitor-client privilege, (ii) certain financial harm, and (iii) 'acting' against former clients.

By 30 May 2014, the Federation's *Model Code of Professional Conduct* had replaced the Canadian Bar Association's *Code of Professional Conduct* as the template employed by most provinces and territories, respectively, in crafting their ethical codes. The Federation's Policy Counsel, Daphne Keevil Harrold, reported on 30 May 2014 that the *Model Code* has been implemented by the law societies of British Columbia, Alberta, Saskatchewan, Manitoba, and Newfoundland and Labrador, and by the Nova Scotia Barristers' Society (with slight modifications, in some, if not all, of those jurisdictions). Further, the *Model Code* has been approved, though not yet implemented, by the Law Society of Upper Canada and the Barreau du Quebec.

### (iii) Code of ethical responsibility: Canadian Bar Association

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

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

As an appendix to the *Code*, the Association has adopted the *Principles of Civility for Advocates*, published by The Advocates' Society, Toronto. (That document, when most recently revised by the Society in April 2009, was expanded to include "Principles of Professionalism for Advocates".)

In recognition of technology's increasing impact on Canadian legal practice, two sets of Guidelines have been published by Canadian Bar 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).

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

As its mid-winter meeting in February 2014, the Canadian Bar Association resolved that the Federation "consult broadly" on any proposed amendments of its *Model Code*. The Association also wrote to the Federation earlier this year proposing changes to the Federation's *Model Code* conflict of interest provisions—in particular, commentary to Model Rule 3.4.1—in recognition of the Supreme Court of Canada's 2013 decision in *CNR v. McKercher* (2013 SCC 39 [CanLII]).

### (iv) Other Canadian ethical responsibility sources

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

http://www.lians.ca/documents/2011%2003%2028%20Current%20Family%20Standards.pdf; http://www.lians.ca/documents/2010-06-25_StandardsIntro(2).pdf

Somewhat comparable to professional code commentaries are the contents of Bulletins published, quarterly, by Canadian Lawyers Insurance Association. The Bulletins, published from May 1991 to April 2014, are tabularized in Appendix A, and there hyperlinked to full texts of all Bulletins. The Association also transmits, from its Internet site, pragmatic Loss Prevention e-Bytes; to which practitioners can subscribe.

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

Eminently wise counsel for family law practitioners may, frequently, be mined from "This Week in Family Law" by the doyen of Canada's family law bar, Philip Epstein, Q.C., of Toronto (available to subscribers to WestLaw's Internet law reporting service).

### (v) Rules supplementing Federation's Model Code of ethical responsibility

Model Rules have been published by the Federation of Law Societies of Canada—separately from the *Model Code of Professional Conduct*—for (i) cash transactions, and (ii) client identification, and verification. Both are subject to approval, either as drafted, or as modified, by the respective provincial and territorial law societies.

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 Client Identification and Verification Requirements was approved on 30 March 2008, and modified on 12 December 2008, by the Federation, and has been adopted, in whole or part, by most, if not all, Canadian jurisdictions.

The Supreme Court of Canada, on 13 May 2014, reserved judgment of the appeal, by Canada ([2013] No. 35399 (S.C.C.)), from the decision of British Columbia Court of Appeal (2013 BCCA 147 (CanLII)). That decision 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 are inconsistent with the Constitution of Canada to the extent that they apply 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 objects to the involved legislative provisions on the basis they violate solicitor-client privilege. Less onerous requirements, in these respects—consonant with solicitor client privilege—are incorporated in the Federation's cash, and identification and verification, Model Rules (which have failed to placate Canada).

On 03 April 2014, the Council of the Federation adopted new national standards to raise the bar on how law societies perform discipline functions, and how complaints are handled. The National Discipline Standards address fairness, public participation and timeliness in how the discipline process functions. The standards have been referred to the law societies for adoption, and implementation effective from 01 January 2015. The Federation has also struck a new Standing Committee on National Discipline Standards, whose mandate is to monitor implementation by the law societies of, and their compliance with, the standards.

### (vi) United States Codes of ethical responsibility

In the United States, the original *Canons of Professional Ethics* (very general statements of principle) were adopted by the American Bar Association on 27 August 1908 and replaced on 12 August 1969 by the *Model Code of Professional Responsibility* (which distinguished between professional principles, and ethical rules governing discipline). The *Model Code*, in turn, on 02 August 1983, was replaced by the *Model Rules of Professional Responsibility.* The *Model Rules*, like the Federation's *Model Code* and the CBA *Code*, integrates professional principles and ethical rules and furnishes supporting commentary. About two-thirds of United States' state Bar governing bodies have approved standards based on the U.S. *Model Rules.* The other one-third of state Bar governing bodies copy, more or less, the earlier U.S. *Model Code.* The *Model Rules* underwent major revision based on the November 2000 proposals of the ABA Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct. (Courts—instead of lawyer governing bodies, as throughout Canada—are, largely, responsible for lawyer discipline in many United States' jurisdictions.)

### (vii) Access to Codes of ethical responsibility

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

### (viii) Reception to Codes of ethical responsibility

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

> An important empirical study has found that the majority of lawyers practising in Ontario did not find the *Professional Conduct Handbook* containing the Ontario

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

### (d) Legal Responsibility

Common law, equity, legislation, and inherent court jurisdiction govern some or all features of legal civil responsibility—and criminal or penal prosecution—of lawyers in Canada. (Noteworthy: an error in judgment does not necessarily constitute negligence generating legal liability.)

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

> A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings. See, for example *Law Society of Manitoba v. Giesbrecht* (1983), 24 Man R. (2d) 228 (C.A.). The courts, which have inherent jurisdiction to remove from 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. …. .
>
> In other words, ethics codes are advisory, in the context of 'lawyers' legal responsibility.

One indicator of financial consequences of negligent discharge by lawyers of their legal responsibility is furnished by the 2013 annual report of LawPRO (Lawyers' Professional Indemnity Company, which provides errors and omissions, including excess, coverage to Ontario's lawyers, and land titles' coverage nationally). LawPRO, in 2013, underwrote insurance coverage of almost 24,300 lawyers in Ontario. Claims reported in 2013—2,539—were slightly lower in total than during the prior 12-month period; amounting to claims by 104 lawyers per thousand (compared to 107 in 2012-2013). The average cost of a fully reserved claim increased to almost $40,000.00. Number of claims reported with a value exceeding 100,000.00 was 217.

Pertinent to civil claims brought against lawyers, assessment of damages is considered by Arnie Herschorn in: "On The Measure Of Damages In Solicitor's Negligence Cases" (2012), 90 Can Bar Rev. (No. 1).

**(e) Professional Responsibility**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 6. Practising Responsibility

### (a) Documentation

Practising allegiance to responsibility—legal, ethical, and professional—(i) serves clientele' needs; (ii) enhances professional standards; (iii) augments reputation (which, more than advertising, continues to generate additional clientele), (iv) precludes liability and disciplinary proceedings, and court censure, and (v) may avoid, or at least mitigate, nuisance complaints from the '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—legal, ethical and professional—is essential. So doing serves as some probative evidence of terms of retention, and of a retention's performance (including the adequacy of lawyer communication with clients).

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

(Either because they, unavoidably, are unrepresented, or choose to be self-represented, increasing numbers of family law litigants in England are going to court, without lawyers, in substantial numbers. Reports Frances Gibb, Legal Editor at *The Times*, on 15 May 2014, in 75 per cent of divorce-related proceedings, at least one litigant does not appear with a lawyer. In 29 per cent of such proceedings, none of the litigants are represented by a lawyer (an increase from 17 per cent in 2012). Absent participation by lawyers, those proceedings require 50 per cent more court time.)

Beyond its utility during a retention, copious documentation serves, invaluably, as evidence or *aide memoire* (or both) should a lawyer need to answer discipline complaints, or to defend civil liability proceedings.

**(b) Commitment**

Practising allegiance to the tenets of responsibility—legal, ethical and professional—is not an absolute expectation. In fact, so doing holds potential for engaging the 'legal' and 'ethical' constituents of responsibility. Witness the current dilemma of a Quebec lawyer, former Justice Minister of that Province. He is the subject of disciplinary action by the Barreau du Quebec. He faithfully—if not misguidedly—performed instructions from two textile corporations to apply to Court to strike judgments against each of them. His client's application, in each of the cases, pleads that the trial judge "had met at a Montreal steak house with lawyers representing one of the [defendants to the proceedings by the two corporations] and conspired to determine [his clients'] claims were fraudulent [and that prominent] lawyers … including [a former federal justice minister] and former vice-president of the International Olympic Committee [representing the defendants] …, took part in the plot [involving] evidence [that allegedly] had been hidden and tampered with." (Hamilton, Graeme, *The National Post*, 06 April 2012, "Former Quebec legal star stakes reputation on mysterious, 'fraudulent' insurance case".)

**(c) Obligation Or Option**

Challenging law practitioners, sometimes daily, are perplexing, time-consuming, responsibility issues, which spanner compliance with deadlines for legal services' delivery. They

are comparable to ditches and fences on a steeplechase course. Do these issues engage obligatory or optional responses?

Legal responsibility, for example, dictates that should a client communicate, to a lawyer, credible reason to believe he or she is, or contemplates, harming a child, legislation in most, if not all, provincial and territorial jurisdictions obligates the lawyer to suspend solicitor-client privilege and report the client's statements to the state.

However, ethical responsibility affords the lawyer options, should a client communicate credible reason to believe he or she is, or contemplates, harming another adult (or her- or himself). Common law does not require a lawyer (or anyone else) to report, to the state (e.g., police), such troublesome communications from the client. And, the only offence constituted by the *Criminal Code*, for omitting to report criminal behaviour, is s. 50(b) (omitting to prevent treason). The cogency of the information garnered from the client; provisions of pertinent provincial or territorial rules of professional conduct, and common law, will probably inform a lawyer in her or his decision whether to suspend solicitor-client privilege on the basis of the common law 'public safety' exception to the lawyer's duty to protect client confidences (*Smith v. Jones* 1999 SCC 674 [CanLII]).

Professional responsibility, on the other hand, counsels that you should report the apprehension that another adult is, or is in peril of, being harmed.

To repeat Justice Proulx and David Layton (above, at p. 2), " … while certain … [responsibility] issues yield to reasonably clear answers, on many occasions identifying or applying the proper standards can be a maddeningly challenging exercise. Reasonable people can differ as to the proper … approach to apply in a given situation. … ."

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

Needs be added, not a few law practitioners have faltered in maintaining the wrenching pace of law practice: being recipients of judicial reproof; professional discipline and/or liability judgments. These failings can—by thrift, toil, patience, discipline, lesson-learning from errors and omissions, and resort to Appendix C—be parlayed into becoming an exemplary practitioner.

## 7. Authors

Substantial literature, addressing legal, ethical and professional responsibility, has been published in Canada. Reflecting, only, the preferences of this anthology's editor, the literature includes:

(1) Canadian Lawyers Insurance Association, "Loss Prevention Bulletin", May 1991 to April 2014 (reproduced as Appendix A to this Anthology).

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

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

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

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

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

(7) Dodek, Adam M., *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;

(8) Dodek, Adam M.; *Solicitor-Client Privilege* (Markham (ON)): LexisNexis Canada Inc., 2014);

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

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

## 8. National Family Law Program History

This (2014) is the fifteen 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.

## 9. Copyright Exception Claim

The author of this anthology claims exception under the *Copyright Act*, R.S.C. 1985, c. C-42, ss. 29, 29.1 (as amended to 15 June 2014).

## 2.0 SOURCES AND STANDARDS OF RESPONSIBILITY

### 2.1 Professional and Ethical Responsibility

**"The 4 Most Common Reasons Law Firms in all Practice Areas Fail (and how to avoid them)"**

AbacusLaw, www.abajournal.com, 03 February 2014

" …. There are 4 common reasons why law practices fail:

1) Lack of technology

2) Non-integrated practice management platforms

3) Inadequate management support

4) No plan for continued improvement

Future-proof your law firm and ensure your success[.] …. ."

**[Full Text]**

**"Professionals are masters of their field[:] Create confidence in your skills, knowledge and performance"**

D'Aversa, Catherine, *The Lawyers Weekly*, 17 May 2013, pp. 20, 22, at p. 20

"A professional is an expert and a master in a specific field. So what is a legal professional? It's someone who has specialized knowledge in a practice area, excellent literary

skills, a quality work product, professional ethics, behavior and work activities, and who displays morale and motivation during their work. Does this describe you? Become an expert, create confidence in your work and get the work you want, while learning the dos and don'ts of working as a legal professional. …. ."

**[Full Text]**

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**"Deal with stress before it deals you a heavy blow"**

Moulton, Donalee, *The Lawyers Weekly*, 14 June 2013, p. 9

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"Lawyers are all too familiar with the demands of deadlines, depositions and doing whatever it takes to please clients and bosses. As a result, lawyers are all too familiar with stress. 'High levels of stress are associated with practicing law whether in private practice or in a corporation. It's just a fact of life,' says Warren Bongard, vice-president and co-founder of ZSA Legal Recruitment in Toronto. Despite its prevalence, stress remains a harmful reality, according to Health Canada. It's a risk factor in numerous diseases including heart disease, herpes, and mental illness, in alcohol and substance abuse and weight loss and weight gain. It has even been linked to Alzheimer's disease. Stress at its most severe can cause biochemical changes in the body. Those changes, in turn, affect the immune system and leave the body susceptible to disease. The nature of legal work—and of those drawn to it—plays a role in keeping lawyers tense and anxious. 'Lawyers can tend to have an all or nothing approach to every issue that arises,' said Jacqueline King, a specialist in civil litigation with Shibley Righton in Toronto. 'The best lawyers—and coincidentally the least stressed—are aware that it's OK to lose a few battles along the way but lawyers are not generally the best at accepting when things don't go their way.' …. .

"John Ohnjec, division director with Robert Half Legal in Ottawa, recommends the following tools and strategies to help lawyers effectively manage stress.

Establish boundaries. As much as possible, try to separate work time from personal time. Bring projects home only when absolutely necessary.

Prioritize. Develop a list of goals that must be accomplished each day and cross off tasks as they are completed. Also, be sure to set aside time for unforeseen events.

Don't overcommit yourself. Saying 'yes' to extra work often is a good career move, but if it's more than you can realistically handle, meet with your supervisor and look for ways to delegate some of your work or postpone non-priority projects.

Seek help. When you're feeling overwhelmed, work with your boss and colleagues to ease the burden. If you manage others, delegate effectively rather than attempting to do everything yourself.

Embrace down time. Regularly step away from your desk for a lunch break or walk. When your schedule allows, take a vacation to recharge.

Explore your options. Find out if your firm offers alternate work arrangements. You may be able to make a case for a compressed schedule, job sharing or telecommuting."

**[Full Text]**

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**"The hurting profession"**

Dempster, Michael, *National*, April-May 2012, pp. 12-20, at p. 12

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"Lawyers are stressed sick. They're succumbing to depression, addiction and burnout and many are afraid to admit they need help, often with tragic consequences. *National* examines what lies behind this endemic problem and how the profession is trying to help its own. Lawyers face a greater than average risk of addiction, depression and other issues. So why is it so hard for them to admit they need help?"

**[Full Text]**

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**"Hand in hand[:]**
**Collaboration among professionals is a cornerstone in helping prevent and identify financial abuse of seniors"**

Moulton, Donalee, 3 *Forensic Accounting & Fraud* [No. 2] 2013, pp. 39-41, at p. 39

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" …. Turning a blind eye is no longer acceptable. Financial abuse of seniors has become the most prevalent form of elder abuse in Canada according to the Ontario Seniors' Secretariat, Lawyers and accountants have the ability to help stem the tide. 'Collaboration amongst professionals is key to the prevention of elder abuse,' said Suzana Popovic-Montag, a Toronto-based lawyer who practices in the areas of estates, trusts, capacity, and fiduciary litigation. …. ."

**[Full Text]**

**"A lawyer's regret:**
**'My boundaries slipped away until work was all that was left' "**

Cassens Weiss, Debra, www.abajournal.com, 13 March 2013

"A tax lawyer who became chief financial officer of Leman Brothers is doing some soul searching since the company imploded in 2008. And she's not happy about her one-time devotion to work. …. 'I don't have children, so it might seem that my story lacks relevance to the work-life balance debate,' [Erin] Callan wrote. 'Like everyone, though, I did have relationships—a spouse, friends and family—and none of them got the best version of me. They got what was left over. …. ."

**[Full Text]**

**"Reinstated lawyer inspires with astonishing story of redemption"**

Mckiernan, Michael, *Law Times*, December 2012 Supplement, p. 6

"Reinstated disbarred lawyers are rarer than hen's teeth, but Vassilios Apostolopoulos bucked the trend this year with an astonishing story of redemotion. In September, 10 years after his disbarment by the Law Society of Upper Canada, Apostolopoulos regained the right to practise law. In between those two landmark dates was a decade-long struggle with mental illness, homelessness, and a return to the law school where he had been a start student. …. ."

**[Full Text]**

**"Stress leaves lawyers prone to addiction [:]**
**Bryant's story highlights difficult issue for legal profession"**

Sebesta, Kendyl, *Law Times*, 03 September 2012, pp. 1, 5, at p. 1

"A successful legal professional, former attorney general Michael Bryant struggled to accept that he was an alcoholic. 'I constantly fooled myself into thinking that because I was functioning as a lawyer, I wasn't necessarily an alcoholic,' he tells *Law Times*. My experience was a lot of self-delusion that was eventually followed by a surrender. There is a point where

every alcoholic throws up their hands up and says, 'I have to give up this fight.' That was the turning point for me.' In fact, Bryant's addiction to alcohol loomed over his work and personal life for more than a decade but he says that even when he began to admit to himself that he was an alcoholic, he struggled to tell anyone else. That all changed last month when Bryant released his memoir about his deadly encounter with cyclist Darcy Allan Sheppard and his battle with alcoholism in *28 Seconds: A True Story of Addiction, Tragedy and Hope* [Toronto: Viking Canada, 2012]. …. ."

**[Full Text]**

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**"Write it down, get it signed, don't get sued [:]**
**Clear communication is the key to making settlements stick"**

Rock, Nora, *The Lawyers Weekly*, 24 May 2013, p. 13

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"The basic driver of malpractice claims against lawyers is client dissatisfaction, which often is a product of poor communication between lawyers and their clients. Regardless of outcome, it's useful to consider the most common causes of client unhappiness, and to understand that while a client's unhappiness is not always about you, it can often be made to be—via a malpractice claim. One way in which clients may do this is by challenging settlements after the fact. Typical allegations are:

[1] The lawyer settled without authority;

[2] The client did not understand the effect and/or implications of the settlement, and so the lawyer, even if she [or he] had instructions, did not have true authority;

[3] The lawyer had the client's instructions to settle, but did not follow those instructions, and the settlement terms are different from what was agreed between lawyer and client;

[4] The settlement is not enforceable because the lawyer left out certain terms that would have made it easier to enforce (for example, in a domestic contract, a requirement to purchase life insurance to fund support payments after the payor's death). …. ."

**Note:** Nora Rock is corporate writer and policy analyst at LawPRO.

**[Full Text]**

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**"A lawyer's professional duties and obligations"**

Krishna, Vern, *The Lawyers Weekly*, 01 March 2013, pp. 21-22, at p. 21

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"Lawyers owe three duties to their clients: avoidance of conflict of interest; loyalty to the client's cause, and candour in all matters relevant to the retainer. A lawyer must avoid conflicts of interest between clients because of the duty of commitment to each client. He or she must be able to provide a client with complete and undivided loyalty, dedication, full disclosure and good

faith. This cannot be accomplished if the lawyer is concurrently representing opposing interests, and thereby sacrificing the interest of one in favor of the other. …. ."

**[Full Text]**

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**"The Profession's Dirty Little Secret[:]**
**While not occurring in huge numbers, cases of lawyer defalcation**
**are increasing—but insurance coverage and the way**
**law societies address them vary greatly across the country"**

Millan, Luis, *Canadian Lawyer*, March 2013, pp. 33-37, at pp. 33-34

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" …. Disciplinary notices posted by law societies are replete with hearings of lawyers unable to resist the temptation of dipping into their trust accounts. Even then, defalcation is rare. As Susan Forbes, director of insurance at British Columbia's Lawyers Insurance Fund says, 'when you consider that there are 10,000 practising lawyers in B.C. and there are only one or two a year that get involved with theft, that is a very small percentage.' …. But it happens more frequently than the profession cares to admit, particularly thefts from a law firm's general accounts. David Debenham, a partner with McMillan LLP in Ottawa who is a certified fraud specialist and investigator estimates only one in 10 frauds within the profession come to light. 'A lot of firms that had lawyers, or law clerks, or staff that commit fraud tend to indemnify clients and not report it—it's sort of the [profession's] dirty little secret,' says Debenham, who is also a certified management accountant often hired by law firms to conduct fraud probes. He says there is no doubt the number of misappropriation cases is growing exponentially. …. ."

**[Full text]**

## 3.0 APPLICATION OF STANDARDS OF RESPONSIBILITY

### 3.1 Relationships with Clients—Retainer and Authority

**"Giving back[:] Pro Bono Report"**

Santry, Charlotte, *Canadian Lawyer*, April 2014, pp. 26-33, at p. 27

"More than half of lawyers believe the profession has a duty to provide *pro bono* services, according to a survey of readers across the country conducted by *Canadian Lawyer*. But a strong majority of respondents oppose making *pro bono* work mandatory, and 60 per cent feel lawyers offering free legal services could discourage governments from providing sufficient legal aid funding.

"The findings highlight the complexity of the debate around where *pro bono* services fit in the quest to achieve greater access to justice, as well as raising broader questions around professional ethics in the legal industry.

" …. Out of 532 respondents, 81 per cent said they worked on *pro bono* files to give back to their communities, and 67 per cent did so to improve access to justice. This was followed by other motivating factors including the desire to support worthy causes (63 per cent), the chance to enhance their professional profiles (28 per cent), the opportunity to fulfill passions and interests (25 per cent), the challenge of working with diverse clients (14 per cent), the opportunity to learn about a new practice area (13 per cent), and the prestige associated with certain cases (seven per cent).

"Successful *pro bono* cases have helped to overturn injustices and raise important public policy issues. Last December [2013], Dentons Canada LLP secured victory for someone who was unlawfully arrested in Toronto during the 2010 G20 clashes while walking to a church service. Lawyers represented the Canadian Civil Liberties Association in the inquest of the death of Ashley Smith, the 19-year-old who strangled herself in a segregation cell. More than 700 hours were devoted to the case—a 'significant undertaking' for the three-lawyer firm, says co-founder Allison Thornton. …. ."

**Note:** St. John's lawyer Robert (Bob) Buckingham provided *pro bono* legal counsel, for more than three years (2009 to 2013), to the mother of a daughter who was an involuntary patient at a mental health facility.

**[Full Text]**

**"How to start a new client relationship"**

Mitchell, Gary, *The Lawyers Weekly*, 17 August 2012, p. 26

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"When approaching a new client relationship, there are many factors that will affect your client's perception of the outcome, and therefore their satisfaction level. …. ."

**Note:** Mr. Mitchell is a business development coach, speaker and author, who works exclusively with lawyers. The editor recommends his first book, *Raindance: The Business Development Guide Book for Lawyers* (Toronto: Carswell, 2012).

**[Full Text]**

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**"Keeping calm when client is not[:]**
**Avoiding future problems a matter of asking the right questions right away"**

Kirbyson, Geoff, *The Lawyers Weekly*, 14 March 2014, pp. 20, 22, at p. 20

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"Every lawyer has picked up the phone to hear a panicky voice on the other end and thought about the question they would soon have to answer—should they take them on as a client, or pass because they're not worth the headache? On the one hand, it's possible their case could involve some lucrative legal work. But without the proper vetting process, lawyers could be saddling themselves with a problem file that won't be worthwhile even if it generated a gazillion billable hours. As soon as a potential client contacts Toronto's Benmor Family Law Group, senior law clerk Cris Lam whips out her intake questionnaire. It features a list of questions she needs answered before the firm's lawyers can give a thumbs-up or down. In addition to some personal and background information, she wants to know how they were referred to the firm, whether they have been represented by counsel before, and the name of the other party. It takes about 15 minutes to complete, and is well worth the investment. Her ears are … [finely] tuned to pick up potential red flags, such as if the would-be client says they are on their fourth lawyer in the last little while. …. They're just trying to find a lawyer who will say 'yes' to everything,' she says. …. ."

**[Full Text]**

**"Limited retainer means managing client expectations"**

Pinnington, Dan, *The Lawyers Weekly*, 11 April 2014. p. 12

"Helping clients reduce the costs of resolving family disputes has become a practical issue for a lot of family law lawyers. As a result, many of them are offering to do work on a limited-scope retainer or 'unbundled' basis. This means doing part but not all of the work on a legal matter, including document review, the preparation of a pleading, providing advice on one issue, or representation at a single hearing. Unbundled legal services come with potential risks for both the client and the lawyers. In choosing to partially represent herself, the client assumes much greater responsibility for decision-making on legal issues and how to navigate an unfamiliar legal system. The lawyer, in turn, loses access to information and a view of the bigger picture, as well as control of the matter. …. [U]nder the rules [in Ontario], a lawyer and client can limit the scope of representation; however, the limitation must be reasonable in the circumstances. Limitations will not be considered reasonable if the time allotted is not sufficient to yield advice upon which the client can rely. Lawyers providing unbundled legal services owe the same duties of competence, diligence, loyalty and confidentiality to limited-scope clients that they owe to full-service clients. Lawyers also need to recognize that unbundled legal services are not appropriate for all lawyers, all clients, or all legal problems. …. ."

**Note:** Dan Pinnington is vice-president, claims prevention and stakeholder relations, LawPRO.

**[Full Text]**

**"How you end your retainer is as important as how you start it"**

Kortes, Michael and Martin, Cynthia, *The Lawyers Weekly*, 10 May 2013, p. 11

"In a climate where claims are mounting against lawyers year after year, new defensive practices have emerged so that they can better defend themselves against allegations of negligence. For instance, when their accounts came under increasing attack by disgruntled clients, lawyers responded by preparing detailed retainer agreements that clearly set out the financial arrangements. As 'phantom' clients became a liability, lawyers responded by sending non-engagement letters. While these strategies were at one time thought to be unnecessary and an inefficient use of a lawyer's skills, over time necessity prevailed and they became routine. There is now another arrow in the lawyer's quiver: the termination of mandate letter. …. A common scenario [in the experience of LawPRO] is where, upon the successful completion of a retainer, a lawyer closes the file only to have the client return alleging that the lawyer was

required to act on a further matter that was, in the lawyer's view, barely or never discussed. Often, a limitation period has passed or the case is otherwise prejudiced beyond repair. …. Consistent with the principle that the burden of establishing a non-retainer rests with the lawyer, the courts can be expected to hold that the burden to prove the end date of a retainer also resides with the solicitor. As such, lawyers will always be at risk of having any ambiguity ruled against them. Accordingly, a good strategy is to write a termination of mandate letter to the client at the end of a file and unequivocally confirm that the representation is over. …. ."

**Note:** Michael Kortes is counsel, and Cynthia Martin is counsel and Unit Director of Primary Professional Liability Claims, at LawPRO.

**[Full Text]**

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***Slater Vecchio LLP v. Cashman***

2014 BCCA 6 (CanLII)

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**Facts**: The appellant law firm appealed the decision of a Supreme Court judge dismissing its appeal from a master's order requiring the appellant to return a fee ($201,600 including disbursements) paid to it at the conclusion of a tort action on the basis that the retainer agreement between the appellant and the respondent was an "entire contract", under which the appellant was obliged to conclude both the tort action and the respondent's claim for benefits under Part 7 of the Regulations to the *Insurance (Vehicle) Act*. At the conclusion of the tort action, the parties (i.e., the appellant law firm and the respondent) and lawyers who previously had acted for the respondent, negotiated a settlement agreement for fees payable in relation to the tort action. The appellant law firm did not pursue a claim for benefits under the *Insurance (Vehicle) Act*. The appellant contended that the settlement agreement amended or supplanted the retainer agreement, that the retainer agreement was not an "entire contract"—which would have required performance of all terms, not just some terms, of the contract before any compensation is paid to solicitors—and that respondent was estopped from claiming the return of the fee paid under the settlement agreement.

**Held**: Appeal allowed. The settlement agreement amended or supplanted the retainer agreement. It is questionable whether the retainer agreement was an "entire contract". Respecting the retainer agreement: if it was an "entire contract", the Court of Appeal wrote that "it remains an open question" whether the principles governing "entire contracts" apply to solicitor-client retention agreements that " cover multiple proceedings which individually can be concluded with the client succeeding or failing irrespective of the actual or potential results of other proceedings." The estoppel issue was not addressed.

**[Full Text]**

***Newcombe v. Newcombe***

2013 CarswellNS 452; (2013), 32 R.F.L. (7th) 371 (N.S.S.C.); 2013 NSSC 183 (CanLII)

**Facts:** In context of divorce proceeding, wife brought motion for declaration that there had been settlement that bound parties, made on their behalf by their respective lawyers. Husband contested existence of binding settlement, arguing that he did not instruct his former lawyer to settle and, if there was settlement, lawyer exceeded her authority.

**Held:** Motion granted. Husband's former lawyer testified that she was acting under authority from her client to agree to settlement and confirmed that draft court order reflected that settlement. His lawyer seemed to have acted appropriately in every way, including lawyer's decision to withdraw when husband suggested that she had pressured him into settlement. Unsatisfactory legal representation does not vitiate contract that is otherwise binding. Exchanges of letters, emails and phone conferences represented typical negotiation by fully instructed lawyers on both sides and resulted in settlement to which both parties were bound. Evidence of husband's former lawyer was accepted that she obtained detailed and precise instructions from husband on each and every move in negotiation before offering his commitment. Husband's former lawyer had both apparent and actual authority to bind husband, and that lawyer acted appropriately and within scope of her actual authority. Husband's position that there would be no settlement until he signed his name on document was untenable. Wife must be taken to have waived a condition precedent to which, the husband alleged, the making of the agreement was subject. Discussions and correspondence between lawyers constituted settlement which bound parties.

**[Full Text]**

***W. (W.) v. X. (X.)***

2013 CarswellOnt 1584; (2013), 31 R.F.L. (7th) 402 (Ont. Sup. Ct. J.); 2013 ONSC 879 (CanLII)

**Facts:** Mother and sperm donor signed donor agreement, in which sperm donor agreed to have no involvement with, or rights of access to, any child born from his sperm. Child was born and sperm donor brought application seeking declaration of parentage and access to child. Settlement conference was held, where counsel for sperm donor attended in person, and counsel for mother attended via telephone from airport. At settlement conference, mother's counsel felt pressured and reluctantly agreed that donor agreement was invalid, without instructions from

client and without opportunity to consult with client. Consent order was made regarding invalidity of donor agreement. Mother brought motion to change order seeking to strike out paragraphs related to invalidity of donor agreement.

**Held:** Motion granted. Order was made without notice and court had jurisdiction under R. 25(19)(d) of Ontario Family Law Rules to change order. Order was based on consent given by lawyer without authority to do so, in circumstances where opposing counsel had good reason to doubt authority to consent and where there would be no prejudice to sperm donor if order was changed and no effective compensation available to mother if change was not made.

**[Full Text]**

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***Catholic Children's Aid Society of Toronto v. F. H.***

2011 CarswellOnt 9677; (2011), 9 R.F.L. (7th) 217 (Ont. Ct. J.); 2011 ONCJ 428 (CanLII)

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**Facts:** Mother and father had child, A, born December 23, 2009. Catholic Children's Aid Society ("CCAS") apprehended A at birth. A remained in care of CCAS since that time. On March 23, 2011, summary judgment was granted and A was found to be child in need of protection. Trial was scheduled to begin on September 19, 2011 to determine whether A should be made Crown ward without access, for purpose of adoption. Mother's counsel brought motion to be removed as solicitor of record.

**Held:** Motion dismissed. Counsel's motion was brought too late in process, as trial was less than three weeks away. Potential harm to child and administration of justice outweighed unfairness or prejudice to counsel. There was not sufficient time for mother to retain new counsel and have counsel properly prepared for trial. Mother would be at considerable disadvantage if she had to represent herself. A had already been in care far in excess of statutory timelines. It would be unconscionable outcome for A if trial did not start until January 2012. There were no ethical issues preventing counsel from acting for mother.

**[Full Text]**

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***Judson v. Mitchele***

2011 CarswellOnt 12435; (2011), 12 R.F.L. (7th) 430 (Ont. Sup. Ct. J.);
2011 ONSC 6004 (CanLII)

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**Facts:** Parties were divorced in January 2009. Parties had two children. On December

30, 2010, wife initiated motion to change, seeking financial disclosure and revised child support. On judge's own initiative, *ex parte* order was made prohibiting husband's mother, a lawyer, from representing him in family court proceedings. Husband brought motion to set aside order. On June 22, 2011, husband's motion was dismissed. Husband brought motion for leave to appeal.

**Held:** Motion granted. It was not possible for motions judge to perform requisite balancing of competing interests in absence of first having complete record. Without request to remove or bar counsel, and without affording husband opportunity to make submissions, correctness of original *ex parte* order was open to serious debate. Husband's mother was not presumptively in conflict of interest by mere fact that close familial relationship existed between her and husband. To extent that ruling of motions judge established prohibition against lawyers acting for close family members, it went farther than Rules of Professional Conduct and represented significant extension of existing common law. By June 22, 2011, husband's mother was, already, subject to disqualification order, and it was unfair to place onus on her to demonstrate why she ought to be entitled to act as counsel.

**[Full Text]**

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***Children's Aid Society of Halton (Region) v. K. (D.)***

2012 CarswellOnt 9463; (2012), 26 R.F.L. (7th) 251 (Ont. Ct. J.)

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**Facts:** Children's aid society commenced application for Crown wardship. At settlement conference, society advised that it was waiting for outcome of recent drug test and upon obtaining results, it may proceed to summary judgment motion. Trial management conference was scheduled. Lawyer for mother sought to be removed as counsel of record on basis that legal aid had only granted him permission to represent mother on summary judgment motion and not for trial. Lawyer for mother brought motion to be removed as counsel of record.

**Held:** Motion dismissed. Harm to children and to administration of justice if matter was delayed outweighed unfairness to counsel. There was not sufficient time for mother to retain new counsel and for any new counsel to be prepared for trial. Legal aid would not entertain any attempt by mother to obtain new counsel. Mother would be at complete disadvantage if she was forced to represent herself at trial. Lawyer was entitled to apply for public funding.

**[No Full Text]**

**"The companion of fools will suffer harm"**

Slayton, Philip, *Canadian Lawyer*, August 2013, pp. 16-17, at p. 16

" …. As a lawyer people seek out your advice [such as] at cocktail parties about whether their pesky Uncle Fred should be put in a nursing home or if renting an apartment is better than buying a condominium, apparently believing these problems may have tricky legal implications. They want your opinion on this stuff *because you're a lawyer*. It doesn't matter to them that studying *Rylands v. Fletcher* [[1868] UKHL 1 (CanLII)] 20 years ago only qualifies you to give advice about what happens if a reservoir bursts. …. What should a lawyer do in these circumstances? The answer is, have a deep sense of the limits of your expertise, and know when a question is a legal question that you can answer and when it is a non-legal question you should stay away from. To stumble around blindly is dangerous. To go beyond expertise is unethical. …. ."

**[Full Text]**

***Broesky v. Lust***

2012 ONCA 701 (CanLII)

**Facts**: Plaintiff appealed dismissal action. Plaintiff injured in motor vehicle accident and retained defendant lawyer to deal with insurer. Plaintiff set out scope of retainer in letter to lawyer. There was negotiated buyout of plaintiff's long-term disability claim with insurer. Plaintiff claimed that she also retained lawyer to handle all of the legal matters arising from injuries she sustained in the accident, or that lawyer owed her duty to advise her with respect to other potential claims. Trial judge held the evidence established that retainer between parties was as set out in plaintiff's letter and there was no ambiguity concerning scope of retainer. Trial judge found that lawyer did not breach standard of care and there was no duty of care beyond retainer [letter].

**Held**: Appeal dismissed. There was no basis in evidence to extend lawyer's duty of care to put in writing what plaintiff already understood, that she had not retained him for tort and accident benefit claims. There was no basis to interfere with trial judge's finding that plaintiff had not established that lawyer's duty of care extended to reviewing applicable limitation periods with her.

**[Full Text]**

## 3.2 Relationships with Clients—Conflicts Of Duty

### 3.2.1 Generally

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**Conflicts of Interest[:]**
**Principles for the Legal Profession**

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**Note**: Indisputably, the most comprehensive reference source addressing conflicts of interest—described by some practitioners as 'conflicts of duty'—is authored by M. Deborah MacNair (Toronto: Canada Law Book, 2009); a supplemented loose-leaf publication, regularly up-dated.

Ms. McNair, a public sector lawyer since 1983, is presently employed by Department of Justice [Canada] where her practice includes labour and employment law, ethics and professional responsibility, and Crown law. Admitted to the Nova Scotia Barristers' Society in 1977, and the Law Society of Upper Canada in 1997, she practised privately in Nova Scotia from 1977 to 1979; served as counsel to the Alberta Institute of Law Research and Reform, Edmonton, from 1979 to 1982; as counsel in the Privy Council Office, from 1983 to 1987, and since then in Department of Justice [Canada].

### 3.2.2 Conflict found

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***Canadian National Railway Co. v. McKercher LLP***

2013 SCC 39, 05 July 2013
(Summarized by *The Lawyers Weekly*, 30 August 2013, p. 18)

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"[**Facts:]** Appeal by the Canadian National Railway Co. (CN) from a judgment of the Saskatchewan Court of Appeal setting aside a decision disqualifying the firm of McKercher LLP from acting against CN.

"CN retained McKercher to act for it on a variety of matters.

"McKercher then accepted a retainer to act against CN in a $1.75 billion class action.

"McKercher did not advise CN that it intended to accept the retainer. Between December 5, 2008, and January 15, 2009, various McKercher partners hastily terminated their retainers with CN, except for one file, which was terminated by CN.

"Following receipt of the statement of claim, CN applied for an order removing McKercher as solicitor of record in the class action against it, on the grounds that McKercher had breached its duty of loyalty to CN by placing itself in a conflict of interest, had improperly terminated its existing CN retainers, and might misuse confidential information gained in the course of the solicitor-client relationship.

"The motion judge granted the application and disqualified McKercher. The Court of Appeal overturned the order. It found that McKercher had breached its duty of loyalty towards CN by peremptorily terminating the solicitor-client relationship on its existing files for CN, but that disqualification was not an appropriate remedy.

"[**Held:]** Appeal allowed. Lawyers owe a duty of loyalty to clients. This duty has three salient dimensions: (1) a duty to avoid conflicting interests; (2) a duty of commitment to the client's cause; and (3) a duty of candour.

"With respect to the duty to avoid a conflict of interest, the general 'bright line' rule was that a lawyer, and by extension a law firm, could not concurrently represent clients adverse in interest without obtaining their consent, regardless of whether the client matters were related or unrelated.

"However, when the bright line rule was inapplicable, the question became whether the concurrent representation of clients created a substantial risk that the lawyer's representation of

the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

"McKercher's concurrent representation of CN and the class action plaintiff fell squarely within the scope of the bright line rule. CN and the class action plaintiff were adverse in legal interests and it was reasonable in the circumstances for CN to expect that McKercher would not concurrently represent a party suing it for $1.75 billion. McKercher failed to obtain CN's consent to the concurrent representation of the plaintiff in the class action against CN, and consequently breached the bright line rule when it accepted the class action retainer. McKercher's termination of its existing retainers with CN breached its duty of commitment to its client's cause, and its failure to advise CN of its intention to accept the class action retainer breached its duty of candour to its client.

"However, McKercher possessed no relevant confidential information that could be used to prejudice CN. The only concern that would warrant disqualification in this case was the protection of the repute of the administration of justice. A breach of the bright line rule normally attracted the remedy of disqualification. However, certain factors could militate against disqualification, and they had to be taken into consideration.

"As the motion judge did not have the benefit of these reasons, the court remitted the matter to the Queen's Bench for redetermination in accordance with them."

**[Full Text]**

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***Svorinic v. Svorinic***

2012 CarswellBC 1619; (2012), 18 R.F.L. (7th) 445 (B.C.S.C.); 2012 BCSC 826 (CanLII)

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**Facts:** Wife had children with first husband and separated in 2006. Lawyer L represented first husband from October 2011 until May 2012. Wife remarried, had child and separated from second husband either in 2009 or 2010. Second husband brought matrimonial action against wife and was represented by L. L named first husband as witness in current matrimonial proceeding. Wife applied for order restraining counsel from further action in second husband's case.

**Held:** Application granted. Court had inherent jurisdiction to make order restraining lawyer from continuing to act for party. Wife in this case had to prove: that L received confidential information about wife as result of solicitor-client relationship of L with wife's first husband; that confidential information L received was relevant to issues at bar; and that there was risk of prejudice to wife. L received confidential information about wife from first husband. L had access to all documents of court file during representation of first husband and represented first husband at case conferences. Issues raised in matrimonial proceeding between parties were

similar to those between wife and first husband. Reasonable person could properly conclude that wife's interests would be jeopardized if L continued to act for husband. Wife established that there was possibility that mischief would occur if L continued to represent second husband.

**[Full Text]**

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***Clarke v. Penney Estate***

2013 CarswellNfld 382; (2013) Nfld. & P.E.I. R. 180 (NLSC[TD])

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**Facts:** Applicant, widow of deceased, brought application against respondent, who is deceased's daughter and executrix of his estate, for division of matrimonial property and financial support from estate. Case management judge requested parties to file affidavits of witnesses they expected to call at trial. Respondent filed affidavit of lawyer S as to deceased's intentions regarding cohabitation agreement. Lawyer S was law partner of respondent's counsel. Applicant applied for order disqualifying respondent's counsel based on alleged conflict of interest.

**Held:** Application granted. Determination of whether there is disqualifying conflict of interest engages question of whether reasonable person, with full knowledge of issues, would consider that administration of justice requires lawyer to be removed. S's affidavit addressed issues arising in litigation and he would be called to testify in proceedings. It was essential that integrity of administration of justice be maintained in adjudication of those interests. Respondent's right to counsel of choice must be balanced against maintenance of legal profession's standards and integrity of system of justice. Reasonable person, in circumstances of case, would consider that evidence offered in S's affidavit raised apprehension that high standards of legal profession and integrity of administration of justice would be compromised should respondent's counsel continue as solicitor of record in proceedings. Respondent's counsel was removed as solicitor of record.

**[No Full Text]**

***Centennial Tire Ltd. v. Anderson***

2012 CarswellSask 496; (2012), 403 Sask. R. 77 (Sask. Prov. Ct.), paras. 1-3;
2012 SKPC 130 (CanLII)

"[**Facts:**]

"1 In the spring of 2010 Derrick Anderson executed an Offer to Purchase Commercial Land from the Plaintiff, Centennial Tire Ltd. Both parties were represented and assisted by Mr. Mike Walz of Royal Lepage Landmart in the negotiation and execution of the Offer to Purchase. At the time of the execution of the Offer to Purchase, Derrick Anderson tendered a deposit of $10,000.00. Very shortly after execution of the Offer to Purchase, Mr. Walz had discussions with each of the parties and with the Grayson and Company law firm in Moose Jaw. After some further discussions regarding the retirement of Mr. Cooper, it was agreed that both parties would be represented, for the real estate transaction, by Mr. Ken Cornea, of Grayson and Company.

"2 The transaction did not proceed. When it became apparent that the real estate transaction would not proceed, Centennial Tire asked that the $10,000.00 deposit be released to it. Royal Lepage Landmart advised that it would release the trust funds in accordance with the directions from the Court. The Plaintiff instructed its solicitor, Mr. Ken Cornea, to commence the present action. The Defendant, Derrick Anderson, then retained his present solicitor, Mr. David Chow, to conduct the civil trial.

"3 Mr. Anderson brought a motion before this Court asking the Court to disqualify Mr. Cornea as counsel for Centennial Tire, and asking that Centennial Tire be required to retain independent counsel from a new law firm. A special date was set for the hearing of this motion. On that date, the parties led *viva voce* evidence and made argument. I reserved and later issued this decision."

**Held:** Motion allowed. Plaintiff's solicitor disqualified.

**[Full Text]**

***K. (M.S.) v. T. (T.L.)***

2011 CarswellOnt 9862; (2011), 10 R.F.L. (7th) 118 (Ont. Sup. Ct. J.);
2011 ONSC 5478 (CanLII)

**Facts:** Parties to family law proceedings engaged in arbitration, which was incorporated into 2006 court order. At time of arbitration, legal assistant F was employed by solicitors for mother T, and performed work on file including performance of clerical services. Subsequent to arbitration, F became employed by solicitors for father K. Father brought motion, *inter alia*, to have mother held in contempt of 2006 court order, and F did work on contempt motion file. Mother brought motion to have father's solicitors of record removed for conflict of interest. Assistant F swore out affidavit upon motion and stated that she was not, to her knowledge, in possession of any confidential information obtained from mother.

**Held:** Motion granted. Under judgment of Supreme Court of Canada in *MacDonald Estate v. Martin* (1990 SCC 32 (CanLII)) relationship of confidentiality between solicitors and their clients must be assiduously fostered particularly "when a client bares his or her soul in civil or criminal litigation". In *Hildinger v. Carroll* (2004 ONCA 13456 (CanLII)), Ontario Court of Appeal held that rules pertaining to acquisition of confidential information "acquired during the solicitor/client relationship apply to other employees of the firm as well, including legal assistants". While F's evidence that she lacked recollection of any specific issues or confidential information obtained from mother was accepted, that did not end inquiry as test required analysis of whether confidential relationship existed so that court could infer transfer of confidential information. In present case, contempt motion was inextricably linked to work done in furtherance of arbitration file and subsequent court order. It was accordingly appropriate to infer that F obtained confidential information from mother on matters presently before court, and in totality of circumstances presence of that information necessitated order removing law firm as solicitors of record for father.

**[Full Text]**

### 3.2.3 Conflict not found

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***Millhouse v. Millhouse***

2012 CarswellSask 900; (2012), 36 R.F.L. (7th) 187 (Sask. Q.B.); 2012 SKQB 499 (CanLII)

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**Facts:** Husband and wife separated in 2007. When husband and wife first met, she was married. Wife divorced and, in 1998, consulted with lawyer of her second husband for limited purpose of obtaining independent legal advice in relation to separation agreement with her previous ex-husband. Wife and her second husband engaged in matrimonial litigation since 2007, during which time husband was represented by his lawyer—who the wife had consulted in 1998—with exception of brief period in 2012 connected to an appeal. Through multiple applications and proceedings, no objection was taken by the wife to second husband's lawyer. Wife was fully aware of her right to take objection. Wife brought application to disqualify second husband's counsel from representing him in custody litigation on grounds of conflict of interest.

**Held:** Application dismissed. Present custody litigation and 1998 retainer for independent legal advice were insufficiently related. Issue was not so much whether subject matter of two retainers were alike, but whether confidential information learned in one would be relevant in other. Parenting attitudes or beliefs that might have been discussed in context of children whose custody was uncontested, and who had approached adulthood, had insufficient bearing on issues related to current custody dispute involving children of wife's marriage to second husband.

**[Full Text]**

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***HMTQ v. Imperial Tobacco Canada Ltd.***

2013 CarswellBC 3265 (B.C.S.C.); 2013 BCSC 1963 (CanLII)

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**Facts:** In 1998, plaintiff province brought action to recover tobacco-related healthcare costs from defendant tobacco companies. In April 2013, plaintiff appointed new counsel, being a consortium of firms also representing five other provincial governments in similar litigation. In May 2013, defendants learned consortium representing plaintiff intended to retain certain law firm as local counsel on contingency basis. Defendants objected on basis one partner at firm had previously worked for firms representing certain defendants in the action and been directly involved in preparing defence. In anticipation of retainer, law firm had taken many steps to

ensure partner would have no access to any materials related to litigation, even agreeing to retain separate premises for legal team working on matter. Law firm had also retained retired judge to advise on design, implementation and monitoring of confidentiality protocol. Defendants applied for order disqualifying law firm from representing plaintiff

**Held:** Application dismissed. No question partner had confidential information, obtained as result of solicitor-client relationship, relevant to matter at hand. Issue was whether there was risk information would be used to prejudice of former clients. While there was strong inference lawyers working together shared confidences, inference could be rebutted by clear and convincing evidence that all reasonable measures had been taken to ensure no disclosure would occur. Extensive steps taken by law firm in anticipation of retainer here constituted such evidence. Reasonably informed person would be satisfied no use of confidential information would occur.

**[Full Text]**

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***Lukasik v. 611554 Ontario Inc. o/a Palm's Court Restaurant***

2013 HRTO 115 (CanLII)

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**Facts:** Applicant's motion requested removal of respondent's law firm from record, due to alleged conflict of interest. The alleged conflict arose from a lawyer at the law firm representing the applicant having transferred to the respondent's law firm.

**Held:** Motion dismissed. Respondent's law firm "took adequate and timely to ensure that … [the transferring lawyer] would not disclose confidential information relevant to the [Applicant's] Application [before the Human Rights Tribunal of Ontario] to lawyers or staff at … [respondent's law firm]." Some prejudice would result, were respondent to have to retain another law firm.

**[Full Text]**

**Note**: The most recent opportunity presented Supreme Court of Canada to consider a 'conflicts' issue, relating to a practising lawyer, was on 05 June 2014, in *NeuroRX Research Inc. v. Elias Denamu, et al.* [2014] No. 35781 (S.C.C.), when the Court dismissed an application for leave to appeal from the judgment (conflict not found) of Quebec Court of Appeal (2014 QCCA 422 [CanLII]).

## 3.3 Relationships with Clients—Rendering Services

### 3.3.1 Generally

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**"Independent Legal Advice"**

McLeod, James G. and Mamo, Alfred A. *Annual Review Of Family Law 2013* (Toronto: Thomson Reuters Canada Limited, 2014), pp. 1074-1077

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**Note:** This is an excerpt from the most comprehensive general text, published annually, for family law practitioners in Canada.

**[Full Text]**

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**“Silver separation has shades of grey[:]**
**Elder divorce ‘especially tough on women’ ”**

Cameron, Grant, *The Lawyers Weekly*, 20 July 2012, pp. 10, 13, at p. 10

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“After years of slogging it out in the workforce, many couples plan to spend retirement together, relaxing, financially secure, traveling the world. Sadly, it doesn’t always work out that way. Grey divorce—or silver separation, as it’s also known—is increasingly common, according to lawyers and financial experts who have dealt with seniors who packed in their marriages. …. While the emotional aspects of a divorce can be draining at any age, no matter the reason, there are added twists for elderly couples—especially from a financial perspective. …. .”

**[Full Text]**

**"New breed of integrative lawyers"**

Wright, J. Kim, *The Lawyers Weekly*, 15 June 2012, p. 12

" …. It is unfortunate that we lawyers are among the most miserable people on the planet. Compared with the general public, lawyers have lower satisfaction, higher rates of addiction, depression, divorce and just about any other measure of unhappiness. While lawyers are in personal crisis, the world economy is rocky and some of the global law firms are dissolving or merging [or failing]. Women are leaving the profession in alarming numbers. The rise of the Internet allows the public to access information previously in the purview of only lawyers. It can be a bleak picture. But with crisis comes opportunity. As old ways of practising dissolve, new ways emerge. While many leave the profession to escape the crisis, others step forward to be innovators and pioneers.

"One such pioneer, Natalie McFarlane, came back from maternity leave with a renewed sense of values and a commitment to create a law practice that fit her passions. She founded Positive Impact Law Group in Toronto to work with social entrepreneurs, those business people who see business as a vehicle for social change and whose bottom line is more than about profits. Her website states her purpose: 'Relationship-based approach to law and legal services, for a collaborative and sustainable society,' McFarlane is an example of the new breed of integrative lawyers. They are purpose-oriented; they have a broader view of their roles as lawyers, often seeing themselves as change agents. Integrative law blends the human and analytical. It incorporates ideas of positive psychology, authentic happiness, appreciative inquiry, integrative and holistic medicine, and system change theories. It includes providing broader services that are focused on client needs and values. …. ."

**[Full Text]**

**"The delicate art of getting paid, in full, on time"**

Benedict, Michael, *The Lawyers Weekly*, 22 November 2013, p. 11

"What do Pamela Anderson, Lindsay Lohan and WikiLeaks founder Julian Assange have in common? Answer: their lawyers sued them for allegedly failing to pay their legal bills. In Canada, clients who don't pay up, at least at first, comprise but a small percentage of the total. Most estimates put their number at well under five per cent. 'I've been in practice for three decades and have had less than a handful of clients refuse to pay,' says Jerome Morse, of Adair Morse in Toronto. Still, every lawyer is likely to be faced at one time with unpaid receivables, a

challenge outside a lawyer's normal education and training. 'Lawyers are lawyers, not bill collectors,' says Phil Melnik, general manager of Bond Street Collections, a Toronto-based boutique collection agency that has been serving the legal profession since 1994. Bond Street's own clients range from sole practitioners to national firms. 'They all have the same issue,' Melnik says. 'They don't have the expertise or resources [or time] to pursue clients who don't pay.'

"According to Melnik, lack of money is the prime reason why legal bills go unpaid. …. Number two among reasons why bills go uncollected is that the client can no longer be located. …. Another reason for payment failure is a disputed bill. Solo practitioner and Toronto family lawyer Kathryn Smithen runs into that one a lot. 'I understand when clients examine my bills closely,' Smithen says, 'but some people have strange ideas—one client in a custody dispute case objected to me charging for the time I spent reading a psychological assessment of her children'. …. ."

**Note:** The editor, a Supreme Court Master and Taxing Officer, has found that most family law invoices which come before him for taxation are challenged by clients because the invoices are inelegantly simple in description of professional services performed or, do not identify time spent on each service performed or, do not state the hourly rate.

**[Full Text]**

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**"Clients pay when financial statements don't add up"**

Shulman, Ron, *The Lawyers Weekly*, 21 February 2014, p. 13

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"Very few words cast as much fear into a lawyer's heart as the word 'error.' Lawyers are reminded on a regular basis to avoid errors, and with the efforts of the law society, professional development … is now mandatory. Although avoiding the more obvious and egregious errors is usually uppermost in a lawyer's mind, it is often the more subtle mistakes that end up costing clients the most in the long run, and have the gravest consequences to the lawyer's reputation, among colleagues, and the judiciary. The problem with these more subtle errors is that they have a long-lasting and expensive impact on the case. One of the family lawyer's most common errors involves paying inadequate attention to completion of a client's financial statements at the commencement of a matter. Quite often this task is delegated to a clerk [or a junior or student lawyer] as a purely procedural or administrative matter. This is a dangerous and potentially costly mistake. Not only is the client's financial statement a sworn document which is subject to legal standards and requirements, but it is also the foundation for the client's legal position, both initially and later on as the matter progresses. Lawyers who pay too little attention to completing a client's initial financial statement often find themselves [absent settlement] watching their client being cross-examined [embarrassingly and mercilessly] at trial on the same inadequate

document [sometimes resulting in irreparable damage to the client's credibility in relation to the statement and the proceeding, generally]. …. ."

**[Full Text]**

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**"Avoid communication related claims"**

Pinnington, Dan, *The Lawyers Weekly*, 12 October 2012, pp. 11, 22, at p. 11

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" …. Lawyer/client communications issues are the most common cause of claims in corporate/commercial law. Close to 40 per cent of the claims in commercial law over the past 10 years involved communication issues. The cost of resolving these will be about $57-million. The communication problems that lead to claims in corporate law involve failures by the lawyer: [i] to inform the client of the implications of decisions or actions to be taken; [ii] to follow the client's instructions; [iii] to clearly communicate with the client; [iv] to obtain the client's consent to complete or take steps on the matter. …. ."

**Notes: (1)** The communications' failings enumerated, not infrequently, also occur in family law solicitor-client relationships. **(2)** Dan Pinnington is vice-president of claims prevention and stakeholder relations at LawPRO.

**[Full Text]**

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**"Before they walk out the door[:]**
**Having a strong relationship is the key to retaining your clients"**

Moulton, Donalee, *The Lawyers Weekly*, 23 November 2012, pp. 22, 24, at p. 22

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"Goodbye is the saddest word, according to songstress Celine Dion. Lawyers can identify: Losing a top client is never easy and always expensive. However, it's also an opportunity to take a look at what went wrong and to prevent other valuable clients from walking out the door. 'Much to the chagrin of law firms and partners alike, we still wake up to discover major clients aren't happy. This is particularly an issue of service,' said Warren Smith, managing partner with Vancouver legal recruiting firm Counsel Network. Despite the surprise, the departure doesn't happen abruptly, and it is imperative that law firms recognize the signs of dissatisfaction. 'Lawyers don't always take the time to understand what is going on in the background. You need to search beneath the surface,' said Smith. Responsiveness is one sign of satisfaction. Clients whose loyalty is shifting are less likely to respond quickly. Other tell-tale

signs include clients who are not reaching out to the firm without prompting and those who are going elsewhere to get special projects done. …. ."

**[Full Text]**

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***Dayal v. Dayal***

2011 CarswellOnt 1305; (2011), 2 R.F.L. (7th) 349 (Ont. Sup. Ct. J.);
2011 ONSC 1304 (CanLII)

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**Facts:** Parties married in India on December 13, 1991 and separated on June 2, 2003. Parties had no children together. In 1992, wife immigrated to Canada to live with husband and his parents. In December 2002, parties entered into separation agreement with separation date of June 9, 2001. Husband selected, paid and instructed lawyer who was supposed to provide wife with independent legal advice. Wife's claim to set aside parties' separation agreement proceeded to trial.

**Held:** Parties' agreement was set aside. Husband was ordered to pay wife equalization payment in amount of $102,059. Wife's evidence was accepted in preference to that of husband whenever there were differences. Wife was credible witness, as she did not exaggerate her evidence and was not undermined on cross-examination. Wife's evidence that she did not understand agreement was consistent with evidence of first lawyer, who admitted he had no recollection of meeting with wife (although he wrote reporting letter to both parties acknowledging that he had drawn a separation agreement at the request of both, and acted as counsel on their being divorced). Wife's evidence was also consistent with evidence of second lawyer, who admitted that he met shortly with wife, did not have necessary assistance of translator, had no financial disclosure, and did not inquire why she would enter into improvident agreement, yet witnessed Wife's signature to the separation agreement and was paid by husband for his services through the first lawyer. Husband was completely lacking in credibility and contradicted himself many times.

**[Full Text]**

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***Attis v. Ontario (Minister of Health)***

2011 CarswellOnt 13940; (2011), 343 D.L.R. (4th) 263 (Ont. C.A.);
2011 ONCA 675 (CanLII)

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**Facts:** Plaintiff litigants commenced certification of class action motion with assistance

of law firm. Certification motion was dismissed, as were subsequent appeals to Court of Appeal and Supreme Court. Defendant Attorney General was advised after appeals had been exhausted that litigants were impecunious. Litigants brought separate action against law firm for negligence, alleging that law firm had not advised them of potential exposure to, and consequences of, costs award. Attorney General brought motion to have law firm pay costs of litigants. Motions judge initially agreed with law firm's suggestion that he lacked jurisdiction, but allowed Attorney General to amend motion to bring it under proper jurisdiction. Motion proceeded on basis that court had inherent jurisdiction. Motions judge found that litigants were not properly advised of costs consequences, and that law firm did not have proper consent to proceed with certification motion. Motions judge concluded that law firm was properly responsible for costs. Law firm appealed from motions judge's finding.

**Held:** Appeal allowed. There was clear authority given by litigants for law firm to commence certification motion. Even if costs consequences were not properly explained, this was matter between litigants and law firm with no effect on liability for costs award. There was no misconduct by lead counsel of law firm that would attract costs. Claim for breach of warranty of authority was invalid. Approach taken by motions judge created multiple proceedings which was to be avoided. Order of motions judge was set aside.

**[Full Text]**

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***Armoyan v. Armoyan***

2013 CarswellNS 637; (2013), 334 N.S.R. 204 (N.S.C.A.), at para. 375

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"375 Alan W. Bryant, Sidney N. Lederman, & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3rd ed, (LexisNexis Canada: Markham, Ontario, 2009) opens the chapter entitled "Illegally Obtained Evidence", with (para 9.1):

The manner in which evidence is obtained, no matter how improper or illegal, is not an impediment to its admission at common law. The point was put starkly by Crompton J. in England in the 19th century: "It matters not how you get it; if you steal it even it would be admissible in evidence." This position remains the common law of both England and Canada.

The chapter then explains exceptions to the rule, principally under the *Charter* and in the criminal law. I take this passage, followed by the text's discussion of the exceptions, as an accurate statement of the law respecting the admissibility of illegally obtained evidence in 2009. I express no view whether more recent authorities, including those cited by Justice Campbell's decision [2012 CarswellNS 670; (2012), 321 N.S.R. (2d) 64 (N.S.S.C.)], have changed the law stated by *Sopinka, Lederman & Bryant*'s 2009 text. That topic may be worthy of exploration if the matter arises at the matrimonial property hearing. Neither do I comment on the law of

privilege, including privilege related to confidential communications (see *Sopinka, Lederman & Bryant*, pp. 913 ff).

**[No Full Text]**

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**"Breaking up is hard to do[:]**
**Divorce can bring out the worst in people.**
**Add a spouse's business into the dividing up of assets,**
**and it can get extremely nasty"**

Cameron, Grant, 3 *Forensic Accounting & Fraud* [No. 1], 2013, pp. 19-21, at p. 19

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"Divorces are rarely—if ever—a walk in the park. If the emotional upheaval and thought of starting over doesn't get you, there's always the stress of divvying up treasured assets, followed by the inevitable legal wrangling over finances. How much money is there? Who should get what? And where is it? These are the common questions partners must grapple with as they dissolve their union and embark on a journey into the unknown. Yes, dissolution of a marriage can bring out the worst in people. If the couple or one of the partners owns a business, the situation can get even more complicated. Forensic accountants and lawyers who often deal in divorce matters say spouses can go to great lengths to hide their true worth from a partner and cheat them out of their fair share. …. ."

**[Full text]**

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**"Lawyers have mixed views on unbundling"**

Santry, Charlotte, *Canadian Lawyer*, June 2013, p. 9

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"The majority of firms offering unbundled fees find they help to attract more business, according to a recent survey in *Law Times*. But the time-consuming nature of the increasingly in-demand work is sometimes proving to be a false economy for lawyers balancing a desire to improve access to justice with the need to run busy practices. …. ."

**[Full Text]**

**"Lawyers (And Others) On Lawyers"**

Moulton, Donalee, *Canadian Lawyer*, February 2013, p. 7

"There's a new book out. It's about lawyers—but it's not for lawyers. *Why Good Lawyers Matter* is intended to help the public understand the role lawyers play in their lives, their society, and their future. …. The book is a collection of essays from lawyers and non-lawyers alike that explore a range of issues related to how the profession practices, how it contributes, and how it has faltered. …. ."

**Note:** Blaikie, David L.; Cromwell, Thomas A, and Pink, Darrel, *Why Good Lawyers Matter* (Toronto: Irwin Law Inc., 2012). Price: $60.00 (paperback); $60.00 (e-book).

**[Full Text]**

**"Cut the legalese[:]**
**Avoid malpractice claims by taking the time to**
**make sure your clients understand you"**

Macaulay, Ann, *National*, March 2013, pp. 7-8, at p. 7

"Writing and speaking may be a lawyer's stock in trade, but how many communicate effectively with their clients? Apparently far too few. In fact, one-third of all Lawyers' Professional Indemnity Company (LawPRO) legal malpractice claims in Ontario stem from lack of communication between lawyers and clients, says Tim Lemieux, practice-PRO co-ordinator in Toronto. It's also the No. 1 cause of all LawPRO malpractice claims, he says. 'All these communication claims in one form or another are basically a result of being on a different page than the client is. The best way to avoid a claim over a communication issue is to put things in writing, says Lemieux; that includes 'your advice, your understanding of the client's instructions, and what you'll be doing (and not doing) on a matter.' As he points out, a client often has only one legal matter in his or her life and will likely remember what was discussed better than a lawyer who deals with hundreds of similar matters. 'Not every discussion has to result in a letter to the client confirming what was said, but even just having thorough notes on file of what was discussed can be very helpful later on.' …. ."

**[Full Text]**

**"Hoodwinked[:]**
**Unsavoury private eyes have been known to make up evidence**
**for unsuspecting lawyers, often setting the cat among the pigeons in family law cases"**

Livesey, Bruce, *Canadian Lawyer*, October 2013, pp. 26-31, at p. 26

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" …. [a recent scandal] presents a vibrant example of the problem that can arise if lawyers don't check the credentials or track records of private eyes they employ. 'You've got to exercise some due diligence—you can't just pick up a name out of the Yellow Pages,' remarks Philip Epstein, a partner at Toronto-based Epstein Cole LLP and one of Canada's leading lawyers and lecturers on family law. 'You've got to make some reasonable investigation as to whom you are hiring and then you have to follow up.' …. ."

**[Full Text]**

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**"Play nice[:] Vigorous advocates still need to keep a civil tongue"**

Sobowale, Julie, *National*, January-February 2014, pp. 6-10, at p. 6

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" …. In a nutshell, civility requires lawyers to remain courteous and respectful to lawyers, clients and members of adjudicative bodies. The Model Code of Professional Conduct recently adopted by [some] provincial [and territorial] law societies sets out the rules. …. (The CBA's Code of Professional Conduct, updated in 2009, sets out principles of civility for advocates as an educational tool to encourage and maintain civility in the justice system. …..) …. ."

**Note:** "Civility in the Legal Practice: Practical Tips" was written for Canadian Bar Association by senior Canadian barrister Ronald J. Profit, Q.C. who, since 1983, has practiced law (family law including collaborative practice, estates and administrative law) from Charlottetown, P.E.I. The Association has also adopted *Principles of Civility for Advocates*, authored by the Advocates Society of Ontario. See: http://www.cba.org/cba/epiigram/february2002/Principles.aspx

**[Full Text]**

**"It Takes Two To Tango? When A Party Can (And Cannot) Contract With Herself"**

Alexander, Anthony M.C., *mondaq*, 24 July 2013

"At common law, a party is generally ***unable*** to contract with itself, or to transfer property to itself. In some provinces, these limitations have been overcome through explicit legislation. In a recent ruling, Penny v. DeLong Estate, 2013 NSCA 74, the Nova Scotia court confirmed that, in the absence of statutory intervention equity will not intercede to overcome this common law prohibition. …. ."

**[Full Text]**

**"Divorce lawyers attract most complaints about bad service"**

Gibb, Frances, *The Times*, 01 March 2013

"Divorce is now the area of law most complained about in England and Wales, according to a report from the Legal Ombudsman. It received almost a fifth of all complaints. The report reveals that 18 per cent of the 7,500 complaints resolves by the legal complainants watchdog last year were about divorce or family law. It says that about a quarter of divorce complaints relate to poor cost information, with one customer in five (21 per cent) saying that they were not given an estimate of fees when a lawyer was first consulted. …. Some bills exceeded estimates [when estimates were furnished] by … £30,000 and in one case a woman was told to pay … £4,000 for photocopying. But sometimes the couples themselves are also to blame for high costs, the report says, warning against running up unnecessary costs by using a lawyer as a support mechanism or taking out their anger on a former partner by using the court process. The average cost of divorce is estimated to be … £1,300. …., 18 per cent of complaints investigated related to the lawyer failing to provide adequate legal advice, resulting in yet further distress for clients. …. ."

**[Full Text]**

**"Buyer out $100K due to missed fax"**

Santry, Charlotte, *Law Times*, 28 October 2013, p. 9

"While people have long since tossed things like cassette tapes onto the 1980s technology scrap heap, lawyers—and not just those nostalgic for the era of the shoulder pad—still widely use fax machines. In a Court of Appeal for Ontario case heard on Sept. 11, 2013, a client lost $100,000 after a real estate lawyer failed to check her fax machine. …. ."

**[No Full Text]**

### 3.3.2 Confidentiality and Privilege

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**"Those Hiring Private Investigators Must Be Aware Of Privilege And Privacy Legislation"**

Major, Steven L. and Lambert, Justin R., *mondaq*, 30 April 2014

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"When a fraud is suspected, the litigator often turns to a private investigator to gather evidence about, and to use against, the fraudster. Retaining and instructing an investigator must be undertaken with extreme caution to avoid ultimately prejudicing the case against the wrongdoer. Those retaining and instructing investigators should pay particular attention to issues surrounding privilege and privacy legislation.

. . . .

"It is an important starting point to realize that investigations, reports, and the work product of investigators are not, in and of themselves, protected by privilege. However, where the investigator is retained for the dominant purpose of litigation, then the investigator's work may be protected from disclosure by litigation privilege. The key here is that the 'dominant purpose' of the investigator's work must be litigation: see *Blair v Wawanesa Mutual Insurance Co,* 1998 ABQB 1025 [CanLII].

"…. every effort must be undertaken to ensure that the investigator performs proper surveillance that does not infringe on the subject's privacy, for example by undertaking surveillance in public areas, by accessing only information that is publicly available, or by accessing information which the person retaining the investigator has a right of access (for example, an employer accessing the workplace computer of an employee). Taking those steps will maximize the chance that the resulting work product will be clothed by litigation privilege, not subject to attack under any applicable privacy legislation, and that your helpful information can ultimately be made admissible."

**[Full Text]**

**"The meaning of presumptive privilege"**

Wardle, Peter, *The Lawyers Weekly*, 24 May 2013, p. 18

"Solicitor-client privilege is a field where the great developments, taking place largely in the fields of criminal and administrative law, eventually percolate through to those of us who practice in more mundane areas. So it may come as a surprise to some that administrative information found in a lawyer's file, including accounts, dockets, information about client's ability to pay, and the source of payment of amounts are only presumptively privileged. This at least was the conclusion of the Court of Appeal in *Re Kaiser* … [2012 ONCA 838 (CanLII)], a bankruptcy case that followed prior jurisprudence from the Supreme Court of Canada in the criminal law field. …. According to Justice Robert A. Blair, who wrote the decision, the 'categorical approach' to privilege over the contents of a lawyer's file has now been replaced by a 'more flexible and contextual approach.' Administrative information related to the establishment of a solicitor-client relationship—including the bills, dockets, information regarding ability to pay, and by extension the source of payment—is only presumptively privileged. That presumption can be rebutted by the party seeking disclosure by meeting one of two alternative tests: first, by demonstrating that there is no reasonable possibility that disclosure will lead to the revelation of confidential solicitor-client communications; or, second, by demonstrating that the requested information is not linked to the merits of the case and that its disclosure would not prejudice the client. The court relied on *Maranda v. Richer* … [2003 SCC 67 (CanLII)] as the basis for the first test and *R. v. Cunningham* … [2010 SCC 10 (CanLII)] for the second. …. ."

**[Full Text]**

***Sable Offshore Energy Inc. v. Ameron International Corp.***

2013 CarswellNS 428; [2013] 2 S.C.R. 623

**Facts:** Plaintiffs were involved in litigation with multiple defendants. Plaintiffs reached settlement with some defendants ("settling defendants"). Plaintiffs and settling defendants executed Pierringer agreement (i.e., settlement agreement among some, but not all, parties to litigation). Remaining defendants brought unsuccessful application for disclosure of quantum of settlement under R. 20 of Civil Procedure Rules (1972) as stated in Pierringer agreement. Chambers judge held quantum met relevancy threshold for disclosure under R. 20, but not until after trial. Chambers judge held disadvantage to remaining defendants of not knowing quantum did not outweigh benefit of encouraging settlement in future litigation among remaining parties.

Chambers judge held that protection of settlement privilege was necessary to encourage remaining parties to settle for reasons of certainty and potential cost savings. Non-settling defendants successfully appealed timing of disclosure of settlement amount. From that outcome, Plaintiffs appealed.

**Held:** Appeal allowed. It was not clear how knowledge of settlement amounts under Pierringer agreement materially affected ability of non-settling defendants to know and present case. Defendants remained fully aware of claims they must defend themselves against, and of overall amount that plaintiffs were seeking. It was true that knowing settlement amounts might allow defendants to revise estimate of how much they want to invest in case, but this did not rise to sufficient level of importance to displace public interest in promoting settlements.

**[Full Text]**

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***Catholic Children's Aid Society of Toronto v. Office of the Children's Lawyer***

2013 CarswellOnt 9678; (2013) 35 R.F.L. (7th) 178 (Ont. Sup. Ct. J.);
2013 ONSC 4560 (CanLII)

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**Facts:** Trial judge ordered that two children, represented by Office of the Children's Lawyer ("OCL"), were in need of protection. Order was silent as to access. Mother and OCL appealed order that was silent as to access in relation to older child J, and mother appealed that order in relation to younger child. Motion for "in person, supervised access" pending appeal was dismissed. Respondent Children's Aid Society brought motion under s. 74 of *Child and Family Services Act* for order requiring OCL to disclose all records contained in OCL's clinical/social work file, which apparently were needed in relation to the appeal. OCL submitted that the material requested was protected by solicitor-client privilege and could not be produced.

**Held:** Motion dismissed. Relationship between OCL as counsel and child is solicitor/client relationship. Child-client's right to confidential relationship with counsel must be guarded with more vigilance than that accorded to adult client. OCL's file is legal file, not "clinical/social work" file. To extent that older child, J, permitted his counsel to disclose some of information he had provided, he had waived his privilege. When OCL meets with child-clients, it provides them with assurances that their communications with their lawyer will remain confidential, except to extent child wishes, or child is comfortable with OCL sharing all information provided. Communications with clinical investigator were made only in presence of counsel, and where confidential nature of communications was clearly reinforced. Injury to relationship between child and counsel and clinical investigator outweighed any benefit to be gained by disclosure of confidential information. To require clinical investigators to disclose their notes without J's consent would breach trusting relationship OCL had developed with its client.

**[Full Text]**

***Union Carbide Canada Inc. [Dow Chemical] v. Bombadier Inc.***

2014 SCC 35, 08 May 2014

**Facts:** The parties are entangled in a decades-long, multi-million dollar civil suit about defective gas tanks used on Sea-Doo personal watercraft. B claimed that the tanks supplied by D were unfit for the use for which they had been intended and commenced an action for damages against D in Montréal, in the Quebec Superior Court. The parties agreed to private mediation and a standard mediation agreement was signed. It contained the following clause regarding the confidentiality of the process: "Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding". The next day D submitted a settlement offer which B subsequently accepted. Two days after B's acceptance, counsel for D stated that his client considered this to be a global settlement amount. Counsel for B replied that the settlement amount was for the Montréal litigation only. D did not send the discussed settlement amount, and B then filed a motion for homologation (i.e., judicial approval) of the transaction in the Superior Court. D brought a motion to strike out the allegations contained in six paragraphs of the motion for homologation on the ground that they referred to events that had taken place in the course of the mediation process.

The motion judge held that in light of the confidentiality clause in the mediation agreement, the mediation proceedings were covered by art. 151.21 of the *Code of Civil Procedure*. She granted D's motion to strike in part, ordering that four of the six allegations be struck because they referred to discussions that had occurred or submissions that had been made in the context of the mediation. B appealed. The Court of Appeal allowed the appeal and found that the rules of the *Code of Civil Procedure* with respect to confidentiality do not apply to extrajudicial mediation proceedings. It observed that when mediation has resulted in an agreement, communications made in the course of the mediation process cease to be privileged and held that settlement privilege does not prevent a party from producing evidence of confidential communications in order to prove the existence of a disputed settlement agreement arising from mediation or to assist in the interpretation of such an agreement. The court declined to strike the allegations and left it to the judge hearing the motion for homologation to consider whether the impugned paragraphs were relevant to the identification of the terms of the agreement, in which case the exception to the common law settlement privilege would apply. D appealed.

**Held:** Appeal dismissed. At common law, settlement privilege is a rule of evidence that protects communications exchanged by parties as they try to settle a dispute. It applies even in the absence of statutory provisions or contract clauses with respect to confidentiality. The rule promotes honest and frank discussions between the parties, which can make it easier to reach a settlement. However, a communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement. Both the

common law privilege and this exception to it form part of the civil law of Quebec, which applies in this case.

A form of confidentiality is inherent in mediation in that the parties are typically discussing a settlement. This means that their communications are protected by the common law settlement privilege. However, parties can tailor their confidentiality requirements by contract, to exceed the scope of that privilege. Settlement privilege and a confidentiality clause are not the same, and they may in some circumstances conflict. One is a rule of evidence, while the other is a binding agreement; they do not afford the same protection, nor are the consequences for breaching them necessarily the same. While allowing parties to freely contract for confidentiality protection furthers the valuable public purpose of promoting settlement, contracting out of the exception to settlement privilege—that applies where a party seeks to prove the terms of a settlement—might prevent parties from enforcing the terms of settlements they have negotiated.

To determine whether an absolute confidentiality clause in a mediation agreement displaces this common law exception to settlement privilege, one must begin with an interpretation of the contract. It must be asked whether the confidentiality clause actually conflicts with settlement privilege or with the recognized exceptions to that privilege. Where parties contract for greater confidentiality protection than is available at common law, the will of the parties should presumptively be upheld absent such concerns as fraud or illegality. However, the mere fact of signing a mediation agreement that contains a confidentiality clause does not automatically displace the privilege and the exceptions to it. Where an agreement could have the effect of preventing the application of a recognized exception to settlement privilege, its terms must be clear.

Here, the mediation contract shows on its face a common intention on the part of the parties to be bound by confidentiality in respect of anything that might transpire in the course of the mediation. However, the nature of the contract, the circumstances in which it was formed and the contract as a whole reveals that the parties did not intend to disregard the usual rule that settlement privilege can be dispensed with in order to prove the terms of a settlement. The mediation agreement was signed on the eve of the mediation with the apparent purpose of settling an ongoing dispute. It was a standard form contract provided by the mediator, and neither party amended it or added any provisions relating to confidentiality. There is no evidence that the parties thought they were deviating from the settlement privilege that usually applies. Absent an express provision to the contrary, it is unreasonable to assume that parties who have agreed to mediation for the purpose of reaching a settlement would renounce their right to prove the terms of the settlement. Consequently, in the course of the motion for homologation, parties may produce evidence insofar as it is necessary in order to prove the terms of the settlement. If sensitive information should not be made available to the public, an application can be made to the motion judge for a confidentiality order and to consider the evidence *in camera*.

**[Full Text]**

## *A. (D.) v. A. (L.)*

2013 CarswellNB 486; (2013), 38 R.F.L. (7th) 45 (N.B. Q.B.);
2013 NBQB 258 (CanLII)

**Facts:** Spouses executed contract to settle financial obligations arising from marriage in advance of possible separation. Marriage contract had been negotiated through Collaborative Family Law ("CFL") process, with each spouse represented by lawyer ("CFL lawyer"). Approximately 2.5 years after executing marriage contract, husband informed wife that he intended to leave marriage. In subsequent divorce proceedings, husband sought to uphold marriage contract and wife sought to attack it. Spouses' lawyers in divorce proceedings requested disclosure of financial information contained in CFL lawyers' files. CFL lawyers opposed this request on grounds of confidentiality and privilege. Husband brought motion for disclosure of requested information.

**Held:** Motion granted. Class privilege applied to CFL process. CFL process engages combination of solicitor-client privilege and settlement privilege. Accordingly, communications and settlement discussions arising through CFL process are prima facie privileged, as public interest in encouraging settlements outweighs interest of disclosure. In case at bar, spouses established that requested information constituted valid exception to settlement privilege. Requested information was compellable at law. Given that spouses were involved in proceedings related to marital and non-marital property claims as well as child and spousal support claims, they were required to produce comprehensive financial disclosure. That duty existed both as result of legislative requirements and jurisprudence. Disclosure of financial documents compellable at law could not be found to be injurious to either settlement privilege and/or solicitor-client privilege where issue to be litigated related to adequacy of financial disclosure and its impact on validity of marriage contract.

**[Full Text]**

## *McDermott v. McDermott*

2013 CarswellBC 773; (2013), 32 R.F.L. (7th) 307 (B.C.S.C.);
2013 BCSC 534 (CanLII)

**Facts:** Parties had been engaged in matrimonial litigation for numerous years. After original trial in 2002, wife, who lived in New Brunswick, was granted custody of children and

husband was granted access, in British Columbia, where he lived, and in New Brunswick. Access schedule led to many disputes which, in turn, led to proceeding concerning custody and support. After trial commenced, husband learned of email correspondence from wife to her sister where she disclosed plan, to be undertaken by her lawyer, to delay trial by losing application, and by then appealing. Husband applied for orders seeking production of communications between wife and her lawyer on documents that wife had waived privilege and on other documents between wife and her lawyer on grounds that communications were not privileged because they fell within crime-fraud exception and that they were relevant to issues to be determined. Wife applied for mistrial.

**Held:** Husband's application was allowed in part; wife's application was dismissed. No privilege was attached to wife's email communications with her lawyer as future crimes exception was engaged. Wife intended to manipulate process of court by resisting application in manner designed to result in adverse ruling so that she could delay trial through appeal she knew was not merited, and plan mentioned in emails was part of larger scheme by wife to delay trial. Wife had waived solicitor-client privilege over certain communications with lawyer. Certain non-privileged documents were to be disclosed. There was no basis to order mistrial as emails protected by solicitor-client privilege that were reviewed by husband did not disclose wife's trial strategy. Mistrial would not be in best interests of children as children showed signs of parental alienation and there was no basis to conclude that parties could or would agree to terms of access regime that would be adhered to.

**[Full Text]**

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***Haugen v. Haugen***

2013 CarswellMan 333; (2013), 33 R.F.L. (7th) 319 (Man. Q.B. Master);
2013 MBQB 155 (CanLII)

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**Facts:** Parties terminated their 13-year marriage. Wife brought motion for order that husband be compelled to provide answers to undertakings that were taken under advisement on his examination for discovery respecting documentation from his law firm (including records of funds held for husband in law firm, invoices from the law firm to the husband, and documents provided by the Husband to the law firm). Husband refused to respond to undertakings on basis that information was protected by solicitor-client privilege. Motion, by wife, to compel disclosure by husband, dismissed.

**Held:** Issue of context when determining protection of solicitor-client privilege is paramount. Wife did not accept husband's answers as to final disposition of monies he sent to his law firm. Regardless of reasonableness of fee amount paid, wife's knowledge thereof was extremely relevant to merits of case. Information sought from law firm concerning husband's statements of account and trust records was not "neutral information". How monies, paid to

husband's law firm, were allocated would clearly illustrate legal advice and consequent instruction given to law firm by husband. Further, quantum of fees paid by husband with anticipated explanation was directly linked to "merits of the matter". Wife, however, had not rebutted husband's right to solicitor-client privilege. Wife was entitled to obtain financial disclosure requested. But, Court was bound to accept meaning of term "presumptively privileged" used by Ontario Court of Appeal *(Re Kaiser* 2012 ONCA 838 (CanLII)). Disclosure relief sought against law firm as husband's counsel was dismissed. Wife's counsel could, however, seek to obtain disclosure by causing husband to be compelled to answer "penetrating financial disclosure questions" or face "adverse inference", at any subsequent trial, for failing to answer such questions.

**[Full Text]**

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***Thompson v. Minister of National Revenue***

2013 FCA 197, 29 August 2013;
Application to S.C.C. for leave to appeal granted, 13 March 2014

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**Facts:** Thompson, a lawyer, is the subject of enforcement proceedings under the *Income Tax Act*. Canada Revenue Agency (CRA) issued a Requirement seeking information and documents relating to Thompson's income and expenses, and assets and liabilities, including a current accounts receivable listing. Thompson provided some, but not all, of the information set out in the Requirement. In particular, he provided no details regarding his accounts receivable, from his clients, other than a total balance owing. Federal Court of Appeal considered whether solicitor-client privilege asserted by Thompson relieved him from disclosing details of receivables from his clients, including the clients' names, to CRA. The M.N.R. successfully applied to Federal Court (T-1190-12) for full compliance by Thompson with the Requirement. The trial judge, in allowing the CRA's application, wrote that " … I have considerable sympathy for the situation [Mr. Thompson] now finds himself in whereby his clients could face garnishee proceedings if their names are disclosed [to the M.N.R.] which might come as a surprise to them and will certainly not assist … [Thompson] who practices law in a small town … [H]owever I do not think the law [respecting privilege] supports … [Thompson's] position. …. ."

**Held:** "[71] …, I propose to return the file to the Federal Court for a new hearing, on the question of the accounts receivable listing. Mr. Thompson may then have the opportunity to get his clients' instructions and, on the basis of these reasons, may file new sworn affidavits explaining why individual clients' names are privileged, if in fact this continues to be the case. …., I should add that the clients on whose behalf … [Mr. Thompson] is claiming privilege should produce their own affidavits explaining the history of their accounts. Copies of such affidavits should be served on … [the M.N.R.], with clients' names redacted. …. ."

**[Full Text]**

***Johnstone v. Locke***

2011 CarswellOnt 13914; (2011), 15 R.F.L. (7th) 209 (Ont. Sup. Ct. J.);
2011 ONSC 7138 (CanLII)

**Facts:** J and L were engaged in mediation relating to J's claim for joint custody of L and S's daughter, M (S being L's former partner). S was invited to attend mediation session, although there was no dispute between J and S at this time. Based on what she learned at mediation session, S's position on custody issue changed, and she sent email to J setting out custody terms that she would be agreeable to. S's email contradicted portions of her Answer in which she subsequently claimed that it was not in M's best interests for J to play primary role in M's life. J sought to enter S's email into evidence as communication against interest.

**Held:** Email was ruled inadmissible. Email was settlement privileged. It was not until mediation session that S understood full implications of what was being asked of her in terms of legal custody of M. After such implications were made known to her, S's position changed, and there was dispute in existence between J and S. Fact that email itself provided notice of this dispute to J did not change fact that there was dispute in existence at time email was sent. S was necessary party to proposed settlement, and was clearly of view that her involvement in mediation was on completely confidential basis. J had not established that email fell within an exception to privilege. While portions of email contradicted S's Answer, this fact was not sufficient to meet necessity test. There was other evidence already before court that provided J with basis upon which to contradict S's pleadings.

**[Full Text]**

***R. v. Dunn***

2012 CarswellOnt 5565 (Ont. Sup. Ct. J.); 2012 ONSC 2748 (CanLII)

**Facts:** Executives of company were charged with fraud. Lawyers who represented them on behalf of company during earlier interviews conducted on behalf of company's audit committee were called as witnesses against them. Accused claimed litigation privilege in regards to notes that lawyers took of questions and answers. Crown argued notes were no more than imperfect transcript and accused were engaged in cover-up so they should be admissible. Company, at time of audit, anticipated civil and securities litigation to follow; which did occur. Notes were made contemporaneously and lawyers did not say notes were false. No actual transcripts of audit interviews existed.

**Held:** Litigation privilege found; notes to be used to refresh memory only. Barrister notes are essential to legal role and lawyer could not do note-taking if expected that they would be later disclosed. Barrister has to be free from unnecessary interference. Court observed there would be no issue if audit interviews were recorded. Notes could be used to refresh memory, however, as they were reliable given lawyers did not testify that any notes were false. It was not possible at this stage to determine if accused involved in cover-up as court was still hearing evidence and notes would not have assisted in any subterfuge. Barristers were not ordinary witnesses memory, however, as and should not deliberately refrain from taking reasonable steps to refresh his or her memory prior to testifying and thereby deliberately deprive court of best evidence, as that would obstruct court's truth-finding function. Crown would not be allowed to read notes if used to refresh memory as unfairness to Crown was outweighed by necessity of minimally impairing protection from disclosure which barristers' notes currently enjoyed.

**[Full Text]**

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**"Exploring the limits of privilege[:]**
**Going beyond the boundaries of traditional lawyer-client relationships"**

Brown, Jennifer, *Canadian Lawyer*, July 2012, pp. 42-45, at pp. 42, 43

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"In early May (2012], Ontario Superior Court Justice Frank Morrocco ruled that lawyers who acted for former executives at Nortel Networks Corp. would not have to produce notes they look during interviews their clients gave to investors probing accounting irregularities at the failed telecom giant. Morrocco ruled the notes were protected by litigation privilege that shields communications between a solicitor and client to allow for preparation of a defence in contemplation of litigation. He suggested that forcing the lawyers to refer to the notes, taken during a meeting in March 2004, would have a chilling effect on Canada's legal community. ….It surprised some who believed it might have fallen under solicitor-client privilege [which is perpetual, in contrast to litigation privilege which thrives only during litigation]. …. So when it comes to privilege, what other areas of privilege can lawyers find themselves operating under? …. ."

**Note:** The most recent book dedicated to solicitor-client privilege is: Dodek, Adam M., *Solicitor-Client Privilege* (Markham [ON]: LexisNexis Canada Inc., [May] 2014).

**[Full Text]**

**"Is legal advice given by accountants privileged?[:]
The UK Supreme Court weighs in"**

Brammall, Brendan, *CCCA Canadian Corporate Counsel Association* [Magazine], Summer 2013, p. 48

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"In a much-anticipated ruling, *R.* (on the application of Prudential plc) *v. Special Commissioner of Income Tax*, [2013] UKSC 1, a majority of the UK Supreme Court confirmed that legal advice privilege (known as 'solicitor-client privilege' in Canada) does not apply to legal advice given by accountants, even if the same advice given by a lawyer would be privileged The majority's decision is consistent with the result reached in the leading Canadian case [*Tower v. Canada (Minister of National Revenue*), 2003 FCA 307 (CanLII)] and should serve as a helpful reminder that communications with accountants, even on legal issues, may have to be disclosed. …. ."

**[Full Text]**

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**"Potential privilege pitfalls posed by cloud storage"**

Neil, Martha, www.abajournal.com, 09 September 2013

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"As the tools of the modern office increasingly operate online, doctors, lawyers and other professionals who serve as the gatekeepers of confidential information are posed with a problem. As a practical matter, they need to operate in the cloud. Yet if a third party has access to private information, that could eliminate confidentiality, pose a liability risk or even potentially violate the law. …. ."

**Note:** Adam M. Dodek, in *Solicitor-Client Privilege* (Markham [ON]: LexisNexis Canada Inc., 2014) at pp. 163-164, addresses the issue for Canadian law practitioners.

**[Full Text]**

**"No privilege at the border"**

Beazley, Doug, *National*, January-February 2014

" …. What amazes … [Cyndee Todgham Cherniak, a Toronto lawyer who founded LexSage] is how little many Canadian lawyers know about the power border officials on both sides [of the Canada-United States border] have to seize documents covered by solicitor-client privilege. As chair of the Canadian Bar Association's Commodity Tax, Customs and Trade Section, … [she] put forward a motion at the CBA's annual meeting in August 2013 to launch a working ground with the federal government to set a policy on solicitor-client privilege claims made when crossing the border into Canada. She's expecting a meeting with justice officials in early 2014. …. ."

**[Full Text]**

**"Absolute Privilege is Not Absolute"**

Radnoff, Brian N., *mondaq*, 09 July 2013

"Although a recent Ontario Court of Appeal decision reaffirms the existence of absolute privilege, it also holds that the privilege does not necessarily prevent an aggrieved party from suing their lawyer for conduct while representing another client, says commercial litigator Brian Radnoff in an interview about the recent decision of the Ontario Court of Appeal in *Amato v. Walsh* [2013 ONCA 258 (CanLII)]. The Court of Appeal considered whether it is 'plain and obvious' that absolute privilege can prevent a claim against a lawyer for alleged breaches of fiduciary duty and the duty of loyalty based on statements made or omitted while the lawyer was representing a different client.

"[In the] … unusual factual situation …. '[a]lleged Ponzi scheme operators faced an OSC [Ontario Securities Commission] investigation. While this was going on, the [scheme] operators urged the plaintiffs [--] investors in the scheme [--], to retain their [the scheme operators'] lawyers to get an opinion on whether the Ponzi scheme complied with securities laws. By taking on the plaintiffs' retainer, the lawyers put themselves in a very difficult situation, owing fiduciary duties and duties of loyalty to both the [scheme] operators and the plaintiffs, who were investors and therefore victims of the Ponzi scheme,' he says. …. ."

**[Full Text]**

**"Can lawyers reveal clients' HIV status?[:]
Case shines light on ethical dilemmas when safety at risk"**

McClelland, Siobhan, *Law Times*, 06 August 2012, pp. 1, 4, at p. 1

"A recent criminal case in which a defence counsel disclosed her client's HIV status to the court raises important ethical issues as to lawyers' ability and obligation to divulge privileged information when public safety is at stake. Lawyers can't divulge information provided by a client in the course of the solicitor-client relationship without the client's consent. But in the recent case of *R. v. Butt*, criminal defence counsel Heather Pringle did just that and drew praise from the court for doing so. Pringle's client had pleaded guilty to sexual interference and received a sentence of 14 days in jail. While waiting for the Crown's appeal of the defendant's sentence, Pringle learned her client was HIV positive. After seeking legal advice, Pringle disclosed her client's status to the Crown and the court, a move that led to HIV testing of the 12-year-old victim and the discovery that he wasn't HIV positive. 'Ms. Pringle is to be commended for her appreciation of her ethical obligations in this difficult matter,' Justice Michael Code stated in a July 25 Superior Court ruling. He went on to note that the public safety or future harm exceptions to solicitor-client privilege and the duties arising from them aren't easy areas of the law to apply. …. ."

**[Full Text]**

**Lawyer who uncovered JK Rowling's Robert Galbraith alter ego fined £1,000; successfully sued by client[:] Solicitor Christopher Gossage told his wife's best friend that obscure writer of The Cuckoo's Calling was in fact Harry Potter author**

Kennedy, Maev, *The Guardian*, 31 December 2013

The lawyer who catapulted a promising but obscure new crime writer into the bestseller lists by revealing the author's true identity as JK Rowling, has been fined £1,000 for breach of confidentiality.

The Solicitors Regulation Authority has also issued a written rebuke to Christopher Gossage, of Russell's solicitors, who confided to his wife's best friend that Robert Galbraith, author of The Cuckoo's Calling, was really one of the most famous and wealthy authors in the world.

Gossage said he believed he was speaking "in confidence to someone he trusted implicitly", but the story subsequently appeared in The Sunday Times, to the dismay and rage of the author of the Harry Potter books.

The publisher of The Cuckoo's Calling, Little Brown – which also published Rowling's first adult novel, The Casual Vacancy – organized hasty reprints as the book, which up to that point had sold 1,500 copies in three months, shot 5,000 places to the top of the Amazon bestseller lists. In the week after the story broke it sold almost 18,000 copies.

Rowling was furious, however, and even more so when she discovered the source of the leak was her own solicitors.

"To say I am disappointed is an understatement," she said at the time. "A tiny number of people knew my pseudonym and it has not been pleasant to wonder for days how a woman whom I had never heard of prior to Sunday night could have found out something that many of my oldest friends did not know."

Writing on her alter ego's website, Rowling explained: "I was yearning to go back to the beginning of a writing career in this new genre, to work without hype or expectation and to receive totally unvarnished feedback. It was a fantastic experience and I only wish it could have gone on a little longer."

Inevitably there were suspicions that the whole affair was a marketing stunt, but in fact the book had been sent, [by JK Rowling] as the work of the unknown Galbraith to several publishers. Orion was one of the few honest enough to admit they were kicking themselves, having seen the manuscript and turned it down.

Rowling's solicitors made it clear that the revelation came from them, not the author.

"We, Russell’s solicitors, apologize unreservedly for the disclosure caused by one of our partners, Chris Gossage, in revealing to his wife's best friend, Judith Callegari, during a private conversation, that the true identity of Robert Galbraith was in fact JK Rowling.

"Whilst accepting his own culpability, the disclosure was made in confidence to someone he trusted implicitly. On becoming aware of the circumstances, we immediately notified JK Rowling's agent. We can confirm that this leak was not part of any marketing plan and that neither JK Rowling, her agent nor publishers were in any way involved."

Rowling sued both Gossage and Callegari and received a fulsome apology and her costs, and the firm paid undisclosed substantial damages to the Soldiers Charity. Rowling also donated royalties from the book to the charity, explaining that they had helped with the research for the book's ex-army hero, Cormoran Strike.

A new Cormoran Strike thriller is due out in 2014 [05 June], again listed as authored by the considerably less obscure and even more promising Robert Galbraith.

**[No Full Text]**

### 3.3.3 Negotiations

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***Kris Rana v. Canadian Business College***

[2014] No. 35653 (S.C.C.), 24 April 2014

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**Facts:** In 2008, Rana enrolled in a one year law clerk course offered at Canadian Business College, to be completed by September 2009. After several months, Rana had incomplete courses and some failing grades, in addition to some passed courses. She was placed on academic probation. Rana issue a statement of claim against the College in November 2009, claiming damages for emotional distress, including punitive and exemplary damages. Rana obtained a two-hour consultation Legal Aid certificate in January 2010. Using that certificate, she consulted a lawyer in March 2010. The lawyer, on behalf of Rana, exchanged correspondence with the College respecting Rana's legal proceeding. The lawyer's correspondence including a proposal for possible resolution of the proceeding, if the College would give Rana credit for the courses she had already passed, and allowed her to write exams for the remaining courses (after furnishing her with materials for those courses). The College agreed, in correspondence, to settle on the terms which Rana's lawyer had proposed. The College asked that the settlement be memorialized in written minutes of settlement. The minutes were prepared, but were never signed. In January 2011, Rana informed the College she was representing herself. The College brought a motion for an order to enforce the settlement made between it and Rana's lawyer though correspondence. Rana responded with a motion for an order to have her proceeding restored to the trial list. Ontario Superior Court of Justice granted the College's motion, and dismissed Rana's motion. Rana's appeal to Ontario Court of Appeal was dismissed.

**Held:** Rana's application to Supreme Court of Canada for leave to appeal was dismissed with costs.

**[No Full Text]**

**"Settlements and Agreements Between Counsel"**

McLeod, James G., and Mamo, Alfred A., *Annual Review Of Family Law 2013* (Toronto: Thomson Reuters Canada Limited, 2014), pp. 1045-1049

**Note:** This is an excerpt from the most comprehensive general text, published annually, for family law practitioners in Canada.

**[Full Text]**

**"The perils of the opening statement[:]
Incendiary words can derail a mediation from the start"**

Worsfold, Richard, *The Lawyers Weekly*, 04 April 2014, pp. 10, 12, at p. 10

"It's your typical mediation. The mediator introduces the process and then immediately turns the mediation over to counsel, who each make a blistering speech on why their client should be successful and how they will prove the opposing party to be a lying rogue in court. After these opening statements have been made, the mediator quickly separates the parties, each presumably having had a chance to 'vent their spleen' through their counsel's presentation, and meets separately with the parties to encourage compromise and the exchange of offers. Too often, however, the co-operative spirit that parties might have had going into the mediation has all but disappeared, as each have been hurt and offended by opposing counsel's opening statement. …. ."

**[Full Text]**

**"How good mediators finesse difficult counsel"**

Wolfson, Lorne, *The Lawyers Weekly*, 04 April 2014, p. 13

"One of the reasons why lawyers recommend mediation to their clients is to circumvent an impasse caused by a difficult opposing counsel. Why do lawyers often display these behaviours? What can the mediator and opposing counsel do in response? …. ."

**[Full Text]**

**"ADR has lost its 'alternative' way[:]**
**Let's return to the 'win-win' formula from the 'mostly okay/mostly okay' "**

Ippolito, Linda, *The Lawyers Weekly*, 14 September 2012, pp. 10-11, at p. 10

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"What happened to the 'alternative' in 'alternative dispute resolution?' Having practised through the rise in the ADR movement since the early nineties, I have watched [as a senior family law practitioner and adjunct professor at Queens University and Osgoode Hall Law School] what promised to be an expansion of the profession start to implode on itself. Creative, fluid processes have become standardized, dehydrated 'five-step' formulas approached with the same rational-logical mindset that led us to look outside the box in the first place.

"Even the promise of collaborative family practice and circle processes in criminal and youth justice are at risk of institutionalization and the formulaic application that follows. After post-graduate studies in ADR and now nearing the end of a PhD in conflict resolution, I have come to the conclusion—without taking away the good work of so many of my colleagues—that, at best, what we are practicing within the legal profession is 'PDR'—parallel dispute resolution. It is certainly not 'alternative,' and that is a real pity. …. Instead of taking the opportunity to open ourselves up to the larger world of conflict resolution, we have taken these practices and adapted them to fit into the legal box. And thus, it has become PDR. It has been institutionalized and formularized within the profession, and annexed by the courts as a form of triage and way to lessen the burden of an ever-expanding docket. …. Rather than using ADR as an opportunity to delve into where the root causes of discord lie, we limit its application to putting out episodic fires of conflict with varying degrees of success and satisfaction for our clients.

"ADR is much more than an alternative to litigation and our contribution to the field can be infinitely more meaningful and significant than it is at present. …. ."

**[Full Text]**

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**"Managing clients goes beyond litigation skills"**

Fogelman, Herschel, *The Lawyers Weekly*, 29 November 2013, p. 17

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"Advocacy is often referred to as the art of persuasion. However, the art employed depends on the canvas being used. Advocacy is not a one size fits all proposition. While many of the basic tools cross over from litigation to mediation, advocacy employed in mediation has to be different from that used in litigation, given the forum and the audience. This article focuses on

the difference in approach that the advocate must employ at three critical stages in the mediation process. …. ."

**[Full Text]**

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**"Vows of arbitration[:]**
**Parties opted out of the right to vary spousal support in court"**

Boulby, Sarah, *The Lawyers Weekly*, 09 November 2012, pp. 12-13, at p. 12

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"An Ontario Court of Appeal decision has affirmed the integrity of family law arbitration and narrowed access to the courts for participants. The Aug. 24 [2012] decision is a hopeful sign that the appellate court will resist invitations to intrude into family law arbitrations and will hold parties to their initial choice of private forum. *Grosman v. Cookson* … [2012 ONCA 551 (CanLII)] concerns a couple who chose mediation to resolve issues arising from their separation. They entered into a final separation agreement that provided for the payment of spousal support by Brian Grosman to Peggy-Lynn Cookson. The separation agreement also provided that if one of the parties wished to vary the spousal support terms, an application would be submitted to mediation/arbitration before a name arbitrator. …. ."

**[Full Text]**

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***Virc v. Blair***

2014 CarswellOnt 6170 (Ont. C.A.); 2014 ONCA 392 (CanLII)

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**Facts:** Parties were married in 1994 and separated in either 2007 or 2008. Parties had three children, born in 1994, 1997 and 1999. In May 2008, parties entered into separation agreement. Wife brought unsuccessful application to set aside agreement. Husband brought successful summary judgment motion seeking to dismiss wife's application. Wife appealed.

**Held:** Appeal allowed. Motion judge erred in application of test to set aside separation agreement. Once motion judge assumed that there had been deliberate material misrepresentation, she erred in shifting onus to wife to inquire as to veracity of husband's financial disclosure.

**[Full Text]**

### *Giesbrecht v. Giesbrecht*

2013 CarswellSask 36; (2013), 31 R.F.L. (7th) 100 (Sask. Q.B.); 2013 SKQB 16 (CanLII)

**Facts:** Minutes of settlement were entered into following pre-trial conference. Minutes contained terms dividing family property. Both parties were represented by counsel at that time. Respondent brought application to amend minutes to provide specific reference to waiver of any division of unadjusted pensionable earnings under Canada Pension Plan ("CPP") on basis that this was mutual intention of parties and implied term of minutes of settlement. Information sought was relevant and probative.

**Held:** Application dismissed. Mutual mistake was not established. Need for specific provision for CPP issue ought to be well-known to counsel practising in this area of law. Such waivers must be expressly dealt with in agreements between spouses, rather than falling under general provision. Counsel at pre-trial conference should have either had waiver built into precedent used for minutes of settlement, added it, or made entire deal struck at pre-trial subject to full and complete agreement. None of that having been done in case at bar, respondent was unable to obtain relief he sought.

**[Full Text]**

### *Fewer v. Fewer*

2011 CarswellBC 3659; (2011), 12 R.F.L. (7th) 257; 2011 BCCA 502 (CanLII)

**Facts:** Parties separated after 11 years of co-habitation that included eight years of marriage. Parties had two children. Husband brought divorce proceedings. Parties participated in mediation without counsel present. Mediator prepared memorandum of understanding ("MOU") which was sent to both lawyers. MOU set out parenting schedule and division of assets. Lawyers of husband and wife exchanged emails. Husband's lawyer sought confirmation of wife's agreement to MOU and next day wife's lawyer responded confirming agreement. About time wife received draft separation agreement, wife noticed that her investments had increased dramatically, although her husband told her his similar investments had not, and letter was sent to husband's lawyer requesting full disclosure. Husband applied by way of summary trial for declaration that separation agreement was binding and enforceable. Application was dismissed. Husband appealed.

**Held:** Appeal allowed. Exchange of email messages created contract binding on both parties to enter into separation agreement as to division of their assets in accordance with terms

set out in MOU. Once both of them consented, there was contract binding on both of them and enforceable by either. Summary trial judge came to opposite conclusion in error. There was nothing left for subsequent agreement. All that was left for parties to do was to sign separation agreement containing terms set out in MOU. Order was made declaring that parties were bound by agreement to sign separation agreement in terms set out in MOU.

**[Full Text]**

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***Yaworski v. Gowling Lafleur Henderson LLP***

2013 ABCA 21 (CanLII)

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**Facts:** Plaintiff lawyer became special partner in defendant law firm in 2004, through his professional corporation. Lawyer worked at firm until 2009, although original agreement was only set through 2006. Mandatory arbitration clause was in place in agreement. Notwithstanding this clause, lawyer brought court action to determine entitlement to compensation under agreement. Law firm applied for stay of court action. Application was granted. Lawyer claimed that reasons given by chambers judge were inadequate. Lawyer claimed that stay was not available remedy under various grounds. Lawyer appealed from order granting stay.

**Held:** Appeal dismissed. Chambers judge exercised jurisdiction properly in determining that arbitration was appropriate forum. Even though lawyer was not personally party to agreement, arbitration clause was broad enough to involve any dispute between professional corporation and law firm, which was covered in instant case. Agreement was read to continue after 2006 with any renewal terms that were agreed upon, none of which actually were. There was no apparent repudiation of agreement, which in any event could be dealt with by arbitrator. Most, if not all, relief sought by lawyer was available through arbitration process. As cause of action rested with professional corporation, lawyer was not within exception to arbitration law.

**[Full Text]**

***Pasqualino v. Pasqualino***

2013 CarswellOnt 12804; (2013), 37 R.F.L. (7th) 197 (Ont. Sup. Ct. J.);
2013 ONSC 5770 (CanLII)

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**Facts:** Trial was suspended to allow parties to attempt to mediate custody and access issues. Parties attended for mediation. As result of mediation and settlement discussions, husband's counsel drafted consent detailing proposed terms of settlement, which was provided to wife for consideration. Wife claimed that she signed offer to settle in form of proposed settlement terms and had her counsel send facsimile transmission of such to husband's counsel. Wife claimed that binding settlement was reached upon receipt of accepted offer by husband's counsel. Wife brought motion to enforce settlement.

**Held:** Motion dismissed. Husband's counsel withdrew offer prior to effective service of wife's acceptance of offer. On that basis, motion to enforce settlement failed. Justice and best interests of children demanded that settlement be based on both parents fully appreciating and having common minds respecting terms. Parties were not of common mind respecting offer when wife attempted to accept it.

**[Full Text]**

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***Estephan v. Estephan***

2013 CarswellBC 3796 (B.C.C.A.); 2013 BCCA 540 (CanLII)

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**Facts:** Parties began living together in 1986, were married in 1996, and separated in 2005. Wife was primary caregiver for two children, while husband successfully pursued career as lawyer. Wife had serious health problems that compromised her ability to work. Parties entered into mediation, represented by their respective counsel. Resulting agreement reduced to writing in form of proposed consent order signed by Wife and her counsel. Wife withdrew consent to entry of order. Trial judge not prepared to find that wife lacked capacity to instruct counsel. Order was entered. Agreement incorporated in order purported to settle all outstanding financial and parenting issues. Wife applied to set aside or vary agreement and for spousal support. Trial judge analyzed agreement using analytical framework set out in *Miglin* (2003 SCC 24 (CanLII)) and found that separation agreement was valid and binding. Wife appealed.

**Held:** Appeal allowed. *Miglin* sets out a two-stage test. The first stage required the court to consider the circumstances under which the agreement was made to determine whether it was obtained fairly and then whether the agreement substantially complied with the objectives of the

*Divorce Act* when it was made. The second stage required the court to consider whether the agreement still reflected the intentions of the parties and continued to substantially comply with the objectives of the *Divorce Act*. The trial judge recognized the relevance of the factors set out in s. 15.2(4) of the *Divorce Act* and the s. 15.2(6) objectives to the evaluation of the agreement, but he did not explicitly test the provisions of the agreement against those factors and objectives. His failure to do so was an error.

**[Full Text]**

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**"The art of negotiation[:] Prepare, ask questions, and get your ego out of the way"**

Macaulay, Ann, *National*, January-February 2013, pp. 11-14, at p. 11

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"Negotiation is the most important skill people use all the time, says Charles Craver, who teaches the subject at George Washington University Law School in Washington, D.C. Yet few lawyers have been trained in the art of the deal. Here are some tips from Craver and three other experts on how to succeed. …. ."

**[Full Text]**

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**"Some lawyer puffery in settlement negotiations is allowed, proposed California ethics opinion says"**

Cassens Weiss, Debra, www.abajournal.com, 18 March 2014

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"A lawyer negotiating on behalf of a client in settlement talks may engage in some 'puffery' in regards to the client's goals or willingness to compromise, according to a proposed ethics opinion by the ethics committee of the California State Bar. A lawyer's false statements of material fact, however, would violate ethics rules that bar a lawyer from engaging in deceit, the proposed ethics opinion says. …. ."

**[Full Text]**

**"Advice for lawyers struggling with mediation advocacy"**

McKiernan, Michael, *Law Times*, 03 December 2012, p. 9

"Mediation advocacy doesn't always come naturally to lawyers, according to a Toronto mediator who says he frequently encounters counsel struggling to contain their inner litigator. 'As lawyers, we are trained to threaten people. In law school, you get bonus points for finding more issues. We are told that a good lawyer digs up all the issues and never leaves a claim uncovered,' says Barry Fisher, a past chairman of the Ontario Bar Association's alternative dispute resolution section. 'It's a dramatic shift when you move to mediation, where the focus is on the core issues, but that training comes out.' …. ."

**[No Full Text]**

## 3.4 Relationships with Clients—Personal

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**"Lawyer suspended for violating no-sex-with-client rule; admits oral sex was DUI case fee"**

Neil, Martha, www.abajournal.com, 01 August 2013

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"Applying a new Pennsylvania legal ethics rule for the first time, the state's supreme court has OK'd a one-year law license suspension for a suburban Philadelphia lawyer who admitted he accepted oral sex as a fee for representing a client in a driving-under-the-influence case. …. ."

**[Full Text]**

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**"Lawyer accused of secretly taping sex with client gives up licence"**

Cassens Weiss, Debra, www.abajournal.com, 19 August 2013

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"The Indiana Supreme Court has accepted the resignation of a lawyer who pleaded guilty to voyeurism based on accusations he secretly taped a sexual encounter with a client. …. According to the appeals court, investigators alleged that [William] Wallace [III] visited a jailed woman in February 2009 and offered to represent her, though she already had a lawyer. Later, the woman hired Wallace to represent her in a civil suit, and Wallace allegedly told her he could gain her release from prison on schedule if she agreed to have sex with him after her release. The sexual encounter took place in September 2009, after the woman's release. The woman contacted police in March 2010, saying she had just learned about … [a tape Wallace had secretly made of the sexual encounter she had with him] because Wallace showed it to her boyfriend. During a search of Wallace's home in Princeton, Wallace tried to hide DVDs and a computer drive in his pants, investigators say. Police said the home search produced the sex tape as well as DVDs containing child pornography. …. ."

**[Full Text]**

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**"Can A Signed Questionnaire Be A Will?"**

Beaudin, Alexander Holburn, and Lang LLP, *mondaq*, 29 January 2014

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"The Supreme Court of BC recently found a Wills planning questionnaire could be considered to be the deceased's Will (*Garnett Estate v. Garnett Estate*, 2013 BCSC 1731 (CanLII). The deceased created a document in 2008 that was in fact a Wills planning questionnaire with instructions to update her 2005 Will. When the deceased realized she would not live long enough to meet with a lawyer to complete a new Will, she and two witnesses signed the questionnaire. The deceased died within hours of doing so. …. ."

**[Full Text]**

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**"Judging when lawyers are at physical risk"**

Kirbyson, Geoff, *The Lawyers Weekly*, 14 June 2013, p. 4

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"The only in-depth study on violence and threatening conduct against lawyers in Canada was done at Simon Fraser University in 2005. The survey of 1,152 lawyers working in the B.C. lower mainland found [i] Nearly 60 per cent of respondents reported receiving some degree and number of threats. [ii] Forty per cent of respondents had received two or more threats. [iii] Less than one-quarter (23 per cent) of lawyers who reported receiving threatening actions contacted police. [iv] Nearly one-third (31 per cent) of that same group changed their business conduct as a result of the incident or incidents."

**[No Full Text]**

**"What lawyers can do when they make mistakes"**

Moulton, Donalee, *The Lawyers Weekly*, 07 March 2014, p. 23

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"There is a reality the law profession has been reluctant to acknowledge, and many lawyers believe it's time to face the truth: lawyers make mistakes. 'The mistakes lawyers make are closely guarded secrets. They're not admitted to by professors in law schools; they don't enter into the advice senior lawyers provide junior ones. The inability of the profession to admit mistakes within its ranks is a hurdle it has to overcome in humanizing itself,' says Dan Kirby, a real estate lawyer in Orillia, Ont. Accepting that fallibility, many lawyers believe, will actually make the profession stronger and enhance individual relationships with clients. 'We're sought after for advice, yet it can be very difficult to admit we don't always do something the right way. If it was discussed more openly, it might improve the profession's integrity,' says Melissa Fedsin, a lawyer with Stephen Durbin Professional Corporation in Oakville, Ont. Fedsin and Kirby recently co-chaired a one-day professional development session entitled *Still Human: Mistakes and Apologies in Legal Practice* sponsored by the Ontario Bar Association. …. Process is a key area of concern. What's a lawyer to do when they mess up? …. ."

**[Full text]**

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**"Convicted of murdering ex-client, lawyer is fighting attorney disciplinary petition"**

Neil, Martha, www.abajournal.com, 21 May 2013

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"Convicted earlier this year of murdering a former matrimonial client and her baby, and sentenced to life in prison, an Illinois attorney is fighting a subsequent ethics case [brought by the Illinois Attorney Registration & Disciplinary Commission]. …. ."

**[Full Text]**

**"Divorce attorney who helped client break into spouse's home loses law licence for 2 years"**

Neil, Martha, www.abajournal.com, 20 February 2013

**"**A New Mexico divorce attorney who made headlines after being caught on a surveillance video helping a matrimonial client break into the home of her estranged husband has had his law licence suspended for two years. …. [The attorney's] lawyer called … [the attorney] a dedicated, hardworking lawyer who let his emotions get the best of him during the October 2011 incident. …. ."

**[Full Text]**

**"Can lawyer name clients on blog without permission? This court says yes"**

Cassens Weiss, Debra, www.abajournal.com, 28 February 2013

"A Virginia lawyer who blogged about his concluded criminal cases and named clients [in so doing] without their permission had a First Amendment right to do so, the Virginia Supreme Court has ruled. The Virginia Supreme Court had contended lawyer Horace Frazier had discussed information that could be embarrassing or possibly detrimental to clients in violation of an ethics rule … [contra] disclosure of client confidences. But all the information discussed at Hunter's blog, 'This Week in Richmond Criminal Defense,' was a matter of public record, the court said in its opinion issued Thursday. …. ."

**[Full Text]**

**"Lawyer learns hard lesson about representing himself"**

Schneiderman, Simon, *Law Times*, 28 January 2013, p. 7

"We all know that when lawyers act for themselves, they often have fools for clients and poor representatives. Nonetheless, when the opportunity occurs, the temptation to represent oneself is great. I have done it and found on the whole, the return was not equal to the investment. …. ."

**[Full Text]**

## 3.6 Relationships with Third Parties

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**"Bias a hot topic for experts as *Getahun* debate continues"**

McKiernan, Michael, *Law Times*, 12 May 2014

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"Bias is once again the hot topic among expert witnesses after an Ontario Superior Court judge barred lawyers from meeting with their experts to review draft reports. Justice Janet Wilson ignited a firestorm with her January decision in *Moore v. Getahun* [2014 ONSC 237 (CanLII), at paras. 47-52], a ruling currently under appeal. Meanwhile, the Supreme Court of Canada will also tackle the issue of expert independence this fall [07 October 2014] when it hears arguments in the Nova Scotia case of *Abbott and Haliburton Co. v. WBLI Chartered Accountants* [ [2013] No. 35492 (S.C.C.); on appeal from Nova Scotia Court of Appeal: 2013 NSCA 66 (CanLII)]. James McAuley, an accountant and senior vice president of KPMG Forensic Inc. in Toronto, says such decisions help emphasize the importance of expert independence in a similar way to the change to Ontario Rules of Procedure in 2010. Since then, experts must sign Form 53 that confirms their duty to the court above and beyond the party that retained them. …. In *Getahun*, a medical malpractice case, a defence expert faced questions about alterations made to his report following a 90-minute phone call with counsel [for the party who retained the expert]. While … [the expert] claimed the changes were minor the judge concluded the meeting involved 'more than simply superficial cosmetic changes' and condemned the practice of counsel and experts meeting to 'review and shape' reports and opinions. 'I conclude that the changes in Rule 53.03 preclude such a meeting to avoid perceptions of bias or actual bias. Such a practice puts counsel in a position of conflict as a potential witness, and undermines the independence of the expert,' Wilson wrote in the Jan. 14 judgment. …. ."

**[Full Text]**

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**"Lawyer's billing 'shenanigans' spur law clerk's letter to columnist"**

Cassens Weiss, Debra, www.abajournal.com, 05 May 2014

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"A law clerk in California who is disgusted with a lawyer's billing "shenanigans" has written a newspaper columnist for advice. The law clerk worked for a lawyer who charged $375 an hour to represent homeowner associations, according to the Los Angeles Times real-estate

column. According to the law clerk, the lawyer instructed the clerk to 'take voluminous fax documents from … [associations], count the pages, estimate how long it would take [the lawyer] to read [them] had he done so, and charge a pro-rata share of $375 an hour, which greatly increased his revenue. ... This and other shenanigans artificially pumped up his billing from $150,000 to well over $395,000 for one HOA case, made up of nonexistent time he claimed he spent researching the client's case.' …. ."

**[Full Text]**

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**"Navigating Without A Lawyer"**

Birnbaum, Rachel and Bala, Nicholas, *The Lawyers Weekly*, 25 May 2012, pp. 23, 25, at p. 23

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"There is growing concern about the increasing number of family litigants without lawyers, but there is almost no research about why these litigants decide to have, or not have, a lawyer. We report here on the first study about the decisions of Ontario family law litigants whether to have a lawyer. This study was undertaken over the past year at six court sites in four Ontario cities, with law students from Pro Bono Students Canada surveying 275 litigants, about 60 per cent without lawyers and 40 per cent with lawyers, and roughly equal numbers of men and women. …. ."

**Notes: (1)** Rachel Birnbaum is an associate professor, cross-appointed in childhood studies and social work at King's University College, Western University. Nicholas Bala is professor of law at Queen's University. **(2)** Birnbaum and Bala, together with Lorne Bertrand, Senior Researcher at Canadian Research Institute for Law and the Family, have co-authored "The Rise Of Self-Representation In Canada's Family Courts: The Complex Picture Revealed In Surveys Of Judges, Lawyers And Litigants" (2013), 91 Can Bar Rev (No. 01). **(3)** Bertrand, together with John-Paul E. Boyd, Executive Director, and Joanne Paetsch, Administrator, of Canadian Research Institute for Law and the Family, have co-authored "Self-Represented Litigants In Family Law Disputes: Views Of The Judges Of The Alberta Court Of Queen's Bench" (April 2014).

**[Full Text]**

**"Self-represented litigants overwhelmed, unsupported"**

Moulton, Donalee, *The Lawyers Weekly*, 24 May 2013, p. 15

"People who represent themselves in court are overwhelmed and underserviced by the judicial system, according to a study from the University of Windsor. 'These are people whose lives are already in a certain amount of chaos,' University of Windsor law professor and principal investigator Julie Macfarlane said in an interview. Two-thirds of the self-represented litigants (SRLs) interviewed over the course of the 18-month study appeared in family court (in some family courts in Canada, up to 80 per cent of individuals are self-represented), and representing themselves in court often added to that personal chaos. …. 'The stereotype is that a self-represented litigant is a crazy person with horns. The reality is that these are people that don't want to be doing this. They didn't wake up one morning thinking they were Perry Mason,' said Macfarlane, who interviewed almost 400 people for her study: *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*. …."

**[Full Text]**

**"When lawyers are sued by the other side[:]**
**It doesn't happen often, much less successfully,**
**but that doesn't mean it should be ignored"**

Kortes, Michael, *The Lawyers Weekly*, 12 July 2013, p. 13

"Typically, a lawyer is sued by a dissatisfied client. Much has already been written describing the steps a lawyer can take to best guard against such claims. But sometimes lawyers also find themselves sued personally by the opposing party. Few claims upset lawyers more. How is the lawyer doing anything other than acting as a zealous advocate, the very role he or she has been tasked to fill by a client? How could such a claim succeed?

"The short answer, thankfully, is that it likely won't—this subset of solicitor's negligence claims is typically quite unsuccessful. Not only is it well established that a lawyer does not owe a duty to the opposing party (*Shuman v. Ontario New Home Warranty Program* [2001] O.J. No. 4102), the court has further recognized that negligence actions against a solicitor by the opposing side are untenable for reasons of public policy inherent in the nature of the adversarial process (*Brignolio v. Desmarais, Keenan* [1995] O.J. No. 3499, appeal dismissed [1996] O.J. No. 4812,

leave to appeal [to S.C.C. denied]). …. The courts have been clear that … [such public policy reasons] extend to solicitors acting in everyday commercial transactions (*Baypark Investments Inc. v. Royal Bank of Canada* … [2002 ONSC 49402 (CanLII)]; aff'd. [2002] O.J. No. 4377). …. Counsel still need to be mindful of the narrow exceptions that have potential to expose them to civil liability. Such exceptions can arise any time a lawyer deals with opposing counsel or self-represented litigants. …. ."

**Note:** Michael Kortes is counsel with primary professional liability claims at LawPRO.

**[Full Text]**

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**"The 'scourge' of unrepresented litigants[:]**
**A ruling from Alberta takes a swipe at certain vexatious parties**
**but the reality is most self-represented litigants do so**
**because they can't afford legal help"**

Cardwell, Mark, *Canadian Lawyer*, January 2013, pp. 44-47, at p. 44

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"Julie Macfarlane says the centuries-old legal cliché about people who represent themselves in court having fools for clients makes perfect sense. But the reality is record numbers of Canadians with legal cases—the vast majority when family law is involved—no longer turn to lawyers to represent them in civil matters. 'I am blown away by the numbers of self-represented litigants in our courts today,' says Macfarlane, a University of Windsor law professor who is currently conducting a national research project on the subject. 'I think it's more fitting now to say that it's the inmates who are running the asylum.' That's why she, like many lawyers who are aware of and interested in the self-rep phenomenon, welcomed the public spotlight a recent Alberta ruling shone on the more lunatic fringe of a fast growing category of litigants in the Canadian court system. In the 155-page decision he rendered last September in a matrimonial dispute, Court of Queen's Bench Associate Chief Justice John D. Rooke issued a call to arms against self-represented litigants he dubs 'Organized Pseudolegal Commercial Argument' litigants—or OPCAs. 'This Court has developed a new awareness and understanding of a category of vexatious litigant,' Rooke writes near the outset of *Meads v. Meads* [2012 ABQB 571 (CanLII)], which notably begins with three famous quotations from Thomas Hobbes' *Leviathan* about the fundamental roles of liberty and law in society. …. ."

**[Full Text]**

**"Jilted husband blames attorney-owned website in alienation-of-affection suit"**

Neil, Martha, www.abajournal.com, 13 December 2013

"An attorney-owned website that helps married individuals seek out possible affair partners is one of the defendants in a North Carolina alienation-of-affection suit. Plaintiff Robert Schindler says his wife of 13 years left him for another man she met on the Ashley Madison website. Schindler seeks damages from the man, the website and its Canadian corporate parent in the Mecklenburg Superior Court suit, the *Charlotte Observer* reports. …. ."

**[Full Text]**

**"Virginia Supreme Court holds that advertising rules may be applied to a lawyer's blog"**

Hudson Jr., David L., www.abajournal.com, 01 November 2013

"An attorney's blog that primarily discusses cases in which he obtained successful outcomes for clients constitutes commercial speech subject to regulation under the state's professional conduct code for lawyers, the Virginia Supreme Court has decided in a case that shed some new light on the issue of how advertising rules for lawyers should apply to social media and other new forms of electronic communications. …. At issue in *Hunter v. Virginia State Bar* was a blog maintained by Horace F. Hunter, one of the two attorneys at Hunter & Lipton in Richmond. The noninteractive blog, This Week in Richmond Criminal Defense, which is accessible through the firm's website, discussed a variety of legal issues and cases. But most of the posts described cases in which Hunted obtained favourable results for clients [absent consent from the clients to do so]. The Virginia State Bar investigated the blog and determined that it constituted advertising under the Virginia Rules of Professional Conduct … . In March 2011, the bar charged Hunter with violating Rule 7.1 of the Virginia rules, which prohibits a lawyer from making 'a false or misleading communication about the lawyer or the lawyer's services [as well as violating other provisions of the rules].' …. ."

**[Full Text]**

**"Federal district court cautions lawyers to be careful about repeating judges' compliments"**

Hudson Jr., David L., www.abajournal.com, 01 October 2013

"An attorney in Newark, N.J., has vowed to appeal a recent U.S. district court ruling that his law firm's website may not post excerpts from judicial opinions praising the quality of his work on various cases. The Dwyer Law Firm primarily represents employees pursuing claims against their employers. Shortly after the firm created its website in 2007, it began posting comments by judges complimenting the work of attorney Andrew Dwyer. The comments were taken from unpublished opinions in fee applications filed by Dwyer, but the full opinions were not posted on the firm's website. …. ."

**[Full Text]**

**"Canadian law firms ease into ad waters"**

Gray, Jeff, *The Globe And Mail*, 21 August 2012, p. B4

" …. Historically, many Canadian lawyers have considered advertising "unseemly" [says Alan Farrer, the managing partner of Thomson Rogers]. But he thinks as the legal business becomes more competitive, more advertising is inevitable. …. Some say the campaign [by three Ontario personal injury law firms, calling themselves the Personal Injury Alliance] is a sign that more Canadian law firms will start to look to mass market advertising on television, perhaps using modern techniques such as storytelling or even humour now mostly shunned by the legal business but common in the race to sell banking, insurance and accounting services. ….

"The trend is more developed elsewhere, with some admittedly extreme examples. In Germany, a cheeky law firm ad recently shown at a film festival depicts a woman holding a chainsaw dripping with blood, leaving a house. On-screen text then advises consumers to get a divorce lawyer to avoid such drastic action. In Chicago, a family law boutique's risqué billboards depicted both a buff male torso and a woman in lingerie with the slogan, 'Life is short. Get a divorce.' …. ."

**[Full Text]**

**"Litigant decries 'post-traumatic court disorder' "**

Taddese, Yamri, *Law Times*, 13 May 2013, pp. 1, 2, at p. 1

"Each time Rhonda Nordlander leaves the court house, she suffers an episode of what she calls 'post-traumatic court disorder.' Like many family law litigants in this country, Nordlander has found herself navigating the complex court system by herself. She's been trying to get access to her children who live with her ex-husband. The do-it-yourself journey has been a downward spiral littered with frustration and failure, she says. …. ."

**[Full Text]**

**"Lawyer 'devastated' after 28-year employee took $3M[:]**
**But James Naumovich suspended for two months for failing to supervise clerk"**

Taddese, Yamri, *Law Times*, 13 May 2013, p. 5

"Real estate lawyer James Naumovich says he couldn't have known his law clerk of 28 years would start diverting millions in client money held in trust. So when he found out a couple of years ago that Gina Kioussis had diverted $3 million for her own use, he was 'devastated',' according to the judge who sentenced the clerk in 2011 [2 years less one day, conditional sentence: *R. v. Kioussis* (2011 ONCJ 823 (CanLII))]. Last week, Naumovich's lawyer and counsel for the Law Society of Upper Canada made a joint submission to penalize him with a two-month suspension for failing to supervise his former employee. …. ."

**[Full Text]**

## 3.7 Relationships with Other Lawyers

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**"Connecting is essential when joining new firm"**

Smith, Warren [The Counsel Network], *The Lawyers Weekly*, 16 May 2014, p. 22

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"Congratulations. After months of discussions, deliberations, and negotiations, you've finally made the move to your new firm. If you're lucky, your new firm has a robust on-boarding process, with a partner to help shepherd you and set out a clear plan for integration and outreach with your clients.

"But what if the plan is less than robust? What if there is no plan at all? What if the plan is well-articulated, but there is little follow-through upon arrival?

"Here are some of the common steps I've seen the very best lateral partners take to ensure they have the greatest chance of success upon arrival at their new firm: …. ."

**[Full Text]**

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**"Keep your eye on the prize [:]**
**In order to avoid nasty surprises, partners should be demanding frequent reports on the financial health of their law firms"**

Bruineman, Marg., *Canadian Lawyer*, May 2014, pp. 23-25, at pp. 23-24

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"A shifting legal landscape is testing the resilience of large and small firms alike as they face the challenges of a post-recession world. The dissolution of Canadian legal giant Heenan Blaikie is a dramatic example of how things can quickly go wrong when partners losing confidence pull out in droves, taking their capital investment with them. Across North America and into the United Kingdom, there is increasing concern over the flow of money as large and mid-sized law firms report sharp revenue decreases as a result of increased competition for a shrinking pool of high-end work.

"Ed Waitzer [Professor, Osgoode Hall Law School] observes the legal profession is indeed undergoing change. 'The market for major law firms is shrinking, certainly in Canada,' he says. More firms are employing in-house lawyers, global firms are competing with national ones, and there is a repurposing of functions.

"Law firms are reacting by being more strategic and moving beyond traditional work and approaches. ….

"The bottom line is an increasing need to focus on the bottom line. That has become more important when the overall collected realization rate—the percentage collected of the standard value of the work billed—has dropped to 83.49 per cent, according to the Georgetown University Law Centre [Washington] and Thomson Reuters Peer Monitor in the 2014 Report on the State of the Legal Market. A reduced realization rate could have a major impact on the working capital available. No longer should getting work be the main focal point of the firm. Ensuring the bill is paid in full and in a timely manner can be critical to a firm's survival.

" 'Recognizing when your law firm is having cash flow problems may not always be easy, says David Bilinsky [a practice management consultant and lawyer for the Law Society of British Columbia]. But keeping a close eye on the firm's budget and reports comparing actuals to projections is a good place to start.' …. ."

**[Full Text]**

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***McCormick v. Fasken Martineau Dumoulin LLP***

[2014] No. 34997 (S.C.C.), 22 May 2014; 2014 SCC 39 (CanLII)

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**Facts:** Lawyer was equity partner, therefore held ownership interest, in a law firm. Equity partners voted to adopt a provision in their partnership agreement requiring equity partners to retire from the firm as equity partners and divest their ownership interest at the end of the year when each reached 65 years old. Such partners could make individual arrangements, beyond 65 years old, to continue working as an employee or as a regular partner without equity stake. When he was 64 years old, and still an equity partner in the law firm, the lawyer complained to the British Columbia Human Rights Tribunal that this provision constituted age discrimination in employment, contra the *Human Rights Code*, s. 13(1). The law firm applied for dismissal of the lawyer's complaint. It argued that the lawyer, being an equity partner, was not in the type of workplace relationship covered by the *Code*. The Tribunal dismissed the law firm's application. In so doing, the Tribunal ruled that an employment relationship existed between lawyer and law firm. The law firm applied for judicial review. The application was dismissed. The law firm successfully appealed to Court of Appeal, which decided the lawyer was not in an employment relationship as contemplated by the *Code*. The lawyer appeal to Supreme Court of Canada.

**Held:** Appeal dismissed. Abella J., for the Court, wrote: "In the absence of any genuine control over … [the lawyer, while an equity partner] in the significant decisions affecting the workplace, there cannot, under the *Code*, be said to be in an employment relationship with the [law firm] partnership. Far from being subject to the control of … [the law firm], … [the lawyer]

was among the partners who controlled it from 1979 when he became an equity partner, until he left in 2012.

**[Full Text]**

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**"Office Love Story Meets The Policy Manual[:]**
**Workplace Romances Both Accepted And Treated With Caution"**

Arnott, Kim, *The Lawyers Weekly*, 03 May 2013, pp. 20, 22, at p. 20

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"Months of painstaking research and trial work brought the two lawyers together day after day. As they worked, often late into the night, they shared inspiration and frustration, along with tales of past cases, clients and bosses. Over countless takeout meals and cups of bad coffee, they laughed, swore and gossiped. In the final weeks of preparation, waking hours were almost entirely spent together. And when the final celebratory moment of victory arrived, their eyes met and the spark was ignited.

"It may sound like the stuff of a paperback legal thriller, but the intense emotional reactions that colleagues in a law firm can share are entirely real. Add in the long hours that co-workers spend together, and the minimal social contact the job sometimes offers young, single [and not a few married] employees, and law firms become 'very fertile soil' for the growth of intimate relationships between colleagues, says Howard Levitt, well-known employment lawyer and senior partner at Levitt LLP. 'Litigation is very emotional. You're in a trial and there are lots of highs, lots of lows. It's very easy for a relationship to start,' he says.

"Even employees in workplace situations that are less fraught with emotion often find themselves attracted to and involved with colleagues, adds Gerlinde Herrmann, a Toronto-area human resources consultant. 'It's hard to stop people from fraternizing in the workplace. It's where we spend most of our time. But it's really important to address it somewhere in employment policies, just like you would any other behavior.' …. ."

**[Full Text]**

***Humby v. Newfoundland and Labrador Housing Corporation***

2013 NLCA 4 (CanLII)

**Facts:** Respondent NLHC applied to strike the appeal by Humby because Humby had failed to disclose three documents prior to trial. NLHC's application alleged that Humby's counsel "exhibited 'serious', 'egregious' and 'willful misconduct' and 'wrongdoing' in an 'improper' and 'unethical' manner in not disclosing or 'concealing' certain documents" [para. 2]. Humby's counsel responded with "counter-allegations of unprofessional behaviour of counsel for NLHC at previous times in the litigation process" [para. 2]. The Court of Appeal noted that the proceeding had been winding its way through the courts for over five years, and had been "characterized by an unseemly degree of animosity and rancour which does no credit to the parties or their counsel" [para. 2]. The Court of Appeal concluded [para. 50] that "[a]lthough the appellants ought to have made disclosure of the documents … the non-disclosure did not call for the response made by counsel for NLHC with an aggressive attack on the professional reputation of counsel for the appellants." The Court of Appeal found [at para. 47] that "[c]ounsel for NLHC has seriously overreached in asserting that counsel for the appellants exhibited egregious, willful misconduct and wrongdoing, and acted in an improper and unethical manner in concealing the documents."

**Held:** NLHC's application to strike was dismissed. Party and party costs were ordered against NLHC.

**[Full Text]**

**" 'Abusive, disruptive and threatening' statements lead to lawyer's censure"**

Cassens Weiss, Debra, www.abajournal.com, 02 December 2013

"A Montana lawyer will be publicly censured [and his licence placed on probation for one year] next month for 'abusive, disruptive and threatening' comments to another lawyer. …. [Jeffrey] Michael was accused of making the abusive comments on voice mail and in person to Elizabeth Honaker, a Billings lawyer representing one of Michael's former clients in an appeal of his conviction. Honaker [in that appeal proceeding] had alleged Michael coerced the arson client to make a no-contest plea. [Michael's abusive comments included a January 2012 voice

mail to Honaker, threatening to wipe her out. On another occasion, he told Honaker she better watch her back or words to that effect.] …. ."

**[Full Text]**

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**"Lawyer who 'incessantly' disparaged opposing counsel gets two-year suspension"**

Cassens Weiss, Debra, www.abajournal.com, 25 November 2013

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"The Florida Supreme court has suspended a lawyer for two years for rude conduct and recommended that the case be studied 'as a glaring example of unprofessional behaviour.' The court rejected a referee's recommended sanction for Jeffrey Alan Norkin as too lenient, saying a two-year suspension is appropriate given Norkin's 'appalling and unprofessional behaviour,' … . According to the court, Norkin accused a judge of being at the 'beck and call' of his client's opponent in a civil case, yelled in court, and 'incessantly' disparaged and humiliated opposing counsel in the litigation. The opposing counsel, Gary Brooks, was 71 years old at the time and was suffering from Parkinson's disease and kidney cancer. He was a Harvard law grad with a 'lengthy and unblemished career,' the court said. Brooks died last year. Norkin was accused of acting improperly toward Brooks when he: [i] Sent emails to Brooks that said Brooks was lying and disingenuous, his motions were 'laughable and scurrilous,' and he will come to regret his 'incompetent, unethical and improper litigation practices.' Other emails threatened to seek sanctions against Brooks and advised him to notify his malpractice insurance carrier. [ii] Approached Brooks in the courthouse hallway and said he had confirmed in conversations with other lawyers that Brooks was 'underhanded and a scumbag.' Other lawyers were within earshot at the time. …. ."

**[Full Text]**

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**"Lawyer suspended for 'illegal alien' comment"**

Cassens Weiss, Debra, www.abajournal.com, 17 September 2013

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"An Indiana lawyer has been suspended for 30 days for a comment about the immigration status of his divorce client's spouse in a letter sent to opposing counsel and the judge in the case. …. [The lawyer wrote that his client 'told me this week that he has only seen his baby … one day all year[.] …. Your client doesn't understand what laws and court orders mean I guess. Probably because she's an illegal alien to begin with. I want you to repeat to her in whatever

language she understands that we'll be demanding she be put in JAIL for contempt of court. I'm filing a copy of this letter with the court to document the seriousness of this problem.' …. ."

**[Full Text]**

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**"DUI case dropped against lawyer who claimed he was set up, mid-trial, by opposing counsel"**

Neil, Martha, www.abajournal.com, 29 July 2013

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"A drunken-driving prosecution will not be pursued against an attorney who was arrested midway through a high-profile defamation trial after unwittingly having drinks with a paralegal from the law firm representing his client's opponent. C. Philip Campbell contended that his Jan. 23 arrest, a few blocks away from the Tampa steakhouse at which he and the paralegal had been drinking was a setup by the opposing firm in the libel case. …. [A lawyer at the firm representing the opponent of Campbell's client], called a DUI sergeant with a tip that Campbell was drinking and would be driving, and police waited near the restaurant for two hours before spotting and arresting him, …. . …. ."

**[Full Text]**

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**"Law Firm Is Booted Off Case After Lawyer Held Dunkin' Donuts Depositions, Dissed Opposing Counsel"**

Cassens Weiss, Debra, www.abajournal.com, 21 May 2012

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"A federal judge in Miami has removed a Florida attorney and his law firm from the record in a fair labour class action, partly because of the attorney's 'deplorable behaviour' in an earlier proceeding against the same defendant represented by the same counsel. U.S. District Judge Cecilia Altonaga concluded that the Florida attorney had, in the previous proceeding, made 'choice statements' in an email to opposing counsel; disparaged opposing counsel; scheduled discovery depositions at Dunkin' Donuts; attended the deposition hearings in T-shirts and shorts, and during deposition testimony, drew penis pictures and played the game Angry Birds. …. ."

**[Full Text]**

**"Lawyer loses claim for unpaid work against Toronto law firm[:]**
**In-house counsel helped with class actions in hopes of landing a position"**

Taddese, Yamri, *Law Times*, 10 December 2012, p. 3

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"In a ruling that highlights the perils of an unspoken agreement, a securities lawyer and in-house counsel recently lost his case against a Toronto law firm over allegations of unpaid work. Gary Sugar first went to the Kim Orr law firm in 2009 to hire it to act for Precious Metal Capital Corp. where Sugar works as in-house counsel. But things soon took a different turn when Kim Orr representatives looked at possibly hiring Sugar, Superior Court Justice Edward Morgan noted in his Nov. 23 ruling in *Sugar v. Kim Orr Barristers Professional Corp*. [2012 ONSC 6668 (CanLII)]. After a March 24 meeting that year, the firm, which specializes in class action lawsuits, gave Sugar a couple of claim drafts to work on as a way of demonstrating his skills. But in November 2009 Kim Orr partners were surprised when Sugar invoiced the firm for more than $31,000 in fees and presented a claim for a 50-per-cent premium should it win the class action cases he worked on. Sugar, Morgan noted, also billed for a third claim he thought up himself and presented to the firm that it ultimately didn't pursue. The firm's partners weren't concerned with the amount of money Sugar billed, which wasn't farfetched for a lawyer with his experience, the court heard. But they were under the impression he was volunteering his time with hopes of landing a position [which did not occur]. …. Morgan concluded the firm didn't deceive Sugar. 'Rather, it appears to me that both parties knew the terms on which the plaintiffs' class counsel typically work [i.e., contingency fee basis], and had a mutual understanding despite never having articulated it.' …. ."

**[Full Text]**

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**"Associate's claims 'scandalous', lawyer responds in dismissal case;**
**Lawyer sues ex-employer's counsel over comments about dismissal suit"**

Taddese, Yamri, *Law Times*, 24 June 2013, p. 3;
Taddese, Yamri, *Law Times*, 17 March 2014

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**24 June 2013:**

"A Toronto family lawyer facing a $2 million lawsuit launch by a former associate accusing her of wrongful dismissal is calling the allegations 'scandalous' and an 'abuse of process.' 'My client's view is that the allegations in the statement of claim are utter nonsense, the plaintiff has made them knowing she had an absolute privilege concerning false statements set out in the statement of claim, and she knows that her claims cannot be supported,' Melvyn

Solmon, counsel for defendant Julie Hannaford told *Law Times*. The plaintiff in the case is Golnaz Simaei. She worked as an associate at Hannaford's law firm until March 18 when she was 'precipitously terminated by e-mail while returning from vacation,' according to her statement of claim. She alleges the e-mail cited no reason for her dismissal other than a mention of termination 'for cause.' None of the allegations have been proven in court. …. ."

**[Full Text]**

**17 March 2014:**

"An associate who sued a Toronto lawyer for allegedly firing her without 'a scintilla of mild misconduct' has now launched a libel lawsuit against her former employer and her lawyer for comments made in a June 2013 *Law Times* article [above]. Golnaz Simaei, who worked as an associate for lawyer Julie Hannaford, is accusing her former employer of 'intentional or, alternatively, negligent infliction of nervous shock' through what she described in her original statement of claim as a toxic work environment. None of the allegations have been proven in court. After Hannaford's counsel, Mel Solmon, told *Law Times* his client believed Simaei's allegations were false and 'scandalous,' Simaei sued Solmon and Hannaford for $3 million each for libel and 'injurious falsehood.' She's also seeking an additional $100,000 from each of them in punitive damages. In a June 2013 e-mail to *Law Times*, Solmon said Simaei made the allegations 'knowing she had an absolute privilege concerning false statements set out in the statement of claim, and she knows that her claims cannot be supported.' …. ."

**[Full Text]**

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**"Why do lawyers insist upon torturing themselves?"**

Gold, Doron, *Law Times*, 26 November 2012, p. 7

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"Recently, a new client of mine described to me how he had spent more than four agonizing hours staring at our telephone number, debating whether or not he should call for help and support. The stated rationale, underpinning his deferral of relief centered upon his multipronged belief that, first, as a lawyer, he fixes problems and doesn't have them and that if he does, he doesn't share them with others. Second, lawyers don't show weakness, as he called it, but instead surmount it. Third, he's ashamed of himself for being in his current state and imagines that others would judge him even more harshly than he judges himself. …. ."

**[Full Text]**

**"Law firm not afraid to cold-call other lawyers"**

Melnitzer, Julius, *Law Times*, 26 November 2012, p. 13

**"**In a high-tech era when concepts like social media, webcasts, podcasts, blogs, and a continuing stream of innovative techniques dominate the thinking of law firm marketers, one Ontario firm has returned to fundamentals with an old fashioned technique: the cold call. 'We routinely make cold calls or e-mail lawyers who we believe could be helpful to our firm either by working together or through business referrals in either direction,' says Jon-David Giacomelli, who co-founded Cambridge LLP in 2010. The initial reaction, for the most part, is unsurprising and very lawyer-like. 'We get many astonished responses from lawyers who can't fathom why they'd want to connect with a so-called competitor, but once we explain our partner in advocacy program to them, it engenders considerable interest and we've built many mutually beneficial relationships as a result,' says Giacomelli's colleague Chris MacLeod. …. ."

**[Full Text]**

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**"Recently retired judge is admonished for treating lawyers 'in a sarcastic and belittling manner' "**

Cassens Weiss, Debra, www.abajournal.com, 14 May 2014

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"A recently retired judge in Los Angeles County has received a public admonishment for treating lawyers who appeared before him 'in a sarcastic and belittling manner.' The Commission on Judicial Performance admonished retired judge Ronald Sohigian, 76, …, the Los Angeles Times reports. Sohigian retired on April 14 [2014]. The commission based its conclusions on five incidents between April 2011 and February 2012. According to the public admonishment …, they included: … When Sohigian overruled a lawyer's objection, the lawyer asked the judge, 'Your Honor, why is that not hearsay?' Sohigian replied, 'I'll explain it to you sometime when you pay tuition'. …. ."

**[Full Text]**

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***Haghighynia v. Darvish***

2013 CarswellOnt 14884; (2013), 36 R.F.L. (7th) 98 (Ont. Sup. Ct. J.);
2013 ONSC 6155 (CanLII)

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**Facts:** Wife swore affidavit claiming that she was owner of business, that business was only asset of value that parties owned and that respondent intended to take money that was left and potentially leave country. Wife successfully brought ex parte motion for order freezing assets of husband and for order that all proceeds of sale of business be held in trust with real estate lawyer. Respondent's lawyer, who was conducting sale of business, prepared and disbursed number of cheques from sale proceeds which appeared on their face to be paid to unsecured trade creditors of business. Wife alleged that respondent lawyer breached freezing order not only once but several times in days after it was made, by issuing cheques payable to various individuals and entities. Lawyer alleged that agreement of purchase compelled him to release funds to individuals and entities other than secured creditors because agreement of purchase and sale obligated vendor to comply with *Bulk Sales Act*. Wife brought motion for contempt of court against lawyer.

**Held:** Motion granted. There was nothing in private contract or in *Act* that would have exempted lawyer from complying with court order.

**[Full Text]**

**"Judge removed from divorce case after sending one party a Facebook friend request"**

Francis Ward, Stephanie, www.abajournal.com, 29 January 2014

"A Florida judge who sent a Facebook friend request—which was rebuffed—to a litigant in a divorce she was presiding over has been removed from the case, the Wall Street Journal Law Blog reports.

"Judge Linda D. Schoonover reached out to litigant Sandra Chace ex parte with the friend request, according to a Florida Fifth District Court of Appeal opinion (PDF). Chace did not accept the request after her lawyer advised her not to.

"According to the Wall Street Journal, Chace's lawyer alleged that when she denied Schoonover's friend request, the judge retaliated by giving her most of the marital debt in her divorce, and giving her husband, Robert Loisel Jr., a larger alimony award.

"The opinion, published Jan. 24, overturns a prior order that found that Chace's motion for disqualification was legally insufficient. …. ."

**[Full Text]**

**"Lawyer jailed for 5 days over comment made at restaurant lunch wins appeal of contempt case"**

Neil, Martha, www.abajournal.com, 10 February 2014

"A Michigan lawyer who served five days in jail for comments he made during lunch at a Flint diner has won an appeal of his contempt conviction.

"A judge's law clerk contended that longtime attorney F. Anthony Lubkin directed a comment including the word 'guilty' at a jury in a Genesee County murder case eating lunch in the same restaurant on April 12, 2012. However, Lubkin and a lunch companion said he had simply been discussing a legal issue that had nothing to do with the murder case, MLive.com reports.

"Nonetheless, Lubkin was held in contempt by the presiding judge in the murder case, who called him a 'smart aleck' and sentenced him to 30 days for 'willfully and deliberately'

making a statement in front of the jury that could interfere with court functioning. Lubkin was released [on bond] after serving five days … as his appeal of the contempt case was pending.

"The Michigan Court of Appeals vacated the contempt order in an unpublished opinion last week, holding that the judge abused his discretion because there was no evidence showing that Lubkin had willfully directed a comment at the impaneled jury and no reason to think that he would want to do so, since he had no connection to the murder case. …. ."

**[Full Text]**

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**"Lawyer must pay witness $1K for shocking him with trick pen, says judge"**

Neil, Martha, www.abajournal.com, 06 May 2014

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"In an April 26 order, Judge James Brady said California attorney Don Howarth of Los Angeles-based Howarth & Smith must pay $1,000 to the expert, identified as Dr. A.P. Meliopoulos, according to Above the Law. He also restricts Howarth's future cross-examination privileges at the next trial and orders him to pay another $2,000 to the opposing side. ….

"Meliopoulos was testifying in *Gunn Hill Dairy v. Los Angeles Department of Water & Power*. The 10-year-old negligence case involves a dispute over the shocking of dairy cattle, due to stray current in the ground near a Utah power plant that sends electricity to LA, explained Howarth's co-counsel, Jefferson Gross of Salt Lake City, in an interview with the ABA Journal. Over a dozen farm owners are seeking a total of $200 to $400 million in damages in multiple planned trials.

"When Meliopoulos testified for the defense that 1.5 volts, a power equivalent to a AAA battery, could not even be felt by a human, Howarth handed him the pen and asked him to press it, Above the Law reports.

" 'Sir, in this pen, I put a AAA battery. The circuit will be completed when you press the back of the pen. Would you like to see whether you can feel the AAA battery, sir?' " reads the transcript.

"While the pen may have been powered by a 1.5-volt battery, it was capable of giving a much greater shock because of an internal transformer, according to the judge's order.

" 'Shock pens like the one Mr. Howarth had Dr. Meliopoulos operate can generate up to 750 volts, enough to cause death in people with health conditions,' wrote Brady. …. ."

**[Full Text]**

***R. v. Switzer***

2014 CarswellAlta 579 (Alta. Q.B.), para. 13; 2014 ABCA 129 (CanLII)

"13 We acknowledge that trial judges may intervene to clarify an unclear answer, to resolve a misunderstanding of the testimony, to ask questions if counsel fails to address an issue, to correct inappropriate conduct by counsel or witnesses, and to otherwise ensure a fair trial. However they must not do so in a manner that undermines the function of counsel and that disrupts or destroys counsel's strategy: *R. v. Brouillard*, [1985] 1 S.C.R. 39 (S.C.C.), at 44-47; *R. v. Konelsky* (1989), 98 A.R. 247 (Alta. C.A.), at 248, (1989), 68 Alta. L.R. (2d) 187 (Alta. C.A.). …. ."

**[Full text]**

**"Judges surveyed on meeting with children"**

Bala, Nicholas and Birnbaum, Rachel, *The Lawyers Weekly*, 05 April 2013, pp. 13, 15, at 13

According to a survey we have conducted, judges are increasingly willing in family cases to meet with children, although many have concerns and do not engage in this practice. Further, among judges who do meet with children, there is wide variation in the frequency, purposes and methods used. Many judges complain about the lack of direction offered by legislation and case law, and it is clear that courts, litigants and children would benefit if judges had clearer guidance and training regarding judicial meetings with children. …. ."

**Notes: (1)** Nicholas Bala is professor of law at Queens University. Rachel Birnbaum is an associate professor, cross-appointed in childhood studies and social work at King's University College, Western University. **(2)** See: Birnbaum, Rachel and Bala, Nicholas, "A Survey of Canadian Judges About Their Meetings With Children: Becoming More Common But Still Contentious" (2014), 91 Can Bar Rev (No. 03).

**[Full Text]**

***Skinner v. Skinner***

2013 CarswellMan 612; (2013), 38 R.F.L. (7th) 90 (Man. Q.B.);
2013 MBQB 276 (CanLII)

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**Facts:** On November 26, 2012, wife applied to re-institute spousal support. Wife's lawyer requisitioned wife's file to be added to Family Uncontested Motions List for forthcoming date. After speaking with husband`s lawyer, parties agreed to put matter over for one week. When wife's application appeared on list, her lawyer unilaterally set matter down for argument for certain date without consulting husband`s lawyer. When that time came, husband's lawyer appeared, and successfully requested adjournment. Parties made submissions regarding costs.

**Held:** Costs were awarded against wife in amount of $1,000, payable in any event of cause. Wife's lawyer bungled things, first by taking approach that he did and then by maintaining position that he took with respect to re-scheduling matter. Wife`s influence over her lawyer did not excuse breach of professional responsibility.

**[Full Text]**

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***M. (D.M.) v. M. (T.B.)***

2011 CarswellYukon 86; (2011), 9 R.F.L. (7th) 50 (Yukon Terr. C.A.);
2011 YKCA 8 (CanLII)

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**Facts:** Parties were involved in matrimonial proceedings since 2002. Parties had one child, R. In November 2003, order was made granting father sole interim custody of R, with supervised access to mother. In December 2003, judge seized himself of proceedings. In January 2004, judge prohibited mother's partner, T, from having contact with R. In February 2007, judge made order restricting mother's exercise of access to R. Mother subsequently brought unsuccessful applications concerning exercise of her access to R, including application to vary February 2007 order. Judge's dismissal of mother's application to vary was reversed. Mother unsuccessfully brought application to have judge disqualify himself. Mother was ordered to pay costs. Mother appealed.

**Held:** Appeal allowed in part. Appeal was allowed from order for costs only. Judge did not err in law in declining to recuse himself. In dismissing mother's application, judge referred

to presumption of impartiality and test for reasonable apprehension of bias. Judge's summary of applicable law was correct. Applying standard stated in case law to material he had before him led judge to conclude that he ought not to recuse himself.

**[Full Text]**

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***Glaspy v. Glaspy***

(2011), 11 R.F.L. (7th) 259 (N.B.C.A.); 2011 NBCA 101 (CanLII)

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**Facts:** Parties married on September 28, 1985, and separated on February 19, 1995. Parties had one child, K, born January 9, 1990. On September 9, 1996, parties' marital property issues were settled and father was ordered to pay spousal support and child support. On February 10, 2011, judge was scheduled to hear motion brought by father, in which he sought permission to pay support directly to child K. Father was self-represented. Judge converted hearing into settlement conference before either party was afforded opportunity to address issue. Mother's counsel and father reached settlement which increased total monthly outlay by father from $1,100 to $2,642. Father appealed.

**Held:** Appeal allowed. Judge erred in advising parties he was converting hearing into settlement conference when, in fact, none was held. Judge was not permitted to adjourn hearing, task unrepresented litigant to meet with experienced legal counsel, proceed to conduct other cases and then return to matter and simply endorse that which the parties subsequently agreed upon. Instead of proceeding with settlement conference, judge accorded parties court-sanctioned opportunity to negotiate.

**[Full Text]**

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**"Lawyer is suspended for faking illness to avoid oral argument"**

Cassens Weiss, Debra, www.abajournal.com, 19 March 2014

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"An Illinois lawyer will be suspended for 60 days for faking an illness to avoid oral arguments before the Chicago-based 7th U.S. Circuit Court of Appeals …. In an Illinois Supreme Court order issued on Friday. …. [Michael Joseph] Finn told the court clerk he had vomited the morning of April 14, 2011, and he could not make oral arguments that day, according to a petition filed by the Illinois Attorney Registration and Disciplinary Commission. Finn also asserted he was ill in an [earlier] initial response to ethics authorities. Finn later admitted, however, that he had not been truthful. Finn felt unprepared for oral arguments, and that was the

reason he missed the court appearance, the petition says. The matter was the first 7th Circuit criminal appeal that Finn had handled by himself. …. ."

**[Full Text]**

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**"Failed courtroom ID ploy cited in suspension of Colorado lawyer"**

Cassens Weiss, Debra, www.abajournal.com, 26 November 2013

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"A Colorado lawyer has been suspended in part because of a failed courtroom ID ploy. …. Denver lawyer Linda Marie Lee, … will have to serve only six months of a year-and-a-day suspension if she successfully completes a two-year probation period [imposed by Colorado Supreme Court]. …, Lee believed her client had been misidentified in a juvenile theft case, so she arranged for her client to sit in the back of the courtroom and for a friend of the client to sit at the counsel table. During opening statements, …, Lee pointed to the client's friend and said, 'My client is innocent.' The ploy didn't work out when the victim correctly identified the defendant sitting in the gallery. A judge granted a new trial and found Lee in contempt. …. ."

**[Full Text]**

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**"Lawyer who criticized federal judges loses licence for 5 years, calls state's top court 'corrupt' "**

Neil, Martha, www.abajournal.com, 02 October 2013

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"Defiant at the news Wednesday that his law licence has been suspended for five years, a longtime Pennsylvania attorney and former state auditor general and law maker vowed to appeal in federal court what he called a violation of his civil rights and described the state's Supreme Court as 'corrupt.' "

**[Full Text]**

**"Submitting A Fake Judgment: Not A Good Litigation Strategy"**

Guthrie, Neil, *mondaq*, 08 April 2013

"Did the plaintiffs in *D'Souza v. Linton*, 2013 ONSC 70 [CanLII] think Justice Penny just wouldn't notice? Apparently, as part of their motion materials in a dispute over a real estate transaction, they submitted a default judgment against the defendants purportedly issued by the hand of that very judge. ….. The result of this 'scurrilous and fraudulent attack on the administration of justice': full indemnity costs to the defendants and no ability for the plaintiffs to take further steps until those costs have been paid. …. ."

**[Full Text]**

**"Lawyer fined $20k for failing to vet frivolous case"**

McDonough, Molly, www.abajournal.com, 11 March 2013

"A Pennsylvania lawyer who failed to vet what a federal judge characterized as a frivolous gun malfunction case has been hit with a $20,000.00 fine. …. The case involved a claim by Regis Ellis who maintained a Beemiller Hi-Point C9 9 mm pistol exploded in his hand in 2007. He later changed his testimony and experts on both sides agreed the incident couldn't have happened the way Ellis initially claimed. However, … [the lawyer] continued with the case anyway, … . …. ."

**[Full Text]**

**"Lawyer vindicated as appeal court tosses judge's fine[:]**
**New Brunswick court took Sandra Dawe to task for third-party claim"**

Taddese, Yamri, *Law Times*, 19 November 2012, p. 3

"An Ontario lawyer has won an appeal of the decision of a New Brunswick judge who slapped her with a steep fine last year after striking her clients' claim in a fraud case. Sandra Dawe, managing partner at Shibley Righton LLP, was representing a group of auditors for Deer Island Credit Union Ltd. Directors of the company took the auditors to court last year in a lawsuit accusing them of negligence for failing to notice that a former employee had cheated the

company out of more than $1.8 million between 1995 and 2007. The auditors denied the allegations and brought a third party claim[,] arguing that it was in fact the 16 directors who were negligent and had contributed to the company's losses. In his Nov. 30, 2011, ruling, New Brunswick Court of Queen's Bench Justice Hugh McLellan criticized Dawe for a claim that [the Justice wrote] was 'irresponsible and an abuse of the process of court.' In addition, he ordered Dawe to pay a fine of $45,000 after noting he didn't believe she had acted in an honest belief that the auditors' claim against the directors had merit. He also threatened to put her in prison if she didn't pay the money by the set deadline. McLellan also said Dawe was pursing the third party claim on her own without a request by her clients, an accusation the New Brunswick Court of Appeal found [*Simson et al. v. Deer Island Credit Union Limited and Barteau et al.*, (2012 NBCA 92 (CanLII))] was without evidence. … [O]n Nov. 1, the appeal court [vacated the order requiring Ms. Dawe to pay the fine, and] reversed McLellan's … ruling [underlying the fine]. It cited several principles the trial judge had overlooked and misapplied. ….

" …. What was bizarre, according to [Edward] Waitzer [a partner at Stikeman Elliott LLP], was that 'the trial judge goes after the lawyer personally.' In fact, the plaintiffs' lawyers hadn't asked the judge to fine Dawe. …. ."

**[Full Text]**

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***Sabourin and Sun Group of Companies v. Laiken; Laiken v. Carey***

2013 CarswellOnt 11824; (2013) 367 D.L.R. (4th) 415 (Ont. C.A.); 2013 ONCA 530 (CanLII); Application to S.C.C. for leave to appeal allowed: 2014 CarswellOnt 3396, 20 March 2014

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**Facts:** In course of litigation as between defendant and plaintiff S Group, defendant sought and obtained broad *ex parte* Mareva injunction (i.e., freezing order) restraining plaintiff's assets. Plaintiffs then advanced funds to solicitor (represent S.), with subsequent instructions to use advanced funds to settle litigation as between plaintiff and non-parties. Solicitor refused to accede to instructions in belief that to do so would violate defendants' injunction, and plaintiff then instructed solicitor to return funds. Solicitor acceded to instructions to return, remitting funds after deducting solicitor's accounts due and owing. Plaintiff (and balance of the $500,000) then allegedly fled jurisdiction. Defendant subsequently brought motion for order finding solicitor in contempt of injunction both by paying solicitor's accounts and by paying out remainder of $500,000 to plaintiff. Solicitor was found in contempt, and solicitor sought reconsideration of contempt finding. Reconsideration was granted and solicitor was acquitted, on evidence establishing solicitor's *bona fide* belief that solicitor's actions did not violate injunction. Defendant appealed.

**Held:** Appeal allowed and contempt finding restored. Reconsideration was not available, as remedy for any erroneous contempt finding, on appeal by party found in contempt. Motions judge was accordingly *functus* with respect to contempt finding after pronouncing solicitor in

contempt. Solicitor's subjective belief that solicitor's actions did not violate injunction did not constitute affirmative defence, as any such belief constituted pure mistake of law. Evidence adduced upon reconsideration going to solicitor's subjective belief, which was not contradicted, went to remedy alone, and appeal was accordingly properly allowed. Contempt finding was restored and solicitor was ordered to pay defendant's costs of contempt proceeding, including costs of appeal, as penalty for contempt.

**[Full Text]**

## 3.9 Relationships with State

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**"A right to be forgotten?**
**Top EU court rules for lawyer who wants Google to delete some links"**

Cassens Weiss, Debra, www.abajournal.com, 13 May 2014

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"A lawyer who wanted Google to remove links to embarrassing legal notices [about him] from 1998 has won in the European Union's top court. The ruling by the European Court of Justice, based on a 1995 data-production law, endorses a right to be forgotten, report the New York Times, CNN, the Associated Press and the Wall Street Journal … ."

**[Full Text]**

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**"Public service or a business?"**

Ellward, Geoff, *The Lawyers Weekly*, 27 July 2012, pp. 1, 9, at p. 1

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"There is trouble in Canada's snow-capped mountain paradise. The tourists strolling along Banff Avenue taking in the alpine air might be surprised to learn that Parks Canada and the representatives of this quaint town are locked in a long and litigious battle. The spat has been going on with varying degrees of intensity since 2007. It has already been to the Alberta Court of Appeal twice and last month the court granted Parks Canada the right to appeal again. The dispute revolves around the location of a law office [rented by Mila Byron & Company] in what is known as a public service district. It sounds like something out of a first-year Law Ethics exam: Is a law office primarily a public service, or is it mainly a commercial enterprise?. …. ."

**[Full Text]**

**"A new principle of fundamental justice"**

Chan, Gerald, *The Lawyers Weekly*, 23 August 2013, p. 11

"In *Federation of Law Societies of Canada v. Canada (Attorney General)* [2013] B.C.J. No. 632, the British Columbia Court of Appeal released a ground-breaking decision. The court not only found certain provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and the accompanying regulations unconstitutional under s. 7 of the Charter, it did so by reference to a newly recognized principle of fundamental justice; the independence of the bar. If it is upheld by the Supreme Court of Canada, this decision could be the most significant constitutional law case in quite some time. …. In December 2008, the government amended the … *Act* and the accompanying regulations to make them apply to lawyers. Under this new regime, lawyers were required to play a role in the detection, prevention and deterrence of money laundering and terrorist financing by keeping records of their clients' financial transactions and allowing the government's financial intelligence agency, FINTRAC, to examine them. In effect, this turned lawyers into state agents tasked with collecting information from their own clients, for potential use by the state. …. ."

**Note:** Appeal by Canada, of the decision of British Columbia Court of Appeal, to the Supreme Court of Canada [2013] No. 35399 (S.C.C.) was argued, 13 May 2014; judgment reserved.

**[Full Text]**

**"Wardrobe writeoff wrangle"**

Golombek, Jamie, *The National Post*, 18 August 2012
[Summary]

Most provincial and territorial superior courts, at certain seasons and for some proceedings, dispense with the requirement of formal court attire (very specialized clothing, including gown and tabs), provided the substitute attire is confined to dark, sober clothing. Is the cost of such clothing'—like the expense of very specialized lawyer vestments—deductible? The Tax Court has ruled: no.

**[Full text]**

**"CRA penalty against lawyer equals criminal sanction: court"**

McClelland, Siobhan, *Law Times*, 15 October 2012, pp. 1, 5, at p. 1

"Tax lawyers and advisers … [had] greater protection from Canada Revenue Agency penalties following an Ottawa lawyer's successful appeal of a more than $500,000 sanction of her actions in advising on a bogus charitable donation scheme. In *Guindon v. Her Majesty The Queen* [2012 TCC 287], the Tax Court of Canada allowed an appeal of the minister of national revenue's decision assessing penalties of $546,747 against Ottawa lawyer Julie Guindon for statements made in the context of a donation program. The court found the penalties imposed under s. 163.2 of the *Income Tax Act* amount to criminal sanctions. Consequently, tax lawyers and advisers prosecuted under this section are able to rely on protections under the Charter of Rights and Freedoms and must be prosecuted through the criminal courts rather than the Tax Court. The ruling by Justice Paul Bedard also makes it more difficult to prosecute these cases [as criminal proceedings] as the higher burden of proof beyond a reasonable doubt applies. It comes as a number of prominent law firms have found themselves in hot water for their advice in questionable charitable donation arrangements. The litigation so far has often involved class actions against the firm that provided the advice. …. ."

**Note:** The decision of the Tax Court of Canada was reversed by Federal Court of Appeal on 12 June 2013 (2013 FCA 153 (CanLII)). Application to Supreme Court of Canada (No. 35519) for leave to appeal the Federal Court of Appeal decision was, on 20 March 2014, granted to Julie Guindon.

**[Full Text]**

## 3.10 Relationships with Technology

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**"Are you working too hard? Here are the warning signs"**

Cassens Weiss, Debra, www.abajournal.com, 15 May 2014

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"Feeling anxious and irritable? Forgetting appointments or having trouble concentrating? Feeling aches and pains, experiencing minor illnesses, and having trouble sleeping? All are signs you are too busy, the Wall Street Journal … reports. …. ."

**[Full Text]**

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**"People looking for a lawyer are turning to the Internet first, survey finds"**

Li, Victor, www.abajournal.com, 21 April 2014

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"Once upon a time, the first thing that an overwhelming majority of people in need of legal representation would do is turn to relatives or friends for personal referrals. Some would consult the Yellow Pages or the local bar association, while only a small handful would use the Internet before any of the other aforementioned options.

"According to a recent survey conducted by FindLaw.com and Thomson Reuters, those numbers have completely flipped around over the last decade. While the Internet was once the least popular option, according to results published last week, using the Web first is now the most popular choice among respondents. FindLaw and Thomson Reuters found that 38 percent of the 1,000 respondents said that they would use the Internet first. That was considerably higher than the other available options: 29 percent of respondents would ask a friend or relative first, 10 percent would go straight to the local bar association; and 4 percent would rely on the Yellow Pages.

"The survey was a follow-up to one conducted in 2005 finding that using the Internet first was the least popular choice among respondents. In that survey, only 7 percent said they would use the Internet first, compared to 65 percent who would ask a family member or friend for a referral. In the 2005 survey, the Yellow Pages did better than the Internet, with 10 percent of respondents … [saying] they would let their fingers do the walking before they double-clicked a mouse. …. ."

**[Full Text]**

**"Disclosure Of Metadata: The Whole E-Truth And Nothing But The E-Truth"**

Foster, Cameron, *mondaq*, 22 April 2014

"A unanimous decision by the Nova Scotia Court of Appeal provides timely consideration of the scope of disclosure through Nova Scotia Civil Procedure Rule 16. In *Laushway v Messervey*, 2014 NSCA 7. ("Laushway") [(CanLII)], Justice Saunders upheld a decision ordering production of metadata in the circumstances of a self-employed plaintiff who asserted that his work capacity (i.e. time spent on his personal computer conducting sales) was reduced due to personal injuries sustained in a motor vehicle accident. While this decision specifically considered the Nova Scotia Rules, the factors outlined by Saunders J. may prove influential as other jurisdictions address similar requests for electronic disclosure.

"The appellant, who is a self-employed businessperson, claimed that after the accident he was unable to sit for long periods and that the time spent at his personal computer had been reduced daily from 12-15 hours to 2-3 hours. As a result, the suit against the respondents contained a considerable claim for income loss. The question was whether metadata should be produced, which is information about other electronic data, and disclosure was sought because it could be used to establish the appellant's pattern of usage on his computer over time. The decision favoured the respondents, who were represented by Stewart McKelvey's Patricia Mitchell, and is of significance because it outlined a general framework to consider where a party seeks production of electronic information.

"As this was a case of first instance Justice Saunders compiled a non-exhaustive list of factors to take into account when weighing production in similar circumstances: …. ."

**[Full Text]**

**"The 5 biggest mistakes lawyers make when choosing a cloud service provider (and how to avoid them)"**

AbacusLaw, www.abajournal.com, 05 May 2014

"… There are 5 common mistakes that lawyers make when choosing a cloud provider:

1) Not knowing where your data really lives

2) Assuming you own your data

3) Neglecting to integrate all your systems

4) Relying on multiple parties for support and maintenance

5) Focusing solely on price, disregarding 'best practices'

Not all clouds are created equal[.] …. ."

**[Full Text]**

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**"Critical role for lawyers in battle against spam[:]**
**'Beast of a law' [went] into effect July 1"**

Kirbyson, Geoff, *The Lawyers Weekly*, 31 January 2014, pp. 20-21, at p. 20

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"The days of spam-a-lot … [is] at an end in Canada, leaving lawyers … to ensure their clients—as well as their law firms are compliant with the … era of electronic communications. Industry Canada unveiled new rules last year outlining how companies will have to regulate the promotional messages they send to customers, potential customers and family members. The new regulations … came into effect … [on] Canada Day. In a nutshell, the Canada's Anti-Spam Legislation considers as spam any message used for commercial purposes, unless the company has a prior relationship with the customer during the previous two years or it has obtained consent from the customer to include them on its mailing list. To give consumers the chance to change their minds in future, every outgoing message must contain an unsubscribe option. …. ."

**[Full Text]**

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**"Consider threshold questions before accepting joint retainer for wills"**

Sheps, Pauline, *The Lawyers Weekly*, 30 November 2012, pp. 11, 13, at p. 11

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"Joint retainers are common in wills practice. Wills and estates lawyers are often asked to prepare mirror or mutual wills for two spouses. While the lawyer is typically assured by the couple that they are in agreement about the proposed estate, lawyers should be careful when relying on these assurances, because over the past five years, conflict of interest claims have been fourth most common of malpractice claims in wills and estates practice. A lawyer contemplating accepting a joint retainer should consider three 'threshold' questions: Is there a

conflict of interest in acting for both spouses? Would accepting the retainer be consistent with … [provisions of the governing code of professional conduct]? And, finally, how should future retainers by the same parties (individually) be managed, in light of client confidentiality [resulting from an earlier joint retention by the spouses]? …. ."

**Note:** Pauline Sheps is a claims counsel specialist at LawPRO.

**[Full Text]**

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**"When Facebook and Twitter are not your friends"**

Chisling, Ava, *National*, June 2012, pp. 42-43, at p. 42

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"In family law cases, image matters. And thanks to the popularity of social media, it's easier than ever to find damaging evidence online in the form of status updates, late-night tweets and risqué photographs that call one's judgment into question. That's why lawyers acting in divorce, support and child custody cases increasingly are going online—and advising their clients to log off. …. Unfortunately, the consensus among family lawyers is that clients are not getting the message that everything posted online—BBMs [Blackberry messages], e-mails, texts, voicemail, chats and all other forms of communication—can be used as evidence if it was intended for the public. …. ."

**[Full text]**

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**"All Out Attack[:]**
**Large or small companies from all sectors are vulnerable to the assaults of cyber hackers intent on illegal espionage and profit"**

Kirbyson, Geoff, 3 *Forensic Accounting & Fraud* [No. 1], 2013, pp. 9-16, at p. 9

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"There are three certainties in life—death, taxes, and getting cyber hacked. The third one is a new addition to the old saying. With an unprecedented amount of information available online, and the ever-increasing sophistication of those practicing cyber espionage, you or your clients have about the same chance of getting hacked as the sun does of rising in the east. …. ."

**[Full Text]**

**"Lawyers of the future[:]**
**The effect of technology on the future practice of law has only just begun"**

Sobowale, Julie, *National*, April-May 2014, p. 6

" …. The seamless use of technology in legal practice is here. Law firms are creating new, easier-to-use systems to make legal work more efficient and more cost-effective. …. ."

**[Full Text]**

**"Law firm's trust account hacked, 'large six figure' taken"**

Taddese, Yamri, *Law Times*, 07 January 2013, p. 3

"While law firms were busy wrapping up the year and planning holiday parties, marauding fraudsters were cooking up a 'scary' scam [that] LawPRO is warning lawyers about. …. In a scam never seen before in Ontario, a Toronto-area law firm lost 'a large six figure' over the holidays after a virus gave hackers backdoor access to it book-keeper's computer. The virus copied bank account passwords as she typed them. 'The level of sophistication of this one was unbelievable,' says Dan Pinnington, LawPRO's vice president of claims prevention and stakeholder relations. The virus 'tricked the [book-keeper] into giving the trust account's password to the fraudsters, allowing them essentially full access to the trust account, including the ability to go in, monitor it, and wire money to foreign countries shortly after deposits were made,' Pinnington adds. Pinnington believes the hacking took place after the book-keeper clicked on a link, opened an e-mail or downloaded something as mundane as a screen saver from the Internet. 'It could be a Word document or something else, but there is a little program built or hidden inside,' Pinnington says. The built-in program, in this case, was the Trojan banker virus. It has an ability to mimic a bank's web site and when a user types in a password, the program logs the keys and sends a transcript to the hackers in real time. …. ."

**[Full Text]**

**"Ontario ruling sheds light on massive scam targeting law firms"**

Bruineman, Marg., *Law Times*, 13 May 2013, p. 3

"Details of an international scam targeting law firms in Canada and the United States that bilked $70 million are slowly emerging in court actions on both sides of the border [*USA v. Mathurin*, 2013 ONSC 5810 (CanLII)]. At its core is a wide-ranging probe of advance fee collection fraud schemes launched in 2008 …. ."

**[Full Text]**

**"Treadmill desks help lawyers stay in shape at Taft Stettinius"**

Neil, Martha, , www.abajournal.com, 29 July 2013

"For lawyers who may think they're too busy to exercise, estate planning and probate partner Mary Rust of Taft Stettininius & Hollister has an answer: Treadmill desks. She and another Cincinnati partner have them in their offices, allowing them to exercise without leaving their desks. Another two treadmill desks are set up for communal use. Aided by technology including a wireless computer keyboard and mouse and the ability to transfer work calls to her cellphone, Rust racks up between one and four hours per day on the treadmill, on the days when she's in the office, … . …. ."

**Note:** The editor investigated treadmill desks. Amazon, within two days of receiving an order, can deliver to a law firm one or another of the models of treadmill desk it retails: (i) Exerpeutic 1030 2000 WorkFit High Capacity Desk Station Treadmill, manufactured by Exerpeutix, for CDN$733.81 (free super saver shipping); and (ii) LifeSpan TR1200-DTS Treadmill Console, manufactured by LifeSpan, for CDN$1,113.93 (free super saver shipping). The editor understands that, currently, on the drawing board is an office treadmill desk, incorporating a Japanese capsule solo bed and ultra-compact wash basin, chemical toilet, refrigerator, microwave oven, clothing holdall, books caddy, and Bluetooth-enabled radio and music system, as well as a 32-inch television monitor.

**[Full Text]**

## 4.0 PROCEEDINGS DERIVING FROM BREACHES OF STANDARDS OF RESPONSIBILITY

### 4.1 Administrative: Disciplinary

**"Minding your Ps and Qs during ADR"**

Kirsh, Harvey, *The Lawyers Weekly*, 14 June 2013, pp. 11-12, at p. 11

"All players in the alternative dispute resolution process, whether they are disputants, counsel, arbitrators or mediators, ought to focus on their respective obligations and standards of conduct, and should beware of the prospect of coercive sanctions for failing to do so. Here are some examples of participants being held to account for their behavior or positions taken in hearings.

"An Ontario lawyer was charged with professional misconduct relating to his incivility and his use of sexually explicit, abusive and profane language at a mediation. In defence, he argued that a mediation session was closed and confidential; that nothing said or done there (other than criminal behavior) could be disclosed; and that the confidentiality provision in the mediation agreement shielded him from any contravention of the *Rules of Professional Conduct*. However, the Law Society of Upper Canada hearing panel held that the confidentiality clause does not shield the lawyer from his obligations under those rules, and that it had a duty to ensure that they are respected by all lawyers even during a closed confidential mediation session. The Society formally reprimanded the lawyer, directed that he be monitored by senior counsel for two years, and that he submit an unqualified written apology to opposing counsel. (See *Law Society of Upper Canada v. Guiste*, 2011 ONLSHP 24, March 8, 2011 [CanLII]). …. ."

**[No Full Text]**

***Law Society of British Columbia v. Chiang***

2013 CarswellBC 1060; [2013] B.C.W.L.D. 3852 (B.C.C.A.); 2013 BCCA 8 (CanLII)
Application to S.C.C. for leave to appeal refused: 2013 CarswellBC 1762, 13 June 2013

**Facts:** Solicitor was controlling mind of corporate party to certain proceedings, and appeared before superior court *ex parte* to obtain certain relief in those proceedings, including injunctive relief. *Ex parte* motion was dismissed, but solicitor was granted leave to proceed to motions court on short leave with respect to injunctive relief only. Solicitor, who was aware that only injunction was properly before motions court on short leave, sought two other forms of relief on short leave without informing motions judge that short leave had only been granted with respect to injunction. Motions judge was misled by solicitor's silence, and granted corporate party certain relief for which short leave had not been granted. Certain members of respondent Law Society then brought complaint concerning, *inter alia*, above-noted conduct by solicitor to Society. Society struck Hearings Panel, which dismissed complaint, one bencher dissenting with respect to above-noted conduct and making finding of professional misconduct against solicitor. Society appealed to Bencher Review Panel. Appeal was allowed, Review Panel adopted reasons of dissenting bencher in Hearing Panel decision, professional misconduct finding was made and solicitor appealed.

**Held:** Appeal dismissed. Decision under review was that of Review Panel, not of Hearing Panel. As Review Panel acts pursuant to self-governance authority granted in accordance with *Legal Profession Act* generally and was operating within core of its expertise, standard of review was reasonableness. Given solicitor's admissions that solicitor knew short leave was granted on one issue only and that solicitor did not so inform motions judge, together with specific finding that motions judge was misled, it was open to Review Panel to find intent to mislead court . That finding was within reasonable range of possible outcomes, and appeal was accordingly properly dismissed.

**[Full Text]**

***Budd v. Law Society of Upper Canada***

2012 CarswellOnt 1385 (Ont. Sup. Ct. J. [Div. Ct.]); 2012 ONSC 412 (CanLII)

**Facts:** Lawyer was convicted of sexual exploitation of his neighbours' teenage daughters

and was sentenced to nine months' incarceration. As result of convictions, Law Society of Upper Canada (LSUC) commenced hearing before hearing panel. Hearing panel revoked lawyer's license to practice law. Lawyer appealed to LSUC's appeal panel, but appeal panel found that decision to revoke lawyer's license was reasonable. Lawyer appealed.

**Held:** Appeal dismissed. There was no real acknowledgement, by lawyer, of harm lawyer had done to entire family, and no evidence of remorse was given at hearing. Panel's treatment of issue of lawyer's good character was reasonable. It was accepted that lawyer was of exemplary character before, and apparently during, commission of offences. Presumably, this made it possible for lawyer to establish relationship of trust to facilitate commission of offences. Reference to medical or psychiatric evidence was in context of panel's conclusion that it was important to understand how or why offences were committed. After two lengthy hearings, eight of lawyer's peers had concluded that revocation was only penalty that adequately addressed enormity of his misconduct. This penalty was within range of what was reasonable.

**[Full Text]**

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***O'Toole v. Law Society of New Brunswick***

2012 CarswellNB 604; (2012), 395 N.B.R. (2d) 391 (N.B.Q.B.); 2012 NBQB 336 (CanLII)
Leave to appeal to N.B.C.A. refused: 2012 CarswellNB 747, 2012 CarswellNB 748;
Affirmed: 2013 CarswellNB 632, 2013 CarswellNB 633;

Application to S.C.C. for leave to appeal refused: 17 April 2014

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**Facts:** Client made informal complaint to Law Society of New Brunswick concerning real estate transaction handled by lawyer. Law Society Complaints Committee referred matter to Discipline Committee for investigation, and registrar subsequently issued formal notice and complaint. Lawyer applied for judicial review and for order that administrative decisions be quashed, based on reasonable apprehension of bias and denial of procedural fairness.

**Held:** Application dismissed. Lawyer's client was adamant that she did not sign deed over to her husband alone, or sign mortgage as "spouse". Lawyer submitted that there was duty of procedural fairness under *Law Society Act, 1996* even at investigatory stage. Essence of informal complaint was that lawyer completed and witnessed documents when people were not present. Formal complaint regarding lawyer's failure to advise client was not inconsistent with informal complaint that was investigated by registrar. Formal complaint also dealt with transaction regarding wills. There was no notice or warning to lawyer about transaction involving wills or that there was investigation, complaint or concern about wills. Business about wills could have been subject of inquiry by registrar and consideration by Complaints Committee before it became official charge. Weight of authorities is against allowing judicial review and

quashing of discipline proceedings before they are dealt with by statutory governing board. Any issues about procedural unfairness during investigative steps or lack of full and appropriate compliance with spirit of *Act* could and should be addressed before Discipline Committee. Court should not interfere with statutory process under *Act*. There was no basis on which to allow any relief because of alleged reasonable apprehension of bias.

**[Full Text]**

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**"Discipline Dichotomy[:]**
**There are definite discrepancies in the way law societies discipline members. Some lawyers see their licenses quietly revoked, while others endure long, public hearings that are humiliating and permanently damaging"**

Livesey, Bruce, *Canadian Lawyer*, January 2013, pp. 26-31, at p. 28

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" …. It's a dirty little secret within the legal profession that Canada's law societies overwhelming[ly] prosecute solo or small firm lawyers compared to those who toil for big firms. Alice Woolley, a law professor at the University of Calgary and leading expert on lawyer discipline, says it's 'empirically demonstrative' this is the case. 'And it means that certain areas of practice are more effectively regulated than others,' she maintains. In a recent paper, Woolley examined the track records of five provincial law societies and concluded 87 per cent of the lawyers disciplined in 2009 were either solo or small firm practitioners, while none who belonged to a very large or national firm were disciplined. 'So do we have the most proactive and sophisticated and innovative regulation of lawyers that we could in Canada/' she muses. 'I think the answer is no.' …. ."

**[Full Text]**

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**"Discipline disasters[:]**
**Two recent proceedings against members of the legal profession don't shine a particularly good light on the regulators"**

Slayton, Philip, *Canadian Lawyer*, October 2012, pp. 16-17, at p. 16

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"Two recent disciplinary proceedings against members of the legal profession make the people running things look a lot worse than the lawyers they are chasing. The Law Society of

Upper Canada has been prosecuting Joe Groia since 2009. In June [2012], an LSUC hearing panel found Groia guilty of professional misconduct, delivering an unconvincing 53-page pastiche of cut-and-paste reasons."

**Note:** The LSUC panel sentenced Mr. Groia to serve a two-month suspension from law practice and pay $247,000 in costs. On appeal by Mr. Groia of his conviction and sentence, a LSUC appeal panel upheld the conviction and varied the sentence to a one month suspension and pay $200,000 in costs. Mr. Groia appealed that ruling to the Ontario Superior Court of Justice [Divisional Court] and the LSUC cross-appealed. Those appeals are likely to be heard in autumn 2014.

"And then there has been the bizarre spectacle of a Canadian Judicial Council inquiry committee investigating the conduct of Lori Marshall, the associate chief justice of the Manitoba Court of Queen's Bench. …. If you haven't heard about the ongoing inquiry into her [alleged] behavior by the Canadian Judicial Council, you must be deep in the wilderness, far from newspapers, free of the Internet. Lucky you. …. ."

**Note:** Hearings of the five-member inquiry committee, respecting the complaints against Justice Marshall, commenced in May 2012. The committee ruled, orally on 27 July 2012, and in writing on 20 August 2012, in response to a motion by Justice Douglas alleging a reasonable apprehension of bias on the part of the committee. The committee dismissed the motion. Justice Douglas sought judicial review, in Federal Court, of the dismissal of her motion before the committee. The judicial review application by Justice Douglas raises allegations of apprehension of bias additional to the allegation of such made by her before the committee. Pending ultimate determination of the judicial review and any consequent appeals, the committee has not sat since 27 July 2012. By 27 August 2012, the independent counsel before the committee had resigned. On 20 November 2013, the committee, itself, resigned, for written reasons delivered on the same date. In March 2014, a new committee, comprised of three members, was appointed by the Canadian Judicial Council. On 30 April 2014, Federal Court dismissed several motions by the parties before the Court on the judicial review, preliminary to hearing the request for judicial review on its merits. A further preliminary motion, made by Justice Douglas, is before Federal Court, requesting a stay of hearings by the new committee which is understood to have wanted to convene in late July 2014. Separate from the complaints against Justice Douglas that were before the five-member committee, and are now before the three-member committee, a new complaint (by the Chief Justice of Manitoba Queen's Bench) has been made against Justice Marshall; which the Canadian Judicial Council is examining. The fresh complaint relates to the Justice's alleged use of some of the $10,000.00 annual 'representational allowance' given federal Justices to cover travel while representing the Court. (Whether the fresh complaint pertains to one or more years, and whether one or more than one amount is allegedly involved has not been publicly disclosed.)

**[Full Text]**

**"No end to the circus"**

Slayton, Philip, *Canadian Lawyer*, February 2014, pp. 16-17

**Note:** Sequel to Mr. Slayton's October 2012 Canadian Lawyer commentary (above).

**[Full Text]**

**"Lawyers warned about situations that can land them in trouble"**

Santry, Charlotte, *Law Times*, 13 May 2013, p. 9

"From client complaints to employment disputes, lawyers face a number of legal and regulatory pitfalls that can damage a career. [Many of the complaints relate to retention arrangements, including joint retainers. For example:] In …, *Law Society of Upper Canada v. Roderick John Byrnes* [2013 ONLSHP 21 (CanLII); 2013 ONLSHP 125 (CanLII)], a family lawyer faced an allegation of failing to provide his client with a written estimate of the fees at the outset of the retainer. Byrnes advised his client, Raouf Rasheed, that if he resolved his matrimonial dispute swiftly and amicably, the cost would be about $8,000. He took a $2,000 retainer. But he later sent Rasheed several invoices totalling $32,866. He received $26,523 of that amount. Rasheed discharged Byrnes and had his account assessed by another lawyer who found Byrnes hadn't kept dockets. A regional hearings officer directed Byrnes to reimburse Rasheed the full amount and pay $48,586 in costs. In the end, Byrnes filed for bankruptcy. …. ."

**[No Full Text]**

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**"Lawyer convicted of prostitution is suspended; ethics officials say she didn't disclose job"**

Cassens Weiss, Debra, www.abajournal.com, 19 March 2014

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"The Illinois Supreme Court has agreed to a three-year suspension for a solo lawyer who pleaded guilty to a misdemeanor count of prostitution and failed to disclose her illegal work history on her bar application. …. ."

**[Full Text]**

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**"Stephen Glass refused admission to California state bar in court ruling"**

McCarthy, Tom, *The Guardian* [London], 27 January 2014

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**"**The California supreme court has refused Stephen Glass admission to the state bar, ruling that the disgraced former journalist had failed to rehabilitate himself. Monday's ruling followed years of effort by Glass, a graduate of Georgetown law school, to become a lawyer in California. The court overturned a state judge's 2010 decision in favor of admitting Glass to the bar. 'Many of his efforts from the time of his exposure in 1998 until the 2010 hearing, however, seem to have been directed primarily at advancing his own well-being rather than returning something to the community,' the justices wrote in an unanimous ruling. 'His evidence did not establish that he engaged in truly exemplary conduct over an extended period. We conclude that on this record he has not sustained his heavy burden of demonstrating rehabilitation and fitness for the practice of law.' Glass, 41, fabricated material for more than 40 articles for the *New Republic* and other publications in the mid-1990s. He was discovered and fired in 1998 at the end of a chain of events that began when a reporter at a rival publication tried to retrace his work and could not. …. The court ruling revisits Glass's exploits as a fabulist. 'A notable 1996 article was entitled Taxis and the Meaning of Work,' the justices write:

> 'It was Glass's first cover article and one he viewed as 'key' to his successful period of writing for The New Republic. Its theme was that Americans, and in particular, African-Americans were no longer willing to work hard or to take on employment they consider menial. The article falsely recounted as factual a supposed encounter between Glass and three entirely fabricated characters, one a limousine driver, one a taxi cab

driver, and one a criminal. …. Honesty is absolutely fundamental in the practice of law.' …. ."

**[No Full Text]**

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**"Work-at-home lawyer suspended partly for lack of a 'bona fide' office"**

Cassens Weiss, Debra, www.abajournal.com, 18 December 2013

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"The Delaware Supreme Court has ordered a two-year suspension for a lawyer who, among other violations, worked out of his Pennsylvania home and did not have exclusive, designated office space in Wilmington. The court said that Fred Barakat had failed to maintain a bona fide office, as required by Delaware Supreme Court Rule 12, and misrepresented the facts when questioned about it. He also failed to maintain adequate bank records and rarely deposited retainers into his escrow account, the court said. …. ."

**[Full Text]**

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**"Lack of an email address leads to disciplinary trouble for a South Carolina lawyer"**

Cassens Weiss, Debra, www.abajournal.com, 24 October 2013

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"A South Carolina lawyer has been placed on interim suspension in part because she doesn't have a valid email address. The South Carolina Supreme Court ordered the interim suspension for Cynthia Collie, despite her assertion that she hasn't had a client in more than 30 years and is retired from the practice of law. …. The court noted that South Carolina lawyers must be 65 years or older to claim retired status, and said that, even if Collie were eligible for that status, she would still be required to maintain an email address as part of its Attorney Information System. Rule 410 of the South Carolina Bar says lawyers must provide a mailing address, an e-mail address and a telephone number. …. ."

**[Full Text]**

**"Paralegal Blows Whistle on Ex-Boss, Says Cash Went in Book on Shelf; Lawyer Suspended for One Month"**

Neil, Martha, www.abajournal.com, 24 September 2012

"A paralegal who once worked for Iowa attorney Sara Anna Kersenbrock blew the whistle on her former boss, filing a 2010 disciplinary complaint that resulted in a one-month license suspension. …. The paralegal was a witness for the prosecution in the attorney discipline case, testifying that Kersenbrock didn't deposit a number of client retainers into her trust account when she worked for the attorney between 2005 and 2010. Instead, Kersenbrock put the retainer checks into her law firm operating account and put cash retainers into a drawer or in books on her bookshelf, then spent them when she needed money, the paralegal testified. …. ."

**[Full Text]**

**"Lawyer bills over 3,500 hours a year, loses licence for 4 years it will take to make restitution"**

Neil, Martha, www.abajournal.com, 04 March 2013

"A sole practitioner who claims to have worked well over 3,500 hours annually while representing parents and children in juvenile court and guardianship matters during two fiscal years between 2007 and 2009 has lost his license for four years [while he makes restitution to the clients for the portion of the time falsely included in his invoicing for legal services]. …. ."

**[Full Text]**

**'Lawyer Disciplined for using Personal Laptop at Work to Earn Extra Bucks from JustAnswer.com'**

Neil, Martha, www.abajournal.com, 01 October 2012

"A Kentucky lawyer has been reprimanded [by Kentucky Supreme Court] for using his personal laptop computer during downtime at work to earn extra income by answering legal questions on JustAnswer.com."

**[Full Text]**

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***Marcus v. Cochrane***

[2014] O.J. No. 1508 (Ont. C.A.)

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**Facts:** Client appealed from dismissal of her proceeding for solicitor negligence. After client's marital separation, she obtained the solicitor's advice about a separation agreement she had made with her husband that was reduced to writing but not yet signed. Appended to the agreement was a list of the client's assets, including a severance payment she had received on termination of her employment. At the client's request, the solicitor incorporated the draft separation agreement into a formal separation agreement suitable for execution. The solicitor did not advise the client that her severance payment should have been excluded from equalization calculation between the client and her spouse. However, the solicitor cautioned the client not to execute the agreement until there had been full financial disclosure to enable an accurate equalization calculation be made. The client rejected that advice, made some minor changes to the drafted formal separation agreement, and then signed it. Subsequently, in her proceeding against the solicitor, the client alleged that had she excluded her severance payment, she would have been able to negotiate an equalization payment of $70,000.00 to $80,000.00, instead of the $4,573 she did receive. The trial judge held that the scope of the solicitor's retainer did not breach the standard of care owed to the client. He had been retained to convert the draft separation agreement between the client and her spouse into a formal separation agreement. The trial judge found that the client did not suffer any damages resulting from the solicitor's performance of legal services for her. Further, the trial judge concluded that the client's spouse would not have agreed to an equalization payment of $70,000.00 to $80,000.0, and that a trial court would not have so ordered. The solicitor was awarded full indemnity costs of the proceeding, totaling $160,706.00 on the basis the client's conduct during trial of the proceeding had been reprehensible.

**Held:** Appeal dismissed, except that costs award varied to calculation of $60,000.00 on partial indemnity basis.

**[No Full Text]**

**"Limits To Limitations:**
**The Ontario Court Of Appeal Addresses The Doctrines**
**Of 'Fraudulent Concealment' and 'Special Circumstances' "**

Alexander, Anthony M.C., *mondaq*, 09 May 2014

"A recent decision involving solicitor's negligence, *Rajmohan v. Norman H. Solmon Family Trust*, 2014 ONCA 352, required the Ontario Court of Appeal to consider two of the murkier issues relevant to limitations analysis, namely, [1] the doctrine of "fraudulent concealment" and [2] the doctrine of "special circumstances.

"It was alleged that a solicitor had been negligent in representing his client in a mortgage transaction. Because of the client's intervening death, the claim was brought by the client's estate. For that reason, the claim was subject to the absolute two-year limitation period under s-s. 38(3) of the Ontario *Trustee Act*, rather than the discovery-based two-year limitation period under the *Limitations Act, 2002*.

"The claim was brought more than two years after the client's death, and was therefore statute-barred. The estate argued that the expiry of the two-year limitation period could be overcome allowing the action to go forward based on principles of 'fraudulent concealment' and/or 'special circumstances.'

"The motions judge granted summary judgment *rejecting* both of these arguments. The Court of Appeal *affirmed* this ruling, and agreed that the claim was statute-barred.

"Both fraudulent concealment and special circumstances represent exceptions to the usual application of limitations principles. Both doctrines are the source of some confusion. …. ."

**[Full Text]**

***King Lofts Toronto I Ltd. v. Emmons***

2014 ONCA 215 (CanLII)
(Summarized by *The Lawyers Weekly*, 02 May 2014, pp. 21-22)

"[**Facts:**] Appeal by a lawyer and a law firm from summary judgment [of $106,000.00 and costs] granted against them for solicitor's negligence in connection with a commercial real

estate transaction. King Lofts Toronto I Ltd. ("King") purchased four commercial properties in downtown Toronto for $2.25 million. King retained the lawyer to act on the purchase. Before closing, the lawyer discussed with King the fact the City of Toronto owned a strip of land underneath a building on one of the properties. King understood this was a minor matter that would be resolved with the conversion of the property to Land Titles, the cost would be a few thousand dollars and title insurance would address the matter. While a number of deficiencies were dealt with through the use of holdbacks, there was no holdback for the laneway. After closing, the lawyer reported the laneway could not be easily converted to Land Titles and that the City would need to transfer it to King, but that title insurance had been arranged to deal with ownership issues. Two years later, King received an offer to purchase its properties and retained a different solicitor to act on the sale. The City indicated it expected to be paid $106,000 for the laneway. King made a claim on the title insurance policy, but learned the insurance did not cover the issue. The sale transaction closed for $31.5 million. …. ."

"[**Held:**] Appeal dismissed. King's claim was not statute-barred by the operation of a two-year limitation period. King was entitled to rely on the lawyer's advice regarding title insurance. Until coverage was denied and the lawyer was proven wrong, there was no cause of action, so the limitation period did not start to run until January 2009, not in April 2008 when the City indicated it expected to be paid for the laneway. No expert evidence was necessary where it was clear the lawyer had a duty to warn King the City might expect payment for the laneway and that he failed to discharge that duty. …. ."

**[No Full Text]**

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**"Lawyer not responsible for fraud losses"**

Millan, Luis, *The Lawyers Weekly*, 28 February 2014, p. 4

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"A $400,00 lawsuit that sought to hold a Montreal lawyer and his law firm responsible for losses caused [an estate] by convicted fraudster Earl Jones was dismissed after Quebec Superior Court held that the lawyer did not assume an obligation of result with respect to the quality of work to be performed. …. Montreal notary Jamie Lands sued Montreal lawyer Kenneth Saloman and his law firm Sternthal, Katznelson, Montigny, [who had been] retained by a former liquidator of the estate in 2007. Saloman advised the former liquidator that the estate could save money by hiring someone to perform its administrative duties [as estate liquidator], and recommended hiring Jones [before public revelations of Jones' fraudulent activities], who took on that role shortly thereafter. The lawsuit claimed Saloman was negligent for the [estate's subsequent] losses because he recommended Jones to the estate and was responsible for Jones' management of the assets of the estate. But in a brief 11-page ruling, Justice Corriveau relied on a test elaborated by the Supreme Court of Canada in *St-Jean v. Mercier* … [2002 SCC 15 (CanLII)] to determine whether Saloman acted as a reasonably prudent and diligent attorney

would have acted in the same circumstances. …. 'From a strictly legal perspective, it was clear that Salomon did not have an obligation to perform an investigation of Earl Jones before referring him—lawyers get requests for referrals all the time,' said [Janet] Michelin, a partner with Irving Mitchell Kalichman [who represented Salomon]. …. The reality is that many professionals get their business from referrals. It's important to keep in mind that I can refer somebody [to a client] but a client still has an obligation to verify themselves, and make sure they are comfortable with the person.' …. ."

**[Full Text]**

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**"Nothing succeeds like excess when buying legal insurance"**

Benedict, Michael, *The Lawyers Weekly*, 06 December 2013, pp. 1., 23, at p. 1

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"Lawyers have 'no excuse' to be without excess professional liability insurance, says Ian Epstein, whose work largely involves defending lawyers accused of negligence. 'I'm surprised how often I run into defence situations where the lawyer doesn't carry additional insurance protection to the amount mandated by provincial law societies,' says Epstein, a partner at Blaney, McMurtry in Toronto who handles defence cases for LawPRO, the sole designated Ontario insurer for mandatory basic coverage requirements. In every province and territory except for Quebec, which has a much larger minimum requirement, Canadian lawyers in private practice must carry liability insurance for at least $1 million per claim and $2 million aggregate in order to maintain their licence. Epstein believes Ontario lawyers should have at least $2 million in excess coverage. 'But I recommend $5 million in total,' he adds. LawPRO entered the excess insurance field in 1998, offering up to an additional $9 million after realizing that only about 10 per cent of lawyers practicing in firms with fewer than five professionals had such coverage and that few insurers were offering such protection. …. ."

**Note:** Mr. Epstein has developed a sterling reputation for his expertise in the field of lawyer liability insurance coverage; not least, as a result of defending lawyers in negligence proceedings. Nonetheless, the editor recommends excess coverage of $9 million (especially considering the minimal additional premium cost).

**[Full Text]**

***2032151 Ontario Inc. v. Webster***

2012 CarswellOnt 3462 (Ont. Sup. Ct. J.); 2012 ONSC 1810 (CanLII)

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**Facts:** Plaintiffs were franchisee and its principal, for international news store. Principal was locked out of franchise, and franchisee ceased to operate. Plaintiffs' lawyer did not send notice of rescission of franchise agreement to franchisor by relevant date, and also neglected to claim damages pursuant to *Arthur Wishart* (*Franchise Disclosure*) *Act, 2000*. Lawyer commenced claim for damages on plaintiffs' behalf, but did not file statement of claim within 30 days of commencing action, as required by applicable rules. Action was dismissed for delay, and lawyer did not provide principal with copy of notice of dismissal. Plaintiffs brought action against lawyer, who was noted in default. Plaintiffs brought motion for default judgment.

**Held:** Motion granted; damages set at $188,646.35. Purported disclosure document provided to plaintiffs by franchisor was deficient in several fundamental ways. Lawyer failed to exercise professional care and attention required to protect his client's interests. Professional negligence deprived client of statutory rights of rescission and damages that were otherwise available. Damages reflected total refunds, purchase of inventory and losses named (losses before revenues) that franchise would have been entitled to by timely rescission.

**[Full Text]**

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***Kubas v. Misir***

2012 CarswellOnt 10058; (2012), 79 E.T.R. (3d) 220 (Ont. Sup. Ct. J.);
2012 ONSC 4683 (CanLII)

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**Facts:** Plaintiff second mortgagee invested in second mortgages on two properties, renewed investments several times, and increased investment after obtaining independent legal advice (i.e., not from defendant lawyer). Mortgagors eventually went into receivership, properties were sold, and plaintiff second mortgagee lost entirety of investment. Defendant lawyer, whose law firm performed legal work in relation to relevant mortgage transactions, did not disclose his personal interest in mortgagor corporations. Second mortgagee brought action against accountant, lawyer and respective firms for damages for breach of fiduciary duty. Lawyer and law firm brought motion for summary judgment dismissing action against them.

**Held:** Motion granted. There was no genuine issue that required trial. It could not

realistically be claimed that plaintiff second mortgagee's financial losses were caused by any alleged breach of fiduciary duty by lawyer. Second mortgagee did not rely on lawyer, but had independent legal advice, when mortgage was extended and increased final time. Investment losses were caused by virtue of fact that second mortgagee made investments in second mortgages on properties, when true value of properties did not provide adequate security for those investments. Alternatively, second mortgagee would have suffered loss in any event because he was committed to pursuing second mortgage investments even after first default under one of those investments.

**[Full Text]**

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***Pirani v. Esmail***

2014 CarswellOnt 2123; (2014) 94 E.T.R. (3d) 1 (Ont. C.A.); 2014 ONCA 145 (CanLII)

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**Facts:** Plaintiff agreed to pay $54,666.66 to TE for one-third interest in rental property. TE was to hold property in trust for himself as two-thirds beneficiary and for plaintiff as one-third beneficiary. TE transferred title to property to his wife, YE, for no consideration. Plaintiff brought action arising out of management and sale, by YE, of property. Plaintiff's expert concluded that rental property earned profit and that plaintiff was owed money. Trial judge accepted calculations of plaintiff's expert. Trial judge found TE and YE liable for breach of trust and breach of fiduciary duty. Trial judge also found defendant lawyer who acted for TE and YE on sale of property liable for breach of trust, breach of fiduciary duty and negligence. TE and YE appealed. Lawyer cross-appealed.

**Held:** Appeal allowed in part; cross-appeal allowed. Existence of trust and failure of TE and YE, as trustees, to maintain records and properly account for administration of trust were findings well supported in evidence. However, trial judge erred in accepting and relying on report of plaintiff's expert. Expert's conclusions with respect to rental income did not withstand scrutiny against evidence led at trial. It was appropriate to make no award to plaintiff for profits from rental property. Plaintiff did not prove that net profit was generated, and TE and YE did not show that property was operated at loss. Damages had to be reduced, as result. Plaintiff's claim against lawyer had to be dismissed. Lawyer was retained by owner, YE, and took instructions from her, as was proper. Lawyer was never told that YE was not authorized to sell property or that either TE and YE was in breach of trust obligations. Trial judge's suggestion that lawyer improperly charged plaintiff for 50 per cent of overdue taxes and water accounts and 50 per cent of fees appeared to be misunderstanding of way in which payments were made.

**[Full Text]**

***L.H. v. H.N.C.***

[2013] No. 35410 (S.C.C.), 28 November 2013

**Facts:** The Applicant, L.H., a lawyer, acted on behalf of the Respondent, Ms. H.N.C., in family proceedings. The professional services mandate was signed on 12 May 2011. Twenty-nine days later, on 10 June 2011, the Respondent client was sent invoices by the lawyer totaling $58,703.79. On 07 July 2011, the Respondent client signed an acknowledgment of debt for that amount. On 02 May 2012—apparently not having, meantime, received payment of the invoices—the lawyer instituted legal proceedings against the Respondent wife. The legal proceedings were not for the unpaid invoices (the subject of the acknowledgment of debt). Rather, the proceedings claimed $45,000.00 for compensatory and exemplary damages. The lawyer alleged the Respondent wife, by refusing to pay the amount owed under the invoices, was causing the lawyer pecuniary loss and psychological injury. (The compensatory aspect of the claim, evidently, was for the monetary value of steps the lawyer had taken and was taking to recover payment of the invoices for her legal services, and for the delay by the client in paying the lawyer's invoices.) On 30 August 2012, a judgment of the Court of Quebec homologated the Respondent wife's acknowledgement of debt, for the lawyer's legal services, which the Respondent wife had signed on 10 June 2011; declared the amount of $59,703.79 under the invoices to be due and eligible, and ordered that interest at the legal rate, as well as the additional indemnity provided for in art. 1619 of the Civil Code of Quebec, apply.

**Held:** On 04 February 2013, the Court of Quebec dismissed the lawyer's legal proceedings for damages. Judge Gouin of the Court of Quebec found that the proceedings were unfounded because, under art. 1617 of the Quebec Civil Code, damages which result from delay in the performance of an obligation to pay a money sum consist of compensation in the form of interest. The 30 August 2012 judgment already provided for interest. The Court of Quebec further decided that a professional whose client refuses or neglects to pay for services rendered cannot claim damages to compensate for the monetary value of the steps that must be taken by the professional in order to be paid. St. Pierre J.A. of Quebec Court of Appeal refused the lawyer leave to appeal from the Quebec Court decision of Judge Gouin. The lawyer applied to Supreme Court of Canada for leave to appeal. The application was, on 28 November 2013, dismissed without costs.

**[No Full Text]**

**"Law Firm Event Gone Wrong"**

Gutherie, Neil, *mondaq*, 21 March 2013
[Summary]

After a British Columbia law firm-sponsored dinner, some younger firm members chose to retire to a night club (not part of the law firm dinner event). There, an associate fell on a law student. The law student suffered brain injuries. The associate admitted liability. He settled, as to damages, with the student; although claimed indemnity under the law firm's insurance policy which afforded coverage to any law firm "employee …with respect to … [his or her] employment". Both at trial and on appeal (*Poole v. Lombard General Insurance Co of Canada*, 2012 BCCA 434 (CanLII)), the indemnity claim was dismissed. Although the insurer was duty-bound to defend the associate, it was not liable for damages paid by the associate to the law student. Both courts acknowledged that the policy should be broadly interpreted to include coverage of a law student attending a function (dinner) which had some connection to work (i.e., an activity "with respect to employment"). But, the courts concluded, that coverage did not extend beyond the dinner to the night club visit which was not part of the firm programme for the evening. The associate was, when he fell on the law student at the night club, not acting "with respect to his employment."

**[Full Text]**

**"Finger-pointing and yelling at deposition does not amount to assault, appeals court says"**

Cassens Weiss, Debra, www.abajournal.com, 21 May 2014

"A New York appeals court has affirmed dismissal of a lawsuit contending that a onetime Paul Hastings partner committed assault by wagging a finger and yelling during a deposition. …. ."

**[Full Text]**

**"Divorce Lawyer is Sued Along with Client Who Secretly Monitored Wife on Video"**

Cassens Weiss, Debra, www.abajournal.com, 12 September 2012

"A well-known Cincinnati lawyer is among the defendants in two federal privacy lawsuits filed by a woman and her online friend claiming the attorney intended to use secret surveillance in divorce proceedings. Plaintiff Catherine Zang alleges her then-husband, Cincinnati home builder Joseph Zang, spied on her with a hidden video camera and microphone, as well as computer-tracking software, …. Catherine Zang says she discovered the devices in 2009 after her husband's divorce lawyer, Mary Jill Donovan, revealed she had evidence portraying Catherine Zang in 'unflattering, embarrassing and private settings,' the suit says. The complaint claims Donovan intended to use the evidence to obtain a favourable settlement for Joseph Zang. …. ."

**[Full Text]**

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**"Doctor's wife is charged in his shooting outside law office after mediation session"**

Neil, Martha, www.abajournal.com, 05 December 2013

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"A mediation session at a Tennessee lawyer's office Wednesday 'apparently didn't go well,' a Manchester police investigator says. As Dr. Henry Bartee and his estranged wife, Brenda Bartee, both 47, were being walked by an attorney to the door of Rogers, Duncan and North at about 1 p.m., Brenda Bartee pulled a handgun out of her waistband and fired seven rounds, … . Four rounds struck her husband, who was airlifted to a Chattanooga hospital. Brenda Bartee was charged with attempted first-degree murder and is being held at the Coffee County Jail in lieu of $1 million bond, … . …. ."

**[Full text]**

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**"Lawyer's conditional discharge overturned"**

Moulton, Donalee, *The Lawyers Weekly*, 21 June 2013, p. 4

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"In a case that raises professional and personal issues for lawyers across the country, the Alberta Court of Appeal has ruled that there is no anonymity when lawyers commit a crime, even if it is not related to their practice. In *R. v. Torske* … [2013 ABCA 162 (CanLII)], the respondent David Torske was a lawyer with no previous criminal record who pleaded guilty to forging 21 prescriptions for narcotics on a counterfeit prescription pad he manufactured. The Crown requested a conditional sentence of six to nine months. The provincial court, however, gave Torske a conditional discharge with one year's probation on lenient conditions."

**Note:** A conditional sentence pre-supposes a finding of guilt followed by entry of a conviction by the sentencing court. A conditional discharge (or an absolute discharge) is imposed where the sentencing court makes a finding of guilt but does not enter a conviction. In both situations the offender suffers a criminal record; however, the record of a conditionally (or absolutely) discharged person is considerably more susceptible, than the record of a conditionally-sentenced person, to a pardon under the *Criminal Records Act*, RSC 1985, c. 47.

"The [Alberta] appeal court was far less accommodating [than the provincial court][;] the majority concluding it was 'impossible to reconcile the [trial court] sentence here' with the criteria set out in … [*R. v. MacFarlane*, 1976 ALTASCAD 6 (CanLII)], the governing case on conditional discharges. …. ."

**Note:** The Alberta Court of Appeal imposed a conditional sentence.

" 'The Alberta Court of Appeal has said that it matters not that the offender did not use his position as a lawyer to commit the offence. The public still has a right to know that the lawyer committed the crime, especially the lawyer's prospective clients and especially where the crimes involve dishonesty such as forgery,' said Joanne Dartana, appellate counsel with the Alberta justice Appeals Branch in Edmonton."

**[Full Text]**

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**"Crown successfully appeals lawyer's jail term"**

Sorensen, Jean, *Canadian Lawyer*, January, 2014, p. 13

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"The British Columbia Court of Appeal [*R. v. Mastop* (2013 BCCA 494 (CanLII))] has allowed a Crown appeal of the sentencing of Vernon B.C.'s William Mastop, the first lawyer in Canadian history to plead guilty to participating in the illicit activities of an organized crime group. Mastop, 46, was originally sentenced to one year in prison after providing support [a conduit for information] to a gang known as the Geeks but the Crown successfully sought to have the sentence overturned and a 2.5-year prison term imposed. The appeal justices ruled the 'trial judge erred by 'under-emphasizing the seriousness of Mr. Mastop's actions.' …. ."

**Note:** A 2.5 year prison term was imposed by the Court of Appeal.

**[Full Text]**

## 5.0 FEES AND COSTS

### 5.1 Fees

***Hungerford Tomyn Lawrenson & Nichols v. Mide-Wilson***

2013 CarswellBC 3914; [2014] 4 W.W.R. 676 (B.C.C.A.), paras. 1, 102;
2013 BCCA 559 (CanLII)
Application to S.C.C. for leave to appeal refused; [2014] No. 35750 (S.C.C.)

"1 This appeal and cross appeal concern a contingent fee agreement between the respondent Ms. Mide-Wilson (the "Client") and the appellant law firm (the "Firm"). The appeals pit two different conceptions of contingency agreements against each other. The Firm's view is of a contract made between sophisticated parties in circumstances that were objectively "fair", which contract enabled the Client to achieve her singular goal (ownership of a large corporation thought at the time to be worth up to $100,000,000) against considerable odds and within eight months of her retaining the Firm. This was the view largely adopted by the Registrar below, who observed that in general, parties to contingent fee agreements should be held to their bargains. The Firm had undertaken a large risk; the Client knew what she was about; and contingency agreements are an important and accepted means of facilitating access to justice for would-be litigants. The Client on the other hand characterizes the contingency agreement as a special type of contract overlaid with equitable, and even fiduciary, considerations including policy concerns relating to the integrity of the legal profession. A lawyer, she argues, is not a "venture capitalist," and a contingency agreement is not a "lottery ticket", even for a lawyer who has undertaken considerable risk and achieved surprising success. On this approach, the fee originally charged by the Firm in this case—some $16,971,015—was "grossly excessive", as was the "fair fee" of $9,000,000 determined by the Registrar. The chambers judge below agreed substantially with the Client's argument and allowed her appeal from the Registrar's certificate, reducing the fee to $5,000,000. (See 2013 BCSC 374 (B.C. S.C.).)

. . . .

"102 …. I would not interfere with the chambers judge's determination that a fair fee in this case was $5,000,000 because in my view, it 'operates reasonably in the context', rewarding the Firm handsomely and recognizing the risks it assumed. On the other hand, it is not an exorbitant or grossly excessive amount that would reflect negatively on the integrity of the profession."

**[Full Text]**

***Dupuis Paquin, Attorneys-at-Law & Business Counselors Inc. v. Agence du revenue du Quebec et al.***

[2013] No. 35401 (S.C.C.), 14 November 2013

**Facts:** Taxpayers were in a litigious relationship with Quebec Revenue Agency. The Dupuis Paquin law firm agreed to represent the taxpayers, under a retention arrangement which provided for the taxpayers to remunerate the law firm for its services by assigning to the law firm a potential claim of the taxpayers against the Agency, to the extent of the law firm's fees and disbursements of representing the taxpayers. The Agency brought a motion which challenged the compensation provision of the retention arrangement. The law firm contended that the retention arrangement was a document which formed part of the taxpayers' income tax records and should not be disclosed for fear of triggering a wave of seizures before judgment by other creditors of the taxpayers, thus interfering with the law firm being compensated. Quebec Superior Court allowed the Agency's motion; declaring null the assignment of the taxpayer's potential claim from the taxpayers to the law firm, on the basis it wrongly amounted to sale of litigious rights. Law firm appealed. Quebec Court of Appeal allowed the Agency's preliminary motion to dismiss the law firm's appeal.

**Held:** The law firm's application to Supreme Court of Canada for leave to appeal was dismissed with costs.

**[No Full Text]**

**"Most lawyers could not afford to hire themselves"**

Benedict, Michael, *The Lawyers Weekly*, 24 August 2012, p. 5

"Concern about lawyers' fees restricting court access to all but the rich in most cases was ramped up recently when Ontario Chief Justice Warren Winkler gave a speech to the Ontario Bar Association. 'Lawyers simply need more modest expectations,' Justice Winkler said at an OBA conference on March 28 [2012]. 'They need to scale costs to what people can afford, and that may mean going back to a set fee for their services.'

"He is far from alone in this sentiment. Supreme Court of Canada Chief Justice Beverley McLachlin has expressed similar sentiments. 'Do we have adequate access to justice?' she asked last year at a University of Toronto Faculty of Law conference on middle-income access to justice. 'I think the answer is no,' she said. 'Among those hardest hit are the middle class and the

poor. We have wonderful justice for corporations—and for the wealthy.' … [she] reiterated that view this month [August 2012] at the annual meeting of the Canadian Bar Association's governing council in Vancouver, calling access to justice a key to a strong and health democracy.

"Escalating legal fees, in some cases $800 or $900 per hour area becoming like bad weather—everyone complains about it but little is being done to address the fundamental issues. Meanwhile, observers say judges are becoming more accepting of legal cost submissions, although the courts are quick to reduce claims they consider excessive. …. ."

**[Full Text]**

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**"Door to assess a lawyer's accounts remains open"**

Benmor, Steven, *The Lawyers Weekly*, 15 February 2013, p. 13

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"Whether you have an adequate retainer in trust, get paid after each account, or you expect payment at the end of your case, the law grants clients the right to have a lawyer's accounts assessed. The process is simple for the layperson: Attend the courthouse counter, fill out a few forms and obtain a date in court. Although assessment officers [or Masters or Taxing Officers in some provinces] have the power to validate and order payment of the exact amounts charged by the lawyer, the general rule is that they will usually reduce the balance owing. The question is: By how much? …. ."

**[Full Text]**

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**"Breach of contract in a legal fees context"**

Chsherbinin, Nikolay, *The Lawyers Weekly*, 29 November 2013, p. 18

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"Unlike other torts, economic torts have as their primary function the protection of a plaintiff's economic interests. They include, among others, the torts of inducing breach of contract and intentional interference with economic relations. In *Heydary Hamilton PC v. Muhammad* … [2013 ONSC 6199 (CanLII)] Justice Edward Morgan grappled with the issue of whether a lawyer who represents a client that disputes the fees of his former lawyer can be held liable in the above-referenced torts. The court re-affirmed that these torts are not viable causes of action against the succeeding lawyer. …. ."

**[Full Text]**

**"Going from the exception to the rule"**

Merkur, Darcy, *The Lawyers Weekly*, 01 November 2013, at p. 16

"More than a decade after the introduction of lawyer-to-lawyer referral fees, the practice has gone from exception to the norm in serious personal injury cases. The logic behind the November, 2000 rule change allowing Ontario lawyers (and since, paralegals) to pay other lawyers referral fees was to encourage the passing of lucrative files that fell outside of one lawyer's area of expertise to qualified specializing lawyers of experience. Claims of negligence against lawyers acting outside their normal area of practice would decrease, and overall client satisfaction with the performance of the legal bar would increase."

**[Full Text]**

***Botan v. St. Amand***

2013 ABCA 227 (CanLII); (2013) 85 Alta. L. R. (5th) 199 (Alta. C.A.)

**Facts:** Plaintiff was lawyer practising in area of HCV tainted blood claims. Lawyer brought action seeking order paying him fee of $58,633.33 on account of contingency fee agreement ("agreement") with defendant. Action was allowed in part favouring the lawyer, in amount of $5,250. However, costs of the action, $37,538.60, were ordered against the lawyer (2012 ABQB 260 (CanLII)).

**Held:** Appeal dismissed. Trial judge did not commit palpable and overriding error with respect to findings of fact. Trial judge carefully discussed evidence and reasons for findings. He explained why he discounted documents presented by lawyer and why he preferred *viva voce* evidence of client.

**[Full Text]**

***FitzGibbon v. Ma***

2012 CarswellBC 1793; (2012), 33 B.C.L.R. (5th) 241 (B.C.C.A.);
2012 BCCA 269 (CanLII)

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**Facts:** Firm H and lawyer M represented client in regards to motor vehicle accident. M withdrew as client's lawyer when client expressed lack of confidence in M, following which client retained lawyer P. Client's claim was settled by lawyer P, based on acceptance of offer made by government insurer to client when she was unrepresented. Firm H and lawyer M asserted to P and insurer that they would be maintaining solicitor's lien over settlement funds. Firm H and lawyer M found out from insurer that claim had been settled for $24,500 including disbursements. Lawyer P indicated to Firm H and lawyer M that he had paid out settlement funds and was not involved in dispute as to payment of Firm H's fees. Firm H applied for charging order against former client, and lawyer P (who replaced Firm H and lawyer M in representing the client), and was successful. Both former client and lawyer P appealed from granting of charging order.

**Held:** Appeal dismissed. Law Firm H and lawyer M met test set out under applicable law, that they had been retained, that they would not be paid except by order, and that settlement was in part result of their work. Law allowed charging order to be retrospective in effect, and was not dependent on lawyer having paid out settlement funds. Termination of retainer, or alleged negligence by law firm H or lawyer M, were not proper grounds to defeat charging order. Conduct of lawyer P had effect of defeating order, and made him properly liable on joint and several basis with client. Client could not rely on fact that she was not lawyer, as applicable professions act had application to general public.

**[Full Text]**

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***Mor-Town Developments Ltd. v. MacDonald***

2012 CarswellNS 225; (2012), 349 D.L.R. (4th) 161 (N.S.C.A.);
2012 NSCA 35 (CanLII)

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**Facts:** Lawyer rendered two accounts. Client paid first account but not second and applied for taxation of both accounts. Small Claims Court adjudicator reduced both bills by half

and ordered lawyer to repay client the difference. Lawyer's appeal was allowed. Supreme Court judge held that adjudicator lacked jurisdiction over account that had already been paid by client, and that adjudicator breached duty of fairness by making "negative credibility findings" against lawyer with respect to both accounts which warranted sending matter back to different adjudicator for redetermination. Client appealed.

**Held:** Appeal allowed. Judge erred in deciding that accounts that had already been paid did not fit within definition of "account" in s. 65 of *Legal Profession Act*, and therefore could not be subject to taxation. Lawyer's accounts may be subject to taxation, whether paid or not. Lawyer bears onus of proving reasonableness of his accounts at taxation. Parties to taxation were owed duty of fairness by adjudicator and were afforded such procedural protections throughout. Lawyer knew that his accounts and methods of record-keeping were seriously contested by client, and that inquiry would engage issues of credibility. Adjudicator's conclusions found reasonable support in evidence and should have been accorded considerable deference by judge on appeal. There was no basis for judge to conclude that adjudicator breached duty of fairness, either in how he conducted taxation or how he expressed result in written reasons. Adjudicator's decision (2010 NSSM 64 (CanLII)) affirmed.

**[Full Text]**

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***M. (C.) v. New Brunswick (Minister of Justice & Consumer Affairs)***

(2012), 19 R.F.L. (7th) 253; 2012 NBCA 45 (CanLII)

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**Facts:** Minister of Social Development sought guardianship in two separate cases. Fathers were denied legal aid. In each case, on father's request for state-funded legal counsel, province was ordered to provide lawyer to father. It was found that failure to provide lawyer to fathers constituted infringement of fathers' constitutional rights. Fathers were found to fall into statutory definition of parent. It was found that father in each case was natural father. It was found that fathers could not afford lawyers and had exhausted all possibilities for state-funded counsel. It was found that relief sought was serious and trials would be complex. It was found that fathers could not meaningfully participate in trials without assistance from counsel. Province appealed.

**Held:** Appeal allowed. The jurisprudence firmly established the presumptive requirement that an individual seeking state-funded counsel to challenge state intervention in child protection cases of this nature must have been exercising custody, care and control of the child at the heart of the application. The fathers had not been. Lower court orders for state-funded counsel set aside.

**[Full Text]**

**"Disbelief will be the catalyst to kill the billable hour[:]
'Churn that bill, baby!' scandal may actually
benefit the profession in the big scheme of things"**

Slayton, Philip, *Canadian Lawyer*, June 2013, pp. 16-17, at p. 17

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" …. What is remarkable about billing by the hour is the absence of serious push-back by clients. Why do they put up with a silly system that leads to their being over-charged and underserved? It's because the only real alternative to paying by the hour is making a subjective judgment about the value of the legal services received. That's difficult to do. It's easier and safer to assess a legal bill arithmetically, just checking the multiplication of hours by rates. If simple multiplication is the accepted method, and the multiplication is correct, then who can complain? But if delicate judgment about the worth of services is required, why, your judgment could be called into question: you might be second-guessed; there could be a lot of trouble. …. ."

**[Full Text]**

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**"Judge condemns deadlock in £3.5m divorce fee battle"**

Schlesinger, Fay, *The Times*, 17 March 2013

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"A wife who is fighting for the UK's biggest divorce payout from her 'property tycoon' husband became embroiled in a High Court battle with solicitors over a … £3.5 million no-win, no-fee arrangement. …. A conditional fee agreement was set up with a funding ceiling of … £3.5 million, her barrister Benjamin Williams told the High Court. If … [the wife] received the divorce payout, [her firm of solicitors] Bracewell Law would get a cut [as well as payment for legal services provided by the barrister and the solicitors up to £3.5 million. Mr. Justice Holman said he had never come across such an arrangement in the family court and Mr. Williams agreed that it was extraordinary. … [the wife] fell out with the firm, the court was told, and with a dispute over who was to blame, the parties found themselves at an impasse. [The solicitors] Bracewell Law claimed that Ms. Young owed about … £900,000 for legal services, to date, of the barrister, and solicitor's firm] because the contract was terminated prematurely. …. ."

**[Full Text]**

**"Lawyers squander their family fortune fighting each other in divorce courts"**

Gibb, Frances, *The Times*, 17 March 2013

"Divorce battles are notorious for leaving husbands and wives penniless while filling the pockets of lawyers. But accepted wisdom took a twist yesterday when it was revealed that two lawyers have quandered most of their multimillion-pound fortune fighting each other through the divorce courts. The couple have been criticized by a judge for 'wrecking the ship of their marriage, then turning their attention to the lifeboats'. …. ."

**[Full Text]**

**"Do you deduct time from your bill sheet for bathroom breaks?
And other billable-hour mysteries"**

Lamb, Patrick J., www.abajournal.com, 17 January 2013

"Some random questions about the billable hour: …. ."

**[Full Text]**

**"Plaintiff in landmark privacy case sued for not paying legal bills"**

Taddese, Yamri, *Law Times*, 11 March 2013, pp. 1, 4, at p. 1

"In a series of ironic twists, the lawyer who succeeded in bringing about the tort for invasion of privacy in Ontario has been facing accusations of incompetence by the victorious plaintiff [the lawyer's client] who has now found herself incurring more costs than gains from the groundbreaking case. Lawyer Christopher DuVernet, counsel for Sandra Jones, the plaintiff in the land mark privacy ruling in *Jones v. Tsige* [2012 ONCA 32 (CanLII)], successfully sued his former client after she failed to pay her legal tab [*DuVernet v. Jones* (2013 ONSC 928 (CanLII))]. In return, Jones [in a counterclaim in the lawyer's action] unsuccessfully accused

DuVernet of failing to represent her properly [2013 ONSC 928 (CanLII)]. The appeal court created waves last year when it recognized the new legal tort of intrusion upon seclusion that came out of Jones' lawsuit against her colleague, Winnie Tsige. Tsige, who was in a common law relationship with Jones' former husband, was snooping on her colleague's financial information from a work computer. She and Jones' ex-husband had a money-related dispute and she was seeking details of his finances.

**[Full Text]**

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**"Offers To Settle And Costs"**

Sherkin, Eric, *mondaq*, 13 May 2014

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"The recent decision of *Mayer v. 1474479 Ontario Inc.* [2014 ONSC 2622 (CanLII)] relates to a personal injury claim arising from a motor vehicle accident, but has some interesting tidbit relating to the general principles of proportionality as it relates to the determination of cost awards at the conclusion of trial. It also reminds counsel about the intricacies of crafting offers to settle. [Successful Plaintiff's claim for costs of about $421,000 entirely denied.] …. [Trial Justice Leach, in his endorsement deciding the costs issue, after a jury trial, stated that] if 'success' is defined by recovery of any positive amount, as suggested, then the plaintiffs in the case before me were 'successful' … to put it mildly [claiming $2-million; being awarded $119,300]. I have great difficulty regarding the outcome as a triumph for the plaintiffs, having regard to their demands and expectations … and the time and resources they apparently have devoted to the matter (as outlined in their bills of costs), all of which were entirely disproportionate to what the case was really worth, as determined by the jury. …. ."

**[Full Text]**

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***Fielding v. Fielding***

2014 CarswellOnt 30; (2014), 39 R.F.L. (7th) 109 (Ont. Sup. Ct. J.);
2014 ONSC 100 (CanLII)

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**Facts:** At a custody and access trial, it was determined that there was not pure alienation by father of three children in which mother was target. Mother was awarded sole custody of one child and father was awarded sole custody of two children. Both parties made offers to settle. Father applied for costs of $493,000 based on partial recovery costs to the date when his initial offer to settle was delivered, and full costs thereafter.

**Held:** Application granted. Father was more successful party at trial. Terms of father's offers to settle did not entitle him to full indemnity costs but offers constituted serious and legitimate efforts to settle issues and compared well to outcome of trial. Mother's offers contained terms less favourable to father and more favourable to her than final order. Father's offers to settle were more conducive to settlement and closer to trial outcome than mother's offers and father was more successful in relation to offers. Father's conduct in surreptitiously

recording mother warranted depriving him of part of costs of action. Father was entitled to costs on partial indemnity basis. Father was awarded costs fixed at $345,000, all inclusive, payable within 90 days. Mother had ability to pay and there was no reason to defer payment of costs.

**[Full Text]**

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***Hansen v. Mantei-Hansen***

2013 CarswellBC 3049 (B.C.S.C.), paras. 6-7; 2013 BCSC 1854 (CanLII)

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"6 The Court of Appeal has stated that there is no special rule for costs in custody cases. In *C. (S.J.) v. A. (S.C.)*, 2010 BCCA 31 (B.C. C.A.), relying on *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (B.C. C.A.), the court said:

> While it is apparent there are different approaches to the issue of costs in matters of custody and access in the B.C. Supreme Court, this Court has previously stated that the usual rule that 'costs follow the event' (that is, that the 'successful' party is entitled to costs) applies in matrimonial proceedings, subject to a discretion to refuse costs to the successful party in certain circumstances.

"7 In *C. (S.J.) v. A. (S.C.)*, an offer to settle had been made [by the successful party, with respect to parenting, consistent with the outcome of the parenting issue at trial]. The trial judge had ordered the unsuccessful party to pay costs but did not order additional costs pursuant to the offer to settle. The Court of Appeal overturned the trial judge's decision to award costs to the successful party and decided that in all the circumstances, the parties should bear their own costs. They then declined to consider the issue of double costs following an offer to settle because they had already decided that the parties should bear their own costs."

**[Full Text]**

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**"Nearly $19,000 in Costs Awarded Against Lawyer Who Accepts Settlement Offer Without Instructions"**

Maurer, Matt, *mondaq*, 29 January 2014

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" … the plaintiff's lawyer accepted an offer to settle from the defendant, knowing full well … [he] had no instructions to do so, in hopes that …. [he] could in turn convince … [his]

client to accept the (already accepted) offer. When the plaintiff refused to accept the offer, the defendant brought a motion to enforce the settlement. Justice Price held, correctly, that it would not be fair in the circumstances to bind the plaintiff to an offer that her lawyer accepted without her instructions and dismissed the motion. In doing so, Justice Price held that the plaintiff's lawyer would bear the substantial indemnity costs of *both* parties on the motion. As it turns out, those costs were not cheap. In a decision released last week, Justice Price has now put a figure on those costs, and they total nearly $19,000."

**[Full Text]**

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**"Ontario appeal court approves $750 rate, nearly $1 million bill[:]**
**Also endorses 'team approach' in handling family case"**

Schmitz, Cristin, *The Lawyers Weekly*, 17 May 2013, pp. 1, 9, at p. 1

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"In two rulings favourable to lawyers, the Ontario Court of Appeal has approved law firm bills in separate family law cases, including a nearly $1-million tab from a leading counsel whose hourly rate was $750.

"In *Stevens v. Stevens* … [2013 ONCA 267 (CanLII)], the appeal court dismissed Joel Stevens' challenge to a lower court order last year requiring him to pay Pamela Stevens $924,057 as full recovery for her legal costs in their battle over the validity of their marriage contract. Stevens argued the hourly rates charged by his wife's lawyers were excessive, but the appeal court held there was 'no serious challenge' to the hours spent, and rates claimed by senior family law counsel Stephen Grant and his team. ….

" … [The same result occurred] in *Bales Beall LLP v. Fingrut* … [2013 ONCA 266 (CanLII)], a decision released the same day as Stevens. A different appellate panel rejected client Karen Fingrut's bid to restore an assessment officer's report slashing her $224,757 legal bill for Bales Beall's work on her matrimonial case to $101,111. …. ."

**[Full Text]**

***Galganov v. Russell (Township)***

2012 CarswellOnt 7400; (2012) 350 D.L.R. (4th) 679 (Ont. C.A.); 2012 ONCA 410 (CanLII)
Application to S.C.C. for leave to appeal refused: 2012 CarswellOnt 15190, 06 December 2012

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**Facts:** Respondent Township R was successful in defence of municipal by-law providing for bilingual commercial signs. R brought successful motion for personal costs against appellant B, counsel for appellants who unsuccessfully attempted to quash by-law. B appealed.

**Held:** Appeal allowed. Application judge's decision to award costs personally against B was based on cumulative effect of what she found to be his negligent conduct which caused R to incur costs unnecessarily. Application judge erred in principle by not separating B's conduct from that of his clients in respect of attempt to cross-examine R's mayor. She also erred in using hindsight with respect to costs related to proposing one of expert witnesses. These incidents were so important to, and so intertwined with, her overall conclusion, that award of costs against B personally had to be set aside.

**[Full Text]**

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***Fontaine v. Canada (Attorney General)***

2012 CarswellBC 3529 (B.C.S.C.), paras. 53 (in part)-54; 2012 BCSC 1671 (CanLII)

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53 …, the Court retains the authority to issue costs orders against solicitors personally as a facet of its inherent jurisdiction. The Court of Appeal in *Nazmdeh* [*v. Ursel* (2010), 317 D.L.R. (4th) 271 (B.C.C.A.)] also reviewed the scope of the Court's authority to order 'special costs'. In the context of inherent jurisdiction, the Court of Appeal, having reviewed the leading English cases on the topic, stated as follows at paras. 49 and 50:

> [49] The language of these cases describes a range, or a spectrum of conduct, which may or may not attract an order against a lawyer personally to pay party and party costs under the court's inherent jurisdiction. Conduct at the most innocent end of the spectrum, such as mere mistake, error of judgment, or even negligence (which is not of a "serious character", as per Lord Maugham) was seen as an insufficient basis to justify such an order. More blameworthy conduct, such as gross negligence, professional misconduct, or serious dereliction of duty was

> thought to justify an order for costs against a lawyer. The inherent jurisdiction test in general terms then was "serious misconduct".
>
> [50] Conduct at the most serious end of the spectrum, such as criminal conduct, peculation (embezzlement), mala fides, or personal obliquity (indirectness or crookedness of thought or behaviour) was said in those cases not to be necessary to support such an order, but clearly would have supported such an order given that such conduct is beyond the threshold of "serious misconduct".

54 In reaching this conclusion, the Court of Appeal quoted Lord Wright's comments at pp. 508-509 in the House of Lords decision in *Myers*, which is aptly reproduced here:

> ... The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally. ... The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. ... It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term "professional misconduct" has often been used to describe the ground on which the court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the court and to realize his duty to aid in promoting, in his own sphere, the cause of justice.

(Emphasis added)

**[Full Text]**

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***Stevens v. Stevens***

2012 CarswellOnt 15385; (2012), R.F.L. (7th) 19 (Ont. Sup. Ct. J.);
2012 ONSC 6881 (CanLII)

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**Facts:** Parties were married in 1991 and separated in 2007. Parties had three daughters, born in 1992, 1994 and 1996. Father started computer company in 1994 and earned significant income from this company for duration of marriage. Mother did not work outside home except for some part-time work for father's company. Mother inherited significant money from her father's trust, with father's intention being that she would invest this money. Both parties obtained separate legal advice and entered marriage contract that would deal with financial implications of separation. After contract was signed by both parties error was discovered.

Contract inaccurately stated that mother would give father full value of matrimonial home, instead of negotiated half of value. Upon discovering error lawyer who drafted contracted and her law firm were added as third parties. Mother's action to find contract invalid, for spousal and child support and for equalization of family property was allowed. Mother and third parties were entitled to costs on substantial indemnity basis. Father's manner throughout litigation was unreasonable and he often acted in bad faith. Father failed to proceed with motion for which trial was adjourned one year, and eventually withdrew motion. Father failed to admit 30 facts in request to admit which were later admitted at trial. Father did not accurately or completely disclose all information sought in timely manner, and for some material information did not provide any disclosure. Father tried to enforce contract he knew to be fundamentally flawed as he was aware of mistake and attempted to take advantage of it. Father's behaviour unnecessarily increased mother's costs as well as increasing preparation and court time.

**Held:** Mother entitled to costs on substantial indemnity basis from onset of litigation. Father ordered to pay mother's costs of $924,058.

**[Full Text]**

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***Burns v. Krebss***

2013 CarswellOnt 5129; (2013), 28 R.F.L. (7th) 481 (Ont. Ct. J.); 2013 ONCJ 226 (CanLII)

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**Facts:** Parties had sexual encounter, resulting in child in 2011. Child lived primarily with woman and maternal grandmother following birth. Man's annual income was $67,000, and woman's annual income was $17,881 from child support and child tax credits. Woman's motion for interim spousal support was dismissed. Self-represented man sought costs.

**Held:** Man was entitled to costs. Costs to be fixed at $1,500. This was not situation in which costs should be borne personally by woman's counsel. Although motion for spousal support was misguided given absence of parties' relationship, counsel did not appear to act in bad faith or intend to cause delay. Counsel presumably acted on woman's instructions.

**[Full Text]**

***Solem v. Solem***

2013 CarswellOnt 8639; (2013), 33 R.F.L. (7th) 120 (Ont. Sup. Ct. J.);
2013 ONSC 4318 (CanLII)

**Facts:** Four children lived in Norway until mother moved with them to Ontario in 2011 with consent she claimed that she received from their father. Father asserted that consent mother provided to authorities had been falsified. Father offered to settle matter by requesting mother voluntarily return children to Norway but she did not comply. Father brought successful application for return of children to Norway under Hague Convention on the Civil Aspects of International Child Abduction, 1980. Motion for costs made by self-represented father.

**Held:** Costs award on substantial indemnity basis, adequately reflected father's offers to settle. Father had offered to settle matter and thus took reasonable steps to avoid costly litigation.

**Note:** Father awarded $3,580 as costs for travel to Norway (2013 CarswellOnt 8639). Father additionally awarded, as substantial indemnity costs, $8,000.00 of $11,306.62 legal bill he incurred in Norway (2013 CarswellOnt 16977).

**[Full Text]**

***Ben-Lolo v. Wang***

2012 CarswellOnt 1085; (2012), 12 R.F.L. (7th) 121 (Ont. Sup. Ct. J. (Div. Ct.)

**Facts:** Parties commenced cohabitation in 2007. Woman purchased condominium. Man was undischarged bankrupt. Following separation in 2009, parties disputed whether man contributed to purchase of condominium. Man obtained *ex parte* order in Family Court for Certificate of Pending Litigation to be registered against condominium. Order was set aside and condominium proceeds were to be held in trust. Motions judge dismissed man's application on ground that undischarged bankrupt had no standing to bring application without obtaining leave to proceed. Motions judge awarded woman costs of $9,046 against man's lawyer personally. Motions judge held that lawyer, in commencing improper action by undischarged bankrupt, acted negligently, or in bad faith under R. 57.07(1) of Rules of Civil Procedure. Lawyer appealed costs order made against her personally.

**Held:** Appeal allowed. Costs order was set aside. Motions judge erred when she

concluded that R. 24(9) of Family Law Rules ("Rules") set lower standard for award of costs against solicitor personally in family law proceedings than in other civil proceedings. Rule 24(9) of Rules allowed costs to be awarded where lawyer had "run up" costs without reasonable cause or had wasted costs. Such wording required negligence, inappropriate conduct, or abuse of process on part of lawyer. Motions judge erred in finding that lawyer acted improperly in commencing application. Lawyer may have made error in judgment in continuing proceeding without obtaining permission leave to proceed on behalf of her client, an undischarged bankrupt, but conduct did not rise to level of abuse of process, negligence, or impropriety that warranted personal order of costs.

**[No Full Text]**

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***Baker v. Harvey***

2011 CarswellOnt 15392; (2011), 12 R.F.L. (7th) 339 (Ont. Sup. Ct. J.);
2011 ONSC 6191 (CanLII)

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**Facts:** Parties had child. They were never married. House was purchased in names of both parties. Man brought application for order that he had trust interest in home. Man brought motion to change quantum of child support paid in respect to son. Application granted and motion dismissed. Written submissions were received on costs.

**Held:** Costs of $1,785.75 were awarded against man payable to woman within 30 days. Woman was largely successful on number of issues. Actions of man's lawyer before and during trial significantly prolonged hearing. There were no formal offers to settle. Man's testimony was repetitive, prolix, and often of marginal relevance. No costs were awarded to man. Most of issues that were litigated at length did not result in success for man and his conduct on one issue of partial success disentitled him to any partial costs. Woman was self-represented and her claim for costs was based on amounts that she paid to lawyer in efforts to settle matter out of court. While costs for prior motions in Ontario Court of Justice or costs for normal trial attendance would not be allowed, it did appear that significant preparation time was devoted, by woman, to case which to great extent made court's assessment of case less complex. Amounts of $1,000 for preparation time and $500 for attendance at trial prolonged by manner in which man approached issues were awarded.

**[Full Text]**

***Patton-Casse v. Casse***

2011 CarswellOnt 11047; (2011), 8 R.F.L. (7th) 399 (Ont. Sup. Ct. J.); 2011 ONSC 6188 (CanLII)

**Facts:** Parties were involved in matrimonial proceedings. After several years of litigation, parties referred matter to arbitration. Prior to arbitration, mother submitted offer to settle. Father made series of offers, last of which was made when parties were two days into arbitration hearing. Arbitrator's award was issued five months later. Father appealed award and brought motion to stay implementation of award. Father made offer to settle motion, and mother accepted father's offer which provided for $50,000 payment to mother. On July 22, 2011, arbitration award was set aside in part. Hearing on costs was held.

**Held:** Mother was awarded costs of $157,202.20 (including expense of her retaining forensic accountant to testify about father's income). Costs were assessed in light of ultimate result obtained. To look at costs for each step in proceedings, or on issue by issue basis, did not sufficiently honour goal of awarding costs in family law litigation.

**[Full Text]**

***Kawana v. Shemal***

2011 CarswellBC 2496; (2011), 8 R.F.L. (7th) 438 (B.C.S.C.); 2011 BCSC 1267 (CanLII)

**Facts:** Parties married in Islamic religious ceremony in July 2004. They separated in January 2008. Parties had two children, M, born August 1, 2005, and Y, born January 4, 2007. In March 2008, parties signed agreement dealing with custody, support, sale and division of family home, line of credit, and debt owed to mother's brother. On March 18, 2008, final consent order was made that incorporated and expanded upon terms of parties' agreement. Father refused to sign consent order until after commencement of trial, and failed to make any payment of child support after August 2008. On January 10, 2010, mother made offer to settle which father did not accept. Mother sought costs of trial. Hearing on costs was held.

**Held:** Mother was awarded total costs and disbursements of $82,235.56. Award of double costs for last six days of trial was appropriate. Although settlement offer was defective because it was sent to e-mail address of father's counsel other than her address for delivery, father's counsel confirmed receipt of mother's settlement offer. Mother's offer was reasonable

and ought to have been accepted within seven days of commencement of trial. Father would have been better off to have accepted mother's settlement offer. Although award of double costs would cause some financial hardship to father, it was not factor which militated against award of double costs. Father substantially increased time and cost of trial.

**[Full Text]**

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***Sandhu v. Sandhu***

2012 CarswellBC 2368; (2012), 23 R.F.L. (7th) 126 (B.C.S.C.); 2012 BCSC 1183 (CanLII)

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**Facts**: Wife was successful in family law proceeding, which included claims for parenting, child and spousal support, and matrimonial property division. She was granted costs against the husband in amount of $124,480. Husband subsequently made an assignment in bankruptcy under the *Bankruptcy and Insolvency Act* ("BIA"). Wife alleged husband took this step to avoid paying the costs. BIA section 178(1(c), however, provides that discharge of a bankrupt does not relieve the bankrupt of any pre-existing obligation for child or spousal support. Jurisprudence has interpreted this section to include costs incurred to obtain child or spousal support. Wife applied for order apportioning costs; such that the portion of costs, payable to her by the husband, attributable to her obtaining child and spousal support, survived the husband's bankruptcy and continued to be payable by the husband to the wife.

**Held**: Twenty-five per cent of the costs were attributed to the wife obtaining child and spousal support.

**[Full Text]**

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***McCash v. McCash***

2012 CarswellOnt 12555; (2012), 25 R.F.L. (7th) 235 (Ont. Ct. J.); 2012 ONCJ 635 (CanLII)

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**Facts:** Parties married in April 2001 and separated in August 2010. Parties had four children. In 2006, father developed mental health issues. In December 2010, mother and children started living with paternal grandparents. Mother brought successful motion for summary judgment on various issues including custody, access and restraining order. Father brought unsuccessful motion for various relief including custody and unsupervised access. Hearing on costs was held.

**Held:** Father was ordered to pay mother costs of $7,900. Mother was successful party.

Issues were important to mother. Issues were not legally complex, but case had lengthy history. Mother had acted reasonably. Father had consistently acted in vexatious, manipulative and harassing fashion. Mother's lawyer's rates were reasonable, and time spent on case was reasonable ($225.00 per hour charged by counsel admitted to Bar in 2009). Disbursements claimed were reasonable and appropriate.

**[Full Text]**

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***Young v. Arthur***

[2012] O.J. No. 1833 (Ont. Ct. J.); 2012 ONCJ 237 (CanLII)

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**Facts:** Parties had two children and separated after 13 years of marriage. Parties made separation agreement, which included provision for shared parenting. When children began living with mother fulltime, she sought review of access arrangements and child support provisions of agreement. Parties settled all issues except costs, at settlement conference.

**Held:** Mother was entitled to costs of $5,000 as she was successful party and was forced to commence litigation because of unreasonable position of father, Mr. Arthur. Counsel's rate and time spent were reasonable. S. O'Connell J:

"47 In summary, I conclude that Ms Young is entitled to her costs in this proceeding. She was required to commence the application because of the position of Mr. Arthur and the final settlement indicates that she was justified. Ms Young made early, consistent and reasonable offers to settle issues in dispute prior to the commencement of proceedings. Mr. Arthur did not. The relief sought in her application is ultimately what she achieved in the final result.

"48 Ms. Berry, Ms Young's counsel, has filed a Bill of Costs which is detailed and organized. Ms. Berry is a family lawyer who was called to the bar in 2008. Her hourly rate is $300.00, which is not unreasonable. The time spent on the case, including correspondence, meetings, drafting of documents and attendance at court, was reasonable. On a full indemnity basis, Ms Young's legal costs, including disbursements and taxes, total $7,481.30."

**[Full Text]**

***Ross v. Ross***

2012 ONSC 3205 (CanLII), paras. 1, 4, 11-12

Mesbur J. [Endorsement as to costs]:

"[1] I have now received the parties' submissions on costs on the applicant's unsuccessful motion to change [child support]. ….

"[4] First, when I look at the motion to change itself, and the applicant's claim to have the respondent found in contempt, it is the respondent who has been overwhelming[ly] successful. He is entitle to costs; the applicant is not. ….

"[11] The respondent's counsel has submitted a comprehensive bill of costs. I have no difficult accepting the hours spent, or the actual billing rates charged. The respondent's counsel is, however, only entitled to full recovery costs from March 27[2012] onward [March 27, 2012 being the date of an offer to settle from the respondent which impressed Mesbur J.]. Having regard to the Notice to the Profession in the *Rules of Civil Procedure* concerning costs, I accept the rates there as reasonable for partial recovery costs. Therefore, until March 27 [2012], Ms. Seaton is entitled, as counsel with more than 20 years' experience, to a rate of $350 per hour. Ms. Keshwani is entitled to $60 per hour for the period she was an articling student, and to $225 per hour as a lawyer with less than 10 years' experience. Similarly, the law clerk's time can be charged at a maximum of $80 per hour for the time when partial recovery rates apply.

"[12] When I apply these adjusted rates to the time spent I conclude the respondent is entitled to his costs fixed at $23,490 (rounded) for fees plus $3,053.70 for HST, for a total of $26,543.70."

**[No Full Text]**

***Shand v. Shand***

2012 CarswellOnt 3499; (2012), 17 R.F.L. (7th) 206 (Ont. Sup. Ct. J.);
2012 ONSC 1863 (CanLII)

**Facts:** Parties were married on June 27, 1980 and separated in 2009. Parties had three adult children, H, age 30, L, age 28, and A, age 22. Wife worked for insurance brokerage from 1988, earning $48,000 per year, and quit in July 2009. In October 2010, wife started another job, and was paid same annual salary of $48,000. Wife quit her job on March 25, 2011, declared

bankruptcy, and had not worked since because of alleged health issues. Husband worked for lumber company and earned $75,000 per year. Husband spent approximately $2,000 per month servicing debt over what he earned. On September 22, 2010, husband made offer to settle, which wife did not accept. At trial, wife's claim for spousal support was dismissed. Hearing on costs was held.

**Held:** Wife was ordered to pay total costs of $20,106.83, inclusive of HST. Order obtained at trial by husband was as favourable or more favourable than terms of offer to settle made by him. Evidence of wife's untruthfulness in trial testimony among multiple factors considered. Hourly rate of husband's counsel, practising 40 years, reasonable: $350.00 if partial indemnity costs granted; $475.00 if substantial indemnity granted. Husband was entitled to partial indemnity costs to date offer was served, and full recovery costs from that date onwards.

**[Full Text]**

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***Johanns v. Fulford***

2010 CarswellOnt 11011; (2010), 15 R.F.L. (7th) 148 (Ont. Ct. J.);
2010 ONCJ 756 (CanLII)

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**Facts:** Parties were, on and off, in intimate relationship from summer of 2004 to November 2005. Parties had one child, H, born July 22, 2006. Number of orders were made regarding custody, access and child support. Two weeks of trial were scheduled in fall of 2009. Shortly before each scheduled week, parties settled issues, except for reserving issue of costs to trial judge. Both orders, reflecting settlement reached, resulted from acceptance by father of offers made by mother. Father sought costs of $161,943.38 and mother sought costs of $287,477.89. Bill of costs of mother's solicitor and accounts of mother's two prior solicitors did not in many instances set out what work was referable to prior steps such as conferences and motions. Mother's current solicitor's bill of costs revealed some work that could not properly be included in cost award related to settlement. In addition, bill of costs detailed work done by number of solicitor's staff all related to same event. Hearing on costs was held.

**Held:** Father was ordered to pay mother costs of $65,000 for fees and disbursements, inclusive of GST. Mother's litigation behaviour did not deprive her of costs. There was no evidence that mother breached access order. Prior to flurry of offers that settled custody and access, mother made six different written proposals to resolve these issues. Father was not guilty of bad faith. However, father's litigation behaviour was unreasonable. Father commenced litigation barely one month after H's birth. Father did not concede issue of custody until eleventh hour even though he was willing to agree that mother have custody from early on in case. Father did not demonstrate either acceptance of duty to pay proper support, or genuine desire to settle issue on reasonable terms.

**[Full Text]**

***Johnstone v. Locke***

2012 CarswellOnt 2198 (Ont. Sup. Ct. J.); 2012 ONSC 1717 (CanLII)

**Facts:** Mother and father separated in 2003. Mother and father had one child, M, who was nine years old. Woman, J, began to live with father in December 2004, married in May 2007, and separated in December 2008. Both mother and father approved of and encouraged J's relationship with M. J was involved in all aspects of M's care, and came to be known as M's "Momma". After J and father separated, J sought custody of M. Following J's application, there was increased conflict between all parties as it pertained to M and time she spent with J. On December 22, 2010, order was made providing J with access. Access did not occur as ordered, as M resisted going to J's house. J's claim for custody of M was dismissed at trial. Hearing on costs was held.

**Held:** J was ordered to pay father costs of $30,397. Some conduct of each party had been unreasonable. J was unreasonable in seeking sole custody of M and in making last minute demand for acknowledgement that access was in M's best interests. However, amount was reduced because J was entitled to costs with respect to portion of trial devoted to allegations of contempt by father. Further, no costs were payable to mother. Mother did not include any claim for her own costs, and findings at trial amounted to finding of bad faith against mother and father during retaliatory period of time in summer 2009.

**[Full Text]**

***Imineo v. Price***

2012 CarswellOnt 1036; (2012), 14 R.F.L. ($7^{th}$) 235 (Ont. Ct. J.); 2012 ONCJ 55 (CanLII)

**Facts:** Husband and wife were married in 1993. While married, wife commenced relationship with another man ("father"), and they had one child, S, born in 2000. S came to know father as family friend whom she called "uncle". Mother maintained that husband was actual father of S, but paternity test proved that father had fathered S. Psychologist made recommendation that father should be involved in S's life and that S should be aware of her parentage. Father maintained that he was close with S throughout her upbringing. Father brought successful claim for access to S and for declaration that S should be informed of her parentage. Father claimed costs of his counsel and, after he chose to self-represent, for himself. His counsel had served, on the husband and wife, but not filed, a bill of costs for $44,824.97. His counsel subsequently served, and filed, a bill of costs for the same proceeding in sum of

$64,227.99. Hearing on costs was held.

**Held:** Husband and wife were ordered to pay father $18,392.90, inclusive of all disbursements and applicable taxes for the period he was represented by counsel. Issues were extremely important and difficult for all parties. All parties conducted themselves appropriately throughout trial, despite highly emotional nature of issues. Although husband and wife did not initially agree with psychologist's recommendations, once trial decision was rendered, they complied immediately. Father's counsel's hourly rate ($300.00) was reasonable. Father, personally, was entitled to be reimbursed for his share of psychologist's assessment, as well as cost of psychologist preparing and attending trial. Father was also entitled to some of his lost wages as result of trial, as well as his other out of pocket expenses.

**[Full Text]**

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**"The New Brunswick Court of Appeal walks the talk:**
**Interest on a litigation loan constitutes a taxable disbursement"**

Thomson, Karen, *CBA National Insurance Law Section Newsletter*, May 2013
[Summary]

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A Plaintiff obtained a loan to finance civil litigation. In the subsequent litigation in New Brunswick Court of Queen's Bench, the Plaintiff was successful. The Court's judgment provided that the Plaintiff recover his costs of the litigation from the Defendant, including 'taxable disbursements'. The Plaintiff included, in his costs, interest of $14,158.45 on a litigation borrowing of $26,276.20. Reversing the Court of Queen's Bench, the Court of Appeal held that the litigation loan interest constituted a taxable disbursement under 2(14) of Tariff 'D' of the New Brunswick *Rules of Court*.

**[Full Text]**

# APPENDIX A - LOSS PREVENTION

## Table of Loss Prevention Bulletins published by Canadian Lawyers Insurance Association: May 1991 to April 2014

**[*Prepared by Kelly A. Hall, Senior Legal Assistant to David C. Day, Q.C., of Lewis, Day, St. John's, NL*]**

## LOSS PREVENTION

**Table of Loss Prevention Bulletins published by Canadian Lawyers Insurance Association: May 1991 to April 2014**

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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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**NOTE:** No Bulletins were published in 2004 or 2005

**LOSS PREVENTION BULLETIN EDITORS**

May 1991 to November 1997 issues: Barry Vogel Q.C. March 1998 to May 2001 issues: Peg James B. Ed., L.L. B. September 2001 to March 2002 issues: Barry Vogel Q.C. January 2003 to December 2003 issues: Tana P. Christianson April 2006 to Winter 2014 issues: Karen L. Dyck

## APPENDIX B – TABLE OF CONCORDANCE

**Canadian Bar Association's *Code of Professional Conduct* and Federation of Law Societies of Canada's *Model Code Of Professional Conduct***

**Note: Acknowledged is the Hurculean effort of Mark M. Orkin, Q.C., in his seminal comprehensive general treatment of lawyer responsibility, *Legal Ethics* 2nd Ed. (Toronto: Canada Law Book [Thomson Reuters Canada Limited], 2011), which includes, at pp. 231-275, a Table Of Concordance of the Canadian Bar Association's *Code of Professional Conduct* (i) with the Federation of Law Societies of Canada's *Model Code of Professional Conduct,* and (ii) with the codes of professional conduct of each of the provincial and territorial jurisdictions in Canada, other than Prince Edward Island, Nunavut Territory, and Northwest Territories.**

**Since preparation of that Table Of Concordance, reports Daphne Keevil Harrold, Policy Counsel to the Federation, the Federation's *Model Code of Professional Conduct* (i) has been implemented, with some revisions, in British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Newfoundland and Labrador; and (ii) has been approved, with some revisions, but not yet implemented, in Ontario and Quebec.**

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**http://www.flsc.ca/_documents/ModelcodeWTCrevdec2012FI.pdf**

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| Commentary 8 | FLSC Model Code: Ch. 2, Rule 2.01(2), Commentary |
| Commentary 9 | FLSC Model Code: Ch. 2, Rule 2.01(2), Commentary |
| Commentary 10 | FLSC Model Code: Ch. 2, Rule 2.01(2), Commentary |
| Commentaries 11-14 | FLSC Model Code: Ch. 2, Rule 2.01(2), Commentary |
| **Ch. III, Rule** | FLSC Model Code: Ch. 2, Rule 2.02(2) |
| Commentary 1 | FLSC Model Code: Ch. 2, Rule 2.02(2), Commentary |
| Commentary 2 | FLSC Model Code: Ch. 2, Rule 2.02(2), Commentary |
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| Commentary 6 | FLSC Model Code: Ch. 2, Rule 2.02(4), Commentary |
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| Commentary 8 | FLSC Model Code: Ch. 2, Rule 202(7), Commentary |
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| Commentary 10 | FLSC Model Code: Ch. 2, Rule 202(2), Commentary |
| Commentary 11 | FLSC Model Code: Ch. 6, Rule 6.08, Commentary |
| Commentary 12 | |
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| **Ch. IV, Rule 2** | FLSC Model Code: Ch. 2, Rule 2.03(3) |
| **Ch. IV, Rule 3** | FLSC Model Code: Ch. 4, Rule 4.06(3) |
| **Ch. IV, Rule 4** | FLSC Model Code: Ch. 2, Rule 2.03(4) |
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| Commentary 13 | FLSC Model Code: Ch. 2, Rule 2.03(1), Commentary |
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| Commentary 15 | FLSC Model Code: Definitions. "Client". Commentary |
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| **Ch. VI, Rule 3** | FLSC Model Code: Ch. 2, Rule 2.04(28) |
| **Ch. VI, Rule 4** | FLSC Model Code: Ch. 2, Rule 2.04((2), Commentary |
| **Ch. VI, Rule 5** | FLSC Model Code: Ch. 2, Rule 2.04(38) |
| **Ch. VI, Rule 6** | FLSC Model Code: Ch. 6, Rule 6.08 |
| Commentary 1 | |
| Commentary 2 | FLSC Model Code: Ch. 2, Rule 2.04(2), Commentary |
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| Commentary 4 | FLSC Model Code: Ch. 6, Rules 6.03(1), Commentary |
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| Commentary 1 | FLSC Model Code: Ch. 2, Rule 2.05(1), Commentary |
| Commentary 2 | FLSC Model Code: Ch. 2, Rule 2.05(2) |
| Commentary 3 | FLSC Model Code: Ch. 2, Rule 2.05(3) |
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| Commentary 5 | FLSC Model Code: Ch. 2, Rule 2.05(1), Commentary |
| Commentary 6 | FLSC Model Code: Ch. 2, Rule 2.05(6), Commentary |
| **Ch. IX, Rule** | FLSC Model Code: Ch. 4, Rules 4.01(1) and 4.01(5) |
| Commentary 1 | FLSC Model Code: Ch. 4, Rule 4.01(1), Commentary |
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| Commentary 2(k) | FLSC Model Code: Ch. 4, Rule 4.01(2)(m) |
| Commentary 2(l) | FLSC Model Code: Ch. 4, Rule 4.01(2)(o) |
| Commentary 3 | FLSC Model Code: Ch. 4, Rule 4.01(4) |
| Commentary 4 | FLSC Model Code: Ch. 4, Rule 4.01(4), Commentary |
| Commentary 5 | FLSC Model Code: Ch. 4, Rule 4.02(1), Commentary |
| Commentary 6 | FLSC Model Code: Ch. 4, Rule 4.03 |
| Commentary 7 | FLSC Model Code: Ch. 2, Rule 4.01(1), Commentary |
| Commentary 8 | FLSC Model Code: Ch. 2, Rule 2.02(4) |
| Commentary 9 | FLSC Model Code: Ch. 4, Rule 4.01(3), Commentary |
| Commentary 10 | FLSC Model Code: Ch. 4, Rule 4.01(1), Commentary |

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**and**

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**http://www.flsc.ca/_documents/ModelcodeWTCrevdec2012FI.pdf**

| *CBA CODE OF PROFESSIONAL CONDUCT* | *FEDERATION OF LAW SOCIETIES OF CANADA MODEL CODE* |
|---|---|
| Commentary 11 | FLSC Model Code: Ch. 4, Rule 4.01(1), Commentary |
| Commentary 12 | FLSC Model Code: Ch. 4, Rule 4.01(2), Commentary |
| Commentary 13 | FLSC Model Code: Ch. 4, Rules 4.01(7) and 4.01(8), Commentary |
| Commentary 14 | FLSC Model Code: Ch. 4, Rule 4.01(6), Commentary |
| Commentary 15 | |
| Commentary 16 | FLSC Model Code: Ch. 4, Rule 4.01(5), Commentary |
| Commentary 17 | FLSC Model Code: Ch. 4, Rule 4.01(1), Commentary |
| Commentary 18 | FLSC Model Code: Ch. 4, Rule 4.04(2) |
| Commentary 19 | FLSC Model Code: Ch. 4, Rule 4.01(2), Commentary |
| Commentary 20 | FLSC Model Code: Ch. 4, Rule 4.01(1), Commentary |
| Commentary 21 | FLSC Model Code: Ch. 4, Rule 4.05(1) to (6) |
| **Ch. X, Rule** | FLSC Model Code: Ch. 6, Rule 6.04(1) |
| Commentary 1 | FLSC Model Code: Ch. 6, Rule 6.04(1), Commentary |
| Commentary 2 | FLSC Model Code: Ch. 6, Rule 6.04(1), Commentary |
| Commentary 3 | |

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| *CBA CODE OF PROFESSIONAL CONDUCT* | *FEDERATION OF LAW SOCIETIES OF CANADA MODEL CODE* |
|---|---|
| Commentary 4 | FLSC Model Code: Ch. 6, Rule 6.04(1), Commentary |
| Commentary 5 | |
| Commentary 6 | |
| Commentary 7 | |
| Commentary 8 | |
| **Ch. XI, Rule (a)** | FLSC Model Code: Ch. 2, Rule 2.06(1) |
| **Ch. XI, Rule (b)** | FLSC Model Code: Ch. 2, Rule 2.06(10), Commentary |
| Commentary 1 | FLSC Model Code: Ch. 2, Rule 2.06(10), Commentary |
| Commentary 2 | FLSC Model Code: Ch. 3, Rule 3.01(1), Commentary |
| Commentary 3 | |
| Commentary 4 | FLSC Model Code: Ch. 2, Rule 2.06(1), Commentary |
| Commentary 5 | FLSC Model Code: Ch. 2, Rule 2.06(4) |
| Commentary 6 | FLSC Model Code: Ch. 2, Rule 2.06(5) |
| Commentary 7 | FLSC Model Code: Ch. 2, Rule 2.06(1), Commentary |
| Commentary 8 | FLSC Model Code: Ch. 2, Rule 2.06(7), Commentary |
| Commentary 9 | FLSC Model Code: Ch. 2, Rule 2.06(7), Commentary |

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**http://www.flsc.ca/_documents/ModelcodeWTCrevdec2012FI.pdf**

| *CBA CODE OF PROFESSIONAL CONDUCT* | *FEDERATION OF LAW SOCIETIES OF CANADA MODEL CODE* |
|---|---|
| | (b) |
| Commentary 10 | FLSC Model Code: Ch. 2, Rule 2.06(2), Commentary |
| **Ch. XII, Rule** | FLSC Model Code: Ch. 2, Rule 2.07(1) |
| Commentary 1 | FLSC Model Code: Ch. 2, Rule 2.07(1), Commentary |
| Commentary 2 | FLSC Model Code: Ch. 2, Rule 2.07(8) |
| Commentary 3 | FLSC Model Code: Ch. 2, Rule 2.07(1), Commentary |
| Commentary 4 | FLSC Model Code: Ch. 2, Rule 2.07(7) |
| Commentary 5 | FLSC Model Code: Ch. 2, Rule 2.07(2), Commentary |
| Commentary 6 | FLSC Model Code: Ch. 2, Rule 2.07(3), Commentary |
| Commentary 7 | FLSC Model Code: Ch. 2, Rule 2.07(1), Commentary |
| Commentary 8 | FLSC Model Code: Ch. 2, Rule 2.07(9), Commentary |
| Commentary 9 | FLSC Model Code: Ch. 2, Rule 2.07(9), Commentary |
| Commentary 10 | FLSC Model Code: Ch. 2, Rule 2.07(9), Commentary |
| Commentary 11 | FLSC Model Code: Ch. 2, Rule 2.07(9)(b), Commentary |
| Commentary 12 | FLSC Model Code: Ch. 2, Rule 2.07(10), Commentary |
| Commentary 13 | |

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**http://www.flsc.ca/_documents/ModelcodeWTCrevdec2012FI.pdf**

| *CBA CODE OF PROFESSIONAL CONDUCT* | *FEDERATION OF LAW SOCIETIES OF CANADA MODEL CODE* |
|---|---|
| **Ch. XIII, Rule** | FLSC Model Code: Ch. 4, Rule 4.06(1) |
| Commentary 1 | FLSC Model Code: Ch. 4, Rule 4.06(1), Commentary |
| Commentary 2 | FLSC Model Code: Ch. 4, Rule 4.06(1), Commentary |
| Commentary 3 | FLSC Model Code: Ch. 4, Rule 4.06(1), Commentary |
| Commentary 4 | FLSC Model Code: Ch. 4, Rule 4.06(1), Commentary |
| Commentary 5 | FLSC Model Code: Ch. 4, Rule 4.06(2), Commentary |
| **Ch. XIX, Rule** | FLSC Model Code: Ch. 3, Rule 3.01(1) |
| Commentary 1 | AB: Ch. 5, Rule 1, Commentary G.1, 2. R. 1, C.1 |
| Commentary 2 | |
| Commentary 3 | |
| Commentary 4 | FLSC Model Code: Ch. 3, Rule 3.01(1), Commentary |
| Commentary 5 | FLSC Model Code: Ch. 3, Rule 3.01(1), Commentary |
| Commentary 6 | FLSC Model Code: Ch. 3, Rule 3.01(1), Commentary |
| Commentary 7 | FLSC Model Code: Ch. 3, Rule 3.01(2) |
| Commentary 8 | N&L: Ch. XIV, Commentary 7 |
| **Ch. XV, Rule** | FLSC Model Code: Ch. 1, Rule 1.01(2) |

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| *CBA CODE OF PROFESSIONAL CONDUCT* | *FEDERATION OF LAW SOCIETIES OF CANADA MODEL CODE* |
|---|---|
| Commentary 1 | FLSC Model Code: Ch.6, Rule 6.01(3), Commentary |
| Commentary 2 | FLSC Model Code: Ch. 6, Rule 6.01(1) |
| Commentary 3 | FLSC Model Code: Ch. 6, Rule 6.02(4) |
| Commentary 4 | |
| **Ch. XVI, Rule** | FLSC Model Code: Ch. 6, Rule 6.02(1) |
| Commentary 1 | FLSC Model Code: Ch. 6, Rule 6.02(1), Commentary |
| Commentary 2 | FLSC Model Code: Ch. 6, Rule 6.01, Commentary |
| Commentary 3 | FLSC Model Code: Ch. 6, Rule 6.02(1), Commentary |
| Commentary 4 | FLSC Model Code: Ch. 6, Rule 6.02(2) |
| Commentary 5 | FLSC Model Code: Ch. 6, Rule 6.02(3) |
| Commentary 6 | FLSC Model Code: Ch. 6, Rule 6.02(5) |
| Commentary 7 | FLSC Model Code: Ch. 6, Rule 6.02(11) |
| Commentary 8 | FLSC Model Code: Ch. 6, Rule 6.02(6) |
| Commentary 9 | FLSC Model Code: Ch. 6, Rule 6.02, Commentary |
| Commentary 10 | FLSC Model Code: Ch. 6, Rule 6.02(1) |
| Commentary 11 | |

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**http://www.flsc.ca/_documents/ModelcodeWTCrevdec2012FI.pdf**

| *CBA CODE OF PROFESSIONAL CONDUCT* | *FEDERATION OF LAW SOCIETIES OF CANADA MODEL CODE* |
|---|---|
| **Ch. XVII, Rule** | FLSC Model Code: Ch. 6, Rule 6.06 |
| Commentary 1 | FLSC Model Code: Ch. 6, Rule 6.06, Commentary |
| Commentary 2 | FLSC Model Code: Ch. 5, Rule 5.01(4) |
| Commentary 3 | FLSC Model Code: Ch. 5, Rule 5.04(1), Commentary |
| Commentary 4 | FLSC Model Code: Ch. 5, Rule 5.01(1), Commentary |
| Commentary 5 | FLSC Model Code: Ch. 5, Rule 5.01(1), Commentary |
| Commentary 6 | FLSC Model Code: Ch. 5, Rule 5.01(1), Commentary |
| **Ch. XVIII, Rule** | FLSC Model Code: Ch. 6, Rule 6.05(1) |
| Commentary 1 | FLSC Model Code: Ch. 6, Rule 6.05(1), Commentary |
| Commentary 2 | FLSC Model Code: Ch. 6, Rule 6.05(1), Commentary |
| Commentary 3 | FLSC Model Code: Ch. 4, Rule 4.01(1), Commentary |
| Commentary 4 | FLSC Model Code: Ch. 4, Rule 4.06(1), Commentary |
| Commentary 5 | FLSC Model Code: Ch. 6, Rule 6.05(1), Commentary |
| Commentary 6 | FLSC Model Code: Ch. 6, Rule 6.05(1), Commentary |
| Commentary 7 | FLSC Model Code: Ch. 6, Rule 6.05(1), Commentary |
| Commentary 8 | FLSC Model Code: Ch. 6, Rule 6.05(1), Commentary |

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| *CBA CODE OF PROFESSIONAL CONDUCT* | *FEDERATION OF LAW SOCIETIES OF CANADA MODEL CODE* |
|---|---|
| Commentary 9 | FLSC Model Code: Ch. 6, Rule 6.05(1), Commentary |
| Commentary 10 | FLSC Model Code: Ch. 6, Rule 6.05(1), Commentary |
| Commentary 11 | FLSC Model Code: Ch. 6, Rule 6.05(1), Commentary |
| Commentary 12 | FLSC Model Code: Ch. 6, Rule 6.05(1), Commentary |
| Commentary 13 | FLSC Model Code: Ch. 6, Rule 6.05(1), Commentary |
| **Ch. XIX, Rule** | FLSC Model Code: Ch. 1, Rule 1.01(2) |
| Commentary 1 | FLSC Model Code: Ch. 1, Rule 1.01(1), Commentary |
| Commentary 2 | FLSC Model Code: Ch. 1, Rule 1.01(1), Commentary |
| Commentary 3 | |
| Commentary 4 | FLSC Model Code: Ch. 6, Rule 6.07 |
| Commentary 5 | FLSC Model Code: Ch. 4, Rule 4.01(2)(c) |
| Commentary 6 | FLSC Model Code: Ch. 2, Rule 2.04(37), Commentary |
| Commentary 7 | FLSC Model Code: Ch. 6, Rule 6.01(2), Commentary |
| Commentary 8 | FLSC Model Code: Ch. 6, Rule 6.02(9), Commentary |
| Commentary 9 | FLSC Model Code: Ch. 2, Rules 40-41 |
| Commentary 10 | FLSC Model Code: Ch. 1, Rule 1.01, Commentary |

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| *CBA CODE OF PROFESSIONAL CONDUCT* | *FEDERATION OF LAW SOCIETIES OF CANADA MODEL CODE* |
|---|---|
| Commentary 11 | FLSC Model Code: Ch. 6, Rule 6.05(1), Commentary |
| **Ch. XX, Rule** | FLSC Model Code: Ch. 5, Rule 5.03(1) and (5), Commentary |
| Commentary 1 | FLSC Model Code: Ch. 5, Rule 5.03(5), Commentary |
| Commentary 2 | FLSC Model Code: Ch. 5, Rule 5.03(5), Commentary |
| Commentary 3 | |
| Commentary 4 | |
| Commentary 5 | FLSC Model Code: Ch. 5, Rules 5.03(5), Commentary |
| Commentary 6 | |
| Commentary 7 | FLSC Model Code: Ch. 5, Rules 5.03(3) and (4) |
| Commentary 8 | FLSC Model Code: Ch. 5, Rule 5.03(5), Commentary |
| **Ch. XXI, Rule 1** | FLSC Model Code: Ch. 4, Rule 4.07 |
| **Ch. XXI, Rule 2** | |
| Commentary 1 | FLSC Model Code: Ch. 4, Rule 4.07, Commentary |
| Commentary 2 | FLSC Model Code: Ch. 4, Rule 4.07, Commentary |
| **Ch. XXII, Rule** | |

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| *CBA CODE OF PROFESSIONAL CONDUCT* | *FEDERATION OF LAW SOCIETIES OF CANADA MODEL CODE* |
|---|---|
| Commentary 1 | |
| Commentary 2 | |
| Commentary 3 | |

## APPENDIX C – A PRACTICAL GUIDE

**Assessing Ethical Infrastructure in Your Law Firm:**
**A Practical Guide**
**by**
**The Canadian Bar Association**

# Assessing Ethical Infrastructure in Your Law Firm: A Practical Guide

Canadian Bar Association
Ethics and Professional Responsibility Committee

**Ethics and Professional Responsibility Committee, Canadian Bar Association**
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THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
INFLUENCE. LEADERSHIP. PROTECTION.

## INTRODUCTION

The Canadian Bar Association's Ethics and Professional Responsibility Committee has undertaken this project to encourage better "ethical infrastructure" in legal practice. The project's goal is to assist lawyers and law firms by providing practical guidance on law firm structures, policies and procedures to ensure that ethical duties to clients, third parties and the public are fulfilled. To this end, the Committee has prepared an Ethical Practices Self-Evaluation Tool to assist Canadian law firms and lawyers to systematically examine the ethical infrastructure that supports their legal practices. The Ethical Practices Self-Evaluation Tool can be found at Appendix A. Using a tool of this type is not only beneficial as a means of increasing professionalism but can also yield tangible risk management returns by reducing firm exposure to disciplinary complaints and malpractice actions.

## WHAT IS "ETHICAL INFRASTRUCTURE"?

Use of the term "ethical infrastructure" in the law firm context can be traced to Ted Schneyer, a law professor at the University of Arizona.[1] Schneyer defines "ethical infrastructure" as:

> Consist[ing] of the policies, procedures, systems, and structures—in short, the "measures" that ensure lawyers in their firm comply with their ethical duties and that nonlawyers associated with the firm behave in a manner consistent with the lawyers' duties.[2]

Aspects of a firm's ethical infrastructure might include, for example: centralized procedures for checking conflicts of interest; billing protocols; the use of template retainer letters; or the designation of an in-house ethics counsel. It is meant to be a broad, general term. Also, the term "ethical infrastructure" is best understood as including not only formal policies and procedures but also more informal aspects of workplace culture and practices that impact lawyers' ability to identify and resolve ethical issues.[3] Even if appropriate formal policies and procedures are in place, those measures may prove ineffective if the broader organizational culture does not facilitate and foster ethical compliance.[4]

## WHY TAKE AN INTEREST IN ETHICAL INFRASTRUCTURE?

Increased interest in law firm ethical infrastructure over the past several decades has been motivated, in large part, by perceived shortcomings inherent in conventional approaches which focus on disciplining individual lawyers "after the fact" rather than encouraging best practices by firms to avoid ethical breaches in the first place. Specific regulatory developments, particularly in Australia, have also contributed to a growing interest in ethical infrastructure.

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1 Ted Schneyer, "Professional Discipline for Law Firms?" (1991) 77 Cornell Law Review 1.

2 Ted Schneyer, "On Further Reflection: How 'Professional Self-Regulation' Should Promote Compliance with Broad Ethical Duties of Law Firm Management" (2011) 53 Arizona Law Review 577 at 585.

3 See, for example, Christine Parker et al, "The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour" (2008) 31(1) UNSW Law Journal 158 at 159-160 and Christine Parker and Lyn Aitken, "The Queensland 'Workplace Culture Check': Learning from Reflection on Ethics inside Law Firms" (2011) 24 Georgetown Journal of Legal Ethics 399.

4 See, for example, discussions in Milton C. Regan, "Moral Intuitions and Organizational Culture" (2007) 51 Saint Louis University Law Journal 941 and Christine Parker et al, "The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour" (2008) 31(1) UNSW Law Journal 158.

Conventional lawyer regulation regimes tend to deal with "after the fact" complaints against individual lawyers about alleged breaches of codes of professional conduct. Given that many lawyers practice together in firms, this focus on individual conduct fails to address much of what happens at a law firm that either encourages or deters ethical conduct. Recognition of this disconnect has resulted in a move towards examining ethical behaviour at law firms at an institutional level, in addition to an individual level. Although directly regulating law firms is one way to do this,[5] interest has also grown in approaches that focus on "education towards compliance"[6] and "proactive, management-based regulation."[7] This more preventive, educative model not only approaches the question of ethical compliance from an institutional perspective but also compensates for other limitations of the conventional complaints-based regulatory model: in particular, its tendency to be highly selective in its application, focus exclusively on minimum standards and be primarily reactive.[8]

The underlying idea is that regulators should look to implement more robust proactive measures to assist firms in developing effective ethical infrastructure. Regulatory developments in New South Wales (NSW) in Australia provide an excellent example of the positive effects of this proactive model of "education towards compliance". A number of years ago, the state passed legislation which permitted law firms to incorporate without restriction on non-lawyer ownership and, if they wish, to provide legal services in conjunction with non-lawyers. The legislative changes also included a requirement that incorporated legal practices implement "appropriate management systems". To provide guidance, the regulator and other stakeholders worked together to define criteria that would enable practitioners to evaluate whether their firms had appropriate management systems. A "self-assessment form" was developed with which incorporated legal practices could evaluate their compliance with ten stated objectives. The self-assessment form used in NSW can be found here. Other Australian states have now also passed legislation providing for self-assessment processes.[9]

The results of preliminary studies suggest that the NSW self-assessment process is highly effective. Among other things, these studies found:

- On average, the complaint rate for each incorporated legal practice after self-assessment was one third the complaint rate of the same practices before self-assessment, and also about one third the complaint rate of firms that were not incorporated and thus never required to self-assess.[10]
- A vast majority of firms reported that they revised firm policies or procedures relating to the delivery of legal services and many reported that they adopted new procedures.[11]
- A majority of firms reported that the self-assessment process was a learning exercise that helped them improve client service.[12]

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5 Adam Dodek, "Regulating Law Firms in Canada" (2001) 90 Canadian Bar Review 383.

6 The phrase "education towards compliance" has been used by the regulator in the Australian state of New South Wales. For a discussion, see, for example, Christine Parker, Tahlia Gordon, and Steve Mark "Regulating Law Firms Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37(3) Journal of Law and Society 446 at 468.

7 The term "proactive, management-based regulation" or "PMBR" is another term coined by Professor Schneyer, who defines it as consisting of "firm-designated lawyer-managers and proactive collaboration between firms and regulators as a complement to enforcing those duties in adversarial disciplinary proceedings." (Schneyer, *supra* note 2).

8 John Britton and Scott McLean, "Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era" (2008) 11 Legal Ethics 241 at 242-243.

9 Susan Fortney and Tahlia Gordon, "Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation" (forthcoming). For a discussion of practices in the state of Queensland, see Legal Services Commission, "Self-assessment audits" online: http://www.lsc.qld.gov.au/compliance/incorporated-legal-practices/compliance-audits/self-assessment-audits.

10 Christine Parker, Tahlia Gordon, and Steve Mark "Regulating Law Firms Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37(3) Journal of Law and Society 446 at 493.

11 Susan Fortney and Tahlia Gordon, "Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation" (forthcoming).

12 *Ibid*.

Although it is regulators of lawyers who are guiding the self-assessment processes in Australia, it has been said that the "main purpose" of this type of model is not regulatory correction but rather "to get firms to go through the process as a learning exercise to improve their own systems."[13]

Interestingly, one study of the NSW self-assessment process found that it made little difference to complaint rates what rating the firms gave themselves in the various categories. This finding led the authors of the study to conclude "[i]f self-assessment makes a difference, it must be the learning and changes prompted by the process of self-assessment that does so, not the actual (self-assessed) level of implementation or management systems."[14] As Christine Parker and Lyn Aitken explain:

> [I]t is probably the process of a firm attending to the need to consider what sort of ethical infrastructure it already has (seeking to self-critically describe its own ethical infrastructure), and then deciding for itself what formal ethical supports it needs (taking responsibility for normatively defining ethical infrastructure for itself) that is important in enabling ethical practice.[15]

With a view to assisting Canadian law firms to think about and examine their ethical infrastructure in a systematic way, the CBA Ethics and Professional Responsibility Committee has developed the Ethical Practices Self-Evaluation Tool in Appendix A. For those interested in learning more about ethical infrastructure, a reading list is provided at Appendix B.

## THE CBA SELF-EVALUATION TOOL

The CBA Ethical Practices Self-Evaluation Tool in Appendix A focuses on ten potential areas or aspects of law firm ethical infrastructure, grouped under three relationship categories:

### I. Relationship to Clients

1. *Competence*
2. *Client Communication*
3. *Confidentiality*
4. *Conflicts*
5. *Preservation of Clients' Property/Trust Accounting/File Transfers*
6. *Fees and disbursements*

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13 Christine Parker, Tahlia Gordon, and Steve Mark "Regulating Law Firms Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37(3) Journal of Law and Society 446 at 494.

14 *Ibid.* at 493.

15 Christine Parker and Lyn Aitken, "The Queensland 'Workplace Culture Check': Learning from Reflection on Ethics Inside Law Firms" (2011) 24 Georgetown Journal of Legal Ethics 399 at 406.

## II. Relationship to Firm Members

*7. Hiring*
*8. Supervision/Retention/Lawyer and Staff Wellbeing*

## III. Relationship to Regulator, Third-Parties, and the Public Generally

*9. Rule of Law and the Administration of Justice*
*10. Access to Justice*

In the CBA Ethical Practices Self-Evaluation Tool, each of the ten headings above are connected with: (1) an objective; (2) possible questions to ask in assessing compliance with this objective; (3) potential systems and practices to ensure the objective is met; and (4) examples of resources available.

The ten headings in the Self-Evaluation Tool were chosen following a review of professional codes of conduct and statistics on top areas of client complaints and malpractice claims. Thought was also given to how the Self-Evaluation Tool might include aspects of ethical infrastructure that reach beyond client-service issues and compliance with rules set out in codes of conduct. To this end, for example, firm practices are covered with regard to access to justice, and diversity and equality in hiring practices.

Although the ten chosen areas capture prominent concerns and risks in relation to ethical infrastructure in Canadian law firms, there is no particular "magic" to these areas. More areas could easily be added and a number of the areas deal with overlapping issues. Moreover, an instrument of this type will need to evolve with developments in the regulatory and practice environments.

The Committee did, however, consciously develops a relatively short list of topics and designed the Self-Evaluation Tool in a manner that engaged with these topics at a relatively general or "high" level. The aim in doing so was to make the tool manageable and flexible across practice contexts. In taking this approach, the Committee was inspired by the Australian model, which aims to "encourage practitioners and firms to take responsibility for developing their own personal ethical judgments, rather than just seeing compliance with professional conduct rules and management systems as the sum total of ethics."[16] The goal of the Self-Evaluation Tool is not to be prescriptive but rather to encourage exploration and discussion of firm practices. As such, the questions, practices and resources listed should be approached as suggestions rather than mandates. Lawyers are also encouraged to think creatively about what additional content could be appropriately and helpfully added to the Self-Evaluation Tool. Individual firms will have unique circumstances and needs to which lawyers should be attentive.

Finally, given that the Canadian legal profession is regulated in each province and territory, lawyers using the Self-Evaluation Tool should be cognizant of the unique rules that may apply in their jurisdictions and bear this in mind when reviewing listed resources developed in other provinces and territories. The resources listed should also be evaluated for their currency – ethical obligations under which Canadian lawyers operate evolve

[16] Christine Parker, Tahlia Gordon, and Steve Mark "Regulating Law Firms Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37(3) Journal of Law and Society 446 at 473.

and this evolution may result in some of the resources being out-of-date. The content listed under the heading “Examples of Resources Available” is a selection of material located on publically-accessible websites; additional resources exist and, in some cases, websites may have additional helpful content that is available to members only. The particular website on which content can be located is identified in each case, but there may be additional author information available on the linked documents themselves. If lawyers have any concern about the legal or regulatory applicability of a particular practice or resource, they should consult the relevant law society or seek independent legal advice. Nothing in the Self-Evaluation Tool should be interpreted as stating a standard of care.

# APPENDIX A: CBA Ethical Practices Self-Evaluation Tool

## I. RELATIONSHIP TO CLIENTS

### 1. Competence

Issues relating to competence give rise to significant risks for law firms. In Ontario, for example, LawPro reports that failures to know or apply the law accounted for approximately 2,703 claims and $9.1 million in costs between 1997 and 2007.[17] In 2007, the Law Society of British Columbia reported that four or more lawyers miss a limitation period or deadline each week.[18] Beyond the available statistics, many additional issues of competence undoubtedly exist, resulting in poor client service although never resulting in a formal complaint to the relevant law society or a civil malpractice action.

Given the complex and dynamic nature of legal practice, continuing legal education is essential to ensure the competent delivery of legal services. In the area of ethics, the availability of informal opportunities for lawyers to discuss and deliberate on ethical issues is likely to be particularly important.[19] Competence also goes beyond securing appropriate legal knowledge and skills, encompassing broader areas of concern, such as understanding of equity issues and the use of technology in practice.

| Objective | Possible questions to ask in assessing compliance with this objective | Potential systems and practices to ensure objective is met | Examples of available resources |
|---|---|---|---|
| **Clients receive competent legal services** | Do lawyers have appropriate and current knowledge of applicable substantive and procedural law in areas in which they practice?<br><br>Do lawyers apply appropriate skills in delivering legal services?<br><br>Does the law firm have appropriate resources for research to enable lawyers to access current knowledge?<br><br>Do lawyers comply with applicable deadlines and limitation periods?<br><br>Do lawyers and other members of the firm understand the technical and ethical aspects of using technology? | Systems are in place to ensure lawyers receive regular feedback on work product (for example, regular performance reviews are conducted; peer review, where appropriate, is encouraged).<br><br>Continuing education efforts are recorded and are considered in the context of performance reviews.<br><br>Lawyers prepare professional development plans that are reviewed by senior colleagues and considered in the context of performance reviews.<br><br>Checklists by matter type are used where appropriate. | Professional Management Practice Management Guideline (Law Society of Upper Canada)<br><br>Practice Checklist Manual (Law Society of British Columbia)<br><br>Checklists by fields of practice (Barreau du Québec)<br><br>Legal Research Checklist (Law Society of Saskatchewan)<br><br>Keeping Current (Nova Scotia Barristers' Society)<br><br>Making Knowledge Management Work (CBA)<br><br>Limitation period charts (LawPro) |

17 LawPro, "The Biggest Malpractice Risks" (online: http://www.practicepro.ca/facts/malpracticerisks.asp).

18 Law Society of British Columbia, "Stay tuned for more than 70 tips to prevent missed limitations and deadlines" (2007) *Benchers' Bulletin* (online: http://www.lawsociety.bc.ca/page.cfm?cid=790&t=70-tips-to-prevent-missed-limitations-and-deadlines).

19 See, for example, the discussion in Christine Parker et al, "The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour" (2008) 31(1) UNSW Law Journal 158.

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|---|---|---|---|
| | Do lawyers and other members of the firm have adequate awareness, knowledge and training in order to ensure that clients with disabilities and other equality-seeking groups receive competent legal services? | A system is in place for keeping lawyers up-to-date with changes in the law (for example, electronic updates are used or regular meetings are held).<br><br>Guidelines for the correct steps in conducting legal research are available to lawyers.<br><br>Dialogue on ethical questions is facilitated (for example, ethics "lunch and learn" seminars or "open door" policies with designated ethics counsel).<br><br>All firm lawyers receive training on and use bring-forward systems to keep track of key dates (for example, limitation periods, court and tribunal appearances, filing deadlines, undertakings, closing dates).<br><br>Technology training is made available and encouraged.<br><br>Ethical issues pertaining to the use of technology are raised and discussed.<br><br>All members of the firm receive training on the provision of services to persons with disabilities, language rights and cultural competence.<br><br>An accessibility policy is in place. | Time management/missed limitations (Lawyers' Insurance Association of Nova Scotia)<br><br>Missed Limitations and Deadlines: Beat the Clock (Law Society of British Columbia)<br><br>Saskatchewan Limitations Manual (Law Society of Saskatchewan)<br><br>Technology Practice Management Guidelines (Law Society of Upper Canada)<br><br>Guidelines for Practicing Ethically with New Information Technologies (CBA)<br><br>Guide des TI - Gestion et sécurité des<br><br>Technologies de l'information pour l'avocat et son équipe (Barreau du Québec)<br><br>Respectful Language Guideline (Law Society of British Columbia)<br><br>Accessible Customer Services (Law Society of Upper Canada)<br><br>Providing Legal Services to People with Disabilities (ARCH Disability Law Centre) |

## 2. Client Communication

Breakdowns in communication are a major source of complaints against lawyers. Client service issues, which include failures to communicate, amounted to 56% of the complaints received by the Law Society of Upper Canada in 2012.[20] As reported by the Lawyers' Insurance Association of Nova Scotia: "[t]he most common source of miscommunication is a simple one: lawyers routinely fail to realize how little they are actually saying - the "I'm Sure it was Obvious" effect….Nothing is ever obvious unless you made it obvious by spelling it out (preferably in writing)."[21]

| Objective | Possible questions to ask in assessing compliance with this objective | Potential systems and practices to ensure objective is met | Examples of available resources |
|---|---|---|---|
| **Communication with clients is clear, continuous and courteous** | Do clients and lawyers share the same understanding of terms and scope of the retainer?<br><br>Do lawyers keep clients adequately informed of the status of their representation?<br><br>Is client feedback actively solicited?<br><br>Are client complaints adequately dealt with internally? | Engagement letters and termination of engagement letters are used.<br><br>Policies are in place that ensure systematic recording of conversations with clients (for example, policies relating to archiving email and creating notes of client meetings and phone calls).<br><br>Client instructions are confirmed in writing.<br><br>Clients are provided with regular progress and costs updates with a frequency and in a form that suits their needs.<br><br>Clients are copied on important correspondence sent and received.<br><br>Client surveys are conducted to determine satisfaction with service.<br><br>Policies and procedures are in place for addressing client complaints. | Retainer Precedents (LawPro)<br><br>Communication Toolkit (Law Society of British Columbia)<br><br>Client Service and Communication Practice Management Guidelines (Law Society of Upper Canada)<br><br>Documenting/Effective Communication (Lawyers' Insurance Association of Nova Scotia)<br><br>Model Client Survey (Law Society of British Columbia)<br><br>Post-matter client service survey precedent (LawPro)<br><br>What Do You Do With Client Feedback? (CBA) |

[20] Law Society of Upper Canada, 2012 Annual Report – Performance Highlights, p. 19 (online: http://www.lsuc.on.ca/annual-report).

[21] Lawyers' Insurance Association of Nova Scotia, "Documenting/Effective Communication" (online: http://www.lians.ca/rpm/risk_management/documenting_effective_communication).

### 3. Confidentiality

Lawyers do not always take the care required to meet their duty of confidentiality to their clients. The Law Society of British Columbia, for example, advises in its practice management materials that it "receives a number of errors and omissions claims relating to lost or missing documents" and warns "there is always a danger of sensitive documents coming into the wrong hands."[22]

As technology becomes more and more integrated into lawyers' practices, ensuring the confidentiality of client information has become increasingly complex. Metadata—which can be understood as "data about data" or "information describing the history, tracking or management of an electronic document"[23]—has, in particular, given rise to new ethical issues and poses unique challenges to maintaining the confidentiality of client information.

| Objective | Possible questions to ask in assessing compliance with this objective | Potential systems and practices to ensure objective is met | Examples of available resources |
|---|---|---|---|
| **Client documents and communications are kept confidential in a manner consistent with lawyers' legal and ethical obligations** | Do lawyers and staff understand the importance of confidentiality and applicable duties of confidentiality as provided for by rules of professional conduct and case law?<br><br>Are lawyers aware of situations where disclosure of confidential information is either permissible or mandated by law?<br><br>Are lawyers familiar with the requirements of privacy legislation?<br><br>Is there adequate office security to ensure that confidential information—including electronic data—is secure?<br><br>Are lawyers and staff aware of confidentiality issues that may arise from technologies in use at the firm? | A written confidentiality policy is in place and signed by all lawyers and staff.<br><br>Lawyers and staff receive ongoing training on their duties of confidentiality.<br><br>Procedures are in place for dealing with situations where exceptions to duties of confidentiality may apply.<br><br>Appropriate security systems are in place with respect to physical and electronic data.<br><br>Measures are taken to ensure the confidentiality of electronic communications with or about a client (for example, encryption software where appropriate, and password-protection on firm computers and lawyers' smartphones).<br><br>Technology training, including training on issues of confidentiality and privacy, is made available and is encouraged. | Sample confidentiality agreement (Lawyers' Insurance Association of Nova Scotia)<br><br>FAQs about solicitor-client privilege and confidentiality (CBA)<br><br>Guidelines for Practising Ethically with New Information Technologies (CBA)<br><br>Cloud computing due diligence guidelines (Law Society of British Columbia)<br><br>"Practice Tip: Be Careful with MetaData" The Advisory, p.8 (Law Society of Alberta)<br><br>Data security (Lawyers' Insurance Association of Nova Scotia) |

[22] The Law Society of British Columbia, Practice Material: Practice Management (February 2013) at p. 24 (online: http://www.lawsociety.bc.ca/page.cfm?cid=300).

[23] Dave Bilinsky, Practice Management Advisor, Law Society of British Columbia, "Practice Tips: Metadata" (2008) *Benchers' Bulletin* (online: http://www.lawsociety.bc.ca/page.cfm?cid=461&t=Practice-Tips:-Metadata).

## 4. Conflicts

The issue of conflicts of interest has become increasingly important over the last several decades as Canadian lawyers have become more mobile, business entities have become more complex and the courts have provided more guidance on when impermissible conflicts arise. As noted in the CBA Conflicts of Interest Toolkit, "the consequences of a conflict of interest for the lawyer can be severe and costly" and can include:

- disqualification from representation of one or more clients;
- forfeiture of fees charged and the inability to charge for work in progress and other time invested;
- a damage claim which may include punitive damages;
- embarrassment and cost in time and money of defending a malpractice claim or investigation.[24]

In addition to monitoring for potential or actual conflicts between clients, lawyers need to also guard against conflicts between lawyers' personal interests (financial or otherwise) and client interests.

| Objective | Possible questions to ask in assessing compliance with this objective | Potential systems and practices to ensure objective is met | Examples of available resources |
|---|---|---|---|
| **Impermissible conflicts of interest are avoided and, where not avoided, resolved/managed in a timely fashion** | Are appropriate systems in place to identify potential and actual conflicts of interest?<br><br>Do lawyers and staff understand what steps to take when a potential or actual conflict is identified? | Policies and procedures are in place with respect to checking for and evaluating conflicts of interest:<br>• Prior to accepting a new retainer;<br>• When a new party becomes involved in a matter;<br>• Upon employment of new individuals at a firm;<br>• When a lawyer is acting for multiple parties and the interest of the parties diverge;<br>• When a lawyer is considering accepting a directorship position or engaging in a business venture with a client; and<br>• When a lawyer's interpersonal relationship (such as marriage) create possible conflicts.<br>Systems to facilitate conflicts checks are in place (for example, appropriate databases are maintained that contain all relevant information with respect to each file).<br>Where appropriate, a senior lawyer or committee at the firm is delegated responsibility for evaluating and addressing conflict of interest questions or situations.<br>Lawyers and staff have been provided appropriate training regarding conflicts. Lawyers are encouraged to regularly review professional rules and case law regarding conflicts of interest.<br>Policies are in place with respect to lawyers acting as directors for public or private companies, not-for-profit corporations or other entities. | Model conflicts of interest checklist (Law Society of British Columbia)<br><br>Checking for conflicts of interest (Law Society of Upper Canada)<br><br>Conflicts of Interest – Toolkit (CBA)<br><br>Conflicts of Interest Checklist (Lawyers' Insurance Association of Nova Scotia)<br><br>Conflict of Interest – Lawyers' Personal Interests (Law Society of Saskatchewan)<br><br>Lawyers on boards (LawPro)<br><br>Sitting on a non-profit board: A risk management checklist (LawPro) |

[24] Canadian Bar Association Conflicts of Interest – Toolkit (available online: www.cba.org/cba/groups/conflicts/toolkit.aspx).

## 5. Preservation of Client Property/Trust Accounting/File Transfers

It is imperative that law firms implement appropriate financial management systems and, in particular, that firms ensure that client money received in trust is properly handled. Fraudulent activity, both at the hands of firm members and outsider fraudsters, is an area of significant risk for law firms.[25] Care must also be taken to ensure that both active and closed files are properly transferred when required.

| Objective | Questions to ask in assessing compliance with this objective | Systems and practices to ensure objective is met | Examples of available resources |
|---|---|---|---|
| **Client property is carefully and prudently safeguarded in a manner consistent with applicable laws and regulations** | Is client property appropriately labeled and identified upon receipt?<br><br>Are appropriate records kept with respect to client property?<br><br>Are monies received in general accounts and trust accounts being handled properly?<br><br>Is the law firm sufficiently protected from trust account misuse/fraud?<br><br>Are both active and closed files transferred in a manner consistent with ethical duties? | Records are kept of client property received.<br><br>An appropriate accounting system is used to track trust account funds and other monies received.<br><br>Accounting records are up-to-date and accurate.<br><br>Adequate internal controls are in place to minimize risk of fraud committed by firm members.<br><br>Training is provided to assist law firm members in spotting possible fraudulent activity.<br><br>Policies and procedures are in place regarding the transfer of active files and closed files. | Trust account requirements and information (various law societies)[26]<br><br>Concerning File Closure, Retention and Destruction (The Law Society of Newfoundland and Labrador)<br><br>Photocopying a client's file (Law Society of the Northwest Territories)<br><br>Transfer of Open Files to New Lawyer (Practice Direction) (Law Society of Manitoba)<br><br>File Transfer on Termination of Retainer (Webinar) (Law Society of Saskatchewan)<br><br>File Transfer (Law Society of Upper Canada)<br><br>Closed files: Retention and Disposition (Law Society of British Columbia) |

[25] Luis Millan, "The Profession's Dirty Little Secret" (March 2013) *Canadian Lawyer* (online: www.canadianlawyermag.com/4551/the-professions-dirty-little-secret.html?print=1&tmpl=component); Yamri Taddese, "Law firm's trust account hacked, 'large six figure' taken" (January 7, 2013) *Law Times* (online: www.lawtimesnews.com/201301079535/Headline-News/Law-firms-trust-account-hacked-large-six-figure-taken).

[26] Trust Assurance (The Law Society of British Columbia), Trust Accounting & Safety (Law Society of Alberta), Trust Account Forms (Law Society of Saskatchewan), Articles relating to trust accounts and financial responsibility (Law Society of Manitoba), Trust accounts (Law Society of Upper Canada), Trust accounts (Lawyers' Insurance Association of Nova Scotia), Trust accounts (Law Society of Prince Edward Island).

## 6. Fees and disbursements

Dissatisfaction with fees is a major source of complaints against Canadian lawyers. Clear communication about fees and disbursements at the beginning of an engagement and throughout the duration of the engagement assists clients in making informed decisions and alleviates frustration that can occur when clients are faced with unexpected final bills. When complaints about fees do arise, firms may benefit from an internal process to help resolve disputes informally: commencing a civil action to recover fees should be undertaken with caution as the result may be a lengthy and costly counterclaim alleging negligence.[27] Empirical studies conducted in other jurisdictions suggest that there is lack of awareness among many lawyers as to what constitutes ethical billing practices[28] and have found that the existence of firm polices to ensure ethical billing is linked to lower instances of observed unethical billing.[29] Authors of these studies strongly recommend that firms offer clear guidance on appropriate billing practices.

| Objective | Possible questions to ask in assessing compliance with this objective | Potential systems and practices to ensure objective is met | Examples of available resources |
|---|---|---|---|
| **Clients are charged fees and disbursements which are fair and reasonable and which are disclosed in a timely fashion** | Are clients being charged fees that are fair and reasonable?<br><br>Do lawyers have a clear understanding of what constitutes unethical billing practices?<br><br>Do clients and lawyers share the same expectations regarding fees and disbursements?<br><br>Is there ongoing communication with clients about fees charged and disbursements incurred? | Written policies regarding billing practices and procedures are in place.<br><br>Educative measures are in place to ensure that lawyers are aware of firm policies regarding billing practices and to encourage discussion of what constitutes unethical billing practices.<br><br>At the beginning of the engagement, billing procedures and fees are discussed with clients and addressed in a written engagement letter.<br><br>Where practicable, an estimate of anticipated fees and disbursements is provided and, where an estimate is given, clients are regularly updated.<br><br>Firm managers periodically conduct random audits of bills.<br><br>Clients are billed on a regular, interim basis.<br><br>Policies and procedures are in place for internally addressing client complaints with respect to fees and disbursements. | Litigation Cost Estimate Template (Law Society of Upper Canada)<br><br>"Practice Watch - Fees, Disbursements and Interest" *Benchers' Bulletin* (Law Society of British Columbia)<br><br>Appropriate Billing Practices (Practice Direction (Law Society of Manitoba)<br><br>Financial Management (Lawyers' Insurance Association of Nova Scotia)<br><br>Resolutions to avoid fee disputes (and to make more money) (LawPro)<br><br>Model Work Guidelines for Young Lawyers (Legal Profession Assistance Conference of the CBA) |

[27] Tim Lemieux, LawPro, "Resolutions to Avoid Fee Disputes (And Make More Money) (online: http://avoidaclaim.com/2013/resolutions-to-avoid-fee-disputes-and-make-more-money).

[28] Susan Saab Fortney, "Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture and the Effects of Billable Hour Requirements" (2000) 69 UMKC Law Review 239; Christine Parker and David Ruschena, "The Pressures of Billable Hours: Lessons from a Survey of Billing Practices Inside Law Firms" (2011) 9 University of St. Thomas Law Journal 619.

[29] See, Parker and Ruschena, *supra* note 28 at 654, noting that their empirical study of billing practices of lawyers in Queensland, Australia revealed "a statistical relationship between firm policies to ensure ethical billing and lawyers reporting both fewer observed instances of bill padding and a lower level of ethical concern about the billing practices of other lawyers within their firms."

## II. RELATIONSHIP TO STUDENTS, EMPLOYEES AND OTHERS

### 7. Hiring

Although at risk of being overlooked, hiring practices are an important part of a law firm's ethical infrastructure. Not only are lawyers "[t]he greatest asset to any law firm,"[30] they are also a major source of risk. Lateral hires can be particularly risky: as noted in a leading American law firm risk management text, "[t]here are multiple instances of awards and settlements in the millions of dollars because of lateral hiring decisions that turn out to have introduced 'Trojan horses' into law firms."[31] Similar examples are likely to be found in Canada.

Hiring practices also implicate lawyers' duty to promote the public interest. There is good reason for lawyers across Canada to share in the Law Society of British Columbia's belief that "the public is best served by a more representative and inclusive legal profession that reflects the diversity of [society]."[32] Unfortunately, there remains a chronic underrepresentation of individuals from equality-seeking groups in the Canadian legal profession.[33] The adoption of fair and equitable hiring practices by law firms is one measure that can be taken in an attempt to address this situation.

| Objective | Possible questions to ask in assessing compliance with this objective | Potential systems and practices to ensure objective is met | Examples of available resources |
|---|---|---|---|
| **The firm engages in careful, fair and equitable hiring practices** | Does the firm conduct appropriate due diligence in hiring new staff and lawyers?<br><br>Does the firm engage in fair and equitable hiring practices? | Adequate due diligence is conducted on candidates before a final hiring decision is made (for example, as permitted by applicable laws, review of disciplinary records and reference and credential checks are conducted).<br><br>Interviewers and lawyers who make hiring decisions receive training on gender and racial stereotypes as well the potential role of unconscious bias in hiring decisions.<br><br>Written interviewing guidelines are used.<br><br>An employment equity and diversity hiring policy is in place.<br><br>Diversity performance within the firm is measured regularly. | Screening and Hiring Employees (Law Society of Upper Canada)<br><br>Finders & Keepers: Recruiting and retaining top talent (LawPro)<br><br>CBA Equity and Diversity Guide Resource Manual<br><br>Guidelines – Recruiting, Interviewing and Hiring Practices (Law Society of British Columbia)<br><br>Guidelines for Equality in Employment Interviews (Law Society of Alberta)<br><br>Best Practices for Employment Interviews (Law Society of Manitoba)<br><br>Summary of Fair Hiring Practices Guidelines (Law Society of Upper Canada)<br><br>CBA Measuring Diversity Guide |

30 Tim Lemieux, "In the practicePRO Lending Library: Recruiting Lawyers – How to Hire the Best Talent" (March 25, 2013), online: http://avoidaclaim.com/2013/in-the-practicepro-lending-library-recruiting-lawyers-how-to-hire-the-best-talent/

31 Anthony E. Davis and Peter R. Jarvis, *Risk Management: Survival Tools for Law Firms* (American Bar Association, 2007) at p. 135.

32 The Law Society of British Columbia, *Towards a More Representative Legal Profession: Better practices, better workplaces, better results* (June 2012) (online: http://www.lawsociety.bc.ca/docs/publications/reports/Diversity_2012.pdf).

33 *Ibid.*

## 8. Supervision/Retention/Lawyer and Staff Wellbeing

The treatment of lawyers and staff is an important aspect of risk management and ethical compliance. In 2008, LawPro reported that clerical and delegation-related errors were the sixth most common type of error by number and cost.[34] In the case of associate lawyers and partners, regular evaluations of performance and peer review processes can work to proactively address and remediate potential problems in lawyer competence and conduct.[35]

Regular feedback may also assist in retention, which has significant financial implications for law firms. [36] Retention is also a significant issue in relation to equality and diversity in the legal profession. This is particularly true for female lawyers. As a report by the Law Society of Upper Canada observed, "[w]omen have been entering the legal profession and private practice in record numbers for at least two decades….[but] have been leaving private practice in droves largely because the legal profession has not effectively adapted to this reality."[37]

Ensuring that both formal and informal performance evaluation and work assignment processes are free of bias (both conscious and unconscious) is essential to alleviating systemic barriers faced by women and other members of equality-seeking groups in the legal profession.[38] Eliminating bias may have broader implications for risk management as well: studies on ethical behaviour in organizations suggest that the perceived fairness of procedures within an organization (like those relating to, for example, compensation, promotion and work assignments) can play an important role in fostering a culture of ethical compliance.[39]

Finally, the wellbeing of lawyers and staff in the firm is a critical area of law firm management. It is repeatedly observed that the practice of law can be extraordinarily stressful. The consequences of this stressful environment for individuals can be devastating: rates of burnout, depression and suicide are disproportionately high in the legal profession and drug and alcohol abuse is prevalent.[40] Mental, physical and emotional issues experienced by lawyers and staff can also give rise to behaviour that leads to malpractice claims.[41]

| Objective | Possible questions to ask in assessing compliance with this objective | Potential systems and practices to ensure objective is met | Examples of available resources |
|---|---|---|---|
| **Issues of training, supervision, retention and lawyer and** | Does the firm provide initial and ongoing training for lawyers and staff?<br>Are lawyers and staff adequately supervised? | Training opportunities are available to firm administrators, senior lawyers, and senior staff on how to train, supervise and give feedback to other lawyers and staff. | Guide to Successful Associate Evaluations (CBA)<br>Employee Delegation and Supervision (Law Society of Upper Canada) |

34 The biggest malpractice risks by Dan Pinnington (LAWPRO Magazine Summer 2008) (online: http://www.practicepro.ca/LawPROmag/Pinnington_Biggest_Malpractice.pdf).

35 Susan Saab Fortney, "Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture" (1996) 10 The Georgetown Journal of Legal Ethics 271.

36 The Law Society of British Columbia, *Towards a More Representative Legal Profession: Better practices, better workplaces, better results* (June 2012) (online: http://www.lawsociety.bc.ca/docs/publications/reports/Diversity_2012.pdf).

37 The Law Society of Upper Canada, *Executive Summary – The Retention of Women in Private Practice Working Group* (May 22, 2008) (online: http://www.lsuc.on.ca/with.aspx?id=397).

38 The Law Society of British Columbia, *Towards a More Representative Legal Profession: Better practices, better workplaces, better results* (June 2012), online: http://www.lawsociety.bc.ca/docs/publications/reports/Diversity_2012.pdf

39 Milton C Regan, "Moral Intuitions and Organizational Culture" (2007) 51 St. Louis U. L.J. 941.

40 Owen Kelly, CBA PracticeLink "Coping with Stress and Avoiding Burnout: Techniques for Lawyers" (online: http://www.cba.org/cba/practicelink/bwl/stresscoping.aspx).

41 LawPro, "Wellness & Balance: Resources to Help you Find Your Footing" (online: http://www.practicepro.ca/LawPROmag/Wellness_Resources.pdf).

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| **staff wellbeing are treated thoughtfully and seriously within the firm** | Do lawyers understand what work may be delegated to non-lawyers and what may not?<br><br>Are steps being taken to ensure that all lawyers and staff experience a fair and safe working environment?<br><br>Are processes for evaluation and assigning work free of bias?<br><br>Does the firm take steps to monitor and encourage lawyer and staff wellbeing? | Systems are in place to ensure that lawyers and staff receive regular feedback on work product (for example, formal performance reviews and informal meetings about performance are regularly conducted; peer review, where appropriate, is encouraged).<br><br>Appropriate internal controls are in place with respect to financial transactions.<br><br>Policies and procedures are in place to address and understand accommodation, equality and harassment in the workplace.<br><br>Written maternity and parental leave polices are in place.<br><br>Processes in place for evaluating performance and for assigning work are reviewed for potential unconscious bias.<br><br>Flexible work arrangements are available where appropriate.<br><br>Lawyers are made aware of, and encouraged to use when needed or desired, personal assistance programs offered by and for the legal profession, and other mental health resources available in the community.<br><br>Benefits are available to staff and lawyers to access good health management services (for example, exercise or courses on healthy eating, ergonomics, or stress release techniques).<br><br>Opportunities are available to lawyers to engage in the legal community (for example, join legal associations, volunteer for boards and committees, and attend events).<br><br>Senior lawyers in the firm model healthy work practices. | Supervision of Employees – the Buck Stops with You (LawPro)<br><br>Human Resources/Staff Management (Lawyers' Insurance Association of Nova Scotia)<br><br>Personal Management Practice Management Guideline (Law Society of Upper Canada)<br><br>Model equality and diversity policies (various law societies)[42]<br><br>Guide to Accessibility Planning for Law Firms (CBA)<br><br>Resource Guide for Lawyers with Disabilities and Employers (Law Society of British Columbia)<br><br>Model policy: flexible work arrangements (Law Society of British Columbia)<br><br>Alternative work arrangements – guidelines for law firms (Law Society of Saskatchewan)<br><br>Model policy on alternative work schedules (Law Society of Manitoba)<br><br>Lawyer assistance programs (various law societies)[43]<br><br>Laughter & Living: The Lawyer's Personal Toolbox (The Law Society of British Columbia)<br><br>Legal Profession Assistance Conference (LPAC) of the CBA |

[42] Model policies (Law Society of British Columbia), Model equity policies (Law Society of Alberta); Equity (Law Society of Saskatchewan); Equity (Law Society of Manitoba); Equity Model Policies (Law Society of Upper Canada)

[43] Personal assistance programs (Law Society of British Columbia), Assist Program (Law Society of Alberta), Lawyers At Risk (Law Society of Manitoba), Member Assistance Program (Law Society of Upper Canada), Nova Scotia Lawyers Assistance Program, Yukon Lawyers Assistance Program, Lawyers' Assistance (Law Society of the Northwest Territories)

## III. RELATIONSHIP TO REGULATOR, THIRD-PARTIES AND THE PUBLIC GENERALLY

### 9. Rule of Law and the Administration of Justice

The administration of justice and regulation of the profession requires that lawyers are responsive to court orders and communications from law societies. Failures to respond to law society communications or cooperate in law society investigations result in a significant number of disciplinary actions against lawyers every year. Moreover, these failures damage the reputation of the profession for trust and integrity.

Prompt and diligent compliance with undertakings is also an important part of ethical legal practice. As observed by a lawyer disciplinary panel in British Columbia:

> The trust and confidence vested in lawyer's undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.[44]

Opinion letters prepared by firm lawyers and relied on by third parties is another area that implicates the rule of law and proper administration of justice, in addition to raising risk management concerns. As noted in a leading American law firm risk management text, "[k]ey to managing risk in this area is the existence and enforcement of policies and procedures ensuring independent review, within the firm, before lawyers with client or matter responsibility can issue opinion letters."[45]

| Objective | Questions to ask in assessing compliance with this objective | Systems and practices to ensure objective is met | Examples of available resources |
|---|---|---|---|
| **Lawyers and law firms respect and foster the rule of law and the proper administration of justice** | Do lawyers understand their ethical duties in relation to giving undertakings and responding to law society communications?<br><br>Are steps taken to ensure undertakings, court orders, and law society requests are properly and promptly fulfilled?<br><br>Does the firm provide training with respect to ethical issues that engage administration of justice issues or concerns?<br><br>Does the law firm have safeguards in place regarding opinion letters that will be relied on by third parties? | Undertakings are given in writing and the file updated when fulfilled. Where appropriate, verification is sought that an undertaking has been properly fulfilled.<br><br>When given, undertakings are recorded; when fulfilled, verification is sought.<br><br>Educational measures are in place to ensure that lawyers understand their ethical duties in relation to giving undertakings and responding to law society communications.<br><br>Systems and policies are in place to ensure that lawyers have opportunities to discuss and understand their role in ensuring the proper administration of justice (for example, informal intra-firm education events are held and/or relevant external CPD activities are funded).<br><br>Policies and procedures are in place with respect to third party opinions (for example, where appropriate, template opinion | Undertakings (Law Society of Upper Canada)<br><br>Undertakings (Lawyers' Insurance Association of Nova Scotia)<br><br>Communications with the Law Society (Law Society of British Columbia)<br><br>Solicitors' Legal Opinions Committee of British Columbia |

[44] As approvingly quoted by the British Columbia Court of Appeal in *The Law Society of British Columbia v. Heringa*, 2004 BCCA 97 (C.A.) at para. 10.

[45] Anthony E. Davis and Peter R. Jarvis, *Risk Management: Survival Tools for Law Firms* (American Bar Association, 2007) at p. 134.

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| | | letters are used and/or peer-review processes are in place). | |

## 10. Access to Justice

Lawyers have a duty to promote and protect the public interest. One of the most significant issues currently facing the Canadian public is meaningful access to justice. Canada ranked ninth among twelve European and North American countries in a 2011 World Justice Project analysis of access to civil justice.[46] Serious issues of access, such as lengthy delays, also exist in the criminal justice system. Improving access to justice in Canada requires leadership and change that reaches well beyond practices within law firms. This does not, however, preclude law firms from looking inward to what they might do themselves to better meet their obligations to promote and protect the public interest. Encouraging pro bono or other volunteer work, as well as exploring alternative fee arrangements and limited scope retainers (where appropriate and permitted under applicable laws and regulations), are examples of some tangible steps that firms can take.

Law firms should explore how their lawyers interact with self-represented parties.[47] One aspect of the access to justice crisis in Canada is that legal services have become increasingly out of reach for many Canadians. This has resulted in a large number of self-represented parties. A recent comprehensive study on self-represented litigants in Alberta, British Columbia and Ontario revealed that a significant number of self-represented litigants had complaints about the opposing counsel they dealt with.[48] On the other hand, a number of lawyers reported challenges in communicating or negotiating with self-represented litigants.[49] This suggests, at the very least, that lawyers need more information and training to assist them in dealing with self-represented litigants.

| Objective | Questions to ask in assessing compliance with this objective | Systems and practices to ensure objective is met | Examples of available resources |
|---|---|---|---|
| **The law firm adopts practices that promote access to justice** | Does the firm undertake practices and foster a culture in which access to justice is valued and promoted?<br><br>Are lawyers trained to effectively interact with self-represented parties? | Pro bono and other volunteer activity in the community is encouraged by the law firm and taken into account in performance evaluations (for example, billable hour credits are provided or annual goals are set).<br><br>A written pro bono policy is in place.<br><br>Where appropriate and permitted under applicable laws and regulations, the law firm uses alternative fee arrangements and limited scope retainers (i.e. unbundled legal services). | The ABC's of Creating a Pro Bono Policy for Your Firm (CBA)<br><br>Best Practices Guide (Pro Bono Law Ontario)<br><br>"Creating Pro Bono Opportunities" The Advisory (Law Society of Alberta)<br><br>Tips for Dealing with the Self-Represented Litigant (Ontario Bar Association) |

[46] Mark Agrast, Juan Carlos Botero and Alejandro Ponce, WJP Rule of Law Index 2011 (Washington, D.C.: The World Justice Project, 2011) (online: http://worldjusticeproject.org/publications).

[47] The terms "unrepresented" or "litigant in person" are also sometimes used to describe individuals who appear in court without a lawyer. The CBA Self-Evaluation Tool follows the recent comprehensive report authored by Julie MacFarlane in using the term "self-represented litigants") (Julie MacFarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report (May 2013) at 16 (available online: http://www.representing-yourself.com/index.php?option=com_content&view=article&id=99&Itemid=97).

[48] *Ibid.* at 91.

[49] *Ibid.* at 92.

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| | | Training is provided to lawyers who are likely to encounter self-represented litigants. | Self-represented Litigants: A Survival Guide (LawPro)<br>"Unbundling" of Legal Services (Law Society of Upper Canada) |

# APPENDIX B: Additional Reading


Briton, John and Scott McLean, "Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era" (2008) 11 Legal Ethics 241.

Chambliss, Elizabeth, "The Nirvana Fallacy in Law Firm Regulation Debate" (2005) 33(1) Fordham Urban Law Journal 101.

Chambliss, Elizabeth and David B Wilkins, "A New Framework for Law Firm Discipline" (2003) 16 Georgetown Journal of Legal Ethics 335.

Chambliss, Elizabeth and David B Wilkins, "Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting" (2002) 30 Hofstra Law Review 691.

Devlin, Richard F and Jocelyn Downie, "'...And the Learners Shall Inherit the Earth': Continuing Professional Development, Life Long Learning and Legal Ethics Education" (2010) CLEAR 9.

Dodek, Adam, "Regulating Law Firms in Canada" (2001) 90 Canadian Bar Review 383.

Fortney, Susan and Tahlia Gordon, "Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation" (forthcoming)

Fortney, Susan Saab, "Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture" (1996) 10 Georgetown Journal of Legal Ethics 271

Fortney, Susan Saab, "Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture and the Effects of Billable Hour Requirements" (2000) 69 UMKC Law Review 239;

Mark, Steve and Tahlia Gordon, "Compliance Auditing of Law Firms: A Technological Journey to Prevention (2009) 28:2 University of Queensland Law Journal 201

Mark, Steve "Views from an Australian Regulator" (2009) 1 Journal of the Professional Lawyer 45.

Christine Parker, "Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible" (2004) 23 University of Queensland Law Journal 347.

Parker, Christine, Tahlia Gordon and Steve Mark, “Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in the Regulation of the Legal Profession in New South Wales” (2010), 37:3 The Journal of Law and Society 466.

Parker, Christine, Adrian Evans, Linda Haller, Suzanne Le Mire, and Reid Mortensen, “The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behavior” (2008) 31 UNSW Law Journal 158.

Parker, Christine and Lyn Aitken, “The Queensland Workplace Culture Check: Learning from Reflection on Ethics inside Law Firms” (2011) 24 Georgetown Journal of Legal Ethics 399.

Parker, Christine and David Ruschena, “The Pressures of Billable Hours: Lessons from a Survey of Billing Practices Inside Law Firms” (2011) 9 University of St. Thomas Law Journal 619.

Regan, Milton, “Moral Intuitions and Organizational Culture” (2007) 51 Saint Louis University Law Journal 941.

Schneyer, Ted, “On Further Reflection: How ‘Professional Self-Regulation’ Should Promote Compliance with Broad Ethical Duties of Law Firm Management” (2011) 53 Arizona Law Review 577.

Schneyer, Ted, “Professional Discipline for Law Firms?” (1991) 77 Cornell Law Review 1.

Woolley, Alice, “Time for Change: Unethical Hourly Billing in the Canadian Profession and How to Fix It” (2004) 83(3) Canadian Bar Review 859.