

**Principles and Practice of Legal, Ethical and Professional
Responsibility**

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HYPERLINKING

Each item in the Detailed Table Of Contents is hyperlinked to the text of that item.

PROGRAM PRESENTATION

Presentation to the 2012 National Family Law Program, based on this anthology, will be made by **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.

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STEADFASTLY:

**PRINCIPLES AND PRACTICE OF
LEGAL, ETHICAL AND PROFESSIONAL RESPONSIBILITY**

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SYNOPSIS

This anthology comprises summaries of, and excerpts from, 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 2010 to June 2012

*Nine comparable previous anthologies—cumulatively covering the period 03 September 1189 (the birth date of legal memory) to June 2010—are posted at:
<http://www.lewisday.ca/ethics.html>; as will be this anthology, on 05 August 2012.*

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1. Overview

Legal responsibility mandates what practising lawyers must do.

Ethical responsibility counsels what they should do.

And, professional responsibility advocates what they may aspire to do.

These three overlapping concepts of responsibility should infuse the daily ritual of practising lawyers: to find, to serve, and to be profitably remunerated by, clientele.

Responsibility experiences of lawyers, scampering from crisis to crisis to achieve these essential, pragmatic goals of practice, are the subject of this anthology.

Cumulatively, the components of responsibility serve to counsel practising lawyers in discharge of their fundamental duty: to represent their clients as "zealous advocates within the constraints of legality," contends Professor Alice Woolley, University of Calgary. Those elements of responsibility, she continues, "should be assessed based on the extent to which they foster or undermine lawyers' accomplishment" of that cardinal duty. (*Understanding Lawyers' Ethics in Canada* (Markham [ON]: LexisNexis Canada Inc., 2011), p. 2.)

Comprising the anthology are excerpts from and summaries of judicial and administrative decisions, transcripts, book and journal scholarship, reports, manuals, and media cuttings. They have been published, primarily, from June 2010 to June 2012. They have been annotated to report any developments since events described in the excerpts.

All of these anthology sources (i) enunciate or imply one or another of the three concepts of responsibility—legal, ethical, professional; (ii) state or foster resulting theorems of responsibility which govern, inform or inspire the law vocation, or (iii) document applications of responsibility in practise.

(Unless essential to understanding of the included excerpts and summaries, involved footnotes and endnotes are omitted. Minor editing has been performed to lend clarity. And, each of the entries, as identified in the anthology's detailed table of contents, is hyperlinked to the text of the related excerpt or summary.)

The entries in this annotation are replete with law practice shortcomings. More than a few lawyers conducted themselves, professionally, in the spirit of John Lennon's lyrics that "Life [such as in the law] is what happens to you *while* you're busy making other plans."

However, like life itself, the conduct of the law vocation is not a dress rehearsal. Concentration, unsullied by life's other demands—or life's vices—is constantly paramount in addressing client dilemmas.

In Canada, the dictates of responsibility may also impact a lawyer in his or her personal life (if the subject of a complaint to a law society); as in some other jurisdictions. Stated Julia

Dias, Q.C., chair of England's Bar Disciplinary Council, 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, had been 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.)

2. Previous Anthologies

Nine previous, comparable, anthologies canvas the period from the birthdate of legal memory (03 September 1189), to 2010. They are published at: <http://www.lewisday.ca/ethics.html>

3. Caveat

Accompanying this anthology is a caveat; much more important than the anthology itself. The caveat is articulated by the Honorable Michel Proulx, of Quebec Court of Appeal (at his passing), and David Layton, Vancouver civil and criminal litigator, in *Ethics And Canadian Criminal Law* (Toronto: Irwin Law Inc., 2001, at p. 3):

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

Moreover, Justice Proulx and Mr. Layton caution (at p. 3):

Our legal culture undergoes constant and inevitable change, and so too, then, do expectations and standards pertaining to lawyers' behaviour. What was contentious fifty years ago may seem totally unproblematic today, and vice versa. Or the preferred method of approaching an issue may change dramatically over time. Ideas about legal... [responsibility] by no means mutate daily, yet... . [t]his topic ... is definitely not static.

4. Practising Lawyers in Canada

(a) Numbers

The constituency of this anthology (especially those practicing 'family law') comprises—as of 31 December 2010—108,389 lawyers. (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”, and “honorary”.) Of these 108,389 lawyers, 79.59% —86,232 —had practising status on 31 December 2010.

Of these 86,232 practising-status lawyers, the largest percentage in each of the 10 provinces has been in the category of “26 years plus” at the Bar: 47.3% in Manitoba; 40.6% in Saskatchewan; 38.9% in New Brunswick; 33.4% in Alberta; 32.8% in Nova Scotia; 30.2% in Ontario; 29.7% in Quebec; 27% in British Columbia; 25.2% in Newfoundland and Labrador; and 21.5% in Prince Edward Island. Only in N.W.T. (the other two territories did not report) was the largest percentage of practicing lawyers in a category involving less than 26 years’ experience at the Bar. (The categories in the Federation’s statistical report are: 0-5 years; 6-10 years; 11-15 years; 16-20 years; 21-21 years and 26 years plus.)

(b) Services Delivery

Although difficult to calculate with precision from available data, clearly, law firms consisting of sole practitioners do form the most substantial portion of ‘vehicles’ delivering legal services in Canada. Sole practitioners, as of 31 December 2010, comprised not less than 74.4% of Yukon’s practicing lawyers; 69.7% in N.W.T.; 56.3% in British Columbia; 46.6% in Newfoundland and Labrador; 42.4% in New Brunswick; 34.3% in Nova Scotia; 31.1% in Manitoba; 30.7% in Saskatchewan; 28.4% in Ontario; 27.9% in Prince Edward Island, and 23.0% in Alberta. (Insufficient data precluded calculations for Quebec, and Nunavut.)

(c) Income

Admittedly outdated, in 2005, based on most recent available Canada Revenue Agency data, the median income of Canada’s lawyers and notaries was \$96,527.00 (up from \$84,120.00 in 2000). The median income of ‘family law’ lawyers was not procurable.

In June 2012, *Canadian Lawyer* magazine published results of a national 2011-2012 survey of lawyers’ fees. The portion of the survey results pertaining to ‘family law’ is tabularized, and compared with results of the 2010-2011 survey, at the end of this Introduction to the anthology.

The next—2012-2013—survey should include lawyer services to a constituency not embraced by the 2010-2011, or 2011-2012, survey: the burgeoning constituency of unwed partners (for example, to provide them pre-nuptial, and defacto marriage, agreements). After all, 15.4% of Canada’s 8,896,840 family units in 2006 was reported by Statistics Canada as being ‘common law’—slightly less than the 15.8% aggregate (one adult) families. (2011 Statistics Canada figures will be available in September 2012.)

In reporting the 2012 survey, *Canadian Lawyer's* Robert Todd wrote that “[f]ifty-two per cent of this year’s respondents said they plan to raise fees in the year ahead, while a mere one per cent plan to hold steady at the same rates” Fee increases are, however, expected to be “marginal” Mr. Todd continued. “Just over half of those who plan to increase fees will do so by up to five percent, while 32 per cent [of lawyers anticipating increases] will raise their rates by five to 10 per cent. Only one in 10 will hike fees by 10 to 20 per cent with a mere three per cent

of respondents ushering in a sharp fee increase of 20 per cent or more Rising overhead costs, inflation, and increased complexity of files were all common themes for lawyers who indicated plans to raise rates. Those who are holding rates steady (47 per cent) often cited a desire to keep pace with competitors, or sympathy for clients in a tough economy."

Mr. Todd determined that "[m]any lawyers expressed consternation with the choices they are faced with when setting fees, perhaps best captured by the following comment: 'For most individual clients (i.e. non-corporate) it is very expensive to retain a lawyer for any reason, yet for lawyers we need high fees to meet our costs.' Moreover, another surveyed lawyer remarked that '[l]awyers are not only providing a service, they are, in some practice areas, insuring a result. The cost of their services reflects this to a certain extent and is separate from the actual work done.' "

The 2011-2012 survey concluded that "[h]ourly rates appear to be on the rise across the board. On a nationwide basis, 10-year calls will charge an average of \$408/hr in 2012, up sharply from \$326 in 2011. Five-year calls expect to bring in \$283/hr compared to the \$260 they indicated they ... [charged] in 2011. One-year calls are expected to charge \$33 more per hour this year, with average hourly rates up at \$229 in 2012 compared to \$196 for the year prior. This year's [2011-2012] survey begins tracking hourly rates for 20-year calls and 20+ year calls, who plan to charge an average of \$408 and \$414 per hour, respectively."

Although Statistics Canada reports, in April 2012, that new divorce proceedings had decreased 2 per cent, nationally, in each year since its annual—2006-2007—data-keeping period (most significantly, in Nova Scotia), 'family law' practitioners needed 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.)

(d) Mobility

By 03 November 2006, the National Mobility Agreement—approved 01 July 2003 by the Federation of Law Societies of Canada—had been implemented by all provinces, other than Quebec. The Agreement provides for (i) temporary mobility (i.e., up to 100 days practice, annually, without writing qualifying examinations or obtaining a license) and (ii) permanent mobility (i.e., to permanently practice, without writing qualifying examinations, provided a license is obtained). The Agreement applies to mobile lawyers licensed to practice in at least one common law province; thus enabling them to practice in another or other common law provinces, under temporary or permanent mobility provisions of the Agreement.

As for Quebec: the National Mobility Agreement provided (para. 40(b)) that "a signatory governing body [of a common law province], [being] other than the Barreau [du Quebec], will admit members of the Barreau as members [in a common law province] on one of the following bases: ... as permitted by the Barreau" No reciprocity was then available, in Quebec, however, for members of the Bars of common law provinces. This situation changed, 19 March

2010, when the Quebec Mobility Agreement was signed. The Quebec Mobility Agreement extended the scope of the National Mobility Agreement by facilitating permanent mobility between common law provinces and the Barreau du Quebec. Essentially, the Quebec Mobility Agreement provides that members of common law provinces—and the territories—may become members of the Barreau and practise federal law and the law of their home common law jurisdictions as 'Canadian Legal Advisors' in Quebec. Moreover, the Quebec Mobility Agreement permits members of the Barreau to become members of law societies of the common law jurisdictions (nine provinces and three territories) and practise federal and Quebec law in those jurisdictions. On 15 March 2012, an addendum to the Quebec Mobility Agreement extended mobility rights, under that Agreement, to members of the Chambre des notaries du Quebec.

In November 2011 the Territorial Mobility Agreement was made. (The National Mobility Agreement, approved 01 July 2003, stated that "the unique circumstances of the law societies of Yukon, the Northwest Territories, and Nunavut necessitate special considerations that could not be undertaken within the time frame prescribed" for satisfying the terms of reference of the Task Force whose report generated the National Mobility Agreement.) The 2011 Territorial Mobility Agreement extended the scope of the National Mobility Agreement to facilitate permanent mobility as between lawyers in the territories, and lawyers of the provinces of Canada (and, by virtue of the 2010 Quebec Mobility Agreement and its 2012 addendum, lawyers and notaries in Quebec).

None of the mobility agreements creates 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.

5. Challenges

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

Accounting, principally, for responsibility issues in 'family law' is clientele described by Justice Mathew Thorpe, while sitting in the Family Division of England's High Court (he now sits in Court of Appeal):

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.

"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 dilemmas.

6. Lawyer 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,” They include “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, and customs of common sense.

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) Ethical Responsibility

(i) Codes of ethical responsibility: Canadian Bar Association (CBA)

One of the two principal national codes 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) established 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, 28 January 2010.

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).

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

The other national code was, after several years of industry, authored by the Federation of Law Societies of Canada, in October 2009, in the wake of its mobility agreements. The Federation, then, adopted a draft national *Model Code of Professional Conduct*; amended 13 December 2011. Further amendments may include provisions reference expanding the 'future harm' exception to solicitor-client privilege, to include certain financial harm, and reference 'acting' against former clients.

(iii) Substantive differences between CBA and Federation and their Codes of ethical responsibility

A material difference between the CBA and Federation ethics Codes relates to treatment of conflict of interest (more accurately, 'conflict of duty') of practising lawyers.

Binnie J.'s reasons for judgment in *R. v. Neil* (2002 SCC 70) established what he termed (at para. 29) 'a bright line':

[29] ... it is the firm not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.

And, in deciding the appeal on its facts, he wrote (at para. 31):

[31] I adopt, ..., the notion of a "conflict" in § 121 of the *Restatement Third, The Law Governing Lawyers* (2000), vol. 2, at pp. 244-45, as a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person".

The CBA Code, eschewing Binnie J.'s 'bright line' rule, incorporates a less rigorous approach, in respect of conflicts of interest (or duty) between current clients.

The Federation's *Model Code*, on the other hand, adopted an approach to conflict of interest modeled on *R. v. Neil* (and subsequent Supreme Court of Canada decisions) reference the 'bright line' rule and otherwise.

(This anthology's author, chair of the CBA's Ethics and Professional Issues Standing Committee (as then known), during revision of the CBA Code on the conflict issue, dissented from the CBA's approach, and the Committee, in any event, abstained from formally submitting on the issue.)

Note that Canadian Bar Association describes itself as the “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; ... promoting fair justice systems,... [facilitating] effective law reform,... [promoting] equality in the legal profession and ... [devoted] to the elimination of discrimination.”

In contrast, the Federation of Law Societies of Canada promotes itself as “the national coordinating body” of Canada’s 14 provincial and territorial law societies (including Quebec lawyers and separately-regulated Quebec notaries), mandated to regulate Canada’s more than 100,000 lawyers and Quebec’s 3,500 notaries.” In so serving, the Federation “leads the development of high national standards of regulation to ensure that all Canadians are served by a competent, honourable and independent legal profession.” Development of national standards, in the Federation's view, includes harmonization of rules of professional conduct: “With national mobility of the profession, the law societies recognize the benefit of moving toward harmonized rules of conduct [via the *Model Code of Professional Conduct*] so that the public can expect the same ethical requirements to apply wherever their legal advisor may practice law.”

(iv) Employment of CBA and Federation Codes of ethical responsibility

Historically, the C.B.A. ethics Code was largely or entirely adopted by law societies of the provinces and territories. A few of the societies currently—at least, for the present—continue to rely, principally, on the C.B.A. Code. The recent trend among other provincial and the territorial governing bodies, Justice Proulx and Mr. Layton determined, has been “to create [their own] codes of conduct that are more detailed, comprehensive, and contemporary [which] translate...into rules that bear diminishing resemblance to the CBA Code,...” (*Ethics and Canadian Criminal Law*, p.11).

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

The same can, now, also be stated respecting the *Model Code of Professional Conduct* of the Federation of Law Societies of Canada which, to date, has, with some modifications, been adapted by at least three Canadian jurisdictions: Manitoba (01 January 2011); Alberta (01 November 2011), and Nova Scotia (01 January 2012), and also has been, or is in process of being, adopted, with some modifications, by British Columbia (in effect: 01 January 2013), Saskatchewan and New Brunswick.

Some Canadian jurisdictions have published ethics codes of professional conduct for particular specialties of law practice, including family law. Perhaps the most ambitious of these, and most-recently undertaken, has been the *Professional Standards – Family Law*, approved 25 March 2011 by the Nova Scotia Barristers' Society Council. The Standards—which qualify as a model for digesting 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](http://www.lians.ca/documents/2010-06-25_StandardsIntro(2).pdf)

(v) Rules supplementing Federation Code of ethical responsibility

The provinces and territories have, in one or another manner, approved Model Rules approved 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 of which 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 30 March 2008, and modified 12 December 2008, by the Federation, and has been adopted, in whole or part, by most, if not all, Canadian jurisdictions.

The Federation successfully challenged, in British Columbia Supreme Court (decision: 27 September 2011), 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 of cross-border movements of

currency and monetary instruments in relation to such clients. Canada has appealed the decision (not yet argued). The Federation objects to the involved legislative provisions on the basis they violated 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 has failed to placate Canada).

In other recent developments, most provinces and territories have adopted, or are considering, a June 2010 agreement prepared by the Federation—incidental to the mobility agreements—relating to mobility defalcation compensation.

And, thirteen of Canada’s law societies (i.e., other than Quebec notaries) agreed to participate, commencing April 2012, in a pilot project to test standards in areas of timeliness, fairness, transparency, public participation and accessibility, relating to complaints about, and discipline of, members of Canada’s legal profession.

(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 CBA Code and the Federation’s Model 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 *Model Rules*. The other one-third of state Bar governing bodies copy, more or less, the earlier *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—rather than lawyer governing bodies (such as throughout Canada)—are largely, responsible for lawyer discipline in some United States’ jurisdictions.)

(vii) Access to Codes of ethical responsibility

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

(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.

(c) Legal Responsibility

Common law, equity, legislation, and inherent court jurisdiction govern some or all features of legal responsibility—both discipline and legal liability (and, 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 CBA Code, the Federation's *Model Code*, and provincial/territorial codes, do not have the force of law. They are, however, respected by courts as representing important public policy. Per Sopinka J. (for the court) in *MacDonald Estate v. Martin*, ([1990] 3 S.C.R.1235, at para. 18):

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

Whatever the code of ethical conduct applicable in a particular province or territory (i.e. Canadian Bar Association *Code of Professional Conduct*, the Federation's *Model Code of Professional Conduct*, or a code generated by a province or territory), code provisions, not infrequently, are depended on to create professional conduct offence rules. An offence may involve a breach of (i) whatever code of professional conduct applies in a particular province or territory, by virtue of an offence created by the rules of the law society of a particular province or territory, or (ii) a society's rule; independent of its ethical code.

One indicator of financial consequences of negligent discharge by lawyers of their legal responsibility is furnished by the 2011 annual report of LawPRO (Lawyers' Professional Indemnity Company). LawPRO, in 2011, underwrote excess insurance coverage of 1,466 law firms (of 50 or fewer lawyers) in Canada; representing 3,711 lawyers. Claims reported—2,568—were higher than in any year since 2000, and 11 per cent higher than in 2010; representing claims by 107 lawyers per thousand (compared with 99 in 2009). The average cost of a fully reserved claim increased about 40 per cent from \$30,000 in 2001 to just under \$42,000 in 2009 (including 275 claims in 2009 costing at least \$100,000—up from 132 such claims in 2000). Distribution of claims, by practice area, in 2011: real estate - 35.6%; litigation - 22.9%; corporate, bankruptcy, security and tax - 22.4%; wills and estates - 7.9%; family - 5.2%, and all other - 6.%.

The Alberta Lawyers Insurance Association's 2001 annual report informs that the average frequency of claims by area of law practice (with the 5-year average, 2007 to 2011, for each area, in brackets) was: civil litigation - 34% (34%); real estate - 28% (33%); commercial and corporate - 14% (13%); matrimonial and family - 10% (9%); estate planning and administration - 4% (4%); income tax - 2% (1%); intellectual property - 1% (1%); and other - 7% (5%).

In Nova Scotia, the Lawyers' Insurance Association reports claims costs for 2011 (with the averages of costs for 1998 to 2007 in brackets) to have originated with practise of: real estate - 40% (47%); income tax - 21% (0%); criminal law - 8% (0%); civil litigation - 9% (13%); estate planning and administration - 9% (4%); commercial - 4% (11%); corporate - 2.5% (13%); immigration - 2% (0%); matrimonial and family - 2% (5%); intellectual property - 0.5% (0%); bankruptcy, insolvency and receivership - less than 1% (0%); employment and labour - less than 1% (3%); and other - 2% (3%).

Not insured, of course, by professional—or (for the most part) commercial general—liability policies purchased by most lawyers, are very real risks inherent in cyber technology.

(d) Professional Responsibility

A helpful definition of the distinction between the concepts of 'professionalism', on one hand, and 'ethical' and 'legal' 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 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 here writing about yacht racing; although the sentiment is known to currently serve as a credo of Honorable William J. English (Provincial Court, Happy Valley-Goose Bay, Newfoundland and Labrador), among many other Canadian judges, and among not a few Canadian lawyers.)

Professor Beverley G. Smith of University of New Brunswick, in his loose-leaf *Professional Conduct for Judges and Lawyers* (Fredericton: Maritime Law Book Ltd., chapt. 1, para. 5), has joined in 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 is viewed by some lawyers—who rarely patronize legal education programs—as being a mere aspirational goal, with the consequence that unprofessional behaviour need not be accompanied by concern that such delinquent behavior will be censured by courts or Bar disciplinary authorities. However, judicial attitudes toward that misguided perspective of some legal practitioners 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 of *The Globe And Mail* on 09 June 2010—recaps testimony at a series of ‘civility forums’ held 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; gripping 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, no doubt, have 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.

7. Practising Responsibility

7.1 Documentation

Practising allegiance to responsibility—legal, ethical, and professional—(i) serves clientele' needs, (ii) enhances professional reputation (which, more than advertising, generates additional clientele), (iii) precludes liability and disciplinary proceedings, and court censure, and (iv) may avoid, or at least mitigate, nuisance complaints from the 'other' parties, and adverse impact of media criticism. An essential ingredient of adherence, in practice, to the creeds of responsibility, is memorializing every step in performance of a retention. Not least are the following:

(a) Before retention: Document

- (i) inquiries to confirm absence of conflict of duty;
- (ii) communications with a potential client—conducted and documented in plain language which does not require client referral to a thesaurus (usually subject to the same confidentiality as solicitor-client contacts);
- (iii) disclosure to the potential client of the lawyer's formal (including, ongoing) training and experience, that qualifies the lawyer to accept retention;
- (iv) avoidance of any discussion with the potential client that provides information capable of placing the lawyer in conflict of interest, should the lawyer ultimately not be retained, or decide not to accept retention, by the potential client;
- (v) that the lawyer's role is not to serve as a 'good news' medium; rather to advise on involved legal matters, including advice that may be unwelcomed by the client;
- (vi) cost of the initial consultation—which may prove, for one or another reason, to be the only contact with the potential client.

(b) On retention: Document

- (i) terms and conditions of retention, by retention letter or agreement, including
 - delineation of the scope of retention (including substantive instructions reference the retention's subject matter),

- any limitations on the scope of retention (such as a client's requirement all communications—with opposing counsel or with self- or un-represented 'other' party(ies)—first be client-approved),
 - and
 - cost estimate (including, information on aspects of legal expense which may be eligible for deduction under the *Income Tax Act*);
- (ii) information (including photograph) sufficiently identifying the client;
 - (iii) communication of the principles, and practical implications, of solicitor-client privilege, and client confidentiality;
 - (iv) assessment of client competence (including suggestions the client consider obtaining, e.g., psychological, psychiatric, or counseling, assistance, should the client present indices of, e.g., duress from spousal abuse, or mental illness)—if not undertaken before retention;
 - (v) communication to the client that (i) the lawyer is not continuously tethered to digital technology; (ii) employment of digital technology poses perils to privilege and confidentiality; and (iii) accessing the lawyer via digital technology will not (depending on the nature of the communication) always yield instantaneous responses—because time is required to prepare considered, carefully-crafted answers;
 - (vi) communication to the client that legal services delivery is not an assembly-line exercise—because each case is different and requires document-preparation exclusive to each case;
 - (vii) that the potential client understands the role of the lawyer as advocate of a client's case, not simply a conduit for a client's instructions (e.g., the lawyer's responsibility to serve as arbiter of what disclosure is gathered, and supervisor of its preparation for filing and service).
- (c) **During retention:** Document
- (i) amendments to the terms and conditions of retention;
 - (ii) identity of personnel, other than the retained lawyer (e.g., another lawyer or a paralegal) who will participate in performance of the retention;
 - (iii) communication to the client that the retained lawyer's legal assistant is not expected to serve as the lawyer's alter ego (because, not infrequently, a client calculates that communicating extensively, if not primarily, with a legal assistant avoids billable time communicating with the lawyer);

- (iv) inquiries, in a 'family law' matter, of the status, or prospects, of efforts to reconcile;
- (v) exploration of alternatives to the lawyer her- or him-self negotiating or litigating the retention matter (e.g., such dispute resolution modalities as mediation, arbitration, med-arb, collaboration);
- (vi) any multi-media shown the client to educate her or him on processes involved, if, e.g. the retention-subject is 'family law';
- (vii) advice to the client specifying the lawyer's obligations to a court, where involved, including situations where a lawyer may or may not withdraw;
- (viii) contacts with the client—especially where instructions are received and advice furnished—e.g., in person, by telephone (while ensuring the lawyer's legal assistant does likewise);
- (ix) confirmation that the client clearly understands the nature, meaning, and consequences of advice given;
- (x) that—whenever the lawyer harbours doubt about the client's instructions or understanding of advice as expressed at a consultation—the client has been copied, and has confirmed the accuracy of, the lawyer's consultation note;
- (xi) details of arrangements for a client to depose, or otherwise sign, any court filings—because the retained lawyer should never serve as a witness to pleadings;
- (xii) employment of experts (e.g., property appraisers, income tax-specializing chartered accountants)—which the client, not the lawyer, should employ (although with the lawyer's concurrence) to minimize, if not avoid, potential liability claims against the lawyer if the experts prove unqualified or otherwise unsatisfactory, or are not paid;
- (xiii) particulars of information and counsel furnished the client, and of other steps taken, to enable the client make voluntary, unhurried (to the extent practicable), and informed decisions;
- (xiv) all negotiations with the counsel for 'other' party(ies) or with the self- or un-represented 'other' party(ies) (while avoiding or minimizing courtroom-portal settlements that are binding, until either reduced to writing or read into the court record);

- (xv) communications to the client, signed by the client, which state (in the event) (i) that the client has given instructions *contra* the lawyer's legal advice, and (ii) implications of those *contra* instructions;
- (xvi) the lawyer's appreciation of issues, and their status—signed by the client—where the lawyer accepts retention in a matter in which the client was previously represented by another lawyer;
- (xvii) interim accounts or, at least, periodic drafts of accounts (which keep the client apprised of accumulating legal expense).

(d) Vacation of retention: Document

- (i) circumstances contributing to, and involving, vacation of retention, either by the client or the lawyer;
- (ii) receipt by client of returned file.

Most important documentation by a lawyer may relate, not to her or his client but, to communications with the 'other' party(ies). The report of 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." Therefore—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.

Beyond its utility during a retention, copious documentation serves, invaluable, should a lawyer need answer discipline complaints, or defend liability proceedings. Indeed, all retentions need be documented, while being constantly mindful that they prove adequate to successfully resist disciplinary and compensatory allegations, were they to be made.

7.2 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' constituent 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 application alleged that the trial judge in each of the cases "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." (*The National Post*, 07 April 2012, p. A10—"I feel the duty to continue.")

7.3 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 credible reason to believe he or she is, or contemplates, harming a child, provincial or territorial protection legislation may obligate the lawyer to suspend solicitor-client privilege and report the client's statements to the state.

Ethical responsibility, however, 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, 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, and the provisions of pertinent provincial or territorial rules of professional conduct, are likely to determine whether the lawyer suspends solicitor-client privilege on the basis of the common law 'future harm' exception to the lawyer's duty to protect client confidences.

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

As Justice Proulx and David Layton write (above, at p. 3), " ... while certain ... [responsibility] issues yield to reasonably clear answers, on many occasions identifying or applying the proper standards can be a maddeningly challenging exercise. Reasonable people can differ as to the proper ... approach to apply in a given situation."

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

Needs be added, not a few of us 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 and lesson-learning from errors and omissions—be parlayed into your becoming an exemplary practitioner.

8. Literature

Substantial literature, addressing legal, ethical and professional responsibility, has been published in Canada. Reflecting, only, the preference of the author of this anthology, this literature includes:

(1) MacKenzie, Gavin, *Lawyers & Ethics* (Toronto: Carswell, 1993), regularly updated in this loose-leaf publication;

(2) Woolley, Alice, *Understanding Lawyers' Ethics in Canada* (Markham: LexisNexis Canada Inc., 2011);

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

(4) Dodek, Adam M., *Canadian Legal Practice [:] A Guide for the 21st Century* (Toronto: Butterworths, 2009) [formerly: *Barristers & Solicitors In Practice* under general editorship of Derek Lundy, and consulting editorships of Gavin MacKenzie and Justice Mary V. Newbury], regularly updated in this loose-leaf publication;

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

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

Perhaps the most exhaustive compendium on lawyer legal, ethical and professional responsibility is the 2-volume *Restatement of the Law [3rd], The Law Governing Lawyers*, published in 2000 by the American Law Institute.

9. Program History

This (2012) is the fourteenth 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.

10. Copyright Exception Claim

The author of this anthology claims exception under the *Copyright Act*, R.S.C. 1985, c. C-42, s.29.

**Prepared from data published as:
CANADIAN LAWYER MAGAZINE 2011-2012 NATIONAL COMPENSATION SURVEY
(Bracketed figures are for results of Canadian Lawyer Magazine 2010-2011 Survey)**

Matter	National (Sample: 2012=570; 2011=709)			West (Sample: 2012=204; 2011=233)			Ontario (Sample: 2012=257; 2011=299)			East (Sample: 2012=56; 2011=93)		
	Min	Max	Average	Min	Max	Average	Min	Max	Average	Min	Max	Average
Uncontested divorce	1,056 (1,056)	2,922 (2,547)	1,540 (1,353)	1,084 (1,124)	2,942 (2,801)	1,442 (1,569)	936 (844)	3,078 (2,327)	1,462 (1,076)	1,582 (1,114)	7,545 (25,44)	2,632 (1,493)
Contested divorce	6,582 (7,208)	86,644 (74,122)	15,570 (12,875)	7,467 (8,729)	39,744 (111,604)	16,001 (15,315)	6,289 (6,002)	149,205 (49,789)	17,675 (11,840)	6,950 (5,825)	51,400 (28,095)	13,200 (9,591)
Separation Agreement	1,386 (1,339)	6,597 (7,029)	2,184 (2,305)	1,193 (1,255)	4,621 (6,217)	1,785 (2,299)	1,710 (1,520)	9,479 (9,346)	2,797 (2,688)	1,036 (993)	4,091 (3,382)	1,682 (1,477)
Child custody and support agreement	1,353 (1,529)	6,628 (9,421)	2,227 (2,590)	1,318 (1,527)	5,793 (10,190)	2,011 (2,668)	1,560 (1,725)	8,367 (11,097)	2,751 (2,991)	1,290 (1,060)	4,100 (3,437)	1,750 (1,645)

2.0 SOURCES AND STANDARDS OF RESPONSIBILITY

2.1 Professional and Ethical Responsibility

“The handmaiden of the power”

Slayton, Philip, *Canadian Lawyer*, April 2007, pp. 18, 19
[excerpt]

The Saskatchewan Crown Counsel Association recently invited me to come to Regina and speak to government lawyers about ethical and professional issues. It was an honour to be asked, and I was happy to accept, but I wondered, what should I talk about?

Often a discussion of “ethical and professional issues” is a dry dissection of the latest on solicitor-client privilege, or conflicts of interest or some other quotidian problem that faces the individual lawyer. Sometimes it strays into the more sensational—if and when a lawyer can have sex with a client, for example, or lawyer-assisted corporate fraud—and everyone wakes up. Sometimes it’s tedious and trivial, dwelling on issues like a lawyer’s responsibility to return calls promptly.

While this chitchat is going on, the legal profession is being undermined by a huge ethical problem that is largely ignored. We lawyers all believe that the justice system is an essential part of a fair and democratic way of government (or so we say). But we also know that the average Canadian cannot afford to use it.

According to Statistics Canada, the 2009 median after-tax income for Canadian families of two or more was \$63,800. For senior families, it was \$46,800. After-tax income for “unattached individuals” was \$25,500. These are medians: there are many Canadians who receive less. With this kind of income, you won’t get legal aid (available only to those who are really poor, and of very limited scope anyway), and will almost certainly be denied the *pro bono* legal services that a handful of socially concerned lawyers occasionally offer. If you need a lawyer, you’ll have to dig into your own pocket. In the cities, where most Canadians live, even a junior lawyer charges \$200 or more for an hour’s work. Fees like these are beyond almost everybody’s ability to pay. The result is that the legal profession has become the handmaiden of the powerful: government, corporations, and wealthy individuals.

We lawyers have a big problem. Our beliefs cannot be reconciled with what we know. We believe in equal access to justice (or do we?), but we know it doesn't exist (even if we don't admit it). We live in a state of "cognitive dissonance" (Chief Justice Beverley McLachlin recently used this phrase in *S.L. v. Commission Scolaire des Chenes*, so I feel comfortable with it). The encyclopedia says, "In a state of dissonance, people may feel surprise, dread, guilt, anger or embarrassment in the legal professional over the access-to-justice problem.

The access problem doesn't sit by itself. It is bound up in a complex web with other major systemic issues. Here are some of them:

1. In the modern age, most lawyers see the practice of law as a business rather than a profession; the Holy Grail is profit.
2. Billing by the hour, with its hideous incentives, fuels the flames of greed.
3. Self-regulation by lawyers has proven disastrously inadequately (it has been abandoned in the United Kingdom as part of the admirable and sweeping Clementi reforms of the legal profession and the provision of legal services.

. . . .

So that's what I decided to talk about in Regina. The biggest ethical problem for lawyers of them all—the fact that most Canadians cannot use the law and legal system that we once thought belonged to all who live in this country. I'm writing this a few days before I get on the plane. I wonder what sort of reception I'll get.

"Canadian Legal Ethics: Ready for the Twenty-First Century at Last"

Dodek, Adam M., [2008] 46 *Osgoode Hall Law Journal* 1, at pp. 9-20

Until recently, the Canadian legal academy was not particularly interested in legal ethics. [Allan C.] Hutchinson [Osgoode Hall Law School] attributes this to the lack of a defining Canadian cultural moment like Watergate "in which lawyers were placed under national scrutiny and obliged to reconsider the legitimacy of their professional practices and norms of conduct." While Hutchinson is correct that there has been no "lawyergate" in Canada to capture the public imagination, the last few years have seen numerous ethical scandals that, cumulatively, seemed capable of exerting some pressure on the legal profession. In this Part, I outline a brief history of Canadian legal ethics in the first decade of this century. For the most part, this history draws heavily on the public account of Canadian legal ethics, but also includes elements from the legal profession's account. The purpose of this section is to discuss examples of lawyers poor ethical behaviour to which the public has been recently exposed and the legal profession's responses, or lack thereof in some cases, to these and other issues.

For Canadian legal ethics it has been an eventful and challenging decade. The twenty first century began with the trial of Ken Murray, the lawyer originally retained to defend Canada's notorious murderer, Paul Bernardo. Murray was acquitted, barely, of obstruction of justice in connection with the infamous Bernardo/Homolka videotapes. The Law Society of Upper Canada (LSUC) began a disciplinary investigation into Murray's conduct, but abandoned it in favour of enacting a rule of professional conduct on the issue of lawyers' duties respecting physical evidence of a crime. After releasing a draft rule, the LSUC shelved this project as well. The Murray case thus ended in three negatives: no conviction against Murray, no disciplinary action by the LSUC, and no action by the LSUC to address the issue.

The next big ethical scandal involved law students, rather than lawyers. In 2001, thirty students at the University of Toronto Law School ("U of T" or "Toronto") were caught up in allegations of misrepresenting their grades to prospective summer employers, and twenty-four received sanctions ranging from reprimands to one-year suspensions. The U of T "fake grades scandal" also became an international *cause célèbre* in academic freedom circles because of allegations against a U of T law professor. As might be expected, one of the students sought judicial review and succeeded in having the Dean's decision against her quashed on jurisdictional grounds. Three years later, another cheating scandal erupted in Toronto, this time at the LSUC's Bar Admission Course. The cheating scandal ended abruptly after a few weeks. When the LSUC made an allegedly secret decision to abandon the investigation, the scandal continued to fester. In between the two Toronto student scandals, the President of the Law Society of British Columbia resigned in 2003, after a conviction for impaired driving, and was subsequently suspended from practice. He would not be the last law society head during the decade forced to resign amidst ethical improprieties.

Lawyers' conduct in the courtroom and in the bedroom dominated ethical discussions at the beginning of this century. Midway through the decade [August, 1995] the CBA embarked on another revision to its Code of Conduct, which had not been overhauled since 1987. The revised CBA Code, based on amendments in 2004 and 2006, is notable mostly for what it did not address, rather than for any ethical boldness. The CBA ducked the Ken Murray problem, took a very modest approach to the issue of dealing with corporate fraud, and rejected a proposed amendment to restrict sexual relations between lawyers and clients, an issue that would resurface sooner rather than later. In 2007, the former Treasurer of the LSUC received a two month suspension for conflict of interest arising out of a sexual relationship with a client who is now suing him and his law firm. Concerned also with lawyers' misbehaviour in the courtroom, the decade saw the rise of the civility and professionalism movement. Precipitated by the conduct of counsel in several cases, Ontario's Advocate's Society formed a Civility Committee, which produced a Code of Civility that the CBA included as an appendix in its revised Code [published 28 January 2010]. Similar concerns motivated the Nova Scotia Barristers' Society to establish a Task Force on Civility. Meanwhile, in British Columbia, solicitor Martin Wirick perpetrated the largest legal fraud in Canadian history, an estimated \$50 million, triggering the largest audit and investigation ever undertaken by the Law Society of British Columbia and sending shockwaves throughout the legal profession, as well as the real estate and business communities. [Note: Mr. Wirick (who declared bankruptcy) was, 09 December 2002, disbarred, and, June 2009, was sentenced to 7 years imprisonment. The Law Society reimbursed victims of his fraud.]

As class action lawsuits began proliferating across the country, the role of lawyers came under scrutiny, especially with regard to fees. Whether it was the \$56 million in fees for the settlement of the tainted blood scandal before a single victim was paid, or the \$100 million that Regina's Tony Merchant hoped to obtain as part of the record estimated \$1.9 billion settlement of residential schools abuse claims, public perception that lawyers put their own interests ahead of those of their clients ran high. Along these lines, concerns about lawyers taking advantage of vulnerable clients led the CBA, the Law Society of Yukon, and the LSUC to each establish guidelines for lawyers acting in Aboriginal residential school abuse cases.

In the courts, the Supreme Court of Canada continued where it left off in *Martin v. Gray* (1990), issuing two decisions, *Neil* (2002) and *Strother* (2007), which helped keep conflict of interest at the top of the legal profession's ethical priority list. On the regulatory front, the court held that provincial law societies could not prohibit non-lawyers from appearing as counsel before the Immigration and Refugee Board, but that law societies do have the power to regulate Crown prosecutors. In a leading case, the Ontario Court of Appeal held that the Ontario Securities Commission (OSC) could regulate the conduct of lawyers appearing before it. The Supreme Court held that law societies do not have a general duty of care to persons who are defrauded by their lawyers, but also that law societies will not be immunized from liability by ignoring their statutory responsibilities to protect the public. Along these lines, the Court vindicated the Law Society of New Brunswick for meting out the ultimate sanction of disbarment to a lawyer who misled his clients for five years. The Court continued its strong interest in solicitor-client privilege that began in 1999, deciding no fewer than eight cases since then, and elevating that privilege to a constitutional right. The bar across Canada, led by the Federation of Law Societies [of Canada], exerted tremendous energy and resources to successfully challenge regulations that, among other things, would have required lawyers to report "suspicious transactions" involving \$10,000 or more in cash.

In the area of judicial ethics, the [Supreme] Court [of Canada] decided two cases regarding judicial discipline, one involving statements made by a judge in court, and the other concerning attempts to remove a judge because of a later-discovered criminal conviction. The Court dealt with two judicial disqualification cases, both of which arose under unique circumstances and both involving allegations of bias against members of the Court itself. First, in *Wewaykum* (2003), the losing litigant before the Court was unsuccessful in its attempt to vacate the decision based on the alleged reasonable apprehension of bias arising from Justice Binnie's involvement in the case while holding the position of Associate Deputy Minister of Justice [of Canada]. Second, in *Mugesera* (2005), lawyer Guy Bertrand made accusations that a Jewish conspiracy had tainted the impartiality of the Court, which the Court found, was an "unqualified and abusive attack on the integrity of the Judges of this Court." Bertrand was later formally reprimanded by the Barreau Du Quebec.

Over the decade, access to justice was increasingly recognized as an important issue by the courts, the profession, and the media. The [Supreme] Court recognized a doctrine of advance costs but then significantly narrowed it. It unanimously and unceremoniously rejected the constitutional claim for state-funded legal counsel in civil cases, and it forced a representative plaintiff to pay costs likely totaling over one million dollars in an unsuccessful class proceeding. The court's treatment of access to justice issues was at odds with an increasingly strong *cri de coeur* being heard both within the profession and in the press. The Chief Justice of Canada and

other justices and leaders of the bar frequently lament barriers to access to justice for Canadians, but have offered little in the way of solutions. One bright note has been the rise of institutionalized *pro bono* initiatives, through *Pro bono* Law Ontario, *Pro bono* Law of British Columbia, and now *Pro bono* Law Alberta. Over the decade, the plight of self-represented litigants has increasingly caught the attention of Canada's judges, lawyers, policy-makers, and to some extent, the press.

The years 2006 and 2007 might well be considered the legal profession's *anni horribiles* from the perspective of Canadian legal ethics. With British Columbia still reeling from the Wirick fraud, the Treasurer of the LSUC in Ontario resigned in January 2006 and was ultimately disciplined and suspended for two months in connection with a sexual relationship with a client. In August 2006, legal heavyweight Peter Shoniker pled guilty to money laundering and was sentenced to fifteen months of incarceration. In the spring of 2007, lawyers from Torys LLP were frequently in the news relation to advice that they gave Conrad Black and other members of Hollinger Inc. regarding non-compete agreements at the center of the Black trial in Chicago. In a deal struck between Torys and the prosecution, the Torys lawyers—not subject to the jurisdiction of the American courts—agreed to testify by recorded videotape in Toronto, with resulting negative press coverage of the lawyers and the law firm. Not to be missed, of course, was the fact that two of the defendants in the Black trial were lawyers: Mark Kipnis[,] and Peter Atkinson (a member of the Ontario bar and a former Torys partner). Rarely mentioned was the fact that Conrad Black is a law graduate (Laval), although not a member of the bar.

In [the] [06 August 2007 edition of *Maclean's* magazine], lawyers were featured on the cover of *Maclean's* under the headline "Lawyers are Rats" with titles above various lawyers reading. "I Pad My Bills," "I'm Dishonest," "I'm sleeping with my clients," and "I take bribes" among other things. The cover accompanied an interview with Philip Slayton, ethics columnist for *Canadian Lawyer* and former law professor, law dean, Bay Street lawyer, and author of *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession*. The sensationalism of *Maclean's* succeeded in provoking a rash of responses from the organized bar as well as from its individual members. It was likely responsible for temporarily catapulting Slayton's anecdotal collection of lawyer malfeasance onto the bestseller list where it quietly retreated after having wrought havoc on the legal profession for two months.

The year ended with a collective sigh of relief from the legal profession with the Competition Bureau of Canada's report on self-regulated professions, including law. The legal profession had been anxiously awaiting this report, looking over its shoulder at the changes precipitated by similar reports in the United Kingdom and the European Union. On 11 December 2007, the Commissioner released her report amidst minimal fanfare and negligible public interest. While the follow-up remains uncertain, law societies will be able to make small changes in response to the Competition Bureau's report without upsetting the apple cart.

Thus ended the Canadian legal profession's two-year *anni horribiles*, with a whimper not a bang. Somewhat surprisingly these events appear not to have had much impact on the level of public trust towards lawyers in Canada, which actually went up in 2006 and again in 2007 after a decrease for several years in a row. In 2007, 54 per cent of Canadians said that they trust lawyers, the same level as in 2002. This is a much lower level of trust than that received by perennial favourites—firefighters (97 per cent)—but far ahead of politicians (15 per cent) and

used car salespersons (12 per cent). While the decade was full of ethical lows and challenges for the Canadian legal profession, Hutchinson's point, first made in 1999, that there had not been a single defining cultural moment for lawyering in Canada, is still the case. Despite the absence of a "lawyergate" that succeeded in capturing the public imagination and spurring an agenda for reform, many of the events described above did have an impact within the profession and the legal academy. Importantly, these events helped stimulate some of the initiatives ..., and certainly provided both motivation and opportunities for the scholarship described ... [in Parts III and IV of then-visiting Scholar Dodek's journal article.]

"One lawyer can make a difference"

**Slayton, Philip, *Canadian Lawyer*, July 2008, pp. 28-29
[excerpt]**

Sometimes an individual lawyer shows what can be done about the legal profession's biggest ethical issue—lack of access to justice—if you care enough. Recently, I've come across two interesting examples.

A friend gave me a book by Vancouver lawyer Dugald Christie, self-published in 2000, called *a Journey into Justice*. Most of the book is taken up with Christie's account of his 1998 bicycle trip from Vancouver to Ottawa (he was 57 at the time). He took the trip so he could burn his lawyer's robes on the steps of the Supreme Court of Canada. He wanted in this way to protest against poor people's lack of access to justice. Christie's quixotic journey attracted a fair bit of attention, which, of course, was the whole point. He took similar bicycle trips later, and with the same purpose.

Christie was killed in a traffic accident on July 31, 2006. His bicycle was hit by a minivan on the Trans-Canada Highway, in the hamlet of Iron Bridge, near Sault Ste. Marie, Ont. This time he was heading to Newfoundland, where he planned to attend the Canadian Bar Association's annual meeting. Christie wanted the CBA to pass a resolution calling on governments to improve access to the justice system. In an official statement, the president of the CBA said members were saddened by Christie's tragic death. "Dugald was a dedicated fighter for the rights of Canadians who could not access the justice system," said the president. The CBA did not pass the resolution Christie wanted.

Not everyone who walks the walk is as eccentric and flamboyant. Recently, at Montreal's Blue Metropolis Literacy Festival, I debated the distinguished lawyer Richard Pound, about the ethics and social commitment of the legal profession. It was high-spirited and good natured. Last year, Pound published a book called *Unlucky to the End*, about Janise Gamble, who was implicated in the 1976 murder of a policeman by her psychopathic and abusive husband. It was clear that she had not fired the fatal shot, but she may have been involved in a robbery that preceded the murder. Gamble was convicted of first-degree murder and was given the mandatory sentence of life imprisonment without eligibility for parole for 25 years. A series

of appeals were unsuccessful. She was sent to the Kingston Prison for Women. Gamble, a poor woman who had led a wretched life, was now, presumably, to be forgotten for good.

But as the Pound tells the tale, several lawyers thought there had been a miscarriage of justice—in particular, Colin Irving, a prominent Montreal tax practitioner. In 1982, Irving saw something about the Gamble case on the CBC's *the fifth estate* and it bothered him. He thought Gamble's sentence was based on legislation not in effect at the time of the murder, and that ongoing enforcement of the sentence she was given violated the prohibition against cruel and unusual punishment in the Charter of Rights. He wrote to Gamble and offered his services *pro bono*. Thus began six years of often-intensive legal work. At the end of 1988, the Supreme Court agreed with Irving's argument and found Gamble eligible for parole. In 1989, she was let out of jail. [[1995] 2 S.C.R. 595.]

Sadly a few months after being granted parole, Gamble was killed in an automobile accident—hence the title *Unlucky to the End*. Perhaps the best piece of luck she had in an unlucky life was having Colin Irving on her side.

“Woman, 79, Finishes Law School, Lands 1st Job in Practice”

Neil, Martha, www.abajournal.com, 23 February 2010

At a time in life when many attorneys have either retired or are putting the brakes on their careers. Alice Thomas is revving up.

Now 79, she completed her course work at McGeorge School of Law in December and has already lined up a job working with elder law issues at a Reno, Nev., firm, reports *The Sacramento Bee*.

That should help her start making a dent in the \$70,000 of student loans she racked up pursuing her dream of becoming an attorney and taking a “nibble” at some of the world's injustices. She will be at least 80 by the time she passes the bar exam, which she expects to take either in California or Nevada in July.

Significantly older than all of her fellow students and all but one of her professors, Thomas struggled to contend with the demands of law school while also caring for a longtime companion with Alzheimer's.

“Most of the time, the other students acted like I wasn't even alive. Some of them asked if I was really serious,” she tells the newspaper. “I told them I could take a first-class trip around the world and not spend as much money and not have to work as hard.”

[**Note:** The law partner of this anthology's author, is currently marking his 66th year of practice. He will celebrate his 88th birthday in November 2012.]

"Five Ways to Incorporate Holistic Lawyering Into Your Law Practice"

Cassens Weiss, Debra, www.abajournal.com, 10 May 2010

J. Kim Wright says it took 10 years to learn the things she needed to know for her new book on holistic lawyering, and a long weekend to write the first draft.

Wright's new book, published by the American Bar Association, is *Lawyers as Peacemakers: Practicing Holistic, Problem-Solving Law*.

Wright's views are informed by an unhappy start in law practice and her experience raising 16 children, 14 of them stepchildren, foster kids and runaways. At work, dissatisfied with her first few child custody cases in Asheville, N.C., she set out to search for an alternative. In 2008, her quest took her on a cross-country trip to tape hundreds of video interviews about a more collaborative approach to law practice. They are available at Wright's website, Cutting Edge Law.

We asked Wright, who was featured as an ABA Journal Legal Rebel, for five tips on how to incorporate holistic lawyering into law practice. Here's her advice:

- 1) **Remember, it's all about context.** Wright gives an example learned from her role as a mother, when a child complains about being hit by a playmate. "What I learned to do is to say, "And what happened just before he hit you?" Wright says. "It's about getting a bigger picture." The same approach can be applied when a client complains about another employee who is treating her badly. The problem could be a workplace disagreement, or it could be a work place that is allowing sexual harassment. "Clients have this idea about what their real problem is, and they tell us a story, but it might be a completely different problem that needs to be resolved," she says.
- 2) **Know why you do what you do.** Know your purpose and the purpose of law and how those fit together. A lawyer may want to be a peacemaker, a problem solver, a truth teller or a hired gun. "When lawyers are working with clients whose values align with them, I think they're more effective and happier," Wright observes.
- 3) **Take care of yourself and others.** A stressed-out lawyer can't serve clients very well, Wright points out. "You have to take care of yourself first so you can take care of other people."
- 4) **Be respectful of everybody.** Too many lawyers consider their clients as cases and files that are part of their to-do-list. Instead lawyers should take time to understand their clients and the reasons they sought legal advice.
- 5) **Be curious and keep learning.** Many important subjects—such as the dynamics and heart of listening—are not taught in law school.

"Lawyers—Especially Men—May be Too Optimistic About Case Outcomes, Survey Says"

Neil, Martha, www.abajournal.com, 11 May 2010

[*excerpt*]

When asked to predict the outcome of civil and criminal cases, lawyers are often too optimistic.

That's the result of a survey co-authored by Elizabeth Loftus, a University of California-Irvine [CUCI] psychologist and law professor, along with other academics, published this month in the American Psychological Association's *Psychology, Public Policy & Law*.

The article is titled "Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes."

"The higher the expressed level of confidence, the more likely lawyers were to fall short of their goals," Loftus said in a UCI release about the survey. "In addition, male attorneys were found to be more overconfident than female attorneys.

Specifically, the study asked two questions of 481 American lawyers representing plaintiffs and defendants in cases expected to go to trial within a year. First, they were asked, "What would be a win situation in terms of your minimum goal for the outcome of this case?" Second, they were asked how confident they were of achieving the goal set in their first answer, on a scale of 0 to 100.

When the researchers conducted follow-up interviews, they found that 32 percent of the lawyers met their goals, 24 percent exceeded their goals and 44 percent were less successful than predicted.

When turning to policy implications of the research, Loftus and her colleagues suggested that lawyers ought to be seeking feedback from third parties to help them counter potential overconfidence, which could translate to client disappointment.

"Take care of your Plimsoll Line"

National, June 2010, p. 8

Samuel Plimsoll was a British politician and social reformer, now best remembered for having devised the *Plimsoll Line*. The original Plimsoll Mark was a circle with a horizontal line through it to show the maximum draft of a ship. This line is more commonly referred to as the waterline.

Each of us has our Plimsoll Line—that point where, if our personal load (stress) is increased, we become overloaded and clear sailing becomes threatened.

Knowing and being aware of your Plimsoll Line is critical for healthy and productive living. We must recognize our ability to take on stress and accept that not all stressors are bad.”

The Oxford Dictionary defines stress as “a state of affairs involving demand on physical or mental energy.”

Stress is extremely personal. We all encounter various stressors in everyday life. If you know how to manipulate it properly, stress can be turned into plenty of advantages for you.

A person who knows how to manage their stress, so as not to exceed their Plimsoll Line, can inject or eliminate stress whenever he or she chooses.

A change in attitude, such as simple modifications of habits, thought, and behavior patterns, often go a long way to reduce stress and tension. Practising to let go or making conscious choices not to become angry or upset over trivial matters saves a lot of mental and physical energy.

And don't forget the role of laughter in reducing stress:

- Try to develop or adopting a humorous view toward situations (‘might be well laugh as cry.’)
- Try to spend as much time as possible with cheerful people.
- Try not to always take yourself too seriously.

Keep a collection of your favorite funny books and CDs/DVDs.

The next time you are feeling miserable, identify your negative thoughts, focus on your feelings and then eliminate all self-defeating thoughts. Substitute them with positive thoughts about yourself. Try putting a really cheerful smile on your face. You will find it difficult to stay sad and you will bask in the glow of making other people feel better. Positive thinking reduces negative emotions and acts as a stress-buster.

Do not, however avoid seeking professional help or mobilizing social support, if required, in dealing with stressful times.

Federation of Law Societies of Canada

**Hunter, Q.C., John J.L., “Notes From A Speech To The National Family Law Program”,
12 July 2010
[excerpt]**

Opportunities to address large numbers of the profession from all over Canada are somewhat rare so I hope you will indulge me for a few minutes so I can place this CLE program in a broader context. I recognize that the vast majority of lawyers in Canada have only a passing knowledge of the Federation, if any knowledge of it at all. Yet, every lawyer in Canada who does legal research is the beneficiary of CanLii, a jewel in the crown of the Federation’s work, and every lawyer in Canada is free to move across provincial boundaries without formality to practice their profession as a result of a national mobility regime put in place by the Federation. For practitioners in the areas of family and criminal law, these continuing professional development programs are also an important feature of the Federation’s work.

The unifying thread to these initiatives is the Federation’s mission to serve the public interest, just like each of its 14 member law societies, the regulators of the 100,000 members of the legal profession across Canada.

As you may know, national mobility plays a fundamental role in driving the Federation and its member law societies toward a consistent, national approach to what we do to meet our public interest mandates. On this score, the framework for national mobility, commenced in 2002, is now virtually complete. In March of this year, all law societies agreed to reciprocal mobility arrangements with the Barreau du Quebec.

With national mobility as the backdrop, and from the Federation’s headquarters in Ottawa, the Federation is now tackling a national approach to bar admission standards, national discipline standards and a national code of professional conduct. A few years ago, these ideas would have been regarded as too hard for the law societies to deal with, especially when seen through a provincial, rather than national, lens. But mobility of the profession and the growth of national or regional law firms has made law societies question why there are differences from one province or territory to the next. They ... [are answering] that question with the determination to smooth out differences with a view to putting in place best practices, high standards and a transparent and defensible national approach which inspires public confidence in how the legal profession governs itself.

Make no mistake about it—harmonizing provincial and territorial practices is challenging and can take a long time, but law societies are determined to get the job done. Some members of this audience will already have had a taste of these challenges by noting the variations in how mandatory continuing professional development hours are accredited. Mandatory professional development began just last year in British Columbia. It is a reality this year in Quebec, New Brunswick and Saskatchewan as well as British Columbia. Other jurisdictions, including

Ontario, are coming online over the next year. In time, I expect that the variety of experiments with this system will see our law societies coalesce around one way of doing things, with uniform standards and methods of administration of the duties of the profession to maintain their competence to practice law in Canada. I was President of ... [the British Columbia] law society in 2008 and at that time, the national discussion around mandatory professional development for lawyers was whether there should be any. Today the discussion is about how much there should be, how it should be structured and how compliance should be measured and enforced.

“Lawyer Competence”

Woolley, Alice, *Understanding Lawyers’ Ethics in Canada* (Markham [ON]: LexisNexis, 2011), pp. 72-75

Lawyers have been subject to professional discipline for failing to provide competent representation in advocacy. In *Law Society of Alberta v. Syed* [1994], for example, the lawyer proposed a plea for a client in a sexual assault case where he had not determined whether his client was guilty. He had not interviewed the accused or explored potential defences. The lawyer did not look at the witness statements in a detailed fashion. As summarized in the decision:

He did not confirm if the complainants were under the age of 14 years.

He did not attempt to interview others present that night. In other words, he did not determine from his client, before offering the guilty plea to this one charge that the client was prepared to admit to more than consensual intercourse...

In essence, the lawyer appeared at the eve of trial knowing that he was unprepared to defend his client and suggesting a plea solely to get out of the dilemma his lack of preparation created. The lawyer agreed that his conduct in this respect was improper.

Syed is an illustrative case. It shows clearly the relationship between incompetence and a failure of zealous advocacy; the lawyer’s lack of preparation and effort rendered him incapable of advocating on his client’s behalf. It also shows why that behaviour is properly characterized as unethical. The potential consequences for a client in a criminal case involving a sexual assault allegation are serious, and putting the client’s liberty and security of the person in jeopardy because the lawyer has failed to prepare adequately, violates that client’s rights. The client did not have the resolute advocacy to which he was entitled because his lawyer was incompetent.

Goldberg v. Law Society of British Columbia is a more recent example [2009]. In that case Goldberg had brought an application on behalf of various individuals arguing that they had received ineffective assistance of counsel in their criminal trials. Their first lawyer, Banks, had practiced law when no longer a member in good standing of the Law Society of British Columbia, when under considerable stress due to the death of his father, and in circumstances such that the Law Society continued to refuse to readmit him to practice. In bringing his

application arguing that Banks' former clients had received ineffective assistance of counsel, Goldberg made a number of allegations against Banks which were unsubstantiated, and much of the orientation of the Law Society's disciplinary proceedings were directed at his having done so.

The Law Society also found, however, that Goldberg was incompetent in his representation of his clients, and that this too was conduct deserving of sanction. The affidavits he filed in Court were irrelevant, rambling, repetitive and disorganized and showed a "complete lack of knowledge of the law of evidence". His facts were similarly "rambling and disorganized"; "presented almost completely without legal authority" and were "stream of consciousness rendition[s] of the evidence".

As noted by Prowse J.A. in her concurring reasons upholding the Law Society of British Columbia's disciplinary decision, Goldberg's incompetence in this respect raises a serious concern both for his clients and for the administration of justice. Banks, who was no longer a member of the Law Society of British Columbia, and whose own competence was therefore self-evidently at issue, had represented individuals in serious criminal cases, some involving murder charges. And now those individuals' *prima facie* non-frivolous argument that they had not received effective assistance of counsel from Banks had not been competently presented to the Court. Those clients remained in jail. Prowse J.A. suggested that

the Law Society may consider it appropriate to review its records to ascertain whether there is a foundation therein for recommending a further investigation into this matter, with a view to determining whether there may have been a miscarriage of justice in relation to one or more of the ... appellants [the jailed clients].

The ethical violation of Goldberg in relation to his clients was profound. Failed not once, but twice, those clients almost certainly did not have the zealous advocacy to which they were entitled. And in both proceedings their liberty and security of the person were at issue. Goldberg needed to investigate the facts fully, present them properly in affidavits in compliance with the law of evidence, and focus his evidence and arguments on the legal points that need to be argued in a case alleging ineffective assistance of counsel. Goldberg may not have been successful given Banks' lack of cooperation, and his inability to access the law society record, but his clients would have had the legal representation to which they were entitled, at least once.

Solicitor negligence cases also provide guidance on the ethical obligation of competence that underlies zealous representation. Although negligence is often distinguished from incompetence with "mere negligence" being said to be insufficient to demonstrate incompetence, legal doctrines arising from the law of negligence nonetheless indicate what zealous advocacy might look like. The standard of care to be met by lawyers is that of the "reasonably competent solicitor" and includes the obligation to advise the client of risks in a course of action, to research the law and understand the principles applicable to a client's case, and to provide effective assistance of counsel.

A particular example of the relationship between negligence law and the failure to provide resolute advocacy is *Hagblom v. Henderson* [2003]. Henderson had acted for Hagblom

in defence of a negligence claim. The defence was unsuccessful; the Court found in that proceeding that Hagblom had negligently constructed a chimney with the result that the house with the chimney was burnt to the ground. In his subsequent action against Henderson, Hagblom argued that Henderson had been negligent in his conduct of the defence. The Court of Appeal agreed and, in particular, they agreed that Henderson was negligent in failing to either consult or call an expert to testify with respect to aspects of Hagblom's construction of the chimney. The Court held that while a decision to call an expert can be a matter of judgment, there are circumstances in which calling an expert is essential. In this case it was impossible to defend Hagblom in the action without expert testimony, yet Henderson did not talk to any potential experts. Henderson's conduct did not meet the standard of the reasonably competent solicitor and he was, therefore, liable to Hagblom for damages.

This case is an example of what a failure to fulfill the duty of resolute advocacy looks like. Properly analyzing the plaintiff's allegations to determine the evidence that is necessary to present the defendant's case effectively, and locating that evidence if possible, is a precondition without which resolute advocacy cannot occur. No amount of cleverness in cross-examination, or rhetorical flourish in argument, can make up for the absence of that sort of basic preparation.

The word zeal, and even the word resolute, bring with them connotations of excitement, an image of the lawyer as superhero—or, to its critics, connotations of the lawyer as gangster, skirting the moral norms of society to achieve what the client wants. The reality is less dramatic, if not less ethically significant. Fulfilling the duty of zealous advocacy means hard work, intelligence and experience applied to the client's problem in order to achieve as successful a resolution as possible.

"Lawyers' monopoly will backfire: BC's top judge"

**Hainsworth, Jeremy, *The Lawyers Weekly*, 17 December 2010, pp. 1, 3
[excerpt]**

The B.C. Court of Appeal chief justice's suggestion that lawyers may monopolize themselves out of being a self regulating profession is being met with mixed reactions.

And, remarked Law Society of B.C. president Glen Ridgway, "the chief justice is focusing, and wants us all to focus, on the issue of access to justice."

Chief Justice Finch made the comments while he was speaking about the number of unrepresented people in the courts. In the B.C. Court of Appeal, he said that rate is about 15 percent. Often, there is lawyer lacking on one or both sides.

"We believe there [are] a significant number of appeals where there is a meritorious argument to be advanced, that cannot be made or made adequately without a lawyer," Chief Justice Finch said "And we also believe that at least some of these litigants are unrepresented

because they cannot afford the cost of a lawyer, and do not qualify for legal aid or *pro bono* services.”

“In short,” he said, “the high costs of legal services appears to be one of the obstacles to access to justice.”

He called it “the elephant in the room.”

“Everyone knows it’s there, but no one wants to talk about it. I think it is time to open the conversation.”

He said simplified court procedures, alternative dispute resolution, legal aid and multi-disciplinary practices can help increase access to justice.

Little is said of reducing high legal fees which are often a disincentive to retaining counsel, he added.

“It touches on the legal professional’s ability to remain independent and self-governing, and it concerns the public interest in access to justice,” Chief Justice Finch said.

Further, he noted, the Law Society of B.C. (LSBC) prohibits those other than practising lawyers from the practice of law.

“The apparent purpose of this prohibition is protection of the public,” he said. “However, the monopoly enjoyed by the legal professional also has the effect of constricting the supply of legal services.”

"The lights are always on"

Todd, Robert, *Canadian Lawyer*, Jan. 2011, pp. 33-37

[excerpt]

Few people have observed the profound shift Canada’s legal profession has taken in recent years as closely as Gowling Lafleur Henderson LLP Chairman and CEO Scott Jolliffe. Called to the bar in 1978, he says the pace of legal practice has accelerated to a rate no one would have envisioned back then. When he started out, “You would send a letter out, and it would take several days for the letter to get there. Then they’d consider it on the other end, and a response would come back.” That lag time has now evaporated. “When a client asks a question, they want an answer,” explains the member of Gowlings’ international strategic advisory group. “They are expecting that you are attached to your cellphone or your Blackberry, and receiving their message as they give it. It’s instant messaging on e-mail.” It also means lawyers now check their smartphones at least every hour during the day, and especially before going to sleep and upon waking. “That’s just the way it is now,” say Jolliffe.

The rhythm of modern legal practice has also been cranked up through the globalization of Canadian businesses, a process that picked up with a wave of foreign takeovers in the mid 2000s. Lawyers now deal with corporate legal departments in every corner of the world, often varying time zones. It's now common for lawyers to teleconference in the wee hours of the morning. Jolliffe, who was recently on an 8 p.m. to 4 a.m. schedule for a Japanese file, acknowledges there's simply no way of getting around these odd hours. "If we are a service profession, then we have to be able to adapt to the needs of our clients, and be responsive to them," he says.

To meet that promise, Canadian lawyers are being forced to change the way they operate. The dividing line between work time and personal time has disappeared, and only those able to flourish within this new reality will survive in the modern era of 24-7 law.

Many lawyers have turned to technological innovation as a means of keeping up with the increasing client demands and volume of work they face. The results over the years been astounding—Brock Gibson, chairman of Blake Cassels & Graydon LLP, estimates the productivity of lawyers is now up to four times as great as when they entered the profession in 1983. Yet Donald Belovich, a corporate law partner at Stikeman Elliott LLP in Toronto, says this superior output has further heightened expectations lawyers face from both within their firms and clients on the outside. That has prompted him to join an expanding group of lawyers experimenting with new tools to keep ahead of the pack.

Like most sophisticated, modern firms, Stikemans has a searchable database that allows lawyers to use templates and precedents to a greater extent than ever before. They also benefit from an intranet filled with the firm's previous work product and intellectual property, which cuts down on research time. But that's just the tip of the iceberg in terms of the ability of technology to save time. "The hardware devices we use, from the BlackBerry to logging in remotely from Citrix [enabling mobile work styles and powering cloud services] to VPN [virtual private network]," have played a huge role in gaining efficiencies, he says. "We're piloting iPhones, iPads, and basically looking at all different ways of getting connectivity and managing the flow of information."

This type of technology allows lawyers to get all the work done "they've signed up for," as Belovich says, in a seamless shift from personal time to work time. It essentially allows them to work wherever they are, fostering some bizarre settings for the completion of legal work. Take Belovich's recent vacation to Italy: While on a 25 kilometre hike, he was able to whip out his iPad from a backpack, and stop on the side of the road to participate in a conference call. When that was done, he tossed the tablet computer back in his bag, and along he went for the rest of the journey.

If not for that technology, he likely would have been holed up at his hotel for much of the day awaiting the call, or absent from a key meeting.

So although modern technology, in the form of new communications tools, have raised client expectations, it has also allowed lawyers to restore some balance in their lives and get things done in a timely, efficient manner. And there are always ways to use technology to greater benefits. "You can't rest on your laurels," says Belovich. "We're constantly looking at ways at

leveraging the new technology and really redefining our work processes and our workflows, and looking at it and saying, ‘OK, this is how we’ve historically done things, how can we do it smarter? How can we use technology to do that?’”

While technology can certainly help lawyers work more efficiently in the face of ever – increasing volumes of work, it won’t necessarily increase the quality of their advice to clients. As Jolliffe notes, one of the biggest challenges lawyers face in modern legal practice is the danger of offering advice as quickly as possible, and some lawyers are too eager to fall in line. He urges lawyers to guard against this by instituting a practice of acknowledging receipt of an e-mail from a client, before pausing to process the question to craft an accurate response [in a further e-mail to the client]. It can be hard to take this time with other pressures bearing down, but it is necessary in order to prevent the delivery of unsound legal advice. “If it takes an extra half an hour, it’s worth doing it,” says Jolliffe. “Because once you give an answer by e-mail, it’s there, it’s fixed—you can’t change it. It’s now like an oral conversation where you can go back and add to it before it’s finalized. Just because we’re now in a world of instant messaging, doesn’t mean we should be giving instant advice.”

At the end of the day, part of the reason lawyers continue to thrive in the midst of technological innovation is their ability to distill information in a way computers cannot. Macleod Dixon LLP’s Calgary-based worldwide managing partner Bill Tuer notes “In our business, we still need reflection time; time for judgment and processing, because that often tends to be part of the high value-add on very important matters; the human judgment that’s applied to the data.”

A big part of making way for that to happen is in the management of client expectations. But there are also strategies lawyers can use to make room for deep thinking. Jason Markwell, an intellectual property partner at Ogilvy Renault LLP in Toronto, uses a valuable technique [:] he attends to his detailed work early in the morning or after business hours when distractions are at a minimum. He also employs old-fashioned willpower when a pressing matter is likely to take up an entire day; he simply doesn’t respond to messages as promptly. “It’s very difficult to be focused on something complicated and at the same time responding to requests,” he explains.

Meanwhile, the story of Belovich’s mid-hike conference demonstrates another key threat of lawyers’ 24-7 work demands: burnout. There was a time not too long ago when lawyers could enjoy a mental break from their work when they returned home for the evening or went on vacation. Sure, it was always hard to get away from the office for extended down time, but when a lawyer was gone, it was possible to get away from their work.

The lawyer could completely disconnect from the office, especially when outside the country. Now they can get virtually everything done away from the office that they can while tied to their desk.

This suggests the new generation of lawyers may never know what it is like to experience absolute downtime. Is it just a matter of time before they hit the wall and crash, potentially to the detriment of both their firms and clients?

Tuer points out that not too long ago the prevailing wisdom in the profession was that people needed to work smarter, not necessarily harder. He says the overwhelming competitive nature of the profession and economy now forces lawyers to do both, raising the stakes exponentially. “Stress levels are higher today in the practice than they would have been five, 10, 20, years ago, by virtue of the nature of the demands and the fact that it is harder to get away from all of those demands,” he says. “Clients know how to find us these days.”

Many lawyers argue their eternal connectivity with clients and colleagues is a good thing—they’d rather deal with a brush fire while sitting on a beach in the Caribbean then return to the office to face an out-of-control inferno. But Tuer doesn’t buy that, and says most lawyers agree the disappearance of downtime is problematic, both personally and professionally. The solution, he suggests, may be the expanded use of sabbatical programs.

Julie McCarthy, an associate professor of organizational behaviour at the University of Toronto’s Rotman School of Management, says certain types of lawyers are innately better able to manage the psychological toll that comes with the non-stop nature of their work. Those with high levels of emotional stability can better cope with the inherent anxiety of this environment. Similarly, lawyers who can efficiently regulate their emotions are also more likely to succeed.

This means two lawyers facing the exact same challenges each day could perform at vastly different levels, based simply on their emotional makeup. “One of them may be much more effective, because the way that cognitively they’re reacting to these stressors, they’re able to disassociate themselves,” says McCarthy. That’s a phenomenon known as cognitive detachment, and the extent to which lawyers can separate themselves from the daily stresses of the job goes a long way to determining how they perform.

Another important psychological consideration for a modern lawyer looking to succeed involves the level to which one internalizes situations. McCarthy says it’s useful to determine whether one possesses an internal or external locus of control. Someone with an internal locus of control is more likely to take responsibility for all of his or her actions, and view events as a direct function of his or her own actions. That type of approach can lead to skyrocketing stress levels, creating self-disdain when problems arise. Conversely, lawyers with an external locus of control are more likely to see how factors outside their control contributed to a defeat. That makes them better able to cope with the high-paced, high-stress environment of modern legal practice. Thankfully, those with an internal locus of control need not despair. “These are behaviours and thought processes that can be trained, that can be learned,” emphasizes McCarthy.

"Can This Marriage Be Saved? Two Spouses, Both Lawyers, Each Hate Practicing. What to Do?"

Neil, Martha, www.abajournal.com, 02 February 2011

Two married lawyers who both hate practicing are at the brink of divorce. The issue they are battling over is which one should work at a legal job to pay both of their student loans, thus putting the other spouse on a path toward the career of his or her dreams, a People's Therapist post recounts.

A law graduate and licensed social worker, psychotherapist Will Meyerhofer is working with the husband in this couple's conundrum. However, he also sympathizes with the wife, who says it would crush her soul to continue in practice. She wants to go to graduate school to study art. If she can't, she'll move back home with her parents.

That might be something of a relief on another front—she hates their shabby apartment, too, which is all they can afford on his salary. It apparently lacks, among other amenities, the fab kitchen with granite counters and AGA stove that she and her husband saw as an achievable dream back in the days when they were classmates in a first-tier law school expecting to work happily ever after at BigLaw jobs.

He desperately wants to go to grad school, too, to study history. Instead he's working at a law firm, hating the job, and paying down both of their student loans, since she's out of work right now. He says he's willing to work at a legal job to pay his own loans, but doesn't intend to do so over the long run to cover hers as well.

Lacking "authentic" work, both husband and wife are essentially suffering identity crises, Meyerhofer writes, as they struggle to redefine their goals in life. And they might have to separate to do so.

"This partnership might need to come apart, so they can go their own ways and find their own work," he writes. "Once that undertaking is accomplished, they could find the confidence to support a new partnership."

"Supreme Court justice LeBel lauds defence Bar's resolve and courage"

**Schmitz, Cristin, *The Lawyers Weekly*, 04 February 2011, pp. 3, 8
[excerpt]**

A Judge of Canada's highest court has praised the criminal defence Bar for striving to ensure that even the "worst of the worst" reap their fair measure of justice.

In a recent speech ... on lawyers' ethics, Supreme Court Justice Louis LeBel highlighted the "pressure and difficulties" faced by defense counsel in the present law-and-order political climate, as well as their "critical role" in upholding core social values, including fairness even for those accused of the most reprehensible crimes.

"I think there is in the public discourse these days, I sense[,] trends that are quite dismissive about the importance of the defence Bar, the importance of the defence in our legal system, [and] the life of our society." Justice LeBel said.

"But... the role of the defence is also the global role of defending some values of fairness in the criminal justice system," he told 145 lawyers attending a dinner sponsored by the Thomas More Lawyers Guild at the National Arts Centre Jan.20 [in Ottawa].

Justice LeBel said "terrible" and "painful" criminal cases naturally attract public opprobrium, yet "there are rights of the accused, and there is a corresponding duty on the lawyer, to make sure that even the worst receive their fair measure of justice."

He said the crucial role of defence counsel "is to make sure that the members of our society, if necessary those who are in the deepest trouble, receive this fair share of the justice in society."

"Changing commercial climate puts lawyers' ethics under microscope"

**Rose, Neil, *The Guardian* [London], 09 February 2011
[excerpt]**

"We've got to draw a line under unethical behaviour," says one lawyer to another in an American cartoon strip. "But draw it in pencil."

Lawyers' ethics is a concept too easily mocked, but there is growing recognition that more needs to be done to ensure both would-be and qualified lawyers are certain of the standards they are required to uphold.

A report published by the Law Society [of England and Wales] last week said ethics should be added to the seven “foundations of legal knowledge” that are at the heart of the law degree, and it emerged that the Solicitor’s Regulation Authority (SRA) is considering whether to make ethics a compulsory element of solicitors’ ongoing post-qualification training. In both instances people might be surprised that these are not already happening.

The SRA’s ethics helpline receives some 5,000 calls a month. My experience, having once sat in on it, is that solicitors are generally seeking reassurance they are doing the right thing rather than looking for ways around the rules.

. . . .

Last year, the Legal Services Board chief executive, Chris Kenny (a non-lawyer), recounted that the most “jaw dropping comment” he had heard since being in the job was a lawyer who said his colleagues were more ethical than the general population “because we are trained in it.”

Kenny said:

“I lose count of the ways in which that comment is both wrong headed and deeply offensive. It is easily rebutted—let’s just count how many degrees in moral philosophy Torquemada and his fellow inquisitors had—but it does highlight a real danger. Ethical training is all about giving practitioners a practical toolkit they can use to protect their own integrity and to build public trust. It’s not about building a wall of professional exclusivity to protect moralizing self-righteousness.”

. . . .

Chairman Louis Armstrong says the “ethics, integrity and standards” exemplified by the professions “have become even more important during the recession. I’ve long felt that most of the problems in the legal profession in recent years can be boiled down to the tension between law as a profession and law as a business (legal aid is a good example), but actually this is too simplistic. Law is professional—need I say ethical?—business. Or at least it should be.”

"10 Tips For Lawyers To Keep Your Law Practice Financially Viable"

Chisling, Ava, *Canadian Lawyer*, March 2011, p. 35

1. **Get a Mentor** All lawyers need someone they can talk to when they have issues or concerns regarding practice management. He or she should know how to set up a diary, maintain files, answer the phone in a timely manner, handle trust funds, and so on. Make sure you find this mentor early in your legal career and maintain one throughout.

2. **Don't Hire a Yes Man** Surround yourself with people who know more than you do (billing, accounting, maintaining dockets, etc.) and listen and learn from them.
3. **Be Prudent With Money** Ken Atlas believes his advice is the foundation for a lifetime of good business practices; "if you want to be rich, spend less than you earn."
4. **Lean On The Law Society** Lawyers who practice on their own can't walk down the hall and ask someone for help. Where there is significant stress or financial issues, most law societies have a lawyers-at-risk program and it's free of charge. This service is often completely anonymous and can be available to a lawyer's family members.
5. **Admit Your Mistakes** William Trudell says the most important thing you can do when running a business is to admit when a mistake has been made and take steps to correct it, preferably sooner rather than later.
6. **Seek Business Advice** Trudell believes not being able to establish and follow a basic business plan is like a doctor not being able to read his own x-rays. Both are essential to a successful practice.
7. **Learn Business 101** If no one taught you the basics of business, take a management course; there are hundreds to choose from.
8. **Look After Yourself Sometimes** a lawyer's entire day is spent solving other people's problems and they don't get around to worrying about themselves.
9. **Small Problems Lead To Big Problems** If you are having trouble making ends meet, seek expert guidance and find a solution quickly. Avoiding the problem only leads to more bills and very poor decisions.
10. **Admit That You Are Human** 'Nuff said'.

"Just saying 'no' to retirement"

Marron, Kevin, *Canadian Lawyer*, April 2011
[excerpt]

Don't ever tell Ned Levitt it's time for him to retire. The 63-year-old partner at Aird & Berlis LLP intends to carry on practising law "until the hearse pulls up by the door." He's one of many healthy and highly motivated baby boomers who believe they will remain active and productive for many years to come. "My practice is still expanding so why put an arbitrary time frame on that," he says. "I work out at a gym three mornings a week. I'm a shortboard windsurfer. So are you going to tell me to go lie on a couch?"

But this determination to break the old retirement age barrier can present huge problems for law firms—especially when it is accompanied with a reluctance on the part of the aging partner to make any moves to wind down his or her practice by passing on work and client contacts to younger colleagues. “Firms are struggling with this,” says law firm consultant Karen MacKay, president of Phoenix Legal Inc. She maintains that many firms do a poor job in managing retirement and succession planning. And it’s an issue that has become even more worrisome for law firm managers in light of a recent British Columbia Human Rights Commission ruling that Mitch McCormick, an equity partner with Fasken Martineau Dumoulin LLP, could proceed with an age-discrimination complaint regarding the firm’s attempt to force him to retire. The human rights code in B.C., as in some other provinces including Ontario, has effectively banned mandatory retirement in employment relationships, having done away with earlier provisions that limited age-discrimination complaints to people aged 64 and under. Faskens argued unsuccessfully that McCormick, as an equity partner, was not an employee and is not therefore covered by this legislation.

In spite of this ruling, many law firms continue to rely upon mandatory retirement provisions in partnership agreements, taking some comfort from the fact that the B.C. Human Rights Commission conceded that the circumstances in McCormick’s case, where the firm controlled his work in various ways, may not apply to other situations where partners might not be considered employees. Nevertheless, in a society where mandatory retirement is no longer the norm, law firm managers would obviously far rather persuade partners to retire than try to enforce a questionable provision in their partnership agreements.

But how do you do this? How do you persuade someone like Levitt to slow down as his career continues to gain momentum? How can you convince people to direct their energies into hobbies or other interests after focusing for most of their lives on little else but their law practices? What will it take to get those whose earning power has never been greater to reduce their income soon after a global economic crisis that has wrought havoc upon many retirement savings plans?

For Levitt the simple answer is that you can’t and you don’t. In fact, people at his previous firm tried and failed. He had been running his own firm, specializing in franchise and distribution law, but decided to move to Gowling Lafleur Henderson LLP at the age of 58, having chosen Gowlings partly because it does not insist upon retirement from equity partnership until the age of 70. While he does not fault Gowlings in any way, Levitt says he became uncomfortable when he realized he was expected to begin making a transition towards retirement in his early 60s. Not wanting to let go of his practice, he decided instead to move to Aird & Berlis, a firm he says will never force him to retire.

Scott Jolliffe, chairman and chief executive officer Gowlings, says “We have one of the best, if not the best, arrangements with our senior lawyers as they approach retirement years.” However, he adds, “We have a business to look after.” And that business, like that of any other law firm, requires that succession plans be put in place. Clients expect this, he says. They need to know who will take responsibility for their affairs when their primary contact leaves the firm. For that reason, the firm has a policy that, for five years leading up to retirement, partners should begin to “transition” their practices, expertise, and client relationships.

"Lawyers battling addictions"

Kirbyson, Geoff, *The Lawyers Weekly*, 22 April 2011, pp. 21-23
[excerpt]

Chuck Rotenberg's cocaine addiction cost him his marriage, his health, threatened to ruin his relationship with his children and caused his work to suffer—but as far as he was concerned, he didn't have a problem.

Even though his life was in a downward spiral and it was obvious that he needed help, he refused to seek treatment. He had it all under control.

He admits the drugs were probably affecting his job performance long before he realized it—he just wasn't prepared to admit it.

"There were an unlawful lot of lawyers and judges (with substance abuse problems) who function very nicely and don't recognize the issues," he says.

Rotenberg says while his vice was cocaine, the addiction, whether it's sex, gambling, alcohol or pills, doesn't matter to addicts because in their minds, they're just different coping mechanisms and forms of escapism.

He describes substance abuse as a "very self-centered disease" where the only thing that matters to a user is what's going to make them feel better immediately. Changing that feeling is a life-long process and just because you've passed certain mileposts, it doesn't mean you are cured.

And, of course, buying cocaine or booze isn't cheap. Rotenburg says nobody can indulge their addiction without it impacting their financial lives. He says he knows of lawyers who have raided client trust accounts to get money to feed the beast within.

Drug and alcohol addiction is a "huge" problem among lawyers, according to John Starzynski, volunteer director of peer support and liaison for the Ontario Lawyers' Assistance Program (OLAP). He estimates the addiction rate of lawyers is three times that of the general public.

"The law is a very stressful job to be in. There's a shopping list of things that lawyers live with every day that cause stress and translate into alcohol and drug problems. The fastest growing addition is Internet addiction. That's the portal to gambling and porn sites," he says.

It's hard to pinpoint exactly how many lawyers across Canada have a substance abuse problem but experts estimate it's somewhere between 10 and 20 per cent.

“Law is the only profession in which pessimism is an asset. Pessimism predisposes one to these kinds of problems,” says Derek Lacroix, executive director of the Lawyers’ Assistance Program of British Columbia (LAPBC).

He adds mood disorders, particularly major clinical depression, are also prevalent in the legal profession.

He describes law as a very competitive and adversarial field where striving for achievement is richly rewarded. The roots of the stress, however, go back to the first year of law school, according to some experts. Lacroix says many lawyers also suffer from a lack of meaning and purpose in their lives so they’ll try to fill the “emptiness” with alcohol or drugs.

And if you got an addiction, chances are good you’ve also had your share of disciplinary problems, too. LaCroix says more than half of the lawyers that walk in LAPBC’s door have been in some kind of trouble with their law society, the partners at their firm or at home.

“Very few people with alcohol problems self diagnose and happily come in and say, ‘I’m drinking too much and I need to stop. Most of them come in because some external pressure has been applied to them,” he says.

Further compounding the problem, Starzynski says, is many lawyers think they’re perfect and their self esteem is tied up in the word, “lawyer”.

“The case of the sleepless lawyers”

Aldridge, Alex, www.guardian.co.uk, 04 August 2011

Hidden deep within the enormous glass and steel buildings that house London’s big corporate legal firms are little bedrooms where shattered lawyers can grab a quick nap. Some are done out in the style of Japanese capsule hotels, others are just plain old rooms with single beds.

With their capacity to evoke unhappy memories of boarding school, they tend not to be very popular. Most lawyers prefer the alternative of a strong cup of coffee, sometimes rounded off with a few early morning pints among the meat workers at the pubs near Smithfield market.

But when demands are such that a second, or even a third, consecutive night in the office is required, as is common in the runup to the closure of a big deal, these strange little rooms usually fill pretty quickly.

One former lawyer at a magic circle firm describes what life is like at these times: “One Sunday morning as I was eating breakfast I got a call from my boss asking me to come in immediately. I worked that day until 1am, then went home for some sleep. I was back in at 7 am on Monday, working through until 6 am on Tuesday. At that point I got three hours sleep at

the office, before starting work again at midday and continuing right through until 7 am on Wednesday—when, thank God, the deal closed.”

Some people thrive on this sort of thing. Mark Vickers, a corporate partner at City law firm Ashurst, likens working on a big deal to climbing a mountain.

“At times it’s a slog, but there’s also this tremendous sense of togetherness among those who share the experience,” he says. “You tend to remember the little things: a few jokes over Chinese takeaway at 3 am, the increasingly surreal banter with weary colleagues, people’s other halves turning up in the morning with supplies of clean clothes.”

Still, few people do their best work after they have missed a night’s sleep, as a wealth of medical evidence proves, including recent findings by scientists from UC Berkley and Harvard Medical School linking sleep deprivation-induced euphoria to risky decision-making and a tendency to overestimate one’s performance.

Round-the-clock working cultures are also damaging to law firms’ ability to hang on to staff, with antisocial hours widely cited as the principle cause of their high female attrition rates (just 18% of partners at City Law firms are women, despite significantly more women than men joining these firms at graduate level) and consistent failure to retain lawyers over 55.

And of course, there is the close link between long hours and stress, a factor cited in the suicides of Freshfields lawyer Matthew Courtney in 2007, and SJ Berwin lawyer Catherine Bailey in 2009.

So why do firms continue to allow this way of working to flourish? Admittedly, some of it is out of their hands, with their big-paying investment bank clients setting the tone with their often bizarre working patterns. Lawyers often say they find themselves sitting around all day only to be landed with a piece of work at 6 pm that needs to be completed by the next morning.

Firms’ ability to handle these situations has not been helped by the fact that many are operating with 10% fewer staff than usual after the job cuts they made during the recession. Just last week it emerged that SJ Berwin was so short of numbers it was forced to ask a summer placement student to help out preparing for a big case until 5 am.

Many all nighters are borne out less out of necessity and more of laddish one-upmanship. Lawyer turned psychotherapist Will Meyerhofer recalls his days at New York law firm Sullivan & Cromwell in a recent blogpost: “There’s a machismo around staying up all night, night after night—like doing 10 shots of tequila. You’re tough. Not a problem. With law firms’ profits largely based on how many hours their lawyer’s bill, it’s no surprise that most turn a blind eye to such behaviour.”

The hope for lawyers of the future is that increasing demands from clients for their legal advisers to bill them according to figure agreed in advance, rather than by the number of hours they rack up on working their file, will lead to more thought being put into efficient working practices by law firm chiefs. But, given the entrenchment of the cult of the all-nighter, no one is holding their breath.

“How Many Clients Do Sleepy Lawyers Hurt?”

Lippe, Paul, www.abajournal.com, 10 August 2011

Most lawyers have an intimate acquaintance with a doctor, whether as a spouse, sibling, roommate or otherwise.

And so we know that while society may traditionally think of lawyers and doctors as similar[,] doctors definitely don't[,] and are usually quick to point it out. If you've lived through the education of a physician, there are two areas in particular where our professional paths diverge:

- The way doctors get advanced professional training.
- The way doctors think of standards of proof.

Doctors are trained in residency, where they spend long hours in the hospital seeing patients and delivering care. New medical treatments are generally (although not always) subject to a clinical trial level of evaluation, where some patients receive the new treatment and others receive a placebo, and their relative performances are evaluated. Medicine tries to subject most propositions to a scientific standard of proof: How do we know that if we do X, then Y will happen? “Do some X, and see if we get Y.” This is generally referred to as “evidence-based medicine,” i.e., if more physicians wash their hands, will we have fewer infections?

These divergences were brought home by a story in Friday's *New York Times* about new rules limiting the number of hours that residents can treat patients. Most of us can recall the bone-crushing hours on call by our medical resident friends, and perhaps questioned whether that was an effective way to train and a safe way to deliver patient care.

It turns out we weren't the only ones wondering. After 18-year old Libby Zion was killed by an improper drug dosing supervised by an exhausted resident in 1984, her father, journalist Sidney Zion, pushed for new rules limiting the number of hours residents could see patients. Zion's intuition and experience—that exhausted residents would make more mistakes—was validated by a 2004 study published in the *New England Journal of Medicine*. So the movement to limit resident hours has gained momentum, with new rules coming into place.

Just one problem—there doesn't appear to be any reduction in mistakes with the new rules. “The fact that the policy appeared to have no impact on safety is disappointing,” David Bates, a professor at the Harvard School of Public Health and a national authority on medical errors, told *The New York Times*. As we learn more about cognitive psychology and decision-making, this becomes a familiar tale—we focus on the problem that we've experienced, that has emotional resonance for us, that we can intuit a solution for—but we may be focusing on the wrong problem.

Again, according to *The [New York] Times*: “About 98,000 people die every year from medical errors. Some of those mistakes are made by doctors whose judgment has been scrambled by lack of sleep. But fixating on work hours has meant overlooking other issues, like lack of supervision or the failure to use more reliable computerized records.”

I certainly don't criticize the medical world for imperfect analysis—I applaud their efforts to get it right. In law, we have nothing remotely like clinical trial standards of proof, and no effort to get there. In those few areas that have been extensively studied, like death penalty cases reviewed with new DNA evidence, it appears that the system has a very high incidence of error. There's no evidence whatsoever that the huge push for more formalized models of corporate governance create shareholder value, and the clearest examples—Apple and Google—suggest just the opposite.

Despite the basic “quality” proposition of elite law firms—that using a sophisticated firm reduces risk—actual evidence seems to overwhelmingly run in the opposite direction—all of the huge losses in mortgage-backed securities ..., for example, were in deals led by elite law firms. We add clauses, we suggest tactics, we assert positions—but almost nothing we do as lawyers has any real ‘evidence’ behind it. More often than not, we default to the three Cs”—greater complexity, greater caution or greater control for our side must be a good thing. And when it comes to evaluating new ways of delivering legal services, the analogue to evidence-based medicine—(Do legal process outsourcers hurt or improve quality of service? Does knowledge management reduce costs?)—we operate with little or no evidence.

The Zion family's experience is typical of our human way of decision-making. Something bad happens to us. We look for a culprit. We find an explanation and initially validate that explanation with further data. And we want that explanation reflected in the rules or norms of society. But it often (usually?) turns out the world is more complicated than we imagined, that actions have unintended consequences, that focusing on the emotionally resonant problem may distract us from the real issue. In the case of residents, it now appears that the handoff problem—how well does one resident explain to the next what care is needed—creates more errors than the fatigue problem. Shorter shifts may mean less fatigue, but also more handoffs.

Understanding how complex systems operate is thirsty work, but probably a prerequisite for truly effective lawyering, and so lawyers will have to become more adept at evidence-based law as we move into the New Normal. We're never going to get this perfect, but as lawyers we should be humble and curious enough to always be trying to raise our game.

“Multiple Choice Or Essay? N.S. Lawyers' Ethics To Be Tested”

Moulton, Donalee, *Canadian Lawyer*, January 2012, p. 8
[excerpt]

Lawyers in Nova Scotia greeted 2012 with a new outlook on ethics, Effective Jan. 1, the Nova Scotia Barristers' Society [NSBS] replaced its old Legal Ethics Handbook and ushered in a new Code of Professional Conduct.

The legal community is well aware of the transition. Indeed, it's been more than two years in the making. Now that the new code is reality, lawyers will be expected to demonstrate their comfort level with its contents and its layout. NSBS members across the province are required to complete a mandatory test online by April 30. The test reflects the importance of the topic, says NSBS President Dan Campbell. “The bar society does have an obligation to make sure it's members are competent. When there is a new working tool, we want to be confident lawyers are familiar with this.”

That obligation was not entrenched in the model code developed by the Federation of Law Societies of Canada [FLSC], on which the NSBS based its code. In fact, the Nova Scotia society is the only one in the country to date that requires such testing. It's a move the Federation applauds. “It certainly seems like a good idea. The Nova Scotia Barristers' Society is saying this is fundamentally important,” says Ronald MacDonald, past president of the FLSC and senior Crown Counsel, policy planning and research, with the Nova Scotia Department of Justice. “I would think the public would be glad to hear that,” he added. “Lawyers should be proud.”

“Investment Banker Study Chronicles the Negative Effects of 100-Hour Work Weeks”

Cassens Weiss, Debra, www.abajournal.com, 16 February 2012

A study of a small group of ... investment bankers who worked an average of 80 to 120 hours a week documents the stress-related toll.

About two dozen people were observed over a decade, and every one developed a stress-related physical or emotional ailment, *The Wall Street Journal* reports. The problems included insomnia, alcoholism, substance addictions, heart palpitations, eating disorders and an explosive temper.

Banks emphasized work-life balance, but perks such as take-out meals and car service blurred work-life boundaries, according to the study.

During the first two years, the bankers studied were eager and energetic. By the fourth year, many bankers were “a mess,” the story says. One investment banker recalled his anger at a cabdriver when he tried to open a locked door from the outside. “I became so furious and I kept banging against the windows like crazy, swearing at the poor guy,” he said.

By the sixth year, ..., 40 percent focused more on their health and set limits.

The study by University of Southern California researcher Alexandra Michel will be published this month. An online summary notes that investment bankers aren’t the only professionals who work long hours. “Surprisingly, many highly educated individuals with the most attractive employment options, including software engineers, consultants, investment bankers, and lawyers, seemingly choose to work up to 120 hours per week,” she writes.

“Family law being shunned?”

**Kirbyson, Geoff, *The Lawyers Weekly*, 17 February 2012, pp.1, 8
[excerpt]**

With fewer lawyers choosing to handle divorce and child custody matters, and full caseloads becoming the norm among the growing minority who do, the family law profession appears headed for crossroads.

If more lawyers aren’t persuaded to go down this path, even relatively straightforward family matters could drag on for many months, perhaps years, experts say.

“There’s such a supply [of family law cases] and not enough lawyers actually practising family law,” says Les Kirchner, one of just three family law lawyers out of more than 60 at Winnipeg-based Pitbaldo LLP. “I have to manage the clients that I have. If I take more on, I won’t be able to serve everybody to the max.”

He believes many young lawyers are avoiding the family law field because it’s so emotionally stressful, forcing them to be a lawyer on one hand while channeling their inner Dr. Phil on the other.

“The clients’ lives are being turned upside down. Their marriage is breaking down and their future is being ripped apart and it’s emotionally troubling for them. It creates a lot of stress. You have to listen to what they’re going through. That’s part of the client management aspect,” he says.

“The law of domestic breakdowns is emotionally charged. The emotional involvement in the process affects a lot of people and that’s why many lawyers choose not to do family litigation.”

But it's not that every lawyer is moving into the corporate commercial side or has started chasing ambulances, according to Allan Fineblit, chief executive officer of the Law Society of Manitoba. It's just that many have determined that [the] traditional model for family law dispute resolution is ineffective.

He says it's true that some family law lawyers have moved to other specialties out of frustration, but many of them have shifted into collaborative law instead, a growing practice area designed around resolving disputes in a more mediated way.

"This essentially leaves both parties happier with the outcome and it tends to be cheaper, more effective and faster," Fineblit says.

There is also a growing recognition that changes are required in how the courts deal with family issues because it has become "incredibly expensive and slow" to resolve contested matters, Fineblit says.

In straw polls with her classes over the past decade, [Toronto lawyer and law school teach Hilary Linton determined that] only a small handful of students indicated they were interested in family law. This year, however, that number shot up.

"I think [family law] has become really sexy. It's everywhere in the news and, in my view, it's the most procedurally dynamic area of law. It's where the most experimentation is taking place with models of dispute resolution, collaborative law, mediation, arbitration or government-subsidized family mediation," she says.

In Ontario, for example, the provincial government is providing free mediation in every family court and heavily subsidized mediation for anybody going through a separation. "It's quite revolutionary."

The days of meeting with a client who is going through a separation, taking \$5,000 retainer, and having the case evolve through a series of letters and phone calls between lawyers, and through court processes, appear to be coming to an end.

"That's becoming obsolete because people going through family law don't want that any more. The demand is changing," Linton says.

Part of it is because clients are becoming sophisticated about their rights, thanks to the proliferation of information available on the Internet, as well as books and do-it-yourself kits.

As a result, several new breeds of professionals have been created to handle family law matters, including divorce coaches, financial specialists in divorce and parenting co-ordinators.

Another growing area is collaborative law, a process in which lawyers and clients agree that they won't go to court and will focus on persuading both sides to negotiate, and come up with a solution and will work for everybody.

"It's a process that brings in other experts as needed. It's a team approach to solving family law problems as opposed to a lawyer-driven approach," Linton says.

There is more of a do-it-yourself culture in family law and the models of delivery of legal services haven't caught up with the reality of client expectations. That's leaving a lot of older lawyers struggling with their role and the new demands that clients are putting on them, Linton says.

This isn't the case with the upcoming generation of lawyers, who she believes will be much more comfortable delivering family law services in a dramatically different way.

“Out of Lawyer's Own Custody Fight, a New Career Path”

Finn, Robin, *The New York Times*, 19 February 2012, p. 25

[excerpt]

Casey Greenfield is sitting pretty in her NoHo law office beneath a 1970s poster advertising a heavyweight championship boxing match between Muhammad Ali and Joe Frazier at Madison Square Garden. As a freshly minted specialist in high-stakes family law, which tends to translate as bitterly expensive and occasionally scandalous divorce and custody litigation, she deems the vintage poster an inspiration.

“The first step to engaging quietly and efficiently in a fight is to realize that you're in one, and that you're not fighting to be mean or petty, but to recognize your own power,” Ms. Greenfield said hoarsely, as always.

Empowerment is a major theme in Ms. Greenfield's personal and professional lives, which have neatly dovetailed since she emerged from her own heavyweight and highly public bout of custody litigation—she shares an out-of-wedlock child with the married legal journalist Jeffrey Toobin—to form the boutique firm Greenfield Labby. On Wednesday, it will celebrate its first birthday with a party at the Modern, the Danny Meyer restaurant at the Museum of Modern Art. Nearly 200 people, many in the boldface category, have received invitations. It will not be a typical law firm fete.

But then, Greenfield Labby is not a typical law firm.

The firm, which Ms. Greenfield formed with Scott Labby, 39, a Yale Law School classmate and a former boyfriend, has roughly two dozen well-heeled clients and employs five lawyers, in Manhattan and in Boston. It sees itself as an elite group of “country lawyers” for glittering urban professionals with lots to gain—or lose.

Unlike the traditional matrimonial law firm, it does not limit itself to divorce and custody litigation. Crisis management, strategic planning and contract resolution are among the specialties the firm claims. And the partners, with their connections to New York's media, entertainment and Wall Street industries, are not afraid to use Ms. Greenfield's life as a subtext

and an asset. “We understand your problems,” the firm’s Web site proclaims. “We know that they exist in a matrix that includes your business, your personal life and your reputation.”

Ms. Greenfield’s first client hired her to settle a will and a custody arrangement. The second case was a divorce, familiar turf for this self-described “product of a modern splintered and re-glued family”—her father, the political pundit and television commentator Jeff Greenfield, is thrice-married, and after a privileged upbringing on the Upper West Side, Ms. Greenfield left for boarding school at Andover when her parents divorced. (Her mother, Carrie Carmichael, was Mr. Greenfield’s first wife.)

“Maybe it’s unfortunate that my own case has ended up being such a beta case for my career,” Ms. Greenfield said, “but because of it I’ve learned a ton about the mechanics of a certain kind of litigation.”

A client, speaking on the condition of anonymity because her divorce was continuing, said in an e-mail, “Let’s face it, when you’re going through a painful or messy or shameful-feeling period in your personal life, it’s comforting to be able to talk to someone who has been in those particular trenches.”

Ms. Greenfield’s time in those trenches began in 2008, when, as a first-year associate at Gibson Dunn, a strait-laced corporate law firm, she found herself single and pregnant at 35.

The presumptive father was Mr. Toobin, a senior political analyst for CNN, staff writer for *The New Yorker*, best-selling author, married father of two teenagers and a close friend of Justice Elena Kagan of the Supreme Court, a classmate of his from Harvard Law. Ms. Greenfield met Mr. Toobin in the Condé Nast cafeteria when, while taking a breather from law school in her mid-20s, she worked as a fact-checker for Glamour magazine. They fell into a secretive off-and-on relationship spanning nearly a decade.

When Ms. Greenfield first informed him of her pregnancy, she said, Mr. Toobin questioned the paternity, balked at submitting to a test and vowed to take no responsibility for a baby he wasn’t sure was his. Both hired lawyers. Inevitably, the tabloids and gossip sites took notice of the scandal, dropping increasingly detailed hints about the behind-the-scenes drama.

“The one time you really don’t want to get pregnant is when you’re single and the other person is married and you’re working as a first-year junior associate at a law firm in a hard-core phase of trying to prove yourself to them,” Ms. Greenfield recalled last week. She said she ruled out an abortion. She did not delude herself that the emotional nadir of her life would qualify for much external sympathy. “I had a job at a prestigious firm,” she said, “a law degree from Yale that was paid for, a wonderful support group of friends.” But when she informed her parents that she was pregnant, she did not say by whom.

In March 2009, Ms. Greenfield had a baby boy and named him Roderick Henry Greenfield: Roderick is Mr. Labby’s middle name, and Henry is her father’s actual first name. She went on maternity leave for four months and then returned to Gibson Dunn until January 2011. She also sued Mr. Toobin for child support and custody of the baby, while being officially

represented by Heidi Harris of Aronson, Mayefsky & Sloan, a preeminent matrimonial firm, and unofficially assisted by Mr. Labby, whom she calls her “fixer.”

Mr. Toobin ultimately acquiesced to a paternity test that confirmed he was the father of the boy, who is nicknamed Rory. He contested portions of her suit. The tabloids zeroed back in. In February 2010, the custody case was heard in Manhattan Family Court. It was not resolved until late last year, with Ms. Greenfield receiving full custody of Rory, including the right to make all pivotal decisions in his upbringing and schooling. She briefly represented herself in the remaining phase of litigation, a dispute over the amount of child support to which she was entitled; barring an 11th-hour settlement, the case is scheduled to return to Manhattan Family Court next month, this time with Mr. Labby litigating. [Outcome not published.]

“Over the years Casey had periodically used me as a consultant on various matters, so when she asked me to take over her case last spring, it was an easy transition,” said Mr. Labby, whose working-class childhood in a mill town in Maine was the unpampered opposite of Ms. Greenfield’s. “I think it just became obvious to her that outstanding matters would remain contested, and representing oneself is fraught with peril no matter how good you are.”

Mr. Toobin’s lawyer, Patricia Ann Grant, of Grant & Appelbaum, said in an e-mail, without going into the specifics of the case: “The law assumes that both parents will contribute to the financial support of the child. Mr. Toobin is providing liberal financial support. Ms. Greenfield’s demands are unreasonable and do not comport with the law.”

As to continuing news media coverage of the matter, Mr. Toobin “feels that it’s not in Rory’s interest for this matter to be publicized,” Ms. Grant wrote. “He wishes Ms. Greenfield felt the same way.”

“Legal Ethics & Financial Issues: Navigating Choppy Waters with Integrity”

Siegel, Brahm. (2011-2012), 30 C.F.L.Q. 93, at pp. 71, 77-79, 82
[excerpt]

At first blush “legal ethics” and “financial disclosure” sound like mutually exclusive concepts. Clients come for help with their parenting and financial disputes but they also want, very much, to “win.” Often, in the client’s mind, the way to achieve that “win” is to gain an advantage by refraining from providing information or documents to the other side which would otherwise impair the complexion of their case. In the heat of the battle, it is sometimes lost on the client and the practitioner that the best way to protect the client against a cost award or future attack from re-opening any settlement is to provide the disclosure rather than resist it.

From the lawyer’s point of view, it can be a delicate line to walk. Naturally, we want to do our very best for the client. Success with future referrals and a reputation in the legal community for getting good results depends on it. On the other hand, we are subject to various

canons, obligations and long-standing legal principles—commonly known as legal ethics—which bump up against the tendency to win at all costs.

. . . .

In *Buttrum v. Buttrum* Aitken J. stressed the importance of counsel’s role in ensuring full financial disclosure. The wife’s lawyer had her client swear and file a financial statement which showed no gross revenues from her business at a time when the business was in fact producing revenues but no profits. Business expenses, however, were set out, resulting in her financial shortfall appearing to be more than it actually was.

This displeased the court greatly. Justice Aitken’s comments below serve as a reminder of our ethical responsibilities associated with assisting clients in completing their Financial Statements:

Complete, honest and on-going financial disclosure is required during the course of a family law case. That is the very purpose of r. 13. Lawyers must devote their full attention to the accurate completion of financial statements. The purpose of financial statements is to ensure disclosure is made quickly and repeatedly as circumstances change, and in a manner that is consistent and easy to follow. That is the spirit in which these forms must be completed. Although I am not suggesting such was the case here, I caution lawyers that they are providing poor service to their client if they delegate responsibility to the client to figure out how to complete the forms, with the lawyers’ assistants merely typing them. Completion of a client’s financial statement must be done under the direction of the lawyer. The lawyer must ask pertinent questions to ensure that disclosure has been accurate and complete, the form has been filled in clearly, and all necessary notes and explanations have been added to make it comprehensible to the opposing client, the opposing counsel and the court.

The active and critical involvement of a lawyer in the preparation of a client’s financial statement can foster a realistic assessment of the merits of each client’s case at the earliest possible stage. Not only does such a thorough approach facilitate an early settlement of financial issues, but also it reduces the opportunities for a lack of trust between the parties to fester. So frequently that lack of trust prevents meaningful settlement discussions and encourages protracted and costly litigation.

Similarly, in *Bhoi v. Bhoi*, Aitken J. continued her theme from *Buttrum* that lawyers are not simply vehicles for their clients’ instructions. Judges expect us to ask pertinent questions from our clients and clarify ambiguities so that the product presented to the court is as complete and coherent as it can be. She also reminded the parties, the lawyers, and anyone reading her reasons of R. 13 (15)–(17) and the requirement that family litigants correct and update financial statements as necessary. At paragraphs 18 and 19, she wrote:

The role of lawyer representing a family law client goes beyond being a conduit of unclear information from the client to the court. The court expects the lawyer

to ask pertinent questions, identify ambiguities, seek clarification from the client and third parties if necessary and then present meaningful information to the court. It is unacceptable for a lawyer to appear in court and say I cannot figure it out and there is nothing further that I can do to figure it out when the most simple and obvious steps have not been taken to sort out the mystery. These comments are especially relevant to the situation where the lawyer's client has already been ordered by three other judges to make further and better disclosure, and when the lack of clarity relates to a point that is critical to the determination of an issue in dispute.

The court's comments in *Bhoi* were echoed by Justice Hennessy in *Lepine v. Lepine*. Since courts have broad powers to make orders affecting family law litigants financially and personally—orders which go to the heart of their sense of identity as parents and often have significant long-term financial consequences—we have the *Family Law Rules* which require early, full and frank disclosure. In addition, we are bound by the traditional obligations imposed on us as officers of the court:

Counsel have the duty to ensure that all information which they put before the court is accurate. In order to do this, they must ensure that they have the correct information from their client. In addition, they may not sit back and allow a judge to be misled.

. . . .

A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given. Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer does not intend to accept personal responsibility for an undertaking, this should be stated clearly in the undertaking itself. In the absence of such statement, the person to whom the undertaking is given is entitled to expect that the lawyer will honour it personally. The use of such words as “on behalf of my client” does not relieve the lawyer giving the undertaking of personal responsibility. For all these reasons, extreme caution should be taken when asked to provide a solicitor's undertaking.

More common are cases where the *client* has provided an undertaking that one party believes has not been fulfilled. As all practitioners know, a client who provides an undertaking, usually at a questioning, is subject to a wide variety of sanctions in the event of non-compliance, including an order striking pleadings.

2.2 Legal Responsibility

"Back to basics"

Chisling, Ava, *Canadian Lawyer*, March 2011

[*excerpt*]

Lawyers who work in big firms receive a lot of administrative support. There are entire departments devoted to handling the very basics of conducting business: hiring and firing, billing, collections, paying rent, ordering supplies, not to mention courier and catering services. With all of the basics covered, each lawyer is free to do what is expected of him or her: bring in clients and earn money. The problem with this big-firm model is that when lawyers want to practice on their own or within a small firm or company, they quickly discover their knowledge of how to run a business is as limited as their experience in ordering paperclips—that is, very little.

There are some things everybody should know about getting a business off the ground and keeping it there. There are balance sheets to read, services to bundle, domain names to purchase, money to collect, leases to negotiate, and retirement to consider. In addition, lawyers have to familiarize themselves with the many law society requirements, especially how to deal with and account for trust funds. So who is responsible for teaching future lawyers basic business and accounting skills? Is it law school, law firms, no one, or everyone?

Without knowing the fundamentals of running a business, particularly lawyers on their own or in small practices can run into all kinds of serious trouble. They borrow too much money or don't properly account for their client's money. They don't budget for the inevitable surprises, such as a big client going elsewhere or a leaky roof. Then the tax bill arrives and law society fees have to be paid, along with rent, parking, and car bills. And soon enough, the professional is overwhelmed and may be tempted to accept cases outside of his or her expertise or "borrow" trust money to pay his or her own bills.

. . . .

Dan Pinnington, director of practicePRO—which "helps lawyers take proactive steps to avoid legal malpractice claims and shows them how to grow successful and thriving law practice"—says all lawyers should have a basic understanding of practice finances, management issues (managing, marketing, and technology), and know how to handle retainers. They should also know how to deal with clients, particularly in regards to the expectations and collection of fees and other accounting issues that are part of a law practice. "Lawyers who make quick transitions—to a new area of law or into private practice after being in-house, for example—without sufficient preparation have greater exposure to claims."

William Trudell, a sole practitioner and chairman of the Canadian Council of Criminal Defence Lawyers, has seen a lot of troubled lawyers over the years. A criminal lawyer for the better part of 40 years, Trudell now spends 90 per cent of his time representing lawyers who need help. He says practitioners can get into trouble quickly (clients complaining to the law society) or it can happen over time, where mistakes and debts are compounded and sometimes addictions begin or are triggered by the difficulties. [Kristen] Dangerfield [of the Manitoba Law Society] agrees. “When someone is in financial trouble, often it is only one part of the puzzle. They may have marriage or addiction issues or they may have a marginal practice or too many financial commitments. They may not honour their statutory remittances or have problems with taxes, and before they know it, they are behind the eight ball and it is very difficult to bring themselves back.”

The reason most lawyers run into problems, says Trudell, is improper bookkeeping. “I don’t mean stealing money or even borrowing it, simply not accounting for it.” In [Kristen] Dangerfield’s experience [as Manitoba Law Society legal counsel], the first sign of trouble for a lawyer, and the subject of the majority of complaints to the Manitoba law society, is his or her failure to respond to the client, either by ignoring phone calls or not providing updates on the status of their cases. “Sometimes lawyers reach a point where they are not engaged in their practice any longer, so they aren’t able to deal with matters in a timely fashion.”

Kenneth Atlas lectures at McGill University and is a partner at Borden Ladner Gervais LLP specializing in lending and bankruptcy and insolvency law. He says lawyers can get into financial trouble by trying to keep up with the Joneses, but not in the way most people would expect. Lawyers get into financial difficulty not by keeping up with competing law firms or their fellow lawyers, but often by trying to maintain the same lifestyle as their clients. “It is less that the lawyers want to keep up with their clients and more ‘this is my peer group. I have to have the same kind of stuff as they do.’ However, often lawyers don’t have the same kind of income as their wealthy entrepreneurial or investment banker clients with money to spend. I have seen that a lot.”

“Why litigators shouldn’t overlook the duty of good faith”

**Schindelka, Dana and Dormer, Chris, *The Lawyers Weekly*, 03 September 2010, p. 12
[excerpt]**

Although it is a reasonably well settled in Canada that parties have an obligation to perform their contractual obligations in good faith, many litigators fail to allege a breach to this duty in their pleadings where it would be appropriate to do so. Likewise, many lawyers do not have this obligation front of mind when advising clients. This can lead to costly litigation which may have been avoidable.

In *Gateway Realty Ltd. v. Arton Holdings Ltd.*, [1991] N.S.J. No. 362 (S.C.); aff'd [1992] N.S.J. No. 175 (C.A.), the court described the duty of good faith, stating, "The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith."

This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. Good faith conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in bad faith—a conduct that is contrary to community standards of honesty, reasonableness or fairness.

While the concept of good faith is difficult to define, the court in *Butt v. McDonald* (1896), 7 Q.L.J. 68 describes it as "a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract." More commonly, however, the courts tend to define this ideal of good faith in a negative way, as excluding bad faith—a concept more readily defined.

According to the court in *Gateway*, "In most cases, bad faith can be said to occur when one party, without reasonable justification, acts in relation to the contract in a manner where the result would be to substantially nullify the bargained objective or benefit contracted for by the other, or to cause significant harm to the other, contrary to the original purpose and expectation of the parties"

3.0 APPLICATION OF STANDARDS OF RESPONSIBILITY

3.1 Relationships with Clients—Retainer and Authority

"Don't be swindled"

Marron, Kevin, *Canadian Lawyer*, August 2010, pp. 19-21
[excerpt]

The bank drafts looked good, but the grammar in the other lawyer's e-mail was bad. That's what made James Morgan suspect he was being targeted for a scam—an attempt to get money out of the small-town Ontario lawyer's trust account on the strength of forged cheques and a phony loan to one of his clients.

But watch out lawyers and law firms everywhere! There's a new breed of fraudster out there who has learned to spell, brushed up on their grammar, and knows enough about the law and legal practices to launch elaborate and credible scams. "They've become more sophisticated and polished," says Dan Pinnington, director of PracticePRO, an initiative of the Lawyers' Professional Indemnity Company that provides risk management, claims prevention, and law practice management information to Ontario lawyers. "They're getting very tough to spot," says John Allen, treasurer and investigator at the Law Society of Saskatchewan. He notes that forged cheques are getting so good that bankers can't always see they're not genuine.

Lawyers are easy targets, because the nature of their business requires that they deal with a great many people who they don't really know, observes Morgan of Mandryk Stewart & Morgan in Tillsonburg, Ont.

So what do lawyers and law firms need to know and do in order to avoid becoming victims?

"Be aware, be alert, and look out for red flags," says Pinnington, who says he hears about new fraud attempts on lawyers almost every day. The majority of these attempts are unsuccessful, but fraudsters sometimes get lucky and everyone is potentially vulnerable, he says.

What kinds of fraud do you need to watch out for? Until recently, the key concern was real estate and mortgage frauds, usually involving flip transactions whereby a property is purchased at an inflated price by a not-arms-length buyer who then applies for a mortgage based on the artificially high purchase price. Lawyers are not directly targeted in such schemes but, if they do the paperwork without enough due diligence, they become vulnerable to negligence claims from the lender who is left holding the bag.

A high profile example of this is the massive lawsuit recently launched by the Bank of Montreal, which has accused 18 Alberta lawyers, including one who is now a Tory MP, of negligence in connection with a \$69-million mortgage fraud. If proven in court, these allegations would serve as a stark reminder of the fact that real estate lawyers can become unwittingly caught up in sophisticated fraud schemes, in spite of all the warnings that have been circulating within the profession over the past several years. However, the fraudulent transactions alleged in this case occurred several years ago, when the Calgary real estate market was red-hot and prices were continually soaring. Since then, the markets have cooled off, properties change hands less frequently, and prices are relatively stable, so, as Pinnington points out, flip frauds are less viable and therefore less common.

So, fraudsters have moved on and figured out ways of targeting lawyers directly by trying to con them into depositing bad cheques in their trust accounts and paying out good money before the cheques bounce. “The magic that makes these frauds work is giving the lawyer a worthless piece of paper and having the lawyer write a cheque against his trust account,” says Pinnington, who notes these scams come in two flavours.

One type involves fake business loans for equipment purchases. Typically, a new client will hire a lawyer to incorporate a business and then return to the lawyer a few weeks later saying he has negotiated a loan and wants to use the money to purchase some equipment. He asks the lawyer to deposit the [bogus] loan [cheque] into a trust account and then advance the money to a third party for the equipment purchase.

The other common fiddle that fraudsters are currently trying to pull on thousands of lawyers involves a phony debt collection—sometimes a bad business debt, but most often a family law spousal support payment. The method is similar to the loan scam. A new client approaches the lawyer asking for help in collecting a debt and the lawyer discovers the debt is surprisingly easy to collect. A [bogus] cheque is deposited and the client pressures the lawyer to release the funds immediately, most commonly, under some pretext, to an offshore bank account.

Some fraudsters bombard the legal profession with e-mails soliciting help with a loan or collection. Pinnington says he and other lawyers at LawPRO have received such e-mails themselves from con artists who are evidently unaware of whom they are targeting. However, either by design or simply because the con artists are sending the messages to everyone, some of these messages will land on the desk of lawyers who routinely handle loans, debt collection, or spousal support matters. In such cases, it is not always easy to spot the fraud. “Everyone is vulnerable, it’s a question of the right file coming across your desk,” says Pinnington.

Deborah Gillis, risk and practice management adviser at the Lawyers’ Insurance Association of Nova Scotia, says it’s a measure of the sophistication some of these frauds have achieved that many attempted scams target lawyers who specialize in collaborative family law—people who are always dealing with situations where ex-spouses will reach an agreement to pay some of what they owe.

As a first defence, Gillis and Pinnington urge lawyers to ask questions of their clients in any situation where they have cause for suspicion—and there is often something about the fraudulent scenarios to raise a lawyer’s antennae: an out-of-province client, a draft from a U.S.

bank, documentation from a U.S. jurisdiction, or request to send funds overseas. But such swindlers have learned from the kind of questions they are getting and will now often respond with very good answers, convincing explanations and authentic-looking legal documents.

Fraudsters have also learned to limit the scale of their schemes to amounts more in keeping with the kinds of deals lawyers likely handle every day. In the past, they would try to con lawyers out of millions, now they'll be forging cheques for \$200,000 or \$300,000[,] says Pinnington. In some cases, the client will present himself or herself as coming from the same ethnic community as the lawyer being targeted, says Pinnington, who recalls how one young lawyer was so concerned about her reputation in her community that she failed to see what should have appeared to be an obvious fraud.

It's not only small firms and solo practitioners who are likely to be conned. Pinnington says he knows of two recent cases where large firms came close to cutting a cheque for a fraudster. In one case, it was someone in the accounting department who sounded the alarm after noticing that the amount on a cheque was exactly the same as another cheque she had seen earlier. In the other case, the matter had been referred to a junior lawyer who happened to have dealt with a case involving fraudulent cheques before and felt the instrument that crossed her desk for processing didn't look quite right.

Protecting against fraud requires a team effort, says Gillis. Not only all of the lawyers in the firm but also the office staff should remain alert and bring to attention anything that seems unusual. She and other experts advise that you should be concerned about clients who don't seem to have any connection with you or the jurisdiction you are in. You should search online to verify the identity of the client and any third party involved in the deal. You should examine the quality of the paper bank drafts are printed on. You should certainly ask questions about any aspect of the deal that seems suspicious.

But, above all else, law firms are advised to resist all pressure to make a quick payment out of their trust accounts and wait to make sure the cheque they have received has cleared and is genuine.

Pinnington notes LawPRO now provides Ontario lawyers with insurance against cheque fraud. The insurance is contingent upon the lawyers satisfying the following conditions: before disbursing funds they must wait eight days for the cheque to clear, confirm with the bank that the cheque is good, and follow up [your understanding of] that confirmation in writing. Whether you are eligible for this insurance or not, if you follow those conditions, you probably won't need it.

"Taking Sides in a Divorce, Chasing Profit"

Appelbaum, Binyamin, *The New York Times*, 05 December 2010, pp. 1, 29
[excerpt]

Michelle Pont and her husband amassed millions of dollars in properties and investments from a freight-hauling business that they started with one stake-bed truck in 1991. They bought a four bedroom home, then a second home, a vacation home, a motor home and half dozen cars.

But when Ms. Pont decided to seek a divorce last year, she quickly ran out of money. She had no job. Her husband controlled the family's investments. A few months of legal bills maxed out her credit cards and drained her retirement account.

She wrestled with accepting a smaller settlement than she considered fair. Then a lawyer referred her to Balance Point Divorce Funding, a new Beverly Hills lender that offers to cover the cost of breaking up—paying a lawyer, searching for hidden assets, maintaining a lifestyle—in exchange for a share of the winnings. In October, Balance Point agreed to invest more than \$200,000 in Ms. Pont's case.

"It's given me hope," Ms. Pont said. "I don't view it as a loan; I view it as an investment in my future. They are helping me to get what is rightfully mine."

With some in the financial world willing to bet on almost anything, it should be no surprise that a few would see the potential to profit from the often contentious and emotional process of ending a marriage.

. . . .

Ms. Pont said the money from Balance Point would allow her to sustain the case for as long as necessary. Balance Point does not charge interest; instead, clients pay the company a percentage of their winnings.

Lawyers who finance other civil cases [especially personal injury claims] generally keep at least a third of the winnings. Ms. Napp said Balance Pint required a "substantially smaller" share from clients though she declined to be more specific.

The company wants to focus on people with marital assets between \$2 million and \$15 million, a bracket Ms. Napp described as "the lower end of the high end." She said that investing in smaller disputes was not worthwhile. Wealthier people, she said, seemed to resolve divorces more easily—perhaps because they still felt wealthy in the aftermath. "Anything south of \$15 million, when you divide that in half and take out the legal fees, you're not in the same house, you're not taking the same trips—your life is different," she said.

"Lawyers Need To Talk Money With Clients"

Sorenson, Jean, *Canadian Lawyer*, November/December 2011, pp. 16-17
[excerpt]

Lawyers need to talk money upfront with clients to ensure they understand the options and costs of legal action, says a Vancouver commercial lawyer who is adopting a business-like model in her new firm. "It's not doing anyone any good where there is a surprise as you present the bill. The lawyer has trouble collecting and the client's personal finances are thrown off," says Lisa Ridgedale, who declined the offer of a partnership with a Vancouver firm in order to start her own commercial and securities litigation firm Ridgedale Law Corp.

She says she was inspired by her corporate business clients to start her own law firm in September, but she also wanted to move the practice forward using a more business-like process. "It's not a surprise to anyone in business," she says of her model, which advocates sitting down with the client and drawing up what she calls a 'road map' that defines objectives and different paths achieving the goal with the associated costs.

Developing the road map may only take an hour in a simple case, but in more complex cases, it can take days of research—for which she charges. The road map or business plan for the litigation or negotiations, with only one in 10 of her cases going to court, provides individuals, and especially companies, the opportunity to discuss the different proposals and associated costs. "And, what is the likelihood of success," she says.

She acknowledges that it is impossible to gauge all costs accurately, especially if the case lands in court, but Ridgedale believes those costs that can be extrapolated for a client should be made known and discussed. "Large companies want to know the cost as they have budgets and people to answer to." Ridgedale, who graduated from Quebec's Concordia University, studied and practiced criminal law in the U.S. as a public defender before coming to Canada to practice commercial law. She points to businesses with in-house lawyers that are now setting rates and the amount of dollars they are willing to commit to hiring outside legal services in order to stay within budgets. Few corporations, in the future, will continue on the path of simply having law firms on a retainer and paying the bills without question.

Ridgedale, who has worked for the B.C. Securities Commission and McMillan LLP, says her clients like the business approach, which sets out alternatives. This road map also serves as a reference, so that when the client re-appears with a decision on which option to pursue, Ridgedale can easily review the file with the intended goal. "My experience has been that as cases go on, the issue become more complex," she says, so having a tool to go back to reference can also guide the process.

The road map can also lay out the various payment options that can be used to hire a lawyer whether it's an hourly fee, a contingency, *pro bono*, or a success fee, where Ridgedale

bills below her usual rate [for the success fee] but recoups in the settlement or award package. “They are not available in all cases,” she said, but clients should also know those options.

Covriga v. Covriga

**2011 CarswellOnt 13682 (Ont. C.A.), K. Feldman, Robert J. Sharpe, G.J. Epstein JJ.A.
[Headnote]**

Administrative suspension—Wife applied to set aside separation agreement, for spousal support, equalization payment, matrimonial home and sole custody—Application was dismissed—Wife appealed—Appeal dismissed—Trial judge only learned after trial that wife’s lawyer was on administrative suspension from Law Society of several days during trial—There was no basis to conclude that administrative suspension affected fairness of trial.

“Guide to Retention and Destruction of Closed Client Files”

The Law Society of Upper Canada, March 2012

Sample File Retention Policy

This file retention policy is a sample policy only to assist lawyers in preparing a file retention policy. This sample policy should be adapted to suit the individual law practice. No one policy can cover all situations relating to all law practices. This policy is not intended to replace the lawyer’s professional judgment. When establishing a file retention policy the lawyer should consider both the circumstances of the lawyer’s practice as well as the Law Society Guide on File Retention.

1. Purpose.

The purpose of this policy is to provide procedures for the closing, retention and disposition of client files.

2. Definitions

“disposition of client files” means the final action taken with the contents of client files and includes destruction, transfer to the firm’s precedent bank and permanent retention.

“client file” means the physical paper folder containing the physical documents related to the matter and/or the electronic folder or directory containing the electronic files, documents, data or information related to the matter (hereinafter referred to as “file”).

“file destruction date” is the date on or after which a file may be destroyed.

“Lawyer” is the lawyer who has carriage of the file or another lawyer in the firm who has been assigned responsibility for the file.

3. Closing the File

3.1 When a matter has been completed, the lawyer shall review the file to determine if the file may be closed.

3.2 No file shall be closed unless

- The retainer has been completed.
- A final account, if any, has been forwarded to the client;
- All accounts have been paid or forgiven;
- There is a final distribution and accounting of all trust balances relating to the file;
- Client property has been returned to the client;
- There are no outstanding undertakings.

3.3 Prior to closing the file, unless otherwise agreed, client documents shall be returned to the client.

3.4 At the lawyer’s discretion, copies of client documents may be retained in the file.

3.5 At the lawyer’s discretion prior to closing the file, the file shall be stripped of the following:

- Duplicate copies of documents.
- Draft copies of documents unless the history of creation of the document might be an issue in the future;
- Any documents that can be reproduced from another source such as pleadings, copies of registered deeds or mortgages.

3.6 Prior to closing the file, at the lawyer’s discretion copies shall be made of any documents that may be used as precedents and placed in the firm’s precedent bank for future use. The lawyer will ensure that such precedent documents are stripped of all personal information within the meaning of *The Personal Information and Electronic Documents Act* (PIPEDA) and that client confidentiality, in accordance with the Rules of Professional Conduct, is maintained with respect to any other information that identifies the client.

3.7 No file shall be closed unless the lawyer reviews the file and determines whether the file is appropriate for destruction at a future date or whether the file should be retained permanently.

3.8 If the file is appropriate for destruction, the lawyer shall establish a date for the destruction of the file (“file destruction date”).

3.9 No file shall be closed unless a letter has been forwarded to the client by ordinary mail or delivered to the client advising the client that:

- The matter has been completed;
- All documents and property belonging to the client have been returned to the client or alternatively confirming any arrangement between the lawyer and the client regarding the storage of the client's property;
- The law firm may store the file off-site, [in which event] an administrative fee will be charged to retrieve the file;
- In accordance with the law firm's policy, a file destruction date has been established and the file will be destroyed on or after the file destruction date without further notice to the client.

3.10 If documents from the file are returned to the client, copies shall be made of all documents that cannot be readily obtained from other sources or that in the lawyer's judgment the firm may require in the future.

3.11 When the file is closed, the file shall be moved from an active status to an inactive status.

3.12 The firm shall maintain a list of closed files including the date that the file was closed.

4. Establishing the File Destruction Date

4.1 If the lawyer determines that the file is appropriate for destruction at a future date, the lawyer shall establish:

- A file destruction date no earlier than fifteen years after the date that the file is close; and
- A date for the review of the file no earlier than 90 days prior to the file destruction date ("file review date").

4.2 If the lawyer determines that the file is to be retained permanently, the lawyer shall establish periodic review dates in order that the lawyer may review the file to determine whether circumstances have changed and whether the file is appropriate for destruction.

4.3 The lawyer will exercise professional judgment in determining whether a file is appropriate for destruction and in establishing a file destruction date. In making these decisions, the lawyer shall consider:

- The length of time that the lawyer is required to retain documents pursuant to specific laws or regulatory provisions;
- The client's age and competency;
- The likelihood that the lawyer or law firm will require the file for the future representation of the client;
- The length of time that the lawyer or law firm may be liable for claims involving professional negligence; and
- The likelihood that the lawyer or law firm will require the file because of the nature of the matter, the outcome of the matter or the fact that the file involved a difficult client.

4.4 All file destruction dates and file review dates shall be entered into the firm's tickler system.

5. Storage

5.1 Closed files shall be stored in facilities that are physically secure so as to maintain client confidentiality and to protect against damage or loss.

6. File Destruction

6.1. The lawyer shall review the file on or after the file review date and prior to the file destruction date to determine whether circumstances have changed since the establishment of the file destruction date and whether the destruction should proceed.

6.2. All destruction of files shall be conducted in a manner that ensures the maintenances of client confidentiality.

6.3 A list or database of destroyed files shall be maintained.

6.4 A record of destruction or disposal shall be maintained. The record shall include the following information: the name and address of the client, the file number, a brief description of the matter, the file closure date, the file disposition date, and the name of the lawyer who authorized the file disposition.

"Judge refuses to let defence lawyer drop a client he 'despised'"

Makin, Kirk, *The Globe And Mail*, 05 March 2012, p. A10

It began with a simple court application from a Toronto defence lawyer who wanted to ditch a client he had come to loathe.

Two years later, a bizarre series of events ensuing from that request has ended in another admonishment for an Ontario Court jurist, Judge John Ritchie, who has repeatedly run afoul of appellate judges for his mishandling of cases.

In the latest instance, Ontario Superior Court Judge Faye McWatt criticized Judge Ritchie for refusing defence counsel Paul Slansky's request to part company with a client who irritated him, Gregory Goodridge.

"It is unfortunate," Judge McWatt remarked, noting that the proceeding had veered "far afield" from the way it ought to have played out.

The parade of legal oddities began on Oct. 7, 2010, when Mr. Slansky made his motion over the protestations of Mr. Goodridge, who faced a trial for threatening bodily harm.

“It is impossible, in my view, to represent his interests when I despise him,” Mr. Slansky told Judge Ritchie. “I’ll repeat that because Mr. Goodridge apparently didn’t hear me. I despise him.”

In his 24 years as a lawyer, Mr. Slansky said that had never sought to drop a client until Mr. Goodridge came along.

“Even if I do my best to maintain my professional obligations to represent him professionally and vigorously, I know that subconsciously, I cannot do so because I want him to go down, so to speak,” he said.

But Judge Ritchie turned Mr. Slansky’s motion down flat, out of concern that Mr. Goodridge might not be able to find another lawyer to replace Mr. Slansky. “The trial is going to proceed,” Judge Ritchie announced. “Madam Crown, put your first witness on the stand.” Flabbergasted, Mr. Slansky refused to participate. He accused Judge Ritchie of prejudging his application and creating “a travesty of justice.”

Mr. Slansky appealed Judge Ritchie’s decision to Ontario Superior Court, arguing in a legal brief that the hearing before Judge Ritchie had degenerated into “a circus atmosphere.” He alleged that Judge Ritchie had been biased, dishonest and ought not be allowed to preside over the case.

Mr. Slansky also reiterated his disgust for his client. “The applicant does not care what happens to Goodridge,” he said. “In fact, it would give the applicant some personal satisfaction if Goodridge was found guilty and went to jail.”

In January, 2011, Ontario Superior Court ... [Justice] Todd Ducharme quickly reversed Judge Ritchie’s decision and removed Mr. Slansky as counsel.

Then, the session [presided over by Justice Ducharme] turned stormy. Mr. Goodridge accused Mr. Slansky of, “very extremely-gross professional misconduct.” He also went after ... [Justice] Ducharme. “You have demonstrated despicable, unethical, insulting rude behaviour,” Mr. Goodridge said. “I think you have exhibited a biased grudge against me.”

After making several attempts to restore order, ... [Justice] Ducharme summoned extra security.

..., Mr. Slansky later launched a motion to force Judge Ritchie to pay legal costs for the proceeding personally.

Judge McWatt cited judicial immunity in rejecting his motion. However, she expressed sympathy for the legal hoops Mr. Slansky had been compelled to jump through.

“Mr. Slansky was forced to bring this application to the Superior Court on a straightforward issue which should have been resolved before Judge Ritchie,” she said. “Although this matter could have become less inflamed by Mr. Slansky and he should have considered more carefully his claim for costs, I do recognize his frustration over what occurred in Provincial Court.”

In an e-mail response to an interview request Monday, Judge Ritchie said that judges cannot comment on individual cases. He said that they can only do their best to decide cases in a just manner based on the evidence before them and the law.

“After our function is complete, it becomes the responsibility of appellate judges to review decisions that are brought before them,” Judge Ritchie wrote.

“Often the trial decision is upheld, and sometimes the appellate judge will conclude that there were one or more legal errors made at trial,” he added. “That is the way our system of justice works, and that is the way it should work.”

Appellate judges who reverse Judge Ritchie’s decisions tend to fault him either for giving short shrift to the defence or for issuing unacceptably sketchy reasons. In mid-February, he was taken to task for convicting a mentally ill man after the Crown backed off the case.

In 2003, Superior Court ... [Justice] Anne Molloy examined several of ... [Judge Ritchie’s] decisions and said in a ruling [that] he provided identical, “boiler plate” comments instead of indicating his reasons for finding some witnesses not believable.

"Courthouse Regular and Texas Lawyer are Charged with Barratry"

Neil, Martha, www.abajournal.com, 12 March 2012

A well-known figure at the Harris County courthouse has been charged, along with a Texas lawyer, in a barratry case.

The Rev. Johnny Jeremiah, a community activist also known as Johnny Binder, is accused of soliciting clients for attorney Tiffany Mooney and fee-splitting, *The Houston Chronicle* reports.

“Defendants are entitled to an attorney of their choice, and not be pressured,” said Assistant Harris County District Attorney Wendy Baker. “They have a right to be free of solicitation at the courthouse.”

3.2 Relationships with Clients—Conflicts Of Duty

3.2.1 Generally

"How to handle joint retainers for wills"

Popovic-Montag, Suzana, *The Lawyers Weekly*, 04 December 2009, pp. 9, 12

Life partners often engage in joint estate planning, whether they are in common law, first-time or subsequent marriages.

Given the generally non-contentious nature of joint estate planning and the partners' belief in the permanency of their relationship, lawyers can easily be lulled into a false sense of comfort. But when joint retainer situations go bad, issues of solicitor's negligence, discipline, rules of practice and moral ethical considerations arise.

The nature[,] scope and duration of the retainer itself are often overlooked and may give rise to negligence issues. A formal retainer is not required for a solicitor-client relationship to exist; a client's offer to employ, and a solicitor's express or implied undertaking to do certain things, is sufficient. To be certain that clients know you are no longer acting for them or looking out for their interests, you should confirm in writing that the work has been completed and the retainer is at an end.

"Mirror Wills" are commonly requested by a husband and wife. They provide for all assets of one to pass to the other and are identical in all respects. But what if one spouse comes back and requests changes that adversely affect the other? Do solicitors have an obligation to tell the other spouse? This is clearly a position of conflict and, unless there are prior instructions on how to deal with it, you have a difficult decision to make.

Ontario's *Rules of Professional Conduct* create an ongoing obligation to examine whether a conflict of interest exists throughout the retainer as new circumstances or information may reveal a conflicting interest (R. 2.04 (3)).

Faced with the ethical dilemma of making changes to a mirror will but not advising the other spouse, lawyers can, of course, refuse to draw the new will. This is neither practical nor satisfactory because the client will get another solicitor to draw the will; this may jeopardize the [ongoing] business relationship [with that client]. Moreover, it does not solve the problem of whether to inform the other spouse. If you do, you risk being sued for breach of trust and negligence or for acting in conflict of interest.

To address such situations commentary accompanying [Ontario] R. s.04 (6) provides that a lawyer who receives instructions from spouses or partners to prepare wills based on a shared understanding of what is in them should treat the matter as a joint retainer.

The lawyer should advise at the outset that if one of them were to subsequently communicate new instructions to change or revoke a will: 1) it would be treated as a request for a new retainer; 2) the lawyer would be obliged to hold the subsequent communication in strict confidence, and 3) the lawyer would have a duty to decline the new retainer unless the spouses had permanently ended their relationship, one had died, or the other spouse agreed to the lawyer acting on the new instructions. This commentary brings much needed clarity and direction to the estates and trusts Bar.

The following checklist provides some best practices when drawing up mirror wills for spouses under a joint retainer. These should be recorded in notes and referred to in a reporting letter.

- Advise spouses that they should consider entering into an agreement not to change their wills without the consent of the other;
- Advise them that you are acting jointly for both, the information between them is not confidential and, if a conflict arises, you may be obliged to advise the other; and
- Remind them that if one dies the other may want to change his or her will and review some second marriage scenarios.

In considering whether to act for both husband and wife, ask the following questions:

- Did they ask you jointly to prepare their estate plans, or did one say “I would like you to prepare wills and trusts for me and my spouse?”
- Have you represented either in another capacity?
- Is either a relative of another client whose interest may be affected?
- Is there any fiduciary duty that may arise to some third party to whom you may owe a duty of care or disclosure?

Accepting joint retainers requires some advance planning by the solicitor. By recognizing conflicts and fiduciary duties, considering their implications and dealing with them in a reasoned way, lawyers can avoid claims arising out of breach of fiduciary duty.

“LSUC relaxes rules for lawyers working for free”

Shufelt, Tim, *Law Times*, 14 February 2010

[excerpt]

Conflict of interest rules, which were blamed for stifling *pro bono* services, will soon include an exemption for lawyers offering court-based brief services.

The Law Society of Upper Canada is amending its rules of professional conduct to facilitate *Pro bono* Law Ontario’s [PBLO’s] legal outreach programs.

The law society's current standards for conflicting interests are too rigid to allow for the kinds of limited retainers used by the PBLO programs, Bencher Julian Porter said at Convocation late last month.

"So the system which is meant to help people that couldn't get legal service otherwise, who were not eligible for legal aid, that were in trouble with the system, can't be helped," Porter said. A simple relaxing of the rules, he added, would improve access to justice for a demographic with few choices for representation, he explained.

It's a way of making this important outreach capacity work," Porter said.

Among PBLO's advocacy projects is Law Help Ontario, which operates two legal clinics in Toronto, one for Superior Court matters and one for Small Claims Court.

Volunteer lawyers offer short-term legal advice to those whose income is greater than the threshold for qualifying for legal aid but who can't afford to pay for representation themselves.

However, before a volunteer lawyer can offer help, the matter must first clear a conflicts check, a rule that unduly delays court-based services, Porter said.

The centres are typically staffed by students from large law firms in Toronto, he explained. "By the time it is checked back at the office to see if there's a conflict of interest, at least three hours has passed, sometimes more.

Those regulations are preventing lawyers from participating in the program, according to the PBLO. *Pro bono* counsel turn away a "considerably number of clients," according to a law society report. Under the new system, lawyers will be able to offer *pro bono* services unless they know of a specific conflict that exists.

"Of course, as soon as the person discovers there is a conflict, that's the end of that and the law firm is always set up with agreement to have information sheltered from the other side," Porter said. Law societies in British Columbia and Alberta have made similar amendments in which a *pro bono* lawyer's associates and partners in a firm may continue to act for clients with adverse interests to the short-term client. Conflict of interest rules that cast a wide net are leading other bar organizations across Canada to reconsider their regulatory framework.

"It's been a topic of importance going back now seven or eight years," says Malcolm Mercer, general counsel at McCarthy Tetrault LLP. "Conflicts are such a practical day-to-day issue."

Mercer was a member of the Canadian Bar Association's task force on conflicts of interest, which made several recommendations last year for lawyers facing increasingly complex situations.

The CBA recently incorporated those recommendations into its code of conduct, making major revisions to its conflict of interest guidelines. Among the most important changes is the very definition of what constitutes a true conflict, Mercer says. For a conflict to exist, there must be a "substantial risk of material or adverse effect on representation of a client," according to the

CBA code. That compares with the “likely” prospect of an adverse effect, as defined in the LSUC’s rules of professional conduct.

The new language is consistent with that of the Supreme Court of Canada in *R. v. Neil and Strother v. 3464920 Canada Inc.*, Mercer says.

The CBA also formalized the notion that there exists a relationship of trust between clients and lawyers, which can be breached by the mere presence of an adverse relationship even when no conflict exists.

“There may be times when just being adverse to the client may compromise the relationship,” Mercer says.

He cites the example of a lawyer fighting for compensation of an injured worker. A conflict of interest may exist if that same lawyer also acts on behalf of a bank in foreclosure proceedings on the worker’s home.

“You could easily imagine the injured worker simply couldn’t trust the lawyer,” he says.

But he adds that acting on a matter that is adverse to another client shouldn’t necessarily amount to a conflict if the matters are unrelated and no significant risk of a negative effect on representation exists.

Also underlying the CBA’s new conflict standards is the promotion of access to justice, Mercer says, noting that *pro bono* lawyers should be allowed to provide assistance on a limited retainer basis. “If you had to go through that process, you’d spend more time clearing conflicts than offering help.”

"Making a list, checking it twice"

Sorensen, Jean, *Canadian Lawyer*, November/December 2010, p. 14

A recent incident that has one well respected Vancouver lawyer up before the Law Society of British Columbia disciplinary committee is underscoring the importance for lawyers, especially those involved in special prosecutions, to be vigilant in checking for conflicts of interest or professional ethics breaches. “This is an example of a case which shows a lawyer has to be extremely vigilant to ensure that he or she had made a full disclosure and a complete review of his or her circumstances and the firm’s practice when talking to the client for the first time,” says LSBC director of investigations Stuart Cameron, on its investigation of special prosecutor Terrence L. Robertson of Harper Grey LLP.

Vancouver lawyer Don Sorochan of Miller Thomson LLP, one of the founding members of B.C.’s special prosecutions system, says conflicts of interest or breaches of ethics are especially critical in cases involving special prosecutors as the system was originally established

to ensure public trust in an independent investigator. “I just kicked off a special prosecutor appointment,” says Sorochan, who turned down an appointment in October for fear of evoking issues that affect the client. “It isn’t about yourself or your firm, when you are appointed a special prosecutor you have an extra duty to give the appearance of appropriateness.”

Sorochan was being cautious in light of the political blowback that erupted when Robertson took an appointment to investigate a campaign brochure distributed during Kash Heed’s election campaign. Robertson failed to disclose his firm had contributed \$1,000 to Heed’s campaign. He later disclosed the information a day after his investigation cleared Heed but recommended charges against two campaign workers. That disclosure caused an uproar. B.C. had to void the investigation and appoint another special prosecutor. Robertson has since issued a public apology and his firm has returned the fees it was paid.

The LSBC hired lawyer Perry Mack to determine whether Robertson breached his ethical obligations when he failed to disclose the donation. Based upon Mack’s findings, the LSBC determined Robertson failed to meet the expected standard to disclose to his client any previous connection to the parties and the disciplinary committee is reviewing this finding. [Note: On 04 February 2011, the LSBC sustained the finding, and ordered Robertson to undergo “a conduct review.”]

"Lawyer-Client Conflicts"

Woolley, Alice, *Understanding Lawyers' Ethics in Canada* (Markham [ON]: LexisNexis Canada Inc., 2011), pp. 272-276
[excerpt]

Lawyer-Client Conflicts

The principles used to identify conflicts of interest may be most straightforward when applied to the relationship between the lawyer and the client. There are no mediating bright line rules to consider, screening devices to implement, or the shifting circumstances that can arise where the lawyer navigates conflicts between clients. If the circumstances of the lawyer-client relationship are such that there is a substantial risk that the lawyer’s representation will be materially and adversely affected, that the lawyer may misuse confidential information, or that the lawyer will take improper advantage of the client, then the lawyer may not act, and will be liable to the client (and subject to discipline at the law society) if he has acted in those circumstances, unless the client has given informed consent to the representation. As stated by the Quebec *Code of ethics of advocates*, an advocate “shall subordinate to the interests of the client his personal interests”.

Thus, in *Strother v. 3464920 Canada Inc.*, Strother was held liable because he had taken a financial interest in one client that resulted in him failing to fulfill his legal duties to another

client. Strother's representation of one client was materially and adversely affected because of his financial interest in the other client.

In *Law Society of Upper Canada v. Barnett*, a lawyer was suspended for one month because, amongst other things, he entered into an agreement with a credit card company whereby the company would finance clients using the lawyer and his firm. That was not in and of itself a problem; however, as part of his agreement with the credit card company Barnett agree to notify the company if anything said by the client raised the risk of non-payment. This created a risk of improper disclosure of confidential information.

In *Moffat v. Wetstein* the Court held that a lawyer could not act in litigation against an accounting firm alleging wrongdoing, because the lawyer had been a partner at the accounting firm for at least part of the time covered by the allegations. Although the lawyer was not alleged to have been involved in the wrongdoing, he would be financially affected if a judgment were made against the firm. That was sufficient to preclude his acting against the firm.

In *Stewart v. Canadian Broadcasting Corp.*, noted earlier [in the book from which this except is taken] as an example of an improper advantage being taken by the lawyer, Edward Greenspan was found to have violated his fiduciary duties to his client when he participated in a television program about the client's case, the program made factual errors in respect to the former client, the purpose of participating in the program was to further the lawyer's own interests, and doing so was directly contrary to the legal benefits he had previously sought for the client. In particular, the television broadcast increased the public opprobrium towards Stewart that Greenspan had previously worked to ameliorate. Greenspan "favoured his financial interests over the plaintiff's interests ... put his own self promotion before the plaintiff's interests ... and undercut the benefits and protections he had provided as counsel, and therefore, increased the adverse public effect on the plaintiff of his crime, trial and sentencing".

Perhaps the most egregious examples of conflicts that may have affected—or been perceived to affect—a lawyer's representation of a client, arose in the cases of *Law Society of Upper Canada v. Daboll* and *Law Society of Alberta v. Abbi*. In both cases lawyers were acting for husbands in matrimonial cases, and began intimate relationships with the wife on the other side of the dispute. In *Abbi* the relationship turned intimate after the representation was concluded; however, in *Daboll* the relationship began while the presentation of the husband was ongoing. The lawyer did not withdraw and, at one point, gave advice to the wife with respect to her dealings with her husband. Perhaps unsurprisingly, the lawyer in *Daboll* acknowledged that he had been in a conflict position. The disciplinary panel described the conflict as "patent, blatant and self-evident."

The Supreme Court has, though, made it clear that where the conflict between a lawyer and client is truly unrelated to a retainer, it will not constitute an improper conflict of interest. In the rather odd case of *Galambos v. Perez*, Perez was an employee of a law firm. She made unsolicited cash advances to the law firm amounting to \$200,000. The law firm then declared bankruptcy, and Perez became an unsecured creditor to the law firm. She sued the law firm, relying in part on the fact that the firm had done legal work for her and that, as a result, they were in a conflict position relative to the cash advances provided. There was neither an actual conflict nor a reasonable apprehension of a conflict in the circumstances.

The most common circumstances of improper conflicts of interest between lawyers and clients arise when lawyers have either sexual relations or business dealings with their clients. Such interactions are fraught with difficulty and risk, to both the client and the lawyer, and are addressed independently in the codes of conduct.

The codes of conduct often have extensive—and sometimes highly complicated—rules relating to business dealings with clients. The essence of those rules is, however, relatively straightforward: unless the lawyer can show that a business relationship was advantageous to the client, that the client clearly understood the conflict and consented to it, and that the client had independent legal advice, the lawyer has a major problem and is at significant risk of civil liability and profession discipline.

These principles were established by the Supreme Court in its early [1933] judgment in *Biggs v. London Loan and Savings Co. of Canada*. In that case the lawyer had extracted a commission when he acted for both the mortgagor and mortgagee in a loan transaction. The transaction was described by the Court as “highly improvident and one which was fraught with disaster to both Biggs and the Loan Company, and advantageous only to himself”. The Court held that where a lawyer and client enter into a business transaction, the onus is on the lawyer to demonstrate that the transaction was “fair and just and in no way disadvantageous” for the client. Moreover, the lawyer must show that he behaved with the “utmost frankness and good faith” and that he made full disclosure of “all material facts within his knowledge in relation to the transaction”. Where a lawyer cannot satisfy these requirements he will be liable to the client for the losses the client suffers.

A more recent disciplinary decision, *Law Society of Upper Canada v. Novak* reinforces this perception. In that case the lawyer sold the client an interest in a company. The sale involved the client purchasing a 1.3% interest in a four-day-old company for \$50,000; the company was subsequently worthless. The Law Society found that this was conduct worthy of sanction, mostly because the transaction was so disadvantageous to the client. In addition, the lawyer did not ensure that the client received independent legal advice.

When entering into a business relationship with a client, it is prudent for the lawyer to ensure that the client not only has independent legal advice, but is also independently represented with respect to that transaction. When a client receives independent legal advice the client is simply advised on the desirability of having the lawyer act in the transaction; with independent legal representation the client is independently represented in the transaction itself. While having the lawyer act on the transaction may save on legal costs in the short run, it makes it less obvious that the client’s interests are being represented, and also makes it more difficult for the lawyer to ensure that the transaction is appropriate for both parties.

With sexual relationships, the codes of conduct provide less direction. Such relations are not prohibited outright in any jurisdiction; however, it is clear from the disciplinary decisions that any sexual relationship that involves taking advantage of a vulnerable client is prohibited, and may not be cured even by the lawyer finding new counsel for the client. This approach is appropriate. While no problem may arise when a lawyer at a large firm has a sexual relationship with the in-house counsel of a corporate client, a lawyer who has a sexual relationship with a client in a matrimonial or criminal law matter can rightly be seen as taking advantage of a client

who is not only vulnerable in general, but even more vulnerable in relation to the person who she has entrusted with helping her navigate the complex legal difficulties in which she has found herself. Further, as the Law Society of Upper Canada noted in its decision in *Law Society of Upper Canada v. Hunter*, a client who has started sleeping with her lawyer may not ask difficult questions that she should be asking, and may have a more difficult time determining whether the legal services she is receiving, or has received, were appropriate.

A lawyer may act for an individual with whom she has a pre-existing sexual relationship—a husband can act for his wife, for example. In that instance the determination that the lawyer must make is whether the personal relationship is such that it might impair his objectivity. As noted by the Alberta Code of Conduct, circumstances that can lead the lawyer to favour the interests of the client unduly may impair the ability of the lawyer to provide proper advice just as much as do circumstances that lead the lawyer to undervalue those interests.

Conclusion

An academic article once claimed that lawyers' ethics are similar to the ethics one learns in kindergarten. Even a cursory review of the law governing conflicts of interest demonstrates the problems with this description. In order to avoid improper conflicts of interest lawyers need to be aware of the obligations that arise when acting against former clients, when acting simultaneously for multiple clients in a single matter or related matters, when acting concurrently for clients whose legal interests are directly adverse, or when in a situation where the lawyer's and client's interests conflict. Lawyers need to be vigilant to ensure that improper conflicts have been identified, that the necessary disclosure has been made and consent obtained, and that they remain alert to shifts in their obligations as the circumstances of the clients change.

This is not to suggest that the law of conflicts is unduly complex or opaque, but simply that it is complicated, and important, and lawyers need to ensure a proper understanding of it to represent their clients, and manage their practices, effectively.

"Neill on *Neil*: conflicts and Canadian corporate law"

**May, Neill, *Canadian Lawyer*, January 2012, p. 15
[excerpt]**

The breadth of a lawyer's and a law firm's duty to a client has been well analyzed since the Supreme Court of Canada's 2002 decision in *R. v. Neil*. That being said, since the bright-line rule laid down in that case continues to stand uncontradicted nearly a decade later, its potentially significant effect on the practice of business law in an increasingly interconnected economy warrants consideration and comment.

The irony in a lawyer complaining about overbroad conflict rules is manifest. But my area of expertise is not lawyer jokes; in fact, for reasons I can't explain, I don't find them all that funny.

Personal conflicts aside, there are reasons to be concerned about the breadth of and uncertainty in conflict rules especially given the realities of the Canadian market for legal services. In one sense Canada is a big place: if the only lawyer in your town is conflicted, it can be a long drive to the next one. But it is equally true that, at least in the context of the market for specialized legal services, Canada is a very small place. There is a limited number of highly specialized lawyers in an economy that is complex, developed, and highly regulated. In that context, overbreadth and uncertainty can limit clients' access.

The lawyer's fiduciary duty is clear; as the Supreme Court put it in the 2007 *Strother v. 3464920 Canada Inc.*, decision, the "fundamental duty of a lawyer is to act in the best interest of his or her client to the exclusion of all other adverse interests except those duly disclosed by the lawyer and willingly accepted by the client." From a theoretical perspective the problem sounds simple: if you have a conflict, don't act. But consider the literal application of the "unrelated matter rule" as set forth in the Neil in the real world of specialized legal services. Expert anti-trust counsel couldn't act for a consolidator one day and argue against anti-competitive mergers the next; an investment fund might not get access to unique tax expertise of one firm because it acts for a competitor in a completely unrelated context; and a government agency couldn't retain a top litigator because she's worked for just about anyone else.

The point is that the market here is sophisticated but small, that there's a very small cluster of firms servicing clients with needs that, as the economy and the resultant regulation become more complex, are expanding. Access to the most qualified, experienced, and well positioned advisers can be critically important. Rules that limit access in a manner disproportionate to their intended objective therefore need to be re-thought.

"The conflict over conflicts"

Marron, Kevin, *Canadian Lawyer*, February 2012, pp. 22-23
[excerpt]

As a sole practitioner in a small town in sparsely populated northern Ontario, Susan McGrath would not be very surprised to discover that she had represented almost everyone in Iroquois Falls at some time or other. That's why she's concerned about conflict of interest and a proposed new set of rules now being considered by law societies across Canada. "If the rules were applied too strictly, sole practitioners in small towns would have to move every five years, because they'd end up with all kinds of client conflicts," she quips.

McGrath has been closely involved with this issue for several years, as a member of the Canadian Bar Association's task force on conflicts of interest. The CBA established the task

force on conflicts of interest in 2007 with a view to recommending changes to current conflict rules that it saw as “cumbersome, time-consuming, and an impediment to the efficient delivery of legal services.”

Meanwhile, the Federation of Law Societies of Canada has been engaged in updating its Model Code of Professional Conduct, including its recommended rules on conflicts of interest. In November 2011, the Federation’s standing committee on the Model Code of Professional Conduct, issued a report on conflicts of interest that includes a recommended set of rules. “We want to have a standard approach to as many aspects of regulation of [the] legal profession as possible. A standard code of conduct is something the Federation has been working on since 2005 and finally we have a standard for the law societies to accept,” says Gavin Hume, chairman of the standing committee and associate counsel at Vancouver’s Harris and Co. LLP.

But individual law societies do not have to adopt the Federation’s model code. While it is generally expected they will choose to accept most of the recommendations [about half the societies already have done so], they have the right to set their own rules and may choose to modify the model code as they see fit. And that is what McGrath and other CBA members will be urging regulators to do.

The Law Society of British Columbia is currently seeking input from B.C. lawyers on this issue and McGrath anticipates other law societies will engage in similar consultations. These consultations will likely reignite a dispute that has been simmering for several years.

It’s a polite, lawyerly dispute focused largely on differing interpretations of judicial dictates, but it involves issues of huge importance to the legal profession and—at least in the eyes of the legal profession—for the public at large.

. . . .

But—whatever motives and high principles lie behind this dispute—the key issue involves differing interpretations of a couple of paragraphs in a 2002 Supreme Court of Canada decision. *R v. Neil* involved a claim by the defendant in two separate trials that the law firm representing him had a conflict of interest. David Lloyd Neil, a paralegal in an Edmonton law firm, had been charged with a series of offences including an indictment relating to an alleged fraud and one involving the fabrication of court documents in a divorce case. His claims of conflict of interest resulted in a mistrial on one indictment and a stay of proceedings in the other. An appeal court overturned the trial judge’s decision to grant a stay and order a mistrial, and Neil appealed to the SCC. The Supreme Court found that there was indeed a conflict of interest, but that was not grounds for halting the criminal proceedings and therefore dismissed the appeal.

What made this a landmark case were Justice Ian Binnie’s comments on the duties of lawyers and law firms with regard to client conflicts. In one paragraph of the ruling he set out a “bright line” rule “that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client—even if the two mandates are unrelated—unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.”

Lawyers and law firms have since argued that this rule is too onerous. To McGrath, for example, it would mean that she can't represent the wife of a businessman in a divorce proceeding because she handled the incorporation of the husband's finances or business affairs. In another scenario, she would not be able to take on a new client because of a conflict involving a former client who started a court action then abandoned it, subsequently moving away from the community, leaving no contact information, and leaving McGrath still on the record in the abandoned suit with no way of finding the former client to get his consent.

But McGrath and other members of the CBA task force argue that the "bright line" was not Binnie's last word on the conflicts issue. In fact, two paragraphs later in his judgment, he stated that he adopted the notion of conflicts, as set out in a legal text *Restatement Third, The Law Governing Lawyers*[:] "substantial risk that the lawyers 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".

This more restrictive definition would allow law firms more leeway in making realistic decisions as to whether a conflict does or does not represent a substantial risk that a client would be materially and adversely affected. "We want the situation where the lawyer will be able to evaluate whether there is substantial risk or not. Right now the bright-line test takes any kind of judgment call away from the lawyer. We have to get consent, preferably with independent legal advice," says McGrath, whose task force proposed deleting references to the bright-line rule in the Federation's recommendations—a proposal that the Federation rejected.

. . . .

And the Federation's new model code is not cast in stone, says Hume. "We will continue to refine and improve it. And, as the jurisprudence evolves, we will continue to look at that. It's a living document."

3.2.2 Conflict found

"OCA refuses to relax lawyer conflict rule"

Schmitz, Cristin, *The Lawyers Weekly*, 03 December 2010, pp. 2, 26

The Ontario Court of Appeal has refused to relax the absolute ban on lawyers acting against their ex-clients in the same matter for which they once represented them.

On Nov. 22 [2010], the appeal court allowed the motion of plaintiff Consulate Ventures to remove Alan Lenczner, and Toronto's Lenczner Slaght, as appellate counsel for Amico Contracting and Engineering and its two co-defendants in a dispute over the building of an outlet mall in Windsor, Ont.

Consulate won a \$3.3 million trial judgment which Amico recently asked Lenczner, one of the country's leading barristers, to try to overturn.

However Lenczner very briefly represented Consulate in the same litigation 11 years earlier.

Consulate therefore argued it would be a breach of his duty of loyalty to now go to bat for the other side.

Lenczner said (without challenge) that he had absolutely no memory of ever talking to the respondent plaintiff (he only spoke with Consulate's president once)—let alone retaining any memory of the file. However, the Ontario Court of Appeal refused to water down the common law prohibition against a lawyer acting against his ex-client in the same dispute, even if there is no realistic risk that confidential information will be misused.

In granting the plaintiff's motion to disqualify Lenczner, Justice David Doherty held that a "lawyers obligation, whether described as a duty of loyalty owed to a former client, or as a professional obligation to promote public confidence in the legal profession and the administration of justice, dictates that Mr. Lenczner cannot act on this appeal against the respondent, his former client."

Consulate's counsel, Patrick Cotter of Toronto's Sim Lowman, Ashton & Mackay LL.P, said the court is basically enforcing the existing practice, as enshrined in r.2.04(4)(a) of the Law Society's *Rules of Professional Conduct* (which is non-binding on the court).

"The duty of loyalty to former clients encompasses more than the duty to preserve confidential information and not to misuse confidential information," Cotter told *The Lawyers Weekly*.

"There is not a lot of law on it, in Ontario anyway" he added.

However, had the appeal court accepted that a lawyer can act against an ex-client on the same matter if there is no possibility of the client's information being misused, I think it would have significantly impaired the public perception of the administration of justice," he said. "So that's been preserved because clients don't understand the nuance between a risk of disclosure of confidential information [or] a risk of misuse, they want to know that their solicitor is going to be loyal to them in that matter, regardless. And the court has confirmed and enforced that."

Justice Doherty did not accept the submission of Lenczner's counsel, Harry Underwood of Toronto's McCarthy Tetrault, that a lawyer's duty of loyalty to their ex-clients' confidences. (Underwood could not be reached at press time).

Justice Doherty noted the appeal court's earlier ruling in *Re Regina and Speid*, [1983] O.J. No. 3198, does not tie the duty of loyalty exclusively to confidentiality obligations.

Rather, as Nova Scotia Court of Appeal Justice Thomas Cromwell held two years ago (before he was promoted to the Supreme Court), lawyers' duty of loyalty to their former clients is rooted both in confidentiality concerns "and the need to foster and maintain public confidence in the client/solicitor relationship and the due administration of justice": *Brookville carriers Flatbed GP Inc. v. Blackjack Transport Ltd.*, [2008] N.S.J. No. 94.

After Lenczner met initially with the president for two hours in 1999, the plaintiff hired someone else to handle the case.

As Justice Doherty remarked, no one, including the plaintiff questioned Lenczner's integrity, honesty or professionalism. "All are of the highest order," the judge said.

However Justice Doherty rejected the argument of Lenczner's counsel that since there is no danger of confidential information being misused, the motion should be dismissed because lawyers do not have a duty of loyalty to former clients.

Underwood cited the English House of Lords' decision in *Boliah v. KPMG*, [1999] 2. A.C. 222, as authority for the proposition that the only duty owed by a lawyer to a former client is the duty to preserve the confidentiality of information he or she obtained during the retainer.

First of all, Justice Doherty did not accept that *Boliah* holds that a lawyer's professional obligations extend only to maintaining confidences. But even if that is the holding, "it is inconsistent with both *Speid* and *Brookville Carriers*," he said. "I agree with the analysis in those cases."

Nor did Justice Doherty accept Lenczner's counsel's argument that since the appellant defendants plan to argue relatively narrow appeal grounds relating to valuations, the subject matter of the litigation was not the same as the broad dispute Lenczner was consulted on by the plaintiff's in 1999.

“Apart from the practical difficulties with defining the ‘matter’ on which a lawyer has been retained strictly by reference to the grounds of appeal, that approach is unduly orientated towards the lawyer rather than the former client,” Justice Doherty observed.

He said he preferred a “functional approach” which asks: “[F]rom a reasonable client’s perspective, what was the matter on which that client retained the lawyer, and what is the matter on which that same lawyer now proposes to act against his former client?”

“Viewed from the perspective of the reasonable former client, I think Mr. Lenczner was retained in 1999 to advise the respondent as to its rights and remedies in respect of the dispute between the respondent and one or more of the appellants relating to development of the mall in Windsor,” Justice Doherty wrote. “Viewed from the same perspective, Mr. Lenczner is now retained by the appellants to challenge on appeal the trial judge’s determination of the respondent’s legal rights and remedies in respect of the dispute over the development of the mall that initially arose in 1999. Both Mr. Lenczner’s advice to the respondent in 1999 and his services for the appellants in 2010 relate to the same subject matter, albeit viewed from the perspective to two very different stages of the legal process.”

The decision indicates that the plaintiff gave Lenczner confidential material relevant to the case, including a chronology and summary. The president [of the plaintiff] said Lenczner gave his views about the strength of the plaintiff’s case; advised on a letter to be written to the opposing parties; and discussed obtaining a certificate of pending litigation.

Blanchard v. Caines

**(2010), 298 Nfld. & P.E.I. R. 268 (NLSC[TD]), Goodridge, William H., J., 19 May 2010
[paras. 2-16]**

Facts

2 After a 12-year common-law relationship, the parties separated on December 25th, 2008.

3 In January 2009 James Bennett Law Firm PLC Inc. agreed to represent both Ms. Blanchard and Mr. Caines *pro-bono* on the sale of the family home. The generous arrangement for provision of these legal services was influenced by Ms. Blanchard's position as a legal assistant employed by the [Bennett] law firm. Mr. Caines did not have a problem with this joint representation initially because he did not anticipate any dispute between the parties on the settlement of their joint affairs. On January 21st, 2009 Mr. Caines and Ms. Blanchard signed an agreement for the sale of the family home, and in the agreement both recognized that James Bennett Law Firm PLC Inc. would serve as their lawyer.

4 On February 7th, 2009 Mr. Caines was served with a court application seeking spousal/partner support, child support and child custody. This was the first indication to Ms.

Caines that the issue of spousal support was in play, and it was his first indication that James Bennett Law Firm PLC Inc. was intending to represent Ms. Blanchard separately on other family matters [i.e., other than sale of the family home].

5 On February 13th Mr. Caines consulted Murphy, Watton & Burrige law firm for advice on this court application and to discuss the possible conflict situation of the Bennett law firm. Mr. Caines states in his affidavit that he was never advised that the law firm was planning to represent Ms. Blanchard on these other family matters.

6 On March 6th Murphy, Watton & Burrige emailed Mr. Bennett advising that Mr. Caines objects to James Bennett Law Firm PLC Inc. acting against him on the [other] family matter[s] but consents to the firm continuing to act jointly on the house sale.

7 The house sale closed on March 10th, with James Bennett Law Firm PLC Inc. acting for both Mr. Caines and Ms. Blanchard. Incidental to the sale, the law firm disbursed proceeds (after payout of the mortgage) in partial satisfaction of joint family debts. I say partial satisfaction because there was only \$11,000 available after the mortgage was paid, and this was insufficient to satisfy all of the joint family debts. Both parties were responsible to make up the deficiency. There was no evidence before me as to the amount each party contributed in satisfaction of the joint family debts, or if additional funds were contributed. James Bennett did not meet with Mr. Caines or provide advice on the appropriate percentage split for payment of these joint family debts. But the [Bennett] law firm, through its staff, received and acted on instructions as to the appropriate payments to be made.

8 On October 13th a new [second] Court application was issued by Ms. Blanchard seeking custody, child support, spousal/partner support and division of assets. The current matter, which Mr. Caines alleges gives rise to a conflict for the law firm, is this second application for which James Bennett Law Firm PLC Inc. is acting for Ms. Blanchard.

Analysis

9 Ms. Blanchard argues that Mr. Caines consented to the law firm acting on the house sale and distribution of proceeds, with full knowledge that the law firm would be acting for Ms. Blanchard alone on all other family issues arising from the separation. She says that he has effectively waived his right to now object to her choice of counsel.

10 There is no evidence before me to support this position and nothing to suggest any informed consent or waiver was given by Mr. Caines. The burden to prove that Mr. Caines had given an *informed* consent or waiver would be with Ms. Blanchard or James Bennett Law Firm PLC Inc. I accept Mr. Caines' position that he did not know that the law firm would be acting against him until February 7th [date of the first application] and that he would not have consented to the joint representation [on sale of the family home] had this information been disclosed. Mr. Caines registered his lack of consent by the email dated March 6th.

11 I find that confidential information passed from Mr. Caines to James Bennett Law Firm PLC Inc. while the firm was acting for Mr. Caines on the house sale and subsequent distribution of funds. There was information communicated by Mr. Caines to Ms. Blanchard, in her role as

an employee. Therefore, James Bennett Law Firm PLC Inc. received instruction from Mr. Caines, confidential information, as to the agreed split for payment of joint family debts. This confidential information is related to the claim for a division of family assets now being advanced by Ms. Blanchard.

12 In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.) at paragraph 55 Sopinka, J. stated:

In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant.

13 At paragraph 18 of *MacDonald Estate*, Sopinka, J. stated that "even an appearance of impropriety should be avoided", and at paragraph 42 Sopinka, J. stated:

This trend [in favour of a stricter test] is the product of a strong policy in favour of ensuring not only that there is no actual conflict but that there is no appearance of conflict.

14 *Dobbin v. Acrohelipro Global Services Inc.*, 2005 NLCA 22 (N.L. C.A.), considered the issue of whether a law firm could act against a party with whom the firm had a "previous relationship". Welsh, J.A., at paragraphs 41 and 42, indicated that the appropriate standard to be applied was summarized by Blair, J. in *UCB Sidac International Ltd. v. Lancaster Packaging Inc.* (1993), 51 C.P.R. (3d) 449 (Ont. Gen. Div.):

... In addressing this question, one should look to see whether there is a "previous relationship" not only between the lawyer and the client but also between the lawyer and the "person involved in or associated with" the client in connection with the original matter "which is sufficiently related to the retainer from which it is sought to remove the solicitor" to justify the removal sought.

In the interests of ensuring, in the eyes of the reasonably informed member of the public who is possessed of all the facts, "that even an appearance of impropriety should be avoided", the law firm should cease to act in the action.

Conclusion

15 In this case there was a previous solicitor/client relationship during which Mr. Caines shared confidential information relevant to the division of liabilities. The issue of division of assets (one of the issues set out in Ms. Blanchard's current [second] application) is related to the issue of division of liabilities. It is not a fresh, independent and unrelated matter.

16 I find that confidential information relevant to the current family matter passed from Mr. Caines to James Bennett Law Firm PLC Inc. and, as a result, I find that there is a disqualifying

conflict of interest. James Bennett Law firm PLC Inc. is prohibited from representing Ms. Blanchard in her continuing family claim against Mr. Caines.

Rosenstein v. Plant

(2010), 80 R.F.L. (6th) 211 (Ont. Sup. Ct. J.), J.A. Blishen J., 26 January 2010
[Headnote; paras. 16-19]

Parties married, had two children, and separated in 2007 after 12-year relationship—In 2007, parties signed separation agreement settling all issues including custody and child support—In 2009, wife retained solicitor and firm to vary terms of agreement—Husband brought motion for order removing firm as solicitors of record for wife based on conflict of interest—**Held:** Motion granted—Appearance of conflict of interest was sufficient to order that solicitor and firm be removed as solicitors of record for wife—Wife's solicitor and husband had two communications and discussions regarding personal and business matters surrounding husband's matrimonial situation—Husband received what he considered to be legal advice, albeit in solicitor's view somewhat generic advice, which husband appreciated—Husband had satisfied onus to establish previous relationship sufficiently relating to solicitor's retainer by wife—Husband shared information with wife's solicitor and received some advice from him regarding matters in issue but never retained solicitor—Formal retainer was not necessary—Given relationship, it was inferred that confidential information was imparted and onus shifted to solicitor to establish that no potentially relevant confidential information was imparted—Solicitor had not met onus—Reasonably informed person would not be satisfied that no relevant confidential information was obtained—For solicitor to continue to represent wife would, at very least, create appearance of conflict of interest—Ability to move forward with litigation would be more difficult, if not impossible, if solicitor continued to represent wife—Delays would be inevitable, which would not be in anyone's best interests, particularly children.

. . . .

16 In determining whether a disqualifying conflict of interest exists, the Supreme Court of Canada in *MacDonald Estate v. Martin*, 1990 CarswellMan 233 (S.C.C.) indicates that the court must consider and balance three competing values: "the maintenance of the high standards of the legal profession and the integrity of the judicial system; the right of litigants not to be deprived of their counsel without good cause; and the desirability of permitting reasonable mobility in the legal profession." Sopinka J. notes that:

47 ...In dealing with the question of the use of confidential information we are dealing with a matter that is usually not susceptible of proof. ...the test must be such that the public, represented by the reasonably-informed person, would be satisfied that no use of confidential information would occur. That, in my opinion,

is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest? In this regard, it must be stressed that this conclusion is predicated on the fact that the client does not consent to, but is objecting to, the retainer which gives rise to the alleged conflict.

48 Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

17 With respect to the first question, Sopinka J. states:

49 ... once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge.

18 The second question is whether the confidential information will be misused. As stated by Sopinka J.:

50 ... A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship. ...

19 It is not necessary for a lawyer to be actually retained before establishing a solicitor-client relationship relevant to the determination of a potential conflict of interest. In *Power v. Zuro*, 2009 CarswellOnt 3553 (Ont. S.C.J.), Aitken J. referred to the Supreme Court of Canada's decision in *Descôteaux c. Mierzwinski* (1982), 70 C.C.C. (2d) 385 (S.C.C.) and stated:

15 ...Such a relationship arises as soon as the potential client has his or her first dealings with the lawyer or his staff in the process of seeking legal representation or legal advice. At p. 403, the Court stated: "It is also clear that solicitor-client privilege can extend to conversations in which a person makes disclosures while seeking to retain a solicitor, though in fact the retainer is not perfected.

Wilson v. Brown

(2010), 85 R.F.L. (6th) 21 (B.C.S.C.), D.A. Halfyard, J.
[paras. 5 to 16; headnote (excerpt)]

5 The parties lived [common law] together in a house on property that eventually became registered in the names of the defendant James Brown, his brother and his sister. Both parties had previously been married twice, before they met each other. The plaintiff's son Andrew was born on December 26, 1983. Her daughter Leigh was born on August 01, 1987. When the parties began living together on the defendant's property in 1995, her two children were with her. Andrew was about 12 and Leigh was 8. Mr. Brown's son, Cameron was 7.

6 Andrew is now 26, and lives independently. Leigh is now 22, and had moved out of the family home in about February 2008. Cameron was not living at the family home, in December 2008.

7 The parties separated on or about December 10, 2008. The plaintiff [Wilson] commenced this action on December 22, 2008. Mr. Sinnott entered an appearance on behalf of [Defendant] Mr. Brown, on January 4, 2009.

8 In this action, the plaintiff is claiming an interest in real property registered in the names of the defendant and his two siblings, on the basis of unjust enrichment. She also claims spousal support.

9 By notice of motion filed December 24, 2008, the plaintiff applied for interim occupancy of the former family home, interim spousal support and an order restraining the defendant from disposing of assets in which she was claiming an interest. This application was hotly contested by the defendant, and numerous affidavits were filed. There were numerous conflicts between the evidence given by the plaintiff and the defendant. The major disputes were whether the plaintiff had been ousted from the family home by the defendant or had left on her own accord, and as to the nature and extent of the physical and mental disabilities of the defendant as a result of a work injury in May 2005.

10 One of the affidavits filed on behalf of the defendant by Mr. Sinnott was the affidavit of Michael Kenneth Bath sworn January 9, 2009. The affidavit was commissioned by Mr. Sinnott and it seems reasonable to infer that it was prepared by him. In his affidavit, Mr. Bath refers to litigation between him and the plaintiff in 1997, concerning the custody of their daughter Leigh. He deposed that, after a hearing on February 19, 1997 at Courtenay, Mr. Justice Cole awarded him custody of Leigh. Mr. Bath attached a copy of the reasons for judgment of Cole J., and notes the judge's adverse findings about the plaintiff's credibility. Mr. Bath also deposed that he had known Mr. Brown since 1996, and that Mr. Brown has been a reasonable person concerning custody and access issues between him (Bath) and the plaintiff, whereas the plaintiff "could be

mean and irrational." Mr. Bath gave further evidence to the effect that, to the best of his knowledge, Leigh had no plans to return to her mother's home in December, 2008.

11 The dispute in January 2009 culminated in a consent order being made by Madam Justice Russell on January 15, 2009. In the result, the defendant remained living in the former family home, but he was required to pay the plaintiff interim spousal support of \$600 per month commencing February 1, 2009, as well as a further \$5,000.

12 Eventually a notice of trial was issued for February 22, 2010. In preparation for trial, the plaintiff met with her counsel Mr. Vining on February 5, 2010. During that meeting, as a result of seeing letters written by Mr. Sinnott in 1997, and discussing them with the plaintiff, Mr. Vining learned that Mr. Sinnott had represented the plaintiff in 1997, in connection with her custody dispute with Mr. Bath. Mr. Sinnott had not acted for either party in the litigation which culminated in the hearing before Mr. Justice Cole, but the plaintiff sought his advice about whether an appeal could successfully be taken from the order of Mr. Justice Cole. After meeting with the plaintiff and receiving instructions, Mr. Sinnott advised that an opinion be sought from another lawyer in Vancouver who was familiar with the appeal process, and that was done.

13 Mr. Vining telephoned Mr. Sinnott on February 5, 2010 and followed up with a letter (by fax) the same day. Mr. Vining had taken the position that Mr. Sinnott should withdraw as counsel.

14 Mr. Sinnott wrote to Mr. Vining on February 8, 2010. In his letter, Mr. Sinnott expressed the opinion that:

There is nothing contained in my file, nor were the matters that were discussed at that time [1997], relevant to any issue in the present action between Ms. Wilson and Mr. Brown.

15 Mr. Sinnott refused to withdraw as counsel for Mr. Brown, and, in effect, suggested that Mr. Vining apply to court if he felt that strongly about it.

16 Mr. Vining filed the present application on February 9, 2010, and obtained short leave permitting the application to be heard on February 15, 2010.

. . . .

Held: Application granted. Present litigation was sufficiently related to earlier litigation between common law wife and her former husband—Two matters were sufficiently related to each other to raise presumption that solicitor had acquired confidential information as a result of his previous representation of common-law wife that could be relevant to present action—Solicitor failed to rebut presumption—There was risk that information received would be used to prejudice of common-law wife.

Achakzad v. Zemaryalai

2010 CarswellOnt 545, Ont. Ct. of J., Marion L. Cohen J., 25 January 2010
[paras. 17 to 24]

17 The leading case on the issue of a disqualifying conflict of interest is *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, 121 N.R. 1, 70 Man. R. (2d) 241, 285 W.A.C. 241, [1991] 1 W.W.R. 705, 77 D.L.R. (4th) 249, 48 C.P.C. (2d) 113 (S.C.C.), 1990 CanLII 32, 1990 CarswellMan 233 (S.C.C.). In that appeal, Justice John Sopinka held (at page 1260 [S.C.R.]) that

... the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That ... is the overriding policy that applies and must inform the court in answering the question

18 Justice Sopinka held that two questions must be answered to determine whether a conflict exists:

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

I turn then to a consideration of these issues.

1 Did the Lawyer Receive Confidential Information Attributable to a Solicitor-And-Client Relationship Relevant to the Matter at Hand?

19 The burden is on the applicant to establish that Ms. Brodtkin received relevant, confidential information attributable to a solicitor-and-client relationship with her. The first step in the analysis therefore requires the court to find that a solicitor-and-client relationship existed between the applicant and Ms. Brodtkin. If the relationship is found to exist, the court will infer that confidential information was imparted. (See *MacDonald Estate v. Martin*, *supra*, at page 1260 [S.C.R.]).

20 It is clear that Ms. Brodtkin was not formally retained by the applicant when the conversations occurred about her case. What are the implications of that fact? The *Rules of Professional Conduct* of the Law Society of Upper Canada provide some guidance. According to *MacDonald Estate v. Martin*, *supra*, the rules can be taken not only as to an expression of the collective views of the profession regarding appropriate standards to which lawyers should adhere, but also as "an important statement of public policy," about the formation of the solicitor-and-client relationship. The commentary to Rule 1, which defines "client", states that:

. . . an express retainer or remuneration is not required for a solicitor and client relationship to arise.

21 The case law is also clear that, for the purpose of determining whether a disqualifying conflict exists, the lawyer need not be retained before the solicitor-and-client relationship comes into existence. See *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860, 44 N.R. 462, 141 D.L.R. (3d) 590, 1 C.R.R. 318, 70 C.C.C. (2d) 385, 28 C.R. (3d) 289 (S.C.C.), 1982 CanLII 22, *Descôteaux c. Mierzwinski*, 1982 CarswellQue 291 (S.C.C.); *Power v. Zuro*, 2009 CanLII 31982, (2009), [2010] W.D.F.L. 114, 2009 CarswellOnt 4943 (Ont. S.C.J.).

22 The facts in *Bell v. Nash*, 1992 CanLII 2210, (1992), 66 B.C.L.R. (2d) 361, [1992] 4 W.W.R. 512, [1992] B.C.J. No. 862, 1992 CarswellBC 115 (B.C. S.C.), are similar to those in the case at bar. In *Bell v. Nash*, the husband's solicitor inadvertently had initial telephone discussions with the wife, who had called seeking to retain her services. The husband's solicitor denied that she had received any confidential information that could be used to the prejudice of the wife. The court held that the fact that the appellant had not been formally retained by the wife at the time of the confidential disclosure

was not fatal to [the wife's] application. The important point was that the appellant, in her role as a solicitor, had received confidential information from [the wife], and [the wife] was entitled to be protected from having that confidential information used against her in her ongoing legal dispute with her husband.

The fact that the disclosure took place in a telephone conversation ... [during which the lawyer was in her office] and was about retaining the lawyer to act were circumstances that the court found supported a reasonable expectation of confidentiality. See *Manville Canada Inc. v. Ladner Downs*, 1992 CanLII 411, (1992), 63 B.C.L.R. (2d) 102, [1992] 2 W.W.R. 323, 88 D.L.R. (4th) 208, 1992 CarswellBC 6 (B.C. S.C.)

23 The case of *Dalgleish v. Dalgleish* (2001), 105 A.C.W.S. (3d) 1157, [2001] O.T.C. 426, 2001 CarswellOnt 2016 (Ont. S.C.J.), is also instructive. In *Dalgleish v. Dalgleish*, a lawyer retained by the husband was disqualified for conflict where the wife had a number of telephone conversations with that lawyer's secretary, on the basis that the husband's lawyer had received prejudicial information about her case.

24 In the case at bar, I find that the applicant spoke to Ms. Brodtkin in circumstances that reasonably gave rise to an expectation of confidentiality. The conversations were expressly about the case now before the court and were detailed. Notwithstanding the absence of a formal retainer, I am satisfied that a solicitor-and-client relationship existed between the applicant and Ms. Brodtkin at the time that she engaged in discussions with the applicant.

[**Note:** The Court found that information was received by Ms. Brodtkin during the telephone conversation with the applicant wife. In the result, the Court decided a "disqualifying conflict of interest" existed, and removed involved counsel from the record in the proceeding.]

Watt v. Nicholls

(2011), 3 R.F.L. (7th) 400 (Ont. Sup. Ct. J.), Olah J., 05 May 2011

[*Headnote*]

Respondent wife retained lawyer for variation motion—Lawyer had been family friend of husband for many years and had acted for husband in business matters—Lawyer claimed that friendship with husband ended well before proceedings at issue—Lawyer answered both parties' procedural questions from time to time—Lawyer was approached by wife when husband brought motion to vary, and declare bankruptcy—Lawyer felt that he was morally obligated to assist due to wife's financial circumstances—Husband brought motion to have lawyer removed from record—**Held:** Motion granted—Lawyer's work for husband's company created solicitor-client relationship even if husband was not individual client—Lawyer would have received confidential information as to husband's finances—Financial information was relevant to motion for variation and thus required that lawyer disqualify himself—Lawyer also had dealings with husband regarding matrimonial matter although no retainer existed—Information obtained while giving assistance had potential to be used against husband by lawyer—Financial hardship of wife did not defeat provisions as to conflict of interest, and there was no evidence that wife could not retain another local *pro bono* lawyer.

"Windsor law firm removed from record in \$6.3M wrongful dismissal"

Sebesta, Kendyl, *Law Times*, 20 February 2012

[*excerpt*]

A Windsor, Ont. law firm has been removed as solicitors of record in a \$6.3 million wrongful dismissal lawsuit launched by former Hotel-Dieu Grace Hospital spokeswoman Kim Spirou after the Superior Court of Justice found the firm repeatedly ignored several conflicts of interest between one of its lawyers and hospital's former CEO, Warren Chant.

Shulgan Martini Marusic LLP was removed despite its argument that Windsor lawyer Gerri Wong was not a member of its firm and never created a conflict of interest, despite being in possession of confidential information resulting from her past work with the hospital and connection to the firm.

Wong was employed by the Hotel-Dieu Grace Hospital in June 2010 to evaluate and resolve workplace violence, particularly in the hospital's cardiology program. While there, Wong worked closely with several defendants listed in Spirou's lawsuit, including Chant.

Spirou had issued a statement of claim against the hospital and several employees in December 2010, including Chant, arguing her suspension and dismissal was unlawful and cited several disagreements between herself and Chant that eventually led to her dismissal. Spirou identified Myron Shulgan of the Shulgan law firm as her counsel in the claim.

Despite several attempts by Wong to identify the pairing as a conflict of interest to the law firm, Shulgan continued to represent Spirou, arguing no conflict of interest existed because Wong was not an employee of the firm.

But in a Superior Court ruling last month, Justice Bruce Thomas approved the motion to remove the firm and determined he would consider awarding costs against the firm at an unspecified date for failing to act on the conflict.

Finding “there can be no doubt” that Wong was a lawyer at Shulgan and acted for the hospital at the time Spirou retained Shulgan, Thomas wrote that while Wong “acted at all times with integrity and professionalism,” there would be a penalty against the Shulgan law firm for “prolonging the inevitable.”

R. v. Sandhu

[2012] B.C.J. No. 396 (B.C.C.A.), C.A. Ryan, K.J. Smith and E.A. Chiasson JJ.A.
[Headnote]

Application by the Crown to quash the appeal of the accused and his lawyer from an order removing the lawyer as counsel for the accused—The accused and three others were charged with various offences in relation to the alleged extortion of an individual in 2010 with respect to a debt he incurred with the Hells Angels in 1993—The charges resulted from an investigation known as Project E-Pulpit—From 2003 to 2004, the lawyer worked for the Organized Crime Agency of British Columbia, which was mandated to reduce organized crime in the province—Her duties included training, mentoring and coaching officers, providing advice about criminal investigation and prosecution strategies, reviewing legal documents, and providing general legal advice—During the course of her employment with the Agency, the Agency conducted Project Halo, a major investigation of the participation of Hells Angels members in the illegal drug trade—One of the co-accused was a target of the investigation and communications involving the accused were intercepted in the course of the investigation—No criminal charges resulted from the investigation—The Crown brought an application to have the lawyer removed as counsel for the accused on the basis that she was in a conflict position given her previous employment with the Agency, her role in providing legal advice to the Agency in relation to Project Halo, and her receipt of confidential information in her capacity as the Agency’s in-house counsel—The trial judge allowed the application, finding that the duties of loyalty the lawyer owed as a lawyer to the Agency, her former client, were broad—In addition, he found that there was a risk that the lawyer could use her knowledge of Project Halo in seeking disclosure or at the accused’s trial—As a result, he concluded that disregarding lawyer’s

relationship with the Agency would have seriously undermined public confidence in the administration of justice in British Columbia—The lawyer and the accused sought to appeal from the decision of the judge and have the lawyer reinstated as defence counsel on the basis that the judge made a number of errors—The Crown took the position that the order sought to be appealed from was criminal in nature and interlocutory and, as such, it could not be appealed until the conclusion of trial and should be quashed for want of jurisdiction—**Held:** Application allowed—The order was criminal in nature because it related to the accused’s hearings with respect to offences with which he had been charged—It was a final order of a collateral issue relating to criminal proceedings—As the Criminal Code did not provide for the appeal, it was quashed for want of jurisdiction.

3.2.3 Conflict not found

Zinck v. Zinck

2009 CarswellOnt 7371 (Ont. Sup. Ct. J.), Robbie D. Gordon J., 25 November 2009
[paras. 1 to 9]

1 The Respondent has brought a motion asking that counsel for the Applicant be removed due to conflict of interest. By endorsement dated November 19, 2009 I declined to grant the requested order and indicated that reasons would follow.

2 The outstanding litigation is a matrimonial dispute. The parties were not getting along and began contemplating separation in early 2008. In approximately August of 2008 they ceased living in the same household. On December 29, 2008 both the Applicant and the Respondent attended the office of Mr. DeRusha to consult with him. The Applicant had made the appointment so that they could discuss how they might resolve the issues which arose out of their separation. The meeting with Mr. DeRusha lasted about an hour. The Respondent has deposed that he was quite emotional and upset and that he cannot remember many of the specifics of what was discussed. However, he says he quite vividly recalls Mr. DeRusha discussing the possibility of settling their financial affairs by having him pay his wife \$2,000,000 and transferring the matrimonial home to her. Mr. DeRusha says that no specific settlement discussions took place. He has deposed that the session was for information purposes only in order to give the parties some sense of the applicable law and the various means by which their issues could be addressed. Although he agrees that certain figures were discussed with the parties, he says it was by way of example of how a property award might be satisfied and had no relation to the settlement that either party might expect. Indeed, he says that he could not possibly have come up with any viable settlement proposal given the lack of financial information at hand.

3 All communication between the Respondent and Mr. DeRusha took place in the presence of the Applicant. The Applicant confirms Mr. DeRusha's version of events. Each of the Applicant and the Respondent paid one half of Mr. DeRusha's consultation fee.

4 In March of 2009 Mr. DeRusha advised the Respondent that he had been retained by the Applicant. The Respondent eventually met with counsel who in the course of time determined that this motion should be brought.

5 The legal principles involved in an issue of this nature are not particularly complicated, although their application can be. Resolution of the motion involves a consideration and balancing of the right of the Applicant to retain counsel of her choice and the right of the Respondent to have solicitor and client communications remain privileged; it requires a resolution that will allow confidence in our system of justice and its players to be maintained.

6 As it applies to this case, and as stated by the Supreme Court of Canada in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.), the test to establish if there is a conflict of interest is whether the public, represented by the reasonably informed person, would be satisfied that no improper use of confidential information would occur were ... [Counsel for the Applicant] to continue to represent the Applicant. The Supreme Court went on to establish that once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. In such circumstances, the burden on the solicitor is a high one.

7 Applying these principles to the case before me, it is clear that both the Applicant and the Respondent met with Mr. DeRusha to discuss issues surrounding their separation and how best to resolve those issues. Both parties contributed to the costs of the consultation. I have no trouble determining that a solicitor and client relationship arose between the Respondent and Mr. DeRusha at that time.

8 Given that there was this solicitor and client relationship and given that it is related to the retainer from which the Respondent now seeks to have ... [Mr. DeRusha] removed, the *MacDonald Estate* case would seem to require that I infer that confidential information was imparted. Indeed, I would have no difficulty making this finding had the Respondent met alone with Mr. DeRusha. However, that he met with Mr. DeRusha in the presence of the Applicant must surely make a difference. It is settled law that where two persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor are privileged against the outside world. However, as between themselves no such confidentiality or privilege can be said to exist. In the circumstances of this case, because the Applicant was present for all of the discussions between the Respondent and Mr. DeRusha, those discussions cannot be said to have been confidential insofar as the Applicant is concerned. Accordingly, there was no confidential information imparted by the Respondent to Mr. DeRusha which requires protection in the context of these proceedings.

9 In addition, this may be one of those rare occasions when the solicitor is able to satisfy the court that no information was imparted to him by the Respondent which could be relevant. All of the evidence and circumstances point to Mr. DeRusha having discussed the couple's issues generically in the context of the manner *by* which they could be resolved as opposed to the manner in which they could be resolved. I accept that there was no financial disclosure provided such as would be capable of precipitating the settlement discussion alleged by the Respondent.

[**Note:** The application was refused.]

Tauber v. Tauber

(2009), 79 R.F.L. (6th) 156 (Ont. Sup. Ct. J.), Ellen Macdonald, J., 23 December 2009

1 In this motion, heard as a long motion on December 10, 2009, the moving party Rachelle Tauber, seeks to remove Niman Zemans Gelgoot LLP (NZG) as solicitors of record for the respondent, Jeffrey Tauber. Ms. Tauber is the applicant in a matrimonial action in which Mr. Tauber is the respondent. Mr. Tauber is the husband of Ms. Tauber. Mr. Harold Niman is the senior partner at NZG. He is a specialist in matrimonial law and has been practicing for 33 years.

2 On June 18, 2009 Mr. Niman, while driving in his car, returned a call to Ms. Tauber at approximately 5:47 pm. She was also in her car driving to her home when she answered the call. She recollected that the conversation lasted 20 minutes. Mr. Niman's cell phone records verify that the conversation lasted 7 minutes. Ms. Tauber was then represented by [Ms.] Wilson Christen in matrimonial proceedings against Mr. Tauber. This was her third marriage. She was considering changing lawyers and called Mr. Niman on the basis of a recommendation from Ms. Sarah Collins, a mutual friend of hers and Mr. Niman. Mr. Niman represented Ms. Collins in her matrimonial proceedings. Mr. Niman also represented Mr. Leo Baliestieri in his matrimonial case with the woman to whom he was married before his marriage to Ms. Tauber. This was raised by Mr. Niman with Ms. Tauber in the 7 minute cell phone call. During the call, Mr. Niman informed Ms. Tauber that he would see her on the following weekend. Mr. Niman, in his second affidavit, stated that it is quite common for him to see new clients on the weekend as he is less likely to be occupied with other matters on the weekend.

3 An appointment was made but was cancelled by Ms. Tauber on the following day. Ms. Tauber decided that she would not change counsel. Mr. Niman did not record any notes of the conversation. He did not send an account for the call nor did he open a file. He has some recollection of what they discussed including the fact that he had met Mr. Tauber. He had been introduced to Mr. Tauber in the hallways at the Court of Appeal and the courts at 393 University Avenue when Mr. Tauber was being represented by Mr. Sadvari in connection with the failure of Mr. Tauber's 2 previous marriages. These were casual introductions. It is an overstatement to imply, as the applicant does in her factum, that Mr. Niman met with Mr. Sadvari and Mr. Tauber on the basis of establishing a solicitor/client relationship between Mr. Tauber and Mr. Niman. Ms. Tauber refuses to reveal her recollections of what was discussed in the cell phone call on the basis that it is confidential information.

4 On November 2, 2009, Mr. Tauber retained NZG to represent him in the matrimonial litigation with Ms. Tauber. He was referred to Mr. Niman by Mr. Sadvari. Mr. Sadvari represented Mr. Tauber in the divorce/matrimonial of his 2 previous marriages and continues to do so. On the same day (November 2, 2009) Mr. Niman wrote to Ms. Christen, who was representing Ms. Tauber to inform her of Mr. Tauber's change in counsel. In a reply letter dated November 3, 2009, Ms. Christen confirmed receipt of the latter and reminded Mr. Niman of the case management schedule. She did not raise any issue of a potential conflict of interest.

5 Ms. Tauber's affidavit deposes that she told Ms. Christen about her June 18 conversation with Mr. Niman immediately upon being informed that Mr. Tauber had retained Mr. Niman and before Ms. Christen's letter dated November 3, 2009 was sent. Ms. Christen did not raise any issue of conflict of interest until her November 12, 2009 letter to Mr. Niman wherein she stated "Surely, you had an obligation to disclose this to me so I could confer with my client about the matter before you served your notice." According to Ms. Tauber, she and Ms. Christen had discussed the matter some 10 days previously. There is no evidence on this motion from Ms. Christen.

6 This motion raises important issues for the legal profession, a point that was emphasized by both Mr. Wilson and Mr. O'Sullivan. It is that [:] does the phone call with Ms. Tauber place Mr. Niman in a conflict of interest when he was approached some 5 months later and was retained by Mr. Tauber? This question is expressed in paragraph 19 of the respondent's factum which states as follows; "This case raises the important issue of when a prospective client who calls but does not seek to retain a lawyer, and who has never retained that lawyer before, can preclude that lawyer from representing an adverse party. If the motion is granted, it would be a simple matter, particularly in smaller communities, to preclude a recognized expert from acting against you by merely calling them and allegedly volunteering enough information about your case to allow you to say later, without having retained that lawyer[,] that he or she cannot act against you. This could be done intentionally or inadvertently". The community of the family law bar in Toronto and elsewhere in Ontario is a small one especially for lawyers of the notoriety and experience of Mr. Niman.

7 Mr. Niman admitted that he and the 8 other lawyers in his firm have no written protocols or guidelines for administering intake professional calls for retaining of services. After he completed the June 18 call, he did not do a conflict check regarding Ms. Tauber.

8 It is conceded by both Mr. Wilson and Mr. O'Sullivan that disqualifying a lawyer from representing a party is an extreme remedy. Courts must exercise the "highest level of restraint" before granting such a remedy. See *Lautec Properties Inc. v. Barzel Windsor (1984) Inc.* (2002), 26 C.P.C. (5th) 131 (Ont. S.C.J. [Commercial List]), at para. 16.

9 The leading case on the issue of whether a lawyer has a disqualifying conflict of interest is *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.) ("*MacDonald*"). The court must answer 2 questions: Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand and is there a risk that it will be used to the prejudice of the client. The second part of this test is only relevant if confidential information has actually been received. In determining this question, I am mindful that Ms. Tauber submits that she did give confidential information to Mr. Niman although she refuses to disclose what the information was and why such information was confidential. Mr. Niman denies that he received any such confidential information.

10 I agree with the submission of the respondent that there are 3 reasons why Ms. Tauber does not satisfy the *MacDonald* test. First, Ms. Tauber and Mr. Niman never had a solicitor-client relationship. Second, I accept Mr. Niman's evidence that he did not receive any confidential information from Ms. Tauber. Third, there is a concern that there is an element of

strategy and tactics underlying this motion. My concern is based on the timing of the correspondence between Ms. Christen and Mr. Niman. The *MacDonald* test begins with an inquiry of whether Ms. Tauber had a solicitor-client relationship with Mr. Niman. As I said above, I find that no such relationship existed. As a result there is no need to conduct an analysis of the balance of the *MacDonald* test. See *Smith v. Salvation Army in Canada* (2000), 50 C.P.C. (4th) 331 (Ont. S.C.J.) at para. 8.

11 For all of the above reasons I find that Ms. Tauber has not demonstrated that Mr. Niman received confidential information. Ms. Tauber refuses to disclose the information that she gave to Mr. Niman. Ms. Tauber's assertion that she revealed confidential information to Mr. Niman (without disclosing it) impedes Mr. Niman's ability to fully respond to her allegations and to this court's ability to determine whether any confidential information was in fact disclosed.

12 This motion is dismissed with costs to the respondents. Both Mr. O'Sullivan and Mr. Wilson provided costs outlines which I have considered. The fixing of costs is an inherently arbitrary process. I fix costs payable at the conclusion of these proceedings in the amount of \$10000, inclusive of disbursements and applicable GST.

Brewer v. Brewer

**2010 CarswellNB 317; (2010), 86 R.F.L. (6th) 321 (N.B.Q.B.), Barbara L. Baird, J., 07 June 2010
[paras 33-35]**

33 In applying the jurisprudence as set out ... [earlier in the decision], I conclude the following:

1. Mr. Brewer retained the law firm of Graser Smith Townsend in 1987. That retainer was limited to an incorporation matter and concluded in one year. The law firm, as it evolved over the years, was retained to perform other services for Mr. Brewer, including the incorporation of a second company.
2. Mr. Brewer at no time used the services of Mr. Myatt [of Graser Smith Townshend].
3. Corporate services were limited to a narrow piece of work associated with a company that no longer exists, and one which has been sold. Although Mr. Brewer deposed in his affidavit that the law firm over the years performed personal work for him, he was not specific in articulating the nature of that work, nor the specifics of any personal or confidential information that the law firm might have received. That onus was on him.

4. Mr. Brewer terminated his retainer with the law firm prior to 2009 when Mrs. Brewer retained Mr. Myatt. He instructed the firm to forward all of his personal and corporate files to Mr. Tweedie at another law firm.

5. There is no evidence that Mr. Brewer had consulted anyone in the Graser Smith Townsend law firm and its successors concerning the issue of his separation or marriage breakdown, nor is there any suggestion that he had discussed same with any member of that law firm.

6. There is no evidence to suggest that Mr. Brewer had retained the above law firm to represent him in any matters that are relevant to his divorce and marital breakdown, aside from Mrs. Brewer's non-descript claim in her financial statement, where she describes her interest in McGinn Travel and Computer Village as "to be determined".

34 Justice Sopinka in *MacDonald Estate* ... suggested that before a conflict of interest can be found, two questions must be answered:

1. In this case, did Mr. Myatt or anyone in his law firm receive information on a solicitor-client basis that is directly related to the matter in issue? I conclude that with reference to question #1, there is no evidence that Mr. Myatt or his law firm received information on a solicitor-client basis that is directly related to the matter in issue.

2. Could the information received by Mr. Myatt or his law firm be used against the client? With reference to question #2, I am satisfied that all files held by the Graser Smith Townsend law firm as it evolved were forwarded to Mr. Tweedie at Cox Palmer in 2002, and on the evidence, there is no possible prejudice to Mr. Brewer.

35 On the facts of this motion, I am not satisfied that the two part test set out in the *MacDonald Estate* decision ... has been met. There may be a perception by Mr. Brewer, otherwise, however, neither Mr. Myatt, nor anyone in his law firm is acting against him on any matter for which that law firm had been originally consulted.

Fishman v. Fishman

2010 CarswellOnt 9720, Ont. Sup. Ct. J., R. Kaufman J., 17 December 2010
[Headnote]

Mother and father separated in June 2005 at which time they were living in State of Georgia in United States—Mother and father entered into several custody and access orders which were incorporated into Final Order granted by judge in Georgia—Issues arose resulting in father commencing court application in Ontario—Mother and father attended mediation without

success—Father alleged that he had several conversations with mother's counsel, before counsel was retained by mother, and that he imparted detailed confidential information regarding major issues in dispute between mother and father—Father brought motion to remove mother's counsel of record—**Held:** Motion dismissed—There was sufficient contact between father and mother's counsel to establish solicitor/client relationship; however, no confidential information was imparted—Analysis of information provided by father did not amount to confidential information which, if provided to mother, could be used to her advantage—Information imparted by father would have been information readily exchanged by parties in course of mediation.

Hermant v. Secord

(2010), 3 R.F.L. (7th) 426 (Ont. Sup.Ct. J.), Cornell J.
[Headnote]

Mother and father of one child separated under agreement—After divorce, father remarried—Mother applied for declaration that separation agreement was void—Mother's lawyer D had acted for father's new wife, and D had hired legal assistant L, who had worked for father's lawyer at time agreement was prepared—Father brought motion to have D removed as mother's solicitor of record—**Held:** Motion dismissed—D did not act personally for new wife or as her corporate counsel, and new wife conceded he had merely sent single letter to disruptive customer and only confidential information known was of price paid for dog—New wife did not provide any relevant confidential information to D—There was no authority for providing protection for confidential information provided to non-party such as new wife—Weaknesses associated with claims made in connection with new wife's so-called confidential information raised serious questions as to *bona fides* of motion—Pool of senior family law litigators in town without conflict who would be prepared to deal with father's aggressive tactics was not deep, and mother would have to retain out-of-town counsel if D was removed—L [the legal assistant] was in possession of father's confidential information, but prior to formally engaging her, D took specific steps to protect confidentiality and reasonably informed person would be satisfied that no use of confidential information would occur—Motion was brought as tactical weapon, which was also sufficient ground for its dismissal.

Le Soleil Hospitality Inc. v. Louie

2011 CarswellBC 777 (B.C.C.A. [In Chambers]), Levine J.A., 02 March 2011
[Headnote]

L Inc. brought action against doctor—M law firm acted as L Inc.'s counsel—Lawyer S from M law firm had previously represented doctor—During examination for discovery, doctor

stated that law firm had not obtained any confidential information during retainer and that he had no objection to M law firm continuing to act against him—Upon cross-examination on affidavit, doctor told S that they went back to 1989 and therefore S knew his modus operandi well—After speaking privately to doctor, his counsel advised that doctor had no issue with M law firm continuing to act against him—Judgment was given in favour of L Inc.—Doctor appealed—Doctor brought application to remove law firm as solicitors for L Inc.; Doctor argued that M law firm gained confidential information into such matters as his character and capabilities as witness and litigant—**Held:** Application was dismissed—Applications judge held that whether or not conflict existed based on M law firm's prior representation, it was far too late for doctor to complain—L Inc. had invested enormous amounts of time, energy and money in instructing M law firm; it would have seriously prejudiced L Inc. to require it to suffer delay and loss associated with retaining new counsel—Applications judge also concluded that doctor unequivocally waived any conflict that might have arisen in connection with M law firm's prior representation—Doctor brought application for leave to appeal decision—Application dismissed—Doctor was aware of, and spoke on record about, his personal characteristics which he later claimed were confidential information in possession of his former counsel—He at least twice, with advice of counsel, stated that he did not object to M law firm continuing to act against him—[Trial] Judge was uniquely qualified to consider these facts and competing interests of parties in determining whether remedy sought should be granted.

3.3 Relationships with Clients—Rendering Services

3.3.1 Generally

"Emoticons a Sign You Should Step Away from the Keyboard, Firm Chair Says"

Cassens Weiss, Debra, www.abajournal.com, 26 January 2010

Bryan Cave chairman Don Lents travels so much that he is a member of American Airlines' Concierge Key program, the invitation-only club highlighted in the movie *Up in the Air*.

Lents advises younger lawyers who have grown up with electronic communications that some news—of the difficult variety—needs to be delivered in person, *The New York Times* reports.

"I tell our younger lawyers, if you think you are going to have a difficult interaction with a colleague or a client, if you can do it face-to-face, that's better because you can read the body language and other social signals," he told *The Times*.

And, ... [assess] the emoticons, Lents says. If you are depending on a smiley face to communicate an emotion in a business communication, you need to step away from the keyboard and get on a plane, especially if there is a dispute involved.

"You should never engage in a disagreement electronically," he told *The Times*.

[**Note:** An emoticon is a representation of a facial expression by employing punctuation marks and letters; usually to express a mood.]

"Call on a sense of right and wrong [:] What's a lawyer to do when asked to advise a client considering bankruptcy to incur more debt?"

Slayton, Philip, *Canadian Lawyer*, March 2010, pp. 18-19
[*excerpt*]

Is it ethical for a lawyer to advise a client considering bankruptcy to incur more debt? After all, if the client is insolvent, any new debt will likely not be fully repaid, and will dilute existing creditors. Does it matter what the debt is for? Is there a difference, if you're broke, between borrowing for food and shelter, say, versus a winter holiday in the sun?

The United States Supreme Court is currently considering these difficult issues. The U.S. Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) prohibits debt relief agencies, which arguably includes lawyers[,] from advising a client to incur more debt in contemplation of bankruptcy. In *Milavetz Gallop & Milavetz v. United States*, heard by the Supreme Court in December 2009, a Minnesota law firm argued that it either had to violate its ethical obligations under the Minnesota Rules of Professional Conduct to give clients “appropriate and beneficial advice,” or be in breach of BAPCPA. This, it said, put its lawyers, and every other lawyer, in an impossible position.

The American Bar Association supported the plaintiffs, and argued that, if BAPCPA applied to lawyers, it would interfere with regulation of the legal profession by state judicial systems, and with the ability of counsel to advise clients in financial distress.

. . . .

Questions and comments from the bench in *Milavetz* were vigorous and animated. Many of the justices seemed to enjoy toying with ethical dilemmas. Justice Sonia Sotomayor asked: “Can it ever be ethical for a lawyer to do something illegal? Is there a difference between unethical and illegal advice?” Justice Ruth Bader Ginsburg wondered whether advising a client contemplating bankruptcy to take on more debt was OK in some circumstances—if money were needed to treat serious cancer, for example. Justice Samuel Alito commented: “If a person takes on additional debt in order to obtain life-saving treatment, that is not done in contemplation of bankruptcy.... It’s done because there is an emergency that requires immediate expenditures.” Justice Antonin Scalia, in his inimitable fashion, was much less nuanced. “It’s a stupid law,” he said of BAPCPA, adding to laughter in the courtroom, “where is the prohibition of stupid laws in the Constitution?”

I know of no explicit law in Canada forbidding a lawyer or anyone else from suffusing to someone contemplating bankruptcy that he or she take on more debt. The federal Bankruptcy and Insolvency Act does not address the issue. Provincial fraudulent conveyance legislation only provides for the setting aside of improper transfers of property.

Counselling fraud is an offence under the *Criminal Code*, but in most cases taking on additional debt when considering bankruptcy does not amount to criminal fraud.

What about ethical rules set out by provincial law societies? They don’t help. The Law Society of Upper Canada’s Rules of Professional Conduct has nothing directly on point, although I suppose some rules might apply tangentially—for example, rule 2.02(5), which says: “A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, fraud or crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment.”

The Law Society of British Columbia Professional Conduct Handbook is a bit more to the point, Paragraph 6, Chapter 4, says “A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, including a fraudulent conveyance, preference, or settlement.” The Nova Scotia Barristers’ Society Legal Ethics Handbook, commentary 21.3, contains the usual bromide:

“The lawyer has a duty not to subvert the law by counseling or assisting in activities which are in defiance of it and has a duty not to do anything to lessen the respect and confidence to the public in the legal system of which the lawyer is a part.”

There’s a lot of tricky issues here. Go back for a minute to the questioning of Milavetz counsel by the U.S. Supreme Court judges. Alito asked: “Well, let’s say someone goes to the lawyer and they discuss the person’s debt situation and the decision is made that a bankruptcy petition is going to be filed at some future date. Do you think that everything that that person does after that point is done in contemplation of bankruptcy?” Chief Justice John Roberts wondered what a lawyer should say if asked by a client. “I know we are thinking of filing bankruptcy, but I want to go to Tahiti and charge it; can I do it?” Later the Chief Justice added: “What if the person takes a trip to Tahiti every November? They’ve always done it. They are intending to defraud the debtor. They are just doing what they have always done.” Ginsburg inquired what the lawyer could tell the client about paying legal fees. Asked Sotomayor: “How about the person comes in, shows the attorney his or her financial statement. There is no money to pay the fee. The attorney simply gives a bill and says, ‘I need it by Friday.’ ”

How does a Canadian lawyer deal with problems like these, in the absence of formal legal and ethical requirements? Feeble as it sounds, I think he or she has to fall back on a sense of what the society he or she works in regards as right and wrong (often not an easy thing to figure out). Most people in this country would probably consider it wrong to advise or help a client contemplating bankruptcy to incur more debt, save in the most dire of circumstances. That doesn’t mean, of course, that a client can’t be told that it may be lawful to do so.

[**Note:** United States Supreme Court, 08 March 2010, decided (among other matters) that (i) an attorney who provides bankruptcy assistance to a debtor client is, to that extent, functioning as a debt relief agency; (ii) the impugned law only prohibits a debt relief agency from advising a debtor to incur more debt simply because the debtor is filing for bankruptcy, rather than for some valid purpose.]

"Divorce Made Easier By Nova Scotia Law Firm"

Moulton, Donalee, *Canadian Lawyer*, April 2010, p. 6

Breaking up is not going to be as hard to do thanks to MacIntosh MacDonnell & MacDonald. The New Glasgow, N.S., law firm plans to open its new Family Centre for Conflict Resolution in June. The Centre’s aim is to provide options for couples outside the traditional legal approach. “We are saying there are ways beyond the adversarial model,” says Mac & Mac lawyer Leisa MacIntosh. “For most couples that model doesn’t work. It takes too long, it’s too expensive, and children end up suffering.”

The centre, located across from Mac & Mac's office, will bring together psychologists, financial planners, and other experts whose insight can make divorce easier on families. It does not, interestingly, include lawyers. "We take off our lawyering hat" say MacIntosh. "We do not act in a legal capacity. We're using our lawyering skills and our experience. Many clients will retain legal counsel outside the family centre, but usually only for an hour or two."

Mediation, collaborative law, and arbitration are the centre's three primary service offerings, although a hybrid approach is often used. "The key to the model is offering more alternatives, and it's custom-made to meet the client's needs," says McIntosh, who gave up practising family law two years ago because of what she saw happening every day in the standard approach to the practice. "Clients are referred to the centre, often by lawyers," she notes. "Our approach is geared to helping other lawyers with their files."

Initially, the centre, which was two years in the making, will be based in Nova Scotia and serve clients predominantly from the northern area of the province as well as Prince Edward Island, although clients are welcomed from anywhere. Next up may be a second location in Halifax and eventually a move to a more fully online service.

**"How am I doing?
Law firms need to stop talking about the importance of client feedback and start
actually asking for and then really acting on it"**

**Chisling, Ava, *Canadian Lawyer*, May 2010, pp. 31-33; 35
[excerpt]**

It's hard to understand why it has taken so many law firms so long to start asking their clients for feedback. One theory is that historically, lawyers believed their clients wouldn't understand the services they offer so [asking them] how could they possibly provide feedback is not proper for professionals. It is for the truck driver with the "How am I driving? sign on the back of his vehicle or for the customer satisfaction survey at the local burger joint.

However, as clients started spending fewer dollars, a new economic reality set in for law firms. Clients now demand a lot more for a lot less and if you're not willing to accommodate their requests, someone down the street or one floor up from you will. This intense competition for new business and the need to coddle current business have led many firms to ask their clients one very simple question: "How can we serve you better?" As Liette Monat, president of Liette Monat Strategies d'affaires Inc. in Montreal, says "It is time to bring down the silos. Companies that change will see results. Companies that do not will die."

"Marketing is more than organizing a cocktail party," says Monat. "It means listening, understanding, and finding the right fit with your clients." And yet, lawyers are still afraid of feedback. "They know their clients will touch upon issues they are not willing to address and these issues can be intangible. If the client says, 'I feel taken for granted,' the professional does

not know how to handle that, and arguing with them is not the appropriate answer. That is why when we coach and train, we open that kind of communication with clients.”

Richard Stock, founding partner of Catalyst Consulting, says opening up is not easy for lawyers. “They are relationship-based professionals. Feedback in a formal sense is not often done because it is obtained through the relationship, on a one-on-one basis. The idea of incorporating formal feedback mechanisms is not something individual partners know an awful lot about, unless they are running the firm.” Catalyst Consulting specializes in the economics of legal departments and counts among its client McCain Foods Ltd., Bell Canada/BCE Inc., Bombardier Inc., TD Bank Financial Group, and Petro-Canada. “Typically firms conduct surveys because someone has an idea and he or she need ammunition,” says Stock. “Partners never believe each other but if a bunch of clients say something consistently, that may save them two years internally.”

When you call John Young, managing partner and 35-year veteran of Boyne Clarke in Dartmouth, N.S., he answers his own phone. He also returns calls within 24 hours if he is out of the office, and on the same day if he is in the office—as does every one of the 40 plus lawyers at his firm. He knows the importance of listening to his clients and he has a multi-tiered plan of action to make sure he does.

A mid-sized firm, Boyne Clarke uses multiple methods to compile information, including sending a feedback sheet from the firm itself (not from the lawyer involved) to all clients once the mandate is complete. Clients are asked to fill it out and return it, postage-paid. They can also send it back anonymously. Young’s firm has someone on the management committee who is responsible for complaints, giving clients direct access to a person in charge. The complaints manager evaluates negative comments, speaks with the lawyer involved, and meets with the client, if required. “The one area where we all fall down is explaining what it is we do,” says Young. “One client in written evaluation asked why he was charged so much for one letter. Well, it wasn’t one letter. It was half a day of research but all he saw was the letter. The public doesn’t always understand exactly what we offer as lawyers. They understand doctors better because they see the equipment. He listens to your chest. He gives you a pill. He makes you stand on a scale. But what do we do? We just sit there and look at you.”

In addition to the feedback sheets, several of the partners regularly meet with clients in person at the firm’s cost, and every four to five years, Young hires an outside firm to survey a percentage of his clients. “We’ll choose to survey 10 clients from the service industry and 10 from the finance industry, for example. We survey big and small clients,” says Young. “And once our feedback is compiled, we have someone objectively call the clients. We also hold ‘lunch and learns’ about once a year with all our lawyers.” Young uses the data compiled by the outside public relations firm as a sort of branding exercise, a way to maintain and strengthen his firm’s reputation within the community, and to see how his company is doing overall. “Our marketing and executive committees analyze the information. General comments go to all partners and then to the full firm. There is no sense in compiling all the information if you are not going to use it as a management tool and to educate people as to what clients think or don’t think about you.”

"Defense Lawyer Holds Possible Record for Most Clients Sentenced to Death"

Cassens Weiss, Debra, www.abajournal.com, 18 May 2010

A Texas criminal defense lawyer has had 20 of his clients sentenced to death, a possible record.

The New York Times profiles the lawyer, Jerry Guerinot, talks to his critics, and looks at one of his recent cases involving a British woman who recently lost a bid for U.S. Supreme Court review.

"A good way to end up on death row in Texas is to be accused of a capital crime and had Jerry Guerinot represent you," *The Times* reports.

In the case of Linda Carty, the British woman, a federal judge concluded that Guerinot "made an imperfect attempt to avoid conviction and death," but "the Constitution does not require perfection in trial representation", the judge said. Carty's new lawyer, Michael Goldberg of Baker Botts, views the case differently. He says mistakes made were egregious enough to merit a new trial, *The Houston Chronicle* reports.

Carty was convicted in a plot to murder a neighbor and claim the woman's son as her own. She says she was framed, according to *Times Online* and *The Houston Chronicle*.

Carty told a documentary filmmaker that Guerinot, her court-appointed lawyer, interviewed her just once, for 15 minutes, only weeks before her trial. He didn't contact the British consulate, which has since hired lawyers to represent her. Nor did Guerinot interview potential witnesses, her lawyer says.

Guerinot didn't talk to *The New York Times*, but he told *The Observer* [London] in 2007 that judges gave him the toughest cases. "I think it's recognition that if I represent them, the state is in for one hell of a fight," he said. "Nothing goes down easy." He has since given up capital work, *The Times* says.

"Divorce Lawyer Changes Approach After Her Own Marriage Crumbles"

Cassens Weiss, Debra, www.abajournal.com, 23 June 2010

Maryland divorce lawyer Regina DeMeo changed the way she practices law after her own marriage ended.

Before her divorce, DeMeo took a businesslike approach when counseling divorce clients, *The Washington Post* reports. “O.K., come on,” she would think. “Get yourself together and let’s move on.”

Then DeMeo herself divorced after seven years of marriage, and she realized how divorce can be so shattering. Now DeMeo practices collaborative divorce and is president of the Collaborative Divorce Association, *The Post* story says.

DeMeo asks her clients to tell her the story of their marriage, and if she thinks there is any ambivalence about divorce, she’ll recommend counseling, the story says. If that isn’t an option, she recommends collaborative divorce, a negotiating process that takes place outside of court.

About a fourth of her clients opt for collaborative divorce. The divorcing couples are still represented by lawyers, and they aren’t forced into an agreement. But if they can’t agree, they have to hire new lawyers for the court case.

DeMeo says the collaborative process opens up the lines of communication and gives the divorcing couples decision-making power. “They feel like they own it because they’re the final decision-makers,” she told *The Post*.

“Latimer book is thought-provoking”

**Penny, Damien J., *Law Times*, 12 October 2010
[excerpt]**

In 1993, Saskatchewan farmer Robert Latimer took the life of his cerebral palsy-stricken daughter, Tracy, rather than force her to go through another painful, potentially futile operation. Author Gary Bauslaugh argues that Latimer might have broken the law, but that he is not a criminal.

My position going into this book was not wholly unsympathetic to Latimer, who went through 12 emotionally exhausting years caring for a seriously disabled young girl whose only means of communication was to cry out in pain. But he took that young girl’s life without her consent. Even if he genuinely believed Tracy was in so much pain she had to be put out of her misery, he could not know what she really wanted—or, indeed, whether she was capable of forming an opinion on the subject at all.

Therefore, I continue to have trouble with what Latimer did. And Bauslaugh, to his credit, agrees that the mercy killing of Tracy Latimer is troubling even for a supporter of euthanasia:

“I have no doubt, as I have indicated frequently in this book, that it was an act of mercy and compassion But for all of that, I cannot shake the feeling that he really ought not to have

done it. It is a matter of relative harm. Tracy was undoubtedly better off dead, but she was likely to have died soon anyway. Latimer could not bear to see her continued suffering, but in ending Tracy's life he seriously damaged his own life and that of his family. Was it worth it? It is impossible to say. I find myself both admiring his heroic act and questioning it, as well.

Even if one accepts that Latimer was rightly found guilty of murder, however, there remains the question of whether he deserved to be treated like any other killer. The jury that found him guilty of murder did not think so: it voted to convict Latimer under the mistaken impression that he could be released after only one year in jail, because of the special circumstances of his case.

In fact, Latimer's conviction of second-degree murder carried with it a minimum of 10 years' imprisonment. And his initial appearance before the parole board resulted in Latimer remaining behind bars, despite posing no realistic threat to public safety, because of his apparent lack of remorse.

Bauslaugh savages the Parole Board appointees who appeared to be making an example of Latimer, and also makes a convincing argument that jury nullification, though frowned upon by the Supreme Court of Canada, was an avenue that should have been open to Latimer and his legal counsel:

“So it is not wrong for a jury to nullify the law, but it is wrong for a lawyer to counsel them to do so. Does that make any sense? A defence lawyer's responsibility is to present the strongest possible case for acquittal of his or her client. Central to that case may be asking a jury to act according to its conscience. But according to the chief justice [Brian Dickson, in the 1988 *R. v. Morgentaler* decision] a defence lawyer cannot even allude to such a possibility.”

“Witness Preparation”

Finlay, Q.C., Bryan; Cromwell, Mr. Justice T.A., and Iatrou, Nikiforos,
Witness Preparation [A Practical Guide]
(Aurora [ON]: *Canada Law Book*, 2010), pp. 17-18; 36; 59-62; 112-114

Legal Relationship with Prospective Client

A key preliminary consideration is appreciating the nature of your relationship with the prospective witness. For example, if the individual is or may become your client, the interview is or may be protected by solicitor-client privilege. This in turn may influence the scope of your discussions. In the same way, if the individual is an expert that you have consulted for the purpose of giving advice in the litigation, the discussions may be privileged. You must be clear in your own mind about whether the interview is privileged and then decide whether or not to advise the witness accordingly.

Explain Your Obligations to the Witness

You will rarely be in a position to guarantee absolute confidentiality or to guarantee that the person will not be called as a witness. It is important that the prospective witness not be misled on either count.

How Much to Tell the Prospective Witness about the Case

You will also have to give careful thought to how much you will tell the witness about the case, directly or indirectly. There is no property in a witness, and you should act as if this witness will be talking to the opposing lawyer tomorrow. Of course, you have to adjust your approach in the light of the circumstances. You will be more candid with your client's best friend or valued employee than with someone about whom you know nothing. It is always important to consider how much of your position you are revealing and to whom, and to make judgment based on the circumstances. You should remember that what you ask and how you ask it will reveal much about the state of your case to the person being interviewed.

Investigating the Prospective Witness

Depending on the circumstances, you may wish to "investigate" the witness before the interview. Your investigation may range from obtaining basic information about the person from your client to a much more thorough look at the witness's background. The key to a witness's potential may be his or her motivation and opportunity to observe. Any advance information you can gather will be useful in designing your approach and evaluation of the prospective witness.

....

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The Major Witness

The preparation of a major witness is a very substantial undertaking. A key witness in a large case may require months of preparation. In most cases the key witnesses will be readily apparent. However, they may very well not include the client. Consequently, the approach to and enlisting of their assistance will require tact and, above all, honesty as to what is being asked of them.

... special consideration[s] come into play when a major witness is not your client [e.g., an expert opinion witness]:

1. The appropriate remuneration for the time to be spent in preparation will have to be settled. The arrangement must be for a fee for time spent as opposed to a piece of the "equity" since the latter gives the witness an interest in the litigation which may be unlawful and will always adversely affect his or her credibility.
2. The financial arrangement must then be reduced to writing so that the agreement can be introduced as an exhibit at trial.

PRIVILEGE

Counsel should also take time to explain issues of privilege to a witness. Specifically, the witness should understand what it means for information or documents to be privileged, and should be warned of the various ways in which privilege may be lost or waived.

Solicitor-client privilege and litigation privilege are two common forms of privilege that are of particular interest for the purposes of this book. Although these are two types of privilege that you will encounter in your practice, there are others, and it is important that you familiarize yourself with the various forms of privilege, preferably before you prepare your witnesses and certainly before you enter the courtroom.

Solicitor-client privilege is the privilege that attaches to communications between the client and the lawyer. These communications are considered to be confidential and the privilege that attaches to them is absolute in scope and permanent in duration. The functional purpose of solicitor-client privilege has been said to go to the very heart of the administration of the legal system.

Of course solicitor-client privilege will only apply when the person with whom you are communicating is your client. When dealing with third parties, such as other witnesses or potential witnesses, litigation privilege may apply so as to protect communications, notes, memoranda, and other information obtained or created in the litigation context. The Supreme Court of Canada decision in *Blank v. Canada (Minister of Justice)* [[2006]2 S.C.R. 319, paras. 26-27)] is the leading authority in distinguishing litigation privilege from solicitor-client privilege, and defining the former's limits:

The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of the unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

This “zone of privacy” around materials related to the preparation for litigation is not as absolute as the privilege that attaches to communications between lawyer and client. It expires once the litigation has ended, and can also be set aside on a *prima facie* showing of actionable misconduct on the part of a party in relation to the proceedings with respect to which the litigation privilege is claimed.

It is difficult to overemphasize the importance of having a grasp over the issue of privilege. The above summary is merely the starting point. Public interest privilege, informer privilege, and doctor patient confidentiality are other forms of privilege that should also be considered in the appropriate cases.

.... In Canada, although documents such as the witness’s notes or prior statements used to refresh a witness’s memory can be the subject of a production order, solicitor-client and litigation privilege have thus far proven robust enough to ensure that, where a lawyer shares with a client or a third party materials prepared for litigation, the communication will remain privileged.

In preparing your witness, you should explain notions of privilege and must identify for the witness how privilege may be lost. Importantly, the concept of waiver of privilege must be described, so as to make the witness aware that if he or she voluntarily discloses privileged information in the course of giving evidence, the door may be open to opposing counsel to probe further and to obtain information and documentation that might otherwise have been cloaked in privilege. You, as prudent counsel, should identify potential trouble spots to the witness in advance, and forewarn the witness that if he or she is asked a question that could lead to a waiver of privilege, you will rise to object to the question.

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Communication With Witnesses During and After Testimony

Custom and rules of professional conduct govern communication with witnesses during after testimony. The details of these rules vary somewhat from jurisdiction to jurisdiction. Rule 4.04 of the Ontario Rules of Professional Conduct establishes the following:

4.04 Subject to the direction of the tribunal, the lawyer shall observe the following rules respecting communication with witnesses giving evidence:

- (a) during examination-in-chief, the examining lawyer may discuss with the witness any matter that had not been covered in the examination up to that point,
- (b) during examination-in-chief by another legal practitioner of a witness who is unsympathetic to the lawyer’s cause, the lawyer not conducting the examination-in-chief may discuss the evidence with the witness,
- (c) between completion of examination-in-chief and commencement of cross-examination of the lawyer’s own witness, the lawyer ought not to discuss the

evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief.

(d) during cross-examination by an opposing legal practitioner, the witness's own lawyer ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding,

(e) between completion of cross-examination and commencement of re-examination, the lawyer, who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination,

(f) during cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause, the lawyer's cause, any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness, and

(h) during re-examination of a witness called by an opposing legal practitioner, if the witness is sympathetic to the lawyer's cause the lawyer ought not to discuss the evidence to be given by the witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in the interest.

The Commentary that accompanies the above states that if there is any question whether the lawyer's behaviour may be in violation of this rule of conduct, it will often be appropriate to obtain the consent of the opposing lawyer and leave of the court before engaging in conversations that may be considered improper or a breach of etiquette. When there has been an order excluding witnesses, it is improper for counsel to relate to an excluded witness any of the testimony of another witness. We think it is not improper to review areas about which the excluded witness may testify and which were covered by other witnesses so long as counsel does not explicitly or by implication relate the testimony of other witnesses. The exclusion may create practical problems, especially for expert witnesses who may need to be aware of the other evidence in the case. These problems should be considered in advance so that appropriate exceptions to the exclusion order may be made [such as, e.g., agreeing that each party's expert sit through testimony of some, or all, other witnesses]. If a problem arises unexpectedly, the correct approach is, as the Commentary suggests, to seek consent from opposing counsel and leave of the court for your communication with the witness.

"Facing Mental Illness In The Law"

Sobowale, Julie, *Canadian Lawyer*, 08 November 2010

[*excerpt*]

Kelly Rowlett likes flexibility. She recently met with a client in Halifax instead of Rowlett's Dartmouth office because her client faced a unique dilemma. The client wasn't allowed to cross the MacKay Bridge due to her problems with suicide. So Rowlett agreed to meet in Halifax.

"People want to feel heard," says Rowlett, a mental-health lawyer at the Nova Scotia Legal Aid Commission. "They want to know that they are valued members of our community."

The mentally ill cannot be ignored. According to the Canadian Mental Health Association, one in five Canadians will suffer from mental illness at one point in their life. So judges and lawyers are learning to accommodate the mentally ill in their pursuit of justice.

Supreme Court of Canada Chief Justice Beverly McLachlin spoke about mental illness and the law at an Oct. 19 lecture at Dalhousie University. She outlined how the criminal justice system has changed from automatic hospitalization to providing psychiatric help through administrative boards. "We want the best outcome for people," said McLachlin. "The informal process helps to provide a non-adversarial way to give help."

Mental illness is an issue that extends beyond criminal law. The mentally ill also face housing, employment and health issues as well in civil courts. Sometimes their issues are difficult to pinpoint. Karen Liberman, executive director of the Mood Disorders Association of Ontario, says the mentally ill can suffer from memory loss, lack of concentration, and a heightened emotional state. "Imagine reading a paragraph and realizing you have no idea what you just read," says Liberman. "Some people face that every day."

The main issue for Liberman is accessibility. For example, a person with memory problems may have difficulty with giving details for written pleadings. The solution could be appointing an *amicus curiae* to help the mentally ill navigate through the proceedings.

"Why do we have to start court early in the morning?" "Mornings can be the worst for some people due to the medication and other biological issue. We have to view the problem as a disability that we need to accommodate."

Rowlett quickly learned about mental illness. As one of the few lawyers working at the Nova Scotia Mental Health Court, Rowlett did extensive research in personality disorders and developed networks of shelters and health professionals to help her clients. "I learned to communicate differently with my clients," she says. "I made sure to be in contact with their case workers so that all parties knew what needed to be done."

"How do I assess my lawyer's performance?"

**Brownstone, Hon. Mr. Justice Harvey. *Tug of War – A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court* (Toronto: ECW Press, 2009)
[excerpt]**

Judges only deal with lawyers who conduct litigation. Lawyers who practice collaborative law or who work exclusively in mediation or arbitration do not come to court, and therefore I cannot comment on the factors used to assess their performance. I can, however, comment on qualities and indicators that constitute good performance by family law lawyers who litigate in court.

As with all professionals, there is a wide variety of competence among lawyers. I have seen excellent lawyers, I have seen incompetent lawyers, and I have seen everything in between. I am pleased to report that the vast majority of lawyers whom I have encountered in my career have been highly competent and dedicated to their clients. They are a credit to the legal profession and to the communities in which they serve.

In my opinion, a good litigation lawyer should

- 1) Know the law. There is no excuse for a lawyer who has not kept up with changes in the statutes, court rules, and case law. It is unacceptable to miss limitation periods (court filing deadlines) or to file incomplete documentation.
- 2) Be well prepared. Court appearances are time-consuming and expensive for clients, so something meaningful should be achieved at each court date. A lawyer should know what he/she wants to accomplish at each court appearance and communicate this to the other party at least several weeks before the court date. Both parties' lawyers should have intensive discussions and negotiations well in advance of the court date to narrow the issues and decide how best to use the court time allocated to them. There should be no surprises sprung on the other party in the court room (for example, requests for court orders being made for the first time without prior notice to the other party, or new evidence being given to the court without first having been given to the other party well in advance so that they could prepare a response).
- 3) Be professional and courteous to other lawyers at all times, and retain his/her objectivity. He/she must not become emotionally embroiled in the dispute, and never turn the litigation into a dispute between the lawyers. I have had cases in which the lawyers spent the entire time arguing and hurling complaints and insults at each other instead of addressing their clients' issues. This is not helpful to the clients or the court, and it reflects badly on the legal profession.
- 4) Be practical, child-focused (in custody and access cases), and settlement-oriented. Look for solutions, not problems. Encourage clients to focus on the future rather than rehash the past. Lawyers can be major role models in teaching clients to adopt mature attitudes and behaviour.

- 5) Resort to court action only when it is truly necessary.
- 6) Communicate with his/her client. Give clear legal advice, with concrete options. Get firm instructions from the client and follow them. Make sure the client understands the goals and likely outcomes of each court appearance, including the possibility of a costs order being made for or against the client. Resolve misunderstandings and communication problems with the client away from the court room and in private, not in front of the judge.

You have the right to expect that your lawyer will conduct him/herself in accordance with these points. If you feel your lawyer is not doing so, discuss this with him/her. If the problem is not rectified to your satisfaction, you may have to consider changing lawyers. This can be very expensive and disruptive to the progress of your case, but if you are truly unhappy with your lawyer's performance, you may have no other option. You should also know that if your lawyer feels that there had been a breakdown in the lawyer-client relationship, impairing his/her ability to properly represent you, he/she may terminate the relationship. If a court case is already in progress, a court order may be required to do this. Judges usually will allow a lawyer to leave the case (this is called being removed from the record or being relieved from the case), because it is generally not appropriately to compel a lawyer to continue to represent a client who has lost confidence in him/her.

I have told you what constitutes a good lawyer. It is equally important to know what constitutes a good client. Your lawyer can only help you if you take his/her advice—even if you would rather not. As stated above, if you have doubts about the accuracy of the legal advice you have received, get a second opinion from another lawyer who is a family law specialist. However, once your lawyer's advice has been confirmed, follow that advice. The reason you hire a lawyer in the first place is because he/she has the knowledge and experience to advise you of your rights and obligations. Too many times, clients fire their lawyers and end up representing themselves because their lawyers didn't tell them what they wanted to hear. I have had countless cases in which parties hired and fired numerous lawyers because they were not prepared to accept the legal advice that was being given to them—advice that was appropriate and that should have been followed. The lawyer's job is to tell you the truth, even if it hurts. In the long run, it is better to take your lawyer's advice and do the right thing than to be ordered by a judge to do it, and then be ordered to pay the other party's legal costs stemming from your unreasonableness. Remember: maturity is the name of the game, and being mature means following legal advice.

“Can you learn to be more empathetic with clients?”

Mucalov, Janice, www.cba.org, October 2010 (citing Dr. Raymond David, psychologist, Montreal)

Raymond David, a Montreal psychologist who coaches lawyers on the use of emotional intelligence, suggests the following exercises:

1. If you find yourself mentally preparing or rehearsing your responses rather than listening, remind yourself that you don't have to agree with your client—just hear what they have to say
2. Practice real listening. Hear someone speak for five minutes, then paraphrase back what he or she said.
3. Aim to spend two-thirds of your time listening and one-third talking.
4. Focus on your client—make eye contact and notice body language and facial expressions. If your client verbally agrees to comment, but folds their arms in front of their chest (which often signals “I am closed to your idea”), you might respond with something like: “you politely agreed with my suggestion but my guess is that you're not really comfortable with it. Is that right?”
5. Help others to build empathy skills. Those who teach usually learn in the process of teaching.

“How ‘predatory marriages’ affect property and estates”

Whaley, Kimberly, *The Lawyers Weekly*, 13 August 2010, p. 17
[*excerpt*]

The statistics confirm that our population is aging rapidly. With longevity comes an increase in the occurrence of medical issues affecting cognition, as well as related diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, cognitive disorders and other conditions involving reduced functioning and capability. A wide variety of disorders affect capacity and increase an individual's susceptibility to being vulnerable and dependent.

Civil marriages are solemnized with increasing frequency under circumstances where one party to the marriage is incapable of understanding, appreciating, and formulating a choice to marry. Indeed, unscrupulous opportunists too often get away with taking advantage of those with diminished reasoning ability[,] purely for financial profit. An appropriate moniker for this type of relationship is that of the “predatory marriage.”

This is not a term that is in common use. However, given that marriage brings with it a wide range of entitlements, it does effectively capture the situation where one person marries another of limited capacity solely in the pursuit of these advantages.

[**Note:** See: Whaley, Kimberly; Silberfeld, Michel; McGee, Heather, and Likwornik, Helena. *Capacity to Marry and the Estate Plan* (Aurora [ON]: Canada Law Book, 2010); which provides an excellent survey of legal and clinical considerations.]

. . . .

In Ontario law, marriage automatically revokes a will.

As is apparent, in some provinces, like Ontario, the marital legislation is extremely powerful in that it dramatically alters the legal and financial obligations of spouses and has very significant consequences on testate or intestate succession, to the extent that spouses are given primacy over the heirs of a deceased person's estate. Yet, the difficulty with such marriages is that despite the injustice they cause to the incapable spouse (and his legitimate heirs, if any), such unions are not easily challenged. The reason for this is that the current test for capacity to marry has, historically, been a fairly low threshold to cross and continues to be so. The case law has not kept pace with the development of legislation that ... [for example, relates to property rights].

In *Banton v. Banton* [1998] O.J. No. 3528, Justice Cullity held that the test for the capacity to marry is not particularly stringent and requires only that a person understand the nature of the marital relationship and its responsibilities. The holding in *Banton* drew on historical English decisions such as *Durham v. Durham*, (1885), 10 P.D. 80, in which it was stated that a high degree of intelligence is not required to comprehend the significance of entering into a marriage.

According to the court in *Durham*, "the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend." As is stands, the current test for capacity to marry is less stringent than the test for capacity to make a will or to manage one's property. Consequently, the test does not require of the marrying spouse that he or she appreciate the financial consequences that flow as a result of marriage. In many cases, the attendant consequences may be future consequences to such people. For instance, they may be exploited to such a degree that they are not able to care for themselves adequately as they continue to age. Or, alternatively, the impact may be on the incapable person's children or grandchildren, who would otherwise have been provided for by this individual.

While litigation arising from marriages involving the elderly is still relatively uncommon, we are seeing an increase in such cases as the number of elderly individuals reaches record highs.

The recent treatment by our courts of costs awards in capacity-related litigation is also topical, and sends a strong message: potential litigants should proceed with caution, and the estate of the incapable person is not to be treated as a virtual ATM machine to fund family feuds.

“Lawyers: Gatekeepers For Psychological Issues”

Mucalov, Janice, www.cba.org, October 2010

Issues Presented by Distressed Clients

Emotions often cloud the thinking of distressed clients. These clients therefore present with particular issues explains Dana Schindelka, a partner at Davis LLP in Calgary, who has represented clients who were sexually assaulted as children in reservation schools. “One, do they have the capacity to provide valid instructions? And two, do they understand what’s going on? You have to spend a lot more time explaining the legal process to them.”

Suicide is a real concern. Several of Schindelka’s sexually abused clients committed suicide when he worked on their case. “With any major turnaround like a divorce, personal bankruptcy or dismissal from your job—where the person was fragile before the event—there’s a greater risk of suicide,” says Raymond David, a Montreal psychologist and expert court witness.

Hopelessness is a significant predictor of eventual suicide. If your client expresses extreme despair and pessimism about the future, urge them to see a professional counselor. (Talking to a person about suicide doesn’t make them more likely to commit suicide.)

With family law clients, the intensity of loss that accompanies divorce is akin to a form of “temporary insanity,” observes John Wade, director of the Dispute Resolution Centre at Bond University’s faculty of law in Australia and a visiting professor at the UBC law school. As he explains, “divorce isn’t just the end of a marriage—it also means the loss of our hopes and dreams for yourself, for your family and for your children.”

“With personal injury clients, you see a lot of diagnoses of anxiety, adjustment disorder—dealing with a new picture of one’s self—and post-traumatic stress disorder ... [including] nightmares and depression,” says Charles Glukstein & Associates in Toronto. He represents seriously injured clients with paralysis, brain damage and other life-altering injuries.

Understanding your client’s emotional state will help you to communicate better with them and deal with their legal problems more effectively.

What is the Lawyer’s Role?

Your main role is to provide objective legal assistance. But when working with clients in emotional pain, compassion and empathy are essential too.

Note that empathy isn’t sympathy, says David. “Empathy is the ability to be aware of, to understand, and to appreciate the feelings of others.” It involves hearing what your client is saying at the intellectual and emotional level, and implies that you care about the situation.

Of necessity, you'll probably end up playing "armchair psychologist" a fair amount, says John-Paul Boyd, a family lawyer with Aaron Gordon Daykin Nordlinger in Vancouver. "I try to get clients to reframe the issues so that they're less daunting and the fear is taken out. But I never engage in therapeutic counselling. It's more about getting the client to understand the legal issues, the process and how the law treats the issues."

Interviewing and Counselling Techniques

Many of the interviewing and counselling techniques that should be part of every lawyer's toolkit are especially useful when dealing with distressed clients.

Listen

"The first tip is very simple," says David. "Close your mouth for the first 15 minutes and listen to your client." The client will reveal the emotional content as well as the factual nature of their legal problem. By listening to the underlying feelings, you can pick up whether your client is angry, depressed or sad. It's the emotion that fuels the client's motivation for seeking legal advice, adds David, and understanding it will help you to counsel your client better.

Also, because people care a great deal about the perceived fairness of rules and procedures used to make a decision, simply listening to your client's story often helps them to feel better, says Jean Sternlight, director of the Saltman Centre Conflict Resolution at the University of Nevada. She has studied how knowledge of psychology can help lawyers be more effective interviewers and counselors.

At a more basic level, if you don't listen and pay attention to the information your client is providing, you're likely to miss important data.

Ask open-ended questions

Asking open-ended questions allows the client to tell their story in a way that makes sense to them. So even if they tell their story in a non-linear or not-chronological fashion, defer asking pointed questions until later, advises Sternlight. The interview may last longer, but you'll obtain more detailed information as a result.

Acknowledge your client's feelings

Deal head-on with your client emotions. It's quicker in the long run, and teasing out the facts will be easier. You can acknowledge a client's feelings by saying something as simple as: "I can tell that you're upset about this."

Let clients know that they're not alone

If the problem is one that other clients have experienced before, share this. It will help to validate your client's concerns.

Use plain language

“Explain the law in plain language so the client doesn’t need a thesaurus,” Boyd advises. “Using language that clients understand is also your best protection against a negligence suit,” he adds.

And don’t be shy about injecting appropriate humor. A light-hearted touch can help to dry up tears or defuse volatility—just be sure to read your client accurately so they won’t be offended.

When to jump in

If memory of factual events is overshadowed by emotions, guide the client away from talking about their feelings to a more factual focus. General encouragement to recall more information isn’t usually helpful and can even impede accuracy, notes Sternlight. So, for example, with a wrongfully dismissed client, instead of asking a general question like, “is there anything else you can recall about your conversations with your employer?”, you can better prompt memories by asking specific questions like, “Who was present at the layoff meeting?” and “Where did it take place?”

With some highly emotional clients, you may need to take control of the interview sooner than otherwise. Says Gluckstein: “if the client is spinning their wheels about everything in life, I have to jump in and direct the conversation—explain that I’m only available another 20 minutes before the next appointment, and that I need to ask some questions to give them my opinion.”

Risks You Face With Emotionally Distressed Clients

Emotionally distressed clients pose greater risks than non-distressed clients. Because emotions may cloud their thinking, you may fail to appreciate the nature of the client’s problems, or they may fail to understand your advice.

You’re also at greater risk of being subjected to a professional complaint. As Wade notes: “The scars of experience also testify that a steady percentage of ‘emotional’ clients and their cheer squads will later turn on their lawyers with damaging gossip, non-payment of accounts, legal actions and reports to law societies.”

Protecting Yourself

Document everything

To protect against Law Society complaints and negligence claims, “paper your file and put everything in writing,” recommends Schindelka. “Confirm by email and letter all instructions. Document all conversations. Explain matters in detail. And if a meeting is likely to be volatile, have a witness such as a colleague or your secretary present.”

Talk to other colleagues

Part of the training of social workers, psychologists and psychiatrists involves talking about their feelings. In contrast, the culture of the legal profession discourages lawyers from talking about their personal experiences, notes [Peter] Jaffe [psychologist, and academic director

of the Centre for Research on Violence Against Women and Children at University of Western Ontario, London]. Yet, as with [Vicarious Trauma], sharing how your work affects you will help preserve your sanity. Solicitor/client privilege must be maintained, but you can talk freely with other lawyers in your firm about firm clients. CBA subsection meetings are also good places to share war stories with colleagues. Just don't divulge client names when chatting with lawyers outside your firm.

Set boundaries and limits

Some distance between you and your clients is necessary for you to remain objective and effective, so set boundaries beyond which clients cannot cross. "I never give out my cell phone number, and I have an unlisted home number," says Boyd. Nor does he go out for coffee with his family law clients during a case (though he will once it's concluded). Clients should also be encouraged to do as much for themselves as they can. Avoid jumping in too quickly to help a client with something they can handle, like retrieving old records.

Take a break

Finally, recognize when you may need to take a break from your practice area, say Schindelka, who is also a director of both the Alberta Lawyers' Assistance Society and Saskatchewan's Lawyers Concerned for Lawyers. After 3 ½ years of sexual abuse litigation (like "family law on steroids"), he felt he was no longer in a healthy mindset and moved into general litigation, except for family and criminal law.

Making Your Office a Safe Place to Experience Emotions

If you work with distressed clients on a regular basis, your office should feel like a safe place to experience emotions.

- **Tissues:** It's elementary, but always have a box of tissues within easy reach.
- **DÉCOR:** "People are talking about their feelings and their children, so my office is more friendly than a banker's office"
- **Privacy:** Don't install tearful clients in the glass-walled conference room. Not surprisingly, says Sternlight, research shows that "people are more willing to disclose relevant personal information in surroundings in which their privacy is assured." Good soundproofing is important too.
- **Lighting:** Nix the overhead fluorescent lights. Go for soft indirect lighting through lamps.
- **Staff:** Give staff instructions on when it's appropriate (or not) to interrupt an interview. Staff should also show the same respect to a client in humble circumstances (including intoxicated clients) that they would show to the president of a company, says Schindelka.

Referring Clients to Other Professionals

Yes, clients should have the opportunity to divulge their feelings. But at a certain point, they may be better served by speaking with someone else. Lawyers should be familiar with the available community resources relevant to their practice area (therapists, shelters, self-help groups, clergy, mental health professionals, etc.) and be ready and willing to make appropriate referrals.

Says Boyd: "If a client can't stop crying in my office, I'll say: 'Have you thought about seeing somebody about this?'" They're usually not taken aback by his suggestion.

Schindelka has walked some clients down to the local food bank and accompanied others to a nearby bank to set up an account and deposit their settlement cheques.

In some cases, consider setting up a counselling appointment in advance. For example, clients may benefit from debriefing with a professional counselor after reliving a painful experience during examinations for discovery.

In extreme cases, you might want to refuse to act for a client until they have consulted a psychologist "and that expert has reported back with a diagnosis and strategy," suggests Wade. If nothing else, this can at least "provide some evidentiary protection for a lawyer when a client later complains about duress or lack of informed consent."

Tips for 3 Practice Areas

1. Family Law Clients

Family lawyers will find it helpful to understand the Kubler-Ross model of loss and grieving, suggests Boyd.

Say you have a case where the other spouse has been leaving the relationship mentally for a while and is well on their way through the Kubler-Ross path.

Your client, who is still in denial and shock, wants to take an adversarial approach because they can't believe how cold and callous their spouse appears. You can explain that, no, their spouse isn't heartless, but just at a difference stage in the grieving process. "This can help defuse emotions and avoid one of the hot spots that trigger litigation," says Boyd.

Boyd recommends the following two books as essential reading family lawyers:

- The Truth About Children and Divorce by Robert Emery.
- www.emeryondivorce.com
- Helping Your Kids Cope with Divorce the Sandcastles Way by M. Gary Neuman.

Family lawyers may also want to join:

- The CBA National Family Law Section
- The Association of Family and Conciliation Courts—entitling you to the “Family Court Review,” a leading multidisciplinary journal for family law professionals by psychologists and others. www.afccnet.org
- The National Council on Family Relations. www.ncfr.org

2. Bankruptcy Clients

Commercial lawyers shouldn't make the mistake of thinking their bankruptcy clients' needs are merely financial.

“Understanding the psychology of failure, particularly when the failure of a business involves individuals who have a history of spectacular success, is equally or more important than addressing their financial circumstances,” asserts Steven Silton. A bankruptcy partner with the Minneapolis office of Hinshaw & Culbertson, Silton is also co-director of the University of St. Thomas Law School Bankruptcy Clinic. The clinic works with the university's school of psychology and social work to address both the psychological and practical issues raised by clients in financial distress.

One aspect bankruptcy lawyers should address is the “deal mentality” of their clients. Business clients are accustomed to charging from deal to deal, where time is the enemy. Silton often asks, “What is the Plan?” and “When is this deal going to be done?” Since patience is often key to resolving these financial problems, he advises that you resist allowing your clients to push an unnecessary and poor solution.

Also, while it's okay to allow bankruptcy clients to grieve a little over their loss, don't allow them to “dwell on their misfortune at the expense of their future,” he says. “Give them a pep talk. Implore your client to focus on two things: first, what is necessary to get them through the financial crisis; second, their future, and their next ‘success’.”

Explaining the exemptions and the assets they can keep often makes them feel more positive about their situation too.

Finally, “shifting the focus from wealth to work will provide a psychological life for your client,” says Silton. “Wealth may have defined their lives for the immediate past; however, at some point, in order to amass their wealth, they were driven by work. Recapturing that spirit is an important aspect of rehabilitating your client's financial fortunes.”

Links:

Read Silton's article on “Counselling clients in financial distress” at www.mnbar.org/benchandbar/2009/aug09/financial.html.

“Ontario’s law society tackles ‘unbundling’”

Claridge, Thomas, *The Lawyers Weekly*, 16 July 2010, p. 2
[*excerpt*]

The Professional Regulation Committee of the Law Society of Upper Canada (LSUC) has launched a study of issues related to the “unbundling” of legal services—the provision of limited legal services or representation.

In a progress report to the law society’s June Convocation, the committee said unbundling involves a lawyer or paralegal providing legal services “for part, but not for all, of a client’s legal matter by agreement with the client, and that the client is otherwise self-represented.” In some jurisdictions the process is described as “limited scope” services.

Examples cited in the report are providing confidential drafting assistance; making limited court appearances as part of a retainer; providing legal services at a court-annexed program or through a non-profit legal services program.

The report said Ontario lawyers are already providing services “on what can be characterized as a limited scope basis”, noting that LSCU’s current Rules of Professional Conduct don’t address the issue. “Procedurally, there are no specific rules for situations in which such services may provided in a litigation setting”.

The committee had reviewed recent developments in Canada and elsewhere, obtained an overview of procedural rules “that may have relevance to limited scope retainers”, and reviewed relevant rules of professional conduct.

“The committee’s initial focus was on what might be done by way of ethical guidance. But it also determined that a dialogue should begin on the issue with interested parties, groups and institutions,” the report said, adding that the dialogue would target the breadth of the issues and permit LSUC to address them “with a focus on enhancing access to justice.”

It said the key issues that prompted the discussion about the need for more guidance to LSUC members are how to define the scope of representation in agreements with clients, clarifying communications between counsel for another party and the client, and the member’s role in document preparation, including disclosure of the assistance provided.

[**Note:** The Benchers of the Law Society of British Columbia—pioneers to the development of ethical guidelines for unbundling of legal services—in 2008 approved a task force report containing 17 recommendations that will make it easier for lawyers to provide their clients with limited scope or “unbundled” legal services. The recommendations address four main contexts for lawyer-client service: confidential drafting assistance; limited court appearance made as part of a limited scope retainer; legal information and advice provided as part of a limited scope retainer; and legal services provided at a court-annexed program or at a non-profit legal service

program. Created in March 2005 on the recommendation of the Access to Justice Committee, the Unbundling of Legal Services Task Force explored a wide range of solicitor-client and access to justice issues that arise when lawyers offer their clients the option of discrete, or limited scope, legal assistance instead of full legal representation on all aspects of a transaction, dispute or process. The major public interest implication of unbundling or limiting the scope of legal services lies in the potential to increase access to justice for members of the public who otherwise might not be willing or able to obtain legal representation.]

At its September 2011 meeting, Convocation of the Law Society of Upper Canada approved amendments to the *Rules of Professional Conduct* and the *Paralegal Rules of Conduct* to provide guidance to lawyers and paralegals who provide legal services under limited scope retainers, also called "unbundled" legal services. Under limited scope retainers, lawyers or paralegals provide legal services for part, but not all, of a client's legal matter, by agreement with the client. Developed following a call for input from the profession, the amendments include a general requirement for a written confirmation of the limited scope retainer.

"Connecting with clients"

Rappaport, Michael, *National*, March 2011, pp. 10-11
[*excerpt*]

Affordable legal advice: JusticeNet.ca

Driven by a deep commitment to access to justice, Heidi Mottahedin [a chartered mediator] launched JusticeNet in September 2009, a legal referral service which helps match low-and middle-income clients with a qualified lawyer across Canada. JusticeNet is entirely self-funded and operates on a shoestring budget. Eight law students who volunteer to answer phones and help guide callers to the appropriate lawyer staff the call centre.

To qualify for legal assistance clients must live in Canada, have a net family income under \$59,000, and be in financial difficulty. JusticeNet offers assistance in a wide range of legal areas, including criminal law, civil litigation, family law, landlord/tenant disputes, disability and immigration/refugee law. The website reaches out to immigrant communities with brochures posted in 15 different languages.

Lawyers pay \$150 plus HST to join JusticeNet and currently it has a roster of 130 members.

To join, lawyers must agree to abide by a reduced-fee schedule for low-and middle-income clients ranging from \$100 or less per hour to a maximum of \$150 per hour depending on the net yearly family income of a client and the number of dependents. Alternatively, senior lawyers or specialists may offer their services at discounted hourly rates, in accordance with

JusticeNet’s private rate fee schedule, which is between 30 to 50 per cent below normal hourly rates.

Finding the right fit: LawyerLocate.ca

About 15 years ago Natalie Waddell’s marriage was breaking down leading her to call the law society’s lawyer referral service. “The lawyer they recommended wasn’t a good fit. He wanted to litigate for my husband’s future earnings. I wanted an amicable split,” Waddell recalls. The experience left her thinking there must be a better way to match clients with lawyers.

So Waddell founded Lawyer Locate Inc. Since launching her website www.lawyerlocate.ca in 2002, the service has processed more than 83,857 referrals from individuals and businesses around the world to lawyers across Canada.

Potential clients can visit the website, search for a lawyer by practice area and geographic location, read detailed bios of each lawyer and contact them directly or they can call a 1-800 number for assistance in finding a lawyer.

“Unlike law societies’ referral services, we don’t require lawyers to give a half-hour free consultation or file a report with the law society after each consultation. We make it easy for both lawyers and clients.”

Lawyer Locate Inc. currently has 579 lawyers as members, who pay from \$62.50 to \$75, every month, depending on their membership plan. The service processes an average of 250 to 300 referrals per week and the website had 1.5 million page views last year. Beyond providing lawyers with a source of referrals, Lawyer Locate actively promotes members through its integration with social media, FaceBook, LinkedIn, Twitter and blogs.

PropertyShop.ca

Lawyers Web Property Shop Ltd, harnesses the power of the Internet, through its portal PropertyShop.ca, to bring a whole new way of buying and selling real estate to Ontario and connect lawyers with clients—without a real estate agent

. . . .

Directories with a difference

Dynamiclawyers.com—In November 2008, Michael Carabach, a Toronto business lawyer and entrepreneur founded Dynamic Lawyers, an online lawyer directory with a forum where potential clients can post questions for free that member lawyers may answer. The Website also features free videos, news, and a blog and legal forms and e-books for sale. “When this generation goes to find a lawyer the first place they are going to look is online,” Carabash says, adding he nets 100 per cent of his clients on the web.

LawyerShop.ca—Stephen Elliott is the chief engagement officer at LawyerShop.ca, an exclusive online network of specialized boutique law firms, which he founded in 2003. “We decided to limit the directory to only one law firm per practice area per region since people were

confused by too much choice,” Elliott explains. “We personally vetted the firms in our directory to find the best one with relevant expertise in each region.”

LawOne.ca—Doug Jasinski, the president of LawOne Lawyers Network, based in Victoria, B.C. launched the online directory LawOne.ca in January 2006. While not quite as exclusive as LawyerShop.ca, LawOne.ca is restricted to lawyers in B.C. and the number of law firms in each region in the province is capped at three to four. “We wanted to improve the search engine optimization of our members.” Jasinski explains. “Many people’s first stop when searching for a lawyer used to be the Yellow Pages. Now it’s Google.”

3.3.2 Confidentiality and Privilege

“When can confidentiality be breached for a 'future harm'?”

**Mundy, Jane. *The Lawyers Weekly*, 28 May 2010, pp. 1, 7
[excerpt]**

Benches of the Law Society of British Columbia (LSBC) were recently asked to consider the extreme scenario of when a lawyer should be required to breach client confidentiality to prevent a “future harm.” Law Societies across Canada currently take inconsistent approaches to this prickly issue and the Federation of Law Societies (FLS) has developed a “model code” for law societies to consider with the hope of encouraging a national approach.

“We raised the issue with the Benches in order to inform and educate, so they will be better equipped to make a decision when we do report to them on the [FLS] Model Code, including the issue of future harm,” said Gavin Hume, Bench and Chair, [LSBC] ethics committee, after a FLS representative presented on the issue to LSBC benches.

The future harm exception attempts to set guidelines for the murky issue of when lawyers must breach their client confidentiality and report when they know some kind of harm is likely to occur. Whether lawyers should have a blanket obligation to disclose or be given the choice is one of the questions the LSBC will be tackling. Benches will also have to consider whether the exception should only apply if the threat involves a crime, or if a threat of violence is enough to trigger the obligation. In *Smith v. Jones* [1999] S.C.J. No. 15, the Supreme Court of Canada recognized a “public safety” or future harm exception to solicitor-client privilege. The court endorsed a discretionary exception to the privilege in that case. “Has the Supreme Court gone too far?” Mona Duckett, FLS committee member for the Law Society of Alberta and a criminal defense lawyer in Edmonton, asked benches at a meeting last month. “The purpose of privacy is to save our clients from liability, but the court didn’t answer our question about use [of that information]. Can anybody use the information we provide to the court in any way?” The Federation’s Model Code includes a rule requiring that lawyers keep the solicitor-client relationship confidential. The rules of professional conduct in force in Canadian law societies, however, recognize a future harm exception. These rules either permit or require lawyers to disclose confidential information that includes a threat of serious bodily harm or death which could be averted if the information is disclosed.

Duckett said the goal in presenting to the benches was “to finalize the missing piece of code.” She circulated materials from a previous FLS meeting where members of LSBC’s ethics committees participated in several scenarios. There were three possible answers. For example,

if your client has HIV and tells you he is going to have unprotected sex tonight, should disclosure be (1) mandatory; (2) permissive; or (3) prohibited?

The scenario resulted in a lively debate. Some benchers voted mandatory, saying they struggled with answering “permissive”[;] explaining that, although it is easier to make your own decision, it is unfair to put a lawyer in a moral dilemma and easier if the decision were mandatory.

“It is absolutely important and essential to a lawyer that they maintain client confidentiality”, said Peter Lloyd, an appointed Bencher. “If you are accused of a crime you talk to your lawyer without fear of the information being passed on. I think the public understands that as a concept, but we must have exceptions where real harm is going to be caused to an individual.”

Although every law society has a future harm exception, they take a number of different approaches. In some jurisdictions, disclosure is permissible (e.g., B.C.), while in others it is mandatory (e.g., Manitoba, NWT). Some jurisdictions require that the threat must involve a crime, while in others the threshold is met if there is a threat of death or serious bodily harm even if not criminal in nature. Some jurisdictions permit disclosure of confidential information to prevent any crimes of violence.

“These sorts of issues should be uniform across Canada,” added Lloyd.

Dymond v. Graham

2010 CarswellOnt 10340 (Ont. Ct. J.), Zisman, Roselyn, J., 30 July 2010
[*Headnote*]

Parents separated and their child remained with mother in Ontario—Mother and child later moved to Quebec—Mother took position that she advised father that she was permanently leaving Ontario with child, while father took position that she did not—At trial to determine custody of child, mother was cross-examined as to whether she told her lawyer that she was leaving Ontario—Father's lawyer withdrew question in mid-sentence, but mother answered affirmatively—Mother's lawyer sought to clarify this answer on re-examination and stated that mother consented to this line of questioning—When asked to clarify her answer, mother testified that she left telephone message for her lawyer about leaving Ontario—Father's lawyer asked to see mother's legal file—Parties made submissions as to whether file was protected by solicitor-client privilege—Mother's lawyer ordered to provide copies of any telephone messages received from mother around time of her leaving Ontario, as well as any messages or interview notes about her desire to leave Ontario with child—There was initial inadvertent disclosure by mother of her communication with lawyer regarding leaving Ontario—However, mother explicitly or by implication waived solicitor-and-client privilege and was able to give self-serving evidence—It appeared unfair that mother should be able to disclose as much as she felt that might help her

case and then withhold what might not help—Production of entire file was not ordered as there were other issues in case at bar and there might be discussions regarding trial strategy—Importance of protecting solicitor-and-client privilege and ensuring trial fairness could be achieved by limiting extent of file that was made available.

“Lawyers alarmed by new tax rules”

McKiernan, Michael, *Law Times*, 21 November 2010
[excerpt]

Tax lawyers fear new reporting obligations for aggressive tax avoidance transactions may compromise solicitor-client privilege.

Back in March, the federal government announced it was looking at amendments to the Income Tax Act to weed out aggressive tax plans it said were undermining the fairness of the tax system.

Then in August, the Department of Finance put some flesh on the bones of its proposals with draft legislation that would impose reporting obligations for “aggressive transactions” on taxpayers and their advisers, including stiff penalties for both parties for any omissions.

Suzana Popovic-Montag, managing partner at trusts and estates firm Hull & Hull LLP, can’t see any way to report transactions without revealing information passed in confidence between clients and lawyers.

“It seems quite clear that we’re being asked to breach the solicitor-client privilege,” she says. With the vagueness of the definitions in the act, lawyers could find themselves at odds with their clients when they disagree over whether a transaction is reportable.

“We encourage clients to tell us everything in confidence and tell us everything they can so we can assist in the best way we can,” says Popovic-Montag. “They have an expectation that we’re not going to repeat that, let alone use it against them.”

It’s not just tax lawyers who should be worried about the legislation, according to Popovic-Montag, because any move that erodes solicitor-client privilege will have a spillover effect on public confidence in the legal profession.

“I’m ultimately afraid they’re opening up a Pandora’s box of issues that compromise everything we’ve held so important and untouchable for so many years,” she says.

“If people start suddenly thinking, ‘My lawyer might use things I tell them against me,’ they won’t tell us anything anymore or they’ll tell us less. It compromises the fundamental tenets of our relationship.”

The Canadian Bar Association has also stepped into the fray to make its concerns known in a letter to the federal minister of finance.

Although the association's tax section composed its submission on the legislation, it was CBA president Rod Snow who addressed the minister, noting the issue was "of importance to the legal profession as a whole."

"We have singled out the information reporting measures because, if adopted in their current form, they will create a serious incursion into solicitor-client privilege and will compromise the independence of the legal profession," he wrote.

"These are fundamental and foundational elements of the Canadian justice system and the preservation of these elements benefits all Canadians."

In an interview, Elaine Marchand, chairwoman of the CBA's national taxation law section, tells *Law Times* she would like to see lawyers excluded altogether from the reporting obligation.

"Plaintiff Who Discussed Suit with Lawyer on Work E-Mail Can't Claim Privilege, Court Says"

Cassens Weiss, Debra, www.abajournal.com, 20 January 2011

A woman who sued her employer claiming discrimination can't shield her lawyer e-mails in the litigation because they were sent from her work e-mail account, a California court has ruled.

Gina Holmes had claimed the e-mail[s] [were] protected by the attorney-client privilege, according to stories by Wired's Threat Level blog and Technology on MSNBC.Com.

The Sacramento-based appeals court said the e-mail was not a protected confidential communication because Holme's employer, the Petrovich Development Co., had warned that employee e-mails were not confidential and were subject to monitoring.

"The e-mails sent via company computer under the circumstances of this case were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him," the court said.

Last March, the New Jersey Supreme Court protected e-mails sent from a personal account on a work computer to a lawyer. The Court noted that the e-mails weren't clearly covered by the employer's policy, and they contained the standard warning that they were confidential attorney communications.

"Confidentiality in ADR"

Daimsis, Anthony, *The Lawyers Weekly*, 11 February 2011, pp. 9, 11
[excerpt]

Confidentiality in ADR proceedings should never be assumed. If you want confidentiality, draft a confidentiality clause.

The assumption of confidentiality in ADR is founded on the belief that because it is a private process, it is also confidential. A recent survey conducted by the school of International Arbitration at Queen Mary, University of London, gleaned the following figure from corporate and general counsel: 50 per cent of respondents erroneously believe that arbitration is confidential, even where there is no specific clause to that effect in the adopted arbitration rules or the arbitration agreement.

This figure reveals that many counsel assume the existence of confidentiality obligations—which may or may not be important to their clients—but which are decisively unenforceable.

The assumption that non-court proceedings like arbitration and mediation benefit from inherent confidentiality is not a new one. In commercial arbitration (and international commercial arbitration specifically) it has resulted in two-dominant views. The first view (known to some as the English view) is that no implied duty exists—and if some duty does exist, it has strict limits.

Relying on an implied obligation is both risky and most likely wrong. ADR is often a private process. But this is true mainly because parties have little interest in holding public proceedings and, in any case, ADR proceedings are not held in public. Parties don't necessarily choose to arbitrate or mediate disputes because they seek a confidential process. There are many reasons to choose an alternative to the courts; access to a specialized tribunal, a speedier process and the ability to tailor proceedings, to name a few. To suggest that arbitration or mediation relies on confidentiality assumes that the process cannot function without it. That assumption is mistaken.

Experienced arbitration practitioners will tell you that the surest way to avoid all of these interpretative headaches is to include a confidentiality clause tailored to your clients' needs. But constructing a proper clause is not as simple as dusting off a precedent and tinkering with it. It takes knowledge of the applicable laws in play, as well as the potential mandatory regulations and disclosures.

For example, many corporations are bound to disclose ongoing litigation (which includes arbitration). Knowing disclosure requirements should affect how to negotiate confidentiality clauses. Why negotiate an obligation that a party is bound to comply with anyway? The same

holds for the applicable law. Knowledge of the scope of confidentiality obligations set down in the applicable law should drive the drafting and negotiating of confidentiality clauses.

The recent enactment of the Ontario *Commercial Mediation Act*, 2010, sets down clear obligations of confidentiality, with the usual exceptions. These exceptions allow a party (or a mediator) to disclose information relating to the mediation for enforcement purposes, or to protect a right or fulfill a legal duty.

What we see in this statute—absent in its equivalent arbitration statutes—is confidentiality by operation of law.

Spending time drafting a confidentiality clause to include obligations already included by operation of law is wasteful at best. An argument may be made, however, that this Act is silent on disclosing the existence of the mediation—information that commercial parties may not wish the public to know about. If this is important to your client, then knowledge of what the law does and does not require is very helpful.

What we see in the statute—absent in its equivalent arbitration statutes—is confidentiality by operation of law. Spending time drafting a confidentiality clause to include obligations already included by operation of law is wasteful at best. An argument may be made, however, that this Act is silent on disclosing the existence of the mediation—information that commercial parties may not wish the public to know about. If this is important to your client, then knowledge of what the law does and does not require is very helpful.

A confidentiality clause should take into account your client's needs, but most importantly, any applicable laws and rules. For example, in the commercial arbitration context, parties often select rules that are distinguished from rules of civil procedure.

"Frequently Asked Questions about Solicitor-Client Privilege and Confidentiality"

Canadian Bar Association [Ethics and Professional Responsibility Committee: Paton, Paul D. (chair); Mercer, Malcolm M. (vice-chair); Brossard, Christian J.; Holmstrom, Joan M., and Morin, Andre A.], November 2010

[excerpt]

What are the exceptions to Solicitor-Client Privilege and the Duty of Confidentiality?

Your ethical duty of confidentiality extends to all *information* you learn during the course of a retainer from whatever source, whether or not the information is confidential.

The duty of confidentiality is governed by your Law Society's Code of Conduct and by the common law of fiduciary duty. In Quebec, a duty of professional secrecy also exists under the *Quebec Charter of Human Rights and Freedoms* and other applicable legislation.

In contrast to the duty of confidentiality, solicitor-client privilege only applies to **communications** between a lawyer and client for the purpose of legal advice. It is governed by the common law.

In both cases, clients can consent to the disclosure of the information and, in certain circumstances, they may be found to have waived confidentiality or solicitor-client privilege.

Crime-fraud exclusion

If a client is seeking legal advice to facilitate the commission of a crime or a fraud, the information provided by the client is not covered by solicitor-client privilege and the duty of confidentiality does not apply.

Some courts have moved to expand the crime-fraud exclusion to other torts. This area of the law is uncertain and controversial, and awaits clarification from appellate courts.

Public safety exception

The Supreme Court of Canada and most Law Society Codes of Conduct recognize a public safety exception which may allow or require disclosure in cases where there is some impending harm to another person. In *Smith v. Jones*, the Supreme Court held that public safety will overcome solicitor-client privilege when a lawyer reasonably believes that there is a “clear, serious and imminent” threat to public safety.

Look to your Law Society rules for the specific terms of the Public safety exception, particularly the types of future harm covered (criminal, violence, serious physical harm, etc.) and the voluntary or mandatory nature of the lawyer’s responsibility.

Innocence of the accused exception

In *R. v. McClure* the Supreme Court of Canada recognized an exception to solicitor-client privilege when the innocence of an accused is at stake [; however, in that decision the Court refused the accused access to the civil litigation file of a complainant in the criminal prosecution who was also, civilly, suing the accused]. It interpreted this exception very strictly and the exception is likely to apply only in the rarest of circumstances. There are no reported cases where a *McClure* application has led to an order for the disclosure of solicitor-client privileged information. Information disclosed under the innocence of the accused exception cannot be used against the client of the lawyer who disclosed the information.

Disclosure of information: fees and allegations against a lawyer

Finally, all Law Society Codes of Conduct permit a lawyer to disclose confidential information in order to establish or collect a fee or to defend oneself or one’s colleagues against any allegation involving a client’s affairs, be it criminal, civil, or regulatory (for example, Law Society complaint). Whatever the case, the lawyer must not disclose more information than is required.

How do my confidentiality obligations affect the other members of my firm?

You are required to keep confidential all information regarding the affairs of your client that you learn during the course of the retainer. This obligation survives the end of the retainer.

As well, these confidentiality obligations are imputed to other members of your firm. The Supreme Court of Canada has held that it is not only the individual lawyer but also the firm as a whole that owes the fiduciary duty of confidentiality to the client.

Neither you nor the lawyers will be assumed to be sharing confidential information about past clients with members of the new firm [should you move to a new firm] unless adequate screening measures are in place to show that confidential information is not being disclosed.

Confidentiality requirements are the reason law firms create complex conflicts of interest machinery.

For more on this issue see the CBA Task Force *Conflicts of Interest* Final Report, Recommendations & Toolkit.

I have been jointly retained by two clients. One client has given me some information relating to the retainer and asked that I withhold it from the other. Can I set up confidentiality screens and keep the joint retainer?

In the context of a joint retainer, you have a duty of undivided loyalty to each client and an ethical obligation to deal evenly with them. Before agreeing to a joint retainer, you should explain the concept of undivided loyalty to each client. In most jurisdictions, you are not permitted to keep information confidential from either client. You should also explain that if an unresolvable conflict arises between them, you will be forced to withdraw and will not be able to represent either of them.

Some jurisdictions (for example, Alberta) permit a joint retainer with confidentiality screens whereas the rules in other jurisdictions (for example, Ontario and British Columbia) are categorical in prohibiting a lawyer from keeping information confidential from one client within a joint retainer. If a joint retainer with confidentiality screens is permitted, it will be essential to obtain fully informed consent in writing after each client receives independent legal advice.

What use can I make of information disclosed during discovery? Can I use it in other or subsequent litigation?

Generally, you cannot use information disclosed during discovery in other or subsequent litigation. The “deemed undertaking rule”, also referred to as the “implied undertaking rule”, is a court-created rule that is now codified in the rules of procedure in many jurisdictions.

This rule provides that evidence compelled from a party to civil litigation during pre-trial discovery can be used by the parties only for the purpose of the litigation through which it was obtained. As a general matter, such information cannot be used in other concurrent litigation against the same or a different client.

The deemed undertaking rule is separate from and not connected to solicitor-client privilege or the duty of confidentiality.

Exception to the deemed undertaking rule

The rules in some jurisdictions provide that the information can be used in specific circumstances, including:

- with consent
- for impeachment purposes
- by obtaining a court order

after the information is filed as evidence with the court or referred to during a hearing (see, for example, Ontario Rule of Civil Procedure 30.1).

I am acting as defence counsel in criminal proceedings. What are my disclosure obligations to the prosecution?

Crown prosecutors have a duty to disclose all relevant information to the defence as a result of the Supreme Court of Canada's decision in *R. v. Stinchcombe*. The failure to fulfill this obligation may result in both court sanctions and discipline by the Law Society. Defence counsel do not have an analogous obligation. Unlike the Crown, the role of defence counsel is purely adversarial.

The CBA explains the role of advocates in adversary proceedings as being “openly and necessarily partisan” and, therefore, “the lawyer is not obliged to assist an adversary or advance matters derogatory to the client’s case.” Moreover, the solicitor-client and litigation privilege protecting communications between an accused and [his or her] counsel Only the client may decide if the privileged communications may be shared with anyone [except that:].

1. An alibi should be disclosed in sufficient time to allow it to be properly investigated.
2. A psychiatric defence should be disclosed in time to allow a Crown psychiatrist to examine the accused.
3. Any expert opinion evidence on which the defence intends to rely should be disclosed 30 days before trial.

An additional exception relates to the issue of defence counsel’s obligations when coming into possession of physical evidence of a crime. That is the subject of ... [a subsequent] question

My client wants to pay me in cash. May I accept a cash payment?

You may only accept cash payments from a client when the total is less than \$7,500 on any one file. All Law Societies have recently enacted rules which prohibit lawyers from accepting \$7,500 or more in cash for a single client. That means you are prohibited from accepting multiple cash payments totaling \$7,500 or more (for example eight separate cash payments of \$1,000) from the same client. More particulars and certain exceptions for institutional clients appear in each Law Society’s rules.

Note that paying you in cash will not mean that the client avoids a record of the transaction. You are obligated to follow certain record-keeping requirements for all clients. Law Society rules now contain very specific requirements regarding client identification, verification, and record-keeping.

Basic record-keeping requirements

All law societies now require some basic record-keeping requirements. You must obtain and verify client information and keep records on the following matters for all clients:

1. The client's full name.
2. The client's business address and business telephone number, if applicable.
3. For clients who are individuals, the client's home address and home telephone number.
4. For a client organization, the name, position, and contact information for each individual who gives instructions with respect to the matter for which you are being retained.
5. For a client organization, other than a financial institution, public body or reporting issuer[:], the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number, if applicable, as well as the general nature of the type of business (or businesses) or activity (or activities) engaged in by the client.
6. For a client organization, the name, position, and contact information for each individual who give instructions with respect to the matter for which you are being retained.
7. For a client acting for or representing third party, information about the third party as set out above, as applicable.

I have come into possession of evidence of a crime from a client. What do I do?

Solicitor-client privilege draws a distinction between “communications” and “evidence”. Physical evidence of a crime is not protected by solicitor-client privilege because it is not an oral or written communication, it is physical evidence. However, anything that a client tells you about the evidence would be covered by the privilege (so long as it is not considered a communication in furtherance of a future crime as discussed ... [above]).

Coming into possession of physical evidence of a crime is fraught with legal and ethical dangers for you. You should seek advice from your Law Society and possibly from counsel.

If you retain physical evidence of a crime, you run the risk of being charged with obstruction of justice under section 139(2) of the *Criminal Code*, which makes it an offence to “willfully attempt in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding”, or possible with being an accessory after the fact under section 23(1) of the *Criminal Code*. In the leading case on this issue, the lawyer was charged with obstruction of justice: *R v. Murray*.

The court in *Murray* accepted that a lawyer may retain incriminating evidence for a reasonable time for examination and testing. Guidance on this matter is provided by Michel Proulx and David Layton in the text *Ethics and Canadian Criminal Law* (2001) where they advise:

1. There must be a legitimate reason to take the item. Possession and retention are only justified where reasonably necessary for the purposes of representation: that is, in order to prepare a defence.
2. Counsel cannot examine or test the item in a manner that alters or destroys its material characteristics.
3. Counsel must retain the item only for the time reasonably necessary to complete the examination or testing.
4. Counsel who removes incriminating physical evidence from its original location risks losing the protection of legal professional privilege. This loss of privilege would include the facts surrounding the item's location and condition; counsel may even be required to be a witness.

In *R. v. Murray*, Justice Gravely of the Ontario Superior Court outlined three “legally justifiable options” once counsel realizes that they are improperly in possession of incriminating physical evidence:

1. Immediately turn over the evidence to the prosecution, either directly or anonymously.
2. Deposit it with the trial judge, or
3. Disclose its existence to the prosecution and prepare to do battle to retain it.

Options two and three are only available to counsel when the client has already been charged with an offence and proceedings are underway.

If you come into possession of physical evidence of a crime prior to proceedings being commenced against your client in relation to the evidence, the best course of action is for you to retain independent counsel and instruct that counsel to turn the evidence over to the Crown. The communications between you and the independent counsel will be protected by solicitor-client privilege. This procedure will also enable the communications between your client and you regarding the evidence to remain privileged and may help to avoid the scenario where you could be called as a witness against your client.

Can I disclose privileged information to the successor in title?

Successors in title are usually clearly identified as they acquire ownership over the title possessed by their predecessor. In a business context, the protections governing disclosure of solicitor-client privilege are given to the successor in title where the communications would have been privileged in the hands of the predecessor in the title.

The Ontario Superior Court outlined the principle as follows: “Solicitor and client privilege belonging to a predecessor in title can be asserted by his or her successor in title. Thus, the privilege of the original owner continues to a successor in title.”

The courts extend the privilege to the successors because their interests are in common with the predecessor and because the communications had been made in confidence. In other words, solicitor-client privilege that is “owned” by a business owner passes to a successor in title to the business, and can be asserted and maintained by the subsequent owner.

The parents of a minor client I am representing have requested access to information about her. May I give it to them?

The minor child is your client. You owe her the duty of confidentiality and your communications with her for the purpose of giving her legal advice are covered by solicitor-client privilege.

Any decision regarding the disclosure of information and waiver of the privilege belongs to your minor client and not to her parents or to you as her lawyer. (This assumes that the minor child is legally competent to instruct counsel.

Even if information is not covered by solicitor-client privilege, you have an ethical obligation to avoid disclosure of any of your client’s affairs, even to members of her family. The duties of confidentiality and loyalty towards a client, including a client who is a minor, ensure that the client can share information freely with you, and receive the best possible legal advice.

You should explain both solicitor-client privilege and a lawyer’s duties of confidentiality and loyalty to your client. Have the conversation with your client without her parents present.

Your client may chose to share information with her parents and may authorize you to do so, but this must clearly be her choice after she understands your duties to her.

When your client’s parents are paying your fees, some information about billing and fees may need to be disclosed to them for practical reasons. The financial information you will need to share with her parents should be clearly outlined in the retainer agreement with the minor to avoid any misunderstandings.

Child is not competent to instruct counsel: litigation

When a minor client is not competent to instruct counsel, because of age, lack of maturity, or disability, then a litigation guardian will have to be appointed to her by the court. You will take instructions from the litigation guardian.

Child is not competent to instruct counsel: non-litigation matters

For non-litigation matters, you must determine if a properly appointed guardian has been designated to deal with the child’s affairs’ including legal affairs. Unless there are relevant limitations on the power of that guardian, you will take instructions from the guardian.

I am representing an elderly client whose competence to decide some matters for himself is deteriorating. His children have asked me to provide them with some information about him and to disclose confidential documents. What do I do?

Your duties of loyalty and confidentiality to your client remain the same regardless of the legal competence of your client. You cannot share confidential information with anyone, including family members, without the explicit or implicit authorization of your client or a court order or other legal authorization. As well, the duty of confidentiality survives the end of the retainer and continues indefinitely, even after the death of a client.

Should you believe that your client has developed reduced or questionable mental competency, you still have a duty to maintain a normal lawyer and client relationship, as far as is reasonably possible. Lawyers for clients with reduced competency have an ethical obligation to ensure that their clients' interests are not abandoned and that their confidential relationship is not compromised by unauthorized disclosure.

When you reasonably believe that your client's impairment may have eroded the legal capacity to give instructions or enter into binding legal agreements, you should take steps to have a lawfully authorized representative appointed, such as a guardian, litigation guardian, or guardian and ad litem. This representative may be a family member. If these steps are necessary, you must not disclose more information than is required.

I have received a request to disclose information pertaining to a former client's will and power of attorney. How do I respond? May I charge the former client's estate for the time spent reviewing notes to answer the request?

Your duty of confidentiality protects all information about current and former clients. The death of a former client does not alter this duty of confidentiality which persists after the end of the retainer and survives the client's death. Any information that you obtain during the lawyer-client relationship may not be disclosed unless by judicial order; there are, however, some nuances in the wills' context.

Because a will is not a solicitor-client communication and therefore not protected by privilege, the information contained in the will is not privileged. Nevertheless, the instructions relating to the drafting of the will are privileged communications. So, any communication surrounding the creation of the will or the choice of executor, power of attorney or trustee, for example, is privileged. The privilege may only be waived by the client and not by the lawyer (even after the client's death).

Waiver of privilege exceptions

In cases involving wills and estates, however, the rules governing a waiver of privileged information have been relaxed. To understand and give effect to the testator's intentions or to determine the existence of a will, the courts have accepted the disclosure of privileged communications.

In *Geffen v. Goodman Estate*, the Supreme Court of Canada extended the privilege to deceased's heirs and successors in title and allowed the disclosure of privileged communications to them. The Court's rationale was that it was in the interest of justice to determine the intentions of the deceased. In cases where there is confusion regarding the appropriate distribution of an estate, "there is no privilege to waive until the true intentions of the settler are ascertained, which in turn requires the testimony of the solicitor to be received."

In these limited circumstances you may disclose confidential and privileged information while maintaining your duty to loyalty to your client.

Fees to former client's estate

The billing arrangements for work that a lawyer may have to do for the estate of a deceased client is often outlined in the retainer agreement with the former client. It usually envisages billing the estate.

When you receive the initial request from the former client's estate, you should confirm that you will be charging for your time in responding to the request. The appropriate fee level is governed by the various law societies, all of which require that fees be fair and reasonable under the circumstances.

When does a "common interest" privilege exist and extend solicitor-client privilege to third parties?

Litigation context

Ordinarily, when a lawyer, with client authorization, discloses privileged information to outsiders, the protection of solicitor-client privilege is considered waived. However, if litigants have a common interest that makes it beneficial for them to share privileged information, the waiver will not be assumed.

In Canada, any privileged information shared between parties who have a "common interest" will continue to be protected by solicitor-client privilege.

The general principle was first described in the often cited *Buttes Gas & Oil v. Hammer* (No. 3). In that case, Lord Denning found that the adversarial system would benefit, when parties who seek a common outcome or share a common, but not identical, goal could unify in their "self same interest." Originally, the extension of solicitor-client privilege was applied only in the context of litigation. It has been expanded in Canada to apply to some commercial transactions.

When a third party has a common interest in the subject matter of a privileged communication between a litigant and the litigant's solicitor's, the communication may be shared with the third party without risk of waiving the privilege. To qualify as a third party with a common interest, it is not necessary to establish a particular kind of relationship, as long as the relationship is one created by joint interest: the courts should, for the purpose of discovery, treat

all the persons interested as if they were partners in a single firm or department in a single company. Each can avail himself of the privilege in aid of litigation.”

Commercial context

The rationale underlying the “common interest exception” in litigation is the promotion of the adversarial system. In the context of commercial transactions, the philosophical underpinning is quite different—the parties’ common interest in the successful and efficient completion of a financial transaction is recognized as a benefit to them and to the economy and society as a whole.

The mere existence of a commercial transaction is not, however, sufficient to insulate all shared solicitor-client communications. A merger or other business transaction that shows a clear adverse interest between the parties is an example of a commercial transaction in which the necessary spirit of sharing for a greater common interest does not exist.

For the “common interest exception” to operate and extend solicitor-client privilege to a third party, the intention of the parties exchanging information must be clearly voluntary and in contemplation of a shared benefit.

A signed agreement between the parties outlining their common commercial interest and their intention to protect privileged communications which they will share is a good idea.

Is the “common interest privilege” exception the same in the United States as it is in Canada?

In the United States, the “common interest exception” to extend the protections of solicitor-client privilege to third parties only applies to litigation matters. In Canada, courts have extended the “common interest exception” beyond litigation matters to some commercial transactions.

The joint privilege exception

In conducting cross-border transactions, privileged communications ought to be clearly marked as such and communicated only through a jointly-retained counsel to attract the protection of “joint privilege” recognized in both Canada and the United States[,] and refers to the situation where one lawyer represents multiple clients. Disclosure outside of a joint retainer would constitute a waiver of solicitor-client privilege in the United States, so care must be taken to direct communications through protected channels.

The client, as “owner” of the privilege must:

1. know of the existence of the privilege, and
2. demonstrate a clear intent to forego the privilege.

It is up to the court to determine if a voluntary and intentional waiver has occurred.

The courts prefer not to interfere with privilege and are reluctant to assume that a waiver is implied. However, the courts have recognized that a waiver may occur for fairness reasons.

If the lawyer opposing your former client wants you to give evidence, you must have a valid waiver of solicitor-client privilege and the duty of confidentiality from your former client. Ask opposing counsel to secure a written waiver from your former client. Ask opposing counsel to secure a written waiver from your former client through your former client's new counsel. If opposing counsel obtains a written waiver from your former client, you may give evidence.

In the absence of a written waiver from your former client, you should advise opposing counsel that a court order authorizing your evidence on the ground of waiver by your former client will be necessary. Only then will you be freed from your duties of confidentiality and privilege and be able to answer questions regarding the advice you gave and instructions you received leading up to the settlement.

How can I preserve solicitor-client privilege when communicating with my client using electronic media?

Lawyers should use encryption when transmitting all confidential communications electronically (e-mail and documents).

The use of the standard "privileged and confidential" disclaimer at the top or bottom of a lawyer's e-mail does not make the contents of the e-mail any more "privileged and confidential" than placing those words at the top of a letter. Critical to determining both privilege and confidentiality are the contents of the communication and to who it is sent.

You should avoid blind copying a client on e-mail communications with the opposing counsel. It is all too easy for the client to press "Reply All" and send a confidential response to the opposing lawyer.

The CBA's *Guidelines for Practising Ethically with New Information Technologies* set out best practices for using new technologies

"Privilege does not always prevail"

Slayton, Philip, *Canadian Lawyer*, June 2011, pp. 18-19

It's déjà vu all over again.

The federal government is once again trying to force the legal profession to comply with the country's money laundering and terrorist financing rules. Canada's lawyers are fighting back, arguing that solicitor-client privilege, the profession's right to regulate itself, ethical considerations, and anything else they can think of, stand in the way. We've seen it all before.

The imbroglio started in 2000, when Parliament passed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. Regulations under the Act required lawyers, and financial institutions, brokers, casinos, and others who handle cash, to report suspicious financial transactions to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). Lawyers went nuts. Several provincial law societies ran off to court, arguing that the regulations forced lawyers to act inconsistently with their constitutional duties of loyalty to a client and confidentiality. In 2001-02 courts across the country accepted these arguments and exempted the legal profession from the reporting requirements. In 2003 the federal government reluctantly removed lawyers from the list of those who must report suspicious cash transactions, but warned it was going to try and figure out some other way of roping lawyers in.

Hoping to head off further action by the government, all law societies adopted a model rule developed by the Federation of Law Societies of Canada. This rule prohibited lawyers from accepting more than \$7,500 in cash, subject to limited exceptions, and required them to adopt more stringent record keeping of cash receipts.

Meanwhile, there was pressure on the government to do something. In 2004, the auditor general said the exemption for lawyers was a “serious gap” and allowed crooks to bypass a key component of the anti-money-laundering system. An academic study that year reported that lawyers had played a role in half the major money-laundering and proceeds-of-crime cases solved by the RCMP from 1993 to 1998. A 2005 RCMP report said lawyers are left “bearing the brunt of increasingly desperate criminals with vast sums of dirty drug cash needing conversion into something that can be spent without arousing suspicion.” In 2006, the Senate Banking, Trade, and Commerce Committee recommended the government monitor lawyers for suspicious transactions. The Financial Action Task Force, an international body combating money laundering and terrorist financing, expressed dissatisfaction with Canadian efforts.

In 2007, the government proposed new regulations, which required lawyers to keep information that verified their clients’ identities and allowed FINTRAC to audit lawyers’ files to ensure compliance. There were lengthy consultations with the legal profession that initially went well. But after considerable back and forth, the government and the profession could not agree. Now the government apparently intends to go back to court to try and reverse the court decisions of 10 years ago. The battle lines have been drawn again, pretty much in the same place as before.

What a dismal story! Two stubborn adversaries have been unable or unwilling to forge a decent compromise, and are resuming legal fisticuffs after a 10-year stalemate. The litigation could easily end up at the Supreme Court of Canada, which means it will be years before it is finally resolved. No one is well served by this.

Lately lawyers are saying the government is indirectly attacking the profession’s power of self-regulation, but I don’t see that. The government has legitimate concerns. Money laundering and terrorist financing are a national and international problem. A few Canadian lawyers have participated in these criminal activities, hiding behind solicitor-client privilege. On the other hand, the principle of solicitor-client privilege is central to what a lawyer does and must be appropriately guarded. There are two opposing considerations, but surely it is possible to reconcile them.

The key is to develop a precise definition of a suspicious financial transaction that must be reported. FINTRAC has identified a number of money laundering and terrorist financing “typologies.” For example multiple cash deposits in a short time and below the reporting threshold, alternating between bank branches or ATM’s, followed by cash withdrawals; large cash deposits by various individuals in different locations followed by electronic fund transfers to foreign countries, often in Asia; numerous electronic fund transfers to one money services business and associated individuals from someone in a country of concern. These and many other so-called typologies are clearly associated with money laundering or terrorist financing. What plausible argument is there that the principle of solicitor-client privilege should exempt a lawyer reporting such activity to the authorities?

It is well understood that a clear and important public interest may trump the principle of solicitor-client privilege. The Supreme Court of Canada found this to be so in the 1999 case of *Smith v. Jones*. The issue there was whether a psychiatric report commissioned by a defense lawyer, which said his client was likely to assault and possibly kill prostitutes, was subject to solicitor-client privilege. The Court decided the danger to public safety justified setting aside privilege. Three factors, it said, should be taken into consideration in determining whether public safety justified setting aside privilege. Three factors, it said, should be taken into consideration in determining whether public safety outweighs solicitor-client privilege: (1) Is there a clear risk to an identifiable person or group of persons? (2) Is there a risk of serious bodily harm? (3) Is the danger imminent?

It is doubtful (but not impossible) that a lawyer’s suspicion of money laundering or terrorist financing will meet the *Smith v. Jones* “clear, serious and imminent” test. But the accepted public-safety exception to solicitor-client privilege does not always prevail. The legal profession and the government would do us all a favour if they stopped grandstanding, went back to the negotiating table, and worked out a compromise which could easily be based on a precise definition of “suspicious financial transaction.”

[**Note:** See Part 1.0 Introduction, subtitle 6.(b)(v).]

"Defendant's Email to Wife Wins Conviction Reversal: Because Sent to His Lawyer, It was Privileged"

Neil, Martha, www.abajournal.com, 06 July 2011

An email from a husband to his wife discussing trial strategy in his criminal case has won a reversal of his conviction in a divided ruling from the Connecticut Supreme Court.

Because the email was forwarded [i.e., copied] by the defendant to his attorney, it was privileged. And, although a prosecutor apparently had no intention to violate the attorney-client privilege when he read the email after receiving it amidst the contents from a search of the defendant’s computer, trying the case to verdict thereafter created a “taint” that is “irremediable”

on retrial and requires reversal, the court says in an opinion that is to be officially released later this month.

“We conclude generally that prejudice may be presumed when the prosecutor has invaded the attorney-client privilege was intentional,” the majority says.

“We further conclude that the state may rebut that presumption by clear and convincing evidence. Finally, we conclude that, when a prosecutor has intruded into privileged communications containing a defendant’s trial strategy and the state has failed to rebut the presumption of prejudice, the court, *sua sponte* [of its own accord], must immediately provide appropriate relief to prevent prejudice to the defendant.”

A dissenting opinion argues that the majority took “a radical and wholly unjustifiable departure from settled Sixth Amendment principles” in dismissing the case against Patrick Lenarz.

“Until today, no federal or state court in this country ever has presumed a Sixth Amendment violation on the basis of a government’s unintentional breach of the attorney-client relationship and no federal or state court ever had dismissed criminal charges due to such a breach. Indeed, until today, this court never has ordered the dismissal of criminal charges as a remedial measure,” Justice Richard N. Palmer wrote in the dissent.

"Lawyers face higher standard over privacy"

McKiernan, Michael, *Law Times*, 23 January 2012
[excerpt]

Lawyers and law firms face a higher standard in dealing with personal information, according to the counsel for an insurance defence firm rebuked by a Federal Court judge for breaching the privacy of an opposing litigant ... [by] web site posting.

Toronto-based Zarek Taylor Grossman Hanrahan LLP was ordered to pay Yolanda Girao \$1,500 plus \$500 in costs after Federal Court Justice Richard Mosley found the firm had disclosed her personal information by posting a report of findings by the privacy commissioner of Canada alongside a covering letter that identified her as the applicant.

. . . .

Girao’s dispute with Allstate dates back to a 2002 car accident. Allstate made a payment related to the crash, but Girao went after a declaration [via arbitration] that she had suffered catastrophic impairment, something that would have increased her entitlement.

Allstate refused to increase the benefits based on a 2006 assessment that indicated she didn't meet the threshold for catastrophic impairment, something that would have increased her entitlement.

Before the arbitration, Girao underwent a number of assessments performed by medical professionals in Ontario. Allstate sent the reports to the United States for review by medical consultants there with expertise in designations for catastrophic impairment.

That prompted Girao to file a complaint with the privacy commissioner in December 2007 against Allstate for disclosing her personal information to the consultants without her consent.

In a February 2009 report of findings, the privacy commissioner found Girao's complaint wasn't well founded and that her consent was implied based on the fact that she had initiated the arbitration that put her medical history at issue.

Believing it was a notable decision, Zarek Taylor Grossman Hanrahan posted the privacy commissioner's report on its web site.

"Lawyer alleges LSUC probe violates solicitor-client privilege Charter rights"

Sebesta, Kendyl, *Law Times*, 12 March 2012

[*excerpt*]

A Toronto lawyer has filed a constitutional motion against the Law Society of Upper Canada alleging the regulator violated the Charter of Rights and Freedoms by compelling the production of solicitor-client communications during an investigation into her conduct.

Jodi Lynne Feldman appeared before a three-member panel at the law society last week after the regulator issued a notice of application against her for professional misconduct.

The law society alleges Feldman had engaged in sharp practice by failing to contact the solicitor representing the spouse of her client, B.K., before obtaining an uncontested order for divorce, by attempting to deceive the court, by understating B.K.'s income in an affidavit, by acting unkindly towards opposing counsel, and by failing to tell the other lawyer about the divorce order and B.K.'s subsequent remarriage. None of the allegations have been proven.

During the course of an investigation into Feldman's conduct the law society sought a production order for all communications between her and B.K. as it related to the alleged misconduct in question.

The investigation included interviews during which Feldman was required to answer questions that revealed the substance of her communications with B.K.

In January, Feldman brought a motion for an order finding the mandatory production of the privileged information violated s.7 and 8 of the Charter. She also alleged s. 49.3 and 49.8 of the Law Society Act violated the same Charter provisions and sought an order returning all solicitor-client communications to her with any copies being destroyed.

In addition, Feldman is seeking to prevent the law society from relying on the privileged communications and a stay of the proceedings.

“One e-mail led to the investigation of Ms. Feldman,” said Michael Lacy, Feldman’s counsel at the hearing into the constitutional motion, on March 6 [2012].

“They were able to carry out the investigation and fulfill their mandate without breaking the solicitor-client privilege and they chose not to do so. The factual record at hand doesn’t support their investigation and there are several constitutional deficiencies within it.”

Lacy argued, among other things, that the law society’s request for documents was grounded in a low threshold. He also said no mechanism was available to challenge the law society on whether the documents were absolutely necessary.

“The law society didn’t carry out the act in a constitutional way. The panel must either accept the [involved] Act is unconstitutional or the manner in which they carried out their investigation is unconstitutional. Either way, the Act only allows for the interference of privilege when it is absolutely necessary.”

But Helen Daley, counsel for the LSUC in the matter, pointed to case law affirming the law society’s ability and power to violate solicitor-client privilege when necessary to protect the interests of the public and the client in question.

“The law society isn’t out with an axe chopping down clients’ privileges,” said Daley last week. “In fact, it is recognized by the Supreme Court of Canada for protecting solicitor-client privilege and is named custodians of the public interest.

There is a need to look at privileged information in some circumstances to protect the public and the law society is on the client’s side in this relationship.”

Daley added the panel shouldn’t operate on the assumption that the law society would abuse such powers or operate unethically simply because the possibility of doing so exists.

“The law society doesn’t seek to review privileged information if it is unnecessary, but privileged information cannot restrict the investigation.”

But several members of the panel and opposing counsel took issue with Daley’s position during the motion. The panel pointed to concerns over the manner in which the law society approached the protection of solicitor-client privilege and questioned why it requested and accessed e-mails occurring outside the time frame in which the alleged misconduct took place.

But Daley argued there wasn’t any evidence to suggest the LSUC carried out the investigation in an “unnatural way.”

Mr. Feldman likely over-interpreted what was requested in the letter and sent more information than was necessary,” said Daley.

“It wasn’t privileged information but rather information shared between lawyers that was related to the divorce. In this particular case, it was necessary to examine all the client files, but in other cases it may not be.”

Daley added that information disclosed to the law society in the course of its investigation to protect clients like M.K. doesn’t undermine the purpose of protections for solicitor-client privilege.

The panel has reserved its decision on the motion.

"Speaker's Corner: *Amato v. Welsh*[:] Absolute privilege not so absolute anymore"

Mathai, Sunil, *Law Times*, 02 April 2012

The Merriam-Webster dictionary defines the word absolute as “having no restriction, exception, or qualification.”

Fittingly, the word absolutely was used to define the privilege enjoyed by lawyers, amongst others, from any liability for comments made during a judicial proceeding.

So sacrosanct was this principle to the administration of justice that courts have held that claims by third parties against lawyers for comments made during a judicial proceeding “must be stopped at once.”

Despite what has historically been seen as a privilege without exception, the Divisional Court, ruling in *Amato v. Welsh*, permitted a claim to proceed as a possible exception to absolute privilege.

In a split decision, the majority held that in the unique facts of the case, it was impossible that a court could find that the defining principle of the duty of loyalty trumps the “indispensable attribute” of absolute immunity.

In *Amato*, the plaintiffs commenced an action against their former solicitors and law firm for a breach of fiduciary duty, negligence, and breach of the duty of loyalty. The plaintiffs were the victims of an alleged Ponzi scheme.

They loaned money to the perpetrators of the scheme on the promise of returns of approximately 25 per cent. The alleged perpetrator of the scheme retained the defendant law firm and recommended that the plaintiffs also do so.

Subsequent to the retainer, the Ontario Securities Commission initiated an investigation into the scheme and interviewed the alleged perpetrator in the presence of counsel from the defendant law firm.

The plaintiffs allege that, during the interview with the alleged perpetrator, the solicitor failed to advise the OSC of the plaintiffs' existence despite being aware that the defendant was operating a Ponzi scheme.

The plaintiffs claimed that had the defendant solicitor disclosed their existence, the OSC would have discovered the Ponzi scheme earlier and reduced the losses suffered. None of the allegations have been proven in court.

The defendants brought a Rule 21 motion to strike the pleading on the basis of absolute privilege. The defendants argued that the statement of claim contained pleadings that relied solely on what the defendant solicitor did and didn't say during the course of the interview.

At first instance, the court dismissed the defendant's motion. [On appeal] Justice Alexandra Hoy (now of the Court of Appeal), writing on behalf of the majority of the Divisional Court, held that the duty of loyalty owed by the defendant law firm to the plaintiffs could, in fact, trump absolute privilege.

Noting that earlier Ontario jurisprudence had held that the doctrine of absolute privilege didn't preclude a former client from suing a solicitor for negligence during the course of a judicial proceeding, Hoy held that it wasn't "plain and obvious" that absolute privilege precluded an action in the circumstances.

The minority decision, penned by Justice Peter Hockin, distinguished the earlier jurisprudence on the basis that "absolute privilege cannot protect [a] lawyer from claims of negligence or breach of fiduciary duty in the representation of a client, if it is that client whom the lawyer represented before the tribunal or court.

"That is not the case here. As the plaintiffs were third parties to the retainer in terms of the OSC investigation, they couldn't claim liability for the conduct of the solicitor during the course of it."

The split decision represents the flipside of the interpretive coin of the duty of loyalty. On the facts of the case, the majority decision interprets the duty as including an obligation to protect the plaintiffs' interests despite the fact they hadn't retained the defendant law firm for the OSC investigation.

Underlying the majority's decision is an expansive view of the plaintiffs' retainer with the defendant law firm to continue to represent the best interests of the plaintiffs during it.

The minority decision, on the other hand, interprets the duty of loyalty as solely to the alleged perpetrator. The defendant law firm had a duty to zealously represent the alleged perpetrator without any divided loyalty.

The defendant law firm has sought leave to appeal ... [to] the Court of Appeal. It has yet to render a decision on leave.

“Lawyers Could Blow the Whistle on clients to stop ‘financial harm’”

**Schmitz, Cristin, *The Lawyers Weekly*, 20 August 2010, pp. 3, 5
[excerpt]**

Canada’s 14 law societies are considering relaxing their stringent confidentiality rules to allow lawyers to blow the whistle on clients who may be poised to commit fraud, or otherwise unlawfully inflict “substantial financial injury,” on individuals.

This summer an advisory committee of the regulator’s national coordinating body, the Federation of Law Societies of Canada (FLSC), proposed a draft model rule of conduct that would permit lawyers to set aside their time-honoured professional duty to keep client information confidential “when lawyer believes on reasonable grounds that there is an imminent risk of ... substantial financial injury to an individual caused by an unlawful act that is likely to be committed, and disclosure is necessary to prevent the injury”

The proposal to amend the umbrella group’s model Code of Professional Conduct (an ethical code which is purely advisory) stresses that any such disclosure would be discretionary—not mandatory—and that lawyers could only disclose as much confidential information as required to prevent the anticipated financial injury.”

The proposed “future financial harm” exception to lawyer confidentiality—which now exists in various forms in many U.S. states—would break new ground in Canada if it is ultimately embraced by individual law Societies as part of their professional conduct rules.

Although the proposed model rule was put forward at the FLSC’s council meeting June 7 in Ottawa, the council deferred voting until its Sept. 23 meeting to give its members time to consult their law societies.

The Committee’s proposed model rule was inspired by similar changes in 2003 to the American Bar Association’s (ABA) Model Rule, which were triggered in turn by massive corporate failures and regulatory changes.

“No Canadian rule of professional conduct expressly addresses disclosure of confidential information to prevent financial harm,” the advisory committee says in its June 2 report advocating the proposed exemption.

“The committee agreed that Canadian legal regulators should not modify our ethical rules merely because of an American initiative born out of the failure to regulate other industries.

However we recognized that in some rare circumstances, pure financial injury could have devastating consequences for individuals,” the committee explains.

“Current ethical rules allow lawyers to disclose confidential information where necessary to protect the lawyer’s financial interests in fee collection. In the rare case where a lawyer could prevent very significant financial harm by limited disclosure, but was ethically prohibited from doing so, the public interest would not be served. Further the public’s perception of lawyers and the role we occupy in the legal system might suffer if we are seen to rank our own interests above the public interest.”

Notably the proposed model rule [amendment] would leave it up to individual lawyers to decide whether to disclose confidential client information in order to prevent financial harm. Whether disclosure should be mandatory or permissive was contentious, with the committee splitting 4-1 in favour of leaving it “to the lawyer’s exercise of discretion and good judgment.”

The draft (FLSC) model rule [amendment] is, in one sense, narrower than the ABA model rule which endorses disclosure not only to prevent, but also to mitigate or rectify, financial harm. ..., the committee also chose not to limit its proposed rule to situations involving “fraud” or “crime”[;] instead setting the threshold at preventing substantial financial injury from an “unlawful act” which may include criminal, quasi-criminal or fraudulent acts that are contrary to criminal, regulatory or civil law.”

[**Note:** The draft amendment continues to be under consideration by the Federation of Law Societies of Canada.]

3.3.3 Negotiations

Seganfredo v. Seganfredo

2010 CarswellOnt 9760, Ont. Sup. Ct. J., Corrick J.
[Headnote]

Parties separated in 2004 after two-year marriage—Wife commenced matrimonial proceedings, and husband’s answer sought equalization of net family property, specifically referencing certain property—Parties entered into consent order in 2006 in which they agreed that “all issues in this application” be referred for mediation/arbitration, and signed mediation/arbitration agreement one month later—Agreement contained provision that parties agreed to not commence any proceedings before any court regarding matters dealt with in agreement, except in case of emergency—All property and equalization issues were to be dealt with by mediator/arbitrator—In 2009, wife transferred her interest in two properties to her parents—In 2010, husband issued statement of claim alleging fraudulent conveyance of properties by wife to her parents, and obtained *ex parte* injunction and certificates of pending litigation—Wife brought motion for order staying proceeding on basis that issue was to be dealt with pursuant to mediation/arbitration agreement—**Held:** Motion granted—Core issue was whether claims advanced by husband fell within terms of agreement—Issues submitted to arbitrator were framed in very broad language, specifically “all property and equalization issues”—Arbitrator was required to determine ownership of properties to determine equalization claim, and ownership of properties [involved in the equalization] was at issue in husband’s claim—While agreement did not relate specifically to fraudulent conveyance, improper assignment or preference, or claims for damages, these claims arose directly out of issues that were submitted to arbitrator—Since matrimonial property dispute arose before parties entered into agreement, s. 59.4 of Family Law Act did not apply—Husband was at liberty to add wife’s parents as parties to mediation/arbitration pursuant to agreement between parties—Husband’s proceeding was stayed.

"Settlements and Agreements Between Counsel"

McLeod, James G., and Mamo, Alfred A., *Annual Review Of Family Law 2011* (Toronto: Carswell, 2012), pp. 797—800
[excerpt]

[1] As a general rule, settlements of pending litigation between counsel acting within the scope of their retainer all be upheld in order to maintain the integrity of the settlement

process, regardless of whether the agreement meets the formal requirements under the local domestic contract legislation.

- [2] In Alberta, a property agreement, whether negotiated between the parties or their lawyers, apparently has to be in writing and contain a declaration of ILA [independent legal advice] to be enforceable: *Grant v. Jovic*, 2005 CarswellAlta 577, 2005 ABQB 323 (Q.B.)
- [3] A lawyer negotiating with self-representing litigant should ensure that the other party understands the nature and effect of the agreement and exchange full financial disclosure: *C.F. Davis v. Davis*, 2003 CarswellOnt 2800 [2003] O.J. No. 2938, 44 R.F.L. (5th) 200, 2003 CarswellMan 527, 2003 MBCA 158 [2004] 6 W.W.R. 454, 180 Man. R. (2d) 223,310 W.A.C. 223, 234, D.L.R. (4th) 525 (C.A.) (problems negotiating with self-represented spouse).
- [4] Although a court will not complete an incomplete settlement, if the parties settled a case in substance but left open a few minor things, a court may be willing to finalize the arrangement: *Chan v. Lam*, 2002 CarswellOnt 901, 24 R.F.L. (5th) 327, 157 O.A.C. 264 (C.A.); additional reasons at 2002 CarswellOnt 1850 (C.A.); leave to appeal refused 2002 CarswellOnt 4382, 2002 CarswellOnt 4383, 307 N.R. 199 (note), 180 O.A.C. 396 (note) (S.C.C.)
- [5] A lawyer who negotiated a domestic contract for a client may end up as a witness if the agreement comes under attack. If that happens, he or she cannot continue to represent the client. In *Lepold v. Lepold*, 1999 CarswellOnt 1837, 48 R.F.L. (4th) 388 (C.A.), the Court of Appeal held that a person could not compel his or her spouse's lawyer to testify in such circumstances unless the spouse consented, because doing so would breach privilege, even if the spouse was relying on his or her intention and/or understanding at the time of the agreement to set aside or override the agreement.
- [6] There is a difference between when an offer to settle expires so that it can no longer be accepted under general contract law and the Ontario Rules of Civil Procedure: *Scanlon v. Standish*, 2002 CarswellOnt. 128, [2002] O.J. No. 194, 155 O.A.C. 96, 57 O.R. (3d) 767, 24 R.F.L. (5th) 179 (C.A.) (different effect of counter offers); but see *Grant v. Jovic*, 2005 CarswellAlta 577, [2005] A.J. No. 491, 2005 ABQB 323, [2006] 3 W.W.R. 304, 53 Alta L.R. (4th) 332 379 A.R. 286, 23 R.F.L. (6th) 286 (Q.B.) where an application for summary judgment to enforce an offer accepted so as to settle three different proceedings was granted.

Mediation Settlements

**Glaholt, Duncan W., and Rotterdam, Markus, *The Law of ADR in Canada* (Markham [ON]: LexisNexis, 2011), pp. 16, 18
[excerpt]**

In order to avoid any conflict with their regulatory bodies, lawyers acting as mediators must at the outset of the mediation ensure that the parties to the mediation understand that the lawyer is not acting as a lawyer for either party, but solely as mediator, to assist the parties to resolve the matters in issue, and that although communication pertaining to and arising out of the mediation process may be covered by some other form of privilege, they are not covered by the solicitor-client privilege.

....

The lawyer as mediator must not purport to give legal advice to a party, but, if the parties jointly request this, can provide legal evaluation of the issues to independently represented parties with their counsel's consent as part of the mediation process. A lawyer/mediator should suggest and encourage the parties to seek the advice of their own legal counsel before entering the mediation process, or at least entering into binding minutes of settlement. Where, during the mediation process the lawyer/mediator prepares a draft contract of settlement for the consideration of the parties, the lawyer/mediator should expressly advise and encourage them to seek separate independent legal advice. Mediators must take special care when mediating a dispute between unrepresented parties, as the lines between mediation and legal advice may become blurred.

“Duty to Disclose Material Facts: Annotation to *D'Andrade v. Schrage*”

**Epstein, Philip M. [Editor of Reports of Family Law] (2011) 99 R.F.L. (6th) 80
[excerpt]**

Across Canada, but particularly in British Columbia and Ontario, moving to set aside prenuptial agreements or marriage contracts is common. Although the courts have examined carefully the effect of incomplete or inaccurate financial disclosure and the consequences that flow therefrom, [2011 CarswellOnt 1292 Ont. S.C.J., H.Sachs, J.] until this case, no court in Canada has dealt with the impact on a marriage contract where non financial information is concealed.

This case raises, for the first time, we think, the issue of whether a marriage contract should be set aside because, unbeknownst to the husband, on the day the wife signed the

contract, she was having an affair and was contemplating separation. The parties had signed a series of marriage contracts prior to the last one [the December agreement] being signed, and when the husband learned of the affair he precipitated a separation. There was no dispute that the affair was ongoing at the time that the wife signed the marriage contract and, at the same time, she was thinking of separating.

The husband argued that the contract should be set aside because marriage contracts are contracts of *uberrima fides*, that is, a contract of “*utmost good faith*”. Thus the central issue in this case is whether the concealment of an affair prior to or during the negotiation of a marriage contract can be a vitiating element with respect to that contract. Justice Harriet Sachs of the Ontario Superior Court of Justice, an experienced judge in the family law field, does a careful analysis of the problem and concludes that the wife was under no obligation to disclose the affair to the husband in the particular circumstances of this case. With the greatest of respect, we disagree.

. . . .

I think the real issue in this case is whether the wife’s affair was a material fact. If it was a material fact then it had to be disclosed. A contract *uberrima fides* requires full communication of all material fact now to the parties.

The husband was deprived of the opportunity to make an informed decision as to whether he should confer further benefits on the wife in the new agreement. There is no doubt whatsoever that had he concealed significant assets, the wife would have been able to argue that the failure to disclose vitiated the contract.

Justice Sachs says the following:

Domestic contracts are financial arrangements. Subject to certain very limited exceptions (e.g. the Part II rights under the Family Law Act and child support) couples are given the freedom to “opt out” of the financial obligations that the law would impose on them if they did not have a domestic contract. When negotiating such a contract couples have absolute obligation to disclose anything that would be relevant to the purpose of the contract. Since the purpose of the contract is financial, that obligation demands the utmost good faith and fair dealing in disclosing their financial positions. The obligation does not extend to disclosing the existence of an extra-marital affair or the intention to separate.

Respectfully, I can think of no logical or legal reason to limit the duty of disclosure to financial matters. Section 56(4)(c) does not limit disclosure and is separate and distinct from s. 56(4)(a). While I appreciate Justice Sachs likely felt on the edge of a slippery slope were she to find the non-disclosure of the affair was a vitiating element, in the particular circumstances in this case. I think it was.

While it would not have been relevant had the wife not been negotiating greater benefits under the December agreement than previous agreements (clearly there is no duty to disclose an affair during the course of the marriage), since the husband here was taking on significant extra

financial obligations, he was entitled to know all of the relevant information. Remember, the wife actually had her lawyer to consider whether she was better off under the old contract or the new one. In the words of the English Court of Appeal, the affair “*cried out for disclosure.*”

In the meantime, counsel should be cautious about marriage contracts and this additional pitfall. Clients who decide to conceal an affair while negotiating a marriage contract need to be concerned that another court on another day might not see this in the same way as Justice Sachs. Obviously, human nature being what it is, too much candor can destroy the chances of the successful negotiation of a marriage contract or a marriage for that matter. On the other hand, insufficient candor may doom the marriage contract to being set aside.

Blustein v. Blustein

2011 CarswellOnt 2787 (Ont. Sup. Ct. J. [Div. Ct.]), Sachs J. (for the Court), Wilton-Siegel and Lauwers JJ.
[Headnote]

Parties had submitted their matrimonial dispute to arbitration—Husband brought application for judicial review of arbitrator’s decision for lack of jurisdiction—On December 8, 2010, husband’s application was quashed—Husband brought motion to set aside or vary order—**Held:** Motion dismissed—Husband was ordered to pay costs of \$6,322.35—There was nothing in Family Law Act that required parties to proceed with arbitration—Arbitrator was not appointed pursuant to any legislation—Parties exercised their choice to enter into private consensual agreement to resolve their dispute outside of courts—Judge correctly found that arbitrator’s authority was agreement from parties to give him authority to resolve their dispute—Judge correctly concluded that arbitrator was not exercising statutory power of decision.

B. (L.H.) v. B. (B.M.)

2011 CarswellBC 1816 (B.C. S.C.), P.J. Rogers J.
[Headnote]

Parties married in 1996, had one child, separated in 2006, and divorced in 2008—Consent order provided that child live primarily with wife, and that husband pay spousal support of \$700 per month—Since divorce order, wife retrained as counselor, but at time of hearing had not yet attracted paid employment—Husband’s income was unchanged at \$45,000 per year—Husband brought application for order declaring that his obligation to pay spousal support to wife was terminated by agreement between parties—**Held:** Application granted—Husband’s obligation to pay spousal support was terminated—It was declared that parties entered into binding agreement relating to payment of spousal support—Exchange of letters between counsel leading up to agreement comprised complete written record of agreement to continue spousal

support to certain date and to terminate it after that date—Nothing further was required to render agreement enforceable—It could not be said that wife’s offer was conditional on her being employed by that date.

Heim v. Heim

2011 CarswellOnt 55, Ont. Sup. Ct. J., C. McKinnon J., 06 January 2011
[Headnote]

Parties began living together in September 1978, married on September 1, 1982, and separated on June 22, 2007—Parties had no children together—following separation, there were many attempts to resolve issues amicably—Minutes of settlement were completed at case conference on September 20, 2010—Following case conference, husband insisted it was not his intention to sign document by which he would assume 50 per cent of joint line of credit—Wife brought motion for summary judgment based on agreement—**Held:** Motion granted—Summary judgment was issued, enforcing terms of agreement—Husband’s professed mistake could not lead to rescission of contract between parties—No reference needed to be made to recommendations of case conference judge, as agreement was simple and completely unambiguous—Minutes of settlement were signed by both parties and witnessed by both lawyers—There was no evidence that wife and her solicitor had any inkling that husband and his solicitor were signing agreement based on mistake, nor did they take advantage of any mistake—Further, neither party failed to disclose significant assets and both parties understood nature and consequences of agreement—In context of entire case, settlement was fair.

"Litigating contracts: If it's broke, rectify it"

Daley, Helen, *The Lawyers Weekly*, 11 March 2011, p. 13
[excerpt]

While corporate solicitors strive for clarity and accuracy in drafting commercial contracts, that goal is not always achieved. What should counsel do when the draftsman (and the contracting parties) err, a contractual dispute arises and the language of the contract fails to properly address the parties’ intentions?

One possible solution is the equitable remedy of rectification. Under the law of rectification, counsel must distinguish between a mistake in the underlying agreement or transaction itself, as opposed to a mistake in the way that the transaction has been expressed in writing. It is only the latter type of mistake that attracts the rectification remedy.

In *Snell's Principles of Equity* (London: Sweet & Maxwell Ltd., (2000)) the distinction is described this way: "Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of the contract."

As recently expressed by Justice Ian Binnie on behalf of the Supreme Court of Canada in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] S.C.J. No. 20, "Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly."

If the transaction itself is affected by some form of mistake (either mutual or unilateral) pertaining to some aspect of the contract (be it subject matter or contractual terms), then rectification is not available, and counsel will have to litigate whether a contract exists and on what terms.

To obtain the rectification remedy, the parties seeking it must establish three elements:

1. The existence and nature of a common intention by the parties prior to the making of the document or instrument which contains the error of deficiency;
2. The common intention remained unchanged on the date the document or instrument was made; and
3. The document or instrument, by mistake, does not conform to the parties' prior common intention (see *Wasauksing First Nation v. Wasausink Lands Inc.*, [2004] O.J. No. 810 (Ont. C.A.)).

Salminen v. Garvie

2011 CarswellBC 617 (B.C.S.C.), Williams J.
[Headnote]

Parties began living together in March 1996, married on September 27, 1997, and separated on March 7, 2009—Parties had no children together—Before trial, parties came to agreement via [a series of five] email[s]—Office of wife's lawyer [then] drafted order and sent it to husband's lawyer—Husband's lawyer found that draft order did not match terms of agreement [to conform to husband's understanding of the settlement via e-mails; rather, amounted to counter proposal]—Husband's lawyer therefore advised wife's lawyer that draft order was unacceptable, and proposed certain changes to that draft order—Wife's lawyer sent letter withdrawing "offer" [being the contents of the draft order her lawyer had prepared and sent to husband's lawyer]—Husband brought application to stay proceedings and to make order in terms of settlement reached between parties [via emails]—Application dismissed—Final [of the five] email[s] was, on its face, agreement between parties—However, email was rendered unenforceable due to ensuing events—[Those events consisted of] parties' actions, [through

correspondence exchanges of their respective lawyers] shortly following conclusion of last [the fifth] email was construed as their termination of otherwise enforceable contract—Document prepared by wife's lawyer contained deviations from emails agreement—Accordingly, when draft order was sent to husband's counsel, it did not accurately reflect what parties agreed upon [in the emails]—What occurred was repudiation on wife's part—Husband accepted wife's repudiation, and thereby terminated agreement, when he replied by way of counter-proposal.

“Independent Legal Advice”

**McLeod, James G. and Mamo, Alfred A., *Annual Review Of Family Law 2010*
(Scarborough: Carswell, 2011), pp. 783-785
[excerpt]**

- [1] In some jurisdictions, a domestic contract is invalid or unenforceable unless the parties had independent legal advice.
- [2] The fact a person had independent legal advice minimizes the risk of mistake, undue influence, etc.
- [3] That a party may have had independent legal advice during the negotiations will often be sufficient to ensure he or she understood the nature and effect of an agreement even if he or she did not have a lawyer at the time.
- [4] The presence or absence of independent legal advice also appears to be a significant consideration in a court's decision to maintain or override a support agreement under the *Divorce Act* or a property agreement pursuant to provincial legislation providing an override power, pursuant to the thresholds established by the Supreme Court of Canada.
- [5] A lawyer negotiating with a self-represented party should emphasize that he or she is not providing advice to the self-represented person, to reduce the risk the self-represented spouse might think that the lawyer is somehow protecting his or her interests as well.

3.4 Relationships with Clients—Personal

"Total ban on sex with 'patients' applies to spouses"

Schmitz, Cristin, *The Lawyers Weekly*, 19 February 2010, p. 3
[excerpt]

Regulated health care providers have known for 16 years that they cannot sexualize their professional relationships but the Ontario Court of Appeal recently warned them that they cannot professionalize their sexual relationships either. In its third ruling in five years on Ontario's "zero tolerance" rule, the appeal court ruled Feb. 2 that even if a regulated health care provider's sexual relationship with a partner predated their professional relationship, that provider has committed sexual abuse and risks losing his or her license for at least five years. In other words, if you are having sex with someone, including a spouse, and then start giving them health care, you are committing sexual abuse unless the care you provide is only "incidental" in the sense of being "minor in nature, casual, or arising in a fortuitous conjunction with a spousal relationship."

The decision applies to 23 professions and tens of thousands of health care providers governed by *Ontario's Regulated Health Professions Act*, including audiologists, speech therapists, dental hygienists, denturists, dieticians, massage therapists, medical lab technicians, midwives, nurses, physicians, occupational therapists, opticians, optometrists, pharmacists, physiotherapists, psychologists and respiratory therapists.

Kam v. Hermanstynne

2011 CarswellOnt 1487 (Ont. Ct. of J.), Spence, Robert J., 04 March 2011
[paras. 1-3; 14; 17-19]

1 This is the applicant mother's motion for an order removing the respondent father's solicitor of record. The applicant and the respondent are the parents of two children. The mother now has an order granting her final sole custody. The father's access is currently supervised, although he is seeking unsupervised access. Apart from the issue of access, the mother is seeking both an increase in child support as well as arrears of child support.

2 The father and his lawyer have a romantic relationship and are cohabiting within that relationship. Either at trial, or in out-of-court questioning, the mother will be seeking to elicit evidence about the father's lifestyle in connection with both the access issue as well as the support issue. To that end, mother's counsel may wish to call the father's counsel as a witness in this proceeding, as she has knowledge of the father's lifestyle.

3 The issue in this motion is whether, in all the circumstances, the father's lawyer should be permitted to continue to act for her client, or whether it is necessary, in the interests of the administration of justice, to make an order removing her as the respondent's solicitor of record.

. . . .

14 In *McWaters v. Coke*, 2005 ONCJ 73, 16 R.F.L. (6th) 271, [2005] O.J. No. 996, 2005 CarswellOnt 989 (Ont. C.J.), Justice Marvin A. Zuker was faced with a motion to remove counsel from the record because he was the husband of the applicant. Justice Zuker's reasons are cited below in their entirety:

The reasons for my decision are as follows:

[1] The court must weigh the potential for any breach of a lawyer's fiduciary obligations to his or her client and any likely confusion of his or her personal and professional roles.

[2] The court must consider a lawyer's personal involvement and whether that may impair his or her—in this case his—professional judgment.

[3] The solicitor-and-client relationship is a fiduciary one and a lawyer's obligation is heightened if a client is emotionally vulnerable to the extent that the client's ability to make reasoned judgments about the future is affected.

[4] The solicitor-and-client relationship is characterized by the dependence of a client on a lawyer's professional judgment and a relationship may well result from a lawyer's exploitation of his dominant position.

[5] The relationship creates, in this case, the potential, at least, that the lawyer may be called as a witness on behalf of the client.

[6] The fiduciary relationship is one of trust in the client or of a client in his or her lawyer in return for the lawyer's placing the interests of the client ahead of any self-interest of the lawyer.

[7] In these proceedings, the highest standard of ethical conduct is required. The more vulnerable the client, the heavier the obligation that the lawyer has to avoid engaging in any relationship other than that of solicitor-and-client.

[8] The client must be protected against the strong influence to which confidential relations naturally give rise. A solicitor-and-client relationship involves a very high level of trust and confidence. And confidence must not be used to the detriment of the rights of the party bestowing it.

[9] The Law Society's *Rules of Professional Conduct*, in particular subrule 2.04(3), is distinguished. The consent of the applicant is not relevant in these proceedings. A lawyer's freedom of action and judgment is subject to other interests, duties and

obligations. Any counsel is an officer of the court, and he or she must fulfill his obligations as such and to the administration of justice.

[10] Great sensitivity, of course, is required in a family law context. I refer, in particular, of course, to *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, 121 N.R. 1, 70 Man. R. (2d) 241, 285 W.A.C. 241, [1991] 1 W.W.R. 705, 77 D.L.R. (4th) 249, 48 C.P.C. (2d) 113, 1990 CanLII 32, [1990] S.C.J. No. 41, 1990 CarswellMan 233, which refers to an objective standard in making such a determination.

. . . .

17 What I conclude from all of the authorities is that, in the circumstances that exist in the present case, Ms. Da Fonte's role as counsel would be seriously compromised. On the one hand, she is romantically involved with the respondent and understandably wants the same outcome as her romantic partner. It would be unrealistic for anyone to believe otherwise. On the other hand, her professional standards of conduct necessitate that she act in a way that does not adversely affect her judgment in her role as counsel to her client. She must try to maintain her objectivity while, at the same time, being inextricably emotionally intertwined with the respondent and the outcome that the respondent is attempting to achieve in this case. In my view, this is a near-impossible tension to resolve.

18 Further, as an officer of the court, lawyers must always be candid and forthright with the court. The court must at all times have confidence that the lawyer will never knowingly allow false or misleading evidence to be presented to the court. The court must also have confidence that lawyers will answer all questions from the court in a straightforward and honest manner, without having to worry about, or wonder whether there are extraneous considerations that could impair the lawyer's ability to act appropriately.

19 In the present circumstances, the court cannot have that confidence in Ms. Da Fonte, not because the court necessarily believes that she would intentionally mislead the court but, rather, because human nature being what it is, mischief may inevitably result. In my view, Justice Zuker ... [was] correct in deciding that lawyers cannot act for clients with whom they are in an intimate and close personal relationship, and I adopt ... [his] reasoning without reservation.

"Lawyer Is Suspended Over Her Marriage to an Elderly Client"

Neil, Martha, www.abajournal.com, 09 March 2011

Back in 2002, Linda Lowney drafted a will for her client, Thor Tollefsen, that provided for his estate to go to his sister and two nieces in Norway.

But by 2005 the 54-year-old California attorney had become involved with Tollefsen, 85. He gave her \$339,000 with his nieces' consent, and the two got married in January 2006, using a confidential license [but, evidently, did not cohabit], reports *The San Francisco Chronicle*.

Later that year, Tollefsen asked for a divorce, as the couple continued to live separately, and in 2007 he moved into a nursing home and died. Now a State Bar Court judge is calling the marriage a sham and has ordered Lowney, who has been licensed since 1978 and has no prior record of discipline, suspended from practice, the newspaper says.

In a Friday ruling, Judge Pat McElroy said Lowney "took advantage of a lonely, sick old man" and ordered her suspended.

Lowney's lawyer, Jonathan Arons, says McElroy misunderstood the relationship between the two, which was an actual marriage. He says Tollefsen's nieces were paid more than \$339,000 in settlement of a civil suit they filed against Lowney.

"Alcohol Allegedly Served by DUI Lawyer in Client Meeting at His Office Leads to His Arrest"

Neil, Martha, www.abajournal.com, 21 March 2011

A female client says she doesn't remember all of what happened after the Iowa lawyer representing her in a 'driving under the influence' case allegedly served her four alcoholic drinks during a meeting at his office.

However, the unidentified woman says she does recall sitting on the lap of attorney Gerald Moothart at one point, although she is uncertain how she got there and doesn't remember how she got home. Meanwhile, surveillance footage at her apartment showed her being dropped off at 9:55 p.m. by a car that looked like Moothart's, *The Ames Tribune* reported.

After a police investigation, he has been charged with assault with intent to commit sexual abuse, and aggravated misdemeanor.

The article says Moothart denies giving the woman any alcohol, but doesn't include any comment from him or his counsel [regarding consumption by him].

“Lawyer Apologizes to His Wife, a Prominent Judge, for Pressuring Ex-Client to Have Sex with Her”

Neil, Martha, www.abajournal.com, 28 March 2011

A Canadian lawyer says he can never apologize enough to his wife, Queen’s Bench Justice Lori Douglas, for pressuring a then-client to have sex with her eight years ago when she was still in practice.

Jack King says his wife, who is being investigated by the Canadian Judicial Council over the incident, knew nothing about the naked photos of her he posted online and gave to the client at the time, reports *The Canadian Press*.

Said King of Douglas: “She did absolutely nothing wrong other than trust me when she should not have,” reports *The Toronto Sun*. “She tried to indulge me in my strange tastes.”

He pleaded guilty today in a professional misconduct case. Lawyers for both sides suggest that a fine would be an appropriate penalty.

"Client In Love Relationship with Lawyer Gets Better Representation, Lawyer Argues"

Cassens Weiss, Debra, www.abajournal.com, 05 December 2011

A bankruptcy lawyer fighting ethics charges in Connecticut maintains that clients who want good representation may be better off if they are in a romantic relationship with their lawyers.

Zenas Zelotes is appealing a disciplinary panel recommendation that he be presented to the superior court for disciplinary action based on his relationship with a woman he represented in a divorce case, *The Norwich Bulletin* reports. He argues that a ban on intimate relationships with clients is counterproductive and unconstitutional.

“This is aggressive judicial paternalism versus freedom of association,” Zelotes tells *The Norwich Bulletin*.

The Connecticut Law Tribune reported on Zelotes’ case earlier this month. The disciplinary panel said the evidence was insufficient that Zelotes’ relationship with the woman was sexual. (Zelotes had admitted that the relationship was “intimate” but denied it was sexual.)

But the panel found nonetheless that the “burgeoning romantic and intimate relationship” materially limited the representation.

According to the disciplinary panel, Zelotes explained why he thought an intimate relationship with clients is not problematic. “When you are representing someone you have love and affection for, you’re going to work twice as hard and there’s no question about it. It is not a detriment to the relationship,” Zelotes reportedly said. “My advice to a woman going through a divorce is, find a competent trial lawyer and make him your boyfriend.”

Zelotes told *The Norwich Tribune* that the disciplinary panel report was “replete with errors” and he’s willing to take the issue all the way to the U.S. Supreme Court.

Zelotes was previously in the news for filing ethics complaints against more than 500 lawyers who paid a bankruptcy website for client leads. Zelotes tells *The Norwich Bulletin* he has moved to Pennsylvania “for love” and has been representing his fiancée for five years. He also challenged a bankruptcy law barring lawyers from counseling clients to take on more debt.

"Lawyer who had sex with family law client in joint retainer in hot water for disclosure"

Sebesta, Kendyl, *Law Times*, 26 March 2012

In the months after a Kingston, Ont., hockey coach [D.M.] appeared in Jehuda Kaminer’s office with a 14-year-old player in tow seeking to emancipate her from her parents, Kaminer wrestled with whether or not he should tell the man’s wife [he did tell her], who he would later become romantically involved with, about his encounter with the pair.

Kaminer, 64, has admitted to having a sexual relationship with the coach’s ex-wife, J.M. He described the encounter with the coach, D.M., and the girl as a run-of-the-mill event but noted he warned him it was highly inappropriate given the state of the D.M.’s separation from J.M. Kaminer had already been representing both spouses in their separation.

The sole practitioner, who was representing both D.M. and J.M. in their joint separation and subsequent divorce at the time, described what he felt, as he made the decision to disclose the confidential information to J.M., during a hearing before a three-member Law Society of Upper Canada disciplinary panel in Toronto last week.

The girl wasn’t the couple’s child but a hockey player who at one point had been living with them before their separation. D.M. and J.M. have their own 16-year-old child.

“Mr. M. had brought the 14-year-old girl to me to be emancipated from her parents sometime in March of 2006. The girl was living with both Mr. M. and Mrs. M. prior to their separation so that Mr. M. could coach her in hockey, from my understanding.

“I thought the optics were really terrible and told Mr. M. that it wasn’t appropriate given the state of his marriage. I also advised the girl not to live with him. I thought that was pretty good advice, given the situation.”

“I had no idea there was a sexual relationship going on between them at the time.” D.M. faced criminal charges for sexually exploiting and assaulting the 14-year-old girl in June 2006 but wasn’t convicted criminally until 2008.

Several months prior to the criminal charges against D.M., both spouses [D.M. and J.M.] had filed for joint separation and retained Kaminer.

In July 2006, J.M. learned of the criminal charges against D.M. and came to Kaminer seeking an immediate divorce. But Kaminer advised J.M. to wait a year rather than cite abuse or adultery grounds, which he said would be difficult to prove.

Some time thereafter, Kaminer and J.M. began their sexual relationship. It lasted for six weeks. According to a notice of application filed in June 2011 by the law society, disclosing the information—shared among D.M., the girl, and Kaminer—to J.M. in October 2006 while still maintaining a sexual relationship with her amounted to professional misconduct.

The law society also alleges Kaminer acted in a conflict of interest by representing both former spouses while initiating and maintaining a sexual relationship with J.M.

During that time, Kaminer also allegedly failed to obtain a divorce order for the pair; to draft a will for D.M.; and to deposit more than \$2,000 from the pair into his trust account, the LSUC alleges. None of the allegations have been proven.

Pausing to wipe his eyes under his dark-rimmed glasses and speaking softly, Kaminer said that while he admits that engaging in a sexual relationship with J.M. was wrong and immediately stopped corresponding with her one he “woke up” and realized “the state he found himself in,” he had never seen any red flags from the pair to indicate that he should advise them to seek outside counsel at any time.

As for the money he received in trust, Kaminer told the hearing panel he hadn’t intended to put it into his general account rather than his trust account. He said that as a sole practitioner, he always asked people to make cheques out to him.

“You have to appreciate this isn’t easy for me,” Kaminer told the hearing panel during cross-examination of his testimony.

“I told them both right up front that I draw the line with any controversy and if there is any, I will send them right away.”

“Yes, I had a sexual relationship with her and I was in a state of shock when I realized the sorry position I found myself in. So, I just stopped calling her and never told him of the relationship I had with his wife.”

Counsel for Kaminer added during the hearing that Kaminer felt it was necessary to disclose the information to J.M. in order to protect her interests as his client.

But the law society's counsel in the matter, Lisa Freeman, argued Kaminer should have done more.

"The fact is that he had a sexual relationship with a client on the other side of the matter. Mrs. M. wasn't aware that the girl was living with Mr. M. at the time of the separation, and it wasn't the kind of conflict that could have been solved with consent," Freeman told the hearing panel.

"Obviously, it's a family law case and one should know having sex with his client's wife is unethical. Mr. Kaminer's misconduct took place at the precise moment when he knew a sexual relationship was taking place with the 14-year-old child and he ought to either have disclosed that information in writing [to a child protection authority] or not accepted the divorce retainer."

"He never should have disclosed the particulars of his meeting [with D.M. and the child] in March [2006] to J.M."

According to the law society, Kaminer has since reimbursed J.M. in full for the money he received in trust along with an additional \$200 given to her without explanation.

Kaminer hasn't accounted for the remaining \$2,000 owed to D.M., the LSUC alleges. Hearing panel members Bob Aaron, Raj Anand, and Marion Boyd have reserved their decision in the matter until a later date.

"Lawyer Faces Employee Suit Alleging 'Extreme and Outrageous Voyeur Activities'"

Cassens-Weiss, Debra, www.abajournal.com, 31 March 2010

An Ohio lawyer convicted of tampering with evidence in connection with a pinhole camera found in the women's restroom of his law office now faces an invasion of privacy lawsuit by two former employees.

The \$2 million suit accuses Fostoria lawyer Donald Guernsey of "extreme and outrageous voyeur activities" and says the employees suffered severe emotional distress, according to *The Review Times* and *The Toledo Blade*.

Guernsey was convicted of two counts of tampering with evidence in a December trial and sentenced to community control for four years.

Guernsey was never charged with voyeurism.

He was indicted on tampering charges two years after police found the camera in a February 2007 search of his offices at Guernsey & Guernsey, *The Review Times* says.

3.5 Relationships with Clients—Special Cases

"The lawyer who defends animals"

Hickman, Leo, *The Guardian* [London], 05 March 2010
[excerpt]

When Patrick Giger, a 34-year old angler from the Swiss village of Horgen, cast his baited line into Lake Zurich's storm-swollen waters on an icy February morning last year, he could not have forecast the trouble he would end up reeling in alongside the 22lb pike which was soon to snare itself on his hook. The day ended with the monster fish being devoured by Giger and his friends at a local restaurant, but just a few months later Giger would face, on the instructions of the state prosecutor for the canton of Zurich, criminal prosecution for causing excessive suffering to the animal after boasting to a local newspaper that he had spent around 10 minutes, and exerted considerable physical effort, landing the fish.

The pike has gone on to become something of a poster child for the animal rights movement in Switzerland. It has even attracted more than 6,000 "fans" on a Facebook page set up in its memory. But the fate of this fish also acts to highlight the political divisions in Switzerland over just how far to push its animal rights legislation, already hailed as arguably the toughest anywhere in the world. The ultimate test will come this Sunday when the country will decide in a referendum—or people's initiative—whether an animal should be represented by a lawyer during any criminal trial in which it is judged to be the "victim". The canton of Zurich has had just such a lawyer—or "animal advocate", as the incumbent prefers to be called—since 1991, but the campaigners who garnered the 100,000 signatures required to automatically trigger a national referendum are now hoping animal advocates will be required by law in all 26 cantons.

Antoine Goetschel, Zurich's animal advocate since 2007, acted in court on behalf of the pike two weeks ago when Giger's trial finally came before a judge. Giger was subsequently acquitted, but Goetschel is still hopeful that when the judge finally submits his written summary of the trial in the coming weeks he will clarify what time-length is acceptable for a fisherman to land a fish.

For some in Switzerland the apparent absurdity of a dead fish having its own legal counsel—let alone placing such a legal time limit on anglers—displays that the animal rights agenda has now gone too far. However, supporters of the referendum argue that this strikes at the very ethical and philosophical heart of animal rights: why shouldn't an animal, they argue, have the same legal right to representation as any other victim in a criminal trial? And when you open that particular Pandora's box, a whole slew of other chewy questions follow. For example, do all animal species deserve equal rights? Does an elephant deserve a lawyer? What about that defenseless slug squished underfoot by a vengeful gardener? Such questions have been troubling moral philosophers for centuries, but it could soon have a practical application in all of

Switzerland's criminal courts. [Note: The referendum, 07 March 2010, resoundingly defeated the prospect of appointing state animal advocates in the other 25 cantons of Switzerland.]

“Are fish sentient beings or not?” asks Goetschel rhetorically, as he thumbs the shelves of his law firm’s library, located in downtown Zurich not much more than a fly case away from the lake where his client once swam. This is the sort of question I am asked to consider in such cases. This fisherman was boasting that it took him around 10 minutes to bring in the pike. The state attorney asked me to look into it. This is my job. I found a case judgment in Germany that said anything over one minute is too long so I used this as evidence. It was uncomfortable in the court and I had 40 fishermen against me. But I ask you this: if we put a hook in the mouth of a puppy and did the same thing for 10 minutes, what would our reaction be? With farm animals there is a strict, legally enforceable time limit between capture and death, so why not with fishing?

Goetschel rejects his critics who claim this all amounts to yet another money-spinner for lawyers. He says he handles 150-200 animal cases a year which, in total, take up about a third of his time. “I get paid 200 francs [CDN \$132.54] an hour for representing animals, but the fee for my other work is 350-500 francs per hour so I don’t do this for the money,” he asserts. “ In 2009, I received 78,000 francs [CDN \$83,375.68] in total [while acting as an animal advocate]—just enough to pay for half an assistant at my office.”

So who does pay for his time? Clearly not the pike and all the other animal victims he represents in court. “I’m designated by the canton government to do this job for four years,” he says. “The state pays me otherwise it would be seen that I’m too close to being a representative of an animal rights NGO [non-governmental organization]. For me it is about conviction rather than money. It’s a thrill for me to make the public think about the animal/human relationship.”

"Accused witch pleads guilty to fraud, leaves lawyer in ruins"

McKiernan, Michael, *Law Times*, 01 August 2010
[excerpt]

A Toronto lawyer caught out by a fraudster originally accused of practising witchcraft used his victim impact statement to rail against what he sees as the lax approach to white-collar crime in Canada.

Noel Daley, an experienced criminal lawyer originally from Newfoundland, was in court last week to see Vishwantee Persaud plead guilty to four counts of fraud.

Persaud fooled Daley into believing she was a law student, defrauding him in the process of at least \$27,000, although he claims the real figure is much higher.

The Crown withdrew a rarely laid witchcraft charge against Persaud as part of a pleas deal. In the meantime, Daley says her crimes have left him shunned by the legal profession and his career in ruins.

“In the Canadian criminal justice system, white-collar crime is much too often minimalized,” Daley said in court, noting the experience had given him new insight into the resources at the disposal of police. “I got a look inside a fraud squad, not that I wanted it, and I saw that they are underfunded and overworked.”

Daley compared the damage Persaud caused him to the physical injuries an assault victim might sustain from a punch. He also noted that while his injuries are more “subtle and nuanced,” they would be “much more long-lasting.”

“I feel violated in this case,” he said. “I feel as though I was the subject of a crime of violence.” Persaud had been in pretrial custody since her arrest in November, which rendered her nine-month incarceration into an 18-month credit under the old two-for-one sentencing rules.

Justice Ford Clements of the Ontario Court of Justice accepted the joint submission from the crown and defence that sentenced her to time served but indicated she should consider herself lucky her offences took place in Canada.

. . . .

In an interview with *Law Times*, Daley says the woman in court seemed almost like another person compared to the one who convinced him she was a law student in need of a mentor.

He took her on and helped her out with money for groceries and then with fees for law school. He even made an \$18,000 outlay for breast-cancer treatments. “It was kindness that got me involved, kindness that was bred into me by my mother and father,” he says. “Newfoundlanders are kind people.”

Persaud then convinced Daley that Sony, a client from her previous marketing career, had approached her about developing a touch-screen remote control system. Later, she would claim to have set up a deal for the pair to represent film stars at the Toronto International Film Festival.

The projects involved large costs, including rental space at First Canadian Place for an office, but Persaud promised the profits would far outweigh them. Daley was so convinced that he left his brother’s firm after more than 20 years of practising together.

“What made me continue was probably an element of greed,” he says. “I thought I was going to score big on this and I admit that.”

Things came to a head when the stars, including Eugene Levy and Vin Diesel, failed to show up at the parties Daley had organized for them. He says he lost about \$150,000 to Persaud but maintains the costs of their business venture continue to grow because he doesn’t want to leave friends and suppliers out of pocket because of their involvement with her.

He believes the Crown accepted the \$27,000 fraud amount because it came from easily traceable cheques. Authorities didn't have the resources to prove the remaining amount very easily, he argues.

The witchcraft charge came after Persaud gave Daley a tarot card reading and claimed to be inhabited by the spirit of his deceased sister.

Daley says he rejects the occult but believed her reading represented a "genuine overture to comfort me," something he accepted in the context of his Catholic faith.

The charge pushed Daley in the spotlight as he fielded calls from around the world, "I was on the receiving end of comments that were inaccurate and represented a smear on the very good name that my mother and father had passed on to me," he says, adding he felt compelled to deliver his victim impact statement to set the record straight about what happened.

"I wanted to show that she mistook my kindness for weakness. Newfoundlanders are kind people." In the meantime, Daley's brother has since taken on a new partner, leaving him with "no job, no income, and no savings." Finding a job has been difficult because, he says, the profession has turned its back on him.

Only three colleagues outside of his family have reached out to him since the case became public. "No one else lifted the phone. I was shunned by people in the profession."

Now instead of retiring to Newfoundland, he's looking ahead to 20 more years of work. But he says his background helps him embrace the challenge. "This offence almost destroyed me, but I'm a Newfoundlander, Newfoundlanders may bend but they seldom break."

"Niagara lawyer wins \$50K libel suit against former client"

McKiernan, Michael, *Law Times*, 16 January 2011
[excerpt]

A Pelham, Ont., lawyer has won a \$50,000 libel judgment against a former client who made defamatory comments about his criminal record and disciplinary history in newspaper advertisements and on web sites following a fee dispute.

Leigh Daboll, who runs his practice out of his home in the Niagara Region, hopes the case will serve as a "cautionary tale" to young lawyers. "I can't overemphasize how careful you need to be about who you represent, especially for new lawyers just starting out," he says.

"You must screen your clients very carefully to avoid this kind of situation from occurring, which in my case dominated nearly a year of my life.

“I don’t know whether I can say I’m pleased yet with the decision. The more appropriate word is relieved. I represented this guy for two months. Seven or eight years later, I’m still dealing with this stuff.”

Mark DeMarco was referred to Daboll in 2003 for matrimonial litigation with his estranged spouse, but the retainer ended soon after. A lengthy assessment process initially reduced the account that was worth less than \$4,000 before a review by the court reversed the decision and made a ... [fee] award against DeMarco.

In November 2008, Daboll finally collected on that judgment with a writ of execution and seizure satisfied by the proceeds from a property sold by DeMarco.

Soon after, advertisements began appearing in local newspapers under the title “Lawyer Crime Ontario.” The same ads appeared on dirtylawyer.com and lawsocietiesreform.com, two web sites run by DeMarco. The ads referred to Daboll’s 2003 conviction for criminal harassment and findings of misconduct by the Law Society of Upper Canada.

In 1996, an LSUC panel reprimanded Daboll over findings that he had fabricated a subpoena to a witness. In 2003, he spent 65 days in pretrial custody before pleading guilty to criminal harassment of a woman who had previously been in a relationship with him. He received three years’ probation, while the law society suspended him for 30 days. It also ordered him to pay costs and get counselling.

In 2006, the LSUC suspended him again, this time for two months, after a panel found he was in a conflict of interest by having a personal relationship with the estranged wife of a client while representing him against her in a family law proceeding.

In his decision dated Jan. 4, Ontario Superior Court Justice Richard Lococo said DeMarco couldn’t rely on the defence of truth for his comments.

“Individual fragments of the advertisement arguably had some basis in fact but they were expressed and juxtaposed in a manner that I find to be inconsistent with the truth,” Lococo wrote.

“The clear [false] implication of the advertisement is that at the time it appeared in the newspapers and/or the websites (that is from November 2009 to the time of trial), Mr. Daboll was allowed to practice law while being at that time on criminal probation and facing a further charge relating to sex/personal relationship with a client’s wife.”

Rejecting DeMarco’s argument that the law society findings would reasonably be considered convictions, Lococo also found that his claim on his web site that Daboll had been convicted of “more than one crime” defeated the truth defence.

Walter Osborn, who co-founded the National Coalition for Law Societies Reform with DeMarco, was also named as a defendant, Lococo, however, noted DeMarco was the “driving force” behind both web sites.

Lococo found the inflammatory nature of the language used in the newspaper ads and online constituted evidence of malice and noted “the most obvious indicia of malice in this case

is the timing of the publication” right after Daboll collected his outstanding ... [fees] order against DeMarco. DeMarco knew about Daboll’s past well before November 2008, Lococo said.

As well as the \$50,000 in damages, Lococo also issued a permanent injunction barring the continued publication of defamatory statements about Daboll.

“I’m not pleased with the decision,” DeMarco tells *Law Times*, noting he plans to appeal the ruling. He has also launched a negligence claim against Daboll.

"Texas Lawyers Reject Ban on Sex with Clients"

Cassens Weiss, Debra, www.abajournal.com, 22 February 2011

Members of the State Bar of Texas have rejected a proposed change in the ethics rules that would have barred sex with clients.

The rule would have banned sex between lawyer and client unless they were married, or engaged in a consensual relationship that began before the representation, according to a summary posted at the state bar website. The rule was rejected by 72 percent of lawyers voting, according to the posted results.

The sex-with-clients proposal was grouped with two other proposed rule changes. One allows lawyers to take action to protect clients with diminished capacity. The other governs conflicts of interest created by disclosures by prospective clients.

The sex-with-clients ban was one of several proposed amendments to the Texas disciplinary rules that were rejected, some by 80 percent of the vote.

Writing at his blog *Defending People*, criminal defense lawyer Mark Bennett says he sees no problem with the sex-with-clients or the two other amendments that were grouped with it. But he argues that that state law governing the ethics referendum required each amendment to be presented separately rather than in the form of “six inexplicable agglomerations of proposed rules.” Other opponents argued that Texas should wait until the ABA’s Commission on Ethics 20/20 completes its review of the model ethics rules.

What’s next? Lillian Hardwick, an Austin solo who chaired a state bar rules committee, told *Texas Lawyer* she hopes the state supreme court will adopt rule changes despite the lawyer vote. “The court can promulgate the rules on its own,” she said.

Hardwick elaborated in an interview with the ABA Journal. She said the Texas Supreme Court has both the inherent authority and the obligation to regulate law practice in the state. Asked why lawyers rejected the sex-with-clients ban, she said it was likely more of a protest vote over the amendment process.

“I think people got a certain amount of satisfaction pulling the lever,” she said.

“Overbearing’ lawyer criticized in discipline case”

Mckiernan, Michael, *Law Times*, 27 February 2011
[excerpt]

An engineer [Lim] has had a complaint against him permanently stayed after a Divisional Court panel found a reasonable apprehension of bias by the Professional Engineers Ontario’s [PEO] disciplinary committee in a case involving the “overbearing” interference by a lawyer on its staff.

The case, described by the court as a “bizarre tale,” revolved around Sal Guerriero, PEO’s disciplinary process.

The case, described by the court as a “bizarre tale,” revolved around Sal Guerriero, PEO’s manager of legal and regulatory affairs. As a staff member in the tribunal office, his function was to provide administrative support to the discipline committee.

Instead, during a dispute over scheduling, Guerriero, who is an engineer as well as a lawyer, attempted to have his staff added as a party to a motion and gave legal advice to the chairman of the disciplinary committee.

Guerriero “ignored” the limitations of his role, while the committee chairman, Nick Monsour, displayed “no understanding of the independent roles of the discipline committee and its staff,” according to the Divisional Court ruling.

The disciplinary committee, comprised of engineers, would normally retain independent legal counsel for advice on its adjudicative functions. Nevertheless, a string of “overbearing” correspondence from Guerriero to Lim’s lawyers indicated his bias against the engineer, the court found. Still, that wouldn’t have been enough on its own to grant the stay.

“His conduct, however unfortunate, would not have resulted in a stay,” wrote Justice Lee Ferrier in the Feb. 8 decision. “That said, his conduct in giving advice to the chair (and therefore to the discipline committee), and in usurping the role of the chair, which the chair tolerated and with which the chair concurred, created the problem.”

At one stage, Monsour overturned a ruling by one of his own committee members who ordered that the motion should continue without making PEO’s administrative staff a party. “Astonishingly, despite having appointed a pre-hearing conference to address the issues raised ... the chair of the discipline committee ignored the decision of his delegate,” Ferrier said on behalf of the three-judge panel.

William McDowell, a partner at Lenczner Slaght Royce Smith Griffin LLP who acted for Lim in the matter, says he couldn't find a similar example in Canadian Law. "We were kind of relieved because the order [of the PEO] straightened things out," he says. "Then you immediately get a fax with another [PEO] order that purports to undo all of his work. The process for us was surreal.

Guerriero, who is still manager of legal and regulatory affairs at PEO, declined to comment. But Kim Allen, the regulator's CEO, says things have changed at the organization since the furor. The chairman of the disciplinary committee has since completed his two-year term, and members now get extensive training from a former judge on their duties.

"Ordered to Wear 'Spit Guard' at Trial After Targeting Attorney, Defendant Looks Like Hannibal Lecter"

Neil, Martha, www.abajournal.com, 22 March 2011

A defendant in a Florida rape trial is going to sit in front of the jury looking more than a bit like Anthony Hopkins in *The Silence of the Lambs* after a judge ordered him to wear a "spit guard" throughout the proceeding that covers his nose and the lower half of his face.

Pinellas-Pasco Circuit Judge Richard Luce ordered Anthony Edward Watson to wear the device after he spat on his assistance public defender this morning, reports *The St. Petersburg Times*.

Watson, 51, said he would prefer to sit out the sexual battery and robbery trial and his lawyer, Jonathon Saunders, wiped the spit off his suit jacket sleeve and tried to persuade the judge to agree to this, the newspaper recounts. However, the judge said Watson must be present for portions of the trial.

A photo accompanying the article shows Watson wearing the spit guard. Like the mask worn by the serial killer character Hannibal Lecter played by Hopkins in the movie, it reduces much of his face to expressionless plastic.

"Lawyer-Client Decision Making and Client Counselling"

Woolley, Alice, *Understanding Lawyers' Ethics in Canada* (Markham [ON]: LexisNexis Canada Inc., 2011), pp. 59-63

[excerpt]

. . . .

C. Client Counselling

The observation that lawyers should respect clients' ability to make decisions about what should be done leads to the next issue respecting client counselling and advising: how can lawyers counsel clients in a way that enables those clients to make good decisions? And, secondarily, what place is there within client counselling for the lawyer to state her own point of view, particularly on non-legal questions?

The codes of conduct articulate some basic requirements for lawyer counselling. All advice given to clients must be honest and candid, and based on "sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise". The lawyer should tell the client the facts and information on which the opinion is based, and should investigate where necessary, unless the client expressly directs otherwise, in which case the lawyer's opinion should be appropriately qualified. The Alberta Code further suggests that while the lawyer has an obligation to ensure "economy and efficiency", the lawyer must obtain whatever information is necessary to provide a proper opinion; if the client cannot afford to pay the lawyer to obtain that information, then the lawyer must either withdraw or provide the information at no cost to the client. Some of the codes emphasize that the lawyer needs to make sure that the client understands the information provided—the lawyer "should explain as well as advise".

The codes additionally place substantive requirements on lawyer advice. As well as being itself honest, the lawyer's advice may not encourage dishonesty, fraud, crime or illegal conduct by the client, and must not "instruct the client on how to violate the law and avoid punishment". Further, the lawyer is directed to encourage the client to settle cases, where settlement can be done reasonably. The codes do not, in general, restrict the matters on which the lawyer may advise the client, although they caution the lawyer not to exceed her competence, and also to be clear to the client when the advice the lawyer is giving does not relate to matters of law. "Within those parameters, the lawyer may properly advise the client on non legal matters, "such as the business, policy or social implications involved in a question".

Can a lawyer advise a client on the morality of his conduct? As noted, allowing lawyers to provide moral counselling can reduce the moral tension of resolute advocacy. While the client ultimately gets to determine what to do, moral counselling allows the lawyer to be up front and authentic about her own perspective on things. In the end, her role as advocate is clear, but relative to the client she will have made no pretence as to her own point of view. The codes of

conduct do not preclude lawyers providing such advice, and may even be said to contemplate it given their acknowledgement of the lawyer's role in advising on non-legal matters. A lawyer who wishes to counsel her client on whether the proposed course of action is not only legal, but also right, is free to do so.

Moreover, moral counselling may be crucial to the lawyer ascertaining what the client wants to do. While a client may want every advantage the law provides, lawyers are often too quick to assume that this is the case; more counselling can help ensure that such assumptions are not made inappropriately. In *Understanding Lawyers' Ethics*, Professor Freedman tells a story of being asked to evict a tenant. On investigation Freedman found that the tenant was a Korean War widow with a young child. The only reason for the eviction was that the child had had difficulty turning off her bath water one evening, the tub had overflowed, and the ceiling below had been damaged. Otherwise there were no complaints about the tenant. Freedman told the client the circumstances and that if the client wanted to proceed with the eviction he would do so but that "I wasn't sure you'd want to, given the facts". After thinking it over, the client decided not to proceed with the eviction; in that case, what the law provides was not what the client wanted.

In addition, as noted by Rob Vischer, lawyers do, in fact, have personal moral values that inescapably influence the manner and content of the advice that they give. Vischer argues that it is better when counselling clients for the lawyer to be self-aware and up front about her own perspective on things, rather than having that perspective simply "out there", silently influencing the advice provided. Clients need to know what lawyers think, but also why they might think as they do. Otherwise the clients may overvalue the advice the lawyer provides.

The important qualification to this analysis is that lawyers should be cautious with respect to their competence on matters of morality and, as well, should be careful not to ride roughshod over client interests. While the power dynamic between the lawyer and client varies considerably, there are circumstances in which the client will view the lawyer's statement of an "opinion" as determinative, or may be confused about whether the lawyer's advice is about the law or about morality. A lawyer must ensure that the nature of her advice on moral questions is understood to be distinct from her legal advice (as required by the codes of conduct). She must also ensure that there is sufficient comfort and trust in the relationship to permit the client to reach his own conclusions without being improperly pushed towards the lawyer's own assessment of things.

D. Counselling and Unlawful Activity

..., the codes of conduct prohibit lawyers from counselling clients in a way that will knowingly encourage illegal conduct, or that will instruct the client on how to violate the law and avoid punishment. A significant issue raised by these provisions arises where lawyers are asked to provide legal advice to clients and suspect that the legal advice will be used by the client for an unlawful purpose. A client could ask the following questions:

"If I do not report my income from tips on my tax return how likely is it that the government will find out?"

“What countries do not have extradition treaties with Canada?”

“What are the fines for taking water from the river in excess of my water licence?”

“If I rob a bank with an automatic weapon will that result in a higher penalty than if I rob a bank with a knife?”

In each of these scenarios the client has asked the lawyer to share her legal knowledge, either with respect to what the law provides or with respect to how the law operates in practice. The client has not asked the lawyer to assist him in wrongdoing—by, for example, filing or preparing the false tax return, or driving the getaway car at the bank robbery—but has simply asked about the legal effect of particular decisions that the client may make. Can the lawyer provide the advice? Can he say, in effect, “I am a law book” and provide to the client that which, if the client was a lawyer, he could discover for himself?

It is obvious that providing the requested information is prohibited by the codes of conduct. The lawyer has not encouraged illegal activity, insofar as the lawyer has not suggested in any of these cases that the course of conduct proposed by the client is a good one. As stated in the commentary to the rule in the Alberta Code of Conduct:

The mere provision of legal information must be distinguished from rendering legal advice or providing active assistance to a client. If a lawyer is reasonably satisfied on a balance of probabilities that the result of advice or assistance will be to involve the lawyer in a criminal or fraudulent act, then the advice or assistance should not be given. In contrast, merely providing legal information that could be used to commit a crime or fraud is not improper since everyone has a right to know and understand the law. Indeed, a lawyer has a positive obligation to provide such information or ensure that alternative competent legal advice is available to the client ... Only if there is reason to believe beyond a reasonable doubt, based on familiarity with the client or information received from other reliable sources, that a client intends to use legal information to commit a crime should a lawyer decline to provide the information sought.

It is also not obvious that providing the information should be considered to be unethical given the rationale for lawyers within the legal system as a whole. If lawyers exist to provide individuals with the information about what the law requires, permits or enables, then on what basis would we ever forbid lawyers from providing that information simply because clients may misuse it? If an individual decides that for example, the benefit of withdrawing excess water from the river exceeds the cost of the fines payable for doing so, that suggests that the substantive law should be changed; it does not suggest that individuals should be kept in ignorance of the law.

On the other hand, if the point of lawyers is to allow individuals to pursue their own conceptions of the good within the bounds of legality, it does not seem logical to allow lawyers to counsel clients in ways that serve to encourage or permit clients to act outside the bounds of legality. Where the information in question is not about the content of the law, but about

imperfections in the ability to the state to implement its laws—as is the case with the audit risk example—it is not clear that the client has any particular entitlement to that information from the lawyer.

Further, where the risk that the client will misuse the advice is substantially foreseeable, and the risk of harm to others from the client’s conduct is high, the lawyer’s justification “I am a law book” seems insufficient to shield the lawyer from accountability for the effect of the advice she has given. The information the lawyer has[,] to allow her to assess how the advice is going to be used[,] means that the lawyer’s advice is not, on the facts, truly separated from the way in which it is going to be used. Moreover, the seriousness of the harm that may result simply outweighs the moral justification for the lawyer giving the advice. As noted, once the advice is *being* used for the *purpose of illegality* a justification for the lawyer’s role based on allowing people to pursue their conceptions of good *within the bounds of legality* does not do very much work, certainly not enough to permit the lawyer to participate, even if indirectly, in the infliction of serious harm on others.

In addition, on a purely pragmatic basis, a lawyer who provides legal advice that facilitates the commission of an unlawful act, particularly an unlawful act that involves harm to third parties, should be cognizant of the risk of legal liability she is incurring. The lawyer could be seen as owing (and as having violated) a standard of care to third parties harmed by the client’s unlawful activities. ... where a lawyer is a “dupe” of a client committing a criminal act the discussions between the lawyer and the client are not privileged, and are arguably not confidential either.

In general while, as the Alberta Code of Conduct suggests, a lawyer should provide legal information to clients, she should not do so when the lawyer can reasonably foresee that the advice would significantly increase the likelihood of conduct that will result in death or serious injury to another person, including serious financial injury. When the harm is that serious, and that foreseeable, the lawyer is at risk of liability and, as well, cannot sufficiently separate the nature of the information being given (the content and application of the law) and the purpose for which it is being used (the infliction of serious harm on others).

"Can lawyers represent their kids? Case involving mother acting for son heads to Divisional Court"

Sebesta, Kendyl, *Law Times*, 21 November 2011
[excerpt]

That was a key question in a new Ontario’s Superior Court decision granting leave to appeal following Justice Heather McGee’s interlocutory order banning a mother from representing her son in family court earlier this year.

Not everyone, in fact, agrees that lawyers can't act for their children. "It may not be wise to have the mother represent the son," says author and lawyer Philip Slayton. "But I don't think it should be stopped unless there are egregious reasons for the court to interfere."

Generally, people should be allowed to pick their counsel, he adds, noting that could potentially include family members,

"It seems natural to say that the son, given that he was living with his mother at the time and had financial troubles it appears, would say, 'Hey mom, represent me,' because she is a lawyer.

It may not have been a very good idea to have [done so], but the mother shouldn't be precluded from representing her son."

The matter first arose nearly two years ago during divorce proceedings between Susan Judson and Richard Mitchele. Mitchele's mother, lawyer Rosemary Lavalley, was representing him.

After Judson moved to Ontario nearly a year later, the question of whether or not Lavalley could represent Mitchele in the pair's continuing family court matters arose before McGee, who ultimately determined she couldn't act for her son due to conflict of interest.

From there, the matter proceeded to Superior Court Justice Cary Boswell upon Mitchele's application for leave to appeal. Boswell directed the matter to the Divisional Court.

Boswell's judgment quoted an e-mail allegedly from Lavalley to Judson showing involvement in her son's affairs.

"I have also questioned Richard about his income since he moved into my condo but he satisfied me that he had not earned enough to pay me rent after meeting his existing child support obligations and other basic personal expenses," the judgment quotes her as saying.

"He has also assured me that on his return from Florida he will try to get his tax return prepared and filed."

The issue of parents representing their children arises so infrequently in the courts that Boswell repeatedly noted its uniqueness and complexity in his judgment this month.

"The proposed appeal raises issues of procedural fairness and the interesting question of whether a lawyer should presumptively be precluded from acting as counsel to her son in family court proceedings due to their close familial relationship," Boswell wrote in *Judson v. Mitchele*....".

"The proposed appeal raises issues of procedural fairness that transcend the interests of the litigants in this case. Moreover, a limitation on counsel representing family members is a matter that extends well beyond the boundaries of this particular case and is, in my view, of general public interest."

Boswell's decision specifically called into question whether or not McGee erred in issuing an *ex parte* order banning Lavalley from representing Mitchele in court.

3.6 Relationships with Third Parties

Canada Trustco Mortgage Co. v. R.

2011 CarswellNat 2542 (S.C.C.), Deschamps J. for the Court, 15 July 2011
[Headnote]

Lawyer taxpayer owed tax to federal government—Minister of National Revenue became aware that cheques payable to taxpayer [and deposited in his trust account] were, in turn, being drawn on his trust account and deposited in joint account [at Canada Trustco Mortgage Co.] owned by taxpayer and third party—Cheques were payable [on his trust account] to taxpayer and delivered to bank with instructions to deposit funds in joint account—Minister issued requirements to pay, to bank, pursuant to s. 224 of *Income Tax Act* [in respect of the joint bank account]—Bank disputed its liability on ground that it was not indebted to taxpayer alone with the joint account—Minister assessed bank for amounts of cheques for failing to comply with requirements to pay—Bank's notices of objections and appeal to Tax Court of Canada (TCC) were both dismissed—Federal Court of Appeal affirmed TCC decision—Bank appealed—Appeal allowed—Evidence showed that cheques were received with instructions to deposit funds into joint account, not that taxpayer, as drawer, demanded that payments be made to him as payee—At no point did bank actually make payment to taxpayer—Argument accepted by TCC that taxpayer was bearer of cheque was inconsistent with definition of term "bearer" in *Bills of Exchange Act* (BEA)—Cheques were neither expressed to be payable to bearer nor endorsed in blank—After cheques had been delivered for deposit into joint account, taxpayer was no longer in possession of them and was not entitled to them and was therefore not their holder—TCC disregarded capacity in which bank acted—Since bank was in lawful possession of cheques, once it had received them for deposit and credited them to joint account, it acquired rights of holder in due course pursuant to s. 165(3) of BEA and was under contractual obligation to holders of joint account to present cheques for payment—Fact that cheques were not endorsed did not mean that bank did not acquire rights of holder in due course—Reason bank owed no money to taxpayer was that it was acting as collecting bank for its customers, holders of joint account—It did not collect proceeds as agent for payee, taxpayer [only].

"Law Firms Swindled Out of \$500K in E-Mail Scam"

McDonough, Molly, www.abajournal.com, 22 February 2010

Two law firms in Honolulu were scammed out of \$500,000 in an e-mail scheme that's apparently targeting the legal community.

During the past six weeks, six different law firms have been targeted, according to the FBI, which issued a warning today. Two of the six fell for the scheme and lost a total of \$500,000.

The FBI reports that the scam begins with e-mail contact from a prospective client who is seeking legal representation in a civil matter. Such as a divorce. The supposed client [a fraudster] sends the law firm a cashier's check for a retainer in an amount far exceeding the firm's rate.

When the law firm responds that the client has overpaid, the client requests and the unsuspecting firm sends a wire transfer with the refund [before the fraudster's cheque 'clears' the bank]. It's after the refund that duped firms learned that the cashier's checks are counterfeit.

In the current cases in Hawaii, scammers are asking that wire transfers be sent to accounts in South Korea, Taiwan, and Canada.

"Law firms and other professional service providers are cautioned to be on high alert when dealing with clients who come forth via the internet," the FBI warns. Also, when dealing with wire transfers, firms should be sure the initial payment has fully cleared before issuing refunds.

"Bad-Check Schemes Targeting Lawyers Are 'Increasingly Sophisticated'"

McDonough, Molly, www.abajournal.com, 25 February 2010

Bad-check schemes specifically targeting law firms are becoming more and more sophisticated, prompting calls for vigilance and caution in the bar.

Lately, family law firms appear to be the targets of scams which purport to involve the collection of outstanding spousal support and other divorce matters. Earlier this week, the FBI in Hawaii warned that two of six family law firms targeted in a cashier's check scheme were swindled out of more than \$500,000.

Toronto's Dan Pinnington wrote on a law Blog Slaw that he gets two to three calls and e-mails a day from lawyers who have been targeted to act on matters that are clearly frauds.

Pinnington says family law practitioners aren't the only ones who need to be on guard. "We continue to see attempted frauds involving debt collections, and we also continue to see real estate frauds as well (more ID theft now, as flip frauds are harder in a slower market when property values are not rising)," writes Pinnington, who is director of practice [at Law]PRO at the Lawyers' Professional Indemnity Company [in Ontario].

Among the [ID] frauds Pinnington has seen in Ontario: three instances where fraudsters have forged checks written on law firm trust accounts. The presumption is that fraudsters

believe the forged law firm checks will undergo less scrutiny than other forged check. Fraudsters are lowering the amounts in spousal collection schemes to make them look more reasonable. Lawyers are also being approached by fraudsters who purport to come from trusted referral sources.

Pinnington offers several tips for lawyers to avoid being duped, including:

- Be familiar with common types of bad checks and frauds targeting lawyers; and educate staff to be on the lookout too.
- Be sure to properly identify and verify client information.
- Never be in a rush to disperse funds from a trust account, especially if the client is pushing.

“Opposing Counsel’s Warning Comes Too Late; Lawyer, 54, Is Stabbed 12 Times in Her Office”

Neil, Martha, www.abajournal.com, 14 June 2010

In a new incident among a spate of case-related violent attacks on lawyers in recent weeks, a Minnesota man has been charged with attempted murder after allegedly stabbing his ex-wife's attorney a dozen times in her law office Friday.

Terri Ann Melcher, 54, was alone in her Fridley, Minn., office at the time and called 911 after the suspect, Sheikh Nyane, departed, [KARE 11](#) reports. She is in critical but stable condition and is expected to survive.

As a subsequent ABAJournal.com post details, Melcher suffered what an Anoka County sheriff's officer described as "horrible injuries" in a rare case-related attack on an officer of the court. It is at least the second such alleged incident in the metropolitan area within less than a decade, however; Rick Hendrickson survived being shot in the neck outside a Minneapolis courtroom in 2003 by a cousin of the client he was representing in an inheritance dispute.

Nyane, 32, who reportedly turned himself in and confessed to authorities Friday, had recently lost custody of his child.

Relying on information from police, the station reports that Nyane's attorney called Melcher's office to warn her that his client might become violent. However, the message wasn't received until today, when her law office opened for business.

"Lawyer Suspended for Agreeing to Pay Receptionist 'Under the Table'"

Cassens Weiss, Debra, www.abajournal.com, 12 August 2010

A Massachusetts lawyer has received a three-month suspension, with all but one month stayed, for agreeing to pay his receptionist without reporting her income.

According to a summary on the Board of Bar Overseers website, lawyer Daniel Szostkiewicz hired a former client as his receptionist in August 2007. He asked her to sign a W-4 form, but she said she needed to be paid "under the table" so she could keep state health benefits for her sick husband.

Szostkiewicz agreed, and paid the woman \$400 a week in unreported income until he fired her in February 2008. When the ex-employee sought unemployment benefits, Szostkiewicz made the appropriate payments to the state unemployment commission and acknowledged that she was a former employee.

The final two months of the suspension will be stayed as long as Szostkiewicz agrees to an audit of his law practice and agrees to auditor recommendations.

"Law Firm Accused of Being 'Mad Men' Throwback - Requiring Heels, Then Discriminating After Injury"

Cassens Weiss, Debra, www.abajournal.com, 18 October 2010

A law firm in Detroit created a hostile work environment for secretaries and discriminated against an executive assistance who initially injured her back while wearing required high heels, according to a lawsuit

Denise Fitzhenry claims in a suit filed last week that her former firm, Honigman Miller Schwartz and Cohn, was slow to accommodate her back injury and then refused to rehire her in May 2010 after a fourth medical leave for the problem, *The American Lawyer* reports. The suit claims violations of the Americans With Disabilities Act, and the Family Medical Leave Act.

The complaint also alleges the firm created a hostile and degrading work environment for secretaries and administrative assistants, 99 percent of whom were female.

Fitzhenry is represented by Deborah Gordon, who told *The American Lawyer* that the atmosphere at Honigman Miller was more like that of the television show *Mad Men* than a

modern workplace. Honigan “is very old-schooled law firm,” Gordon said. “Up until a few years ago they were still using teacups and saucers in a very intentional kind of way.”

Gordon alleges secretaries were required to wear high heels, and Fitzhenry was injured at work when she caught one of her heels in the carpet.

Fitzhenry had worked as an executive assistant for firm vice chair Alan Schwartz, who was the firm’s chairman when Fitzhenry went to work for him in 2005. Gordon told *American Lawyer* that Schwartz can be a difficult boss “because of his style and the paces he puts people through.” The suit also names Schwartz as a defendant.

“Lawyer Accused of Hiding Money Had Nearly \$1M in Cash in His Law Office Closet”

Cassens Weiss, Debra, www.abajournal.com, 02 November 2010

A South Carolina lawyer known for his TV commercials and billboards has turned over \$994,000 in cash kept in a closet of his Myrtle Beach law office after a court-appointed bankruptcy investigator stressed the importance of disclosing his assets.

Harry Pavilack, who urged clients to “Call Pavilack Today!” in his advertising, says he owes about \$72.5 million to creditors, most of it in mortgages and personal guarantees on loans on his real estate investments, the *Sun News* reports.

Pavilack, 70 initially estimated he had assets of \$50,000 or less in documents filed with the bankruptcy court in September, the story says. Less than two months later he told the court he has about \$8.9 million in assets.

Bankruptcy examiner George Durant says in a report that Pavilack’s financial records are incomplete and it may never be known how much he has, the story says. According to the report, Pavilack has taken cash out of his real-estate corporations, transferred some assets to relatives and friends, and opened bank accounts in Peru. Since February, Pavilack has conducted mainly cash transactions, DuRant’s report says.

“Judges grapple with unrepresented litigants”

**Millan, Luis, *The Lawyers Weekly*, 05 November 2010, pp.1, 27
[excerpt]**

The surging number of unrepresented litigants trying to navigate the complex demands of law and procedure may leave legislators with little choice but to review and enact simplified

rules of practice to make justice more accessible, said the chief justice of Quebec's Superior Court at a conference examining the disturbing trend.

The figures are alarming, with an average of 37 per cent of parties representing themselves in civil matters before Quebec Superior Court, revealed ... Justice Francois Rolland. In divorce cases before Quebec Superior Court, 36 per cent of Quebecers are unrepresented litigants, a figure that rises to 42.1 per cent in family matters dealing with child custody and separation. Almost 42 per cent of parties appealing a sentence in criminal matters before Quebec Superior Court are unrepresented litigants while 38.8 per cent of individuals facing a motion that could authorize their psychiatric treatment do not have legal representation, prompting to remark that if anybody "should be represented if seems to me it's the treatment cases."

The Court of Quebec, a court of first instance that has jurisdiction in civil, criminal and penal matters as well as in matters relating to youth, does not fare any better. Approximately 38 per cent of individuals who have a matter pending before its civil division appear in court without a lawyer. Even the Supreme Court of Canada cannot dodge the trend. Approximately 30 per cent of requests to file an application for leave to appeal are lodged by unrepresented litigants, noted Justice Rolland.

While there are self-represented litigants, armed with a "do-it-yourself attitude" who choose to go before the courts without legal representation, that does not account for the dramatic decrease in the number of civil cases before Quebec Superior Court—a 57 per cent drop since 1996, pointed out Justice Rolland. Nor does it explain why family law cases before Quebec Superior Court have plummeted by 24 per cent since 1996. "Is it because there are less conflicts in our society or because there are less child custody problems since 1996?" wondered Justice Rolland. "I don't think so."

Echoing remarks made by the SCC's Chief Justice Beverly McLachlin, Justice Rolland said that unrepresented litigants impose a burden on courts. Proceedings are stretched out, adding to the public cost of running the court, because unrepresented litigants are at a loss, and ill-equipped to steer around the complexities surrounding law and procedures. And more often than not, they turn to the judge for help, an impossible task for a judge operating in an adversarial system. "It's not the role of the judge to help someone in the preparation of their case because the other party who may be represented by a lawyer may feel aggrieved," explained Justice Rolland.

The Justice Education Society (JES) [in British Columbia] has created more than two dozen websites, many of which are geared towards providing litigants who go to court without legal representation with the basics of the court system. The JES has also published guidebooks that provide information about civil, non-family claims in B.C.'s Supreme Court, and four years ago it established the Justice Access Centre Self-help and Information Services in Vancouver, which now serves over 6,000 people annually.

"Law school star fights LSUC's good character ruling"

McKiernan, Michael, *Law Times*, 24 January 2011
[*excerpt*]

A law school star blocked from joining the profession is now appealing a Law Society of Upper Canada panel decision that found he wasn't of good character.

The panel dismissed Ryan Manilla's application for ... [a] licence by a 2-1 majority last September following complaints from fellow members of his Thornhill, Ont., condominium board about his conduct towards them.

In late 2008, a dispute over a condo-fee increase on the five-person board, of which Manilla was president, escalated into a bitter feud that eventually left Manilla facing a number of criminal charges, including four counts of criminal harassment, intimidating a witness, and threatening death.

Authorities later withdrew the charges after Manilla completed the requirements for diversion. He apologized for his behaviour, took anger-management classes, and began seeing a therapist.

But panel members James Wardlaw and Sarah Walker found his motive for confessing to his misconduct was "equivocal" and that not enough time had passed since he began treatment to be confident his character had changed. Nicholas Pustina dissented, finding that Manilla was of good character as of the date of the hearing. He also noted his strong network of professionals and family members made a relapse unlikely.

In a notice of appeal, Manilla asks the law society to set aside the decision on the grounds that it was "unreasonable and contrary to the weight of evidence." He also says the ruling "erred in failing to provide adequate reasons for its central determination that the appellant was not of good character."

"Idaho Lawyer Gunned Down After Filing Client's Divorce"

Ward, Stephanie Francis, www.abajournal.com, 14 March 2011

Emmett Corrigan, a 30 year-old Boise, Idaho, lawyer in practice since October, was shot and killed Friday, allegedly by a man whose wife was Corrigan's employee.

The shooting took place in Meridian, a Boise suburb. The suspect, Robert Hall, allegedly confronted Corrigan over “domestic issues,” Meridian Deputy Police Chief Tracy Batteredchea told *The Idaho Statesman*. *The Idaho Press-Tribune* reports that Corrigan filed divorce papers on behalf of Hall’s wife the day before he was killed. Hall reportedly believed Corrigan was having an affair with his wife, who was Corrigan’s assistant.

The shooting took place around 10:20 p.m. at a Walgreens parking lot. Hall, a civilian employee with the Ada County Sheriff’s Office, was charged with first-degree murder today, *The Press-Tribune* reported. He has a superficial gunshot wound to the head, according to police, but it is not clear if Hall was shot in a struggle or shot himself.

Corrigan and his wife, Ashlee, had five young children, according to news reports. He recently started his own law practice, focusing on criminal defense work.

“He hadn’t had that much experience. But I’ve done criminal law for 20 years and can tell when someone loves it,” D.C. Carr, a Boise criminal defense lawyer who knew Corrigan, told *The Idaho Statesman*. “Emmett was one I could tell was going to stay with it.”

“Sticker shock”

Crowley, Kieran, *The New York Post*, 18 May 2011

A Long Island lawyer got custody of his two daughters after a judge ruled his estranged wife was behind a bizarre scheme that left his town plastered with stickers denouncing the attorney as a Hummer-driving deadbeat who let his kids go hungry.

In a scathing ruling, a Suffolk Supreme Court judge awarded Mark Musachio custody of his 11- and 13-year-old daughters, saying their mother, Annmarie, needs a shrink.

At one point in the 7-year court battle, Musachio's Deer Park apartment complex was covered with stickers that read: "Attorney Mark Musachio is a deadbeat dad! He drives a Hummer and his 4 kids have to eat at the food pantry."

When he first saw the stickers, Musachio—who later sold the Hummer—told *The Post*, "My mouth fell open. I couldn't believe it." He has never been behind on child-support payments, court records show.

Judge Carol MacKenzie said Annmarie's testimony that she knew nothing about the campaign was "incredible."

Claims that she didn't know that a gaggle of her friends would show up to picket custody hearings was equally "ludicrous," the judge said.

The judge also found that the mother had tried to "brainwash" the kids by lying about their father.

MacKenzie refused the mom's request to have more than two days with her daughters until she gets the psychiatric help "which this court concludes she badly needs."

"Family litigants without lawyers"

**Bala, Nicholas and Birnbaum, Rachel, *The Lawyers Weekly*, 05 August 2011, pp. 9, 12
[excerpt]**

There is a growing concern about litigants without lawyers—especially for family cases, which are often complex and have profound effects on litigants and their children and where judgment is particularly prone to being influenced by emotions.

One's perspective on litigants without representation reflects one's role in the justice system: judges and lawyers dealing with cases have a different view from government administrators with systemic responsibilities, and litigants with a focus on their case have a different view as well. We are undertaking a series of studies on access to family justice and report here on preliminary findings from a recent survey of the perceptions of Ontario family lawyers—the first study of its kind in Canada. This study reports serious challenges for lawyers and their clients, as well as for those without lawyers and the family justice system.

[**Note:** The authors' final report was published in May 2012, confirming this preliminary report, and will be presented by them at the 2012 National Family Law Program.]

We conducted an Internet-based survey of attendees at the Law Society of Upper Canada's Family Law Summit, held in Toronto in mid-June. There was a healthy response rate, with 325 (over 40 per cent) of the participants responding, suggesting a high level of concern about these issues. On average, lawyers reported that for 27 per cent of their family cases the other side had no lawyer at all, and another 21 per cent of the cases had no lawyer on the other side for part of the case. Only four per cent of the lawyers reported no experience in the past year with family cases without a lawyer for the other party.

This significantly understates the problem of lack of representation for the justice system, since these figures do not reflect cases where both parties are unrepresented. When asked whether the number of family litigants without lawyers had increased in the previous five years, 37 per cent indicated that there were many more such cases, 44 per cent reported more cases and just 19 per cent thought it was about the same. None reported fewer litigants without lawyers.

The question of why litigants are without lawyers is complex. There are many reasons for a person to be without a lawyer, and some individuals may not themselves be fully aware of their own rationale for not having a lawyer. The respondents to this survey clearly believe that

the inability to afford a lawyer, exacerbated by recent cuts to Legal Aid, is the primary issue: 65 per cent reported this as the most important reason and another 31 per cent indicate it as an important reason. Thus, most of those with no lawyer are “unrepresented” by financial circumstance: they want a lawyer but can’t afford one.

There is, however, a minority who could afford a lawyer but choose to represent themselves: they are often referred to as “self-represented” litigants. In this survey, seven per cent of lawyers reported that the most important reason for family litigants to have no lawyer is that they think that they can do as good a job as a lawyer and 19 per cent think that a desire to directly confront one’s former partner in court is a factor (though only one respondent ranked this as the most important factor).

Over 90 percent of respondents expressed a concern that when the other party has no lawyer, this increases costs for the represented party. For example, 75 per cent of lawyers reported that they must always document communications more carefully with a party who has no lawyer as there is more potential for misunderstandings or even deliberate misrepresentation of communication. Further 84 per cent of the respondents indicated that those without lawyers usually or always have unrealistic expectations at the start of a case, making settlement more difficult.

"Self-represented litigants common nuisance"

**Schofield, John, *The Lawyers Weekly*, 26 August 2011, pp. 21, 24
[excerpt]**

It wasn’t one of the high-lights of Chelsea Caldwell’s career. But it ranks as one of the Vancouver lawyer’s more unusual experiences. In a downtown office building, in the middle of the day, a man stood in the middle of the lobby, proclaiming to anyone who cared to listen what a bad lawyer he thought Caldwell was. Ironically, he capped off his performance by paying her several thousand dollars to settle a case she had just won for her client. “I think his announcement was lessened,” she remembers with a laugh, “by fact he was handing me a big wad of cash.”

It may seem funny now, but the story is a vivid illustration of the frustrations that lawyers can face when they go up against self-represented litigants (SRLs). Anecdotal evidence suggests that’s happening more often. But if do-it-yourself lawyers aren’t handled carefully, Caldwell warns, it can end badly for almost everyone involved. “A self-represented litigant is vulnerable, frequently angry, sometimes volatile, and usually the less-informed person in the room,” she wrote in a paper she delivered in May to the Continuing Legal Education Society of British Columbia’s small claims conference. “As a result, that litigant is capable of creating chaos, unless he or she can be either made to feel respected or managed very efficiently.”

. . . .

By following a few survival tips, lawyers can go a long way to ensuring that the proceedings run smoothly. Start by observing the rules perfectly and bending over backwards to be respectful, regardless of the frustration level. “You have to be very firm with self-represented litigants, but at the same time you have to be a bigger person,” says Caldwell. “Your job is to present your case, but it’s also to assist the court, and you’re going to look like a real schmo if the person is struggling to find a document and you’re not helping.”

At the same time, lawyers risk offending their own clients if they appear to be too supportive. In communicating with lay litigants out of court, Caldwell recommends avoiding phone calls and putting everything in writing. Cover yourself and maintain a paper trail. If phone calls occur, she suggests following up with an email summarizing the conversation and asking the SRL for his or her interpretation.

Lawyers should reassure their clients that they’re giving their adversary only enough information to advance the client’s case, says Caldwell. To convince them you’re in their corner, she advises lawyers to politely encourage the self-represented litigant to talk to duty counsel or to retain their own lawyer. If the case is going into overtime, let your client know that there may be extra costs, but the investment will be worthwhile and they’ll leave with a solid agreement. “This is an area where you have to be completely upfront and make sure your client is appreciative of the fact it’s going to take longer,” says Pinnington.

Judges are another story, says Caldwell. Their behaviour is beyond your control. Courts are surprisingly patient with lay litigants, she notes, and it’s easy for clients to feel that the judge is helping the self-represented litigant too much. Remind them that the judge is there for both sides. “The problem in litigation is there’s usually a winner and a loser,” she says. “There are probably a lot of lay litigants out there who feel the system is unfair. Judges and masters try very hard to make sure that isn’t the case.”

If things turn ugly, Caldwell urges lawyers to remain professional at all times. She says that more than one self-represented litigant has threatened to drag her before the law society, and she’s been called a variety of names. But if lay litigants respect the process, they are respected in return. In the end, she notes, lawyers are just there to do their jobs. “Lawyers are there to get the right result, but we can never forget it’s important that justice be seen to be done,” she says. “I want that person to walk away having seen the judge treat both sides fairly.”

“Re: 'Even smart lawyers can be scammed'[,] *The Lawyers Weekly*, Sept. 16 [2011]”

**Kirkham, D. Barry, Owen Bird Law Corporation,
The Lawyers Weekly, 14 October 2011, p. 5**

With respect to your excellent article, *Even smart lawyers can be scammed* I would point out that waiting 8 or 10 days for a cheque to clear is no assurance that it is a valid cheque.

I recently went through an exact experience as described in your article. The cheque was on deposit in our account for about eight days, when the fraudster asked me to wire transfer the funds to a Hong Kong bank account. Our bank said the cheque had cleared.

Fortunately, I discovered the fraud before paying out. I was alarmed, however, at the bank's advice that I could have paid out on it. It turns out that all our bank does is wait the eight days and then assume the money is in the account.

We then checked with the bank on which the cheque was drawn—Main Branch, Bank of Montreal, Toronto. They refused to tell us whether the cheque was legitimate, on the grounds of customer privacy. Hard to believe but true. They said they would check with their customer.

Ultimately the cheque came back in about three weeks. It had been altered [between leaving the writer's bank account branch, and arriving at or being returned by, the bank on which the cheque had been drawn].

If a cheque has been altered, the ultimate holder of the account on which it was drawn might not discover the fraud for a long time. Yet they could still go back against their bank, which could go back against us, on grounds that the cheque was a fraud from inception.

My point is that it is incorrect, as one firm cited in your article apparently believes, that if you hold the cheque [in your trust account] for 10 days that "ensures" that the cheque has cleared. It may have cleared initially, but that can be reversed later if the cheque was altered.

[**Note:** The anthology author acknowledges the exceptional asserance of Barry Kirkham in providing background for his chilling experience which, in fact, twice occurred in the same matter. Mr. Kirkham apprehended the fraud, in each instance, before the involved banks.]

"Lawyer Accused of Seeking Secretary with 'Benefits' Gets One-Year Suspension"

Cassens Weiss, Debra, www.abajournal.com, 29 November 2011

An Illinois lawyer accused of telling an applicant for a secretarial position that the job included "sexual interaction" has been suspended for one year.

The Illinois Supreme Court issued the order of suspension for Samir Zia Chowhan, the Legal Profession Blog reports. According to a hearing panel's report, Chowhan posted an ad in the "adult gigs" section of Craigslist seeking a secretary, and asking applicants to send pictures and measurements.

After one woman responded, Chowhan is accused of sending an email informing the applicant her duties went beyond secretarial work. "In addition to the legal work, you would be required to have sexual interaction with me and my partner, sometimes together, sometimes separate," the email said. "This part of the job would require sexy dressing, flirtatious

interaction with me and my partner, as well as sexual interaction. You will have to be comfortable doing this with us.”

3.7 Relationships with Other Lawyers

"Tips for Dating an Attorney: Be Ready to Cite Sources, Deal With 'Lawyer Personality' "

Neil, Martha, www.abajournal.com, 10 February 2010

In the spirit of Valentine's Day, a lawyer search and legal information website is offering tongue-in-cheek advice about the dos and don'ts of dating an attorney.

While members of the profession "are really very sweet at heart," that quality is often concealed beneath a hard-charging, gruff exterior,

Hence, those up to the romantic challenge of dating an attorney must prepare themselves for a lifestyle in which love notes will be long and confusing and backup for factual statements will be expected. ("When in doubt, point to scientific studies, real or imagined," the article advises.)

The argumentative "lawyer personality" can, of course, be 'wearing' over long periods. But this may not be a major issue because many members of the profession are so busy they are rarely home.

And, with persistent patient training, the article says, a lawyer can be the love of your life.

"Incivility on the rise"

**Wiltshire, Elaine, *The Lawyers Weekly*, 05 March 2010, pp. 23, 27
[excerpt]**

For legal professionals, dealing with complex and abstract concepts is all simply part of the job; however, it seems that some are quick to forget one important lesson from their days in kindergarten—treat others as you would like to be treated.

"It's hard to identify if truly there has been a loss of civility" in the legal profession, said Peter Cronyn, leader of the litigation group at Nelligan O'Brien Payne LLP, "but as soon as people are talking about it then that's the time to do something about it—whether it's real or it's perceived is almost irrelevant."

Well, people are not only talking about it, according to The Law Society of Upper Canada (LSUC), the problem is real.

Between 2004 and 2008, statistics provided by the LSUC indicate that regulatory cases containing allegations of unprofessional behaviour by legal professionals rose steadily from 11 per cent to nearly 35 per cent and, said Derry Millar, treasurer of the LSUC, the problem is province-wide.

This alarming statistic was one motivator behind the recent civility forums hosted by Millar. Eleven meetings were held throughout Ontario—from Windsor, Ont. To Ottawa, Thunder Bay, Ont. to Hamilton—beginning last November, wrapping up in Toronto on Feb. 16. Nearly 900 lawyers, paralegal, articling students and members of the judiciary were brought together for facilitated discussions about civility issues, including examples of incidences between lawyers and paralegals, towards each other, their clients and even in the courtroom.

“One of my objectives was to promote a dialogue with the profession on the importance of civility and to get their ideas about what the society could do and what we can all do, to promote civility and professionalism,” said Millar, adding that he believes the goals of raising the level of awareness and promoting the exchange of ideas were achieved.

“It’s hard to identify if truly there has been a loss of civility” in the legal profession, said Peter Cronyn, leader of the litigation group at Nelligan O’Brien Payne LLP, “but as soon as people are talking about it then that’s time to do something about it—whether it’s real or it’s perceived is almost irrelevant .”

Well, people are not only talking about it, according to The Law Society of Upper Canada (LSUC), the problem is real.

“I got a great insight into how the profession treats one another,” said Richard Lammers, vice president of the Paralegal Society of Ontario, who attended the meeting in Windsor, Ont. last December, “Before paralegals were members of the society, we didn’t have much contact or insight into what was going on in the profession,” Lammers added.

Speakers at each event included regional members of the judiciary, senior lawyers and staff for the LSUC’s Professional Regulation Division.

“The judges spoke about how it’s counterproductive to your effectiveness as a lawyer and gave some ideas about what they would like to see in the courtroom,” said Cronyn, who was a speaker at the Ottawa session last November.

“The areas where a lot [of] lawyers have problems is [when they are] trying to deal with each other in the context of moving the case forward to the point where they finally do get into the courtroom. Sometimes it’s felt that lawyers, when they’re not under the microscope of the courtroom and the judges, might be doing things that are less than civil,” added Cronyn, who was also the president of The Advocate’s Society in 2008-2009 and was an integral part of the [efforts that produced] Principles of Professionalism for Advocates and Principles of Civility for Advocates published in 2009.

“There’re not concerning themselves about whether or not that conduct is policed or watched, so they’re trying more aggressive behaviour in that context.”

Statistics also show that over 80 per cent of professionalism cases involve lawyers who practice either as sole practitioners or in the firms with two to five practitioners—illustrating that this is not only a Bay Street problem.

“Anecdotally, people in the smaller centres said they didn’t think there were as many incidences of incivility”, said Millar. “But it’s interesting because once the conversation got going ... it turned out that there were more instances of incivility that were discussed.”

But Cronyn argues that in the smaller communities, professionals have a sense of “self policing,” in that they tend to work with the same lawyers and judges more often than in an urban centre like Toronto.

“You have to work with each other so frequently that if you take difficult positions, are unreasonable and uncivil you’re probably not going to be very successful within that community,” he said.

But he acknowledged the reason the Advocates’ Society published its principles on professionalism and civility was because “there was a sense amongst the members that there has been a diminishment.”

Lammers also said that as a paralegal in Windsor, Ont. he has personally witnessed very few incidences of incivility, so the discussion was “a real eye-opener.”

“It was really interesting to hear what’s happening, not only in Windsor, Ont. but throughout Ontario” he said. “And only by pointing out the problem and making the profession aware of it can we learn to what extent it can be corrected. Will it ever be eliminated? No. But can it be reduced? Certainly.”

The LSUC has taken the first steps to reduce the problem by bringing awareness to the issues and facilitating discussions. But the forum was just that; a first step.

**"Civil Unrest?
Drawing the line between vigorous advocacy and just plain rudeness"**

**Singer, Leo, *National* (April-May 2010), pp.27-31
[excerpt]**

... from 2004 to 2008 in Ontario, the number of complaints that involve incivility or unprofessional conduct has tripled. The Law Society of Upper Canada fields more than 1,500 complaints a year related to the issue of civility, almost one complaint every working hour of the week. In 2008, the Barreau du Quebec received 48 complaints about breaches of civility between lawyers and 75 civility complaints between adverse parties. (In Atlantic Canada, however, the Nova Scotia Barristers’ Society heard only four cases involving complaints between lawyers for breaches of civility between 1998 and 2008.)

Experienced litigators and judges across Canada worry their colleagues have forgotten how to conduct themselves properly and politely, both inside and outside the courtroom. The Law Society has even embarked on a civility road show [2009-2010], travelling the length and breadth of Ontario to spread the word about the need for respect, courtesy and professionalism in the profession. It seems an epidemic of insolence is sweeping the Canadian courtroom, and the legal establishment is worried.

Incivility is generally defined as behaviour that shows a lack of respect or courtesy for others involved in the legal process. It might include insults directed at opposing counsel, harassment of witnesses, or devious courtroom tactics. In its Legal Ethics Handbook the Nova Scotia Barristers' Society says "haranguing or offensive tactics interfere with the orderly administration of justice and have no place in the legal system." The LSUC warns against "misplaced hyperbole, or a desire to intimidate, sully or defame." The Law Society of Alberta adds that incivility can include "sharp conduct or shoddy treatment of other lawyers, opposing parties and even independent witnesses."

As well as general exhortations to gentlemanly and decorous conduct, the Advocates' Society Principles of Civility outline very specific guidelines about counsel's behaviour during discovery. They should "conduct themselves as if a judge were present." It emphasizes the need for truthfulness and candour; "Counsel should not ascribe a position to opposing Counsel that he or she has not taken, or otherwise seek to create an unjustified inference based on opposing Counsel's statements or conduct." It suggests that lawyers should be accommodating when it comes to more practical matters. "Counsel should consult opposing Counsel regarding scheduling matters in a genuine effort to avoid conflicts."

Civility is not just a concern with relations between counsel. The lawyer-client relationship can also sink into discourtesy, and sometimes much worse. Toronto lawyer Julia Ranieri chose to settle a dispute by punching her client in the nose. After the client responded with a solid counter-strike of criminal assault charges, Ranieri hit back with a quick private suit against her client. The bout ended in 2009 when Ranieri was suspended for ten months by the law society and fined \$5,000; they also stipulated she could only return to the bar when she no longer presented a physical danger to her clients. But it's rare that actual violence is involved. More often, the fisticuffs are verbal. Consider the following exchange, caught on record at the end of a deposition in an asbestos-related U.S. civil case from January 2005:

Lawyer 1: Mr.—, if you ever imply that I manufactured testimony again, I'll fucking kick your ass. I'll do it right here in front of all these attorneys, okay? Because we're off the record. Did you hear what I said?

Lawyer 2: To the Court reporter] Did you get that on the record?

Lawyer 1: No, it's not on the record. I said 'we're off the record, end of deposition.'"

The Reporter: You have to agree, per the Rules. I mean, that's just my ... I'm sorry.

Lawyer 1: That's fine. Whatever.

Alice Woolley, Associate Professor of Law at the University of Calgary and author of a paper entitled ‘Does Civility Matter?’, has collected more colourful examples of when rhetoric gets out of hand. Some are just moderately disrespectful, such as when one lawyer politely writes to another: ‘I regret to say this, but you are clueless.’ Sometimes the inner censor is entirely absent: consider *Law Society of Upper Canada v. Wagman*, in which Wagman, tells a mediator to “get ready because I can be ten times a bigger asshole than you. You want to fight, go ahead.”

The Rude Generation

Mark Lerner, a civil litigator at Lerner LLP and a specialist in medical negligence cases, took part in the Law Society’s Civility Forum when it visited London, Ont. in February [2010]. What he heard there confirmed his suspicions: “The stories are appalling. I can’t believe this kind of conduct exists ... there’s clearly a sea change in civility and the lack of professionalism in the past 10 to 15 years.” With 35 years of litigation experience, Lerner is aware that young lawyers are not as beholden to the traditional way of doing things. “There’s a new generation of counsel that seems to be devoid of these attitudes of respect and courtesy—whether it’s incompetence, or insecurity, or the impact of television, who knows, but it’s certainly there.”

Kevin Carroll, [then] president of the Canadian Bar Association, agrees. “The profession, in some way, has lost its civil compass—it’s gone askew. And now there is a need for recalibrating that compass.”

A loss of mentorship opportunities may be partly to blame, he says. “Many lawyers, after completing their education and certification, will go out on their own, and unless they’re savvy enough and lucky enough to arrange for mentorship along the way, these habits may creep into their practices.”

The image of a civil and temperate courtroom is at odds with the Hollywood-infected fantasy of the first-thumping litigator, and American lawyers in particular seem to relish that reputation. Last year a large billboard appeared in Coconut Grove, Fla., depicting a lawyer, briefcase in hand kicking someone in the backside. The slogan underneath read: “We Kick Butt.” The owner of the firm explained his theory of what clients want: “They’re not looking for a guy who coaches Little League. They don’t want a wimp. They want a lawyer who means business, an animal who’s going to get the job done, whatever it takes—as long as it’s legal. I’m an honest lawyer. I just don’t take crap.”

Indeed, an adversarial system is founded on the very idea of conflict—two lawyers, each fearlessly fighting for their respective clients with vigour, engaging in a battle of intellect and rhetoric. If that battle gets combative, if a few harsh words are thrown around, or if sneaky tactics are used to get under the skin of opposing counsel, well, that’s part of the game and it’s to be expected. Isn’t it?

Chronic incivility, especially in the context of a major trial, may have serious consequences. In their 2008 Review of Large and Complex Criminal Case Procedures, Patrick LeSage, former Chief Justice of the Superior Court of Ontario and Professor Michael Code (now himself a Superior Court Judge) argued that every “dysfunctional mega-trial” is characterized by

acrimony and hostile relations between counsel. The longer and more complex the trial, the more damage incivility can cause: “the financial and human costs and, more importantly, the damage to public confidence in the justice system, can be very significant.”

LeSage and Code praised British Columbia, where they found the Law Society dealt rapidly and effectively with judicial complaints of uncivil behaviour. But in Ontario, judges complained into a black hole: “We encountered widespread dismay amongst members of the judiciary, if not outright cynicism, on the subject of LSUC discipline There is a widespread perception that the LSUC will do little or nothing in response to these matters. That perception has considerable basis in fact. As a result, the judiciary has simply given up on referring lawyers to the LSUC.” Their conclusions were stark: “there are almost never any serious consequences when professional misconduct occurs in the courtroom.”

Since the LeSage and Code report was published, the LSUC has developed new protocols in an attempt to meet their criticisms, Judges’ complaints concerning discourtesy or vulgarity are handled more effectively, and there are programs in place to mentor lawyers who have behavioural “problems.” The Law Society has been praised for these attempts. But still, the profession’s public image is suffering.

Canadians love telling pollsters how much they distrust lawyers: a 2009 Nanos poll concluded that just 27 per cent of Canadians rated the honesty and ethics of lawyers as high or above average. (This compares to doctors, who scored an impressive 77 per cent, and car salespeople, at 14 per cent.) It’s no wonder that stories involving lawyers behaving badly are seized upon by media all too eager to reinforce the stereotype of the legal profession.

"There can be too much civility"

Slayton, Philip, *Canadian Lawyer*, May 2010, pp. 18-19
[*excerpt*]

Is it that Canadians like decorum and restraint, and object when someone raises his voice? Complaining about a lawyer’s lack of civility smacks a little of whining to your mother because someone was mean to you in the schoolyard. But legal heavyweights say there is real substance to the problem. They say incivility contributes to the complexity, cost, and slowness of legal proceedings, and diminishes respect for the administration of justice. And the volume of complaints to law societies from the public about lack of professionalism by lawyers has accelerated dramatically in recent years.

In Ontario, complaints about incivility, counselling or behaving dishonourably, and misleading the court, have increased to 35 per cent of all complaints in 2008, from 11 per cent in 2004.

Ontario leads on the civility issue, although most other provincial law societies, and the Canadian Bar Association genuflect to the concept. For example, John Hunter, a recent president of the B.C. law society, wrote in a message to his members, with just a slight touch of xenophobia, “Civility and mutual respect are aspects of professionalism that need emphasis in these days of the portrayal of aggressive and preening lawyers on American television.” Derry Millar, the LSUC treasurer, says, “The administration of justice depends upon the parties involved treating each other and the proceedings with respect.”

A couple of years ago, Alice Woolley, a law professor at the University of Calgary, published an article in the Osgoode Hall Law Journal challenging the civility movement. First of all, argued Woolley, excessive emphasis on professional courtesy and collegiality inhibits the search for truth about another lawyer’s conduct. She wrote: “The law of defamation still exists to give protection to lawyers who are unfairly subject to criticism by their colleagues. The addition of law society discipline fosters protectionism unnecessarily and suppresses legitimate criticism.”

More importantly, Woolley argued the enforcement of good manners may obscure the real ethical principles at play. Often, for example, the focus should not be on whether a lawyer was rude, but on whether he was disloyal to the client or violated his duty to ensure the proper functioning of the legal system. Civility is not a proxy for these more fundamental considerations.

Woolley concluded: “What is required is strong and cogent debate about lawyers The civility movement should be abandoned in favour of this more difficult but ultimately more fruitful and important task,” That is how she resolves the civility dilemma: forget civility, and focus on what’s underneath.

I’m with Professor Woolley. Fussing about politeness, as an end in itself, is silly. Sure, we should be all nice to each other, but it’s not the end of the world if sometimes we’re not, and sometimes we shouldn’t be. On occasion, hard things need to be said to people who don’t want to hear them. The picture of lawyers and judges getting together and chatting, delicately one presumes, about politeness in the law is faintly risible. Where is Monty Python when you need him? OK, I better stop now, before I start getting really sarcastic.

"Treasurer's Report on the Civility Forums"

**Millar, W.A. Derry, *The Law Society of Upper Canada*, 27 May 2010
[excerpt]**

Introduction:

1. The Civility Forum was a series of eleven meetings I hosted for lawyers and paralegals throughout Ontario between November 2009 and February 2010. In this report, I provide

Convocation with the results of those meetings. I also offer my views on future initiatives to address civility issues.

2. Civility is an important issue for lawyers and paralegals and for the Law Society. Lawyer and paralegal civility and professionalism toward the courts, their clients and one another are essential to the effective administration of justice. The Law Society is committed to ensuring that lawyers and paralegals conduct themselves to the highest standards, in accordance with the *Rules of Professional Conduct* and *Paralegal Rules of Conduct*.
3. One of the Law Society's roles as the regulator of lawyers and paralegals is to address issues related to civility, including complaints. In doing so its goal is to encourage civil conduct and respond in an appropriate and effective manner when the ethical standard is breached.
4. In 2007, the Law Society noted that civility issues constituted a significant portion of all complaints to the Society and that the number of issues was growing. The Professional Regulation Committee was alerted to this trend and the Law Society began to develop strategies to address it.
 - (a) In 2007, the Law Society noted that civility issues constituted a significant portion of all complaints to the Society and that the number of issues was growing. The Professional Regulation Committee was alerted to this trend and the Law Society began to develop strategies to address it.
 - (b) In 2007, the Honourable Coulter Osborne released his report on the *Civil Justice Reform Project*. This report noted the adverse effect of unprofessional conduct on the administration of civil justice. In February 2008, Attorney General Chris Bentley appointed the Honourable Patrick J. LeSage, and His Honour Justice Michael Code (then a law professor at the University of Toronto) to conduct a review of large and complex criminal case procedures, and to identify issues and recommended solutions to move these cases through the justice system faster and more effectively. In November 2008, the Attorney General released the Code/LeSage report entitled "Report of the Review of Large and Complex Criminal Case Procedures". One of the issues identified as contributing to the length of some complex criminal cases is incivility and the litigation culture. Concerns about lapses in civility were cited as affecting the length of criminal cases and their orderly administration with adverse effect on access to justice.
5. The Law Society responded to its experience with civility-related complaints, the comments respecting civility in the Osborne Report, and the anticipated comments in the Code/LeSage Report with a number of initiatives. It had discussions with key stakeholders such as members of the judiciary, the Criminal Lawyers Association and the Advocates' Society that led to a protocol for addressing judicial complaints about lawyers and paralegals and a mentorship protocol to address certain types of civility concerns. To highlight the issue, an article entitled "Civility in the Profession" was published in the

Winter 2008 edition of the *Ontario Lawyers Gazette*. In addition, I launched the Civility Forum.

. . . .

Participant's Experience with Uncivil Conduct

14. Forum participants, including members of the judiciary and senior counsel, described their encounters with uncivil conduct. Both lawyers and paralegals related experiences that ranged from a lack of respect to harassment. Some younger practitioners described a sense of powerlessness at their treatment by more senior members of the bar.
15. Conversely, there were observations that younger members are not respectful enough of more senior members. Lawyers and paralegals described experiences with difficult, demanding clients, and encounters with lawyers and paralegals who were clearly overly-stressed, rude or bullying. Lawyers and paralegals also described experiences with judges who they felt had failed to respond appropriately to uncivil conduct in the courtroom, or failed to show the appropriate respect for lawyers, paralegals and others in the courtroom. Those in sole practices described the difficulty of dealing with uncivil and harassing behaviour without colleagues to support them and to help them formulate a response.
16. Most participants indicated that they try to address the uncivil conduct themselves. They offered a range of best practices on how to respond to uncivil and bullying conduct:
 - a. Remain calm, do not escalate the situation.
 - b. Ask the speaker who made the offending comment to rephrase.
 - c. Ignore the conduct and do not pursue the issue unless it interferes with the client's matter.
 - d. Tell the person the behaviour is inappropriate and ask that it stop.
 - e. Find a way to defuse the situation, and use humor if appropriate.
 - f. Ask for an apology.
 - g. Allow a "cooling off" period before responding.
 - h. If the behaviour is serious or persistent, complain to the other practitioner's firm or the Law Society.
17. The guest speakers described their observations about civility largely in the courtroom setting. Many of their observations were captured in the following list prepared by one of the Regional Senior Justices of the Superior Court who attended :
 - a. Lateness

- b. Failure to stand when the judge enters the room.
 - c. Failure to stand when making submissions or objections.
 - d. Failure to attend court gowned and then grumbling when gowns are required.
 - f. Slipshod preparation or outright lack of preparation.
 - g. Failure to accept rulings when they are made and continuing to argue.
 - h. Demonstrating an attitude of truculence when rulings are made.
 - i. Criticizing the judge or other judges.
 - j. Ignoring orders or directions of the court.
 - k. Stating or implying that an immediate appeal of decision will follow.
 - l. Making faces or rolling eyes.
 - m. Behaving rudely to witnesses.
 - n. Dismissive body language.
 - o. Disrespectful tone of voice, including a raised voice.
 - p. Baiting the judge, in hopes of gaining grounds for appeal.
 - q. Slamming down books.
 - r. Leaving the court room before the judge.
 - s. Slamming the door upon exiting.
 - t. Referring to judges in an overly familiar or disrespectful way, such as calling them by their first names.
 - u. Putting feet on the counsel table.
18. Invited speakers observed that since the licensing of paralegals, the level of civility in the Ontario Court of Justice has improved, with greater attention to ethical conduct requirements. The guest speakers also noted that the judiciary is in a position to show leadership by maintaining civility within the courtroom. They agreed that it is important to nurture a culture of civility through leadership, particularly on the part of judges and senior counsel.

Causes of Uncivil Conduct

19. Many of the reasons offered as causes of incivility were repeated across meetings, revealing broad consensus throughout the province.
20. The participants identified some causes as societal:
 - a. A general decline in civility in society, including changes in the tolerance for the use of foul language, dress standards and standards to denote respect.
 - b. Behaviours and expectations adopted from American television as to how a successful lawyer should behave, which have influenced the expectations of clients and the conduct of some lawyers who emulate these roles. The consensus was that the public needs to be better informed about what it can expect from a lawyer or paralegal and what the standards of service, values and professionalism should be.
 - c. The economic and business stresses caused by the recession, adding to the stress experienced by many lawyers and paralegals.
 - d. Personal stressors on lawyers and paralegals, such as family pressures, psychiatric or physical illness, addiction and alcoholism; such societal issues often affect the lawyer or paralegal's behaviour in their practices.
 - e. General differences that result in younger lawyers and paralegals and more senior lawyers and paralegals having legitimate, but different expectations of what is acceptable conduct.
21. The participants linked some causes to the nature of practice and legal services:
 - a. Increasing competition and competitiveness in practice which may cause some lawyers and paralegals to accept retainers that may be beyond their capacity or competence to handle.
 - b. Lack of training and competency resulting in stress and frustration for the practitioner who must deal with processes they do not understand well enough.
 - c. The impact of personal stress on practice, including stress arising from psychiatric or physical illness or addiction issues.
 - d. Court processes that are not conducive to efficient and effective practice, with multiple matters scheduled for the same time of the morning or afternoon. Those attending court are not told what is to happen and the process can appear mysterious and stressful.
 - e. Having to litigate against un-represented parties, particularly in family law matters, where the personal stress of the situation on the parties adds a layer of added complexity to the lawyer's practice.
 - f. Failure to communicate effectively with the client to ensure that expectations are realistic. This includes appropriate discussions with the client about possible and likely

outcomes in a matter, and explanations of the process, including the time it is expected to take.

- g. Failure to prepare and manage time properly.
- h. Reduced face-to-face communication among lawyers and paralegals in favour of telephone and email, resulting in fewer personal relationships and less ability to address stresses that may emerge.
- i. Isolation, particularly for some sole practitioners.
- j. A lack of role models and mentoring.
- k. A need for greater emphasis in education on civil conduct for lawyers and paralegals.

. . . .

Complaints to the Law Society

- 23. Participants offered a range of views about when a complaint should be made to the Law Society about incivility. Some participants noted that complaints to the Law Society take considerable time to resolve and that civility issues need a faster, more immediate response. They also noted that working with the Law Society on a complaint is time consuming. Others worried about retaliatory complaints against them if they spoke up to the Law Society about a colleague.
- 24. There was general consensus that a single egregious instance of incivility, or a course of conduct that could not be remedied with more personal responses, should be reported to the Law Society.

Maintaining Standards of Civility

- 25. During discussions on how the Law Society can assist in maintaining high standards of civility, both lawyers and paralegals identified a need to focus on this issue, pointing out that one public incident of incivility by a lawyer or paralegal “can tar us all.” They were conscious of the need to maintain public trust and to demonstrate professionalism through high personal standards of conduct.
- 26. Forum participants provided their thoughts on how lawyers and paralegals can maintain high standards of civility,

. . . .

A Culture of Civility and Leadership by the Judiciary and Senior Lawyers

- 28. Members of the judiciary said that judges have a special role to play in encouraging civil conduct and controlling the courtroom to ensure a fair and balanced process. They agreed

that they can lead by example and promote civil courtroom conduct. Similarly, senior lawyers should be role models and conduct themselves accordingly.

29. The Law Society, senior lawyers and the judiciary were urged to create and maintain a culture of civility that more clearly illustrates this aspect of professionalism.

"Suspended lawyer turns on counsel in civil suit"

McKiernan, Michael, *Law Times*, 27 June 2010

[excerpt]

A lawyer suspended for incapacity has turned on her own counsel, accusing him of negligence in the hearings that saw her forced to stop practising.

In order to defend himself, Kenneth Hughes has now turned to the Law Society of Upper Canada to reverse an *in camera* order he originally requested on behalf of his suspended client, Tracey Marie Foster.

On June 20, 2007, a law society panel suspended Foster, who was then known by her married name Tracey Marie Resetar, indefinitely “until she provides medical evidence” that she’s fit to practice law.

The panel acted based on a medical report that found she suffers from a “Significant Psychiatric disorder.” As part of the ruling, it sealed the document brief and almost all of the medical report’s contents because of their intimate personal nature.

But in a statement of claim filed on June 19, Foster is seeking more than \$10 million from Hughes for alleged breach of contract, breach of fiduciary duty, negligence, loss of income, and loss of reputation.

Foster claims Hughes was negligent through his failure to produce medical reports to counter the one provided to the LSUC and by not cross-examining the doctor whose report was the basis for the suspension.

According to Foster’s claim, which hasn’t been proven in court, Hughes “arrived at the hearing of the applications unprepared, not having served or filed any documentation or medical evidence in defence of the plaintiff, making it impossible for the plaintiff to prevail at the hearing.”

Hughes coerced her into providing consent, Foster says in her claim, “in essence railroading the plaintiff into an unjust and unsubstantiated finding by the LSUC.”

But in his statement of defence, Hughes, who maintains he acted on Foster's instructions, says she "consented to the disposition in exchange for the law society withdrawing misconduct charges against her."

He claims Foster told him she planned to move to the United States to practice and that it was "crucial that the plaintiff not be found guilty of professional misconduct."

He also quotes an e-mail to Foster three days before the panel's decision requesting instructions to allow admission of the medical report on the understanding that the LSUC would discontinue misconduct applications against her in return.

According to Hughes' defence, Foster replied: "Hi Ken, this is fine, please proceed. Thanks, Trace." In an application for reinstatement to the law society filed on May 10, Foster repeats many of the allegations made in her civil action and claims to have medical reports from a psychiatrist and family doctor confirming her fitness to practice law once again.

At a hearing on June 18 to deal with a motion by Hughes to allow him to participate in the matter, Foster's duty counsel, Phil Downes, explained that she had abandoned the application for reinstatement after receiving advice that it wasn't necessary under the terms of her suspension [that she need apply to be reinstated to resume practicing law in Ontario].

"She will go to the director of professional regulation and provide them with the information [required as a result of the disciplinary proceedings against her]," said Downes, adding Foster would restart proceedings should the LSUC [having received the information, then] deem her unfit to practice.

. . . .

Even if she can convince the director of professional regulation that she's once again fit to practice, Foster is still facing potential problems. In an endorsement dated May 6, Ontario Superior Court Justice Leonard Ricchetti expressed concerns about Foster's conduct as trustee of her sister's estate.

He details a number of payments Foster made to herself for expenses and legal services. Two payments for legal fees, totaling almost \$60,000, took place after the law society had suspended her, but Foster claims they were for services performed in advance of the LSUC's action.

She purchased a \$30,000 car with estate money and used it for more than a year after her removal as trustee despite "several court orders directing its sale," according to the endorsement. She also paid her husband \$114,000 out of the \$1-million estate.

"The suspicions that Ms. Foster used the estate monies as her own 'piggy bank' are real and may very well be justified," Ricchetti wrote.

He copied his endorsement to the LSUC, noting Foster "has apparently not kept the estate accounts as required" by the Law Society Act. Ricchetti also questioned whether she should

have operated an estate trust account after the 2007 panel decision [suspending her] because the Act prohibits suspended members from handling money held in trust for another person.

The matter now goes to trial to determine whether Foster's application to pass accounts disclosed all of the assets she received and whether the expenses and disbursements she made were proper.

“Recent Law Grad Files New \$1M Suit Against Lawyer In Prove-Me-Wrong Dare”

Cassens Weiss, Debra, www.abajournal.com, 12 July 2010

A South Texas College of Law graduate has filed a new breach of contract suit against a lawyer who promised to pay \$1 million to anyone who could prove the prosecution's theory of a case against his client.

Former law student Dustin Kolodziej filed suit late last month in federal court in Atlanta, the city where he drove from an airport to a La Quinta Inn [in Atlanta] in less than 30 minutes in an effort to fulfill what he says was an oral contract, according to stories in *The Atlanta Journal-Constitution* and *Courthouse News Service*. Kolodziej says Florida criminal defense lawyer James Cheney Mason has to live up to his televised challenge.

Prosecutors had claimed the defendant drove to the La Quinta in 28 minutes as part of a longer journey. They said he used an alias to fly from Atlanta to Orlando where he murdered four people, then flew back to Atlanta and drove to La Quinta where he used a motel security tape as an alibi. [Former law student] Kolodziej followed the same route and recorded his quest on video after [defence attorney] Mason said on Dateline NBC that it just wasn't possible.

According to the lawsuit, a transcript has Mason scoffing at the 28-minute claim. “I challenge anybody to show me, I'll pay them a million dollars if they can do it,” he reportedly said.

Mason claims the interview was edited, and his comments about paying a million dollars followed a challenge issued to prosecutors about the travel time. Mason says he told the interviewer: “State's burden of proof. If they can do it, I'll challenge 'em. I'll pay them a million dollars if they can do it.” Mason also claims the challenge was a joke.

Last year, Kolodziej filed a similar suit in Houston federal court.

The Journal-Constitution interviewed Kolodziej's lawyer, David George. “This is the kind of thing only a law student would do,” George said. “It reads like a question on a law school test. This case will likely be studied in law school.”

"Easy come, easy go"

Faguy, Yves, *National*, September 2010, pp. 42-43

For lawyers, planning to leave a firm to start up a new practice can be a source of major anxiety.

First, they must consider the logistics before striking out on their own: office space, bank accounts, and support staff, all of which requires time and effort, not to mention discretion until the time is ripe to make one's intentions known.

And then there are the clients, always a sensitive topic under the circumstances. No matter how hard one tries to avoid burning bridges, a lawyer taking a few clients is bound to set off a few sparkes. Jilted law firms typically insist that clients belong to the firm, not the individual lawyer. They often consider that contacting clients before (or even after) jumping ship is a form of solicitation—and therefore a breach of the lawyer's fiduciary duties to his former partners.

But many firms misunderstand the extent of those fiduciary duties. In *Aquafor Beech Ltd. v. Whyte*, the Ontario Superior Court ruled that departing professionals can take steps to start up a new business while still in the old job, provided they do it on their own time. They can also contact clients to inform them they are leaving their current positions.

"There's a misunderstanding being clarified in the law," says Sarit E. Batner, a lawyer at McCarthy Tetrault LLP in Toronto, who represented the defendants in the *Aquafor* case. "This idea that the clients are owned by the firm, that they belong to the firm like property or chattels and that professionals have to keep their hands off, and can't communicate with them and tell them they're leaving. But that's not right."

The case before the Ontario Superior Court involved two engineers, Robert Whyte and Bill Dainty, who had joined Aquafor Beech, an engineering and environmental firm, in the early 1990s. Though both were eventually promoted to senior positions, they had little say in major business decisions.

Neither had signed a non-competition or non-solicitation agreement and in 2003 the pair left Aquafor to start up a new outfit, Clader Engineering. Leading up to their departure, they organized themselves to set up a new office and contacted clients to tell them they were leaving. Several clients asked the two engineers to either work on new projects, or project extensions beyond any contract in existence at Aquafor.

Two years later, Aquafor sued Whyte and Dainty for breaching their fiduciary duty to the company, leveling accusations that the pair had solicited its clients, while "secretly" planning to leave.

The court found that Whyte and Dainty had indeed been fiduciary employees, on account of their positions within Aquafor. Even so, it found no breach of their fiduciary duties. There is nothing wrong in planning their next career move on their own time.

The court also recognized that, “Whyte and Dainty are professionals who owe duties to their clients. Regardless of whether they owe fiduciary duties to their employer, they are entitled to resign, to enter into a competing practice, and to carry on working for the same clients, if that is what the clients choose.”

Not surprisingly, the decision has caught the attention of lawyers who, as professionals, have similar duties. Lawyers, says Batner, are accountable to their clients and, as such, owe it to them to keep them apprised of who’s on the file and not to “leave them high and dry” when they leave their firm.

What’s more, she says, regardless of whether the lawyer’s parting with his firm is amicable or not, professional conduct rules require that clients be notified in a timely manner of the situation. “If you breach them you’re the one who risks getting reported to the professional body, perhaps in conjunction with the firm, but you owe the duties. So it’s not a breach to reach out to them and let them know what’s going on, as long as you’re not soliciting them.”

Does the *Aquafor* decision truly signal a shift in how we interpret professional’s fiduciary duties to former partners or employers? Time will tell, since the ruling is being appealed, but there does seem to be confusion about the rules. According to Batner, most of the case law on fiduciary duties has developed around the notion of key employees, and not professionals. “We’re not talking here about the senior sales guy who works for a company and has sold hundreds of sales contracts.”

“And the analogy with professionals doesn’t work,” says Barner. “Clients choose their insurance company. But they choose their professional for a whole host of reasons that are personal to the professional, and the firm may or may not come into play. And if it does it may only come into play until they get to know their professional, which may then overtake all other factors as the most important one in the relationship.”

"Family Law: Steine case shows pitfalls of incomplete [courthouse] agreements"

Siemiarczuk, Maria, *Law Times*, 03 October 2010

Quite often during the course of a family law proceeding, the parties reach settlements at case or settlement conferences with handwritten minutes drawn up by the lawyers and the litigants in courthouse hallways. Most of the time, the dispute ends quickly once they become orders.

Sometimes, however, things don't go smoothly. Such was the case in *Steine v. Steine* in a decision by Superior Court Justice Gregory Mulligan.

After the parties had been separated for some time, Lori Steine commenced an application. Following completion of pleadings and disclosure, they attended a case conference.

A 6 1/2-hour negotiation ensued at the courthouse that led to an agreement on all issues, including [property] equalization and support, which both parties and their lawyers signed. One of the clauses in the agreement specified that formal minutes would include final releases and standard terms pursuant to the Law Society of Upper Canada's "green book" [Civil Court Practise].

Negotiations ended at 6:30 p.m. I surmise that facilities with photocopiers were by then unavailable and that only counsel for the husband, Terrance Daniel Steine, retained a copy of the minutes while promising to provide one to the opposing side the next day and prepare a draft final order. It seems simple enough, but that's not what happened.

Two months went by without agreement as to the language of the final order. What's most surprising is that Terrance's counsel appears to not have provided a full copy of the courthouse minutes to the opposing side for quite some time, including after providing a draft order for review.

The unfortunate part of all of this is that the funds, including lump-sum spousal support payable to Lori, remained with the parties' real estate lawyers pending agreement on the final terms.

Because the settlement involved lump-sum rather than monthly periodic support, Terrance also terminated his prior voluntary payments to Lori, who for various medical reasons was only able to earn an income of about \$900 per month. Terrance's income was more than 10 times that at just over \$9,000 per month.

In the meantime, his lawyer denied requests for even partial distribution of the proceeds. Understandably, Lori became very upset. By this past April, three months after the case conference and still having no funds, she retained new counsel.

By then, she started a motion for summary judgment and simultaneously filed a cross motion to set aside the courthouse minutes and for interim support.

The basis for her motion to set aside the minutes included duress and a lack of comprehension of the implications of what she had agreed to that day, as well as allegations that her former husband had failed to disclose income and assets.

Mulligan made short work of those allegations primarily because neither she nor her counsel had made any claims about non-disclosure or that the minutes were somehow unconscionable prior to that, specifically as they related to lump-sum support and a subsequent release from Terrance.

In reading the case, what becomes very clear is that Lori, at the end of her rope at not having finality or any money in her hands, had changed her mind about the agreement. Ultimately, her husband was successful in obtaining summary judgment.

However, recognizing the serious impact the protracted negotiations of terms and lack of continued interim payments had on Lori, Mulligan made an order in her favour for arrears of spousal support retroactive to January of this year that totalled about \$20,000. Of note are Mulligan's comments on the issue of costs, which Terrance then sought.

Specifically, the judge ordered that his submissions [on costs] were to include an explanation of why he didn't continue his voluntary payments of spousal support during the continued negotiations of the terms of the final order and why he didn't agree to the partial release of the proceeds of sale of the matrimonial home.

Based on these comments, it's clear that Mulligan was less than impressed with the hardship that Lori suffered after the case conference.

Courthouse settlements, which both counsel and the judiciary encourage, are extremely common in family law. However, we as lawyers have to be careful as to how we craft those agreements.

I think that where this case really fell off the rails is with the earlier noted term that the formal minutes will include standard LSUC clauses.

As lawyers, our job is to be picky about what does and doesn't go into agreements, and leaving certain things unsaid on the assumption that there will be little disagreement, as to what's appropriate and standard, later on, is simply a recipe for complications as it so clearly was in this case.

“Harassment complaints against lawyers spike”

McKiernan, Michael, *Law Times*, 11 October 2010
[excerpt]

Discrimination and harassment complaints against members of the legal profession hit a record high in the first half of 2010, a spike Law Society of Upper Canada benchers are calling “disturbing.”

In her latest report, LSUC discrimination and harassment counsel Cynthia Petersen recorded 40 complaints against lawyers, law students, and paralegals, the most in any six-month period since the program's inception in 1999.

In 2007, there were just 35 complaints during the whole year. That number rose to 43 in 2008 and went up again, to 66 complaints, in 2009.

In presenting the latest report to Convocation, equity and aboriginal issues committee chairwoman Janet Minor said she couldn't offer any explanation for the rise.

"It's a bit dispiriting to be aware that rather than going down based on education, awareness, and otherwise good intentions, that these complaints seem to be not only continuing, but increasing, and it's certainly an area where we need to be vigilant and try and do whatever we can to reduce them."

Several benchers expressed concern about the trend, including Paul Schabas, who called on the law society to disseminate the "disturbing information" more widely than just Convocation.

"It would seem to me that when we get this kind of information, which is troubling, that it's something that we ought to make the membership aware of as well," he said.

Most of the complaints, just over half of which alleged discrimination on the basis of sex, were from women. One was from a lawyer who complained her employment was terminated when she announced plans to take maternity leave.

In another case, a closeted gay male litigant reported that opposing counsel had maliciously outed him in order to intimidate him. Other complaints alleged discrimination on the basis of race, disability, and age.

Despite the statistics, Petersen tells *Law Times* she isn't worried about them. "On the contrary, I actually think it's a good sign because I don't think it's an indication of increased discrimination and harassment by lawyers," she says. "I think it shows a greater confidence in the program, awareness of the program, and willingness to use it which I think is a good sign."

According to Petersen, the law society's equity department promotes the program during continuing legal education courses, and her office has participated in workshops for law firms and information sessions at university law faculties.

All of those efforts have helped raise its profile in the eyes of the profession, she notes. Petersen's office accepts anonymous complaints and gives advice to people who feel they've suffered discrimination by lawyers, paralegals or law students. Although it receives its funding from the law society, it operates independently from it.

Sixty per cent of the complaints came from other members of the bar, a fact that supports Petersen's suspicions about greater awareness among lawyers. During the last seven years, legal professionals reported only 43 per cent of the complaints, compared to 57 per cent from members of the public.

"People are feeling more empowered to assert their rights when something happens to them, whereas previously they might have felt insecure about confronting the issue or doing something about it," Petersen says.

That's particularly true of law students who are often reluctant to complain about a more senior member of the bar for fear it may affect their career prospects. Eight students made complaints in this six month period, another record high.

"Did Partner Dispute at Beasley Firm Begin Before or After Barroom Brawl?"

Neil, Martha, www.abajournal.com, 14 February 2011

[*excerpt*]

A barroom brawl between two partners of the Beasley Firm—witnessed by two other partners, including the firm's managing partner—was the impetus for a recent announcement that one of the partners involved in the altercation and one of the witnesses are leaving the firm, reports the *Legal Intelligencer* in an article reprinted in *New York Lawyer*.

Although the Feb. 7 press release announcing their departure makes no mention of the Jan. 28 scuffle and includes positive comments from both the managing partner and the exiting lawyers, a private criminal complaint was filed by one of them, says the legal publication, which obtained a copy of it.

Paul Lauricella, who was not injured in the fray, said in an e-mail that he intends to withdraw the complaint as a courtesy to the firm's managing partner, "out of respect for the other attorneys at the firm, and in order to put the entire matter in the past." It alleges simple assault, terroristic threats and harassment.

Unidentified sources tell the *Legal Intelligencer* that a dispute was brewing for weeks before the brawl, but differ as to whether compensation for the two departing partners, who are among the firm's leading lawyers, or an alliance between the managing partner and Lauricella's opponent, was the main cause for the tension. None of the four responded to repeated requests for comment.

James Beasley Sr. was considered one of the best trial lawyers in the city and contributed \$20 million to Temple Law School in 1999. However, a number of lawyers have left the firm after his death.

"LSUC civility crusade sparks debate"

McKiernan, Michael, *Law Times*, 09 January 2011
[*excerpt*]

The law society [LSUC] must be cautious not to impinge on the ability of lawyers to provide fearless advocacy in its prosecution of uncivil lawyers, according to a Toronto lawyer facing disciplinary action over his behaviour.

“It’s certainly in the public interest that lawyers be civil with one another, but at the same time, we must be very, very careful not to create a situation where over-emphasis on civility can be used an instrument to undermine the effectiveness of my role to advocate on behalf of my client,” Ernest Guiste tells *Law Times*.

Guiste was one of three lawyers who faced hearings last month over charges of misconduct related to civility. His matter stemmed from his behaviour at a mediation session during a sexual harassment case.

In an agreed statement of facts signed Dec. 13, he admitted to much of the law society’s account of his actions but denied they constituted misconduct. The hearing panel has reserved judgment following a two-day hearing. [Note: LSUC panel, 11 March 2011, found him guilty of professional misconduct.]

In another matter, Julia Ranieri had her licence revoked on Dec. 17 after a panel found her guilty of misconduct for among other things, the rude and abusive language she used towards a law clerk on the other side of a real estate deal she was involved with in July 2008.

“She just kept ranting and raving about how it was my fault that the deal wasn’t yet closed,” the clerk said of the 20-minute phone call in documents filed in the matter.

Ranieri failed to attend the hearing and was also found guilty of misappropriating funds and acting for clients while suspended.

That suspension was just the first of three imposed by the law society on her, including another in which she received a 10-month suspension for breaking a client’s nose with a punch to the face. She couldn’t be reached for comment.

In addition, Colin Lyle has been suspended on an interlocutory basis since December 2009, by which time the law society had what the hearing panel chaired by Carl Fleck described as “an alarming” 22 complaints against him related to his practice that primarily focuses on family law and child protection matters.

In March, he apologized in writing to complaints, including a former client who objected when Lyle allegedly said his girlfriend was “sleeping around.”

“If you want to make her into a slut, that is your problem.” Lyle allegedly told the client on the phone. In his apology, Lyle thanked the client for the complaint, saying it had made him reconsider his career direction.

“I apologize for an abrasiveness I have sold my law practice and I am working toward a more balanced lifestyle,” he wrote.

Lyle couldn’t be reached for comment, and his lawyer, Janet Leiper, declined to speak about the matter. His hearing is due to reconvene on Jan. 20.

Former law society treasurer Derry Millar says he hopes the new continuing professional development requirement will keep civility top of mind for lawyers and stop problems before they arise. Three out of the 12 hours are reserved for professionalism and ethics courses.

The Law Society of Upper Canada v. Ernest Guiste

**2011 ONLSHP 0024, 08 March 2011,
Doyle, Adrianna (Chair), Pustina, Q.C., Nicholas, and van Burek, John
[excerpt]**

[**Note:** Lawyer found guilty of professional misconduct for conduct in violation of Rule 4.01(6) and Rule 6.03(5) of the Rules of Professional Conduct for failing to be courteous, civil and act in good faith, by using sexually explicit, rude and profane language during a mediation, communicating with counsel in a manner that was abusive, offensive and otherwise inconsistent with the proper tone of a professional communication from a lawyer, and failing to treat a court with courtesy and respect.]

. . . .

Allegation # 1

[6] The Lawyer was involved in a wrongful dismissal case in the matter of *D.L. v. N. Ltd. et al.* In the Agreed Statement of Facts, the Lawyer admits the following:

12. On June 21, 2007, a mandatory mediation session was held. Richard Sadowski was the mediator. The Lawyer attended with his client D.L. J.G. attended with an associate lawyer, M.Q., LL.B and J.G.’s client, R.J.

13. During his opening statements, the Lawyer explained his view that for actions to be sexual harassment, they do not need to be blatant. He said “someone doesn’t need to grab a tit for it to be sexual harassment”.

14. Following the presentation of the Defendant’s settlement proposal, the Lawyer used the word “fuck” more than once, raised his voice and told J.G. to “take [the offer] and shove it up your ass”.

[7] The Lawyer’s first argument regarding this allegation is that a mediation session is closed and confidential

. . . .

Allegation # 2

[29] J.G. maintains that the Lawyer handed a Rule 49 settlement offer directly to R.J., (J.G.’s client) and left the room with his own client D.L. The Lawyer states that he passed the Rule 49 settlement offer to the other side without regard to whether it was handed specifically to J.G. The lawyer states that it was not his intention to by-pass J.G., who was present at the time.

[30] During his testimony, the Lawyer explained that the offer was passed to the other side of the table where J.G. was sitting with his client. He stated that he was upset and had “had enough” and just before leaving, he sent the offer in the general direction of the opposing side. The Society is not pursuing this allegation as constituting professional misconduct.

. . . .

Allegation # 3

[32] With respect to the communications in the case of *D.L. v. N. Ltd. et al.*, the Lawyer admits the following communications in the Agreed Statement of Facts:

17. In a letter dated October 14, 2005, the Lawyer wrote to J.G.: “Unlike yourself [sic], I don’t have a client that is a CASH-COW! Accordingly, I am very practical and pragmatic in my practice of law. I sensed from the outset once you mentioned your client’s ability and willingness to go to the Supreme of Court of Canada that this litigation would take this tenor. Let it be known, I don’t care how much money your client has. They will pay in the end. The end can be tomorrow or ten years from now. I will be there. I hope you can say the same.”

18. In a letter dated October 18, 2005, the lawyer wrote to JG: “I am still awaiting your statement of Defence. It would appear that the facts of the case are giving you some trouble! An American friend of mine who represents defendants tells me—“When the facts give you a problem—delay and bring jurisdictional motions.” You are speaking of your motion like it is the second coming of Jesus Christ! Your motion is premature and has not [sic] chance of success. I look forward to successfully defending your motion. Bring your motion already! I look forward to pinning our trust cheque on my wall as another trophy. If there is some legitimate reason for your delay, please advise me and I will consider it.”

19. In a letter dated October 26, 2005, the Lawyer wrote to J.G.: "...As a bit of free legal advice, you may wish to speak to Mr. [P.S.]. at [T.M.]. He tried to bring such a motion against me despite my free legal advice to him, he lost. I do this not to "toot my own horn" but only in the interests of efficiency."

20. By letter to J.G. and another counsel dated November 17, 2005, the Lawyer wrote: "Mr. [H.] you are speaking nonsense [...] By your logic a man would be free to rape a woman in the workplace and her only civil remedy would be to go to the OHRC!"

21. By email to M.H., LL.B on March 4, 2006, the lawyer wrote: "Does your client set your calendar? I don't understand what you are seeking instructions on. This in fact has nothing to do with your client. Play at your own risk.—Play at your own risk—Play at your own risk!"

22. By letter to J.G. dated March 28, 2006, the Lawyer wrote: "...Should you wish to settle—do not be shy—put aside your personal hang-ups and pride and settle the case like a professional!"

23. The Lawyer had a telephone conversation with J.G.'s assistant, J.L. on November 23, 2007. In a memo to file written on that day, J.L. described his conduct as "very unprofessional" and that throughout their conversation, the Lawyer was "yelling at me, extremely rude, consistently interrupting me ... He tried bullying, intimidation and when that failed, he used profanity. This is not the first time I have had Mr. Guiste yelling at me down the telephone because he was unable to reach [J.] or get an immediate response to correspondence sent to us just hours earlier.

J.L.'s memo dated November 23, 2007, Exhibit 2 (Tab 10 of the Document Book to the ASF), she states:

...In an aggressive manner he cut me off in mid-sentence by asking what the dates were. I advised him they were January 18th 21st 22nd 2008, with [J's] preference being January 21st or 22nd, but that the letter would be addressing certain additional points. He again cut me off and stated "what are the fucking dates". I was shocked and told him that I didn't appreciate his language, that I had already advised him twice that the available dates would be January 18th, 21st and 22nd with the preference being January 21st and 22nd. While I was explaining this Mr. Guiste was mumbling something, I asked him what he had said and so he said "I apologize but I want the dates".

Later in the memo as the assistant is trying to explain that [J.G.] had concerns regarding the time estimate for the motion.

As I was trying to explain this to him, he yelled into the phone "it's not half an hour it's one and a half fucking hours." I said "excuse me" and he said "it's for one and a half hours" and then he slammed the down the phone and the call ended.

The Agreed Statement of Facts continues:

24. The Lawyer sent an email to J.G. on January 16, 2008 in which he simply stated: “we wii [sic] be there when the bell rings—will you?”

25. C.C., LL.B., an associate lawyer with the firm at the time, attended at an undertakings motion in this matter on January 22, 2008. It was her first time arguing a motion, and the first time C.C. had met the lawyer in person. At the time of the Motion, C.C. was in her first year of law practice. Prior to the commencement of the motion, lawyer commented to C.C. that he found it “funny how big law firms send young female associates on sexual harassment motions.” The comment made C.C. nervous and she viewed it as a successful attempt to unnerve her before the argument of the motion.

26. Following a request by the Lawyer that C.C. consent to the Lawyer late-filing an amended refusals/undertakings chart, and C.C.’s assertion that the Lawyer would have to seek direction from the presiding Master, the Lawyer told C.C. “for this, you will burn in Hell”. In C.C.’s view, the Lawyer was extremely agitated and erratic at the time of the comment. She was offended and taken aback by his comment but simply walked away.

27. C.C. felt that the Lawyer targeted her as she was a young associate whom he saw as an easy target. She described him as the most difficult counsel she had ever dealt with.

28. The Lawyer sent additional emails to C.C. on March 3, 2008 and April 1, 2008. On March 3, 2008, the Lawyer wrote: “why must you be so vexatious? Why can’t well [sic] all just get along? Why are you so hostile? How am I to know that you are away. I know that you are away. I know you think I am gifted but I am not that gifted.”

29. On April 1, 2008, he wrote: [C] let me be clear. What you do with your people is your business. I do not care. All I care about is bringing this case to trial and winning [sic] and les[sic] a quarter million dollars for my client? Do you understand? All I ask of you is that you get the answers to me by the date stipulated in the order all will be well. If you wish to bring a motion- BRING IT ON! Call my assistant and get may availabl[sic] dates.”

30. The Lawyer sent two emails to J.G. on January 9, 2009 as follows: “I know what the hearing is about. You will get my list soon. Bill Bill Bill Bill Bill Bill Bill Bill.” J.G. expressed concern about the Lawyer’s allegation that he was intentionally overbilling his client in this matter and the Lawyer responded: “Why, would you conclude that? What does what you bill your client have to do with me. Keep on truckin’ [sic]. If they give you the right to bill. Bill bill bill bill! Bill for this email. Why its [sic]. If they give you the right to bill. Bill bill bill bill! Bill for this email. Why its [sic] your God given right?”

31. On February 2, 2009 the Lawyer handwrote a note on January 30, 2009 letter to J.G. and faxed it to J.G. He wrote: “Mr. [J.G.]. You need to come out of that Gold-Plated tower and take a breath of fresh air!”

. . . .

Allegation # 4

[42] The Lawyer and J.G., LL.B. were also opposing counsel in the matter of *R.K. v. B.B. Canada Ltd.* J.G.’s firm was retained by the Defendant and the Lawyer acted for the Plaintiff. The Agreed Statement of Facts states as follows:

33. By letter to J.G. dated January 14, 2007, the lawyer wrote: “It is clear to me that you have more idle time on your hands that [sic] I do. I do not have time to respond to needless motions” and “My client does not have the resources to engage in a needless urinating contest with yours”. He added as a post script: “In ordinary parlance this is known as a “pissing contest”. It is where young boys (5-7 yrs of age) compete to see who can urinate the farthest.”

34. The Lawyer sent an email to C.C. on January 30, 2008 in which he wrote:

“WHICH PART OF “I AM NOT AVAILABLE” DO YOU NOT UNDERSTAND? YOU AND OR [J] WILL EXPLAIN YOU [sic] SAGA TO THE COURT. Have a good day.”

35. The Lawyer sent three emails to C.C. on February 4, 2008. In the first email he said “Don’t [sic] be a hero. Serve your affidavit of documents and consent to the proposed amendment. It’s ok believe me. No one will ever know.”

35. (sic) In his second email he wrote: “What about [sic] your client’s consent to the proposed amendment—Don’t be a hero. It is not your case [...] the only impediment here is ego—and it is not B.B.’s ego. They are unfortunate ones footing the bill for someone else’s [sic] ego. This is not right! You can do better! I know you can- [C.C.] Rise up and be the lawyer you are capable of.”

36. In his third email he wrote: “you folks must be either understaffed, undermotivated or just plain demoralized. Give it up! You [sic] will sleep better at night! Consent and move on! [...] DON’T BE A HERO!”

36. (sic) The lawyer sent an email to J.G. dated August 5, 2008 which he found inappropriate, given his experience with the Lawyer: “I saw you the other night walking in the rain in Greek Town all by yourself. I hope that all is well with you!”

37. On January 22, 2009, the Lawyer represented the Appellant at the hearing of an appeal to the Court of Appeal. The Court of Appeal dismissed the appeal and ordered the Lawyer’s client to pay costs to B.B. in the amount of \$10,000.00. B.R.J., LL.B. a partner at the firm, approached the Lawyer to ask about payment of the outstanding costs against his client. In response to B.R.J.’s inquiry the Lawyer laughed and said that B.B. would not “receive one black penny.”

38. T.G., LL.B., an associate lawyer, was involved in the B.B. matter. Shortly after the hearing of the appeal, T.G. was asked to prepare a draft order and obtain the Lawyer’s comments and approval as to form and content. In response to T.G.’s request that the Lawyer approve a draft Order as to form and content, the Lawyers wrote: “If there is not

enough work for you to do—see [J.G.] for another assignment. The world will not end if this order is not resolved by the end of the week.

39. In subsequent e-mail correspondence, the Lawyer said to T.G. “Why don’t you stop pretending to be tough and just be yourself. Why must you give me this attitude. Do you have problems with your manhood or what? I don’t understand you. Now you are giving me attitude. I recommend you keep yourself in line”. T.G. felt that the Lawyer’s comment was a personal attack and an attempt to bully him.

40. The Lawyer wrote to B.R.J. “I thought my point was very clear. Obviously one of us has problems with the Queen’s English. Allow me to try again. I, Ernest Julius Guiste, the first—of La Plaine, Commonwealth of Dominica, the first born of Evans Alexander Guiste, also of LaPlaine [sic] Commonwealth of Dominica, do hereby confirm that I am not aware of any steps which my client wishes to take in the interim and I hereby confirm that it would be most unethical of me to intentionally mislead my fellow lawyers. There are not steps that I intend to take before the hearing of the motion. In ebonics—I aint gonna take any steps in the litigation before the hearing of the motions—word up! Does that make you feel good [B.]? Does that satisfy you?”

. . . .

Allegation # 5

[50] With respect to the appearance before Justice Bassel on July 6, 2009, the Society is not proceeding with respect to the allegation that the Lawyer’s failure to stand in his courtroom constituted professional misconduct.

[51] The panel makes no finding of misconduct on the part of the Lawyer for his initial failure to stand. We take into consideration ... the Lawyer’s mistaken impression that it was an informal procedure, and the Lawyer immediately stood when he was asked by the court and explained his initial failure to do so.

[52] However, the Society’s position is that the transcript supports the fact that the Lawyer was curt and rude to the Court and did not deal with the Court in a courteous manner contrary to Rule 4.01(1) of the *Rules of Professional Misconduct*.

[53] The context of the exchange with Justice Bassel is important to note. Justice Bassel thought that the Lawyer had missed four Judicial Pre-Trials (JPT). Justice Bassel was not aware that two of the JPTs dealt with the co-accused who were represented by other counsel. Therefore, the Lawyer and his client’s attendance were not necessary.

[54] Secondly, Justice Bassel was not aware that the Lawyer had advised the Court that he would not be able to attend the April 29, 2009 JPT.

[55] The Lawyer admits to his failure to attend the June 30, 2009 JPT due to a miscommunication in his own office and took responsibility for this missed court appearance.

[56] The Society indicates that the following exchange between Justice Bassel and the Lawyer demonstrate[s] professional misconduct: [Transcript of Proceedings, July 6, 2009]

At page 11:

Mr. Guiste: “If you’ve been in practice, private practice, Your Honour, you would know that you employ a clerk. I employ a student-at-law. The Student-at-law appeared on a number of initial dates.

[57] After Justice Bassel had suggested that the Lawyer could have picked up the phone and called other counsel, Mr. Robbins, to explain his non-attendance.

At page 30,

Mr. Guiste: Yeah. For the record, whoever this Mr. Robbins is, I guess he must be some very esteemed lawyer. I notice that this jurisdiction has a way of putting some lawyers higher above other lawyers; but in my view, we’re all lawyers. I’ve never met this man, whenever I attend in court or my student attended, when I attended personally, there was another person that he sent as his agent. I have never seen this man in court representing this person. I also attended a judicial pre-trial. I think it might have been early June before Justice Nordheimer, and the young man that was acting as his agent was also there and he also confirmed to me, I think at that time, the June 30th date. So this thing about Mr. Robbins, or whoever he is, Johnny Cochrane come lately, or whatever, whoever he is, I’ve never seen him.

The Court: That’s a very sarcastic thing to say for another counsel, Mr. Guiste.

Mr. Guiste: No, no, but you’re putting it as if he’s God.

The Court: Mr.....

Mr. Guiste: The man has never attended when I attended. He had an agent attend. It as an agent that dealt with me. You check the record. I’ve never met him.

The Court: But he attended all the judicial pre-trials.

Mr. Guiste: He didn’t—I don’t think he did.

The Court: He attended all judicial pre-trials.

Mr. Guiste: Whenever I

The Court: ...that you did not attend.

Mr. Guiste: Okay, Well, whenever I attended it was somebody else.

The Court: You don’t get it.

Mr. Guiste: And I am very very sorry that, I indicated, that there was any inconvenience. I accept that my office's inadvertence caused a problem. I have undertaken that I will do my best to remedy that; but the way that you're conveying this to me is like Mr. Robbins is like some special individual.

The Court: You know, sadly, Mr. Guiste, sadly you don't get it.

Mr. Guiste: I do get it.

The Court: If Mr.—Whether Mr. Robbins is a top counsel or the lowest counsel, he's a human being who has a law practice and I think your comments about Johnny Cochrane were sarcastic and very inappropriate for a counsel and a member of the Law Society. I never made such allusion. I said as a courtesy to Mr. Robbins, or whoever else the lawyer was, you should have called him; and quite frankly—I'm going to ask you to make a copy of this transcript, please, Mr. Cavanaugh—I find those comments that you made disrespectful to Mr. Robbins and disrespectful to the Court and they are a dereliction to your obligations for courtesy to the Court and to another counsel, Mr. Guiste

. . . .

Allegation # 6

[60] Regarding the failure of the Lawyer to attend two scheduled judicial pre-trial conferences of April 29, 2009 and June 30, 2009, the Society is not proceeding with this allegation.

. . . .

Conclusion:

[64] In summary: Particulars 1, 3, and 4 were established; Particular 5 was established in part; and Particulars 2 and 6 were dismissed. Given these findings of professional misconduct, arrangements should be made through the Tribunal's Office to set a date for the penalty hearing.

[**Note:** On 24 June 2011, Mr. Guiste—who frequently represents marginalized persons with fearless advocacy—apologized, and was reprimanded.]

"To undertake or not to undertake"

**Brannen, David, *The Lawyers Weekly*, 29 April 2011, pp. 11, 14
[excerpt]**

Black's Law Dictionary defines an undertaking as a "promise, pledge or engagement." Undertakings are enforceable pledges between lawyers or between a lawyer and the court. They can be given unilaterally and there is no need for mutual consideration. Once given, the undertaking must be carried out as specified and cannot be unilaterally revoked by the person giving it.

Undertakings are not part of civil procedure, but are governed by the rules of professional conduct. For example, in Ontario, undertakings are governed by Rule 4(7) of the *Rules of Professional Conduct*: "A lawyer shall strictly and scrupulously carry out an undertaking given to the tribunal or to another legal practitioner in the course of litigation." Undertakings can be enforced by court proceedings and professional disciplinary bodies.

Lawyers often use undertakings to facilitate commercial and property transactions. Undertakings provide temporary safeguards to allow agreements to take effect before every paper is signed and document delivered. In this context, the use of undertakings is of mutual benefit to both parties.

On the other hand, the practice of giving undertakings in personal injury litigation typically only benefits the defendant. Unless carefully worded, undertakings to provide documents result in the defendant having expanded discovery rights and simpler enforcement mechanisms. Normally, a defendant must establish that a document is relevant and in the possession or control of the plaintiff; however, once a plaintiff provides an undertaking to give the document, all the defendant has to prove is the existence of the undertaking and whether it has been fulfilled.

Legitimate disputes over the wording and interpretation of the undertaking are common. Allegations of lawyers failing to fulfill undertakings are taken seriously by regulators of the legal profession. A party's efforts to have a matter set down for trial can be stalled by unfulfilled undertakings. Plaintiffs can avoid all these problems by simply not giving undertakings to produce documents.

Over the past two years, defendants have relied on *Michaud v. Cormier* [2009] N.B.J. No. 182 to argue that a plaintiff (or his or her counsel) has a duty to undertake to provide documents. *Michaud* was a personal injury claim involving a motor vehicle accident. At discovery, the defendant sought production of 18 documents, 10 of which were requests for medical records and the remaining eight for various documents in the plaintiff's possession (photographs, resume and tax returns) and in possession of third parties (gym, file, employment file, EI file, and the accident benefits insurer's file).

Counsel for the plaintiff declined to undertake to produce the documents and subsequently did not produce any of the documents. In ordering the plaintiff to produce the documents, the motions judge stated that, at first glance, she viewed the practice of refusing to give undertakings as against the spirit of the rules of court.

A careful reading of the decision reveals the judge was concerned with the plaintiff's blanket refusal to provide documents, most of which were obviously relevant and producible. The plaintiff simply failed to meet his obligations to produce relevant documents. Whether he gave an undertaking to do so is irrelevant—he still had the obligation to disclose the documents and did not do so.

Rather than give undertakings to produce documents, plaintiffs and their counsel should simply meet their discovery obligations under the rules of the court. The giving, or not giving, of an undertaking does not relieve the plaintiff from his or her responsibility from complying with a legitimate request for a document made by the opposing party.

“Rule Against Sharp Practice”

**Wolley, Alice, *Understanding Lawyer's Ethics in Canada* (Markham [ON]: LexisNexis, 2011) pp. 81-85
[excerpt]**

Lawyers' zeal in advocacy is constrained by the rule in the codes of conduct that prohibits “sharp practice”:

A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights. [CBA Code, Chapter IX, Commentary 7].

Consistent with the point made at the beginning of the chapter [reference a lawyer's duty of zealous advocacy], and as was the case with the restrictions on making frivolous arguments in court, the practical imperative for a lawyer to observe this constraint is not primarily the potential for personal costs or sanctions against a lawyer, but is rather effective advocacy for the client. While the rule does restrict lawyer's conduct, and a breach of the rule could result in discipline, the case law applying the rule generally arises in the context of adjudication of a client's legal position. That is, a finding that the lawyer has engaged in “sharp practice” generally affects the legal situation of the client, not the lawyer.

The “sharp practice” rule has two essential elements. First, the mistake in question must be clear and obvious. If it is “questionable but... may have involved a conscious exercise of judgment” it is a “mistake” that the opposing party *may* take advantage of. Thus, a mathematical error is a clear and obvious mistake, but an interpretation of a legal rule that is less advantageous

that the lawyer thinks could have been applied to the rule, is not. Second, the advantage that the client would receive from the mistake must be one to which the client has no legal right. The termination of a lawsuit because of a missed limitation period is an advantage to which the client has a legal right, but the failure of a lawsuit because the statement of claim has a typographical error in the name of the corporate defendant, is not.

This rule comes up most frequently in cases where a defendant in litigation has been noted in default without notice, and seeks to have the order noting in default set aside; the rule against sharp practice is cited by the courts as a basis for setting aside the order. In most cases, consistent with the rules in codes of conduct, it appears that the defendant's "mistake" of failing to defend in a timely fashion was minor and had not deprived the plaintiff of its rights. Orders have been set aside where the delay was minimal; the defendant had notified of her intention to defend and the parties had been discussing the claim; where the plaintiff was aware that the defendant had recently obtained new counsel; or, where the statement of defence had been served but not filed.

More substantively, in an action to enforce a settlement, the Ontario Superior Court relied on the principle underlying the sharp practice rule to refuse to allow a party to enforce as written a settlement with a known mistake. In that case the party proposing the settlement had made a mathematical error that was known to the other side; the settlement was enforced but with the error corrected.

The most interesting case to apply the rule against sharp practice is *Crosby v. Guardian Insurance Co. of Canada*. In that case Guardian was required to pay out on a surety bond for the benefit of minor applicants. It did not pay despite requests that it do so. An application was ultimately brought to enforce payment; Guardian agreed that it should pay, but argued that it should not have to pay interest, because the proper process for enforcing the bond had not been followed until that point, which constituted a failure to mitigate. The Court rejected Guardian's argument. It said that counsel for the children was unaware of the necessary requirements under the *Estates Act*. Guardian and its counsel knew of the proper procedures, but did not advise counsel for the children as to what needed to be done; as a consequence, Guardian was required to pay the interest:

I adopt the rule [from the Law Society of Upper Canada Code on sharp practice] and say that **Guardian's solicitor's duty in the circumstances was to point out the necessity of an assignment under The Estates Act**. This was a non-adversarial proceeding and the rights of children were affected adversely. There was no accretion on their accounts from interest. The failure to mitigate argument has no application to the facts. In these circumstances, the children should not be deprived of postjudgment interest and should be paid. It is regrettable that counsel for Guardian failed to act in accordance with his clear duty as set out in the Rules of Professional Conduct.

If applied broadly, the court's interpretation of the duty of counsel in this case constitutes a notable addition to the constraints on lawyer advocacy; it may amount to requiring lawyers to correct mistakes in law by opposing counsel, a position that, while advocated for by some, has not generally been viewed as part of the law governing lawyers. The interpretation of the sharp

practice rule as having this effect is not necessarily wrong; if the mistake in law is sufficiently obvious to pass the first part of the test set out in the rule, taking advantage of the mistake almost certainly provides the opposing side a benefit to which it has no legal entitlement, thereby passing the second part of the test. That second point follows inexorably from the fact that the error in question is one of law: a benefit obtained through an error in law must necessarily be one to which there was no legal entitlement.

Guardian does not necessarily warrant such broad application, however. The proceedings were “non-adversarial”, the injured parties were minors, and the benefit sought by *Guardian* (non-payment of interest) was arguably an equitable remedy and not a legal one, such that an absence of “clean hands” could properly disqualify it from obtaining that remedy. Which leads to the question of whether, apart from this case, the rule against sharp practice should apply to prohibit a lawyer from taking advantage of mistakes in law?

There is some reason to believe that it should. As noted, an obligation to correct obvious mistakes in law seems to fit *prima facie* within the terms of the rule. Further, the justification for the lawyer’s role offered earlier in this book turns on a claim for the authority of law; permitting lawyers to take advantage of the equivalent of a legal spelling mistake does not fit particularly well with that justification. Also, as discussed in the following section, the lawyer would clearly have an obligation to correct a legal mistake of that type if the proceedings went to court; there seems to be no particular reason to have a different legal obligation on the lawyer simply because the parties are not yet in court. Indeed, as was suggested with respect to advising, the opposite may be the case. In court there are safeguards that may correct the mistake in law even if the lawyer fails to do so; outside of court those safeguards do not exist. Finally, where a party to a settlement discussion or negotiation knows that the other side has made a fundamental error in law, the agreement that results may be liable to be set aside on the basis of implied misrepresentation or mistake. That is, proceeding without revealing the mistake may simply not be in the client’s interests, and she should be advised as such consistent with the lawyer’s ethical duty of zealous advocacy.

Having said that, to the extent a requirement to correct mistakes of law by the opposing party exists, it is a narrow one. The mistake has to be the equivalent of the “mathematical error” referenced in the commentary to the rules, such as thinking a statute has been repealed when it has not. Mistakes about the interpretation of a law, or how it might apply to a set of facts, are not mistakes requiring correction by the opposing party. Even the type of mistake found to require correction in *Guardian*—not knowing that a particular process applies—would not, I think, typically trigger the duty; normally if a lawyer is ignorant of how to go about enforcing his client’s rights, the lawyer on the other side is not obliged to tell him what to do.

In addition, the rule against sharp practice could not properly broaden the obligations and rights of the client as they exist in the substantive law (that is, apart from the lawyer’s ethical obligations). The sharp practice rule itself expressly prohibits the lawyer from altering the client’s substantive legal position in order to correct a mistake. Thus, for example, under the law of contracts, where one party knows that the other side has made a mistake about the effect of a contract term, so long as the non-mistaken party did not induct it, the mistake does not affect the enforceability of the contract. That lack of obligation to disclose under the substantive law of

contracts cannot properly be altered by the lawyer's professional obligations pursuant to the sharp practice rule.

In sum, the sharp practice rule does impose some constraints on lawyer advocacy. The constraints are not broad, but they are material, particularly in the context of negotiations.

“Criticism of Other Lawyers”

Woolley, Alice, *Understanding Lawyer's Ethics in Canada*.
(Markham [ON]: LexisNexis, 2011), pp. 96-99
[excerpt]

Earlier in this chapter I discussed the case of *Goldberg v. Law Society of British Columbia*, and the problem that arose from Goldberg's incompetent representation of his clients. As I noted there, however, the more significant concern from the point of view of the Law Society was with Goldberg's comments about Banks, the lawyer who had previously represented Goldberg's clients. Goldberg had *inter alia*, accused Banks of drug and alcohol abuse, psychological problems, and dishonesty. The Law Society found that these allegations were “unfounded” and merited sanction.

In so holding the Law Society acted consistently with other disciplinary decisions, and also with other codes of conduct, which provide that public statements about misconduct by other lawyers may only be made if they are supported by factual evidence. The codes of conduct impose an obligation on lawyers to report other lawyers' serious misconduct, and allow a lawyer to give a second opinion on advice that another lawyer has provided, but nonetheless prohibit one lawyer from making comments about another lawyer that are “ill-considered or uninformed”. The obligation is on the lawyer making the statement to demonstrate that it was well founded. In addition, and more generally, codes of conduct impose duties of civility on counsel, requiring that the lawyer “at all time be courteous, civil, and act in good faith.... to all persons with whom the lawyer has dealings in the course of an action or proceeding”.

In disciplinary cases lawyers have been sanctioned for, *inter alia*, saying that a lawyer with whom the sanctioned lawyer used to have a personal relationship was “dangerous and out of control” and a “few bricks short of a load”; for writing a letter to another lawyer asking that lawyer not to write “rambling letters” and additionally accusing another lawyer of “fraud” with respect to her statements about settlement negotiations; writing a letter to legal aid describing another lawyer as “biased, incompetent and a liar”; calling a lawyer “clueless”; making anti-Semitic comments about another lawyer and calling another lawyer “stupid” and telling her to “fuck-off”.

The behaviour of these lawyers is not commendable. It does not appear to have advanced the interests of their clients in an obvious way, and it certainly was not courteous. The question, though, is not whether the behaviour of the lawyers was commendable or courteous. Nor is it whether these are lawyers with whom one would enjoy practicing or going out for a cup of

coffee. And, most significantly, nor is it whether these lawyers could appropriately be shunned by their peers or subject to other informal social sanctions. The question is whether the behaviour was conduct worthy of sanction by the law society exercising its legislative authority. Answering “yes” to that question requires identifying the public interest that is served by sanctioning lawyers who make comments that are rude and unsubstantiated and, as well, requires ensuring that the benefit obtained by sanctioning lawyers in this way is not outweighed by any potential downside.

Before answering the question of whether this was properly considered to be conduct worthy of sanction, a few additional points must be noted. First, in the majority of cases the comments made by the lawyer were not made to a broad audience. In one case the comments were made to another lawyer. In three cases the comments were made only to the lawyer being criticized. In one case the comment was made to a former client now represented by the new lawyer.

Second, in at least some of the cases the problem with the comments was not with what the lawyer said, but rather with the manner of expression. Thus, the lawyer who was described as “clueless” had improperly imposed a trust condition in a real estate transaction that resulted in the transaction not closing in a timely fashion, and in the other side paying additional costs. That lawyer could, I would argue, have been accurately described as “in error” or “mistaken” or, even, “ignorant of the law” without attracting regulatory sanction. Similarly, the lawyer who was described as “stupid” had not noted pleadings as closed when she could have. Again, that the lawyer could have been accurately described as “failing to be concise” and the lawyer who was described as “fraudulent” may perhaps have been accurately described as “not providing entirely accurate information with respect to the state of settlement negotiations”. The point being, the lawyers in each of these cases may have been disciplined not so much for what they said, but for how they said it.

Third, with the exception of *Goldberg*, the comments made by the lawyer were made outside of the courtroom, such that the civil remedy of an action in defamation was potentially available to the lawyer about whom the comment was made. Lawyers who have been criticized unjustly by other lawyers have successfully used the law of defamation as a remedy.

What these qualifications mean is that the justification offered for disciplining lawyers for criticizing other lawyers must explain why that discipline can justifiably be extended to comments that (a) are not widely reported, (b) may be substantially accurate and (c) could be dealt with under the law of defamation. In my view no such justification can be offered. The most coherent reason for regulation of lawyer criticism of other lawyers is that civility between lawyers enhances public respect for the legal profession.

Civility between counsel is not a trivial matter. Indeed it goes to the heart of professionalism and is essential to maintain the general reputation and integrity of the legal profession. Lawyers, on behalf of clients, must face adversity on a daily basis but this does not justify a descent into incivility. Indeed, quite the contrary. Professionals are expected to act professionally and must do so or they compromise the interests of not only their clients but society at large. Launching or exchanging insults is not professional behaviour.

This justification for regulating civility to protect the profession's reputation, while coherent, seems hard to maintain. It is not at all clear that people distrust lawyers because lawyers are rude. The reputation of lawyers is complicated as well as troubled, and relates mostly neither to the conduct of specific lawyers, nor to specific abuses or misconduct, but simply to the fact that lawyers are lawyers. People dislike and distrust lawyers because lawyers advocate for clients, fight against state power and assert procedural claims in defeat of substantive rights.

3.8 Relationships with Courts

"Better results start with better talk"

Marsh, Vince, *The Lawyers Weekly*, 02 July 2010, p. 24
[excerpt]

Better results start with better talk

From preparing factums and conducting discoveries, to speaking in boardrooms and appearing in courtrooms, lawyers traditionally demonstrate a common skill: they are exceptional advocates. Yet this very strength often masks a critical weakness. When lawyers bring this bias for advocacy into their communications with their partners and associates, conversations frequently break down.

Issues that may have simple resolutions quickly turn into drawn-out debates. Opportunities that require fast action die on the vine as every member of the senior management team vies to put their expertise on the table. Meetings that should wrap up expeditiously drag on for hours, without participants ever reaching consensus.

This flawed approach causes more than frustration. In an industry where time is money, ineffective communication can vastly reduce productivity, result in poor decision-making and limit your team's ability to execute on the firm's strategic goals. To avoid these outcomes, leaders must learn the essential elements of effective communication.

. . . .

Balance advocacy with enquiry

According to Canadian psychologist Jervais Bush, effective dialogue requires people to balance two modes of talking: advocacy and enquiry. Advocacy involves the statement of a position, i.e. "we should buy." Enquiry involves an exploration of the thinking that supports the position, i.e. "why do you think we should buy?"

While most people understand the benefits of advocacy and enquiry, the vast majority of conversations are dominated by advocacy. In part, this is due to the fact that people are often recognized and rewarded for their ability to state their positions clearly and forcefully. Lawyers, in particular, are trained to advocate—a skill that can result in stubborn attachment to a particular opinion and/or an adversarial approach.

To address this tendency, leaders should aim to consciously introduce enquiry to a conversation. Rather than watching as your team members entrench their positions, ask each person to fully explain their point of view. An in-depth exploration [via inquiry] of conflicting

opinions may reveal more consensus than you imagined at first. At the very least, it will help enrich team conversations, foster mutual understanding and uncover the root of key challenges.

Learning new habits

Most leaders understand that it takes a concerted effort to change people's habits. This is particularly true in the realm of communication, which is rarely formally taught. Despite the training effort required, the payoff is worth it. By helping your people improve their listening and speaking skills, you can engage in more meaningful dialogue—both internally and with clients. By implementing more collaborative decision-making models, you can capitalize on emerging opportunities before they pass you by. In a nutshell, better communication leads to better results—and no one can argue with that.

“What They’re Thinking Up There—True Confessions From The Bench”

Killoran, Maureen, *S.C.C. L@wLetter* (Eugene Meehan, Q.C., Ed.), 04 November 2010

Introduction

Effective trial counsel must establish and maintain a good connection with the Bench. A strong professional reputation is key. Our goal is to be recognized as capable, trustworthy and conscientious counsel. As they say, reputation is everything. But, on what is our reputation based? What do Judges consider when evaluating trial counsel? We contacted a number of Justices and asked them to identify best and worst practices among counsel. Here are the highlights.

Understand the Role of the Judge v. the Role of Counsel

In the words of the Honourable Roger T. Hughes, Judge of the Federal Court of Canada:

A judge wants to make the right decision—a barrister wants to persuade the judge that his or her client's position is the right one. It is overwhelming to know that every judge has, as a single goal, the doing of the right thing. This means that all parties must have a full and fair opportunity to present their case. It means avoiding, whenever possible, the sidetracking of meritorious cases on grounds that are merely procedural. It means bringing the most informed version of all relevant facts to bear on the true state of the law.

In achieving their goal of making the right decision, Judges rely on counsel as officers of the Court to present evidence and argument in an even and direct manner.

Counsel's First Obligation is to the Court

Many counsel forget that our primary duty is [as] an officer of the Court. The client comes second.

Counsel's job is to present the facts and the law accurately. Ensure that your representations to the Court are always above reproach. Do not exaggerate or spin facts. Paraphrase at your peril. It is always preferable to take the Court directly to the evidence rather than risk misleading the Court. If there are favourable facts, present them and deal with them. If there is case law that does not support your argument, do the same. 'A Judge becomes very skeptical very quickly when it is learned that counsel concealed or failed to disclose pertinent facts or legal authorities... Sometimes you just have to take the hit. Do so openly and with dignity.'

Remember you are counsel to your client, not unconditional supporter. If your client has a bad case, it is your job to counsel them, encourage and facilitate settlement. It's your job to counsel them, encourage and facilitate settlement. If your client gives you instructions that are unreasonable, unfair, designed to delay, or designed to mislead opposing counsel or the Court, you must refuse to act on such instructions.

Get Your Act Together

Take pride and care in the preparation of your submissions. Written materials are often reviewed by the Judge in advance of the hearing. Effective and timely materials can give you huge advantage. One Judge remarked that when she was counsel, she often raced the clock to get her materials filed and, as such, skipped the step of highlighting her authorities. She now admits that it drives her crazy (as a Judge) when she receives unhighlighted authorities: 'What am I supposed to take from the cases? Point me in the right direction, and then I'm up to speed in advance of the hearing.' One Judge enumerated his 'top ten' peeves:

- i) Lack of preparation: Lack of knowledge of the basic facts and legal principles;
- ii) Lack of focus: arguing ten points when only two are key;
- iii) Underestimating the time required for the motion (often, in order to jump the queue);
- iv) Failure to speak to opposing counsel in advance and agree on minor matters;
- v) Frivolous motions designed to obfuscate/stall;
- vi) Unreasonable and over-reaching costs submissions;
- vii) Unhelpful factums: unfocussed; poorly written; too few appropriate citations;
- viii) Lack of organization: uncompartamentalized submissions; no introductions; no context; no succinct summaries;
- ix) Citing numerous cases rather than the one or two most recent/meaningful;
- x) Failure to refer to case law, and/or failure to bring copies of cases to court.

Another Judge said, 'I always tell people to imagine that they are the Judge. Would you grant the relief that you are seeking based on your presentation?' Take the time to present your case simply and effectively. Make it easy for the Court to decide in your favour.

Civility and Cooperation

According to more than one Justice, 'the number of counsel who come to Chambers without trying to work out a consensual arrangement first is astounding. We are the last resort, not the first resort.' Another notes that counsel should avoid getting personal and recommends leaving the backroom bickering in the backroom.

Hear Me, Read Me

'Listen to and answer the Judge's questions,' said one justice. 'I am the one deciding the case. If I ask you a question, it is because I think it is important. Don't try to weasel out of it. Don't try to distract me with smoke and mirrors. Answer.'

Other Judges appreciate the ability of some counsel to read them. 'It is a pleasure when counsel are so attentive that they know when I want them to move on without my having to speak the words.' Another said, 'watch your Judge, we send important signals.'

"Crown's gestures a good example of civility issue"

Kauth, Glenn, *Law Times* [Editorial], 28 November 2010

The courtroom antics of Crown prosecutor Paul Alexander seem like a perfect case for the Law Society of Upper Canada's new civility regime.

Over the last couple of years, the LSUC has put a big emphasis on civility, particularly in light of comments in the report on major criminal cases by former Superior Court chief justice Patrick LeSage and current Justice Michael Code about problems in that area being a major impediment to the efficient administration of justice.

In Alexander's case, the implications of his actions in court were very grave. As a result of his gestures and faces towards Erika Mendieta, the accused in the murder of her young daughter, Superior Court Justice Nola Garton ruled she had no choice but to declare a mistrial.

Even the jury found Alexander's behaviour unsettling. "We find him very distracting and he is making strange faces all the time," the jury said in a note. "We feel very uncomfortable with him."

Alexander, of course, had been the prosecutor during earlier proceedings against Mendieta, which also resulted in a mistrial.

So while he had an obvious investment in the latest proceedings, it was clearly inappropriate for him to come back to court where he sat rolling his eyes and making gestures [which] the accused interpreted as trying to convey the message that she [the accused] was lying.

The case has prompted vigorous debate over whether Garton should have declared the mistrial rather than simply remove Alexander from the courtroom and canvass the jury on whether it could then still render a fair decision.

It's a reasonable question to ask, but given that continuing on that basis would likely have resulted in an appeal later on, Garton made the right move.

As for Alexander, his actions are an egregious example of the types of conduct the LSUC is attempting to address with its measures on civility. But given that a key focus is on providing mentorship to errant lawyers, going that route is clearly not enough.

By provoking a mistrial, Alexander has done a disservice to the profession, potentially wasted even more public funds on the second proceeding, and put the search for justice in the girl's murder at risk. He should have known better.

As a result, the LSUC should go beyond mentoring to formally discipline him, as should the Ministry of the Attorney General.

“Do Judges Read Online Briefs Differently? Brief Writers May Need to Be Briefer”

Cassens Weiss, Debra, www.abajournal.com, 09 December 2010

As more courts require e-filing, lawyers may need to adjust their writing style to account for differences in the way people read online.

That's the conclusion of Houston Appellate lawyer Martin Siegel in an article for *Texas Lawyer*.

Online readers “jump around, skimming and seizing on bits of text,” Siegel writes. “Eye tracking studies show they seek content in an F-shaped pattern, looking down the left side for structural cues and then focusing on headings and first sentences of paragraphs. Heaven help the content provider with important text consigned to the bottom right of the screen.”

Siegel cites a book by Houston appellate lawyer Robert Dubose and a law review article by University of Dayton law professor Maria Crist. Dubose says lawyers writing with online readers in mind should put their most important points in headings and first sentences of paragraphs, use bullet points, and quickly get to the point. Similarly, Crist endorses short paragraphs and condensing chunks of information into smaller pieces.

It's important to adapt your briefs for online readers, Siegel says, but the important next step is "weaving artistry and real substance into the new form."

The Legal Skills Prof Blog notes Siegel's article, but questions the assumption that judges and clerks will read online, rather than printing out the materials. And judges looking at online documents will likely read differently than readers of newspapers, blogs and websites, according to the blog post by Nova Southeastern law professor James Levy.

"Chutzpah on the rise in Canadian courts?"

**Miller, Jeffrey, *The Lawyers Weekly*, 14 January 2011, pp. 5, 24
[excerpt]**

Master Polika continues his tendency to apply the term to counsel. In 2005, though a fellow master had granted a telephone conference to arrange a case timetable, Master P. found the conference request "smarting of Chutzpah," given that a timetable already had existed: *Griffiths v. Canaccord Capital Corp.*, [2005] O.J. No. 1136. That same year, the master took exception to an attempt to re-institute an action where the litigants had exchanged correspondence acknowledging its discontinuance as they discussed their positions on refilling the claim. Counsel anyway "sought to rely on what at most was a technicality, namely my advice at the case conference ... that the court had no record of ... the Notice of Discontinuance and purported to withdraw [it]. This action appears to be the height of Chutzpah and a prime example of counsel on behalf of clients reprobating and approbating': *BDO Dunwoody ltd. v. Miller Bernstein LLP*, [2005] O.J. No. 5504 (Ont. S.C.J.).

In *M.J. Dixon Construction Ltd. v. Hawkim Optical Laboratory*, [2009] O.J. No. 13 (Ont. S.C.J.), Master Polika found "baseless" counsel's allegation that opposing counsel had acted contrary to the Rules of Professional Conduct: "Given his own conduct on the cross-examination of Mr. Hakimi, the statement smarts of chutzpah both in terms of civility and the requirements of the Rules of Civil Procedure."

"When can regulators restrict the free speech of lawyers?"

**Schmitz, Cristin, *The Lawyers Weekly*, 21 January 2011, p. 3
[excerpt]**

.... in 2001 ... criminal lawyer Gilles Dore appeared before Quebec Superior Court Justice Jean-Guy Boilard at a bail hearing. As part of the judge's inappropriate behaviour and attitude that were later excoriated by a disciplinary subcommittee of the Canadian Judicial Council (CJC), Justice Boilard told the barrister his argument was completely ridiculous and completely full of overblown rhetoric and hyperbole. When the lawyer complained to the judge

that he hadn't been given an opportunity to make his arguments, Justice Boilard replied that "an insolent lawyer is rarely of use to his client (translation)."

Outraged, Dore held his fire in court but hours later privately fired off a blistering letter to Justice Boilard, noting in his postscript (translation) "as this letter is purely personal, I see no need to distribute it

Justice Boilard conveyed Dore's letter to the Barreau du Quebec. Dore was suspended from practice for 21 days for his "disrespectful letter" to Justice Boilard, which the Barreau said violated the code of ethics by using "language that did not bear the stamp of objectivity, moderation or dignity."

. . . .

WITHOUT PREJUDICE OR ADMISSION

Sir,

I have just left the Court. Just a few minutes ago, as you cowardly hid behind your status, you made comments about me that were both unjust and unjustified, scattering them here and there in a decision the good faith of which will most likely be argued before our Court of Appeal.

Since you marched out quickly and refused to hear me, I have chosen to write a letter as an entirely personal response to the equally personal remarks you permitted yourself to make about me. This letter, therefore, is from man to man and is outside the ambit of my profession and your functions.

If no one has ever told you the following, then it is high time someone did, If your chronic inability to master any social skills (to use an expression in English, that language you love so much), has led you to become pedantic, aggressive, and petty in your daily life, it makes no difference to me; it seems to suit you well.

If however, you deliberately introduce these character traits while exercising your judicial functions, and you make it your trademark, then it concerns me a great deal, and I feel that it is appropriate to tell you.

Your legal knowledge, which appears to have earned the approval of a certain number of your colleagues, is far from sufficient to make you the person you could or should be professionally. Your determination to purge any humanity from your judicial position, your essentially non-existent listening skills, and your propensity to use your court—where you lack the courage to hear opinions contrary to your own—to launch ugly, vulgar, and mean personal attacks not only confirms that you are as loathsome as suspected, but also casts shame on you as a judge, that most extraordinarily important function that was entrusted to you.

I would have liked to say this to you personally but I highly doubt that, given your arrogance, you are able to face your detractors without hiding behind your judicial position.

Worse still, you possess the most appalling of all shortcomings for a man in your position: You are fundamentally unjust and I doubt that that will ever change.

Sincerely,

Gilles Dore

P.S. As this letter is purely personal, I see no need to distribute it.

[**Note:** A complaint to the federal Judicial Council by avocat Gilles Dore resulted in the Council expressing disapproval of Justice Boilard’s “lack of patience and excessive remarks.” In the wake of his being censured by the Judicial Council, Justice Boilard withdrew from a criminal trial, unrelated to the Dore complaint, because he regarded the reprimand as depriving him of “the moral authority, and perhaps also the necessary capacity” to continue with that criminal proceeding (at a time when 113 witnesses had been heard and 1,114 exhibits had been admitted). Justice Boilard was replaced, at the criminal trial, by another Justice who eventually discharged the jury and recommenced the trial. Justice Boilard’s withdrawal from the criminal trial resulted in a further complaint against him to the Judicial Council which, again, expressed disapproval of his judicial behavior.]

“The Lawyer’s Duties Where The Client Intends To Deceive, Or Has Deceived, A Court Or Tribunal”

**Woolley, Alice, *Understanding Lawyers’ Ethics in Canada* (Markham [ON]: LexisNexis, 2011), pp. 167-173
[excerpt]**

In circumstances of anticipated perjury, where a lawyer draws an irresistible conclusion that his client intends to deceive a court or tribunal, the first obligation of that lawyer is to try to dissuade the client from doing so. Lying to the court is generally poor strategy, as well as being illegal and unethical. Given his duty of zealous advocacy for his client’s interests, the lawyer has a paramount obligation to try to prevent the client from doing something that will injure her case, including lying in court. Even before addressing the lawyer’s own ethical concerns, this should motivate the lawyer to be as clear and persuasive as possible in dissuading the client intent on committing perjury. The client is unlikely to be impressed or persuaded by lawyerly moralizing; however, Proulx and Layton provide a helpful checklist of the information which should be given to a criminal accused set on committing perjury.

1. perjury is a crime;
2. the prosecution will likely attack the perjured testimony, using cross-examination, reply evidence, and/or argument to the trier of fact (concrete examples should be provided if at all possible);

3. the perjury may well be discovered by the trier of fact, leading or contributing to the client's conviction;

4. once revealed, the bogus defence may cause the court to impose a harsher sentence than would otherwise be the case....

5. the client's falsehood may also lead authorities to lay a separate charge of perjury, with the attendant risk of an additional conviction and punishment; and

6. defence counsel has an ethical duty not to mislead the court, and this duty may operate to permit or mandate remedial measures if the client does not change his or her mind.

In civil cases the information given to the client should indicate the ways in which the misrepresentation may undermine the client's likelihood of success on the substance of the case, even if the case is otherwise meritorious, and that the misrepresentation may lead to solicitor-client costs being levied against the client.

In circumstances of completed perjury, where a lawyer draws an irresistible conclusion that the client has deceived a court, the first obligation of the lawyer is to try to persuade the client to correct the deception. Under the codes of conduct the lawyer has a duty to correct misleading information provided to the court or tribunal, even if the misleading information was provided inadvertently. The lawyer must thus try to persuade the client to consent to correction of the deception, emphasizing with the client the consequences and risks associated with perjury as indicated above and, as well, the ability to manage and decrease prejudice to the client through voluntary pre-emptive disclosure.

Where the lawyer is unable to dissuade the client from giving misleading testimony, or to persuade the client to correct deception of the court, then the lawyer has an obligation to withdraw from the representation. If reasons for the withdrawal must be given to the court, then the lawyer must indicate that the withdrawal is for "ethical reasons". The court is required to permit the lawyer to withdraw in those circumstances. Although in some cases counsel have indicated to the court more specific information about the reasons for withdrawal—"the information which the accused had conveyed to [his lawyer] was such that it was fundamentally inconsistent with the very essence of the case which had been advanced to the jury on behalf of the accused"—doing so is improper because of the lawyer's obligation of confidentiality. A lawyer may not directly indicate to the court, the tribunal, or to any other party the client's anticipated or completed deception.

The view that confidentiality generally forbids specific disclosure requires further elaboration, particularly as a number of Canadian commentators have suggested that where the perjury is "completed"—that the client has provided the misleading information to the court—the lawyer has, or should have, an obligation to correct the misapprehension even if the client does not agree to do so. In my view this assessment is incorrect under the law governing lawyers. Instead, the lawyer's duty of confidentiality, ordinarily prohibits any disclosure of an intended or completed perjury.

With the exception of the New Brunswick Code of Conduct [Chapter 8, Commentary 12], which permits the lawyer to disclose false testimony intentionally provided to the court (either directly or by indicating to the court that the testimony may not be relied on), the codes of conduct make disclosure of a client's misleading testimony subject to the duty of confidentiality. While not universally clear on this point, the implication of the rules appears to be that disclosure cannot be made unless the information is not confidential, or some exception to confidentiality applies.

Is information of intended or completed perjury confidential? Does it fall within any applicable exception to confidentiality?

With respect to an intended perjury, the communication to the lawyer that the client intends to provide false evidence falls within the protection of the solicitor-client privilege and the lawyer's ethical duty of confidentiality. The client is seeking legal advice, both with respect to the underlying action and with respect to the advisability of providing false evidence; the information provided arguably goes to the heart of the lawyer's mandate, which requires advising and representing the client through the trial process. In addition, the communication is not excluded from the privilege as a "criminal communication". While the client states her intention to commit a crime, she is not duping the lawyer into assisting her to do so (indeed, she is being up front about her criminal intentions), and since the lawyer refuses to participate in the perjury, the discussion between the lawyer and client is not a conspiracy or other inherently criminal communication. As discussed in Chapter 5, the criminal communications exclusion is "extremely limited".

Further, no exception to the privilege will ordinarily apply. The public safety exception does not permit disclosure of an act simply because it is criminal; the crime must create a clear, imminent and serious threat to public safety. Under the public safety exception the perjury may only be disclosed where it is intended to accomplish a danger to public safety, such as obtaining access to a child the accused tends to abuse. Finally, the statement by the Supreme Court in *R. v. Cunningham*, where the Court directed judges not to ask counsel any further questions where counsel states that withdrawal is for "ethical reasons", affirms the view that information about the nature of those ethical reasons, including prospective client perjury, should be viewed as falling within the lawyer's duty of confidentiality.

Lawyers should also not disclose a completed perjury. Again, the information falls within the privilege and within the ethical duty of confidentiality because the client is still seeking legal advice, either with respect to the consequences of the perjury itself, or with respect to the consequences of the perjury for the underlying legal action. The information also is not excluded from the privilege as a criminal communication; since the crime has already been committed without the lawyer's knowledge (although with his unwitting assistance) the communication about the consequences of committing the crime are not themselves criminal nor are they made to obtain the lawyer's assistance in the commission of a crime. And since the crime has already been committed, no serious, clear or imminent threat to the public safety from the perjury is likely to arise.

In sum, then, a lawyer should try to persuade a client to tell the truth, or to correct deceptions that have occurred, even if inadvertent. If the client cannot be persuaded to do the

right thing, then the lawyer must withdraw, advising the court or tribunal that the withdrawal is for “ethical reasons” if court permission to withdraw is required. Beyond that, the lawyer may not disclose the client’s intended or completed misrepresentation to the court or to anyone else, unless for some particular reason an exception to the duty of confidentiality applies.

The remaining sections will consider the merits of this and other approaches to the problem of the client who lies to the court or tribunal in a criminal trial. Before doing so, however, the circumstances of civil litigation, or where someone other than the accused gives the deceptive testimony, need to be addressed. In my view, the approach of the Canadian law governing lawyers to false or misleading evidence in those contexts is appropriate.

In the context of civil litigation, the right to counsel does not have the same force or application as in a criminal trial; the Supreme Court has suggested that civil litigants normally do not enjoy a constitutional [Charter] right to counsel. That means that the lawyer withdrawing from representation where the client has or intends to commit perjury does not have the same constitutional impact; in the context of civil litigation there is no constitutional reason why the client who wishes to deceive the court should have the benefit of counsel while doing so. The client still has a right to confidentiality that will (and does) prevent direct disclosure of the client’s deception. In the civil litigation context, though, where there is no [Charter] liberty or security of the person interest at stake, the indirect disclosure that may result from the lawyer withdrawing mid-trial, has less force when measured against the importance of not deceiving the court. Further, in civil litigation contexts a lawyer may not have to provide reasons for withdrawal in the same way that she does in a criminal context, with the result that the indirect disclosure problem may not even arise.

With respect to evidence from a party other than the accused in a criminal trial, the distinction is more complicated. If the knowledge that the evidence is false comes from the person testifying, that person has no right against self-incrimination in this context, no right to counsel and no right to confidentiality relative to the accused’s lawyer. A lawyer may not present evidence he knows is false offered by a party whose rights are not implicated, and who can make no particular claim to the lawyer’s attention.

Monroe Freedman and Abbe Smith argue for the ability of the lawyer to present perjured testimony by someone very close to an accused, such as the parents or spouse of the accused. For the reasons just indicated, however, I am not convinced by this position. Even though they are people close to the accused, the spouse or parents of the accused do not have rights implicated in the accused’s proceeding that would warrant the lawyer participating in their presentation of false evidence to the court.

What if the lawyer knows that the evidence provided by the third parties is false as a result of disclosures given by the accused? In that instance, the right to confidentiality is at play (since the information that the testimony is false comes from the client), and the relationship between the lawyer and the client, including the right to counsel, is at issue. If the lawyer does not present the evidence as instructed by the client, or withdraws from the representation, the client does not have assistance of counsel or may directly or indirectly have her confidences disclosed.

Nonetheless, the prohibition on the presentation of that evidence, or withdrawal if the evidence has been presented unknowingly and the client will not consent to correcting it, is justified. The courts have consistently treated the right of the accused to testify in her own defence as of unique importance; as discussed in Chapter 3, even in the lawyer-centric approach that the Canadian law governing lawyers takes to lawyer-client decision-making, the decision about whether to testify is viewed as the client's to make. Further, if lawyers could present any evidence without concern for its falsity, the process of criminal adjudication would break down. The identification of the perjury trilemma does not diminish the significance of the duty of candour to the court; it simply notes that in some situations[,] respecting the duty of candour involves defeating other important duties. That is the case here as well, but I think that the duty of candour is paramount in this instance. It is only in truly exceptional circumstances—that is, where the accused herself seeks to testify but has advised the lawyer in confidence that the testimony is false—that violations of the duty of candour to the court may be justified.

In sum, the normal duty of the lawyer is to decline to present evidence to the court that is false, or to refuse to continue to act in litigation where a client will not permit the lawyer to rectify the presentation of false evidence.

That normal duty is justified by the duty of candour even though it may undermine the ability of a client to be represented by counsel, or strain the lawyer-client relationship of trust and confidence.

“Dealing with Difficult Judges”

**Her Honor Madam Justice Carole Curtis [unpublished]
[*excerpt*]**

[Full text of this commentary, and of a commentary on “Dealing With Difficult Clients”, both authored by Carole Curtis, a leading family law barrister in Toronto before her appointment to the Bench in 2008, are available from: eugene.meehan@mcmillan.ca

Categories of difficult judges

- **The judge who has not read the written material**

Never assume the judge has read the material, and never ask.

A recent question (in the last 10 years) frequently asked: has your honour had an opportunity to review the material”? Why would you ever ask that question? Do not ask that question. All that does is embarrass the judge. So you start off on entirely the wrong foot. Was that what you intended? Also, it may prompt the judge to answer on the record that she has not read the material, and that may create a record not suited to your client's needs.

Start your submissions as though the judge has not read the material. The judge who has read the material will tell you.

Prepare your submissions to start with the background facts: dates, names, ages, litigation history. You may not always have to recite those facts in the level of detail that you prepared them, but you should have them in front of you in case you need to.

Even when you know the judge has read the material, that is not a reason to truncate your argument, especially if you know the judge has a large list that day and will have read many files. Judges often have large work-loads and long docket lists. So a judge in a busy courthouse will have her hands quite full to be able to read everything on her list.

Some of this is in your control, some of it is not.

Make it easy for the judge. Make sure your written material is focused, organized, easy to read, and contains only relevant information. Make sure the pleadings do not contain evidence. Evidence goes into the affidavits.

Longer is not better. It is your job to sort through the evidence and decide what evidence is relevant and to put only that evidence before the judge. It is not the judge's job to sort through a whole mess of evidence and decide what is relevant.

The judge who has not read the material is a fact of life in our busy court schedules and our family law justice system. A competent advocate will prepare for that possibility and will know how to deal with that.

- **The judge who has already decided the case before the lawyer speaks**

It is very distressing to the lawyer when the lawyer realizes this or thinks this is happening. And it does happen, especially when the judge has read the written material.

You must continue to present your case. Just keep going. You never know when you will be able to convince the judge otherwise. After all, that is what advocacy is all about.

And stay calm and focused.

Do not tell the judge "well I can see your honour has already decided this issue". And do not otherwise communicate this. What do you expect to gain by saying that? Will you feel better if you say that? Will your client's case be well-presented if you say that?

The lawyer has to make a decision about how much of the prepared argument to give. Complete your argument. You will know that you gave it your best shot, and your client will know that you did everything you could.

You need to use your judgment here. Sometimes this judge will not let you continue your argument. Know when to fold (which is dealt with later) and know when to worry about the record.

- **The rude, abusive judge**

This one of the most difficult situations an advocate can be in. Lawyers have all been there.

Some judges are rude, aggressive, even abusive, for no apparent reason, or at least none that justifies this behaviour.

It is extremely important for the lawyer to be calm, and to remain calm, polite, focused.

Remember that the court is a public record. It is important to ensure that there is a record.

The worse the judge's behaviour is, the more polite and calm the lawyer should be. This is very hard. It sometimes feels impossible, especially since this behaviour by a judge gets your back up.

Remember your goal is to de-fuse the situation.

In situations that are egregious or extreme, the lawyer can order a transcript and send it to the judicial council. This is not an easy thing for a lawyer to do.

Judges have to approve transcripts before they are sent out and you may be suspicious that the worst remarks may be removed from the transcript.

However, you are unlikely to be the only lawyer experiencing this treatment from this judge. In some provinces, the judicial council not only asks to see the transcript, they also ask for the tape, which is a good thing, since sarcasm (or raised voices, or interrupting, for example) often does not appear as serious on the transcript as it was on the tape.

Have the courage, where appropriate, to object, if the person being abused is your client or your witness.

The fact that it is not easy to do this is not a reason to not do it.

- **The unpredictable judge**

A judge's value to the public as a judge is in direct proportion to the ability of the lawyers who frequent the courts to predict how the judge will deal with a particular issue. Predictability in a judge is a very important quality. It is the mark of a really good judge.

Not all judges are predictable. In fact some are predictable only in the mercurial nature of their courtroom behaviour. With some judges, the only thing one can predict is that the process or the outcome or both is unpredictable.

Warn your client that this judge is unpredictable and that your ability to predict the outcome is limited by that.

Be prepared for the unexpected, whether that means unexpected process or unexpected outcomes and results. Think of what might possibly go wrong or in what unanticipated direction the judge

might take the case. Be prepared to take whatever steps are necessary to deal with an unanticipated result, whatever that means in a given situation.

- **The judge who does not know family law**

This is one of the easier situations to deal with, although unpleasant for the lawyer, particularly if you draw this judge for a trial.

The most difficult part of this may be just identifying this judge, which is why knowing your judge is so important. However, addressing this problem is much simpler than addressing the problems associated with some other difficult judge situations.

Adjust your presentation to ensure that you are covering the basics. Always start by explaining to the judge what you are asking for, even for a senior experienced judge.

All judges appreciate knowing the statutory authority for their jurisdiction and the legal test to be applied. Every submission in a contested matter, including a trial, should start here.

Be clear about the law at every relevant junction. Be unafraid to review the law where needed. It is better to risk the judge being irritated with you than to risk the judge not understanding the legal test to be applied.

In particular, child protection is a highly structured area of law, with very precise language for the legal tests to be applied, much more so than family law, with a much higher knowledge of evidence law required than family law. Keep that in mind if dealing with a judge who does not know child protection law.

- **The judge who hates family law**

Family law is difficult area (particularly child protection law, which is often in a long and complicated statute). Family law is a narrow area of law with a great deal of jurisprudence, in a fast-changing environment. Family law requires a judge to have a confident knowledge of the rules of evidence, particularly for a trial.

A judge who hates family law is also a very difficult circumstance to deal with. This is more likely to happen in court locations where judges rotate in and out of family law.

You need to get through this situation. Remain calm, and focused.

Your goal is to ensure the judge does not push you or rush you so much that your client's interests are not presented or are compromised.

Remember the record that you are creating for possible appeal or judicial council purposes.

Often a judge who hates family law also does not know much family law (which may be why the judge dislikes it).

- **The judge who does not let the lawyer argue the case**

It is quite difficult when the lawyer is not permitted to argue their case. It is not always evident why the judge takes this position. Again, the lawyer needs to stay calm and focused (which is not easy).

Lawyers have some choices to make here. The lawyer can specifically say “I will make my argument”, or can just calmly continue to make submissions without drawing attention to the fact that you are feeling silenced and closed down. The latter is the better option.

Do not draw the judge’s attention to your criticism of her conduct if you can help it, unless and until it is necessary for the sake of the court record for you to put that issue on the record.

You will know by that point that you may have lost this round, and that your ultimate remedies may be elsewhere, should you choose to pursue them.

- **The judge who dislikes the client (or dislikes the lawyer)**

This definitely happens.

Start by analyzing why this has happened. It is related to something the lawyer or the client has done or failed to do? This can be so particularly regarding service or other process issues.

Pay attention to clues from the judge about your materials.

If there is no discernable reason for the judge to dislike you or your client, just get on with the job. Make your submissions. Argue your case. Use your judgment about when to move on.

- **The judge who cannot stay out of the arena**

This is also very difficult, a judge who cannot stop being a lawyer. This can sometimes turn your entire case on its ears, particularly if the judge asks exactly the questions you intentionally did not ask of a witness.

Is the judge entering the arena because you or another lawyer is failing to cover pertinent or relevant information? The judge is also creating a record.

Where this behaviour is egregious there may be grounds for appeal on the record, which is really not what any lawyer wants, to have to appeal.

Just go through your argument. Stay calm and focused. You cannot change or fix this while it’s happening. Be polite.

"Lawyers, judges battle at LSUC - Members of judiciary need to have thicker skin: accused"

McKiernan, Michael, *Law Times*, 28 March 2011
[excerpt]

A Hamilton, Ont., lawyer facing allegations of incivility from six members of the family court bench stood by her conduct at a disciplinary hearing last week, arguing that judges need to have thicker skin. Sole practitioner Ann Bruce's conduct led one judge, Superior Court Justice Cheryl Lafreniere, to find her in contempt of court in June 2010.

Lafreniere lodged a complaint about her May 2010 on behalf of judges, who all sit in the Unified Family Court in Hamilton and had encountered Bruce over the previous year.

But Bruce, who is facing four counts of professional misconduct, insisted she had done nothing wrong, and claims their views weren't representative of her interactions with the judiciary elsewhere in the province.

"There is no basis to suggest I have denigrated the court," she told the Law Society of Upper Canada panel hearing her case. "I have worked in other courthouses, and there hasn't been one instance of anything remotely similar to these extreme allegations."

Instead, she said the allegations were all rooted in her dispute with Lafreniere. "This judge didn't have thick skin and she was hypersensitive," Bruce said.

Suzanne Jarvie, counsel for the law society, said transcripts of court proceedings showed Bruce had adopted "an aggressive, interruptive, argumentative, and disrespectful tone."

"Ms. Bruce's practice is to recklessly cast aspersions on the bench and opposing counsel without factual foundation," Jarvie said.

Bruce accused several judges of bias and told some of them she'd be appealing their decisions, according to Jarvie.

"It is an extreme case, not one where [there were] isolated events in which counsel have lost control of themselves," Jarvie said.

"Ms. Bruce was repeatedly getting messages, both explicit and implicit, from the bench and from other counsel. At every turn, this advice and these comments and these cues fell on deaf ears."

The final straw for Lafreniere came during a custody hearing on February 25, 2010, after the judge told Bruce to move on from a point she was making.

“Yes I will, your honour. Yeah, I’ll move on with my report to the Canadian Judicial Council as well,” Bruce said, according to a transcript of the proceedings filed with the hearing.

Lafreniere then cited Bruce for contempt for threatening the court. The judge eventually found her in contempt of court at a hearing four months later at which Bruce was fined \$500.

During that proceeding, Bruce accused the judge of “sharp practice” and “intimidation” when she [the Justice] raised her complaint to the law society about Bruce’s conduct.

Bruce told the hearing her comment wasn’t a threat because she did in fact move forward with her complaint, a move she says she was entitled to make. “This is a case where I was cited in contempt for using a very lawful mechanism,” she said.

It wasn’t the first spat between Bruce and Lafreniere, who had previously warned the lawyer of a possible contempt citation if she left the courtroom during a hearing on a separate matter. Bruce was seeking an adjournment while her client sought legal aid.

“I’m not getting paid to be here right now,” Bruce said, according to the transcript.

Bruce also objected to Lafreniere’s handling of a settlement conference, involving another client. “I think it should be conducted as settlement conference, not as some draconian court proceeding,” Bruce said, according to a transcript of the matter. “I’ve never had a judge take such an antagonistic tone I know it’s difficult, but if you could just respect me for five minutes.”

Superior Court Justice Alex Pazaratz, another complainant, awarded \$2,000 in costs against Bruce personally in one case. He characterized her approach as “unnecessarily inflammatory” and chided her for presenting “lengthy, unfocused, and irrelevant” materials.

“If you think you’re going to control the way I advocate, you’re wrong,” Bruce told Pazaratz, according to a transcript.

But Bruce said civility cut both ways and argued she had been subject to rude and insulting comments from the bench. In any case, transcripts can never give a true picture of what happened in court, Bruce said, adding she never swore or raised her voice in court.

Without hearing audiotapes, “There is a fundamental lack of understanding of the dynamic” in court, she said.

“There was never one instance where I have lost control of myself,” she told the panel. “Anyone who was not in court that day is not in a position to be interpreting these transcripts. The context is extremely probative.”

In her evidence, law society investigator Renae Oliphant admitted that the intonation of speech is lost in transcripts but said the content is critical. She was present on June 22 when Lafreniere found Bruce in contempt of court.

“Ms. Bruce was appropriate in the manner in which she was speaking. My concern was the content of the words. There was no yelling or raised voices.”

“They were speaking in very normal, monotone-esque voices. There was nothing that would have caught my attention had I not been listening to the words.”

"Lawyer Steps In to Help Woman Attacked During Divorce Hearing in Judge's Chambers"

Neil, Martha, www.abajournal.com, 19 April 2011

Catherine Scott-Gonzalez, 23, says she tried to get a restraining order against her husband, Paul, but couldn't persuade a court to issue one.

However, police say he attacked her in a Florida judge's chambers Friday, leaving her with two black eyes, broken facial bones and split lips, and he is now jailed in lieu of \$1 million bond on a felony battery charge, reports WSVN.

“Rarely in my career have I set a bond in this amount or even approaching it, but the allegations are indeed extremely serious and shocking,” said a bond court judge after the incident in Broward County Circuit Judge Ronald Rothchild's chamber's in Fort Lauderdale.

Bailiffs reportedly used a stun gun on 28-year-old Paul Henry Jr. A lawyer for his wife said Gonzalez became enraged and attacked her after a judge ordered him to pay child support and set visitation terms.

After storming out, Gonzalez came back in shouting, retreated, and then re-entered Rothchild's chambers a second time and went straight for Scott-Gonzalez, rushing up to her from behind and punching her with closed fists, reports *The South Florida Sun-Sentinel*, based on information from attorney Michael Dunleavy and a police report.

Dunleavy intervened and held Gonzalez in a bear hug until authorities arrived, the newspaper says.

"Think Oral Arguments Are Important? Think Again, Justice Alito Says"

Cassens Weiss, Debra, www.abajournal.com, 17 May 2011

Supreme Court litigators don't speak much more than the justices during oral arguments, according to a first-hand participant, Justice Samuel A. Alito Jr.

Justices are “pushing 50 percent” in the number of words spoken at oral argument, Alito told lawyers at a Law Day gathering in St. Louis on Monday. As a result, he said, oral arguments aren’t all that important, despite a popular belief to the contrary. Instead, he asserted, what’s important are the briefs and the preparation.

The St. Louis Post-Dispatch covered Alito’s speech, in which he covered the top 10 misconceptions about the Supreme Court. He also cited these, according to the article:

- Justices hand off all the work to their law clerks. Actually, “We are very independent,” he said. “We are not manipulated by our clerks.”
- The court is “pro business.” Alito recalled seeing one television commentator assert that Alito has previously worked for the Chamber of Commerce. “I wondered if I was suffering from Amnesia and thought I’d better check my résumé,” Alito said. “The only employers I’ve ever had have been the Department of Justice and the Supreme Court. I’ve never earned an honest living.”

"Hot-tubbing experts - should lawyers like it?"

van Rhijn, Judy, *Canadian Lawyer*, July 2011, pp. 43-45

[excerpt]

Across the country, courts have been struggling with the best way to present expert evidence. If you have been listening to the latest debates on the subject, you will probably have heard the term “hot tubbing” as a method for organizing expert evidence in a hearing. It was coined in Australia to describe the procedure of organizing all experts in a case into a panel and hearing their evidence concurrently. The growing bulk of academic and legal papers on the topic seem to agree that both judges and experts like the idea. The question is “Should lawyers like the idea?”

One of the main difficulties in deciding the answer to this is that few lawyers in Canada have any experience with the practice. Professor Gary Edmond of the University of New South Wales in Australia, who has not only written extensively on the practice but watched it in action many times, describes the process in two parts. “In the first part, the experts are asked to comment generally on the issues and discuss any differences of opinion. Then they supplement the initial testimony with comments on the testimony of other experts. The judge, lawyers, and fellow experts ask questions. The judge can suggest topics and direct the experts to comment on legally relevant issues. The second part involves cross-examination by the lawyers.”

In Australia, hot tubbing has a long history, having been employed in tribunals as far back as the 1970’s. Its spread has been driven by enthusiasm from the bench. Edmond reports that it is most used in the Land of Environment Court but also regularly in medical negligence cases. “If the judge is at all willing, it will be used in any kind of expert dispute in civil cases in

New South Wales The issue we are considering in Australia is the extent to which it can be used in criminal trials with juries.” Edmond is concerned about going this far. “It is very easy for the experts to say something that is inadmissible or subversive in all sorts of ways. There are real dangers.”

In Canada, various attempts at combining expert evidence are taking place, driven by the need to educate judges and reduce trial costs. John Buhlman, a partner at WeirFoulds LLP, believes procedures such as the appointment of joint experts, pretrial meetings of experts, and mediation between experts will evolve over time. “Everyone is using a lot of experts these days and the evidence gets very complicated. In most tribunals and courts, most fact-finders don’t have any knowledge or expertise in the area the experts are talking about. You’ve got non-experts trying to figure out which expert is right.”

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In Canada, only the new Federal Courts Rules introduced in August 2010 and the federal Competition Tribunal Rules explicitly allow judges to force lawyers to serve up their experts in a hot tub, while stressing the duty of the expert to the court. While there is certainly much ambivalence about the panel approach amongst the bar, [Halifax barrister, Bruce] Outhouse voices the thought that might cause Canadian lawyers to give the hot-tubbing option a try. “If it’s so entrenched in Australia, maybe they’ve found a better answer than the regulators have found here.”

"Federal Judge Invites Lawyers to Court 'Kindergarten Party' Focusing on Remedial Discovery Skills"

Neil, Martha, www.abajournal.com, 29 August 2011

A federal judge in Austin, Texas, has served notice on local lawyers that they would be well-advised to try harder to get along. In a Friday court order, he issues a mandatory invitation to two apparently squabbling members of the bar to attend what is described as a “kindergarten party” focused on learning basic discovery skills.

Promising a “memorable and exciting event,” U.S. District Judge Sam Sparks of the Western District of Texas told the invitees to bring a sack lunch as well as a toothbrush if they wish, noting that the U.S. Marshal’s Office has beds available should the party run late, according to Above the Law, which published a copy of the court order.

The order responds to a motion asking Sparks to quash subpoenas concerning a case pending in another U.S. District Court jurisdiction.

The Sept. 1 party would have focused, Sparks promised, on basic skills including “not wasting the time of a busy federal judge and his staff because you are unable to practice law at the level of a first-year law student.”

The two lawyers settled the case before the “party” took place, and the event was canceled.

"Cunningham good news for lawyers, CLA Intervenor says"

McKiernan, Michael, *Law Times*, 04 April 2010

A Supreme Court of Canada ruling that judges can prevent lawyers walking away from trials when the client fails to pay is actually good news for Ontario’s criminal lawyers, according to the man who represented their interests in the case.

“It’s a move in the right direction because it moderates the rule that was in practice in Ontario,” says Scott Hutchison.

He argued on behalf of the Criminal Lawyer’s Association in *R. v. Cunningham*, in which the top court ruled the power to refuse a withdrawal request in one judges should exert “exceedingly sparingly.”

Justice Marshall Rothstein, who delivered the judgment on behalf of his unanimous colleagues, laid out strict rules for a judge’s exercise of discretion over withdrawal.

“Refusing to allow counsel to withdraw should truly be a remedy of last resort and should only be relied upon where it is necessary to prevent serious harm to the administration of justice,” he wrote.

“That’s a much higher threshold than we’ve seen applied previously in Ontario,” Hutchison says. “Before now, if you were going to cause an adjournment, you couldn’t get off the record.”

An adjournment is something the system now could tolerate as long as it won’t cause serious harm to the administration of justice. The judgment makes it very clear the standard applied is not about inconvenience.”

When the withdrawal is early enough to prevent an adjournment, it should be allowed, Rothstein said. When timing becomes an issue, the judge can ask for a reason.

When the reason is ethical, the judge must allow the request, but when it involves non-payment of fees, the court must decide if the withdrawal would damage the administration of justice by taking into consideration factors such as the impact on the Crown, witnesses, jurors, and the accused.

Only then can a judge act to block a request, Rothstein wrote.

But Greg DelBigio [Vancouver lawyer], who represented the Canadian Bar Association in the case, says the ruling could have unintended consequences. The prospect of fighting a trial for free, however remote, could negatively affect access to justice, he says.

“I think there is a risk that this will cause lawyers to be much more cautious about becoming counsel of record and at its worst could result in more unrepresented people before the courts,” DelBigio says.

The case originated in the Yukon, where legal aid lawyer Jennie Cunningham asked the court to remove her as counsel of record for a man accused of sexual assault offences against a six-year-old girl when his legal aid certificate was revoked.

A territorial judge [Heino Lilles] denied Cunningham’s application because of the resulting delays, but the Yukon Court of Appeal overturned that decision. It drew on a convention from British Columbia that judges have no discretion to refuse a request for withdrawal.

The ruling will have its greatest impact in those two jurisdictions, since most other provinces and territories in Canada already took the opposite position.

Ron Reimer, who argued on behalf of the Crown in the case, says the ruling will force lawyers to improve management of their financial relations with clients.

“It will encourage better practice in terms of managing the retainer in places such as British Columbia, where lawyers knew they could depart from cases essentially at will,” he says.

“In Alberta, where I practice, the main impact of having this discretion is that lawyers will tell judges up front, ‘I am counsel for today only. I’m not fully retained.’

“Then the system can operate on the basis of knowing what to expect.”

The Yukon case was rendered moot when the man no longer needed a trial but it proceeded to the Supreme Court so it could make a ruling on the issue.

There, it attracted a string of high-profile interveners eager to weigh in on the role of law societies and the authority of the court. The Ontario attorney general was among those backing up the Crown, while the CBA and the Law Society of British Columbia supported Cunningham.

DelBigio doesn’t expect to see much change in practice because he says the law societies of most provinces and territories forbid criminal lawyers from turning their back on a client at the last minute because of non-payment of fees.

“In some ways, it should be business as usual,” he says. “Prior to the judgment, lawyers have always been under an obligation to act ethically. *Cunningham* does not change that in any way. The ethical requirements that existed continue to exist, and lawyers for the most part act ethically.”

However, Reimer says professional standards alone aren't enough to monitor withdrawal because the law society's actions are necessarily reactive.

“Whatever the law society might have been able theoretically to do about this sort of problem, when lawyers were departing without good cause, they could do nothing to prevent that harm from happening. A court has that preventative ability,” he says.

In his judgment, Rothstein said the courts protect the administration of justice, while law societies discipline errant lawyers. That results in different, but important, roles in regulating withdrawal.

“These roles are not mutually exclusive; rather, they are necessary to ensure the effective regulation of the profession and protect the process of the court,” he said.

Hutchison says the ruling was also notable for Rothstein's acknowledgement that *Rowbotham* orders [where Crown stays proceeding while accused seeks to obtain legal aid] were a factor to consider in such applications.

“If such an order were available, it would be relevant to the court's decision on whether to decline to grant counsel's request to withdraw,” Rothstein wrote. “That said, a *Rowbotham* order could not be a complete substitute to the court's authority to refuse counsel's request to withdraw.

"Courts must 'bend over backwards' for self-represented litigants"

**Moulton, Donalee, *The Lawyers Weekly*, 28 October 2011, p. 11
[excerpt]**

The judicial system must bend over backwards—and even further—to ensure self-represented litigants are given their just day in court, the Superior Court of Justice of Ontario has ruled. The sole issue in *R. v. Rice* [2011] O.J. No. 4236, was whether Justice Bruce Young provided the appellant with the minimum level of assistance necessary to ensure he had a fair trial. The superior court determined this had not happened.

In his decision, Justice Ian MacDonnell acknowledged the challenges self-represented litigants present to the legal system—and the obligation the system has to meet those challenges. While agreeing with the court in *R. v. Tran*, [2001] O.J. 3056 (C.A.) that “it is not an enviable task for a trial judge to conduct a criminal trial where the defendant is without counsel,” Justice MacDonnell noted the difficulty does not diminish the obligation.

“It is firmly established, however, that trial judges have a duty to provide self-represented accused with such guidance and assistance as may be necessary to ensure that he or she received a fair trial,” he said citing such cases as *R. v. McGibbon* [1988] O.J. No. 1936, and *R. v. Gonsalves*, [2005] O.J. No 1238 (C.A.).

Determining whether the bar has been met is complex and must be done on a case-by-case basis, the court found. “Whether the assistance provided by a trial judge to a self-represented accused was sufficient will be a case-specific determination that will take into account, among other things, the nature of the charges, the under-lying allegations, the background and sophistication of the accused and the manner in which the trial actually unfolded,” Justice MacDonnell said. “From the perspective of an appellant court, the question is not whether the trial judge could have done more but whether the failure to do more resulted in an unfair trial.”

“Withdrawal”

Woolley, Alice, *Understanding Lawyers’ Ethics in Canada* (Markham [ON]: LexisNexis, 2011), pp. 65-68
[excerpt]

WITHDRAWAL

One of the reasons why client selection and the ability of the lawyer to establish a functional relationship with a client are so essential, is that the lawyer-client relationship is not terminable at will by the lawyer. A client may terminate a retainer at any time, but a lawyer owes an ethical duty not to withdraw from the representation except with good cause.

In general, cause sufficient to *permit* the lawyer to withdraw will arise where there is a “serious loss of confidence” between the lawyer and the client. The codes of conduct go on to suggest that circumstances sufficient to create a serious loss of confidence include deception of the lawyer by the client, a refusal by the client to follow advice (although the lawyer “should not use the threat of withdrawal as a device to force the client into making a hasty decision on a difficult question”), the client acting in a way which is persistently unreasonable or uncooperative, or the client not paying fees that are owed. British Columbia additionally gives the lawyer a residual right to withdraw in any circumstances where doing so would not be unfair to the client or be for an improper purpose.

The codes vary with respect to when the lawyer is *required* to withdraw. The Canadian Bar Association (“CBA”) Code provides that withdrawal is required where the client persists in instructing the lawyer to violate her duties to the court; the lawyer’s continued representation of the client would cause the lawyer to violate the ethical rules (with respect to conflicts and competence, for example); or, the client is “guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another”. The [Federation of Law Societies of Canada Model] Code, by contrast, limits mandatory withdrawal to circumstances where the client persists in instructions that would require the lawyer to act contrary to professional ethics or the lawyer would not be competent. This means that under the FLS Code, conduct requiring withdrawal could not simply be immoral (“dishonourable”), but would have to result in a violation of some specific ethical obligation placed on the lawyer. The FLS Code’s

approach is superior. Once a lawyer has agreed to take on a case her reasons for withdrawal should be more concrete than a client's "dishonourable conduct".

The codes also require that when a lawyer withdraws she do so in a way that minimizes the expense and prejudice to the client. The codes place specific obligations on a lawyer to, for example, account for funds, cooperate with the successor lawyer and deliver papers to the client in an orderly and efficient manner (subject to any lien the solicitor has to enforce payment of her accounts). The codes emphasize that a lawyer should not enforce a lien for payment of fees and disbursements where doing so would materially prejudice the client in an uncompleted matter.

What about lawyers working in organizational settings? Obviously for a lawyer employed as in-house counsel by a company or the government, withdrawal is not straightforward; effective withdrawal could mean resigning from her employment. The codes of conduct do contemplate the possibility that resignation may be required, but only where the organization has engaged on a course of dishonest, fraudulent or criminal conduct, and attempts by the lawyer to bring the proposed action to the attention of those higher up within the organization have not resulted in any change.

Lawyers acting in criminal cases are also subject to the jurisdiction of the court when seeking to withdraw from scheduled criminal proceedings; lawyers must request permission to withdraw, and that permission may be denied where the only reason offered is non-payment of fees. In its 2010 decision in *R. v. Cunningham*, the Supreme Court held that the inherent jurisdiction of the superior court to control its own processes, and to ensure the proper administration of justice, gives those courts the right to both remove counsel and to require them to continue. Statutory courts have the same jurisdiction by way of implication from the statutory authority they are given over certain legal proceedings.

The Court held that exercising jurisdiction to require counsel to continue in some cases is necessary to prevent delay that might prejudice the accused and the administration of justice. The Court held that where counsel seeks to withdraw sufficiently in advance of proceedings, such that an adjournment would not be necessary, the court should permit withdrawal without requiring counsel to give reasons.

Where timing is at issue, and counsel states that the withdrawal is for ethical reasons, then "the court must accept counsel's answer at face value and not require further so as to avoid trenching on potential issues of solicitor-client privilege". "Ethical reasons" include a request by the client that the lawyer violate ethical obligations or refusal of the accused to accept advice of counsel "on an important trial issue". The court *must* grant a request to withdraw for ethical reasons.

Where withdrawal is for non-payment of fees, permission to withdraw lies in the court's discretion; exercise of that discretion should take into account the feasibility of self-representation, the availability of alternative representation, the impact of delay, the conduct of counsel, and the history of proceedings. Since none of these factors involves matters specific to the lawyer-client relationship, considering them will not breach privilege. Requiring counsel to continue without payment should only be used as a "last resort", where doing so is essential to avoiding prejudice to the accused or to the administration of justice. Counsel required to

continue to represent an accused may request that the court consider issuing a *Rowbotham* order, under which the government stays proceedings until legal aid is given to an accused. The Court in *Cunningham* was clear, though, that the issuance of a *Rowbotham* order was not related to a court's ability to refuse a counsel's request to withdraw from representation.

In sum, then, lawyers seeking to withdraw from retainers must have a reason for doing so; once a representation has been taken on it must be seen through to the end, so long as the client pays his bills and no ethical issues arise in the course of the representation.

"Posner Opinion Hits 'Dreadful Muddle' of Vague Judicial Terminology, Takes a Swipe at Cat's Paw"

Cassens Weiss, Debra, www.abajournal.com, 13 March 2012

[excerpt]

A federal appeals court has reversed an employment verdict in an opinion that blames “vague judicial terminology” for adding confusion to workplace bias cases.

. . . .

Here's the portion of the opinion where Posner condemns confusing judicial metaphors:

“This is all a dreadful muddle for which we appellate judges must accept some blame because doctrine stated as metaphor, such as the ‘cat’s paw’ theory of liability, which we introduced into employment discrimination law... can be a judicial attractive nuisance; because vague judicial terminology, such as ‘motivating factor’ and ‘proximate cause’ (the latter has been a part of the judicial vocabulary for the last 150 years, yet its meaning has never become clear...) confuses judges, jurors and lawyers alike; and because philosophical conundra such as ‘causation’ present unnecessary challenges to understanding.”

3.9 Relationships with State

"Handling a tax search and seizure properly"

Krishna, Vern, *The Lawyers Weekly*, 12 February 2010, pp. 23-24
[excerpt]

A tax search and seizure of a professional's office can be stressful. It does not have to be so. What do you do when the revenue authorities arrive with a search warrant and sworn information authorizing the search of your offices for information and documents in connection with a criminal tax investigation?

First, take a deep breath and normalize your blood pressure. There are various legal protections available, but you must know enough to invoke them.

Both the *Income Tax Act* and the *Criminal Code* allow the minister of revenue to apply *ex parte* to a judge for a search warrant to enter into premises and seize documents or things found on the premises. The minister must support the application for a warrant with information establishing the facts on which he or she seeks the warrant.

Unlike earlier versions of the tax statute, the judge has discretion as to whether to issue the warrant. The judge will issue the warrant if the minister establishes reasonable grounds that the taxpayer or person being investigated has committed an offense under the *Income Tax Act* and that documents contained on the premises will be evidence of the offense.

Second, examine the search warrant and, if available, any information sworn to determine the scope of the warrant and any limitations that it outlines. At this juncture, you must determine whether the Canada Revenue Agency (CRA) is investigating a particular client, the professional firm or a third party.

The warrant must be specific and identify the particular offense to which it relates. It must also identify the particular building or premises that it authorizes for search and the person who is the target of the search and is alleged to have committed the particular offense.

If the search warrant pertains to a client, you should obtain instructions immediately from the client and, on his or her instructions, retain legal counsel [for the client, unless he or she retains you and you see no ethical impediment to accepting retention].

If the client authorizes the search, you can cooperate with the authorities in their investigation, but you should keep a detailed record and notes—preferably in the presence of another person—of all documents that the CRA seizes.

The taxpayer and her counsel should cooperate to the extent that they can do so with the tax officials. It is an offense to interfere with, hinder or molest any official or prevent him from doing his authorized duties under the tax statute or the *Criminal Code*.

Third, claim privilege on all documents at the outset. You can ask for the documents to be sealed and placed in custody under the authority of the *Criminal Code* or sec. 232 of the *Income Tax Act*.

Once the documents have been seized and are in authorized custody, you have 14 days to apply to the court to determine whether the documents—or any portion of them—should be disclosed to the tax authorities. You will need to review all of the documents to select the particular ones for which you wish to claim privilege on behalf of your client. Failure to pursue this document review will result in the documents being turned over to the CRA after 14 days.

The *Charter of Rights and Freedoms* circumscribes the law of search and seizure warrants. The information cannot be simply a fishing expedition; it must specify the documents or things that the minister is looking for. Thus, the minister must limit his search and seizure to the documents or things that he specifies and believes reasonably support the commission of the offense. Under the “plain view” doctrine, however, the person executing the warrant may also seize any other documents or things that are evidence of any other offense under the *Act*.

There is very little that the taxpayer or her legal counsel can do to curtail the minister’s execution of a properly obtained warrant that he executes according to its terms. The remedies, if any, lie after the search and seizure.

A judge will determine whether the minister can retain the seized materials. The minister is entitled to retain seized materials—and the judge must so order unless the minister waives retention. The taxpayer can, however, through his legal counsel, apply to a judge for the return of documents will not be required for an investigation or in criminal proceedings. Of course, any documents or things that were improperly seized and outside the scope of the warrant will be returned to the taxpayer.

"Lawyer's Bra Troubles Jail Guards, Who Bar Client Visit"

Cassens Weiss, www.abajournal.com, 14 June 2010

Lawyer Brittney Horstman’s experience with a bra and metal detector kept her from visiting a jailed client earlier this month.

Horstman wasn’t allowed into the Miami Federal Detention Center because her underwire bra set off the metal detector, *The Miami Herald* reports. After a visit to the restroom, she returned without her bra, but this time she wasn’t allowed into the jail because of the prison dress code.

Horstman, a former Public defender now in private practice, complained about her June 4 experience in an e-mail to a group of other lawyers, the story says. Apparently, the guards who kept her out of the jail weren't aware of an arrangement worked out a few years ago in which women lawyers who set off the metal detector are allowed entry if an inspection with a wand shows their bras are the source of the problem.

Michael Caruso, the chief assistant in the Federal Public Defender's office, told the newspaper that warden Linda McGrew "conducted her own inquiry, she resolved the situation to our satisfaction and she said it won't happen again."

"Lawyers suffering violence alone"

McKiernan, Michael, *Law Times*, 08 August 2010

The profession must do more to help lawyers who suffer routine threats and intimidation in silence, says a criminologist who specializes in the issue.

Karen Brown, a doctoral candidate at Simon Fraser University, says the recent defacing of Ottawa defence lawyer Lawrence Greenspon's office was an anomalous case only because it received press attention and was reported to the police.

According to Brown, lawyers rarely judge threats to be serious enough to go to the police, instead choosing to soldier on alone.

"It's something that happens all the time," she says. "There's a lot of aggression and abuse, and the psychological impact of that abuse can be really detrimental. I don't think they have anyone they can report this to and they should. The law society should survey its members, but I think it's something they're looking at."

Greenspon says his office became a target because he represents a client accused in the firebombing of a Royal Bank branch back in May. At first, he says, a man approached staff at the office while shouting abuse at them. "The disturbing part was that the behaviour started escalating," Greenspon says.

The man began leaving notes that gradually became more threatening before Greenspon came in one morning late last month to find the office spray-painted with graffiti. Within 24 hours, police had arrested a suspect.

Greenspon has now added security features to his street-level office to prevent a repeat of the incident. Clients now have to be buzzed in by staff.

But it's not the first time Greenspon's choice of clients has earned him the wrath of the public. He acted for Mormin Khawaja, the first person charged under Parliament's anti-

terrorism law, and also represented a woman accused of attempting to murder her unborn child. Recently, The Advocates' Society honoured him for representing unpopular causes in court.

"I received some letters and e-mails which were less than flattering," he says. "In any high-profile case, there's a chance for that kind of thing to happen, but you have to block it out of your mind and do your job. In this case, it was difficult because it was affecting the people that work with me."

In 2005, as part of her master's thesis, Brown surveyed 1,200 lawyers working in British Columbia's Lower Mainland about their experiences with threats and violence as a result of their work. She found 60 per cent of the lawyers surveyed had encountered some form of threat in their careers.

Only 23 per cent had sought police assistance as a result. For certain areas of practice, the problem was even more pervasive. Brown found 73 per cent of criminal defence lawyers, 82 per cent of prosecutors, and 87 per cent of family law lawyers had such experiences.

Since then, Brown has extended her research to include all provinces and territories in Canada and says the data reinforces the original findings. Not all lawyers are good at brushing off threats, and female lawyers are much more likely to suffer psychological trauma as a result, she notes.

According to Brown, governments have taken the lead to reduce the danger to lawyers by, for example, making the offices of Crown attorneys and judges hard to access and going to extreme lengths to ensure security in court. But Brown says members of the private bar have fewer options and less support.

The Ontario Bar Association has a personal safety handbook, first produced in 2005, that it distributes to lawyers throughout the province.

"What we try to explain to our members is that you don't have to just suck it up and take this. You're not expected to go out and get yourself killed," says Ian Kirby, who was the OBA's president when the handbook came out.

The book offers lawyers tips for assessing the credibility of a threat and on how to defuse potentially violent situations. Kirby himself has worked under a bomb threat from the ex-spouse of a client and recently warned his family about an unstable woman currently opposing him unrepresented in court.

"Most of us used to shrug it off and carry on," he says. "You wouldn't talk to anyone about it but once you start, you find this common experience. The message has to be it's not acceptable to threaten violence or exact violence on lawyers and, if you do, don't think you'll get away with it."

But Victoria Starr, who owns a family law practice in Toronto, suggests many lawyers still don't share their stories. "It's not something we talk about, and maybe that's the first step,"

she says. “We would learn that lots of us have been under that type of threat and be able to support each other.”

Starr’s practice focuses on domestic violence cases that “nobody else wants.” That means she frequently encounters men with violent histories. “Some of them are pretty psychotic, and when you read what they have done to their wives and children, it’s pretty scary,” she says.

According to Starr, low level physical intimidation is routine from her clients’ spouses. Actual threats of violence are rarer. She once received a middle-of-the-night call from court staff to warn her that the angry spouse of a client had threatened to kill her and others involved in his case.

But even then, Starr didn’t report the incident to police because she feared it could prevent her from representing a client desperately in need of her help.

In the meantime, Starr had developed her own safety plan by minimizing her time alone and requesting a police escort from court when she suspects a situation could turn nasty. She tries to remember the words of a mentor, who told her, “it’s not you they’re after.”

“If I thought differently, I’d be so afraid,” Starr says. “Part of being a lawyer is being fearless. We might feel the fear but we push ahead, and it can put us at risk.”

At the same time, Brown says a lack of awareness about the problem means young practitioners fresh out of law school aren’t fully aware of what they’re about to face.

She also says law societies may have been able to ignore the root causes of the problem because many lawyers who haven’t encountered threats fail to understand the impact they can have.

“There’s a division between lawyers that concerns me,” she says. “Until everyone’s on the same page, they won’t do anything about it. You can’t just continue to lay the blame on people with mental-health issues. There has to be more to it, but nobody seems to be focusing on this.”

“Mark Saunders inquest: shot barrister’s gun not in firing position”

Davies, Carol, *The Guardian* [London], 24 September 2010

[excerpt]

Saunders’s shotgun was in “broken” or “open” position meaning it could not have been fired, court hears

The shotgun found near the body of barrister Mark Saunders was in the “broken” or “open” position, suggesting it was unable to have been fired, an inquest was told.

Shortly before collapsing in a hail of police bullets, the 32-year-old divorce lawyer was seen apparently trying to operate a “switch or lever” on the top side of his “up and under” Beretta silver shotgun. The gun had a lever on top which had to be moved to “open” it and once “open” could not be fired, Westminster’s coroner’s court heard.

The evidence came as one firearms officer revealed he did not fire on the lawyer because he could not justify it and did not believe the Oxford graduate was taking aim at anyone.

Saunders, who was very drunk, was killed by five bullets from seven officers as he appeared to take aim, but had not fired his weapon immediately before the fatal police volley, though he had done so earlier in the five-hour-siege that ended with his death on 6 May 2008.

One of the marksmen who shot him, known only as AZ4, said he fired as Saunders, who was hanging out of his kitchen window, looked as if he was “ready to shoulder it [the gun] and take aim” and he believed there was imminent threat to the lives of colleagues on a nearby roof.

"Proposed tax reforms breach privilege, warns Bar"

**Schmitz, Cristin, *The Lawyers Weekly*, 26 November 2010, pp. 1, 7
[excerpt]**

Lawyers are sounding alarm bells over draft legislation targeting aggressive tax planning that they warn will require them to inform on their clients to the Canada Revenue Agency (CRA) or risk heavy monetary penalties.

Proposed s. 237.3(2) of the *Income Tax Act* (ITA) would create a new information reporting regime (not a new tax) aimed at alerting the CRA to potentially abusive tax avoidance.

If passed, as is, the draft legislation would generally require tax payers and their paid advisors, including lawyers, to report what they believe are tax avoidance transactions to the CRA so that the agency can determine whether the transactions offend the ITA’s general anti-avoidance rule (GAAR).

The GAAR permits a tax benefit to be denied if a taxpayer has engaged in an “avoidance transaction” that tax authorities deem to be frustrating or defeating the object, spirit or purpose of the ITA provisions relied on to realize the tax benefit.

However, the Canadian Bar Association (CBA) and other legal organizations contend that the proposed information reporting measures—which would apply to the panoply of professional tax advisors—would put lawyers into an untenable position by dividing their loyalties, pitting them against their own clients, and compelling them to breach their own rules of professional conduct.

“If adopted in their current form, they will create a serious incursion into solicitor-client privilege and will compromise the independence of the legal profession,” CBA President Rod Snow warns in a recent letter to federal Finance Minister Jim Flaherty.

The CBA and other lawyers’ groups are therefore lobbying the Harper government to specifically exempt lawyers and Quebec notaries from the proposed reporting obligations vis-à-vis any client information or communications gleaned in the context of a solicitor-client relationship.

“I have got a hunch we are being listened to ... [but] I can’t say as to what will result or when,” Halifax tax litigator Bruce Russell of McInnes Cooper told *The Lawyers Weekly*.

Russell, a member of the Society of Trust and Estate Practitioners (STEP), and other legal associations don’t object, in principle, to the government’s aim of achieving a fairer tax system and allowing “for a greater recognition by CRA of situations involving tax planning that could trigger the GAAR provision.

“But the devil is in the details,” he emphasized. “One of the major details that is of concern is the obligation on lawyers, who meet the definition of ‘advisors’, to have to report regarding their clients, and that brings into play solicitor-client privilege which is ... sacrosanct and puts these lawyers into real dilemma: Do they breach their professional obligations, or [do they] not report when they otherwise feel that the matter was reportable? And that’s a real difficulty.” Russell suggested other aspects of the draft legislation also overreach. “Many of these definitions ... are very broad and sweeping and can bring in lots of individuals under the definitions of ‘advisor’ and ‘promoter’ who have played very incidental, or small, or indirect roles in the advising of taxpayers.”

"Push to expand money laundering law"

**Duhaime, Christine, *The Lawyers Weekly*, 09 March 2012, pp. 11-12
[excerpt]**

The Canadian government is contemplating significant changes to its anti-money laundering (AML) and counter terrorist financing (CTF) regime by proposed amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA). The proposed amendments will follow a consultation with Canadians and stakeholders. The government has released a consultation paper highlighting the proposals entitled “Strengthening Canada’s Anti-Money Laundering and Anti-Terrorist Financing Regime.”

. . . .

The key amendments include the following (3) Eliminate the triggering threshold of \$10,000 for reporting international electronic fund transfers. This is one of the most significant

proposals, impacting not only the regulatory burden on reporting entities but also the privacy interests of Canadians. The amendments would require banks, casinos and money services business to report all electronic funds transfers into and out of Canada to FINTRAC [Financial Transactions Reports Analysis Centre of Canada], regardless of the amount.

. . . .

While lawyers are also reporting entities subject to certain provision of the PCMLTFA, several court rulings and injunctions have rendered those provisions inoperative. The federal government has [in British Columbia Court of Appeal] appealed the decisions that render the PCMLTFA inoperative as against lawyers. In the event that appeal is ultimately successful, the proposed changes to the PCMLTFA would apply to lawyers. The interesting reality about the PCMLTFA and lawyers is that FINTRAC receives suspicious and large cash transactional reports about client financial transactions involving law firms from banks in any event (since law firms are client of banks and their transactions are reportable), but not from law firms directly with respect to those client transactions.

The transactional information flows to FINTRAC regardless but the subject of the report is, ironically, the law firm. Canada is one of only a few jurisdictions that has exempted, wholesale, lawyers from the AML/CTF regime and continues to be criticized by the FATF [Financial Action Task Force] as a result for failing to comply with its commitment to FATF standards. The exemption of lawyers constitutes a significant gap in Canada's AML/CFT regime. Lawyers have been involved in money laundering activities and as facilitators of money laundering activities for clients.

3.10 Relationships with Technology

“Florida Personal Injury Firm Sues Over Strangely Similar Website”

Cassens Weiss, Debra, www.abajournal.com, 26 January 2010

Lawyers at the Florida personal injury law firm Gordon & Doner stumbled on a surprising online find: There were two versions of its website.

The Florida law firm did something about it—they filed a trademark infringement suit against the Web host for the knockoff site and the still-unknown copier, *The Daily Business Review* reports.

The knockoff version of the website fortheinjured.com was being used by someone posing as a British law firm, but it was strangely similar to the original version, *The Daily Business Review* says. The knockoff site had mostly the same wording, design and logo as the Florida firm, and the same lawyers were pictured, with a notable exception. There was no photo of firm co-founder Robert Gordon, who appears in advertising and is the public face of the law firm.

Lawyer Adam Doner was pictured on the site, maslinassociates.com, although his name was changed to Evans Maslin. “It’s really strange,” Doner told *The Daily Business Review*. “Talk about identity theft. The public needs to be aware of this. I can’t believe we’re the only one this has happened to.”

The lawyers are puzzling over the motive, the story says. It could be an effort by a competitor to knock Gordon & Doner down in the Google search results. Or it could be an attempt to confuse and discourage would-be clients.

The Webhost, GoDaddy.com, took down the knockoff after the suit was filed.

“First Thing Lawyer Tells New Clients: Shut Down Facebook Account”

McDonough, Molly, www.abajournal.com, 09 February 2010

People may believe there’s a degree of anonymity on the Internet. But police know better, and they are increasingly using social media tools to collect evidence of criminal activity and head off wrongdoing.

“Technology has revolutionized law enforcement in many ways,” Jack Rinichich, president of the National Association of Chiefs of Police, tells *USA Today*. “Sometimes people are pretty liberal about what they put on (social networking sites)”.

So liberal in fact that Nashville, Tenn., criminal defense attorney David Raybin addresses the issue head-on with clients. “The first thing I tell them is, ‘You are shutting down your Facebook account,’” Raybin says.

USA Today notes several cases throughout the country in which police investigations were bolstered by taking time to explore You Tube, Flickr and other online message boards:

- Police in Suffolk, Va., were able to identify suspects involved in a Dec. 14 street fight when cellphone videos were posted on You Tube.
- Police in Chattanooga, Tenn., discovered an online forum where residents were planning illegal drag races, staked out the area and ticketed participants.
- Police in Los Angeles used You Tube and Flickr to identify people suspected of being involved in riots following the June 2009 NBA Championship.

"Legal Standards / Why Can't We Be Friends?"

Gray, Jeff, *The Globe And Mail*, 03 March 2010, p. B9

Can a lawyer poke a judge on Facebook? Twitter from the courtroom? Can judges and lawyers be "friends"?

The dilemmas posed by social networking sites could open up a whole new chapter in rule making for legal professionals. So far, there are very few formal rules for Canadian judges and lawyers to govern Facebook, Twitter and other such websites. But of course the long-established [ethical] rules governing the conduct of lawyers and judges still apply.

The Canadian Judicial Council, which governs the behaviour of superior-court judges, recently published a paper explaining Facebook and Twitter in simple terms. It advises judges to use it "judiciously" but does not ban them from setting up accounts.

"Facebook is not only for the young and hip," the paper reads. "It can also be quite enjoyable for a judge who wants to connect with family members, see photos of children or grandchildren and keep up with classmates from high school."

The Canadian Bar Association recently released new guidelines for lawyers on advertising, including using social media. The document warns lawyers that the normal [ethical] rules apply, and warns that Twitter and Facebook pose special dangers.

In the United States, the issue has received more attention. Florida's judicial ethics committee last year recommended that judges refrain from "friending" lawyers who appear before them, to avoid giving the impression they have special status.

The U.S. Judicial Conference recently issued federal judges with new guidelines on instructions to juries. The guidelines suggest warning jurors that they cannot "communicate with anyone about the case on your cellphone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any Internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn and YouTube."

"Virtual Offices May Violate Ethics Rules, New Jersey Opinion Says"

Cassens Weiss, Debra, www.abajournal.com, 06 April 2010
[excerpt]

Lawyers who rent offices under time-sharing arrangement may violate New Jersey ethics rules if they hold out these workplaces as their principal place of business, according to a recent ethics opinion.

Such "virtual offices" violate the state requirement for a *bona fide* office rule, the *New Jersey Law Journal* reports. The joint opinion is "likely to reinforce New Jersey's reputation among attorney regulators around the country as a state that bends its ethics rules slowly to the inchoate winds of social and economic change," the story says.

According to the opinion, a virtual office refers to a time-sharing arrangement in which lawyers visit the office by appointment only. A receptionist serves all of those who rent space in the shared office, directing clients to the proper room at the appointed time. Depending on the lease, the receptionist may also receive and forward mail and phone calls.

New Jersey requires lawyers to maintain a *bona fide* office when clients are met, files are kept, mail is received, and the lawyer or "a responsible person acting on the attorney's behalf" can be reached in person and by phone. The purpose, according to the opinion, is to make sure lawyers are available and can be found by clients.

A virtual office can't be a *bona fide* office, the opinion says, since the lawyer is only present when he or she has reserved the space. And a receptionist at a virtual office doesn't qualify as "a responsible person acting on the attorney's behalf"—indeed such a receptionist shouldn't be entrusted with confidential information, the opinion adds.

A home office, however, can meet the requirement for a *bona fide* office, the opinion says. And solos who can't afford a receptionist can still meet the requirement, as long as absences from the office are only occasional and the lawyer can be reached by phone, e-mail or the like.

"Laptop ban an isolated incident, judge says"

McKiernan, Michael, *Law Times*, 25 April 2010

A judge who spearheaded the use of paperless trials in Ontario says the justice system is moving too slowly to embrace technology after a justice of the peace banned a lawyer from using his laptop in court.

Nevertheless, Superior Court Justice Thomas Granger says the case is an isolated incident since almost all judges allow laptops. But while the general trend is towards greater acceptance of technology, that embrace isn't as strong as he would like.

"It's a paperless world we live in," says Granger. "Expectations have changed for everybody except the court system. If I walked into a bank, and they had all my records on paper, I'd walk straight out of there."

"That's what they did 30 or 40 years ago. When a client walks into a courtroom and sees these boxes and boxes of photocopied paper, they must think they've entered a time warp."

The renewed debate over technology comes after a justice of the peace ordered criminal defence lawyer Sean Robichaud to switch off his laptop during a stunt-racing trial in Whitby, Ont. The Crown prosecutor objected to the laptop's potential use as a recording device.

"Of all the arguments I had anticipated that day, that one didn't even come close to the radar screen," Robichaud says. "I was so taken aback that I was virtually speechless for the first couple of minutes trying to form an argument on how to respond to that, maybe because I wasn't allowed to use my laptop to do so."

Robichaud says he informed the justice of the peace that the computer contained all of his notes on the case. As a result, he had to ask for an adjournment because continuing the trial would have compromised his client's defence.

Later that day, Robichaud says he got a call from prosecutor Veronica McGuire saying she had changed her position after talking with colleagues and wouldn't object to the laptop when the case returns to court in August.

"I really don't have any comment to make on it at all," McGuire tells *Law Times*.

Ontario Chief Justice Warren Winkler brought the technology issue to the fore at the opening of the courts ceremony last September, when he urged the courts to adapt to the electronic age.

"Anachronistic methods of doing business that do not take advantage of available

electronic court information are inefficient for the administration of justice,” he said. “They can also be costly to the users of the system and inconsistent with the expectations of the public.”

It’s an argument that resonates with Granger. Last October, he delivered his judgment in a complex trial involving almost 3,000 exhibits and about 70,000 pages

Each document was scanned into a litigation support program, saving thousands of dollars in photocopying costs alone. Granger says electronic storage can also improve advocacy because judges can immediately access relevant information.

“If you did it in hard copy, you’d have bankers’ boxes full of these photocopied exhibits,” he says. “Sitting in front of me is a laptop with everything at my fingertips: those 2,882 exhibits, 300 days of evidence, 3,500 pages of submissions, and a judgment of 700 pages. Wherever I go, it goes. I’ve got that one chained to my wrist.”

Edward Prutschi, a lawyer with Adler Bytensky Prutschi in Toronto, also sees the Whitby case as an outlier [a case deviating from the norm]. He finds increasingly complicated disclosure now routinely comes in digital format and that a significant shift in lawyers’ attitudes has become apparent in recent years.

“I think the bulk of judges, counsel, and all actors in the process are moving slowly to adoption of technologies that will make the process more manageable. You do get some of the old guard who get disclosure on CD and request that it be printed out. But there’s starting to be some push back to that.

“I think there will be a point where a court says that’s not part of counsel’s disclosure obligation. You have it in a standard format and you’re going to have to figure out how to utilize it.”

For his part, Robichaud says laptop use has become the norm for most lawyers in court and traces his own dependence on it to his time in law school less than a decade ago.

“I used it from Day 1 and I haven’t stopped since. It’s a pretty rare day where I pick up a pen and start writing anything anymore.”

Pulat Yunusov, a student who has just completed his third year at Osgoode Hall Law School, says the trend has only intensified since Robichaud graduated in 2004.

“If you come to one of my classes, you will see a room with rows and rows of laptops with people typing. They are critical to us. I don’t like being tied down to any physical location, so most of my data and readings are online.”

Of course, it’s not only students who are embracing technology. Professors run web sites for courses, and the school has a large audio archive of lectures and talks available online. Yunusov fears any restriction on technology risks limiting access to justice for those who can only afford representation by smaller firms.

“When a solo lawyer comes up against a powerful party like the Crown or a large firm, this cheap technology levels the playing field, at least a little bit,” he says. Still, Granger says he’s surprised more lawyers, especially younger ones, don’t bring laptops into his courtroom.

“I think some lawyers see the tradition of courtrooms with paper and books and they’ve yet to move into this new era of electronic technology,” he notes, adding they sometimes seem to be waiting for a sign.

“I heard a motion not too long ago where one counsel was not using a computer, but as soon as he saw me using mine, he couldn’t wait to get his out.”

"Ethics Officials Seeing More Cases from Lawyers' Online Foibles"

Cassens Weiss, Debra, www.abajournal.com, 11 May 2010

Lawyers—who are more circumspect in person—are making online mistakes that are landing them in trouble with ethics officials.

James Grogan, chief counsel of the Illinois Attorney Registration and Disciplinary Commission, recalls an early case that got attention of bar counsel in more than one state, *The National Law Journal* reports. Steven Belcher, a temporary lawyer at a St. Louis law firm who was licensed in three states, was helping defend a wrongful death case when he decided to e-mail a picture of the deceased to a friend, the story says. The body of the overweight man was pictured lying naked on an emergency room table. Belcher added his own commentary.

The result was a 60 day suspension, the story says. “It got our eyebrows up.” Grogan told the publication. “We thought, ‘Wow are we going to see more of these?’ Well, I think it’s clear we are starting to see more.”

The story notes an increase in interest in the issue. Bar associations and bar counsel hold seminars on online ethical mistakes, and the ABA Commission on Ethics 20/20 will consider whether existing ethics rules adequately address online transgressions.

“It’s not as if lawyers never misbehaved before,” the story says. “But now they’re making the same old mistakes—soliciting for sex, slamming judges, talking trash about clients—online, leaving a digital trail for bar counsel to follow.”

The story summarizes other online foibles, including these:

- A Chicago immigration lawyer posted an ad on Craigslist seeking a secretary and asking for measurements and photos. In a follow-up e-mail, the lawyer said one of the job requirements would be “sexual interaction with me and my partner.” The disciplinary is pending.

- A Florida lawyer called a judge an “evil, unfair witch” on his blog. He was reprimanded in April 2009.
- A Tampa lawyer listed four lawyers who weren’t licensed in Florida as attorneys on the website for his law firm. He was suspended for 90 days.

"Lawyer told to hand over computer"

**Brean, Joseph, *The National Post*, 20 August 2010, p. A4
[excerpt]**

A judge has ordered anti-hate lawyer Richard Warman to turn over a laptop computer on far-right websites, so that an independent expert can search it for evidence that Mr. Warman authored a racist comment against a Canadian senator.

In a ruling stemming from Mr. Warman’s libel suit against free-speech activist Ezra Levant, Master Donald E. Short of the Ontario Superior Court ordered that a “mirror image” of the computer’s hard drive be searched for any data about the names “Pogue Mahone,” “Axetogrind,” “Lucie,” “Mary Durnford” and “Dave McClean,” names Mr. Warman gave when registering with controversial websites to monitor online racism and prepare complaints of hate speech.

“Lucie” refers to Lucie Aubrac, a hero of the Frenc Resistance. Pogue Manhone means “kiss my arse” in Gaelic.

The computer must also be searched for a list of words taken from the racist comment, posted on Freedomsiteorg in 2003 by a ‘person of choice’ in search terms.

In ordering an independent expert to conduct a highly specific search, Master Short also denied several of Mr. Levant’s other requests, concerned that they amounted to a “fishing expedition.”

“In my view to a large extent in this case the only relevant information to [Mr. Warman’s] libel claim on Mr. Warman’s hard drive would be files which establish whether he was the author of the Hateful Posting,” Master Short wrote. “Unless and until we know what the [independent expert] finds on the hard drive (if anything), this alleged fishing expedition may turn out to have been a wild goose chase.”

He acknowledged the two men are involved in wider battle over hate speech, which reflects a national unease with the convoluted state of laws against it. Both are “zealous advocates for very different approaches to the interpretation and application of Canada’s laws,” whose theories of this libel case “could hardly be more diametrically opposed.”

Mr. Levant describes himself in court filings as one of Canada's "premier advocates of free speech and free expression," and an expert on "civil liberties and threats posed to them by the abusive use of Canada's human rights commissions and through nuisance defamation lawsuits, such as the within action."

Mr. Warman, a lawyer who has seen 13 successful hate speech complaints through the Canadian Human Rights Tribunal over the past decade, is described in his fillings as "attempting to bring to justice those who spread hate on the Internet," and claims "Mr. Levant's style of writing is to make his point by disparaging and, in many instances, defaming his targets. Mr. Warman is one of those [target] people."

Mr. Warman's false personas have been the subject of legal comment before. Last year, the Canadian Human Rights Tribunal upheld his complaint against the Northern Alliance, a defunct white nationalist group in London, Ont.. But chairman Edward Peter Lustig also found that his use of false personas to make offensive website postings, including Nazi Symbolism, was "disappointing and disturbing," and it "diminishes his credibility."

Also, Richard Moon, a law professor who recommended the Canadian Human Rights Commission no longer deal with hate speech, said this practice of baiting and investigation online racists on behalf of a commission that is unwilling or unable to do so itself is a burden that private citizens should not shoulder.

"Weighing the benefits and costs of going paperless"

McKiernan, Michael, *Law Times*, 21 May 2010

[excerpt]

In a profession as document-driven as the law, the idea of a paperless office can seem daunting at best or simply inconceivable at worst.

For Donna Neff of Neff Law Office Professional Corp., it was practical considerations at her office in Stittsville, Ont., that finally convinced her to make the switch in 2006.

"The basement was filling up," she said. "Storage cost was my no. one reason." Despite initial doubts and some pushback from staff, four years later the centerpiece of Neff's wills and estates practice is a very complex and expensive scanner.

"We love it," she said. "It cost close to \$4,000 but it can scan 40 pages per minute, and you can e-mail it straight to the person who will file it. It's a printer, fax, photocopier and it's very fast."

Speaking at the Law Society of Upper Canada's recent Solo and Small Firm conference at Osgoode Hall, Neff attempted to recruit an audience of small-firm practitioners to the paperless bandwagon, one she said is growing all of the time.

The initial outlay on equipment puts off many lawyers, but according to Neff, the savings in administrative costs and reduced need for staff in a paperless office can easily cover the cost of the transition.

“You have to remember that you pay salaries every year, so you’re going to save money over and over,” she said.

Victoria Starr, a family lawyer from Toronto, tells her clients up front that all of her documents are electronic. She noted her own paperless practice allows her to transport all of her files without lugging around boxes of physical files.

“I can access any of my files from the courtroom,” she said. “It’s essentially your whole filing cabinet.” Neff has reaped the benefits of remote access even further afield than the local courthouse by running her office from as far away as South America.

But with paper out of the equation, Neff has still found a way to fill her desk. Every employee in a paperless office needs a personal scanner, she said, adding she also recommends an additional monitor for computers.

“You’ve got to have two monitors at least because it mimics the way you work with paper when you spread the sheets out in front of you. I’d love to go to three but I don’t have the time to figure out the technology for it. “The more real estate the better.”

But she and Starr warn against rushing into a decision. Without a shared and consistent filing system, a paperless office can cause more problems than it solves, and while lost paper files can be troublesome, a computer malfunction could be disastrous with electronic documents.

“If you’re not using two or three forms of backup, don’t go paperless,” said Neff. “You’ll be committing professional suicide.” Starr added: “Especially if you’re like my office, where you’re throwing the paper out eventually, you’ve got no safety net.”

"Many Wince at 'Above the Law' Blogger's Chilling Account of Online 'Stalk' "

Neil, Martha, www.abajournal.com, 15 June 2010

[excerpt]

Law blogger Kashmir Hill thought she had few illusions about internet privacy, according to her biography page for a True/Slant blog about privacy, technology and the law.

But the online research that resulted in the 'Above the Law' editor's chilling Assembly article about the enormous amount of detailed personal information a stranger can glean from social networking sites and an "online stalker", has left readers at the *ABA Journal* and elsewhere wincing.

Hill herself found the situation uncomfortable and recounted the difficulty she had speaking with her subject, Noah Brier, after she had completed her research. And, although Brier told her he was OK with what she had done, his body language indicated that he wasn't as comfortable as he claimed.

Hill was able to tell Brier something he didn't know himself concerning his nearest and dearest—the value of his family's Connecticut home, in which he grew up. And, her 28-year old, media-savvy subject said, he was surprised that Hill was able to come up with his home address. However, his main focus, as he listened to Hill's detailed account of what she had found out about him online, was accuracy—she'd missed a few things, and some information was outdated, he said.

As a result of her research about Brier, Hill writes in the article, she herself changes her social networking habits:

“I adjusted by more carefully curating my online persona. I took down accounts on Friendster and MySpace that I hadn't updated in many months. I changed the privacy settings on my Facebook account. Though I accepted Facebook friend requests from strangers, I placed them in a category which gave them limited access to my profile—mainly restricting their access to view my photos.”

“Class action contends lawyers' copyright infringed by commercial database”

**Schmitz, Cristin, *The Lawyers Weekly*, 18 June 2010, pp.1, 8
[excerpt]**

Do lawyers enjoy copyright in the *facta*, pleadings, motions and affidavits they file in open court and, if so, can their “works” be reproduced via a commercial on-line database, without permission or compensation?

Those are some questions recently raised by a novel \$51-million class action for alleged “mass copyright infringement” that was filed in Ontario Superior Court last month against legal publishing giant Thomson Reuters Corp. and Thomson Reuters Canada Ltd., by prominent immigration lawyer Lorne Waldman.

The Toronto lawyer contends that the defendants' Westlaw Litigator service is infringing his copyright, and that of hundreds, if not thousands, of other lawyers by reproducing (in PDF, Microsoft Word and other downloadable formats), and making available on-line for a fee, more than 50,000 pleadings, court motions and *facta* the defendants recently copied from civil court files across Canada.

“The defendants have created a service whose sole purpose is to carry out mass copyright infringement for their own financial profit,” Waldman alleges in a May 25, 2010 statement of claim whose allegations are disputed by Thomson Reuters.

Argues Waldman, “in addition to asserting that they own copyright in legal documents they did not create, the defendants seek to trade on the name and reputation of the lawyer and /or firm who actually drafted the document by showing (and permitting searching by) lawyers and firm names.”

Of course none of the lawsuit’s allegations have been proven in court. Absent settlement, the case is also likely to take years to be determined on the merits, beginning with skirmishes over class certification.

Waldman’s counsel Louis Sokolov and Jordan Goldblatt of Toronto’s Sack Goldblatt Mitchell told *The Lawyers Weekly* the lawsuit breaks new ground in Canada. They said they did not know of any similar case having been decided by a court elsewhere in the common law world.

(In the U.S., the question of whether digitizing copyrighted material into a searchable database is sufficiently transformative to qualify as a non-infringing “fair use” under American copyright law was recently raised—but not decided—in a class action against Google for its controversial project to scan and create a searchable online database of millions of books.) Waldman, in addition to demanding general damages of \$50 million (or alternatively, statutory damages under the *Copyright Act*) and punitive damages of \$1 million, is asking the Superior Court to enjoin Thomson Reuters permanently from dealing “in any way” with the documents authored by the class members; to enjoin further copying of court documents without consent of the authors; and to compel the defendants to disgorge any profit reaped from the alleged mass infringement.

He also requests that a class action be certified and that he be appointed as the representative plaintiff.

Sokolov acknowledges “anybody can go to the court file and get a copy of a document and use it as a basis for their research or work. That’s fair.”

But he argues “the difference of course is if you go to a court file and make a copy, the court isn’t making a profit off a lawyer’s work. The court is providing it as a public service. But it’s a material difference to take tens of thousands of documents and offer them for sale, on a bulk basis, without any compensation, or indeed any permission, from the people who wrote them.”

“The nature of the copying, the nature of the publication, and the nature of the profit-making from it, puts it in a different category altogether, and we think that that’s what makes this matter actionable.”

Goldblatt adds “on top of that there is also the fact that the documents are transformed into a format where they can be downloaded, and directly copied from [via cut and paste, for example]. So it goes above and beyond research, to where it can be used as the very basis for another draft of the document.”

Counsel for Thomson Reuters, Wendy Matheson of Toronto's Torys, told *The Lawyers Weekly* her clients dispute the plaintiff's allegations and are defending the action.

The *Copyright Act* provides various defences to copyright infringement, including an exception for "fair dealing for the purpose of research or private study."

Matheson did not outline her clients' defence given the newness of the law suit, but she did note that "the Litigator service provides significantly enhanced access to court documents that are already available to the public and already routinely used by lawyers. Certainly the service benefits both the legal profession and the public, including the public interests that are served by our well-established open court system."

As do several on-line database services that have existed in the U.S. for years, the Litigator service pierces the veil of practical obscurity shrouding court files by digitizing, sorting, indexing, and making available online selected pleadings, motions and *facta*.

These are made searchable by, among other things, area of practice, level of court, counsel, and law firm.

One issue of dispute may be whether that amounts to actually selling court documents, or just making those documents more accessible for a fee. Certainly the service does give the profession and the public access to a rich vein of aggregated legal reference material that otherwise remains mostly buried (unless, and until, Canadian courts permit direct on-line access to documents in their files, as the Supreme Court of Canada did last year when it posted appeal *facta* on its website).

"Meet the Solo Who Wrote the Book on Virtual Law Practice"

Ward, Stephanie Francis, www.abajournal.com, 09 September 2010
[excerpt]

Stephanie Kimbro was pregnant with her first child and thought a sole practice doing estate planning from home would be a good way to combine a job and parenting. What she didn't realize was that in five years, she'd earn more working from home than she did as a law firm associate. Kimbro, 34 and owner of Kimbro Legal Services, estimates her operating costs are about \$140 a month: \$100 for her software service and \$40 for a wireless card.

"I just wanted to be able to stay home with my daughter, and I thought this would be a way to do that until we figured out how I could stay home," says the Wilmington, N.C., lawyer, noting the financial realities many young families face when weighing how much money they need to live on versus child care arrangements they desire.

Kimbro's husband, Benjamin Norman, is a computer programmer, and while she was pregnant the two developed a website to serve clients online. What they came up with was a secure, Web-based interface that has importing and exporting capacities.

She opened her practice in January 2006, the same month her daughter, Madeleine, was born.

"The first month she'd be in my lap while I'm working on the computer. As she got more mobile, it got more tricky," says Kimbro, who now also has a son, William, not yet 2. "I'd start working at 1 a.m., or getting up earlier than she was."

Many of Kimbro's clients are also mothers with young children, and she discovered they were often online when she was.

The first year was somewhat rough, Kimbro says, in terms of getting clients. She found that traditional advertising didn't accomplish much.

She shifted marketing efforts to numerous e-mail discussion lists and social networking sites like LinkedIn, Facebook and Twitter, allowing her to interact with other lawyers without sharing an office with them. "I'm way more social now than I was working in a small firm," she says.

She also developed a presence on local parenting message boards. Her signature line includes "mom of William and Madeleine, owner of Kimbro Legal Services."

"If someone did have a legal issue, if it was something I could do—I would be called on," says Kimbro, who works on North Carolina matters only.

She started to see a steady stream of business after one year. Today, much of her work comes from client referrals. The bulk is estate planning, which she unbundles. For wills, she charges \$150 per person. For a couple purchasing an estate planning package, the price is \$500. The packages include standardized forms and memos, Kimbro says, but her work is personalized through discussions with clients, usually online.

Besides trust and estate work, Kimbro handles small-business matters like incorporation and contract drafting.

"I provide each prospective online client with a price quote for fixed-fee services based on the complexity of their matter," she says. "I sometimes will do a fixed fee for a portion of the work and then move to billable-hour rates if it exceeds the scope of that initial project."

Prospective online clients click to accept Kimbro's price quote along with a click-wrap agreement that defines the scope of representation.

"She's got a really interesting vision for how law practice can change, and how you can offer it in ways that haven't been offered before," says Eric Mazzone, director of the North

Carolina Bar Association's Center for Practice Management. "She has a unique way of looking at a situation and seeing things that others don't."

But they're starting to. In October 2009, the software system she and her husband designed, Virtual Law Office Technology, was sold to Total Attorneys for an undisclosed amount. Total Attorneys hired Norman as a senior developer and bestowed the title of "evangelist" on Kimbro, who in addition to her law practice does consulting work for Total Attorneys. The Chicago-based company is a technology service provider that focuses on small-firm and solo law practice management

"Beware of Fact-Specific E-mail Discussion, Says ABA Ethics Opinion re Law Firm Websites"

Neil, Martha, www.abajournal.com, 29 September 2010

Guidance for lawyers advertising on the Internet is offered by a new ethics opinion announced by the American Bar Association in a [press release](#) today.

The [ethics opinion](#), which was issued by the ABA Standing Committee on Ethics and Professional Responsibility, points to a number of potential website pitfalls.

Among them are a need to obtain informed consent from clients before identifying them online; a need to update website information to ensure that it is current; and a need for lawyers to beware of conducting fact-specific discussions over the Internet that might create confusion about whether the other party is a client.

A disclaimer, generally speaking, is needed to help make clear that no attorney-client relationship is created by website-related e-mail communications, and a lawyer should be careful to limit the scope of electronic discussions with nonclients, according to the opinion.

"But a limitation, condition, waiver or disclaimer may be undercut if the lawyer acts or communicates contrary to its warning," it concludes. To be effective, a disclaimer must also be "reasonably understandable, properly placed and not misleading" to a reasonable person.

"Mirror, mirror on the web"

**Moulton, Donalee, *The Lawyers Weekly*, 15 October 2010, pp. 23, 25
[excerpt]**

There's an old expression: I'd like to be a fly on the wall in that room. Now, there is a new reality. You can be that fly.

In an Internet age, access to information is only a click away. That click can elicit information about yourself and your company.

That type of search is often called ego surfing—taking a look at what's out there on the web with your name or your firm's attached to it. It's a smart exercise for both lawyers and their clients, said Sunny Handa, a partner with Blake, Cassels & Graydon LLP (Blakes) in Montreal. "You'd be almost foolish not to do that. You spend a lot of time developing your brand and your reputation.

"Social medial is viral," he added. "Before widespread net working, business was much more in control of the message. Now information is flowing like water."

Sometimes the water is tainted. "It's risky if you don't," said David Fraser, a partner in the Halifax office of McInnes Cooper, who has a standing Google Alert of his name. "Every time my name shows up, I'm notified."

Fraser is not alone in wanting to know what's out there. A study published by the Pew Research Center, a social science research organization in Washington, D.C., found that nearly half of all Internet users in 2007 searched for information about themselves online—up from just 22 per cent in 2002.

Those numbers continue to grow. A more recent survey released this year by Accountemps, a specialized staffing service in Toronto, found that four out of five workers interviewed said they have entered their name in one or more search engines to see what results were displayed.

Not surprisingly, the Pew study determined that younger users (under the age of 50) were more prone to self-searching than those 50 and older. More surprising perhaps is the lack of apparent concern about what's out there.

The study, *Digital Footprints: Online Identity Management and Search in the Age of Transparency*, also discovered that fully 60 per cent of Internet users surveyed said they are not worried about how much information is available about them.

Caution is required, however. And action is a viable option. “You have to be careful what is being said. There is recourse,” noted Giles Crouch, chief executive officer of MediaBadger, a social media research and consulting firm in Halifax.

Indeed, said Fraser, “you have at least a measure of control. If it’s defamation, you can take legal action.”

That action was apparent in Nova Scotia in a recent court case that highlighted the extent to which individuals—and the courts—will go to protect their reputation. In *Mosher v. Coast Publishing Ltd.*, 2010 NSSC 153, the Supreme Court of Nova Scotia determined that information about individuals who posted online comments following a story in *The Coast* newspaper alleging racism in the Halifax Regional Municipality fire department and in particular, against two senior officials, should be provided.

Justice Heather Robertson found that the civil procedure rules were “flexible enough” to require production of Identifying information in the pre-commencement stage of an action. “You need to identify those individuals who have committed the alleged defamations and you cannot start an action until you know who they are.”

“I have no problem in principle with your application and [am] prepared to grant the order [b]ecause the court does not condone the conduct of anonymous internet users who make defamatory comments and they, like other people have to be accountable for their actions,” she added.

"Podcasts way for law firms, lawyers to develop 'strong bonds' with listeners"

**Benetton, Luigi, *The Lawyers Weekly*, 29 October 2010, pp. 22-23
[excerpt]**

Can your practice produce promotional or educational radio and television segments? No? Well, if you can't do broadcasting, try podcasting

Podcasts are essentially prerecorded radio and TV shows that people subscribe to, then play back on computers, TVs, and personal media players such as iPods. People play then at home, during their morning commutes, while jogging or any other time they consume media.

Podcasts are popular in Canada. Social networking and knowledge management consultant Connie Crosby cites a study commissioned for the CRTC in 2009 which claims 19 percent of English Canadians who used the Internet listened to podcasts, along with seven per cent of French Canadians.

Law has yet to seize this trend. “When starting law school, I noticed there were hardly any legal podcasts in Canada. And absolutely no podcasts by law students,” says Omar Ha-Rede, currently articling in Toronto with Fireman Steinmetz. “So I decided to [start one].”

People who produce podcasts generally find they make great promotional tools. “Listening to podcasts tends to be more active than listening to the radio,” claims Crosby.

“When people routinely listen to podcasts, strong bonds develop between listeners and podcasts, strong bonds develop between listeners and podcaster. You just can’t achieve the same connection with advertising.”

It’s that bond that managing partner Suzana Popovic-Montag and her colleagues at Hull & Hull LLP sought when they first started podcasting in 2006. To introduce the concept, they sent iPods preloaded with their podcasts to referring solicitors. “This was very well received,” she recalls.

Who listens to legal podcasts? According to Popovic-Montag:

- potential and existing clients
- referring solicitors
- students and lawyers looking to enter a niche
- other social media enthusiasts.

“We get 2,000 to 2,500 downloads a week for each of our two podcasts,” she claims.

Podcasting isn’t all about promotion. Lawyers who edit their own podcasts find out what it’s like to listen to themselves speak, an experience that affords them the chance to improve as speakers.

Ha-Redeye considers a “virtual audio library” essential for litigators. “Much of what we engage in includes oral advocacy,” he explains. “Although the context is very different, clients can get a sense of a person’s presence and tone through sound files that they can carry anywhere.”

Podcasters also build relationships by inviting guests (clients, industry experts, referral sources and so on) to their podcasts, and accepting invitations to other podcasts.

All this podcasting can increase the value of a set of web assets. “My goal in starting the Law is Cool podcast was to add something new to the legal blogosphere, especially from the student slant,” says Ha-Rede.

“Podcasts were an important component in building the site up to be the largest law school site in Canada.”

While Hull and Hull’s podcasting start was deliberate, Ha-Redeye’s introduction to podcasting happened when classmates at Centennial College volunteered him to podcast with a guest social media expert.

“It was my first time trying anything like this,” he says.

“Should Lawyers Tweet?”

Lippe, Paul, www.abajournal.com, 02 November 2010
[excerpt]

With a front-page feature story on Twitter in Sunday’s *New York Times* Business Section, it is perhaps a good time to visit the question: “Should Lawyer’s Twitter?”

In the tradition of Donald Rumsfeld and now Randy Moss, let me proceed by asking and answering my own questions.

What is the functionally of Twitter? Twitter is a wide-open Web service that lets you either (A) publish 140—character “tweets” that can be anything from a deep but brief legal thought to notes from a talk to a rant on your service frustration with American Airlines; and (B) “follow” other folks who are tweeted by reading their tweets. You can go Twitter periodically to catch up without having the miscellaneous communications clog up your e-mail inbox.

What problem does Twitter solve? Think of Twitter as a meta watercooler. It allows you to track and share thoughts across a wide range of folks. This may or may not solve a problem for you. I find the most useful aspect of Twitter to be (A) as an ubereditor for news and developments across the Web; (B) a way to stay in tune with the conferences I can’t attend.

Twitter is a lesser set of functionally then previously available on Facebook’s “FriendFeed,” since you can follow or be followed by folks with whom you have no affiliation. As such, an interesting lesson on how less is sometimes more. I don’t think twitter itself is a mechanism for deep substantive legal dialogue or legal marketing, but just as Twitter is a variant on Facebook that creates its own dynamic, keep any eye out for law-specific variants on Twitter.

Isn’t the 140 character limitation a problem? Probably not. Most people think the 140-character limit forces succinctness and a form of “Twitter Haiku” which has its own elegance. It’s obviously not a long-form, essay style of communicating, so it doesn’t make sense to think of it or compare it in that way.

How Should I think about twitter? Twitter is a form of communication. The legal profession is about communicating, so it is natural for lawyers to explore new forms of communication. Even if 90 percent of what’s on Twitter is inane (maybe 99 percent, I don’t know), there are ways to use it usefully, and to cite another recent NY Times piece, even Amish folks who are resistant to new technologies find ways to adopt new communications tools to their purpose.

"Seeking Clients Via Facebook? In Ky., Bar May Regulate Social Media Comments"

Cassens Weiss, Debra, www.abajournal.com, 18 November 2010

Lawyers in Kentucky who reach out to potential clients through social media such as Facebook and MySpace may see their comments regulated by the Kentucky Bar Association.

The Bar has proposed a regulation that would bar solicitations through social media unless lawyers pay a \$75 filing fee and permit regulation by the Bar's Advertising Commission, *The Louisville Courier-Journal* reports. Some lawyers contacted by the newspaper criticized the proposal, saying it isn't clear what kind of comments would be regulated because of vague language.

Critics said the proposal could be interpreted to regulate posts about lawyers' views on legal issues, their latest court wins, or basic information such as their employment and education. But Lexington lawyer Ben Cowgill told the *Courier-Journal* he disagreed with those interpretations.

"Does a lawyer engage in an 'advertisement' of legal services merely by posting on Facebook that he is happy about winning a big case, or that she is burning the midnight oil on behalf of a client? No, not in my opinion," said Cowgill, the Bar's former chief disciplinary counsel.

The blog Kentucky Law Review posted the proposed amendment to the Bar's advertisement rules, which authorize an advertising commission to review lawyer ads for compliance with the ethics rules.

The proposed amendment defines "advertisement" as any communication containing a lawyer's name or other identifying information. It goes on to list some exceptions.

One exception is made for lawyer blogs that communicate in real time about legal issues, as long as there is no reference to an offer of legal services. "Communications made by a lawyer using a social media website such as MySpace and Facebook that are of a nonlegal nature are not considered advertisements," the proposal says.

"Major law firms fall victim to cyber attacks"

**Gray, Jeff, *The Globe And Mail*, 06 April 2011, p. B10
[excerpt]**

Hackers have penetrated four major Bay Street law firms in the past seven months with highly sophisticated cyber attacks designed to destroy data or to steal sensitive documents relating to impending mergers and acquisitions.

Daniel Tobok, president of Toronto-based Digital Wyzdom Inc., who investigated the attacks, would not name the firms. The attacks, which he said appeared to originate from computers in China, show that Canadian law firms are a target for hackers and potentially, state-sponsored cyber espionage. They follow similar attacks on governments and major corporations in recent years.

“They were harvesting information,” Mr. Tobok said of the hackers who penetrated the computers of the four Toronto law firms. He said it was the hackers who penetrated the computers of the four Toronto law firms. He said it was hard to say if any sensitive data actually went missing, but said the attacks were at least successful at getting inside the firms’ systems. “This was probably one of the most sophisticated attacks we have seen.”

In the most devious attacks, Mr. Tobok said, lawyers at a major Canadian law firm working on a proposed deal involving the acquisition of a Chinese company received e-mails that appeared to be from a partner working on a deal. The e-mail was a fake, and its attachment launched a hidden computer program known as malware that infected dozens of the law firm’s computers.

The attack was traced to computers in China, but Mr. Tobok said it was not possible to be certain that the Chinese government had a hand in the attack.

Malware of this kind can sit in a target’s computers undetected for months, Mr. Tobok said, stealing reams of information before anyone realizes security has been breached. And there is no question that sensitive information stolen from a law firm’s files on an impending merger deal has value: It could be used to sabotage a deal, it could be sold to give rival bidders an advantage, or it could be used to conduct illegal insider trades.

Mr. Tobok said some in the legal world have been slow to realize just how serious the hacking threat is, although he said IT departments are doing the best they can. “Sometimes they have a false sense of security,” he said of companies in general. “After they get attacked, they understand that they have to invest a little more.”

Hugh Mackinnon, Chief Executive Officer of Bennett Jones LLP, said he was not aware of his firm ever falling victim to a hacking attack. He said the growing importance of keeping

the firm's data safe has prompted it to take a number of measures, including the recent move of all of its computer servers to a third-party, off-site security facility.

He said Canadians in general tend to underestimate the threat from malicious threats such as cyber attacks: "We're Boy Scouts, right? We tend to think that the rest of the world is comprised of Boy Scouts, and it's not."

David Craig, national information security practice leader for PricewaterhouseCoopers Canada, said law firms are a natural target for hackers because they are storehouses of information of interest to everyone from organized crime to spouses in marital disputes. But he said law firms tend to be extra careful about confidential information. Large firms usually have sophisticated IT staff and policies in place to try to keep data secure.

"Problems typically arise when those policies are violated for expediency, such as copying data to a flash drive and then misplacing it, or using a commonplace password that can be easily guessed," Mr. Craig said.

"Mass. Lawyer Suspended for 6 Months for Craigslist Term Paper Offer"

Ward, Stephanie Francis, www.abajournal.com, 13 April 2011

Damian R. Bonazzoli, a Massachusetts lawyer who allegedly placed three advertisements on Craigslist to write students' term papers and essays, was recently suspended from practice for six months. Additionally Bonazzoli lost his job with the Massachusetts Appeals Court, according to *The Worcester Telegram & Gazette*.

Advertising writing services, for a fee, for something that could be submitted for academic credit violates the rules of professional conduct, according to the Massachusetts Board of Bar Overseers of the state supreme judicial court. It is also against state law in Massachusetts, though the Board of Bar Overseers General Counsel Michael Fredickson told the *Telegram & Gazette* that he was unsure whether Bonazzoli would be prosecuted. "We've never had anything like this before," he said.

Bonazzoli's action came to the court's attention when a freelance reporter with *CommonWealth Magazine* responded to one of Bonazzoli's ads, looking for a paper about a physician-assisted suicide. Bonazzoli wrote back that he would help, and guaranteed a "respectable" grade, according to the Massachusetts Board of Bar Overseers. He also wrote that he was an attorney with the Massachusetts Appeals Court.

An article mentioning the exchange was published in 2009. According to the *CommonWealth* piece Bonazzoli earned \$94,000 a year working for the court, and he sought \$300 to write the paper.

According to Fredickson, Bonazzoli, who lives in Lancaster, did not write papers after the reporter contacted him, and he removed the listings after discovering the person's [the reporter's] identity.

"Experts Offer Tips for Safe Flying in the Cloud"

Zahorsky, Rachel M., www.abajournal.com, 13 April 2011

Cloud computing—the act of using software and storing data on the internet versus a private computer—is an innovation of exploding popularity, and why not? It can boost efficiency, improve work product and cut costs at firms large and small.

However, uncertainty about the ethical responsibilities of client confidentiality and privilege makes many lawyers hesitant to fully embrace the cloud for their computing needs. The silence from the ethics committees on the topic and vague guidelines issued by state bars add confusion, not to mention the rise of global hackers seeking to infiltrate the outdated security measures at many U.S. firms.

... , ABA Techshow presenters Brett Burney, Sharon Nelson and Dan Siegel offered plenty of tips, precautions and advice to keep client data safe at a Tuesday session that discussed the ethical breaks in the cloud-based services.

“Lawyers have an ethical duty to ... be knowledgeable about how providers will handle data entrusted to them,” Burney says. While a strict guarantee of invulnerability is impossible, Burney and his co-presenters encourage lawyers to treat cloud providers in the same manner as other legal outsourcers—investigate their security measures, policies and methods. A few of the most important questions to ask include:

How often is data backed up by the provider?

Is data stored in multiple data centers that are geographically dispersed?

What security measures are implemented at the data centers?

Has there been an audit of the provider's security conducted by a trusted third party?

Does the service level agreement clearly state who owns the data?

If cloud data is subject to a litigation hold, what is the process to comply with the hold?

Does the provider have an uptime guarantee to ensure access to the data?

In addition, firms can take their own in-house precautions to limit potential breaches, such as installing firewalls, limiting access to information and verifying the identities of individuals who are provided information.

As for critical data, keep it out of the cloud. “You won’t see the formula for Coke in a cloud,” Nelson said.

"Cloud computing on the rise"

Millan, Luis, *The Lawyers Weekly*, 29 April 2011, p. 25

Questions that should be asked

At first glance cloud computing agreements look simple and straightforward. They are not. In fact, most tend to be “contracts within contracts” that refer to terms of use and terms of service that may be found in a website that may periodically change, without giving notice to the consumer. They may also have acceptable user policies that “you may or may not see when you sign up,” and they may or may not have a privacy policy, warns Lisa Lifshitz, a Toronto lawyer who specializes in preparing and negotiating technology licences and agreements.

“Don’t accept necessarily the terms that are presented to you unless you really understand what you’re signing up for—negotiate them,” said Lifshitz, a partner with Gowling Lafleur Henderson LLP.

Lifshitz suggests that lawyers or law firms exploring cloud computing conduct a needs-assessment exercise, followed by a careful examination of the contract, and then due diligence.

Lifshitz recommends asking cloud providers the following series of questions:

- Is there a single agreement? Or are there references to outside documents, such as online acceptable use policies, that the vendor may unilaterally change over time?
- Does the agreement contain service levels for uptime and availability?
- What does the contract say about where the data and servers are located? Where does the data go? It might be a good idea to insist the data reside in Canada, said Lifshitz.
- What levels of protection are guaranteed? How frequently are back-ups performed? Is data backed up to more than one server? What types of encryption methods are used?
- Who’s got access to the data? What “technological organizational practices” are in place? What physical protection? How secure are the data centres?
- What happens in the event of data breach? Will the lawyer or law firm be notified? What warranties does the cloud provider provide? How is data breach or loss compensated? Lifshitz points out that “a lot of the contracts don’t talk about data loss or disclaim any losses for damages for loss of data.”

- Is the vendor itself outsourcing certain services and functionality to third party providers? If so, what are the terms and conditions of the services provided by the outsourcer? Will the terms and conditions negotiated with the cloud provider apply to the outsourcer or will yet another agreement have to be drafted?
- When and how can the customer get his data back? “Some of the biggest problems relating to this is data being held hostage or customers being unable to get their data back,” said Lifshitz.

"Cyber risks & liability insurance"

**Hilliker, Gordon, *The Lawyers Weekly*, 19 August 2011, pp. 9, 12
[excerpt]**

Very few organizations operate today without taking advantage of the benefits of cyber technology. Yet a remarkable number fail to adequately address the liability insurance needs that arise as a result of simply accessing the Internet.

Any organization with a website, online storage facilities or even just an email account is vulnerable to a claim that it has caused damage to another’s computer software or data, whether through the inadvertent distribution of malevolent code, inadequate protection against hacking or otherwise. The Internet also provides a ready forum for the commission of various other torts, such as defamation, breach of privacy and infringement of copyright.

For liability insurance protection, most organizations purchase a commercial general liability (CGL) policy, which is a one size-fits-all insurance product that was originally created to protect against claims for bodily injury or damage to tangible property. Cyber risks do not generally fall into either category. A data breach from a hacking incident or an errant email does not involve tangible property. Tangible property may be involved in the case of a careless erasure of a hard drive but whether there has been physical injury is open to debate. Although as a matter of physics, there has been a magnetic alteration to the hard drive, the fact remains that the drive can nevertheless still serve its intended purpose and the claim is for the loss of data itself rather than any possible alteration to the physical structure on which the data resides. As might be expected, American authority can be found in support of either side in this debate.

In response to this issue, the Insurance Bureau of Canada, an insurance industry association that, among other things, publishes recommended policy forms, revised its CGL form so as to specifically exclude electronic data from the definition of property. An electronic data exclusion was also introduced and excludes coverage for damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate, electronic data.

These policy revisions appear to have effectively removed coverage for a data breach. There are other features of the modern CGL policy, however, which provide limited coverage for certain types of claims which are more prevalent as a result of the Internet. The “personal

injury” coverage feature of the CGL policy, which is not to be confused with “bodily injury”, extends coverage for certain “offences” against the person, including the publication of defamatory material and material that violates a person’s right of privacy. The “advertising injury” feature of a CGL policy specifically extends to advertisements placed on the Internet.

These are valuable coverage features in the Internet age. The nature of email is such that it is unfortunately far too easy to accidentally send a message to the wrong recipient or even an ill-advised message to the correct recipient. Cyber libel suits are now commonplace. A recent example is provided by the British Columbia Supreme Court in *Wright v. Van Gaalen*, [2011] B.C.J. No. 1004.

Privacy concerns are also paramount. Many jurisdictions have enacted legislation establishing privacy rights for the collection and use of personal information and providing for damages for a person harmed by an organization’s breach of the statutory requirements.

There are, however, a number of limitations to the personal injury and advertising injury coverage provided under the CGL form. Coverage is not extended to insureds in media and Internet businesses. Nor is coverage provided for the insured’s hosting of an online chat room or bulletin board.

"All hyperlinking is not 'fair game'"

Smith, Michael C., *Canadian Lawyer*, 31 October 2011

Generally, someone is *prima facie* liable for defamation when they publish, to a third party who understands them, words concerning the plaintiff that have a tendency to lower the reputation of the plaintiff in society. Then the onus shifts to the defendant to establish one of the defences, such as justification (truth), fair comment (opinion), responsible communication on matters of public interest, etc. From the perspective of defamation liability risk, the Internet and social media are very dangerous places.

In *Crookes v. Newton*, released Oct. 19 [2011], the Supreme Court of Canada considered for the first time in the 16 years since the Internet first became widely available, whether or not the act of creating a hyperlink from one web site to another web site containing defamatory information constituted “publication,” making the hyperlinker liable along with the author of the defamatory web site.

The traditional “publication rule” was that *any act* that had the effect of transferring the defamatory information to a third party constituted “publication” and fulfilled the publication element of the tort of defamation. This could be verbally, in writing, by “dramatic pantomime,” or otherwise—any act. The range of conduct that could constitute publication was historically quite vast. Anyone who repeated and published the defamatory information was jointly liable for defamation with the original author, just by passing it on.

Progressively, Justice Rosalie Abella, writing for the majority, held that “[s]trict application of the publication rule in these circumstances [hyperlinking on the Internet] would be like trying to fit a square archaic peg into the hexagonal hole of modernity.” The majority concluded that a “shallow” or “deep” hyperlink, by itself, does not constitute publication and that the hyperlinker is not liable for linking to defamatory content. However, this does not mean that all hyperlinking is ‘fair game’ and will never affect liability or damages.”

The majority went on to hold that a hyperlinker will still be liable for defamation “if the manner in which they have referred to content conveys defamatory meaning; not because they have created a reference, but because, understood in context, they have actually expressed something defamatory.... This might be found to occur, for example, where a person places a reference [the hyperlink] in a text that repeats defamatory content from a secondary source Only when a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content, should that content be considered to be ‘published’ by the hyperlinker.”

This means that hyperlinkers still have to be concerned with the context in which the hyperlink is made. The hyperlink alone will not attract liability, but, combined with the words surrounding it, it might.

Had it not been for the dissenting decision of Chief Justice Beverley McLachlin and Justice Morris Fish, I would have thought that a hyperlinker’s express adoption or endorsement of defamatory hyperlinked material could be “presenting content from the hyperlinked material in a way that actually repeats the defamatory content”; conduct that the majority said would attract liability. But McLachlin and Fish found themselves in dissent because that was their view: “the combined text and hyperlink may amount to publication of defamatory material in the hyperlink in some circumstances. Publication of the defamatory statement via hyperlink should be found if the text indicates *adoption or endorsement of the content of the hyperlinked text*. If the text communicates agreement with the content linked to, then the hyperlinker should be liable for the defamatory content.” [Emphasis in original.]

A distinction is therefore made between the adoption or endorsement of the defamatory material and repeating it. This indicates that the majority was speaking about conduct even closer to a literal repetition of the linked-to material before publication and liability will be established.

The Supreme Court only considered “shallow” or “deep” hyperlinks, which require the user to actively click on the hyperlink in order to access the linked web site. The court was clear that it was leaving for future consideration the same issues as they relate to evolving technology such as automatic hyperlinks—links that automatically display other content with little or no action by the user. It is my view that the more automatic the display of the linked information, the closer we get to publication. At least until the issue is considered in future cases, there is still liability risk associated with the use of automatic hyperlinks and the like.

Hyperlinking will not by itself create liability, but it is still likely relevant to important issues like malice and damages. A finding of malice on the part of the defendant defeats several defamation defences. Plaintiffs will likely argue that a defendant’s hyperlinking to other

defamatory postings is evidence that she or he was acting maliciously. A defendant who is found liable and who has hyperlinked to other defamatory postings may find the damages awarded against him or her increased as a result.

There is danger in only reading a 140-character 'tweet' about this decision. It cannot be said that all hyperlinking is "fair game." The context in which a hyperlink is made may still attract liability. The Supreme Court has not yet addressed automatic links, pop-ups, and similar technology. And hyperlinks may still get a defendant into trouble by evidencing malice or having the effect of increasing the damages award.

"Read All Over: Two New Opinions Describe Need to Keep Email from the Wrong Hands"

Podgers, James, www.abajournal.com, 01 November 2011

[excerpt]

With all due respect to basic paper and direct conversation, email and other electronic vehicles are becoming the dominant forms of communication in today's world.

But while email, text messaging and cellphones offer speed, efficiency and convenience that are hard to resist, they can have downsides. One is the fact that electronic communications never really go out of existence. And as two recent ABA ethics opinions point out, that can raise important confidentiality issues for lawyers when they communicate with clients.

Formal Opinions [11-459](#) (Duty to Protect the Confidentiality of Email Communications with One's Client) and [11-460](#) (Duty When Lawyer Receives Copies of a Third Party's Email Communications with Counsel) were issued Aug. 4 [2011] by the ABA Standing Committee on Ethics and Professional Responsibility.

A COMPANY COMPUTER

Both opinions use the same hypothetical fact pattern as a starting point.

An employee of a company retains a lawyer to advise her on a potential workplace claim against the employer. The company provides the employee with a computer for her exclusive use in the course of her employment, but it's customary for employees to occasionally use their computers for personal reasons. A written policy of the company states that it has a right of access to all employee computers and email correspondence, including those relating to personal matters. Despite that policy, the employee has used her computer at work to communicate with her lawyer about her possible claim against the company.

Opinion 11-459 discusses what steps a lawyer must take to prevent third parties from gaining access to email communications between the lawyer and a client.

“Whenever a lawyer communicates with a client by email, the lawyer must first consider whether, given the client’s situation, there is a significant risk that third parties will have access to the communications,” the opinion states. “If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.”

The “significant risk” factor should not be underestimated. There are many reasons why companies monitor computer—and employer-issued smartphone—use by employees, including productivity, security and protection of reputation. Companies may scrutinize employee emails as part of their compliance obligations or in the course of internal investigations. Moreover, email sent or received through a company’s network is captured on servers, and can be read and copied by third parties, even if the employee thinks she has deleted it.

The opinion notes that the law is evolving on the question of whether an employee’s client-lawyer communications located on an employer’s server are privileged. But it focuses on ethics implications of the risk that such communications may be seen by others and held admissible in legal proceedings.

“Given these risks,” the committee concludes, “a lawyer should ordinarily advise the employee-client about the importance of communicating with the lawyer in a manner that protects the confidentiality of email communications.”

. . . .

LET THE COURT DECIDE

Formal Opinion 11-460 picks up the hypothetical with the employee filing a lawsuit against the company. The company then copies the contents of her workplace computer and gives it to outside counsel. In reviewing the material, the outside counsel notices that some of the emails are marked *attorney-client confidential communication*. Does the company’s counsel have an obligation to notify the employee’s lawyer that the employer has accessed this information?

Although courts may recognize a legal duty under these circumstances, Opinion 11-460 concludes that “the Model Rules do not independently impose an ethical duty to notify opposing counsel of the receipt of private, potentially privileged e-mail communications between the opposing party and his or her counsel.”

. . . .

Ultimately, the decision on what to do with communications that one party thought were confidential might best be made by a court, states the opinion. “Even when there is no clear notification obligation, it often will be in the employer-client’s best interest to give notice and obtain a judicial ruling as to the admissibility of the employee’s attorney-client communications before attempting to use them and, if possible, before the employer’s lawyer reviews them,” the opinion states.

“This course minimizes the risk of disqualification or other sanction if the court ultimately concludes that the opposing party’s communications with counsel are privileged and inadmissible.”

"Lawyers, Ethics, Security & The Cloud"

Power, Michael, Website (www.michaelpower.ca), November 2011

The regulatory bodies governing lawyers have long recognized the benefits and the risks of information technology in modern legal practices. However, with “Cloud computing” seemingly (and finally) “catching on”, one can’t help but wonder when the ethical guidance provided lawyers will be amended to address its possible use by the legal community in Canada.

As for existing guidance for lawyers in Ontario, one need only refer to the Law Society of Upper Canada’s Technology Guideline and its 2001 Ethical Considerations and Technology. The Canadian Bar Association, in 2008, produced a very useful document with its Guidelines for Practising Ethically with New Information Technologies. I’ve actually had one American lawyer, active in the American Bar Association leadership, make very positive comments about the CBA Guidelines, suggesting that the ABA should produce a similar document. It is to be noted though, not unexpectedly given their dates of publication, that none of these documents expressly address the subject of cloud computing.

. . . .

The technology guidance issued by the Law Society of Upper Canada and the CBA appear to be written from a perspective of the law firm having ownership or certainly a greater degree of control over the technology on which client data is stored. That’s not a criticism but it’s likely time for regulators of the legal profession in Canada to update the guidance provided to lawyers to address the use of the Cloud.

This all presupposes that the legal profession uses (or will use) Cloud computing resources. Whether or not lawyers or law firms should be using the Cloud is a separate question and one that deserves a very hard look.

"Is cloud computing like e-mail was in 1995? Lawyer predicts new models will soon be commonplace at firms"

McKiernan, Michael, *Law Times*, 28 November 2011
[excerpt]

In the early 20th century, as electricity made its transition from novelty to necessity, many businesses maintained their own generators to power their operations.

"A lot of places had no backup, and eventually people started relying on a grid system when they realized it was much more efficient, cheaper, and you ended up with much less downtime," says Kevin West, recounting an analogy to cloud computing he heard from a speaker at a New York technology conference.

West's months-old firm, SkyLaw LLP, that he co-founded with fellow ex-Bay Streeter Michael Lee, is firmly on the cloud-computing grid. The pair's sparse office in midtown Toronto is populated with little more than a couple of laptops and a rarely used printer.

The firm's document storage system is in the cloud rather than on a shared server or in a series of filing cabinets.

"I remember when we first got e-mail, there were to be no sensitive documents sent because it wasn't trusted," says West, turning to a more recent analogy. "Cloud computing is the same way. There aren't too many doing it, but it'll soon become the norm and in five years or 10 years, it's not going to be an issue."

SkyLaw takes a collaborative approach to client matters by establishing a team of lawyers from a variety of firms to work on each corporate transaction depending on the expertise required.

The two founders have a strong web of corporate law contacts having worked together at Davis Ward Phillips & Vineberg LLP in Toronto and having spent time at large international firms abroad.

They say the ease of access to cloud-based services also host client minute books and contracts through secure online access.

Mitch Kowalski, who spoke at the Law Society of Upper Canada's recent seminar on ethical considerations in an age of technology, suggested to participants that such services may actually help lawyers fulfill their often-forgotten obligation under the Rules of Professional Conduct to "make legal services available to the public in an efficient and convenient way."

He added that he believes concerns over security in the cloud have been "overhyped." "Access and security of your data— that's their core business," said Kowalski. "That's not your core business. Your core business is the practice of law."

[**Note:** “Cloud computing” involves the practice of using a network of remote servers hosted on the Internet, rather than a local server, to store, manage and process data. Involved is delivery of computing as a service—rather than a product—in which shared resources, software and information are provided to computers and other devices, as a utility (like an electricity grid) over a network; typically the Internet. The phrase is a marketing term for technologies that provide computation, software, data access, and storage services that do not require end-user knowledge of the physical location and configuration of the system that delivers the services. A parallel to this concept can be drawn with the electricity grid, in which end-users consume power without needing to understanding the component devices or infrastructure required to provide the service.]

"Benchers approve family law platform"

Claridge, Thomas, *The Lawyers Weekly*, 13 January 2012, p. 6
[excerpt]

Law Society of Upper Canada benchers have unanimously approved the creation of an online Unified Family Law Platform designed to provide a “first stop” for those needing assistance with family law disputes.

As outlined to the society’s December Convocation by Marion Boyd, chairwoman of the access to justice committee, the platform is to focus on using plain language and provide information and links for existing resources for potential users, including those who plan to represent themselves.

The benchers were told the overall approach “would emphasize constructive resolution as opposed to litigation to speed up and simplify results. The platform’s goal is to guide users through the legal, financial and related considerations commonly involved in resolving a family law issue.”

"Bits and Bytes: Top 5 tech trends for lawyers in 2012"

Goyal, Monica, *Law Times*, 16 January 2012

Based on what I’ve observed in the last few months of 2011, here are five trends I think lawyers should pay attention to in 2012:

1. Rocket Lawyer and LegalZoom are said to be entering the British market in 2012. Furthermore, a few notable legal web services have come up in the last year, all

positioning themselves to take advantage of the new legal regulatory framework in Britain, including Everyman Legal and New Lawman.

This undoubtedly represents the start of a wave of new legal technology companies and services that may come to this side of the ocean once they've proven themselves in the British market. All of this because of recent changes to the Legal Services Act there. Will the United States follow suit?

2. Cloud-based software services: Microsoft Word, a staple software for almost everyone, will now be cloud-based with Office 365. This has been a long time coming and it represents a huge shift for those still refusing to get on the cloud. If you haven't already, you should be asking the question what you need to do to prepare yourself for cloud computing.
3. Business Analytics and accountability go hand in hand for most businesses. Today, there are many tools to allow businesses to measure and then adapt their behaviours in order to improve their bottom line. Take social media, for example.

Customers and clients use social media and you could possibly engage with them there, but how does a company capitalize on this and what kind of return are they realizing on this investment? In 2012, people will be talking less about getting their businesses on social media and more about how to measure the return on investment through analytics.

There are many tools already available that will measure your influence online or your click-through rates on your tweets.

4. Mobile payments: In 2012, with the emergence of near field communication, you'll now be able to use your smartphone to make small purchases at stores, restaurants, and even in taxis. It's totally cool but is it too convenient?
5. Behavioural advertising: Currently, there are countless technology startups with an advertising revenue business model. To make it work, they go beyond general demographic information and instead use a person's private online browsing preferences to sell them something.

Behavioural advertising has come under the scrutiny of ... [Canada's] privacy commissioner. I'm sure we'll hear more about this in the coming year as a number of invasive but more interesting innovations go mainstream.

"New guidelines for behavioural advertising"

Spratley, David, *The Lawyers Weekly*, 20 January 2012, p. 15
[excerpt]

Canada's regulators continue to catch up to e-commerce developments. The latest example is the Privacy Commissioner's guidelines for online behavioural advertising, which were released in December.

This is a good opportunity for businesses to review the various e-commerce-specific laws that may apply to them.

The new guidelines

The new guidelines deal with online behavioural advising—tracking individuals' activities and building detailed personal profiles that are used to deliver targeted ads. The guidelines comply with the *Personal Information Protection and Electronic Documents Act* (PIPEDA) by having fair and transparent behavioural advertising practices.

One of the key points is that PIPEDA requires express or implied consent to collect, use or disclose personal information and that implied consent may be reasonable for online behavioural advertising if:

- Individuals are notified, at or before the time of collection, of the purposes for behavioural advertising practices and of the parties involved. This notice must be clear, understandable and obvious (not "buried in a privacy policy").
- To the extent practicable, only non-sensitive information is collected and used.
- The information is destroyed as soon as possible or is effectively made anonymous.

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Anti-spam legislation

Every business should make a note of Canada's new anti-spam law, which is expected to come into force in mid 2012. The legislation is wide-reaching and imposes strict requirements on anyone distributing "commercial electronic messages"—that is, any electronic messages sent or received in Canada where it is reasonable to conclude that one of its purposes is to encourage participation in a commercial activity. Businesses cannot send such messages without consent and consent can be implied only in limited specific circumstances (for example, if there is an existing business relationship").

The party sending the message must prove it had valid consent if there is a complaint. Further, commercial electronic messages also have to meet prescribed requirements, including having a working mechanism for unsubscribing.

This legislation will affect every Canadian business that sends such messages. The legislation allows for significant administrative penalties, [and] officers and directors can be personally liable for violations. Canadian businesses should therefore begin preparing sooner, rather than later, for this legislation to come into force.

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Online advertising

The federal *Competition Act* prohibits or misleading representations and deceptive marketing practices, whether online or otherwise. The Competition Bureau has issued some guidance on Internet representations and the new anti-spam legislation also amends the *Competition Act* to prohibit representations in the body of an electronic message that are false or misleading in a material respect, and any false or misleading representations (whether or not material) in an electronic message's sender information or subject matter information.

"Newly Licensed Solo Reprimanded for Exaggerating Experience in Online Profiles"

Cassens Weiss, Debra, www.abajournal.com, 01 February 2012

A solo practitioner licensed to practice law in 2010 has been reprimanded for exaggerating his experience on law firm websites and in online profiles.

The South Carolina Supreme Court says in a public reprimand released today that Dannitte Mays Dickey mischaracterized his legal skills through misleading statements on two websites and exaggerated his experience in online profiles. The Legal Profession Blog notes the discipline and says it was imposed by consent.

Dickey, a 2008 law grad, violated lawyer ethics rules by falsely stating on websites that he had graduated from law school in 2005 and falsely stating he had handed matters in federal court, the court said. He also listed about 50 practice areas in which he had little or no experience.

He also set up internet profiles and LinkedIn, lawyers.com and other online directories that contained "material misrepresentations of fact by overstating and exaggerating respondent's reputation, skill, experience and past results," the court said.

"The Facebook conundrum"

Marron, Kevin, *Canadian Lawyer*, April 2012, pp. 22-23
[excerpt]

To be on Facebook or not to be? That is the question now facing many law firms. Whether to put up your shingle on a network of more than 800 million people, many of whom build their online lives around Facebook and would see exclusion from it as something akin to a social death. Or to assume that those people aren't your clients or, if they are, they don't want to 'friend' their law firm.

"It's not where our clients are right now. We don't find Facebook to be an effective business tool for the legal profession," says Sean Pratap, digital manager at Norton Rose Canada LLP, one of many large firms that have chosen not to jump on the bandwagon.

Pratap says he can see the value of using Facebook for communicating with students and this has been done successfully by a couple of Norton Rose practices elsewhere in the world. It is not, however, the social media platform his firm has chosen to put its efforts into. "We have to pick our spots," he says, noting that the firm's Twitter feed is very successful. "Our Twitter strategy is more tied to where our clients are and how they want to communicate with us."

The same question was keenly debated at Torys LLP before it launched its Facebook page (*Facebook.com/TorysLLP*) in October 2010, at a time when few large firms had taken this route. "Lawyers are risk averse," says the firm's marketing manager Maureen Peets. "People were hesitant to do it because they weren't sure that it was the right forum for information about Torys."

What Torys decided, however, was to use its Facebook page to post the kind of content that wouldn't appear on the firm's official web site, such as information about *Pro bono* work, student programs, social events, and community involvement. "It's more casual. The photographs are funny, with people wearing goofy hats and pink wigs, that kind of thing. It shows visitors that there is a human side to Torys," says Peets.

The page is particularly popular with students and it also provides an opportunity, not only for lawyers, but also for Tory's staff and law clerks to make a contribution. This differentiates it from the web site that is mostly about the lawyers and what they do professionally.

This is typical of the Facebook pages of larger law firms, according to Jordan Furlong, senior consultant with Stem Legal Web Enterprises Inc. "A law firm web site needs to be professional, respectable, buttoned-down. Facebook allows you to unbutton. It's a way for law firms to say, 'We're people just like you and we're very heavily invested in our community.'" Furlong says involving staff and associates in updating the Facebook page is also a common and

successful practice among large firms because “it’s very rare that associates and staff have a real say in how a firm is run, or gets much attention or publicity.”

For small firms, on the other hand, particularly those that don’t primarily serve corporate clients and those with specialized niche practices, Facebook presents other opportunities. If your practice is focused on real estate, wills and estates, or personal injury, for example, you don’t necessarily have a solid core of regular clients who will keep coming back to your, so you don’t know what your next client is or where you think your potential clients might be and a lot of the are likely to on Facebook.

“It’s important to be up there. More people are living in Facebook and we feel it gives us that much more visibility,” says Patrick Rocca, general manager at Pace Law Firm in Toronto. The firm has two Facebook pages. One, launched about 18 months ago and devoted to its immigration practice (facebook.com/CANimmigration), has garnered a lively following among people in immigrant communities with more than 2,400 “likes” (compared to 407 who “like” the Torys page). The other is a recently launched more general page (facebook.com/PaceLawFirm), primarily focused on the Pace personal injury practice. Rocca doesn’t think this page is likely to attract such a large and enthusiastic following as personal injury is a narrower focus than immigration with less consumer-oriented material available to post. It also has no similarly large community of interest that is likely to gravitate towards the page. Nevertheless, he says, there was no question that the firm needed that Facebook presence.

"Wired Lawyers Are Examples of Changing Workplace: We Communicate, But We Don't Converse"

Cassens Weiss, Debra, www.abajournal.com, 24 April 2012

There’s a new bubble that doesn’t involve the costs of law school or high law firm billing rates.

It’s the bubble we all live in when we communicate electronically, according to psychologist and MIT professor Sherry Turkle. In-person conversations are falling by the wayside, as people tied to their electronic devices have learned to be “alone together,” she says in an op-ed for *The New York Times*. People who communicate by texting or email can edit or delete to present themselves as the people they want to be, avoiding the messiness of real relationships, she says.

“We expect more from technology and less from one another and seem increasingly drawn to technologies that provide the illusion of companionship without the demands of relationship,” she writes.

The change is affecting the workplace, where people don’t talk in person. A senior partner at a Boston law firm told her about a typical scene in his office. Associates lay out their

laptops, iPods and multiple phones, and put on their earphones. “Big ones. Like Pilots,” the partner said. “They turn their desks into cockpits.” The office is quiet, Turkle writes, “a quiet that does not ask to be broken.”

Turkle calls for digital-free zones at home and possible change at work. “Employees asked for casual Fridays; perhaps managers should introduce conversation Thursdays,” she says.

“Lawyer Warns of Blogging Burden, Even as Top Law Firms Embrace It”

Cassens Weiss, Debra, www.abajournal.com, 15 March 2010

A former law firm blogger has written a cautionary tale for those who would like to follow in his footsteps, even as new data shows nearly half of the large law firms are blogging.

Ninety-six of the nation’s top law firms have blogs—a 149 percent increase from August 2007, when the top 200 law firms published only 74 blogs, O’Keefe says.

The swelling numbers were released at about the same time that a former Jones Day partner warns in an article that blogging demands “Herculean efforts.”

Writing in *Litigation*, a magazine published by the ABA Section of Litigation, lawyer Mark Herrmann says he figured he had lots of ideas to write about when he launched the Drug and Device Law Blog in October 2006. But after about six weeks, he and a fellow blogger from Dechert had exhausted their initial ideas and themselves.

“If you are thinking of launching a legal blog, have your eyes open.”

Herrmann advised would-be lawyer bloggers to find their niche and find a voice. “Be provocative; be funny; be distinctive,” he writes. “Perhaps most importantly, don’t be staid.”

“A blog written by a committee of starched-shirt, bureaucratic lawyers might proclaim: ‘Our firm has the utmost respect for our learned adversaries, whose experience in complex multi-jurisdictional litigation nearly matches our own.’ We’d write: ‘Those clowns couldn’t spell “FDA” if you spotted’ em two letters.’ We might not have much institutional gravitas, but we sure as heck have readers.”

Herrmann quit writing for the blog in December, about the same time he decided to take a position as chief litigation counsel at Aon Corp., *The Wall Street Journal* Law Blog reports in the post about Herrmann’s warnings.

“Lawyer’s Legal Fight with School is ‘Cautionary Tale of the Internet Age’”

Cassens-Weiss, Debra, www.abajournal.com, 01 September 2010

An estate planning lawyer in New York has rewritten his will and sued his son’s school over the suspension of the teen due to topless photos found on the youth’s laptop.

Lawyer Herbert Nass claims it was unfair for the Horace Mann School, his own alma mater, to punish his son but not the fellow students who took the laptop out of his backpack during an out-of-state convention and looked for the photos, the *The New York Times* reports. Their curiosity had apparently gotten the best of them after the 10th grade girl in the photos admitted months earlier that she had taken off her top during a video chat, *The Times* says. Nass’ son had apparently downloaded the photos.

The Times calls the dispute “a cautionary tale of the internet age.”

Nass has written books, *Wills of the Rich and Famous* and *The 101 Biggest Estate Planning Mistakes*. He tells *The Times* he had rewritten his own will to make his five-figure bequest to the school conditional. He wouldn’t discuss the condition, but said he hopes it is satisfied.

Horace Mann sent a statement to *The Times* that said it [the School] believes it acted “entirely appropriately” and the suit is “an attempt to sanitize their child’s school record.”

"Divorce Lawyers' New Friend: Social Networks"

Borzan, Nadine, *The New York Times*, 13 May 2011, p. 17

Discretion and privacy have become antiquated notions on social networks, and the generous revelation of secrets make some people cringe—though not divorce lawyers searching for evidence of misbehavior by their clients’ spouses. What once could be uncovered only through laborious and often unsavory sleuthing can now sometimes be found with the click of a mouse.

Bar associations have been conducting workshops on how to navigate this often brazen new world.

“It has changed the way we do business,” said Gary L. Nickerson, a matrimonial lawyer in Fort Worth. “Before, we would hire private investigators, have opposing spouses followed,

try to interview acquaintances and friends. We would strive forever to get evidence, and now people can't wait to post on MySpace or Facebook who they are out drinking with. We just come along and scoop that up."

Linda Lea M. Viken, president of the American Academy of Matrimonial Lawyers, who has her own firm in Rapid City, S.D., agreed.

"Facebook has become an open book of people's lives," she said. They write things as though they were having a conversation with a friend, so they say the most outrageous and private things. You can't get better evidence than what comes from their own mouths or their own computers."

A survey released last year by the academy found that in the previous five years, 81 percent of its 1,600 members had used information plucked from social networks.

Social networks of course, are not the only electronic sources of evidence. Videos on YouTube, text messages, dating services, voice mail, cellphones, even Global Positioning System receivers and E-Z Pass records can be gold mines of potentially damaging information.

"We had one woman who said her husband was beating her, and we found the E-Z Pass records her crossing the George Washington Bridge at the precise time she said she was being beaten," said Alton L. Abramowitz, a New York lawyer.

The things people post can be worse than any accusation of an angry spouse. For example, Ms. Viken said, a father seeking custody "had listed on his Facebook page that he was single with no children looking for a fun time."

And if divorcing spouses do not sabotage themselves, their friends, real or on Facebook, can do it for them—either intentionally because they are taking sides in the dispute, or accidentally.

"John may be dating Susan," said Randall Kessler, an Atlanta lawyer who is the chairman elect of the American Bar Association's family law section. "If they go out with friends, she does not tell them he is married. Susan's friend takes pictures and posts them on Facebook, where his wife sees them."

Indeed, though many people restrict who can see their Facebook profiles and pages, lawyers said they can find useful information simply by looking at their friends' pages.

Still, Steven Tavlin, a private investigator who runs the Holmes Detective Bureau in New York, is skeptical about just how much social media sites can yield.

"I haven't found it to be that much of a help," he said. "Anyone who is cheating is not going to have that stuff out in the open anyway. I guess stupid people might."

Mr. Talvin, who said that he seldom takes a matrimonial case "unless it's interesting" added, "being anonymous is easy in a million different ways and it doesn't come back to you."

While finding evidence of wrongdoing by one party is no longer as crucial as it was before no-fault divorce laws were adopted across the country—last year New York became the last state to do so—contests over child custody or assets often require proof of blame.

“No fault does not mean that fault is irrelevant,” said Kenneth P. Altshuler, a lawyer in Portland, Me., and the president-elect of the American Academy of Matrimonial Lawyers. “It is when you are lying about money, when you show bad behavior in front of children, when there is untreated substance abuse. Facebook has made it very easy to show lack of credibility and that is what can win a case. Once you catch them in a lie, nothing else they say is credible to the judge.”

Still, it is not free for all. There are strictly defined legal limits on what information can be lifted and what is in the private domain and can be obtained only through legal procedures like subpoenas, depositions and discovery.

“It is important how I obtain information,” Mr. Viken said. “If my client gives it to me and it has been obtained improperly, then I can’t use it.”

Yet a great deal is available with a subpoena she said, citing a situation in which a client contended that his wife was playing the online game “World of Warcraft” when she said she was home schooling their daughter.

Mr. Viken subpoenaed the records from the company that tracks players for the game; they showed that on some days the woman played for 10 hours.

“It turned out that her version of home schooling was to put her daughter on another computer program lasting an hour and the rest of the time the daughter watched television,” Ms. Viken said. “Needless to say that was a valuable piece of information and the father got primary custody.”

Most often, lawyers say they use the evidence they have extracted online to exert the threat of potential embarrassment.

Once people start to think about the silly or irresponsible things they have said, or photos they have posted online, they don’t want to risk being defined in court by their online conduct,” Mr. Kessler said. “That makes them more eager to settle and that is a very good thing.”

"Cloudy with a chance of liability"

Lewis, Michael, *National*, December 2011, pp. 39-44
[excerpt]

What is cloud computing?

Cloud computing is described by a Pew Internet Study, as “an emerging architecture by which data and applications reside in cyber space, allowing users to access them through any Web connected device.”

It includes such common activities as storing photos and using online applications such as Google’s Office suite, Facebook or Twitter; webmail like Gmail or Hotmail and paying to store computer files online or even backing up files online using services such as Jungle Disk.

The cloud contract [:] Some major issues to consider when negotiating with a cloud service provider.

Security isn’t the only obstacle to cloud computing. Also top of mind for lawyers is a service that is tailor-made for their needs.

Unfortunately, the limited number of cloud service providers in Canada have not tended to customize their services to law practices, says Wally Kowal, president of Canadian Cloud Computing in Kitchener, Ontario. Recent surveys show that this failing can even trump security concerns when lawyers rate cloud service providers.

And while the profession is viewed as a lucrative market given its data storage needs and often antiquated IT systems, “we’re probably not the easiest group to deal with,” says Lisa Lifshitz., a partner at Gowlings.

For those firms keen on moving to cloud computing solutions, there are a number of contractual issues to consider first.

For starters, Lifshitz advises that lawyers should be mindful of how a data breach or loss is compensated, whether a vendor disclaims liability for damages and any available warranty protections.

Ian Kyer, counsel at Fasken Martineau DuMoulin, says the law firm or practitioner should also require prompt notification of service interruptions or a potential data compromise after specifying the threshold at which such notification will be provided.

The cloud contract should disclose where data will be stored and whether it will be held in a multiple jurisdictions. It should cover encryption and other measures in place to secure the information against unauthorized access. It should lay out when and how data can be retrieved in a suitable format—and indicate if a provider can be indemnified for unscheduled downtime.

The Privacy Commissioner of Canada also advises that copies of data be removed permanently from the cloud infrastructure soon after the end of the contract. If, following termination, data is to be transferred to another provider or back in-house, the contract ought to outline how to handle associated fees.

In addition, Lifshitz says cloud vendors should be asked about any possible outside agreements such as online acceptable use policies that the vendor can invoke unilaterally. Vendors should be asked to disclose any outsourcing service deals with third parties, and whether those deals involve a separate contract.

The question of who has jurisdiction over distributed data is being tested in the courts, which have relied on evidence of a substantial connection between the vendor and the locale. Courts have already ruled that U.S. laws apply if the storage equipment is owned by a U.S. company such as Microsoft, even if it is located offshore.

Protection from data intrusions

The Privacy Commissioner also recommends that parameters be set to guard against inappropriate access and manipulation of data by a cloud provider. There are even more nebulous areas, such as whether protections from data intrusions, unlawful or lawful, can be negotiated into a service agreement and ultimately honoured and enforced by the cloud service provider.

"Dallas Law Firm Sues Anonymous 'Ben Doe' over Bad Online Review"

Cassens Weiss, Debra, www.abajournal.com, 20 January 2012

A Dallas law firm has filed a lawsuit seeking to learn the identity of a commentator claiming himself "Ben" who posted an online review.

The Lenahan Law Firm claims defamation and seeks \$50,000 in damages, *Texas Lawyer* reports. Partner Wes Black says the suit will allow the law firm to subpoena Google to learn the commenter's identity.

Ben wrote in his comments on Google Review: "Bad experience with this firm. Don't trust the fake reviews here." Ben also gave a bad review to an Oregon cleaning company and may have intended to post the negative review about a different law firm closer to home, the suit says.

Black tells *Texas Lawyer* the Lenahan Law Firm gets most of its clients from [Internet] searches, and the bad review won't help. "The issue isn't trying to recover tons of money," Black tells *Texas Lawyer*. "We just want the review down."

4.0 PROCEEDINGS DERIVING FROM BREACHES OF STANDARDS OF RESPONSIBILITY

4.1 Administrative: Disciplinary

“A Legal Battle: Online Attitude vs. Rules of the Bar”

Schwartz, John, *The New York Times*, 12 September 2009, p. 128

Sean Conway was steamed at a Fort Lauderdale judge, so he did what millions of angry people do these days: he blogged about her, saying she was an “Evil, Unfair Witch.”

But Mr. Conway is a lawyer. And unlike millions of other online hotheads, he found himself hauled up before the Florida bar, which in April issued a reprimand and a fine for his intemperate blog post.

Mr. Conway is hardly the only lawyer to have taken to online social media like [Facebook](#), [Twitter](#) and blogs, but as officers of the court they face special risks. Their freedom to gripe is limited by codes of conduct.

“When you become an officer of the court, you lose the full ability to criticize the court,” said [Michael Downey](#), who teaches legal ethics at the [Washington University](#) law school.

And with thousands of blogs and so many lawyers online, legal ethics experts say that collisions between the freewheeling ways of the Internet and the tight boundaries of legal discourse are inevitable—whether they result in damaged careers or simply raise eyebrows.

[Stephen Gillers](#), an expert on legal ethics at [New York University](#) Law School, sees many more missteps in the future, as young people who grew up with Facebook and other social media enter a profession governed by centuries of legal tradition.

“Twenty-somethings have a much-reduced sense of personal privacy,” Professor Gillers said. Younger lawyers are, predictably, more comfortable with the media than their older colleagues, according to a recent survey for LexisNexis, the legal database company: 86 percent of lawyers ages 25 to 35 are members of social networks like Facebook, LinkedIn and [MySpace](#), as opposed to 66 percent of those over 46. For those just out of law school, “this stuff is like air

to them,” said [Michael Mintz](#), who manages an online community for lawyers, [Martindale-Hubbell Connected](#).

In Mr. Conway’s case, the post that got him in trouble questioned the motives and competence of Judge Cheryl Aleman, and appeared on a rowdy [blog](#) created by a criminal defense lawyers’ group in Broward County. The judge regularly gave defense lawyers just one week to prepare for trials, when most judges give a month or more. To Mr. Conway, the move was intended to pressure the lawyers to ask for a delay in the trials, thus waiving their right under Florida law to have a felony trial heard within 175 days, pushing those cases to the back of the line.

“All I had left were my words,” Mr. Conway said, adding that he decided to use the strongest ones he had.

Mr. Conway initially consented to a reprimand from the bar last year, but the State Supreme Court, which reviews such cases, demanded briefs on First Amendment issues. The [American Civil Liberties Union](#) of Florida argued that Mr. Conway’s statements were protected speech that raised issues of legitimate public concern. Ultimately the court affirmed the disciplinary agreement and Mr. Conway paid \$1,200.

That penalty is light compared with the price paid by Kristine A. Peshek, a lawyer in Illinois who lost her job as an assistant public defender after 19 years of service over blog postings and who now faces disciplinary hearings as well.

According to the [complaint](#) by officials of the state’s [legal disciplinary body](#), Ms. Peshek wrote posts to her blog in 2007 and 2008 that referred to one jurist as “Judge Clueless” and thinly veiled the identities of clients and confidential details of a case, including statements like, “This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because ‘he’s no snitch.’ ”

Another client testified that she was drug free and received a light sentence with just five days’ jail time, and then complained to Ms. Peshek that she was using methadone and could not go five days without it. Ms. Peshek wrote that her reaction was, “Huh? You want to go back and tell the judge that you lied to him, you lied to the pre-sentence investigator, you lied to me?”

The complaint, first noted by the [Legal Profession Blog](#), said that not only did Ms. Peshek seem to reveal confidential information about a case, but that her actions might also constitute “assisting a criminal or fraudulent act.”

Ms. Peshek declined to comment, citing the pending inquiry “for which I am currently seeking representation.”

Frank R. Wilson, a lawyer in San Diego, caused a criminal conviction to be set aside and sent back to a lower court because of his blog postings as a juror. According to a decision published recently in the [California Law Journal](#) and picked up by the [Legal Profession Blog](#), Mr. Wilson, while serving on a jury in 2006, posted details of the case on his blog. Any juror

who blogs about the details of a trial risks trouble and even civil contempt charges. But lawyers like Mr. Wilson also face professional penalties that can threaten their livelihood.

Mr. Wilson received a 45-day suspension, paid \$14,000 in legal fees and lost his job. He said that warnings not to discuss the case did not ban blogging; the bar disagreed. Mr. Wilson also had not disclosed during jury selection that he was a lawyer. In an interview, Mr. Wilson said he had not been working as a lawyer at the time and had only been asked his occupation.

Judges, too, can get into trouble online. Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, in California, was investigated for off-color humor that was accessible on his family's Web server, though not intended to be public. He was cleared of wrongdoing, but a three-judge panel admonished him for not safeguarding the site, which they said was "judicially imprudent."

Of course, some lawyers' online problems are the same as everyone else's, like getting caught in a fib. Judge [Susan Criss](#) of the Texas District Court in Galveston recalled in an interview a young lawyer who requested a trial delay because of a death in the family. The judge granted the delay, but checked the lawyer's Facebook page.

"There was a funeral, but there wasn't a lot of grief expressed online," Judge Criss said. "All week long, as the week is going by, I can see that this lawyer is posting about partying. One night drinking wine, another night drinking mojitos, another day motorbiking." At the end of the delay, the lawyer sought a second one; this time the judge declined, and disclosed her online research to a senior partner of the lawyer's firm.

Judge Criss, who first [told the story at a panel during an American Bar Association conference](#), said that the lawyer has since removed her from her friends list.

For his part, Mr. Conway noted that the judge he criticized was reprimanded last year by the Florida Supreme Court, which affirmed a state panel's criticism of what it called an "arrogant, discourteous and impatient" manner with lawyers in another case. (Judge Aleman did not return calls seeking comment.) Mr. Conway said his practice was "probably enhanced by the experience" of going public.

But the State Supreme Court ultimately accepted Mr. Conway's earlier reprimand agreement with the bar, which had argued in its brief to the court that the online "personal attack" was "not uttered in an effort to expose a valid problem" with the judicial system, and so the statements "fail as protected free speech under the First Amendment."

“Self-defeating' lawyer can practise”

Shufelt, Tim, *Law Times*, 17 January 2010

A Toronto lawyer who says psychological disorders led him to ignore clients and repeatedly defy the Law Society of Upper Canada has received the green light to resume his law practice.

At a hearing last week, Yaroslav Mikitchook convinced the LSUC to terminate the indefinite licence suspension imposed on him after his seventh finding of professional misconduct.

“We understand he has been seeing a psychiatrist approximately twice a week, and it is our understanding that will continue,” said panel chair Paul Schabas.

The panel relied on psychological reports indicating that Mikitchook suffers from obsessive-compulsive disorder as well as self-defeating personality disorder, also known as masochistic personality disorder.

“They concluded Mr. Mikitchook made the errors he did for psychological reasons,” Schabas said.

Counsel for the law society and the hearing panel agreed that Mikitchook’s progress in therapy represented a material change of circumstances.

Mikitchook’s lawyer, David Cousins, said his client had attended approximately 140 therapy sessions.

“The picture has changed for him to the point where he is now ready to return to practice,” Cousins said.

Last January, the law society deemed Mikitchook had once again engaged in professional misconduct, the seventh such finding since the early 1990s.

Among the allegations, the panel heard evidence he had delayed issuing a statement of claim for a client’s 1999 auto accident until 2004. He also failed to issue a statement of claim for the same client in a separate 2005 collision.

When the client terminated the retainer, Mikitchook failed to pass the file on to his new lawyer or respond to repeated correspondence, the ruling said.

When a complaint against Mikitchook was filed, he neglected to respond to the LSUC.

He then failed to show up for his disciplinary hearing, instead choosing to go on a holiday with his wife, documents show.

Counsel for the law society argued last year the lawyer was “ungovernable,” constituted an “unacceptable risk to the public,” and should be disbarred. At last week’s hearing, the panel heard evidence of Mikitchook’s lengthy disciplinary history.

In 1992 and twice in 1994, the LSUC found him to have engaged in professional misconduct for failing to communicate with and misleading clients and failing to respond to the law society.

His penalties escalated from reprimands and fines to a six-month suspension in 1994.

In 1997, the law society ruled he had misappropriated funds in trust, a breach later shown to be due to bookkeeping inadequacies. As a result, he received a three-month suspension. The LSUC then suspended him for the third time in 2001 for professional misconduct in breaching a Convocation order.

Similar complaints against Mikitchook on behalf of clients led to further misconduct proceedings in 2008. The lawyer then submitted psychiatric evidence to the panel indicating he had two underlying personality disorders that drove him to behaviour that undermined his own career.

“The self-defeating personality disorder causes people to be involved in self-sabotage,” said a law society ruling.

Two psychiatrists conducted interviews and tests with the lawyer and submitted they didn’t feel he was ungovernable but rather that he lacks the normal ability to deal with complaints about his professional conduct.

“He becomes paralyzed and is unable to respond in a normal way, leading to escalation,” the ruling said.

In response, Mikitchook received another three-month suspension, after which the law society prohibited him from practising law except under the supervision of another licensed lawyer for five years.

It also ordered him to engage in a course of therapy. However, Mikitchook then apparently ignored a subsequent notice of application related to the most recent misconduct proceedings and missed his panel hearing.

A letter from the lawyer’s psychiatrist described that oversight is “another example of his pattern of automatically turning a blind eye to situations he experiences as unpleasant rather than addressing them head on.”

Dr. Norman Doidge, a psychiatrist who submitted a report to the panel, indicated Mikitchook was driven to do too much in his practice.

“A core psychological conflict for Mr. Mikitchook leads him to repeatedly overextend himself to clients, without retainers, working many hours for free, and becoming inevitably overwhelmed and fed up,” Doidge wrote.

“At times, he cuts off work on a file without having attended to the necessary communication with the client to maintain a healthy lawyer-client alliance.”

As a result, a disciplinary panel suspended Mikitchook indefinitely until he could provide medical evidence that he is able to practise law. It also ordered him to engage in ongoing therapy and practise only under a plan of supervision for five years once the suspension ended.

In Doidge’s most recent report to the panel, he and two other psychiatrists agreed that Mikitchook is ready to return to the practice of law under supervision and is highly unlikely to run into further problems with clients and the governing body.

The report indicated the lawyer would not be inclined to “put his head in the sand” and concluded “it would be psychiatrically beneficial for him to resume practice and contribute to the community with his legal skills.”

Counsel for the law society didn’t oppose the motion to terminate the suspension. “He’s shown insight into his difficulties,” Janice Duggan said.

The panel accepted the motion.

Cousins indicated his client has kept up with continuing legal education programs over the course of his suspension and has the support staff in place to return to his practice.

As well, Mikitchook’s previous mentor has agreed to help implement a plan of supervision, he said.

"Mayor's remarks against judges not 'misconduct': disciplinary tribunal"

Jobb, Dean, *The Lawyers Weekly*, 26 February 2010, pp. 1, 27
[excerpt]

In a case that tests the limits of free speech for lawyers in political life, a Nova Scotia mayor has been cleared of allegations of professional misconduct despite making “offensive” and “intemperate” comments about the judiciary.

A disciplinary panel of the Nova Scotia Barristers' Society ruled Feb. 8 [2010] that John Morgan, mayor of the Cape Breton Regional Municipality, could not be convicted of breaching his ethical duties because the comments were made in his capacity as a politician.

But the ruling, which turns on the distinction between professional misconduct and allegations of conduct unbecoming a lawyer, may do little to clarify what a lawyer-turned-politician is entitled to say when criticizing court rulings or the judicial appointments process.

The ruling ends a dispute triggered in April 2008 when Morgan, who holds practising status, expressed disappointment with a Nova Scotia Supreme Court ruling that dismissed his municipality's claim of unfair tax-revenue sharing with Ottawa and the provincial government ((*Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*), 2008 NSSC 111).

In an interview on CBC Radio, Morgan said Nova Scotia's judges are "part of the establishment ... appointed by political parties" and "not tree shakers." Claiming the judge who made the ruling, Justice John Murphy, "has ties to the Conservative party," he said he would have preferred a hearing before a Cape Breton judge, rather than one in Halifax.

Morgan also predicted the outcome might be different once the case was appealed beyond Nova Scotia. As it turned out, Nova Scotia's Court of Appeal upheld the ruling and the Supreme Court of Canada refused leave to appeal in December.

The discipline panel, chaired by Dartmouth lawyer John Young, said Morgan failed to substantiate his criticisms or to apologize for making them.

The comments ... are particularly offensive inasmuch as they imply that the decision is without merit and unjust," Young wrote. Morgan's "intemperate unsupported allegations" and the inferences to be drawn from his comments "were clearly intended to disparage the decision and the justice system."

But Morgan cannot be punished, Young noted, because he was not engaged in the practice of law when he made the comments. Morgan was accused of professional misconduct and, unlike an allegation of conduct unbecoming, the offence does not apply to what lawyers do in their personal or private lives.

Despite this distinction between legal and political roles, a Halifax law professor who publicly questioned the decision to prosecute Morgan worries the ruling may make politicians—and even academics—wary of criticizing rulings and the justice system."

"One effect of this might be to make political candidates who happen to be lawyers less attractive to voters," says Vaughan Black, who teaches at Dalhousie University's Schulich School of Law.

"Why would I want to vote for someone who is hobbled when it comes to protecting my interests by pronouncing publicly on such matters? A disappointing aspect of the Morgan decision is that it fails to grapple with this dilemma, or in fact even to acknowledge it."

The ruling suggests academics who are also lawyers may have to be careful what they say, Black added. “The interests of the judiciary in not being insulted trump both the public interest in frank scrutiny of the judicial system and the value of academic freedom.”

Morgan told *The Lawyers Weekly* they could find no precedent for a Canadian politician being convicted of breaching legal ethics based on public statements. He too fears the bar society’s decision to prosecute will have a chilling effect. “The potential jeopardy is in allowing open season on politicians in speaking about the judiciary,” he said in an interview. “I really believe that politicians ought to be able to speak about (the judiciary) fully and freely and effectively, and especially to be able to speak within the language of the common citizen, not necessarily in abstract, academic language”

Mix v. Law Society (New Brunswick)

**2010 CarswellNB 400 (N.B.C.A.), Alexandre Deschênes J.A., J.C. Marc Richard J.A.,
Kathleen A. Quigg J.A., 08 June 2010**

Per curiam:

1 Mr. Mix appeals the decision of the Discipline Committee of the Law Society of New Brunswick to disbar him. The grounds of appeal are as follows:

1. The Panel of the Discipline Committee erred in finding the Appellant guilty of misappropriation.
2. The Panel of the Discipline Committee erred in finding the Appellant guilty of conversion.
3. The Panel of the Discipline Committee erred in admitting the evidence of the Society's accountant and auditor over the Respondent's objection he was unable to present contradictory evidence or obtain the advice of his financial advisors as to the Society's evidence prior to the Hearing in that the Law Society of New Brunswick failed or refused to provide the Appellant with his accounting records prior to the Hearing.
4. The Panel of the Discipline Committee erred, when considering sanction, in placing total emphasis on deterrence, protection of the public, and the preservation of public confidence; without a fair analysis of the exceptional circumstances existing which at law negate the necessity of the sanction entered.
5. The Panel of the Discipline Committee erred in failing to consider, analyse or give any determination to the Respondent's Defences of addiction and mental illness, or on the issue of *mens rea*, and presented as a complete answer to the Complaint of the Society.

6. The Panel of the Discipline Committee erred in considering the charges laid by the Society collectively or, "in toto", rather than individually; and whether each and every charge did, or did not, warrant the sanction given.

7. The Panel of the Discipline Committee erred in finding there was no credible evidence that disbarment would have a deleterious effect on the Appellant's rehabilitation; and thereby failed to consider the impact the sanction of disbarment would have on the Appellant as required by law; which said impact, had it been considered, may have met the required threshold at law thereby negating the sanction as imposed.

2 A statutory appeal to this Court is allowed on a question of fact or law (see s. 66 of the *Law Society Act*, S.N.B. 1996, Ch. 89). It is common ground that all questions raised on appeal involve a question of fact or one of mixed fact and law.

3 Both parties agree that the proper standard of review relating to all questions raised on appeal is reasonableness. In addition, an exhaustive contextual standard of review analysis is not required in this case as it has already been performed in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17, 2003 SCC 20 (S.C.C.). In that case, the Supreme Court held that despite the broad range of the statutory appeal provided, the expertise of the Discipline Committee, the purpose of the enabling statute and the nature of the question in dispute all suggest reasonableness as the appropriate standard of review.

4 Both parties also agree that the decisions under review must be examined on the basis of their reasonableness as discussed in *Ryan* and in *Dunsmuir v. New Brunswick (Board of Management)*, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9 (Q.L.), 2008 SCC 9 (S.C.C.).

5 The appellant admitted several of the complaints filed against him such as using inappropriate comments with a sexual connotation towards a client, withdrawing funds from a client's trust account for his own benefit with the use of a bank card and committing sexual assault on another client for which he pled guilty before a judge of the Provincial Court. In addition, the appellant was found guilty of 16 breaches of the Law Society's trust account rules and 5 unauthorized appropriations of clients' funds. Although the appellant's disbarment was not based on his incapacity to practice law by reason of mental illness, medical reports adduced by the appellant before the Discipline Committee clearly indicate that the appellant is permanently disabled from practicing law by reason of a mental disorder. There was, however, no evidence of a causal connection between the appellant's mental illness and the complaints filed against him.

6 Taken as a whole, the reasons for confirming the penalty of disbarment included the following findings and premises:

(1) the appellant's breaches of professional ethics were similar to ones for which professional disciplinary bodies have previously imposed a sanction of disbarment;

(2) the appellant's conduct amounted to serious breaches of his professional conduct and responsibilities. His serious misconduct towards his clients and his systematic disregard

for the Law Society's trust account and appropriation of clients' funds Rules, coupled with the lack of any factors to mitigate the seriousness of such unethical behaviour made it obvious that his trustworthiness and fitness as a lawyer were forever compromised and that disbarment was the only appropriate sanction.

7 In our view, based on those findings and premises, the Committee's findings of guilt with respect to the complaints filed against the appellant, and the decision to disbar him are supported by tenable reasons all of which are grounded in the evidentiary foundation. Such decisions are not unreasonable and this Court should not interfere.

8 The appeal is dismissed with costs in the amount of \$2,500.

"Suspension Urged for Lawyer Who Called Judge a 'Narcissistic, Maniacal Mental Case'"

Neil, Martha, www.abajournal.com, 30 June 2010

A six month suspension has been recommended for an Illinois lawyer who repeatedly criticized a judge, calling him, at one point, a narcissistic, maniacal mental case” during a telephone conversation with the judge and opposing counsel in a family law matter.

Although Melvin Hoffman has practiced for more than 35 years without any prior discipline, he is not a good candidate for probation because he refuses to admit that he was wrong and take recommended steps to correct his behavior, says the Review Board of the Illinois Attorney Registration Disciplinary Commission in a written opinion last week.

Hoffman contended that his constitutional right of free speech allowed him to express his opinion about the judge.

“Lawyer takes on colleague over collections practice”

McKiernan, Michael, *Law Times*, 14 November 2010 pp.1, 27
[excerpt]

A Markham, Ont., lawyer will face a disciplinary hearing in the new year for her conduct on behalf of collections agencies in a matter her counsel says should be seen as “a test case.”

The Law Society of Upper Canada [LSUC] alleges Deanna Natale’s use of draft statements of claim attached to demand letters breaches the LSUC’s Rules of Professional Conduct. But her lawyer, Bill Trudell, tells *Law Times* the lack of clear regulations in that area

makes a disciplinary hearing an unsuitable venue for deciding whether Natale's actions constitute misconduct.

A hearing was to start this week, but the LSUC granted an adjournment until Jan. 11 due to a clash in Trudell's calendar.

"This is a new and evolving area of practice," Trudell says. "I'm disappointed it's being dealt with this way.

There's better ways to give guidance to lawyers about what's acceptable and what isn't. This is being done under the umbrella of a discipline hearing, which is very unfair."

Mark Silverthorn, a lawyer from Kitchener, Ont., has complained to the LSUC about Natale's alleged practices. He says collections agencies hire law firms to draft statements of claim because regulations governing the industry prevent them from doing so themselves.

Natale herself espoused the effectiveness of the tactic in a blog posting earlier this year on her own web site. "It is very effective to send a draft statement of claim for our clients who are creditors," she wrote.

"The letters are sent to people who owe money, and those people respond to the letter in an increased percentage when it is sent from Natale Law Offices."

Silverthorn says Natale's law firm has sent letters on behalf of Global Credit & Collection Inc., a third-party debt collector retained to recover money owed to entities such as banks, utilities, and communications companies. The statements of claim list the original creditor, who may or may not have retained the law firm, as the plaintiff.

But Silverthorn believes the practice is illegal under the Ontario Debt Collectors Act, which prevents "every person, whether principal or agent," from sending imitation court documents where it's "calculated to deceive" that they're part of a real court process.

Besides the law society, he complained to Brian Pitkin, the Ontario registrar of collection agencies at the Ministry of Consumer Services.

[Notes: (1) On 05 January 2011, the disciplinary hearing into the complaint against Ms. Natale, scheduled for later in January 2011, was adjourned after counsel for Ms. Natale informed the disciplinary panel that she is taking a respite from, and winding down, her law practice. (2) Mark Silverthorn has received correspondence from a Toronto lawyer, representing Ms. Natale, alleging that Mr. Silverthorn defamed Ms. Natale. Attached to the correspondence was a draft Statement Of Claim claiming \$500,000 general damages and \$50,000 punitive damages from Mr. Silverthorn, who responded by submitting to a 7-minute Facebook interview to deny the defamation allegations. (3) Later in 2011, Ms. Natale applied for a stay of the disciplinary proceeding on the ground of alleged misconduct by the LSUC in handling of the complaint against her. A three-member Hearing Panel of the LSUC, on 15 December 2011, reserved its decision on the 'stay application'.]

Tilley v. Law Society (Newfoundland and Labrador)

2010 CarswellNfld 382, 06 December 2010, Alphonsus E. Faour J.
[paras. 2-7; 29]

2 This proceeding is about a review of a decision of the Complaints Authorization Committee (the "Committee") of the Law Society (the "Society"), constituted under section 42(1) of the *Law Society Act, 1999*, SNL 1999, c. L-9.1 in response to a complaint from the Appellant. Mr. Tilley's complaint to the Society concerned the conduct of a solicitor, whom I shall call "the lawyer", who acted for the vendor in a transaction in which he, Mr. Tilley, was the purchaser. Mr. Tilley was represented by his own solicitor, who played no part in these proceedings.

3 The deal fell through and the next day Mr. Tilley became aware that the sale was completed in a conveyance to a company in which the lawyer had a personal interest. Mr. Tilley's allegation surrounds his view that the lawyer's behaviour, which he says was unethical, caused him to lose the transaction.

4 In the period leading up to the failure of the transaction there were three extensions of the deadline for closing while certain title issues were worked on. Mr. Tilley says that the delays were necessary because the lawyer failed to provide the requested documents in a timely fashion, or at all. In the end, the Purchaser (Tilley) was not prepared to close with what the lawyer had provided on title. Mr. Tilley, in his complaint, drew the connection between the failure to provide the requested title documentation and the acquisition of the land by the lawyer's company the day after the deal fell through.

5 An examination of the record indicates the Society's investigation initially involved an examination of the documents related to the transaction, and then a request for a response from the lawyer. The Committee then sought further investigation, which consisted of contacting the lawyer's client (the Vendor) to determine his willingness to discuss the matter further. His response was that he was not prepared to waive the solicitor-client privilege, and felt the transaction failed for the valid reason of the issue with title.

6 The Committee concluded there was insufficient evidence to make a finding against the lawyer. It said:

[The lawyer] has a duty to represent his client's best interests. When contacted by the Law Society [the lawyer's] client indicated that he is satisfied with the services provided by [the lawyer] and the conclusion of his property transaction.

7 On that basis, it dismissed the complaint. Mr. Tilley appealed to the Court, as he is entitled to do, under the *Law Society Act, 1999*.

....

29 I am going to allow this appeal, and order that the Committee re-examine the complaint, from Mr. Tilley's perspective, and from the perspective of members of the public in having an ethical legal profession. In deciding whether the complaint should be referred to a board of inquiry it should address these issues, and consider whether it is likely there has been a breach of any aspect of the *Code of Professional Conduct* to which reference has been made.

"Lawyer Helped In \$1.5M Fraud"

Law Times, 06 December 2010

[*excerpt*]

A Toronto lawyer has had his licence revoked for his part in a \$1.5-million insurance fraud.

Pradeep Bridglal Pachai admitted to taking part in a scheme that saw a senior employee at an insurance company client authorize higher payments to settle litigation than was needed and the two men pocketing the difference.

Pachai claimed he was pressured into the scheme by Vinti Sansanwal, national claims director at HB Group Insurance Management Ltd., fearing he would cut him off from legal work defending the company, which had become his largest client.

Initially, Pachai said he thought the arrangement was for one time only, but between 2005 and 2007, the scam snowballed, netting the pair \$1.5 million from 11 files with the lawyer keeping \$675,000 of the spoils for his role.

The scheme came crashing down after an anonymous tip led to an investigation and Sansanwal's dismissal. The insurance company then launched a civil action to recover the funds that named Pachai as a defendant. After he made restitution, the claim against him was dismissed.

"Attorney Is Suspended Over Misrepresentations on Job Application"

Neil, Martha, www.abajournal.com, 14 February 2011

A Connecticut lawyer who applied for a staff attorney job with a state worker's compensation agency wound up suspended over misrepresentations on his resume after the woman assigned to check his references alerted lawyer disciplinary authorities.

Contrary to what Mark Villeneuve claimed in his resume, he hadn't graduated with honors from Western New England College School of Law, nor was there any record of his claimed participation as assistant note editor on its law review, explains the Connecticut Appellate Court in a written opinion that is scheduled to be officially released on Feb. 22nd.

Meanwhile though he claimed at the time of his application to be presently employed by the Law Office of Jean Smith, that law firm "apparently did not exist." However, "the defendant had worked for another law firm during the time that he allegedly was working for Smith and did not indicate that fact on his application or resume," the opinion continues.

Villeneuve defended, to no avail, by moving to dismiss for lack of subject-matter jurisdiction, the Legal Profession Blog noted. At one point, he claimed his identity had been stolen and denied having any knowledge of the application.

"Solo Suspended, Partly for Implying His Law Firm Was Bigger"

Cassens Weiss, Debra, www.abajournal.com, 24 February 2011

A Virginia solo practitioner has been suspended partly for holding out his law firm as a bigger operation.

Jason Matthew Head, a Virginia Beach lawyer, began calling his law firm Jason Head & Associates in May 2009, although he was the only lawyer in the firm, according to findings cited by a three-judge court. His website identified nonexistent practice groups, falsely stated his firm had three locations, and implied that a nonlawyer was actually a lawyer associate, the [opinion](#) says. The [Legal Profession Blog](#) has the story.

The panel also found that Head overdrew his IOLTA [Interested On Lawyer Trust Accounts] account and did not maintain the required records. He also failed to pay a \$7,500 settlement in a suit against his firm for alleged violations of the federal debt collection law, the opinion said.

The panel imposed a 30-day suspension and a one-year period of probation. During the suspension, Head will be required to retain a law office management consultant.

Head did not return a phone call requesting comment.

"Lack of Ellipses Leads to Public Reprimand for Massachusetts Lawyer"

Cassens Weiss, Debra, www.abajournal.com, 09 March 2011

A Massachusetts lawyer has been publicly reprimanded for failing to include ellipses when he omitted some words from a trial judge's statement of facts in his first-ever appeal.

Lawyer Vincent Cragin had presented the statement of facts in single-spaced, indented format, implying it was a full copy of the factual statement, according to a Feb. 3 summary of the disciplinary findings by the Massachusetts Board of Bar Overseers. The blunder led a Massachusetts appeal court considering the appeal to call Cragin's omission a "brazen misrepresentation."

The Legal Profession Blog posted portions of the disciplinary summary.

Cragin had represented Pella Windows Inc. in breach of contract litigation with homeowner Mary Burman, who had in turn sought double damages for what she deemed to be unfair and deceptive acts. The company's alleged wrongdoing had included making unauthorized charges on Burman's credit card (later refunded) and placing a collections call to her husband while he was in the hospital.

When Cragin included findings of fact in the appeal, he omitted references to the hospital call and the credit card charge.

"In as brazen a piece of misrepresentation as we have ever seen, Pella deleted certain words, phrases, and sentences without use of an ellipsis, or any other indication of editing," the appeals court wrote in its 2009 opinion in the contract dispute. "Defeating one's hope that the deletions were the result of sloppy copying and proofreading, rather than dishonesty, is the fact that all the information deleted is helpful to Burman, or harmful to Pella."

It was the first appellate brief Cragin had filed, and he frequently referred to the phone call and unauthorized charges in his statement of the case and his argument section of his brief. He viewed the deleted facts as parts of his argument, the Board of Overseers says.

Cragin did not immediately reply to a phone call and an e-mail seeking comment.

Regular v. Law Society (Newfoundland and Labrador)

**2011 CarswellNfld 265, NLCA (C.K. Wells, J.A. for the Court), 01 August 2011
(Para. 2; Headnote in part)**

2 The sexual relationship giving rise to these proceedings commenced within two months of Mr. Regular's first meeting S.G. as a client and continued, secretly, over a period of some fifteen years. During that fifteen year period S.G. married T.P., gave birth to a child and was divorced from T.P. Mr. Regular occasionally provided legal services to S.G. and her husband, T.P., and [legal services] to S.G. in proceedings connected with her divorce from T.P. The Trial Division judge succinctly summarized the relevant background facts. He wrote:

[8] While there are matters of disagreement on the facts as between Mr. Regular and S.G., what is not disputed is that shortly after his being retained by S.G. to represent her on a peace bond application [and after having completed that retention], Mr. Regular and S.G. became involved in what was to become a 15-year personal, consensual and sexual relationship. During that period of years, Mr. Regular and S.G. met up to three times per week to engage sexually. Almost all of these encounters occurred at the law office of Mr. Regular. During this period of time, Mr. Regular provided monies to S.G. on occasion as well as arranged housing for her, on some occasions without the payment of rent and through companies he had an interest in.

[9] It is also not disputed that S.G. married during this 15-year period, had one child as a result of that marriage and eventually separated. Mr. Regular assisted S.G. in negotiating a settlement on her student loan debt in 1993 after the sexual relationship commenced. As well, while their sexual relationship continued and during the time of the relationship between S.G. and her husband, Mr. Regular provided certain other legal services to them by acting with regard to the sale and purchase of properties. Mr. Regular further assisted S.G. with legal matters involving her separation from her husband.

[10] It is also readily apparent from the transcript of the hearing before the Adjudicative Panel that the end of the relationship in 2005 between Mr. Regular and S.G. was very acrimonious. It was at that time that S.G., who testified that Mr. Regular had told her he would be leaving his wife to cohabit with her, made known the relationship between her and Mr. Regular that had up to then been kept secret. It was as a result of an attempt to have her removed from a home that Mr. Regular had arranged previously for her to live in that S.G. claimed an ownership interest in that property and subsequently filed her complaint with the Law Society.

. . . .

Lawyer's maintenance of relationship with client after original retainer was completed constituted misconduct—Lawyer took advantage of vulnerable client whom knew suffered from depression and had been sexually abused—Lack of formal solicitor-client relationship at time that sexual relationship began did not mean that lawyer did not have obligation to client—Waiver was properly effected by client [during ongoing relationship with lawyer] as there was reason for her to retain lawyer in family law proceedings ... [in relation to her failed marriage with her husband]—However, conflict of interest still existed as lawyer did not act with integrity in taking on retainer and did not fulfill duties to public and courts.

"Tragic Death of Tot After Hard-Fought Custody Case Leads to Call for Disbarment of Dad's Lawyer Sib"

Neil, Martha, www.abajournal.com, 17 August 2011

[*excerpt*]

Stunned by the recent death of a 2-year-old girl at the center of a hard-fought California custody case, observers wondered what might have done differently to prevent the tragedy. Although the case is still being investigated, new reports indicate Madeline Layla Samaan-Fay likely died as a result of a murder-suicide by her father, Mourad “Moni” Samaan, 49. Their bodies were found over the weekend.

The deaths, which may have been caused by carbon monoxide poisoning while the two were in a sports utility vehicle, followed an award of custody to the girl’s mother, Marcia Ann Fay. She is well-known as a deputy to state Attorney General Kamala Harris, recounts the *Capitol Weekly*.

Following news of the deaths, Samaan’s father and brother reportedly blamed what they called a corrupt court system for the custody award. But it was additional comments made by the brother [of the deceased father], who is an attorney, that provided an unusual focus for public outrage. In a television interview with Fox News, lawyer Nabil Samaan, who apparently did not have a role as an attorney in the custody case, implied that his brother had acted appropriately.

“I think he did the right thing. I’m proud of him,” Nabil Samaan said, prompting the network’s reporter to ask him what he meant. Replied Samaan: “I think justice was done.”

Late yesterday, the Center for Judicial Excellence filed a complaint with the State Bar of California asking that it consider lifting Samaan’s law license over the comments he made concerning the child’s death. They demonstrate both a lack of requisite moral character needed to work as a lawyer and conflict with an ethical obligation to support the Constitution and the laws of the United States, the CJE contends.

However, lawyers who regularly defend other lawyers in ethics cases tell the *Capitol Weekly* that Samaan's comments aren't likely to result in his disbarment, or, it appears, even lesser legal discipline:

While in "incredibly bad taste," Samaan's comments probably would be considered constitutionally protected free speech, said attorney Jerome Fiskin of Fiskin Slater. Although Samaan probably won't be disciplined for making the statements, they're likely to have an adverse effect on his law practice and discourage potential clients from retaining him, Fiskin notes.

Another lawyer points out that Samaan's anguish over his brother's death likely would excuse any rash statements he made immediately afterward.

"Deferred Suspension Recommended for Lawyer Who Ran 'Extremely Loose Ship'

Cassens Weiss, Debra, www.abajournal.com, 21 November 2011

[excerpt]

A Louisiana hearing committee has recommended a fully deferred 60-day suspension for an attorney who failed to detect that a lawyer he employed in his high-volume real estate practice oversaw closings in a house-flipping scheme.

The hearing committee recommended that the sanction for Owen Trahan Jr. be deferred if he completes ethics courses and stays out of ethics trouble during the period. The Legal Profession Blog has a story.

According to the hearing committee report, Trahan hired the lawyer to help with an "exploding" real estate practice and allowed him to work unsupervised. Trahan also inadequately supervised his daughter, who was the office manager, and another employee who worked on real estate closings, the hearing committee said.

"It is clear from all of the evidence submitted that respondent ran an extremely loose ship of an office," the report said.

The scheme allegedly operated this way: Home sellers intended to sell their properties directly to the buyers, but instead they unknowingly sold their home to a financial services company. The company in turn sold the properties to the intended buyers for an inflated price.

"Lawyer's conspiracy allegations against three judges 'hurtful': court official"

Sebesta, Kendyl, *Law Times*, 19 December 2011

[excerpt]

The case of a Toronto lawyer who has levelled allegations of conspiracy against multiple players in the justice system, including several judges, has begun to sound like a movie, counsel for the Law Society of Upper Canada said last week.

Glenn Stuart made the comment during proceedings against the Toronto lawyer, Kimberly Townley-Smith, whose dispute on behalf of a client previously involved in a battle with Warner Bros. is at the centre of the long-running case.

“It appears that any time someone lays a hand on this file, they become a part of this blossoming tree of conspiracy,” Stuart told a law society hearing panel.

“It’s ironic that Warner Bros. is involved because it sounds like a movie. It appears that Ms. Townley-Smith may feel she is attempting to challenge the system in some way, but it is my submission that there is no sense to be made of these actions.

“We may never really know what drove Ms. Townley-Smith to do all of this ... but the result seems to be the undermining of the integrity of the administration of justice and the public confidence of the judiciary.”

Townley-Smith had her licence to practise law suspended on an interlocutory basis since June 2010. She didn’t appear at the LSUC hearing last week despite claims by the law society that she had previously agreed to the time and date of it. Townley-Smith had previously attempted to resign from practising law.

The suspension followed complaints against Townley-Smith that prompted the LSUC to issue a notice of application accusing her of professional misconduct stemming from a copyright dispute with Warner Bros. and a series of related matters that ensued.

Townley-Smith first became involved with Warner Bros. nearly six years ago when her former client, Kim Baryluk, retained her in the copyright dispute involving her Manitoba folk band, the Wyrd Sisters, against the film giant’s use of a similar name in the movie *Harry Potter and the Goblet of Fire*.

Baryluk attempted to stop distribution of the film because it featured a band called the Weird Sisters.

But in the end, the action ended in defeat and a \$140,000 costs award in favour of Warner Bros. In turn, Townley-Smith filed a lawsuit on behalf of Baryluk against Superior Court justices Colin Campbell and John Wilkins, as well as Master Ronald Dash.

All three were involved in the Warner Bros. matter in Ontario. The lawsuit made allegations of conspiracy and fraud against them. That case was also unsuccessful and resulted in an additional \$100,000 costs award to be split between Baryluk and Townley-Smith.

Baryluk sued Townley-Smith nearly five years later. She claimed she had never consented to the litigation against the three judges [including the Master] and wasn't aware of additional matters against other members of the judiciary that made similar allegations of conspiracy and corruption until recently.

Baryluk has since written letters to the judges named in the action apologizing for the lawsuit. Townley-Smith maintains she had Baryluk's consent to pursue the matter, however.

The litigation between Baryluk and Townley-Smith is ongoing, the panel heard. The court and disciplinary allegations against her haven't been proven.

At the same time, Townley-Smith has launched a lawsuit against the law society alleging it has mishandled her case, the panel heard.

She has also made allegations of conspiracy and corruption against the administration of the Superior Court, the Court of Appeal, the Ministry of the Attorney General, and the government of Ontario, as well as a Manitoba judge, opposing counsel in the Warner Bros. matter, and LawPRO.

. . . .

In each of the letters and memos, Oliphant testified, Townley-Smith concluded by saying "the matters have been reported to the police or in some instances the RCMP, and to govern yourself accordingly."

...., Charles Scott, opposing counsel in the Warner Bros. action, filed a complaint to the law society about Townley-Smith's actions in the case in March 2009. The LSUC also received complaints from Brian Shiller, Baryluk's lawyer, and Jonathan Stainsby, also opposing counsel in the Warner Bros. action.

In addition, former Manitoba Court of Queen's Bench chief justice Marc Monnin (now of the Court of Appeal) complained on behalf of Justice Christopher Martin, who participated in the Warner Bros. matter in that province.

Lastly, Roslyn Levine, executive legal office at the Superior Court, complained on behalf of Campbell, Wilkins, and Dash.

"In my experience, every judge lives with great trepidation of the day when a letter comes from the Canadian Judicial Council speaking to a complaint," Levine told the panel last week.

"They take those complaints very seriously. ... It becomes an attack against their integrity, and I think in this case it was particular hurtful because it was made by a member of

the bar. Judges very often feel isolated ... as though they have no one to defend them against attack.”

"Manitoba lawyer investigated for fee irregularities in residential school cases"

McKiernan, Michael, *Canadian Lawyer*, 25 January 2012

[excerpt]

A Winnipeg lawyer has been suspended by the Law Society of Manitoba until he can face a hearing on allegations that he took more money in fees from residential school survivors than he was entitled to.

Howard Tennenhouse, who had well over 1000 former residential school clients, was suspended on Jan. 11. The allegations relate to around 50 clients.

Payouts to victims, which average around \$100,000, are administered by the Indian Residential Schools Independent Assessment Process. Lawyers typically receive a 15 per-cent fee from the federal government on top of the award made, but they can apply to increase fees by up to an additional 15 per cent, which comes out of the client's money.

“This lawyer would make an application in some of these cases for a higher payment, and the allegation is that, regardless of whether or not he was successful, he would take the higher payment anyway,” says Allan Fineblit, the law society's CEO.

Fineblit says Tennenhouse was charged in early 2011, and had restrictions placed on his practice. The law society moved to suspend him when he stopped paying back the money to victims, a condition on his right to continue practising. Fineblit says the law society's compensation fund will cover any shortfall.

“No clients will be out any money,” he says.

A hearing on the charges, which have not been proved, is due the third week of February.

[**Note:** In February 2012, Mr. Tennenhouse was disbarred by the Law Society of Manitoba.]

Aylward v. Law Society of Newfoundland and Labrador

NLSC[TD] (G), 23 February 2012, Handrigan J.
(Newfoundland and Labrador Case Digest, Vol. 20, No. 05, 16 March 2012, pp. 2-3)

The Plaintiff, a practicing member of the Law Society of Newfoundland and Labrador, was a party to a family matter and represented himself. He filed a formal allegation with the Law Society of Newfoundland that counsel for the other part was guilty of professional misconduct for postponing a settlement conference without notifying the Plaintiff and then acting vague or non-committal about what she had done when a judge asked her about it in court. The Plaintiff also alleged that counsel for the other side colluded with the judge who presided at the settlement conference to deprive him of property he was entitled to in the distribution of his and his wife's matrimonial assets.

The complaints authorization committee of the Law Society found that counsel for the other party in the Plaintiff's matter was guilty of professional misconduct for how she handled the settlement conference and issued a letter of caution to her. It did not deal with the allegation of collusion. The Plaintiff applied for judicial review of the committee's decision on the basis that the Law Society "...erred in fact and law by failing to refer the complaint against [the respondent to the complaint] to a Disciplinary Panel."

Standard of Review: Justice Handrigan adopted the reasons of Orsborn, C.J. in *Martin v. Law Society (Newfoundland and Labrador)* wherein he determined that the standard of review for decisions of the Law Society's complaints authorization committee was "reasonableness" because of "...the legislated right of appeal, the screening or vetting stage of the process, and the particular expertise of the standing committee as part of the scheme by which the conduct of lawyers is regulated. ..."

As to "reasonableness", Justice Handrigan relied on the Supreme Court of Canada decision in *New Brunswick (Board of Management) v. Dunsmuir* wherein the Court stated: "A court conducting review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

The Committee Decision: Justice Handrigan found that the committee's decision met the *Dunsmuir* criteria "to the extent that it considered [the Plaintiff's] allegation." Handrigan J. continued:

Regrettably the committee did not consider [the Plaintiff]'s allegation in its entirety; and more particularly, it did not consider his claim that [the respondent

to the allegation] and [the judge] colluded against him, which was the most serious allegation he made against them.

The committee was found to have acted reasonably when it found the counsel for the other party guilty of professional conduct by failing to extend professional courtesy to the Plaintiff and equivocated when LeBlanc, J. [not the Judge involved in the complaint] asked her about it in court.” The committee was also found to have acted reasonably in issuing the lawyer a letter of caution to sanction her for the misconduct.

Justice Handrigan found [however] that the committee did not act reasonably when it failed to consider the Plaintiff’s allegation that the other lawyer and a judge had colluded against him. He directed the committee “to consider the allegation and determine whether it is a complaint under the *Law Society Act, 1999*; and if so, whether it should be dismissed or referred to the disciplinary panel for further consideration.”

"Lawyer in hot water over paralegal's theft"

Sebesta, Kendyl, *Law Times*, 09 April 2012
[*excerpt*]

A Hamilton, Ont., lawyer who worked with former paralegal Shellee Spinks is facing sanction after a Law Society of Upper Canada hearing panel found him guilty of professional misconduct stemming from Spinks’ theft of \$893,000 from his trust account.

Michael Puskas, according to facts admitted at a hearing on March 30 [2012], provided Spinks with ... administrative access, and unsupervised use of an old trust account used for mortgage transactions at his Hamilton law firm between 2002 and 2008.

Spinks then used Puskas’ pass code and letterhead and forged his signature to transfer money from the old trust account to her personal bank account to feed an extensive gambling habit without the lawyer’s knowledge.

In 2010, Spinks received a sentence of four years in jail after the law society examined 42 files with Puskas’ help that contained information detailing the paralegal’s theft. Spinks, according to facts read out by law society counsel, had established a relationship with an unnamed TD Bank manager who was fired shortly after the paralegal’s arrest.

TD Bank, the law society counsel noted, reached a settlement in a related class action last February.

But Puskas said while he admits he engaged in professional misconduct, he said he never shared office space with Spinks and never had a formal employment relationship with her. He

noted he and Spinks operated on a fee-sharing arrangement they had agreed to before she began working at the firm.

“Real estate was five per cent of my practice at the time, so it wasn’t feasible for me to leave court and return to the office every time,” Puskas told a three-member hearing panel at the law society late last month.

“After some time, I fell into the practice of allowing Shellee to handle ... [the] trust account while I was in Court and allowed her to sign off on the transactions after I’d reviewed them.”

Puskas told the hearing panel he never realized Spinks was diverting trust money [from the trust account] into her personal account, which she held under a company she referred to as Spinks Law.

“I asked her to close the trust account in 2006 when I [ceased to be a sole practitioner and] formed a partnership with another lawyer in Hamilton,” said Puskas. “I thought that she had done so. I never conducted a detailed analysis of the old trust account [which he had maintained before forming the partnership] but I didn’t authorize the removal of any funds from it.”

But Puskas admitted he was suffering from depression, often drinking five nights a week, and struggling with his mother’s illness and his own separation from his wife at the time of Spinks’ theft, all of which made it difficult to concentrate on his law practice.

“Shellee’s arrest woke me up. My phones were cut off, I was evicted from my office, and my partner left me. I had to decide if I was going to clean myself up and get my practice back or this would be it,” Puskas told the hearing panel.

But the law society counsel Amanda Worley argued Puskas’ personal circumstances, while concerning, weren’t enough to warrant the abdication of his professional responsibilities.

“The law society sent a cautionary letter to Mr. Puskas [while he was a sole practitioner] in 2005 following an investigation,” said Worley. “It warned him against allowing Ms. Spinks to use his pass code, that Ms. Spinks was giving legal opinions although she was not a lawyer, and that her signing documents on Mr. Puskas’ behalf was not authorized.”

“It appears Mr. Puskas did not heed that warning.”

Worley told the hearing panel Puskas also borrowed more than \$200,000 from Spinks to cover losses in his billings during the time of the theft and hasn’t attempted to pay her back.

“I assumed the loaned money was stolen following the police charges against her,” Puskas told the hearing panel.

“I never had any discussions with her about repayments.”

Puskas was on vacation in Mexico in 2007 when he received a phone call from another lawyer in Hamilton telling him several of his clients had visited his law office looking for him and Spinks and claiming they were missing significant amounts of money.

Puskas said he called the law society the next day to report the thefts. Spinks was arrested shortly thereafter.

"For a Fourth Time, Would-Be Lawyer Is Rejected for Bar Admission on Moral Character Grounds"

Cassens Weiss, Debra, www.abajournal.com, 12 April 2012

Marcia Denise Jordan won't get a law license from the Louisiana Supreme Court—now or in the future—according to an opinion issued on Monday.

The court denied Jordan's fourth application for admission because of evidence that she embezzled money from the student bar association and engaged in unauthorized practice of law, the *National Law Journal* reports.

"Given the egregious nature of petitioner's wrongdoing, as well as a pattern of conduct occurring over many years, we can conceive of no circumstances under which we would ever grant her admission to the practice of law in the state," the court said in its opinion.

By the third time she applied for admission, Jordan had repaid the money allegedly taken from the bar group for her own use while a student at Loyola University's law school in New Orleans, the NLJ says. But new evidence emerged that she had engaged in ...[unauthorized practice of law] while working for a New Orleans lawyer who was later disbarred based on the allegations.

"Petitioner possesses serious and fundamental character flaws," the court said.

"Ex-Bencher's sexual misconduct 'irrelevant' to sex harassment case"

Schmitz, Christin, *The Lawyers Weekly*, 26 March 2010, pp. 1, 8
[excerpt]

The Ontario Court of Appeal says it is "irrelevant" that disgraced ex-Bencher George Hunter was secretly having sex with a client in 2004 while he chaired the law society's disciplinary panel which disbarred Toronto lawyer Gary Neinstein for sexually harassing a client and a law firm secretary—allegations Neinstein is still fighting six years later.

In 2007—three years after Hunter and fellow Law Society of Upper Canada (LSUC) Benchers Joanne St. Lewis and Stephen Bindman ordered Neinstein disbarred for professional misconduct (the most severe punishment the law society ever meted out for sexual harassment)—Hunter himself pleaded guilty to “conflict of interest” and failure to “maintain the integrity” of the legal profession during an affair with a family law client which Hunter admitted was one of three extramarital relationships he was juggling at the time. The law society gave Hunter a 60 day suspension from practice for his professional misconduct.

Meanwhile, Neinstein—who denies any sexual interaction with the two complainants in his case—successfully appealed his professional misconduct and disbarment penalty to a law society appeal panel—which ordered a new hearing. When the law society appealed, the Divisional Court restored the findings of professional misconduct against Neinstein, but reduced his penalty to three months’ suspension from practice. This month, the Ontario Court of Appeal allowed Neinstein’s appeal, stating that the reasons given by the hearing panel chaired by Hunter were so deficient as to constituting no reasons at all.” The appeal court set aside the Divisional Court’s order restoring the findings of professional misconduct and remitted the matter back to the law society for a new hearing.

Neinstein’s counsel, Brian Greenspan, of Greenspan, Humphrey, Lavine, told *The Lawyers Weekly* the law society should drop the matter which has dragged on for a decade. The original hearing panel’s “totally inadequate” reasons reflect the weakness of the law society’s prosecution, Greenspan suggested. “It never was a strong case and there are countless contradictions that really ought to give them, and ought to have given them years ago, cause for concern.”

At the Ontario Court of Appeal, Neinstein argued that the Hunter discipline panel gave wholly inadequate reasons to sustain its findings of sexual harassment. He also asked the Court of Appeal to admit the new evidence of Hunter’s misconduct, which Neinstein contended gave rise to a reasonable apprehension that Hunter was biased in the Neinstein case.

Neinstein argued that a reasonable person informed of Hunter’s misconduct could conclude that Hunter would be disposed to deal harshly with Neinstein because Hunter knew that his own sexual misconduct might one day be exposed. By treating Neinstein harshly, Hunter could hope to create an image of himself as someone intolerant of sexual misconduct in a professional context, which could in turn help him if he was ever investigated for sexual misconduct by the law society.

That scenario “cannot” be dismissed as outright impossibility, Justices David Doherty, Eileen Gillese and Susan Lang observed in their March 16 judgment.

However the panel held that “the proffered evidence is not capable of supporting a finding of a reasonable apprehension of bias as regards to Mr. Hunter. It is, therefore, irrelevant to these proceedings and should not be received on appeal.”

Justice Doherty explained that the scenario painted by Neinstein’s counsel was “based on speculation that goes well beyond the kinds of reasonable inferences that can be made in assessing a reasonable apprehension of bias claim.”

He elaborated, “individuals who sit in courts or tribunals and are required to make independent and impartial decisions have private lives. Some may do things in those private lives that may be improper or illegal. Those misdeeds may subsequently come to light and become the subject matter of some form of inquiry. To suggest that decision-makers could reasonably be viewed as being influenced by considerations of what might best serve their interests at some unknown future date if some past impropriety should come to light and become the subject of some form of inquiry is farfetched, and stretches the concept of a reasonable apprehension of bias beyond all practical limits.”

“The proffered evidence is not capable of supporting a finding of a reasonable apprehension of bias as regards to Mr. Hunter.

Justice Doherty said the prosecution was “a classic ‘he said-she said,’ case.” The complainants testified about various acts of sexual harassment. The appellant denied those acts occurred. Other witnesses were called, but their evidence was secondary to that of the main protagonists.

“Longtime Prosecutor Faces Ethics Complaint for Sarcastic Closings, Blog Comments”

Cassens Weiss, Debra, www.abajournal.com, 23 September 2010

An ethics complaint accuses a longtime Chicago prosecutor of lying to a blogger about a past disciplinary probe and making sarcastic closing arguments.

Laura Morask, a Cook County prosecutor since 1987, faced an earlier ethics complaint over her courtroom arguments, but an inquiry board panel closed the probe in 2006 with a [private] warning that her actions may have been inconsistent with ethics rules, according to the new complaint. *The Chicago Tribune* has the story.

Morask later ran for a judgeship and objected when Jack Leyhane wrote his blog For What It’s Worth linked to a bar group’s negative rating, based on negative appeals decisions about her courtroom conduct, the ethics complaint says. Morask wrote to the blogger, a local lawyer, saying she had a full and complete hearing on the conduct allegations and had been completely cleared. The blogger posted the comments.

At no time had there been proceedings before a hearing board, let alone a full and complete hearing, the ethics complaint says, and at no time was she cleared.

The complaint also accuses Morask of making sarcastic statements in three trials that occurred before the 2006 private admonishment, all of which were highlighted in appellate opinions. Among the allegations:

- In 1999, she sarcastically called a woman accused of killing her daughter “Mother Teresa” and “June Cleaver.”

- In 2001, she used sarcasm to support a rape victim who had difficulty identifying the defendant. “It’s really tough to be a rape victim now,” she said. “Hold on a minute, Mr. Rapist, I know you’re about to plunge your penis in me, but I think I need to take a picture of you so that I won’t get blamed in Court later for forgetting anything.”

4.2 Judicial: Penal

“Marzen says he won’t comment on Supreme Ct. ruling suspending him”

**Nelson, Josh, *Waterloo-Cedar Falls Courier* [Iowa], 19 March 2010
[excerpt]**

Charles City—Floyd County Attorney Jesse Marzen turned in his keys and left the courthouse following an Iowa Supreme Court ruling Friday suspending his license to practice law for at least six months.

Marzen declined to comment Friday on the ruling when reached by phone. He also did not comment on whether he’s still the county attorney.

“I’m not answering any questions,” Marzen said from his home.

In a 5-2 decision, the court found that Marzen had an inappropriate sexual relationship with a client Victoria Nehls in 2006, when he was representing her in child custody case. Marzen had been appointed to Nehls’ case when he represented her in a mental health committal hearing in Mitchell County, the court records indicate.

The justices said Marzen took advantage of Nehls when she was “most vulnerable” and was relying on the trust of a lawyer.

“This case goes beyond the vulnerability that is inherent in all attorney-client relationships,” the ruling said.

The decision was the outcome of a complaint Nehls filed in 2006. The Iowa Attorney Disciplinary Board dismissed two of the three charges in the complaint based upon insufficient evidence. The third count—that Marzen disclosed information to media about Nehls—[was found by the Board to have] violated the attorney-client relationship.

Roger Sutton, who represented Marzen in the complaint hearing, said he disagreed with the majority ruling, but said the court’s decision was “final”.

“I believe the dissent in that case is correct”, Sutton said.

The two dissenting justices—Brent Appel and David Baker—agreed with the disciplinary board that there was too much conflicting evidence and that Nehls’ prior history of complaints against authority figures “raise substantial credibility issues.”

The justices said they didn’t think there was enough evidence to warrant the charges or suspension. They did however, believe confidential information was disclosed. To that, they recommended a public reprimand.

"Appeal Court Upholds Misconduct Ruling"

Sorenson, Jean, *Canadian Lawyer*, June 2010, p. 12

The B.C. Court of Appeal has dismissed a request from lawyer Douglas Hewson Christie to have a Law Society of British Columbia discipline panel decision overturned. The decision found him guilty of professional misconduct for causing the preparation of three subpoena documents in way not permitted by B.C. Law.

On April 30, 2009, the panel found Christie knowingly changed Form 21, even though he knew there was no such thing as a "Subpoena for Documents in British Columbia" and had just completed an appropriate Rule 26 application weeks earlier. The panel found Christie's zeal in pursuing the case on behalf of his clients caused him to overlook his professional responsibilities and ordered him to pay a \$2,500 fine and \$20,000 in costs.

In his appeal request, Christie contended the panel erred in finding his conduct deliberate rather than negligent or inadvertent. He also submitted that the panel ignored evidence of stress in assessing his relevant state of mind and that he was prejudiced by an inordinately long delay in the LSBC review.

The subpoenas were questioned in May 2005 when the defence counsel, in a case that Christie was to argue, complained that they were being used to obtain documents to which Christie did not have the right to ask for. Justice Kenneth MacKenzie, in his reasons for judgment April 21, pointed out that according to evidence tendered before the panel, Christie admitted to signing the subpoenas and directing another individual to change the wording on one subpoena from "requiring" information to "requesting" information. As a result, the appeal court justice concluded there was no evidence to disturb the panel finding of misconduct.

The appeal court acknowledged Christie's illness at the time plus a wife serving as a receptionist [at Christie's law firm] who was also battling cancer and absent at the time, but also accepted the panel review findings that this had not "prevented him from preparing and delivering proper subpoenas" or "lead to subpoenas being prepared and delivered", without his knowledge, which improperly sought to compel pretrial production of documents not permitted" under court rules. The court also did not find that there had been a delay, that affected Christie, prejudicing his ability to respond.

The justice reasoned that while Christie challenged only the cost [but not the disbursement] portion of \$20,000, the LSBC had originally tallied the ... [cost] of the proceedings at \$50,000 but reduced this amount to reflect Christie's 30 years of unblemished service and his contributions to the *pro bono* community.

"Lawyer Who Acquired Too Many Clients Has Breakdown, Fights to Keep Law Licence"

Cassens Weiss, Debra, www.abajournal.com, 01 July 2010

A Las Vegas lawyer who was overwhelmed with the number of clients flocking to his bankruptcy practice is fighting to keep his law license after suffering an "emotion crisis" and packing up for Miami.

Jorge Sanchez had been out of law school for only a couple of years in August 2008 when he launched a bankruptcy practice catering to Spanish-speaking clients, *The Las Vegas Review-Journal* reports. The next year, the Sanchez Law Group was taking on as many as 42 new clients a month.

"But it all fell apart in March," the *Review-Journal* reports, "after Sanchez said he realized that he had acquired too many clients, too fast, and had hired some employees who weren't loyal to him."

Last week the Nevada Supreme Court temporarily suspended Sanchez's license after finding he had "failed to safe keep funds in potentially hundreds of cases," the article says.

The story pieces together Sanchez's plight and its aftermath through interviews and court documents. According to one bankruptcy filing, as many as 480 of Sanchez's former clients have active cases pending, but they don't have the money to hire substitute counsel. Some local lawyers are taking on some of the cases *pro bono* while others are offering to handle them at lower fees.

In court papers Sanchez said that as his clientele grew larger he struck a deal with lawyer Joseph Scalia, known for managing large caseloads. Scalia told the *Review-Journal* that he was to receive outstanding fees for the cases he handled, and Sanchez would come work for him.

But Sanchez wrote that he wasn't happy with Scalia's treatment of his clients, causing him to become "depressed and apprehensive." That led to a thwarted attempt to take back his files that involved an altercation with lawyers from Scalia's office and a call to police, Sanchez said.

Afterward, Sanchez "suffered an emotional crisis," and he went to Miami to stay with relatives and get treatment. He has now returned and hopes to continue his legal career.

Scalia told the bankruptcy court that his office has many of Sanchez's files, but it has not received fees to service the cases.

“Ohio Lawyer Suspended for Billing More than 24 Hours in a Day”

Cassens Weiss, Debra, www.abajournal.com, 25 August 2010

An Ohio lawyer has been suspended for overbilling local courts for her representation of poor clients, submitting bills for more than 24 hours a day on three different occasions.

The lawyer, Kristin Ann Stahlbush of Toledo, will be suspended for two years, with the second year stayed if she completes a one-year probationary period, the Legal Profession Blog reports.

According to an Ohio Supreme Court opinion issued Tuesday, Stahlbush billed the courts in Lucas County for more than 24 hours a day on at least three different days, and more than 20 hours a day on five other occasions.

The court said Stahlbush failed to keep adequate records of the hours she worked, submitted inflated fee requests, and sometimes “merely guessed at the time she had spent on a case.” She had no prior discipline, however, and was known as a competent and hardworking lawyer.

"Lawyer Suspended for Deposition Tirade; Taped Incident Is Instructive, Court Says"

Cassens Weiss, Debra, www.abajournal.com, 02 August 2010

A Miami lawyer won't be able to attend depositions alone for the next two years, unless the proceedings are videotaped, under an unusual order by the Florida Supreme Court.

Plaintiffs lawyer Robert Joseph Ratiner was sanctioned for his videotaped conduct at a May 2007 deposition with DuPont lawyers in a case alleging crop harm from the fungicide Benlate, *The Daily Business Review* reports. The court's deposition requirements are in addition to a 60-day suspension and a requirement that Ratiner receive mental health counseling and write letters of apology to those at ... [the May 2007] deposition.

A referee in the case found that Ratiner's outburst followed the opposing counsel's attempt to stick an exhibit sticker on Ratiner's laptop, according to the supreme court opinion. Ratiner briefly touched the opposing counsel's hand, then attempted to run around the table toward him, the referee found.

According to the referee's findings of fact, Ratiner “then proceeded to forcefully lean over the deposition table, lambast [opposing counsel]”.

Ratiner's own consultant told him to take a Xanax, and the court reporter protested. "I can't work like this!"

The Florida Supreme Court called Ratiner's conduct "an embarrassment to all members of the Florida Bar."

"The referee has suggested and we agree that members of the bar and law students could view the video recording of the laptop incident in the context of a course on professionalism as a glaring example of how not to conduct oneself in a legal proceeding," the court said.

"Iowa Lawyer Reprimanded for Plagiarizing Bankruptcy Brief"

Cassens Weiss, Debra, www.abajournal.com, 18 October 2010

The Iowa Supreme Court has reprimanded a West Des Moines lawyer for filing a bankruptcy that was largely copied from a published law review article.

The court rejected a recommendation of suspension of up to six months for the lawyer, Peter Cannon, the Legal Profession Blog reports. The opinion found that "Massive ... verbatim copying of a published writing without attribution" does amount to an ethics violation. But the court said reprimand was appropriate since Cannon had owned up to the copying, refunded fees charged for the brief and paid another lawyer to get up to speed on the case.

Cannon's copying came to light after a bankruptcy judge noted that his brief seeking disqualification of a lawyer and a reply brief were "of unusually high quality," the Iowa Supreme Court opinion says. The judge asked Cannon to certify that he was the author. Cannon responded by disclosing the copying to the court, his client and the bar association.

The judge found that Cannon had copied 17 out of 19 pages of legal analysis in the initial brief and long citation string in the reply brief. He then ordered Cannon to refund fees charged for preparing the briefs and return to law school for a legal ethics course.

In his disciplinary hearing, Cannon testified that he had conducted research and analyzed 32 bankers' boxes of documents in preparation for the disqualification motion, but he became time-pressed when the briefs were due.

“Law Firm Partners Reprimanded for Misleading Information on Website”

Cassens Weiss, Debra, www.abajournal.com, 18 October 2010

Five partners at a Louisiana law firm apparently weren't aware of misleading information posted on their firm's website, but they were reprimanded Friday for allowing the mistake.

The Website suggested that former Louisiana Gov. Mike Goster was a partner at the firm Breazeale, Sachse & Wilson even though he didn't have a law license, according to the Advocate.com and the Legal Profession Blog. The Louisiana Supreme Court said the five reprimanded partners, all members of the firm's management committee, failed to supervise a nonlawyer employee who put the information on the website.

Foster is a graduate of the Southern University Law Center but never took the state bar exam, the Advocate.com says. Foster told the newspaper he has worked on projects with the law firm offering his expertise but not his legal advice.

One of the five lawyers reprimanded is Foster's son, Murphy Foster III. All five lawyers consented to the discipline.

Managing partner Scott Hensgens told the newspaper that none of the reprimanded lawyers were aware the information was on the Website. He said an anonymous complaint spurred the ethics probe.

“Lawyer Disbarred for \$3,500-an-Hour Fee and ‘Bizarre Behaviour’ ”

Cassens-Weiss, Debra, www.abajournal.com, 13 October 2010

A Kansas City lawyer has been disbarred for charging a soldier a fee of 3,500 an hour, shouting profanities at court clerks, brawling with court security officers and suggesting that a judge is a pedophile.

The Kansas Supreme Court disbarred lawyer Carlos Romious on Monday, according to the *National Law Journal* and the Legal Profession Blog.

In the military case, Romious had originally agreed to represent the soldier for a flat \$3,500 fee, but later claimed the amount was his hourly charge, the NLJ story says. In a different case of “abusive and bizarre behavior,” the court says. Romious asked a judge whether he was a pedophile and said, “You’re going to sit up there with the audacity and the smugness of your holiness.”

The court also cited conflicts with courthouse personnel. In one, Romious brawled with security officers after he set off a magnetometer. In another, he called a court clerk a “f---ing bitch,” said he wanted to “f---ing” file his papers, and declared that he was smarter than anyone in the clerk’s office.

The Legal Profession Blog posted the opinion. The court said Romious’ behavior had resulted in two criminal convictions and a contempt citation.

"Lawyer Sanctioned for E-Mail Insults, Including 'Scum Sucking Loser' Comment"

Cassens Weiss, Debra, www.abajournal.com, 03 January 2011

Two Florida lawyers who called each other a “retard” and “scum sucking loser” in escalating e-mail insults have been sanctioned by the state supreme court.

Nicholas Mooney of Tampa, a lawyer representing Volkswagen of America, received a public reprimand and must take a class on professionalism, according to the *St. Petersburg Times*. He is identified as a former partner at Hinshaw & Culbertson and a lawyer for Bromagen & Rathet on the law firm’s website. Kurt Mitchell of Palmetto, an accident lawyer who is identified as “an experienced litigator and biker” on his website, was suspended for 10 days and must attend an anger management class, the story says.

The St. Petersburg Times cites e-mails quoted in the bar complaints against the men. At one point, Mooney called Mitchell a jerk; at another, Mitchell called Mooney an “old hack.” Later e-mails went so far as to insult wives and children. The story cites these exchanges:

- From Mooney to Mitchell, written after an accusation [by Mitchell] that he couldn’t handle the pressures of litigation: Mooney said he was handling more than 200 cases, “many of which were more important/significant than these little Mag[nuson] Moss [warranty] claims that are handled by bottom feeding/scum sucking/ loser lawyers like yourself.”
- From Mitchell: Mooney displays symptoms of a disability marked by “Closely spaced eyes, dull blank stare, bulbous head, lying.”
- From Mooney: Mitchell should look in the mirror to see signs of a disability. “Then check your children (if they are even yours. . . . Better check the garbage man that comes by your trailer to make sure they don’t look like him).”
- From Mitchell, after learning Mooney’s son suffers from a birth defect: “While I am sorry to hear about your disabled child, that sort of thing is to be expected when a retard reproduces.”

“Federal Judge Recommends Criminal Charges for Lawyers Who Questioned His Impartiality”

Cassens Weiss, Debra, www.abajournal.com, 11 January 2011

U.S. District Judge John McBryde of Fort Worth, Texas, has sanctioned three lawyers and recommended criminal charges against two of them for motions questioning his integrity in litigation over golf club patents.

McBryde said the plaintiff in the litigation, John Gillig, had used comments the judge had “jokingly” made about contingency fees to support a “fictitious scenario” of bias, according to his 114-page opinion issued Jan. 5. McBryde imposed sanctions, even though he could have asked another judge to rule on the issue, *The Fort Worth Star-Telegram* reports.

It’s not the first time McBryde has battled over removal of cases assigned to him. A 1996 *New York Times* article says the judge had fought to keep two cases from being removed from his docket because of allegations he had been intemperate. In 1997, the New Orleans-based 5th U.S. Circuit Court of Appeals suspended the judge for a year, citing his “intemperate, abusive and intimidating” conduct, the *Star-Telegram* says. The U.S. Supreme Court declined to hear McBryde’s appeal, *The Times* reported in 2002.

In the golf patent case, McBryde recommended criminal charges against lawyers Melvin Silverman and S. Tracey Long, both of whom have offices in Florida, and barred them from practicing in courts in the Northern District of Texas, *The Fort Worth Star-Telegram* reports. Silverman is banned for life, and Long for 10 years. Both were given pro hac vice [for this occasion] status to pursue the Texas suit. McBryde barred a third lawyer, Joseph Cleveland of Fort Worth, from practicing in the district for two years, except in cases already pending.

McBryde also recommended criminal charges against Gillig, whom he accused in court documents of being “a liar, a fraud and a phony who played a ‘shell game’ with the facts,” *The Star-Telegram* reports. Gillig has said the judge’s accusations are not true, the newspaper says.

In his Jan. 5 [2011] opinion, McBryde criticized a 2009 plaintiff’s motion seeking to prevent the judge from hearing a second round in golf [patent] litigation, saying that virtually everything in several paragraphs of Gillig’s declaration was false. The document cited Gillig’s belief that McBryde “has exhibited personal and extrajudicial bias and prejudice” against him. According to Gillig’s motion, McBryde had addressed the plaintiff in a status conference, saying “you cannot afford to be in this court.” The plaintiff also asserted that McBryde asked his lawyers if they were taking the case on contingency, and if so, they “should not expect to get a house out of this case.” The motion had been filed through Cleveland and Silverman.

McBryde also criticized a 2010 recusal motion claiming [he,] the judge[,] had an “overt personal bias against Gillig” in which Long supported Gillig’s previous claims, although he disputed the date of the pretrial conference. Silverman filed the motion.

McBryde says he “jokingly” made some comments about the contingency fees, but Silverman and Gillig, had searched for on-the-record comments to support a “fictitious scenario.” McBryde also cited circumstantial evidence that neither Silverman nor Long believed Gillig’s assertions.

McBryde said Cleveland did not make a reasonable inquiry about the facts, and his lack of curiosity and inquiry “are the earmarks of an attorney who knew that he was about to present to the court false information.”

"Suspended for Incivility: Lawyer's Indignant Letter Questioned Town Manager's Soul"

Cassens Weiss, Debra, www.abajournal.com, 10 March 2011

Columbia, S.C., lawyer William Gary White III fired off a letter when the town manager of Atlantic Beach, S.C., wrote the lawyer’s church client about the need for zoning compliance.

White sent his indignant letter to two owners of the church property and copied the town manager, Kenneth McIver. The missive accuses McIver of making false statements about the zoning matter, and goes on to say that the town manager “has no brains and it is questionable if he has a soul.” White doesn’t spare Atlantic Beach officials either, describing them as “pagans” and criticizing them for “pigheadedly” causing damages to the church.

Now White has been suspended 90 days for his conduct, according to the Legal Profession Blog and TheSunNews.com. In a March 8 opinion, the South Carolina Supreme Court ordered the suspension and required White to take an ethics course within six months of reinstatement.

“Respondent’s conduct in this matter reflects poorly on himself as a member of the legal profession and reflects negatively upon the profession as a whole,” the court said. “He represented to this court at oral argument that in the future he will conduct himself in accordance with the [Rules of Professional Conduct] and treat all persons in a civil, dignified, and professional manner as is expected of all members of the South Carolina Bar. We expect nothing less.”

"Blistering 7th Circuit Opinion Fines Lawyer \$5K, Orders Him to Alert Clients to Possible Malpractice"

Neil, Martha, www.abajournal.com, 23 March 2011

Yesterday can't have been a good one for attorney Michael J. Greco, who apparently has found a foray into federal court in Chicago a tougher slog than he may have initially anticipated.

The 20-year Chicago practitioner was excoriated and fined \$5,000 in a 7th U.S. Circuit Court of Appeals opinion authored by Chief Judge Frank Easterbrook that describes an employment discrimination case handled by Greco as a "litigation" [that] has gone off the rails because of multiple errors."

Not all of the mistakes were the lawyer's, however. While Greco dropped the ball by not promptly filing individual complaints after Judge Ruben Castillo dismissed the joint action he initially pursued in the Northern District of Illinois, "Judge Castillo should not have presented Greco with the opportunity to bungle his clients' cases away", the 7th Circuit states. "There was nothing wrong with the original complaint."

After a lengthy civil procedure lesson, the opinion goes on to say that "Greco's calamitous handling of this litigation in the district court has been followed by a sloppy performance in this court," including "procedural gaffes, three of which led to orders to show why the appeal should not be dismissed—and one of which led to his client's brief being struck."

The opinion concludes with a finding that Greco "has comported himself unprofessionally," fines him \$5,000 (payable within 14 days) and orders him to send copies of the ruling to his clients in the case "so that they may consider whether to file malpractice suits against him."

Easterbrook also calls Greco "a menace to his clients and a scofflaw with respect to appellate procedure" and suggests that the federal district court "may wish to consider whether he should remain a member of its bar."

Reached by the *ABA Journal*, Greco said he could not comment at this time on the ongoing case. His disciplinary record since his 1989 admission is unblemished, according to the Illinois Attorney Registration and Disciplinary Commission website.

"Court Calls Lawyer's Conduct a 'Textbook Example of How Not to Operate a Law Office' "

Cassens Weiss, Debra, www.abajournal.com, 17 May 2011

The Iowa Supreme Court has suspended a Dubuque lawyer accused of incompetent representation, client neglect and failure to maintain client trust accounts.

Lawyer John Edward Netti Jr. will be suspended for two years before he can apply for reinstatement, according to *The Telegraph Herald* and *The Iowa Independent*. "Netti's handling of his client's property is a text book example of how not to operate a law office," the court opinion said.

Netti has a brain tumor causing some short-term memory loss, a mitigating factor in the ethics case, the court said. The decision cited several aggravating factors. "We cannot overlook the serious, egregious, and persistent nature of Netti's misconduct and the effect it had on his victims," the opinion said. "This was not one isolated incident. Netti displayed a pattern of taking fees without doing the work he was hired to do."

"Appeal Court Upholds Reinstatement Of Disbarred Lawyer's Licence"

**Leger, Kathryn, *Canadian Lawyer*, October 2011, pp. 8-9
[excerpt]**

Quebec's highest court has upheld a ruling by the province's professions tribunal ordering the reinstatement of a controversial Montreal divorce lawyer disbarred for misconduct more than a decade ago. The unanimous 55-page ruling by the Quebec Court of Appeal confirms the right of one-time celebrity lawyer Micheline Parizeau to practice law after completing a five year disbarment term—notwithstanding opposition by the Barreau du Quebec.

Importantly, says one of the lawyers who defended Parizeau, the Aug. 18 [2011] ruling recognizes the Tribunal des professions du Quebec as a true court of appeal with the power to reverse a decision by the Barreau's Comite des requites, a standing committee that reviews contested applications from lawyers seeking to formally re-enter the profession following disbarment.

The Tribunal des professions is an administrative body made up of 11 Court of Quebec judges whose self-described mandate is to review decisions rendered by 45 disciplinary committees of Quebec's various professional orders.

The Barreau du Quebec, acting on opposition to Parizeau's reinstatement by both its syndic and the council of the Barreau de Montreal, had vigorously defended its right to decide if a disbarred lawyer is once again fit to practice law. It lost an attempt before Superior Court Justice Daniel W. Payette on Feb. 4, 2009, to have the Dec. 3, 2008, tribunal ruling, ordering Parizeau's reinstatement, suspended. But the Barreau succeeded in convincing Superior Court Justice Jean-Francois de Grandpre that the professions tribunal should defer to its [the Barreau's] experience and authority. On Nov. 10, 2009 de Grandpre ruled that on re-examining the evidence presented at Parizeau's readmission hearing, the profession tribunal had overstepped its authority.

Quebec's high court disagreed, citing the tribunal's assessment that the Barreau's review of Parizeau's application for readmission as "an occasion to prolong a temporary disbarment already served by relying on a faraway past that then recent proof." Not considering all of the evidence at Parizeau's readmission hearing was "a serious gap" that led to a "hijacking of the finality of the exercise," wrote tribunal justices Martin Hebert, Danielle Cote, and Francois Godbout.

In its Feb. 20, 2007 decision refusing to reinstate Parizeau, the Comite des requites said Parizeau had not shown a real change of attitude in her testimony during three days of hearings in June 2006 and offered a "hodgepodge" of reasons for the conduct that led to a seven-year disbarment and \$5,600 in fines back in 2000. (The sanction was reduced to five years and some charges dropped after lawyer Julius Grey argued on her behalf in a previous separate hearing before the tribunal.)

Accordingly, the Comite des requites said it could not, under power accorded to it under article 70 of the Loi sur le Barreau, rule that she "possesses the morals, conduct, competency, knowledge, and the qualities required to exercise the profession of law." The Barreau's disciplinary committee had determined that Parizeau was a danger to society based on her behaviour during a divorce case almost a decade earlier when she fabricated evidence (she falsified a bill of her services), incited a client to lie about her expenses in court, destroyed evidence (a client's hotel bill), and filed so-called "useless proceedings" before the court.

In the 1980's and 1990's, Parizeau was one of the province's most well known divorce lawyers, often representing the wives of Montreal's wealthy, but also powerful men like Quebecor Inc., medial baron Pierre Peladeau—and often in the news for her flamboyant style. *The Montreal Gazette* in 1995 reported on Parizeau's "judicial guerrilla warfare," condemned by four judges during a short period. All four cases involved nasty battles that basically led to the financial ruin of the warring couples.

Although no formal complaint was lodged, during her Barreau readmission hearing, Parizeau was grilled about the judges' comments on her behaviour in those rulings and her one-time use of retainers, a practice she changed after warning from the syndic of the Barreau—facts not lost on either the Tribunaux des professions or the Quebec Court of Appeal.

The Comite des requites exceeded its legal mandate by acting as a disciplinary committee and placed too much emphasis on Parizeau's disagreement with some of the judge's comments and "underweighted and ignored" evidence and testimony presented on her behalf.

Noted in the two rulings is support from two judges [not involved in the appeal] for her readmission. Quebec Superior Court Justice Louis S. Tannenbaum (now deputy judge of the Federal Court) and a noted divorce lawyer before his judicial appointment, had supervised her refresher course prior to the readmission application and said “she understood and regretted her past errors” Quebec Court of Appeal Justice Allan R. Hilton also vouched for her in a letter of support and Alan Stein of Montreal’s Stein & Stein Inc. offered tutelage over her work and accounting for two years.

""Unscrupulous Procedural Tactics' Result In 12-Month License Suspension for Ohio Divorce Lawyer"

Neil, Martha, www.abajournal.com, 08 March 2012

Saying that an Ohio divorce lawyer had engaged in “a course of conduct that was replete with dishonest, deceptive, and disrespectful acts” as a practitioner, the state supreme court today unanimously agreed that his law license should be suspended for 12 months.

The court found that attorney Joseph G. Stafford, among other conduct, was dishonest with the Cuyahoga County Domestic Relations Court when he filed an *ex parte* motion to amend a complaint in a divorce case and recklessly accused a Cuyahoga County Common Pleas Court judge of intimidation in response to the judge’s determination that Stafford should not represent a client because of a conflict of interest, WKYC reports.

The court also said in a slip opinion that it “reject[ed] Stafford’s contention that the ultimate settling of the case somehow legitimized his unscrupulous procedural tactics.”

In a separate concurring opinion, several members of the court addressed the bench and bar concerning a contention by Stafford’s counsel that *ex parte* communications were commonplace in the domestic relations court. Discussions between a judge and a representative of only one party in a case are prohibited and subject to sanction, that opinion notes.

“Counsel and judges are reminded of their obligation to adhere to the Ohio Rules of Professional Conduct and the Ohio Code of Judicial Conduct in this regard and to avoid the appearance of impropriety,” it states.

"Associate Gets 2-Year Suspension for Billing Clients for Work That Wasn't Performed"

Neil, Martha, www.abajournal.com, 02 April 2012
[excerpt]

A former associate at the Albany, N.Y., law firm of Maynard O'Connor Smith & Catalinotto has had his law license suspended for two years because he billed clients for work he didn't perform.

Health and family issues were a factor in Mark Nizer's misconduct, according to last week's opinion by the state Supreme Court Appellate Division, Third Department. However, the court wrote, "attorneys must attend to their clients' interests punctually and with vigor despite distracting and stressful intrusions from personal and family problems or advise their clients of their option to obtain other counsel," Reuters reports.

"No Sanction for Lawyer Who Told Billionaire 'I'm Not a Busboy' in Filed Deposition"

Neil, Martha, www.abajournal.com, 02 April 2012

Apparently seeking to disprove a public claim by billionaire Sheldon Adelson that he had lost his temper in a 2006 state court deposition, a Las Vegas attorney last year filed, in a subsequent federal wage-and-hour case [related to the circumstances of the state court proceeding], a video of the session.

As the deposition video shows, attorney Donald Campbell of Campbell & Williams spoke throughout in calm and measured tones. And he did not attempt to throw books at Adelson, the chairman and CEO of the Las Vegas Sands, contrary to claims publicly made by Campbell's litigation ... [representative].

After Campbell filed the 2006 state court deposition in the federal case, Adelson sought to have Campbell held in contempt for violating his privacy by making confidential material public.

However, a federal judge determined last year that his court lacked jurisdiction to sanction Campbell concerning his handling of evidence in a state court case.

And a Clark County, Nev., judge on Friday held that the Las Vegas Sands [of which Adelson is chairman and CEO], by its conduct, "greatly diminished" the confidentiality quotient by putting out a public press release about the deposition and likewise inviting Campbell to defend himself by questioning his conduct, *Vegas Inc.* reported.

"Where the one claiming to have fallen victim to invasion of their privacy takes occasion to publicly accuse opposing counsel of bullying tactics, an accusation for which a federal judge has found no support, the court finds it difficult to see the necessity of invoking the court's supervisory powers over the litigation process," state District Court Judge Kenneth Cory wrote in his Friday ruling.

The video shows that Adelson started the deposition with a contention that Campbell was late even though Campbell said it was Adelson who had kept him waiting for admission to his office after he arrived on time. Then Adelson had unrequested volumes placed on the table in front of Campbell. The attorney moved them to the floor, where they seemingly landed with an audible thump.

At that point, Adelson told Campbell to pick them up and put them on a table.

"No, I don't think I will, Mr. Adelson," the attorney responds.

The situation deteriorates from there as Adelson threatens to stop the deposition, calling Campbell discourteous and saying that he won't allow his company's facilities to be abused.

When the session resumes after a break, an armed bodyguard is sitting between Adelson and Campbell, to which the attorney objects. Speaking to off-camera opposing counsel, who apparently was Rusty Hardin of Houston, Campbell says he doesn't know what is standard in Houston but local practice doesn't require him to conduct a deposition sitting next to an armed bodyguard.

Adelson says he won't be mistreated but tells Campbell he's prepared to continue with the deposition "if you bend down and pick up the papers you threw on the floor," saying that this would provide evidence "you're not as violent as you appear to be."

Campbell then picks up the pace on his side, telling Adelson: "I'm not a busboy. I don't work for you, I work for them," he said, gesturing toward his clients. "And I'm not taking orders or directions from you."

He threatens to move for sanctions. Little happens on the tape after that, except for various breaks.

"Don, you've been a perfect gentleman," Hardin tells Campbell as the video concludes. "Someday I'll be able to repay you."

"Lawyer Suspended 30 Days for \$2,500 Minimum Fee Charge"

Cassens Weiss, Debra, www.abajournal.com, 09 April 2012

A retired Iowa lawyer has received a 30 day suspension for charging a \$2,500 nonrefundable retainer, even though he spent less than four hours of work on the case.

The Iowa Supreme Court imposed the suspension on Friday against retired Clinton lawyer William Vilmont, report *The Quad-City Times* and the Legal Profession Blog. Vilmont spent only 3.7 hours on the case, including an hour spent to provide an accounting.

Vilmont entered into a fee agreement with a client accused on a state charge of enticement of a minor. The agreement provided for charges of \$225 an hour, with a minimum fee of \$2,500 to be paid with a retainer, according to the Supreme Court opinion. The state dropped the charge a few weeks after the arrest when a federal charge was filed. At that time, the client found a different lawyer to represent him. Vilmont withdrew the retainer from a trust account five days later, with no notice to the client.

According to the opinion, Vilmont was “uncooperative and unapologetic” at a disciplinary hearing. “Almost defiantly, but without support, he maintained the fee he charged was not unreasonable,” the opinion said.

“The amount of the fee charged and collected by Vilmont for performing the limited and insignificant services in representing his client was, without question, unreasonable,” the opinion found. A reasonable fee under the circumstances would have been about \$600, the court said.

4.3 Judicial: Civil

"Lawyers targeted in row over expert witness"

Todd, Robert, *Law Times*, 14 March 2010

[excerpt]

A man who says he lost custody of his children due to the testimony of a Whitby, Ont., man who allegedly falsely represented himself as a doctor of psychology in court now wants to hold lawyers and the legal system to account for his ordeal.

"I think the lawyers have to be held to a higher standard," says the man, suggesting counsel need to do a better job of screening expert witnesses. "From what I'm seeing, there's no accountability for lawyers."

The man, who can't be identified, is among a group of alleged victims working with Toronto lawyer George Callahan to investigate the viability of a class action lawsuit after charges were laid against a Whitby man, Gregory Carter, whom police claim falsely identified himself as a doctor of psychology in family court.

Callahan says he has spoken to about eight people regarding their experiences with Carter, who is classified as a psychological associate by the College of Psychologists of Ontario. "and the number is rising," he adds.

"The commonality is, first of all, Gregory Carter; second of all, the impact on custody; third of all, the expense," says Callahan.

While he has yet to determine the target of such a lawsuit, Callahan suggests it could include two lawyers. He says the civil action might centre on accusations of "a failure to warn."

Tom Dart, past chairman of the Ontario Bar Association's family law section, says the allegations Carter faces are "highly unusual." He adds the charges could have major implications.

"Obviously, this person's qualifications are called into question, so that kind of challenges all of the evidence he's put forward to the court and opens up those cases again, I guess, for review," says Dart.

"From a lawyer's point of view, I guess it depends on what side you're on. But if you're on the side of the Children's Aid [Society], then naturally you're very concerned because you've been relying on that evidence for the files that you're handling in addition to going to court and relying on that evidence."

So it becomes pretty devastating for them, similarly for parents, obviously, that have been given the opinions that this gentleman has given.”

According to Durham Regional Police, officers fielded public complaints in November 2009 about a man who said he was a psychologist and referred to himself as a doctor while giving testimony in family court. Police said the man’s evidence led to parents’ loss of custody of their children.

"Deceased lawyer vindicated in long-running estate dispute"

Naumetz, Tim, *Law Times*, 03 October 2010

The Supreme Court of Canada has dismissed an application for leave to appeal by a Calgary woman in a dispute that goes back nearly two decades against a respected Calgary lawyer, his estate, and the prestigious law firm Bennett Jones LLP.

The top court dismissed the application with costs last week, which ends the court action by Cathyrene Broeker against the estate of Sheldon Chumir, a member of the Alberta legislature from 1986 until he died from a sudden illness in 1992, and Bennett Jones.

The strange case began after Broeker took action against Bennett Jones and Chumir’s estate following a dispute between the pair. At one point, after Broeker had been repeatedly visiting Chumir at his office, he obtained a restraining order against her.

That restraining order sparked a defamation suit Broeker launched against Chumir before his death and was also related to her claim as an unpaid claimant for part of Chumir’s estate.

Bennett Jones was named in the legal action as the law firm where the executors of Chumir’s estate practiced. Gerry Scott, a partner at Fraser Milner Casgrain LLP in Calgary who represented Bennett Jones in the court action, declined to comment on the case or the top court’s dismissal of the application for leave or appeal.

Broeker, who has represented herself during the court proceedings, couldn’t be reached for comment. Chumir, a Rhodes scholar who won the gold medal for highest marks in his class when he graduated from the University of Alberta Faculty of Law 1963, was first elected to the Alberta assembly as a Liberal in 1986.

He was re-elected in 1989 but died just three years later. A founder of the Alberta Civil Liberties Association, Chumir was an advocate for human rights. In recognition of his work, the Law Society of Alberta awarded him a posthumous distinguished service award.

"Law Firm Fell Below Standards"

Sorenson, Jean, *Canadian Lawyer*, November/December 2010, p. 15

The failure of a Vancouver senior law partner and associate to keep on top of a plaintiff's motor vehicle injury claim that occurred in Hong Kong has resulted in a B.C. Supreme Court ordering them to disgorge fees and settle with the estate of the late plaintiff for approximately \$500,000.

Justice Paul Pearlman, ruling in *Campbell v. Rogona*, found lawyers Michael Rogona and Joseph P. Cahan and the firm Alexander Holburn Beaudin & Lang [AHBL] LLP negligent and in breach of fiduciary duty to protect the interests of client William Arthur Bedford Campbell.

Campbell was 40 when the action was commenced in May 1994 following a 1992 accident where Campbell's cab was broadsided by a drunk driver. Campbell received injuries that over time would lead to his termination of employment, severe headaches, delusions and an attempted suicide. Once a noted lecturer and consultant, he would end up living in a trailer, separated from family, and after developing cancer as his trial moved forward, died a year before the award was handed down.

Campbell hired the Vancouver firm to prosecute his case. Rogona was the senior litigator and partner at AHBL at the time and newly called Cahan assisted from 1995 to the case's conclusion in 2004. AHBL engaged Ong & Chung, a Hong Kong firm, to conduct the action and in November 1998, the Hong Kong High Court determined the driver was wholly liable. However, as the action had been divided into two trials, damages were not set. In June 2004, the Hong Kong driver applied and was successful in having Campbell's action for damages dismissed for want of prosecution. Pearlman, in a 163-page ruling, said he found "that the defendants' failure to effectively manage the conduct of their client's case, and to have the damages assessment tried in 1998, 1999, 2000, 2001, 2002, or 2003 was negligent, constituted a breach of their contract with Mr. Campbell, and caused loss to Mr. Campbell when the Hong Kong defendant successfully applied to strike their client's action for want of prosecution." Pearlman also outlined the frustrations between law firms.

The Judge maintained that much of the difficulty between the two firms could have been managed with direct communications rather than written correspondence. He cited several areas where he felt the Vancouver firm failed the client's interests.

With only a 50-per-cent chance to [succeed on] appeal [of] the decision of the Hong Kong courts to strike the action [relating to damages assessment], Campbell made it known to the Vancouver firm that he had a potential claims for damages for professional negligence against it, [and its lawyers] Rogona, and Cahan, as well [the Hong Kong law firm agents] Ong & Chung. [Justice] Pearlman maintained that Rogona, realizing his firm was in a conflict-of-interest situation [in the wake of the client's potential claim against the Vancouver firm], should

have insisted that Campbell seek independent legal advice Instead, [the Vancouver firm negotiated] a \$167,530 settlement [of the civil action, and Campbell’s potential claim against the Hong Kong law firm acting as agent for the Vancouver firm] in December 2004. AHBL deducted its fees and disbursements, paying Campbell \$63,478.79. Campbell signed a release of claims against [the driver, and the Hong Kong law firm] Ong & Chung, but not AHBL.

[Justice] Pearlman maintained [that] because Ragona realized he was in a potential conflict and did not mitigate the situation, “he and AHBL must bear the consequences of their breach of the fiduciary duty.”

“There will be an order that AHBL disgorge and pay to Mr. Campbell’s estate the sum of \$84,391.86, representing the full amount of the fees charged by AHBL in their account rendered to Mr. Campbell dated December 29, 2004.” Pearlman ruled Campbell was entitled to the difference between the settlement and what he would have received had his damage claim gone to court in Hong Kong. He calculated the figure at \$465,290 based upon Campbell’s death in 2009. The \$167,530 settlement would be deducted. On top of the remaining \$297,760 he awarded \$30,000 for pain and suffering, \$20,000 for non-pecuniary losses attributed to the defendants’ negligence or breach of fiduciary duty and \$20,000 for mental distress. The judge allowed interest to be calculated on the award, except for the portion that related to earnings.

"Collaborative lawyers must observe same standard as family law litigators: Alta. CA"

**Schmitz, Cristin, *The Lawyers Weekly*, 18 February 2011, p. 13
[excerpt]**

The Alberta Court of Appeal has ruled that collaborative family law (CFL) practitioners must meet the same standard of care as other family law lawyers—including taking appropriate steps to get the financial information needed to properly advise their clients.

The court’s unanimous Jan. 26 [2011] ruling in *Webb v. Birkett*, [2011] A.J. No. 54 is the first appellate decision in Canada to pronounce on the standard of care and duties of CFL practitioners, counsel say.

“This is a very important case for CFL lawyers,” Philip Epstein of Toronto’s Epstein Cole told *The Lawyers Weekly*.

“This is just a reminder that even if parties are not adversarial ‘a lawyer is a lawyer’—he has minimum professional standards ... and the Court of Appeal has described them,” Epstein explained. “It’s still important for us to remember that the client can, if properly advised, waive [their entitlements]. But you have got to be very careful about how you get that waiver and how you get informed consent.”

Justices Myra Bielby, Keith Ritter and Richard Marceau explicitly rejected the trial judge’s holding—in a negligence suit brought against an Edmonton area CFL practitioner by an

ex-client –that family law lawyers owe a lower standard of care to those clients involved in CFL rather than in litigation.

“While clients are entitled to forfeit legal entitlements through the collaborative family law to achieve benefits that may not be available through litigation, including the hope of maintaining civility among family members, the collaborative family law process does not excuse their lawyers from obtaining the information required to give the advice needed to support informed settlement decisions,” admonished Justice Bielby.

The appeal court rejected Marguerite Webb’s appeal from a 2009 trial decision which dismissed Webb’s negligence suit against her former lawyer, Lucille Birkett, and Birkett’s firm. Webb alleged that her ex-lawyer failed to provide her with proper and complete legal advice during the collaborative family law process she participated in with her ex-husband—with the result that she signed an improvident matrimonial property settlement and waived her entitlement to support.

The appeal court rejected the trial judge’s conclusion that Birkett was not negligent. The panel held that Birkett did breach the standard of care in relation to: obtaining financial disclosure from Webb’s ex-husband; advising the client in a manner that allowed her to make an informed decision to settle, and explaining to the client the risks and losses attendant upon her waiving receipt of full information from the other side.

However, the panel dismissed Webb’s suit because the plaintiff failed to prove that Birkett’s actions caused her any damages, i.e. the client failed to show that if she had received the relevant missing financial information, or “proper advice in relation to her entitlement to spousal support” she would have obtained a better settlement, or would have gone to trial and obtained more than she settled for.

"Lotto dispute ensnares lawyer[:] Divorced couple turns on wife's counsel following settlement"

**McKiernan, Michael, *Law Times*, 02 May 2011
[excerpt]**

A London, Ont., lawyer has found himself caught in the aftermath of a divorced couple’s high-profile dispute over a \$30-million lottery jackpot long after they settled their matrimonial litigation.

Alfred Mamo of McKenzie Lake Lawyers LLP represented Nynna Ionson as she sought a share of Raymond Sobeski’s winnings. Sobeski had obtained an uncontested divorce from Ionson in February 2004 without telling her about his windfall. Two months later, he turned up at Ontario Lottery and Gambling Corp. headquarters to collect the \$30-million Super 7 jackpot on a ticket purchased in April 2003.

In 2006, Sobeski sued Mamo for defamation related to comments he made to the media during the high-profile case. The defamation action went dormant after Mamo filed a defence in May of that year.

Sobeski and Ionson eventually settled their dispute ahead of a trial scheduled for January 2009 on terms that remain confidential. But a short time later, Ionson moved to have Mamo's legal bills assessed. Around the same time, Sobeski revived his defamation suit.

Mamo was then denied the opportunity to use files from the matrimonial dispute in his defence of the defamation action when Ionson refused to waive her solicitor-client privilege, an issue that was before the court last month.

In ruling on the matter, Ontario Supreme Court Justice Paul Perell rejected Mamo's attempt to get around Ionson's refusal when he declined to order that the deemed undertaking shouldn't apply to the matrimonial documents.

According to Perell's decision, Ionson's challenge of Mamo's fees and Sobeski's revival of his dormant defamation action came only after the former spouses had reconciled and resumed their relationship.

However, Sobeski's lawyer, Brian Shiller of Ruby Shiller Chan, denies his client is back together with Ionson. "It's not accurate," he says, adding he's unable to comment on what contract there has been between the pair since their settlement.

According to Shiller, Sobeski deliberately waited before continuing with the defamation action that claims damages of \$1.3 million against Mamo. "It wasn't a question of reviving it," he says.

"Mr. Sobeski did not want to be seen as seeking an advantage in the matrimonial litigation by suing Mr. Mamo. So the lawsuit was held in abeyance until the matrimonial litigation was complete."

Mamo declined to comment on the case, and Ionson couldn't be reached.

"DA Sues Family Law Lawyer over Alleged Affair, Claims Alienation of Affection"

Cassens Weiss, Debra, www.abajournal.com, 30 June 2011

A prosecutor slated to become president of the North Carolina Conference of District Attorneys has filed an alienation of affection suit against another lawyer who is the godmother to her children.

Johnston County, N.C., District Attorney Susan Doyle alleges her neighbor and one time friend, Christi Stern had an affair with Doyle's husband, according to *The Raleigh News & Observer*, NBC 17.com and WTVD. Stern is a family law lawyer in Smithfield.

The suit alleges that Doyle and Stern had been friends for 17 years, and Doyle confided in her about marital problems in 2008 and 2009. The suit alleges Stern sent emails to Doyle's husband, Michael, in 2010 that expressed a romantic interest, leading to a sexual relationship, according to WTVD.

Doyle and her husband are now separated, *The News & Observer* says.

Webb v. Birkett

[2011] A.J. No. 54 (Alta. C.A.), Bielby J.A. for the Court
[Summary-*The Lawyers Weekly*]

Negligence—While respondent lawyer breached duty of care to client in advice provided prior to settlement of matrimonial issues, appellant failed to prove damages.

Appeal from the dismissal of appellant's negligence action against respondent lawyer. Appellant retained respondent in 2002 to represent her in matrimonial proceedings. Appellant alleged that as a result of improper legal advice received from respondent, she entered into an improvident matrimonial property settlement in 2003 and waived her entitlement to spousal support. Respondent did not obtain full financial disclosure from the husband's solicitor prior to the parties entering into the settlement agreement. The spouses had reached a tentative oral settlement on all matters without their lawyers present. Appellant told respondent that she was willing to settle as proposed because it would give her sufficient funds to live on without relying on the husband generating any income in the future. The present action was commenced in 2006. The trial judge found that respondent had not breached her duty of care to appellant. In any event, the action was statute-barred—**Held:** Appeal dismissed. The trial judge erred in finding that respondent did not breach her duty of care to appellant. Respondent had a duty to advise appellant that, at the time the settlement agreement was negotiated, she did not have sufficient information to determine what appellant was legally entitled to receive by way of spousal support and through a division of matrimonial property. Respondent also had an obligation to advise appellant that she was at risk of accepting less than she was legally entitled to receive. However, appellant failed to establish damages resulting from respondent's breach of duty. There was no evidence that the amount received from the settlement was not a reasonable reflection of what she would have received at trial or pursuant to a settlement made on the basis of full disclosure. The judge also erred in finding that the limitation period had passed. The action was commenced within two years of the date that the appellant's new lawyer received the husband's financial statements and realized that appellant had a claim against her former lawyer.

"Tax court calls poker player's bet"

**Waldie, Paul, *The Globe And Mail*, 16 June 2011, p. A9
[excerpt]**

Toronto lawyer Steven Cohen loved playing seven-card stud with his buddies so much he decided to quit his \$200,000-a-year legal career to become full-time poker player. It didn't go well.

Mr. Cohen started out with great confidence. He figured he could make \$150,000 during his first year by playing small-stakes tournaments and then move up to bigger games where he would pull in \$500,000 annually. He prepared by reading poker books, attending a gambling seminar in Las Vegas and devising strategies for bluffing and how to read mannerisms.

He joined several online poker sites, playing up to eight hours a day, and travelled to tournaments in Las Vegas and Niagara Falls, Ont. He had a few wins at first, but his luck changed. By the end of 2006, his first year as a full-time player, Mr. Cohen had lost \$122,000. He'd had enough and gave up poker. But his problems were just beginning.

When Mr. Cohen filed his taxes, he claimed the \$122,000 loss as a business expense, arguing he was a professional player and entitled to the deductions. The Canada Revenue Agency disagreed and disallowed the claim. The CRA argued Mr. Cohen's gambling was a hobby, not a legitimate business.

The case ended up in the Tax Court of Canada and Judge Frank Pizzitelli sided with CRA. In his ruling, Judge Pizzitelli said Mr. Cohen had failed to show he had been engaged in a commercial venture with a reasonable expectation of profit.

The judge dismissed Mr. Cohen's attempt at bettering his game by buying books and attending a seminar; saying that was not business-like training.

"The seven little piggies that cost Earl Spencer thousands as dispute with divorce lawyers settled"

Petre, Jonathan, www.dailymail.co.uk, 16 July 2011

Earl Spencer faces paying tens of thousands of pounds after dropping a legal action against a lawyer he blamed for costing him £ 1 million in a divorce hearing.

The brother of Princess Diana sued Sir Nicholas Mostyn and the legal team who represented him in his second divorce two years ago, claiming they mishandled his case.

But his action and a counter-claim against him by solicitors Fladgate have now been dismissed after all parties agreed to an undisclosed settlement.

Last year Lord Spencer embarrassed Sir Nicholas by revealing in writ that the lawyer—now himself a judge—had told him in a private email that he had named seven piglets after a judge involved in the divorce hearing, Lord Justice Murphy.

The piglets' names included 'self-regarding', 'pompous', 'publicity-seeking' and 'pillock'.

Lord Spencer claimed that his legal team did not warn him in time of change in the law that meant the hearing to decide his ex-wife's financial settlement could not be held in private.

To avoid the public gaze, he settled out of court with his wife Caroline—and paid her an extra £ 1 million, which he had to borrow from his bank.

But procedural judge Master Bowles has now ordered that Lord Spencer's case should be dismissed.

A legal expert said: "it appears Earl Spencer has not had any of his legal costs paid by the other side, so his own costs could run to tens of thousands of pounds."

In the Lord Spencer case, Sir Nicholas was assisted by barrister Elizabeth Clark, with whom he later began a relationship.

Lord Spencer, who lives at Althorp in Northamptonshire, sued Fladgate, Sir Nicholas and Ms. Clarke for breach of contract and negligence between 2005 and 2009.

In his 32-page writ, Earl Spencer complained that the press had taken a hostile interest in him for many years, and said it was vitally important to him that the divorce proceedings should attract minimum publicity.

Sir Nicholas is now embroiled in divorce proceedings from his wife of 29 years over his relationship with Ms. Clarke. Her husband, barrister Mark Saunders, was shot dead by police marksmen after a stand-off at his £2.2 million London home in May 2008.

Nagarajah v. Singh

[2011] O.J. No. 5066 (Ont. S.C.J.), Roberts J., 07 November 2011

[*Headnote*]

Motion by defendant solicitor to strike out and dismiss plaintiffs' claim of negligence—Plaintiffs retained defendant on two occasions to transfer title to a property within their family—On both occasions plaintiffs reviewed the information set out in the Acknowledgement and Direction and confirmed that the information was correct—Subsequently, a bank commenced proceedings against plaintiffs, alleging that the transfers were fraudulent conveyances—The bank obtained summary judgment—Plaintiffs then commenced an action against defendant seeking \$350,000 in damages and indemnification in the event that they were required to make any payment to the bank—Plaintiffs took the position that defendant acted negligently in performing his duties as he failed to ask why they were transferring the property, failed to ask what the consideration was for the transfers, and failed to advise them of all surrounding legal issues—**Held:** Motion allowed—Plaintiffs' action was an abuse of process—Plaintiffs were attempting to re-litigate the same issues that were clearly determined in the bank's action—Furthermore, plaintiffs had acknowledged in writing that the consideration was correct and could not now complain that it was erroneous or different—Finally, there was no evidence that plaintiffs suffered any damages—As a result there was not genuine issue requiring a trial and it was plain and obvious that plaintiffs' action could not succeed.

“Little things can add up to trouble”

Hainsworth, Jeremy, *The Lawyers Weekly*, 23 December 2011, p.9

Despite best-laid plans to ensure quality work in a timely fashion it's the “oops” factor that will likely trip up a lawyer and bring on a negligence claim, says the director of the Law Society of British Columbia's Lawyers Insurance Fund.

About 40 per cent of claims against lawyers that the fund receives are tied to lack of diligence and not paying attention to details, Su Forbes says.

The best strategy to guard against a negligence claim is by managing client expectations so that both parties know who is responsible for what in any particular retainer, she says. And the best way to achieve that is quite simple—through communication.

“It's about listening carefully to someone speak and repeating back to them the message you heard,” she explains. “You want to focus 100 per cent of your attention to that client.”

Differences in background, gender, culture, age and language can all play a role in communication failures, she concedes. But active listening is a good tool for avoiding misunderstandings, so that problems don't crop up that possibly lead to a negligence claim, Forbes explains.

The "oops" factor also comes in the guise of inordinate delays, documents not being drafted properly, or blind reliance on precedents she says. "It's really about setting and adhering to procedures for routine transactions. A systematic approach to providing high-quality services reduces the possibility of human error."

That operating procedure can apply to what some might consider banal tasks. She cites a recent situation where a lawyer had no idea when documents were being received because the secretary had no date stamp.

"The success—or failure—of a negligence claim can turn on something as simple as being able to establish when you received a document," she says. "We suggest lawyers create a culture in the firm that supports routines and systems as good for everyone."

"Hold regular seminars for assistants so they understand the procedures and know their limits ... Hire the best staff you can afford and invest in early training," she says.

As well, have staff create procedure manuals for their jobs as a resource for relief staff, Forbes suggests.

She also urges lawyers to survey their clients when they close out retainers. Not only will it provide an idea of a lawyer's strengths and weaknesses but the letter can be a pitch for the firm leading to repeat business. "Lawyers can reframe this from a task they have to do to an opportunity to market."

She recommends all lawyers review the fund's book *Beat The Clock*, which offers advice on dealing with limitations and deadlines. "Twenty-five per cent of matters reported to the Lawyers Insurance Fund [British Columbia] are about limitations and deadlines," says Forbes, who has been on the road throughout the province this year with assistant director Margrett George educating lawyers on ways to minimize risks.

"Do not let clients or the other side pressure you into acting when you have not had time to do a good job," Forbes says.

She also warns the profession on the perils of crossing over to the dark side.

"You're opening the door to terrible ethical and financial consequences if you find yourself caught up with a rogue client," Forbes says. "It's about professionalism and preservation of an appropriate distance from your client."

Meister v. Coyle

(2011), 310 N.S.R. (2d) 361 (C.A.), Oland J.A. for the Court
[summary]

Appeal by Meister from the dismissal of his professional negligence action against Coyle, the lawyer who represented Meister at his trial on two charges of dangerous driving causing death. Meister had driven an empty school bus into a car, causing the deaths of two people. He had come upon the scene of an accident and, possibly distracted by the accident, failed to see a car, which he struck with his bus. Meister's collision took place early one morning before the sun had come up. The collision was reconstructed six weeks later, in day light, by the police. The reconstructionist assumed the car struck was stopped at the time of the collision. Based on the reconstruction, the police concluded that Meister should have had ample time to stop the bus to avoid colliding with the car. The video of the collision reconstruction was admitted as evidence. Coyle did not object to its admission, nor to the qualification of the police reconstructionist as an expert. Coyle cross-examined the officer and was able to obtain admissions about the differences between the conditions at the time of the collision and the reconstruction, and an acknowledgement that the time Meister had to avoid the collision was not as he had testified in chief. Coyle unsuccessfully moved for a directed verdict. He then called an expert witness, a retired RCMP officer experienced in accident reconstruction, who provided a different theory as to what happened when Meister's bus collided with the car. Essentially, this expert took the position that Meister had had much less time to react to the car than the Crown alleged, with the result that his driving was not a marked departure from reasonable. Meister was found guilty on both counts on trial, but his convictions were quashed on appeal. A different lawyer represented Meister on the appeal. The appeal judge stated that the video of the collision reconstruction and the expert's supporting evidence should not have been admitted, and that the defence should have made a timely objection to their admission. Meister then sued Coyle for professional negligence and breach of contract. Coyle explained that he did not object to the admission of the Crown's video and expert evidence because he saw the Crown's theory of the collision as obviously flawed, as there was no basis for concluding that the car struck was stopped at the time of the collision. He noted that the judge's charge to the jury was very supportive of the defence's case. Expert criminal lawyers differed in their assessments of whether or not Coyle should have objected to the admission of the reconstruction evidence. The judge considered this evidence not particularly helpful. She was not satisfied that Coyle had breached the requisite standard of care to Meister. **Held:** Appeal dismissed. The statement by the appeal judge [who quashed criminal convictions of Meister] that Coyle should have, at the original criminal trial, made a timely objection to the admission of the reconstruction evidence was not a castigation amounting to a finding that Coyle was negligent during Meister's trial. Coyle's admission that he made an error in judgment in failing to object to the admission of the evidence did not amount to professional negligence. A lawyer's choice of strategy was not tantamount to negligence. The criminal court judge clearly considered the evidence admissible, as did the Crown attorney who adduced it.

"Suit Claims Ex-Partner Installed Software Allowing Continued Access to Law Firm Files"

Cassens Weiss, Debra, www.abajournal.com, 13 February 2012

A Pennsylvania law firm has sued a former partner, claiming he installed software allowing remote access to its computer network before he jumped to a new firm.

The law firm, Elliott Greenleaf & Suedzikowski, filed a motion for an injunction to stop the alleged hacking on Thursday, *The Legal Intelligencer* reports. The federal suit claims the former managing partner of Elliott Greenleaf's Harrisburg office, William Balaban, is accessing the files via Dropbox software installed before he abruptly left at the end of January.

Balaban and two Elliott Greenleaf associates left to join the law firm Stevens & Lee; it has also been named as a defendant along with two former clients, the story says.

The suit claims Balaban configured the software to ensure that 78,000 electronic files "were stolen and automatically transmitted to a distant 'cloud.'" It also alleges that Balaban deleted 5 percent of the firm's backup tapes for Harrisburg clients.

The information is being used to help Stevens & Lee obtain tax lien clients from Elliott Greenleaf, according to the suit. Stevens & Lee issued a statement calling the suit "devoid of merit."

"Two Lawyers Sue West and LexisNexis for Reproducing Legal Briefs"

Cassens Weiss, Debra, www.abajournal.com, 23 February 2012

Two lawyers have filed a class action suit claiming West Publishing and Reed Elsevier are violating the copyrights of lawyers by reproducing their lawsuit documents in Westlaw and LexisNexis databases.

The plaintiffs, Oklahoma lawyer Edward White and New York City lawyer Kenneth Elan, filed suit on Wednesday in Manhattan federal court.

White has obtained copyright registration for some of his motions, while Elan has not. They seek to represent two classes of lawyers who have and haven't copyrighted their work. The suit says the publishers charge substantial fees for access to lawyers' work. West, for example, charges \$622 a month for solos to access its "All State Briefs" and "All Federal Briefs" databases, the suit says.

The Law Blog says the suit “appears to be novel interpretation of copyright law” while the Volokh Conspiracy says the argument for infringement is “moderately strong.”

The question is whether the commercial posting of the briefs is fair use; and fair use law is, as usual, vague enough that there’s no clear answer,” the Volokh Conspiracy says.

"Jurors Award Lawyer and Husband Nearly 10 Times the Requested Amount in Internet Defamation Case"

Cassens Weiss, Debra, www.abajournal.com, 13 March 2012
[excerpt]

Georgia jurors in an internet defamation case last month ignored a request to award \$48,000 each to a lawyer and her husband. Instead, they awarded a total of \$900,000 in damages.

The plaintiffs, lawyer Jana Tabor and construction company owner John Tabor, had alleged they were defamed through media and Internet posts, according to *The Daily Report*. The defendant, Robyn McKinney, was accused of claiming the Tabors were responsible for the actions of a convicted murderer who had at one time worked for John Tabor’s company.

Peter Michalakopoulos v. Lawyers Title Insurance Corporation et al.

S.C.C. L@wletter (Meehan, Q.C., Eugene, Lang Michener, Editor), S.C.C. File No. 33662, 19 August 2010

Mr. Michalakopoulos was reprimanded by a judge before whom he had appeared. An insurer involved in the case brought an action against him. When he asked the Professional Liability Insurance Fund of the Barreau to defend him, it refused to do so, and once judgment had been rendered against him, refused to appeal the judgment. Mr. Michalakopoulos brought proceedings in which he claimed \$99,999 in damages jointly from the insurer and the Fund. The Quebec Superior Court dismissed the motion to institute proceedings. The C.A. dismissed the appeal.

“A Rare Case on Champerty”

Cook, Diane L.M., *Canadian Lawyer*, February 2010, pp. 12-13

Last November, a rare champerty case surfaced in Calgary.

Champerty is defined as aiding in a lawsuit in return for a share in the proceeds. In *Wilkinson v. Stafford T. Gorsalitz Professional Corp*; Stafford Gorsalitz represented a husband in divorce and matrimonial property proceedings. At the time the lawyer was retained, the husband had been noted in default of defence.

The two lawyers [in the matrimonial proceeding] engaged in settlement negotiations. The lawyer [Gorsalitz] lost contact with his client, Douglas Ross Coyle who subsequently died without a will. The husband and wife had never been divorced.

Aleksandra Maria Coyle acquired most of the estate as designated beneficiary of her husband's retirement savings plans and pensions, and by reason of the Intestate Succession Act.

Unknown to Gorsalitz, the husband had two adult sons from a previous marriage [who received nothing from their father's—the husband's—estate]. With the consent of the sons, the wife was granted letters of administration in respect of the husband's estate.

The sons [both surname Wilkinson] sued their father's lawyer. The essential allegation was that Gorsalitz was negligent in not taking steps to set aside the noting in default. The lawyer argued he owed no duties to the sons.

The sons then took an assignment [from their father's estate] of whatever claim the deceased husband's estate may have had against the lawyer. [That claim appears to have been the sole 'asset' of the estate.] The assignment was granted by the wife, in her capacity as estate administratrix. The sons amended their statement of claim to sue assignees of the estate. In response, Gorsalitz said the assignment was champertous and should not form the basis of the suit. Alberta Court of Queen's Bench Justice D.K. Miller agreed.

Miller said there are no Canadian decisions on the point. “The practice of assigning choses in action arising from legal negligence does tend to debase the very solicitor-client relationship. Authorities in the United States have consistently said this is to be discouraged because of the unique ‘personal nature of legal services.’... I am persuaded that what has transpired ... is a type of ‘commoditization of legal malpractice’ claim which should not be encouraged. This is truly an example of the evils of champerty.”

The Judge essentially found the agreement between the sons and the administratrix to be champertous, with the result that Gorsalitz had a defence to the action. There are ... exceptions[;] ... not all agreements involving assignments of claims are champertous. Generally,

contractual rights are assignable [; e.g., assignment] of a debt by a creditor is legitimate and the assignee can sue the debtor in the assignee's name.

Douglas G. Stokes of Miles Davison LLP says: “[The decision] recognizes that a properly functioning lawyer-and-client relationship requires full and frank communication. That communication can be compromised if the lawyer is to be wary that he may be called upon to account to complete strangers to the relationship. It recognizes that claims against lawyers cannot be bought and sold like commercial paper or pork bellies.”

Karin Schwab, of Fraser Milner Casgrain LLP in Edmonton, says this is a case of professional negligence. “The twist here, arising from the deceased's two sons taking an assignment of the estate's claims against the divorce lawyer, is highly unusual and are very rare. The overall result in this case speaks more to the caliber of the ‘advice’ these two sons received from their counsel in, first of all, agreeing to the wife's appointment as the administrator of her estranged husband's estate, and secondly, to the wisdom of suing the divorce lawyer in the first place even before taking an assignment of the estate's negligence claim against the divorce lawyer.”

Schwab doesn't believe the decision will have much of an impact on practice. “The standard of care of the divorce lawyer has not been modified. The chief cause for the lack of success [of] the two sons was the fact that their decision, not to contest the appointment of the wife, made them the authors of their own misfortune .”

Gwen K. Randall, of Davis LLP in Calgary, says she was involved in a series of oil and gas lawsuits several years ago where a third party obtained assignments of the claims from the other litigants and was carrying the litigation. “We did do some research as to whether to challenge the assignments on the basis of champerty but we decided against it. Champerty is also rare in Alberta because it is lawful to accept cases on contingency.

“Man Wins \$25,000 from ‘negligent’ lawyer in ‘tale of woe’ ”

Small, Peter, *The Star*, Toronto, 30 July 2010
[excerpt]

It's taken 21 years and two negligent lawyers, but Vernon Malcolm has finally been compensated for injuries he sustained in a car accident.

“This is a tale of woe,” Justice Duncan Grace said in his ruling made public this week in Ontario Superior Court.

Malcolm's story “is something that may bring joy and fodder to those who malign the legal profession and dismay and frustration to the many who work hard and long to bring it honour,” Grace said.

The judge awarded the 65-year-old heavy machinery mechanic, originally from Jamaica, \$25,000 in damages against his former lawyer, G. Peter Abrahams.

“Mr. Malcolm was not a high priority for Mr. Abrahams. In fact, he does not appear to have been a priority at all,” Grace said.

The saga started in 1989, when Malcolm sustained back injuries from his car being rear-ended on Highway 401 near Black Creek Dr.

Malcolm was initially convicted of making an unsafe lane change and was sued by the other driver, who was actually at fault, Grace said. Eventually Malcolm’s conviction was set aside and the other driver’s claim was dismissed.

Malcolm decided to seek damages for his injuries in a counterclaim, so he hired Irvine Usprech. But the lawyer went on to mislead him about the status of his claim, the judge said.

Malcolm maintains he was not told by Usprech that his counterclaim had been dismissed in 1994. To the contrary, on two occasions Usprech called to inform him that the matter was to be tried the next day, the judge said.

Malcolm accompanied Usprech to the courthouse both times, but on neither occasion was his case on the docket.

“While Mr. Malcolm did not know the depth of the deception, repeated miscues led Mr. Malcolm to conclude that his faith in his first lawyer was misplaced,” the judge said.

He fired Usprech, and then hired Abrahams in 1996.

Abrahams took a \$750 retainer and “did nothing” to pursue the counterclaim, the judge said.

Abrahams failed to inform Malcolm that his counterclaim had been dismissed and failed to take steps to resurrect it, the judge said.

“Mr. Abrahams’ negligence and failure to fulfill his retainer resulted in Mr. Malcolm losing any opportunity to pursue recovery in the motor vehicle action,” the judge said.

Malcolm complained to the Law Society of Upper Canada, which resulted in Abrahams returning the retainer in 2003.

“However the status of the counterclaim continued to be shrouded in mystery because (Abrahams) had lost Mr. Malcolm’s file. It has never been found,” Grace said.

Twelve years after the fact, Malcolm learned that his counterclaim had been dismissed.

In 2006, Malcolm launched a lawsuit against both lawyers for a total of \$300,000. He discovered that Usprech had died in 1998, and opted not to pursue his estate. But he continued suing Abrahams.

Almost 21 years after the accident that caused Malcolm to seek some remedy for his injuries, a trial was finally held in May — on his negligence claim.

Grace assessed \$7,500 in compensation for lost income due to Malcolm's auto accident injuries, and \$20,000 for pain and suffering. He reduced the total to \$25,000 because the chances of his counterclaim succeeding, had it been pursued, were uncertain.

Maurice Pilon, his present lawyer, declined comment except to say that Malcolm is happy it's over.

“Mr. Malcolm was very pleased to have his day in court,” he said.

Malcolm did not respond to a request for an interview.

Abrahams did not return phone calls and emails seeking comment.

4.4 Judicial: Criminal

"Law Firm Partner, Accused of Groping Opposing Counsel, Pleads Guilty to Harassment"

Cassens Weiss, Debra, www.abajournal.com, 06 July 2010

A partner with a Portland Ore., law firm accused of groping his opposing counsel in a construction defects case has pleaded guilty to harassment.

Jack Levy, a partner with Smith Freed & Eberhard, was sentenced Friday to two years of probation, *The Oregonian* reports. He was also ordered to write an apology letter and to attend a class on "gender issues" and professionalism.

Levy admitted to "offensive physical conduct" when he pleaded guilty to the misdemeanor, the story says. The opposing counsel, who wasn't identified in the story, had alleged the incident took place at a party hosted by another law firm in March. She said Levy started making sexual comments, and when she left the room, he followed her into the hallway, groped her and asked her crude sexual questions.

The woman has said she viewed the incident as a "strategic maneuver" designed to unsettle her in the case, the story says. During the hearing Friday, the woman said she reported the incident to the bar and the police despite fears that "people wouldn't believe me, would blame me, would think less of me, and that my career would be ruined. "

Levy has denied any intent to gain an unfair advantage in the litigation. The state bar is investigating.

"Civil Case Turns Criminal As Lawyer Allegedly Punches Lawyer Who Called Him Stupid, Bald"

Neil, Martha, www.abajournal.com, 19 July 2010

A 46-year-old Philadelphia area lawyer was briefly jailed and manacled last week after allegedly punching an opposing counsel who reportedly called him stupid, bald and an unprintable word.

Authorities said the Thursday incident, which was captured on a surveillance camera at the Lackawanna County Courthouse, showed 46-year-old Michael Rauch throwing three roundhouse punches at John Fisher, reports *The Citizens Voice*.

Rauch was briefly jailed afterward and taken in handcuffs and leg chains to be arraigned before he was released on \$10,000 unsecured bond. He was charged with simple assault, harassment and disorderly conduct, the newspaper reports.

Fisher, who practices in Scranton with Rinaldi & Rinaldi, declined to comment.

The underlying case concerns an auto accident.

"Lawyer says he couldn't have stopped paralegal's pilfering"

McKiernan, Michael, *Law Times*, 15 August 2010

[excerpt]

A lawyer who worked with former paralegal Shellee Spinks, who stole \$2.6 million from clients, denies he could have done anything to stop her.

Spinks used an old trust account belonging to Hamilton, Ont., lawyer Michael Puskas' law firm to deposit funds for mortgage transactions and then transferred the money to a personal account at the same bank to feed her gambling habit.

Sentencing the former paralegal to four years in jail on Aug 5, [2010] Ontario Supreme Court Justice Barry Matheson was left to wonder how she got away with it for so long.

"How it went undetected is a mystery to me. Did the lawyers not check on the paralegal?" asked Matheson. "Did the law society not check on the trust accounts of the firm? Many questions remain unanswered."

The court heard Spinks worked for Puskas between 2002 and 2008, when she was arrested. But Puskas tells *Law Times* his relationship with Spinks, who operated an office in the same building as him, was always at arm's length.

He says he contracted her to assist him on real estate files, but she was never his employee. "These were all files of which I wasn't aware. If someone is suggesting I should have been breaking into her office and reviewing her filing cabinet, that's putting a heavy onus on me," says Puskas.

He says he asked Spinks to close down the trust account in September 2006 because he was transitioning from sole practice to a partnership and no longer needed the old trust account.

"She told me she had closed it. She had me sign a cheque to transfer the remaining funds out of it into the new account. Unfortunately I relied upon her advice that she had indeed shut it down," says Puskas.

For its part, the Law Society of Upper Canada said it conducts about 1,200 spot audits on trust accounts every year to help identify financial irregularities.

“In addition, 400 practice management reviews are conducted annually to ensure that lawyers meet competency standards and to identify areas for improvement. The law society recently approved an increase in the number of spot audits so that all firms in Ontario will be audited once every five years,” says LSUC spokesman Roy Thomas.

Spinks pleaded guilty to 16 criminal charges in April that included theft by conversion, theft by power of attorney, perjury, obstruction of justice, and uttering forged document.

She allowed 12 clients to believe she was a lawyer, arranging mortgages and refinancing before stealing the funds. Between them, they lost almost \$1 million.

From October 2002, she also held power of attorney for an elderly woman who lived in a nursing home. Over the next six years, she stole \$200,000 from the woman, “systematically bankrupting” her, according to Crown counsel Tracy Stapleton.

In 2006, Spinks forged the will of an Ancaster, Ont., man that named her executrix of her estate. She kept the proceeds from the sale of his house and later swore a false affidavit confirming she was the executrix in order to cash out his securities. The total loss to his real beneficiaries was \$1.4 million.

At the sentencing, Stapleton said records at the Ontario Lottery and Gaming Corp. showed most of the money was gambled away at casinos by Spinks over the same period as the frauds.

Defence counsel Stephen White wanted a lighter two-and-a-half-year sentence, asking the judge to consider her difficult childhood and unorthodox legal training.

“There is no question that Ms. Spinks has dug her own grave, but I want to document how the shovels were handed to her,” he said in court.

White said his client’s parents were both gamblers who abused Spinks physically and emotionally. He said she was “thoroughly imbued” with gambling as a part of normal life from an extremely young age.

White said her legal education began under the Hamilton lawyer [Puskas] who gave her too much responsibility for his practice and encouraged her to cut corners.

“It led to Ms. Spinks having a higher sense of her capacity that she ought to have had. Her training ground was the slippery slope of practising quick and fast law,” said White.

But Matheson opted for a harsher sentence, explaining the court needs to send a message about this kind of crime.

“There is no doubt that many innocent people have had their lives ruined by Ms. Spinks,” said the judge. “She has made very little effort to rehabilitate herself, attending only a few Gamblers Anonymous meetings and she attempts to shift the blame to others.”

"Lawyer Gets 2 Days in Jail for Snorting Coke at Courthouse During Client's Trial"

Neil, Martha, www.abajournal.com, 21 September 2010

A Minnesota lawyer has been sentenced to two days in jail for snorting cocaine in the Winona County Courthouse while defending a client in a terroristic threats trial.

Charles Ramsay, 43, was also fined \$2,500, ordered to perform 240 hours of community service and sentenced to 10 years of probation in the third-degree felony drug possession case, reports *The Minneapolis Star Tribune*.

His conviction, which resulted from a guilty plea last year, will be converted to a misdemeanor if he completes his sentence successfully.

Ramsay was arrested mid-trial after a police investigator present to testify in his client's case reportedly noticed suspicious behavior in the courthouse and other authorities were called in. Trace-cocaine residue allegedly was then found on the conference table Ramsay had been using.

Dakota County Attorney James Backstrom said the fact that the crime was committed by an attorney, at the courthouse, while representing a client made the case more serious. However, he commended Ramsay for admitting he had a problem and seeking private treatment,

In an unrelated disciplinary case, the Associated Press reports that the attorney James Wolff has been disbarred, effective Oct.1, by the North Dakota Supreme Court.

He gave a client \$200 to purchase cocaine for his own use, “so they could party,” the court says in its opinion. He was also disciplined earlier concerning a felony bad check conviction and allegedly billed some clients for work that wasn't completed.

"Lawyer Says Dropping His Pants Was Educational Rather than Sexual"

Cassens Weiss, Debra, www.abajournal.com, 18 January 2011

A lawyer charged with dropping his pants while counseling two 19-year-old men says he exposed himself as part of a mentoring program to help at-risk youths.

Thomas Walkley, a lawyer from Norton, Ohio, has been charged with two misdemeanor counts of public indecency, *The Akron Journal* reports. He entered a written plea of not guilty on Tuesday, according to Fox8Cleveland and *The Akron Beacon Journal*.

The incident allegedly took place at the café [which] Walkley founded, an at-risk center for troubled teens. The two men told police they had gone to see Walkley about the possibility of performing court-ordered community service at the cafe.

One of the men, Xavier Swornowski, told *The Beacon Journal* that the conversation was very disjointed as they discussed an underage drinking arrest. Walkley dropped his pants, Swornowski said, after asking the men whether he could make them think differently.

Walkley told the newspaper that his motivation was educational rather than sexual, and he has dropped his pants in past counseling sessions. "Radical times call for radical measures," he said.

NewsNet5.com quotes from the 911 tape in which the victim handed the phone to Walkley. It includes this exchange:

"Dispatcher: I'm just trying to figure out what's going on.

"Walkley: Oh, there's nothing going on. They just came over for community service. I was explaining to them what the program is, and so forth.

"Dispatcher: So, nobody pulled their pants down?

"Walkley: I didn't say that. These guys are over the age of 18 and they were being ... we have something going on with our ... part of our program and if you want to send one of the officers over, we can talk to him about what that is."

"Disbarred lawyer facing 30 criminal charges"

Mckiernan, Michael, *Law Times*, 23 January 2011

A former London, Ont.-area lawyer has been charged with 30 criminal offences relating to more than \$1 million in missing funds more than a year after his disbarment by the Law Society of Upper Canada.

Alec John Dobson is accused of 11 counts of breach of trust; 11 counts of theft of entrusted monies over \$5,000; and a further eight counts of uttering falsified documents.

The 56-year-old was due to appear in court on Jan. 14 [2011], the same day police picked him up and charged him. None of the criminal allegations have been proven in court.

According to Const. Dennis Rivest, the fraud section at the London Police Service began investigating Dobson in the summer of 2008 “in regards to his professional business practices.” He ran a legal practice in the village of Dorchester, Ont., about 20 kilometers east of London.

Dobson had run into trouble with his law practice before. Around the same time, the law society suspended him on an interim interlocutory basis while it prepared for a hearing on his misconduct.

More than a year later, on Nov. 24, 2009, the LSUC revoked Dobson’s licence after a panel made 17 separate findings of misconduct against him related to a number of mortgage transactions.

If found he had removed money from the trust accounts of six sets of clients and misled them by telling them he had used the funds to pay out mortgages when he had in fact used them for another purpose.

One client, known only as S.D., contacted Dobson to ask why he [S.D.] was still paying interest on a line of credit. But according to the LSUC, Dobson hadn’t actually paid off the line of credit as instructed by S.D.

Two more clients, J.P. and M.P., had the proceeds of their sale broken down in a reporting letter detailing payments to cover an existing mortgage, a real estate commission, and a bridge loan. None of the payments, however, had been made.

According to the law society, Dobson [who has serious mental health issues] sent another set of clients, M.L. and L.L., a false copy of a cancelled cheque to back up his claim that he had paid out an existing mortgage.

Later, he admitted to them that the mortgage hadn’t been paid out but insisted a new bank draft had been issued to cover the amount. That was also false.

The panel also found Dobson guilty of misconduct for failing to maintain proper books and records related to three of the trust accounts as well as misleading a law society investigator assigned to the case.

The LSUC ordered Dobson, who represented himself at the hearing, to pay \$5,000 in costs to it. It also made him cover the \$158,000 costs of grants made to complainants from its compensation fund.

[**Note:** On 31 May 2012, Dobson was given a conditional sentence of two years less a day (i.e., to be served at his residence); based on a joint Crown defence sentencing submission.]

"Singleton convicted of theft and fraud"

**Sorensen, Jean, *Canadian Lawyer*, February 2011, p. 11
[excerpt]**

A 77 year old former lawyer was found guilty of fraud and theft in British Columbia's Supreme Court in December after using almost half a million dollars from a deceased client's trust fund two decades ago to finance a failed mountain-living complex that included growing wild rice.

Justice Elizabeth Arnold-Bailey refused to enter a judicial stay of proceedings for Marvin Kenneth Singleton's claim that the RCMP had "dragged their heels" in bringing him to trial and his constitutional rights to a speedy trial had been ignored.

Singleton practiced law in Nelson, B.C., and became the executor and trustee of the million-dollar-plus estate of John Alexander George between March 30, 1988 and Dec.31, 1990. The Crown alleged Singleton stole and defrauded the estate of just under \$500,000 by converting it for use in a planned development, which subsequently failed. The trust funds were earmarked [by the client] to go to charities and a local hospital.

Singleton came to the attention of the Law Society of B.C. in the mid-1980's because of "a significant number of complaints" about his practice, Arnold-Bailey said in her ruling. "Several reviews were undertaken and on October 23, 1990, the day before a three member panel was being sent to evaluate his competence, he voluntarily withdrew from the practice is law."

. . . .

"In convicting Mr. Singleton of theft and fraud as charged, it is my view that Mr. Singleton, as a highly intelligent man educated in both law and letters ... simply gave into the venal urge to engage in activities of interest to him with money within his sole control but belonging to others," the judge reasoned.

[**Note:** Singleton was, 15 September 2011, sentenced to 3 years imprisonment, and ordered to pay restitution of \$494,633 to the BC Law Society which had reimbursed Singleton's victims.]

"Lawyer in Custody Battle with Attorney Ex-Wife Kills Their 2 Teen Sons and Himself, Cops Say"

Neil, Martha, www.abajournal.com, 22 June 2011

Upset about his finances and a custody battle with his attorney ex-wife, a lawyer in California reportedly killed their two teenage sons and set fire to his home before committing suicide. Their bodies were found early yesterday.

Chula Vista police said Thomas Fuchs, 49, left notes explaining what had happened. It is the third murder-suicide in San Diego County in the past month, reports *The Los Angeles Times*.

All three died of gunshot wounds, reports *The San Diego Union-Tribune*. The newspaper says both Fuchs and his ex-wife, Maria Pe, are listed as inactive members of the California bar.

He earned his law degree from the University of California's Hastings College of the Law, but worked as a life coach after also obtaining a doctorate in psychology, according to *The Daily Mail* [London]. It says the home in which Fuchs lived was in foreclosure, according to court records.

"Disbarred lawyer is headed for jail"

Hainsworth, Jeremy, *The Lawyers Weekly*, 25 November 2011, p. 3

A disbarred British Columbia lawyer has been ordered jailed for two weeks and fined \$5,000 after a B.C. Supreme Court justice found him in contempt, October 26 [2011], of a previous order that he not practice law.

However John P. Gorman did not attend the final parts of the case, having previously told the Law Society of British Columbia that he intended to sue both it and the Law Society of Upper Canada for \$20 million for wrongful disbarment in 1984 (the Law Society of Upper Canada disbarment disposition is dated April 25, 1986).

In December, 2001 Gorman was ordered by Justice Nancy Morrison to abstain from appearing as counsel or advocate; drawing, revising or settling a document for use in a proceeding, judicial or extra-judicial or a document relating in any way to a proceeding under a statute of Canada or British Columbia; doing any act or negotiating in any way for the settlement of, or settling, a claim or demand for damages; or giving legal advice.

The B.C. society presented evidence in the 2011 case before Justice John Savage that Gorman had acted in disputes in 2007 and 2010. In both cases, he wrote emails suggesting legal action and marked “without prejudice.”

Savage ruled the evidence showed Gorman had contravened Morrison’s order.

“It is clear that there is a court order and that Gorman knew of it and its terms. Gorman appeared on his own behalf before Morrison J., and signed the order,” Savage said.

Savage observed that Gorman at various times had called himself the “Strata Advocate” and signed his name as “Counsel” while prominently displaying the designation “L.L.B. on his letterhead.

“Gorman uses legal terms such as ‘without prejudice’ in his correspondence when representing third parties,” Savage wrote. “In my opinion, the juxtaposition of these titles with his university qualification is clearly designed to mislead those with whom he is dealing.”

On June 8, Gorman’s request for an adjournment to October 25 was agreed on, in the action brought by the B.C. society under the province’s *Legal Profession Act*.

Society spokeswoman Lesley Pritchard said in an interview that Gorman is not authorized to act as a lawyer in British Columbia, after being disbarred in Ontario.

“To protect the public, we applied to the courts for an injunction, and in 2001 the court ordered him to stop practising law. In 2010, we received information he was again acting as legal counsel in B.C. so we asked the court to consider finding him in contempt of the order, which it has now done,” Pritchard said.

"Lawyer Pleads Guilty In Child Porn Case"

Law Times, 12 December 2011

A Timmins, Ont., lawyer involved in child pornography activities from his law office computer has pleaded guilty to two criminal charges.

Last week, Brad Sloan pleaded guilty to a charge of possession and distribution of child pornography, Ontario Provincial Police Det.-Const. Doug Lockhart confirmed this morning.

“The distribution actually took place from the confines of his office,” says Lockhart, who works with the OPP’s child sexual exploitation unit.

According to *The Timmins Daily Press*, a forensic computer examiner retained for the investigation retrieved 4,377 images depicting individuals or pairs of young girls in various sexual poses.

Sloan shared the images with others and, in e-mail exchanges, noted his computer's security, including the fact that no one else accessed it. But according to the newspaper, police learned of his activities from someone hired to do service work on the computer. Authorities first charged him in November 2009.

Sloan is to return to court on Jan. 11 for sentencing. Lockhart notes the Crown and defence have made a joint submission of a jail sentence to two years less a day.

According to Lockart, the fact that the investigation involved a law office complicated the computer search. Because of concerns over solicitor-client privilege, the court appointed an associate partner at Deloitte & Touche LLP to act as an independent examiner in the case who would separate privileged files and isolate any offensive materials.

At the same time, a criminal defence lawyer was to act as an independent referee to assist the examiner in deciding what materials were privileged.

[**Note:** Sloan was, 13 January 2012, sentenced to 2 years less a day imprisonment, and placed on 2 years' probation following his release from prison.]

"Lawyer Who Failed Courthouse Breath Test When She Arrived for Client Hearing Now Faces Criminal Case"

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

A California lawyer has been criminally charged after allegedly appearing at court to represent clients at hearings in a drunken state.

Michelle Winspur is accused of blowing twice the legal limit on Oct. 7, when she was given a breath-alcohol test as she entered Kings County Superior Court in Hartford, reports *The Visalia Times-Delta*.

She was tested because a court clerk said she sounded drunk when she called to say she was going to be late for trial.

Winspur, now 45, also failed a sobriety test she was given on Dec. 8 as she left court after a client hearing, according to *The Times-Delta* and *The Hanford Sentinel*.

She was criminally charged in Kings County both with appearing in court under the influence and with drunken driving because she was seen driving to court prior to the Oct. 7 breath test, Larry Crouch told *The Times-Delta*. He serves as chief trial deputy for the Kings County district attorney.

Already facing an attorney discipline case for allegedly being drunk during a 2010 trial in Monterey County, Winspur had her law license suspended earlier this month.

A defense lawyer pleaded not guilty on her behalf to the criminal charges last week, but Winspur herself did not appear because she apparently is in rehab.

“Inexperienced’ lawyer off the hook for criminal contempt”

**Schmitz, Christin, *The Lawyers Weekly*, 16 July 2010, pp. 2, 8
[excerpt]**

Ontario’s top court says a lawyer who inadvertently misled the court at her client’s sentencing hearing should not have been convicted of criminal contempt of court.

Late last month the Ontario Court of Appeal overturned the conviction and fine imposed in 2008 by Justice Hugh Fraser of Ontario’s Court of Justice on Karine Devost of Ottawa’s Langevin Morris Smith.

When Justice Fraser cited her for contempt in the face of the court, Devost, whose practice is 90 per cent civil and family litigation, cited her inexperience. She apologized unreservedly to the judge for inadvertently misleading him. However the judge rejected her explanation, parts of which he considered to be incredible and disingenuous.

In acquitting Devost, Justices David Doherty, Michael Moldaver and Robert Sharpe said Justice Fraser “quite properly” criticized Devost’s conduct.

However the evidence indicated that Devost didn’t have the *mens rea* to intentionally, or recklessly, mislead the court. The court said a misstatement by counsel that misleads a judge into imposing a sentence other than what he intends is not criminal contempt unless counsel intended that result, or knew there was a risk that her misleading statement would lead to that result and she was indifferent to that risk in making the submission.

“It’s one thing, albeit a serious thing, to declare that a lawyer’s inexperience, or even incompetence, has led to conduct that has frustrated, at least for a time, the proper administration of justice,” Justice Doherty wrote. “It is quite another thing, and a much more serious thing, to declare that a lawyer has acted criminally in the discharge of his or her duties by intentionally frustrating the due administration of justice. The judge was fully justified in conducting a full and careful inquiry into the appellant’s actions. With respect, however, having regard to the requisite *mens rea*, it was unreasonable in all of the circumstance to label the appellant’s conduct as criminal.”

Commenting on how judges should handle contempt of court proceedings, Justice Doherty said Justice Fraser should not have entered a conviction against Devost relying only on her written explanation and apology. Instead he should have put his concerns to her in person at the contempt hearing and allowed her to respond. Her counsel offered to put her on the stand, but the judge did not take up that offer.

“Clearly a judge is not obliged to accept an explanation or an apology,” Justice Doherty acknowledged. “There is, however, nothing manifestly incredible about the appellant’s explanation, or any apparent reason to doubt the sincerity of her apology. I say this having regard to the unchallenged evidence with respect to her inexperience in criminal law matters. It was unreasonable to reject the explanation based on a critical parsing of parts of that explanation, without affording the appellant an opportunity to address the specific concerns that the judge had.”

Devost was instructed by a colleague to step in to plead his client guilty and do a joint sentencing submission with the Crown before Justice Fraser. Devost asked the judge to give her client credit for the pre-sentence custody he served in Ontario. Because credit for pre-sentence custody is not available if an offender is already serving a sentence for another crime—that would be “double-dipping”—Justice Fraser naturally assumed when she asked for the pre-sentence custody credit that Devost’s client was not in custody on any other matter.

But Devost had been informed by the client before the hearing that he had actually started serving a two-year sentence imposed a week earlier in Quebec for an unrelated matter. He asked her if it was true that his sentence would be concurrent to any other sentence being served unless the judge specified the sentence to be “consecutive.” Before she went into court, Devost spoke with a lawyer who affirmed that if the judge did not say “consecutive” the sentence would be served concurrently.

However, because Justice Fraser didn’t know about the Quebec sentence, he did not consider, or say anything about, the sentence [he imposed] being consecutive.

He only became alive to the issue when correctional officials later asked for clarification because they would normally treat the Ontario sentence as running concurrently. The judge then amended his warrant of committal to indicate that the entire 12 months’ sentence should run consecutively.

He also demanded that Devost, who was called to the Bar in 2000, explain why she shouldn’t be convicted of contempt. She wrote to the judge explaining that she was unaware of the “double-dipping” sentencing issue when she routinely asked for credit to pre-sentence custody. She said she did so inadvertently because of her inexperience and lack of expertise in criminal law. However Justice Fraser rejected her explanation for what he described as her “deliberate actions” and “indifference to her duties” that interfered with the administration of justice. He cited her for contempt because Devost’s credit or pre-sentence custody submission left him with the false impression that the offender was not in custody on any other matter, with the result that the question of whether the sentence should be consecutive did not arise

5.0 FEES AND COSTS

5.1 Fees

Hurst v. Gill

[2011] N.S.J. No. 573, N.S.C.A., Bryson J.A. (Farrar J.A. concurring), Fichaud, J.A.
(dissenting on companion appeal)
[Headnote]

Appeal by husband from an order for division of family property and allocation of support—Appeal by the husband’s law firm from a decision postponing its judgment to the matrimonial award in favour of the wife—The parties met in 1989, married in 1995 and separated in 2008—The wife worked as a physiotherapist—The husband also had a varied work history which included attempts to have a successful music career—During the early part of the divorce proceedings, the law firm acted for the husband—After the husband terminated his relationship with the firm, it obtained a judgment for its fees, which it registered against the matrimonial home—The home had since been sold and the proceeds were held in trust pending the determination of priority of the sale proceeds—Following trial, the trial judge dismissed the husband’s claim to an interest in the physiotherapy clinic, ordered that the wife receive half of the proceeds from the sale of the matrimonial home, together with an equalization payment of \$46,328 in priority to the judgment of the firm—The wife was ordered to pay spousal support of \$2,200 per month until May 2012—The husband was to pay child support of \$216 per month to be set off against spousal support—**Held:** Appeal by husband dismissed—Appeal by the law firm allowed—The trial judge did not err in imputing income to the wife or the husband—In awarding spousal support, the trial judge properly considered the husband’s capacity to earn an income as well as his need to become financially self-sufficient—The judge properly applied s. 18 of the Matrimonial Property Act (N.S.) in determining that the husband had no interest in the wife’s physiotherapy clinic—In subordinating the law firm’s judgment to a division of matrimonial assets, the judge erred in law as the home was jointly owned by the parties, the firm’s judgment became a mortgage when it was registered against title and the firm consented to the sale of the home on the basis that its position would not be prejudiced—There was no basis to set aside the encumbrance.

Perino v. Perino

2009 CarswellOnt 7935 (Ont. Sup. Ct. I.), D.L. Corbett J., 28 September 2009
[paras. 30 to 32]

30 What I say here about compensation of counsel applies only to this case, and is not intended as a comment on appropriate rates for counsel within established frameworks for publicly funded legal services. What is required in this case is senior counsel, with expertise in family law, mental health law, competency and capacity issues, and a willingness to undertake the work immediately in view of the need to conclude this trial in a timely way.

31 In reviewing the requirements of this case, I am satisfied that the work and expertise involved more closely resembles the scope of work done at the PGT [Public Guardian and Trustee office] than at the OCL [Office of the Children's Lawyer] or in criminal defence work. Thus I am satisfied that the rates at which the PGT charges for its services on an indemnity basis, being \$250 to \$300 per hour, are an appropriate measure of reasonableness. Given Ms. Burns' seniority and expertise, I fix the reasonable rate for her remuneration at \$275 per hour, the middle of the range.

32 In determining what is "reasonable", therefore, I look to the rates attributed to counsel in a public sector civil law practice focused on the interests of persons who may not be able to speak for themselves. The economics of a civil practice may well be different than those of criminal defence or family law. I have not been provided with a record on this point, other than the fact, accepted for the purposes of this motion, that the rates charged out for PGT counsel reflect the costs of providing service (including lawyers' salaries and benefits) and do not include a profit component. As counsel for the Crown put it during argument, the Crown does not make a profit when claiming costs for these services. This measure, then, is not selected in the abstract, but rather is based on the acknowledged costs associated with compensating public sector counsel reasonably and the other costs associated with a civil practice analogous to the case before me.

Merchant Law Group v. R.

(2010), 322 D.L.R. (4th) 260 (Fed. C.A.), Dawson, Stratas J.J.A., Blais C.J., 05 August 2010
[Note: Leave to appeal to S.C.C. dismissed with costs.]
[paras. 1-4; 12-15; 21-22; 24-26]

Eleanor R. Dawson J.A.:

1 The respondent is a law firm. The Minister of National Revenue (Minister) assessed the respondent in respect of Goods and Services Tax (GST) under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (Act). The assessment related to the respondent's treatment of certain disbursements it incurred in the course of providing legal services to its clients. The disbursements included money spent in respect of searches, courier costs, office supplies, witness fees, recording services, transcript production, birth certificates, death certificates, marriage certificates, travel expenses and expert reports and testimonies.

2 It was the position of the Minister that such disbursements were consideration for the supply of legal services and so were taxable supplies, and that the respondent had failed to collect and remit GST in respect of those taxable supplies. The respondent challenged the assessment, arguing that it had incurred the disbursements as the agent for its clients. It followed, the respondent argued, that the disbursements were not in respect of a taxable supply and so it was not obliged to collect and remit GST on those disbursements.

3 A judge of the Tax Court, in reasons reported at [\[2008\] T.C.J. No. 265, 2008 TCC 337](#) (T.C.C. [General Procedure]), concluded that, except in respect of one class of disbursements (office expenses), the respondent had met the onus upon it to establish that it had incurred the disbursements as agent for its clients. It followed that, with that exception, the disbursements were not subject to GST. Judgment issued allowing the appeal from the Minister's assessment and remitting the matter to the Minister for reconsideration and recalculation in accordance with the reasons of the Judge.

4 A single issue is raised on this appeal: did the Tax Court Judge err by concluding that the respondent had met its onus to establish that it acted as agent for its clients when it incurred the disbursements in question? No challenge is made to the Judge's conclusions with respect to the respondent's liability to pay GST on invoices sent to Legal Aid Manitoba, the calculation of certain input tax credits or the imposition of penalties under paragraph 280(1)(a) of the Act.

. . . .

12 Disbursements incurred by a lawyer can be incurred in one of two ways. Disbursements can be incurred by a lawyer as the client's agent, or can be the lawyer's own expense incurred in the course of providing legal services. There is no dispute about how disbursements should be treated in either situation.

13 In the former situation, the lawyer is not the recipient of the supply as defined by subsection 123(1) of the Act so long as the lawyer is not the entity liable to pay the consideration owing under the agreement with the third-party supplier. The lawyer does not provide a supply. The lawyer is simply acting as an agent or conduit of his or her principal. In such case, the disbursement does not form part of the lawyer's expenses. It is the client's obligation and the lawyer pays the account on the client's behalf.

14 In the latter situation, where the lawyer is a "recipient" of a supply, the disbursement is the lawyer's expense. The client may reimburse the lawyer for the expense, but the client had no obligation to pay the third-party supplier. The lawyer incurred the expense in order to provide

legal services to the client. Because the goods or services were acquired for use or consumption in the course of providing legal services, lawyers who are GST registrants may claim an input tax credit so as to remove GST from the original disbursement. The pre-GST disbursement is then charged by the lawyer to the client. If eligible, GST is then levied on the entire account to the client, including the pre-GST disbursement.

15 What is in dispute in this case is whether the disbursements at issue were incurred by the respondent as agent for its clients. Canada Revenue Agency's position concerning whether one person acts as an agent for another is set out in the GST/HST Policy Statement P-182R. This Court has previously found the policy to not be binding upon the Court, but nonetheless to be "a useful tool in determining whether an agency relationship exists." See: *Glengarry Bingo Assn. v. R.*, [1999] G.S.T.C. 15, 237 N.R. 63 (Fed. C.A.).

. . . .

Analysis

21 As discussed above, for a lawyer who acquires goods or services not to be the "recipient" of the goods or services, the lawyer must establish that he or she was acting as agent on behalf of their client when the goods or services were acquired. The onus is on the lawyer to establish the existence of the agency relationship. See: *Glengarry Bingo* at paragraph 10.

22 This Court has previously recognized that an essential quality of agency is whether the putative agent has the capacity to affect the legal position of the principal. Thus, in *Glengarry Bingo*, once the Court determined that the putative agent did not have the capacity to affect the legal position of its alleged principal, the Court found it unnecessary to address any of the other factors indicative of an agency relationship. The absence of the ability to affect the legal position of the alleged principal conclusively determined that there was no agency relationship. See: *Glengarry Bingo* at paragraph 32. The Court then went on to explain, at paragraph 33, that:

The most common example of how an agent might affect the legal position of its principal is by entering a contract on the principal's behalf. It is clear here that GBA was not authorized to enter contracts with third parties on behalf of the members. For instance, GBA could not have entered into a contract for purchase of bingo equipment on behalf of its Members. It was only empowered to bind itself. In the contract of purchase, GBA bound itself; it did not purport to act for its Members nor did it expose them to risk. The fact that the Members were insulated from risk is demonstrated by the reaction of ABS when GBA was in arrears on its equipment payments: ABS made no attempt to seek compensation from the Members and the Members did not entertain the idea that they might be liable. These events illustrate that GBA could not effect the legal position of its Members, which demonstrates that an essential element of agency was not present.

[Emphasis added.]

. . . .

24 In the present case the Judge, while referencing liability under contract as being an indicator of an agency relationship, failed to address whether the respondent or its client was liable under the agreements with third-party suppliers to pay the consideration owing under those agreements. He made no finding of fact with respect to whether the clients assumed any risk or liability with third-party suppliers. In oral argument counsel for the respondent could not point to any evidence that was before the Judge on this point. Instead, the Judge relied upon the general nature of the solicitor-client relationship, reasoning that it was "trite to say that the relationship that exists between a solicitor and his client is one of principal and agent."

25 In my respectful view, the Judge erred in law by relying upon the general nature of the solicitor-client relationship. As a matter of law it does not follow that, because the solicitor-client relationship is generally one of agency, all financial obligations incurred by a lawyer while providing legal services are incurred as agent of its clients. Indeed, the Judge recognized this by dismissing that portion of the appeal that related to office expenses incurred by the respondent on behalf of clients. Application of the proper test required the Judge to determine whether the respondent's clients were bound by the contracts with third-party suppliers and were, therefore, liable for payment under the contracts and also exposed to any risk as a party to the contracts. If so, it follows that the respondent made payments to the suppliers only as an agent.

26 The absence of any evidence to support the conclusion that it was the respondent's clients who were bound to the contracts with third-party suppliers means that the respondent could not meet the onus upon it to establish that it acted as agent for its clients when it incurred disbursements. It follows that goods and services that attracted the disbursements were taxable supplies received by the respondent so that it was required to collect and remit GST on the disbursements.

"More Top Lawyers Break Through \$1,000 Hourly Billing Barrier"

Cassens Weiss, Debra, www.abajournal.com, 23 February 2011

Kirkland & Ellis lawyer Kirk Radke has emerged as one of the nation's most expensive lawyers, court filings suggest.

Radke, a private equity and corporate lawyer, charged hourly fees of \$1,250 in early 2010, *The Wall Street Journal* reports. He is one of an increasing number of top lawyers billing more than \$1,000 an hour.

Lawyers at the top of the billing spectrum tend to be in finance-related practices, such as mergers and acquisitions, bankruptcy law, and taxes, the newspaper reports. Its [chart](#) of publicly disclosed billing rates puts these lawyers at the top:

1) Kirk Radke of Kirkland & Ellis, a corporate lawyer billing \$1,250 an hour.

- 2) Ian Taplin of Kirkland & Ellis, a tax lawyer billing \$1,220 an hour.
- 3) Gerhard Schmidt of Weil Gotshal & Manges, a finance, corporate and M & A lawyer billing \$1,165 an hour.
- 4) Michelle Y.L. Gon of Baker McKenzie, a real estate, M&A and intellectual property lawyer billing \$1,163 an hour.
- 5) Andrew Shutter, a Cleary Gottlieb bankruptcy lawyer; and Michael McDonald, a Cleary Gottlieb corporate and M&A lawyer, both billing \$1,160 an hour.

Billing rates for other well-known lawyers are \$1,065 an hour for former White House counsel Gregory Craig, now at Skadden, Arps, Slate, Meagher & Flom; and \$1,045 an hour for bankruptcy lawyer Harvey Miller of Weil Gotshal.

"The underlying principle," Miller told *The Wall Street Journal*, "is if you can get it, get it."

"Kaye Scholer Will Pay Opponent's Legal Fees After Judge Blasts Pleading"

Cassens Weiss, Debra, www.abajournal.com, 10 March 2010

Kaye Scholer has agreed to pay an opponent's legal fees after a Florida bankruptcy judge criticized the law firm of trying to "score a litigation point" in its pleadings.

The law firm represents Bank of America in a foreclosure action against a Miami condominium developer, *The Wall Street Journal* reports. In a motion that sought to keep developer Cabi Downtown from renting out the condo units, Bank of America contended that at least nine condos had been rented to convicted felons, including a sexual offender.

Cabi's lawyers responded that only two of the units were rented to residents with criminal records, and their histories don't raise any basis for concern, the story says. Both sides now agree that none of the renters was a sexual offender.

Judge Laurel Myerson Isicoff said the Kaye Scholer lawyers should have investigated more thoroughly before putting possible defamatory allegations in its pleadings, according to *The Wall Street Journal* account. "If you truly believed there were dangerous individuals living in that building," Isicoff wrote, "then that is something you should have brought to the debtor's attention immediately, unless it's more important to score a litigation point than it is to protect the safety of the people living in your collateral."

A Kaye Scholer lawyer told *The Wall Street Journal* that the information in the pleadings came from lease files provided by the developer, but some of it turned out to be inaccurate. A lawyer for Cabi countered that the assertion is “completely wrong.”

"Legal project management's new billing paradigm"

**Rappaport, Michael, *The Lawyers Weekly*, 14 May 2010
[excerpt]**

For the masses that are still skeptical or struggling with how to adapt the arcane principles of project management to the practice of law, the arrival of Steven’s new book will be a godsend. *Legal Project Management: Control Costs, Meet Schedules, Manage Risks, and Maintain Sanity* is destined to become the bible of project management for law firms, and frequently consulted book by lawyers of all stripes.

Levy is a legal project management guru who hails from Seattle. He honed his expertise as the head of the legal technology department of Microsoft and the principal of Lexivian, a consultancy to major law firms.

What took law firms so long to embrace the creed of project management? Until the global recession, law firms were doing quite nicely billing by the hour, running up the clock and charging exorbitant hourly rates. Pressure from cash-strapped corporate clients may have driven law firms to implement project management firm-wide—namely, the unpredictable nature of complex legal work. Litigation, in particular is characterized by multiple variables beyond the control of counsel, not to mention the jargon-laden, process-heavy, and statistically driven nature of project management.

Legal project management, as conceived by Levy, offers a powerful new approach to the traditional field of project management, with less emphasis on terminology, methodology and methodology and metrics. Best of all, it doesn’t require any sophisticated software to get started. A Microsoft Excel spreadsheet is all that’s needed to begin to plan legal work and provide accurate budgetary estimates, Levy preaches.

As written by Levy, legal project management involves the following four stages: First, initiation—a discussion with the client on the scope of the work and desired outcome; second, planning—this involves staffing, sourcing, scheduling and providing budgetary estimates; third, execution—delivery of the outcome and ongoing communication with the client and further, evaluation—assuring client satisfaction, stockpiling lessons learned and celebrating success.

“Planning is the heart of project management, legal or otherwise,” Levy writes. But he recognizes that in the legal world, as in warfare, “no battle plan survives contact with the enemy.” He acknowledges that certain practice areas are more amenable to project management, such as trademark and patents. But even the least predictable practice areas, such as litigation,

have components that can be carved out and managed like projects—for example, document review, which can cheaply be outsourced to contract lawyers.

Legal project management is not a quick fix for a law firm. The proper implementation of project management as a firm wide initiative requires the development of tools and techniques tailored to each practice area to plan work and generate budgets. In addition, partners, associates and staff must be trained in the principles and practice of project management—a substantial investment in time and money for a busy firm. Furthermore, for training to have any lasting effect, according to Levy, it must be followed up with coaching to ease the transfer of the skills learned on paper to the messy real world.

"Legal Bills in 5-Year Divorce Battle Allegedly Top \$36M"

Neil, Martha, www.abajournal.com, 06 July 2010

An unidentified woman, (presumably rich), is seeking court intervention concerning the \$10.5 million legal fees she says she has been charged in a hard-fought five-year divorce battle.

Her husband has allegedly spent 26 million in legal fees, so far, in the case, which is Australia's most expensive divorce, reports *The Herald Sun*.

Contending in court papers that the legal fees she was charged were unfair and unreasonable, the Adelaide woman says she is stressed and strapped for cash and asks the Supreme Court to intervene and cut the bill.

Her now-former law firm, which is not identified, says the client was "fully informed" that "not all lawyers charged on the same basis" and says it did what it did to pursue her goal of "maximize[ing] the chance of a successful outcome."

"Restraining runaway litigation costs—Getting your budget under control"

Rappaport, Michael, *The Lawyers Weekly In-House Counsel*, Spring 2010, pp. 34, 37-39

The French Enlightenment philosopher Voltaire wrote, "I was never ruined but twice—one when I lost a lawsuit, and once when I gained one." What was true in 18th century holds true today. When not carefully managed, legal fees can rapidly spiral out of control, rendering the cost of litigation prohibitively expensive

To assist in house counsel with the often tricky task of managing legal costs in litigation, *In house Counsel* consulted two of North America's most knowledgeable experts on legal fees,

John Toothman and William Ross. Toothman is a Harvard-trained lawyer and the founder and principle of The Devil's Advocate, a Virginia-based firm that provides legal fee management and litigation consulting services. Ross is professor of law at Samford University in Birmingham, Ala., and a nationally-recognized expert on the ethics of legal fees. He has authored two books on attorney billing issues, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* and *Legal Fees: Law and practice* (with Toothman), as well as numerous articles.

Before retaining outside counsel it is essential to find a law firm that has experience handling your exact legal matter, according to Toothman. When searching for representation, you should request that firms provide a detailed plan and an itemized budget. "If the proposed plan and budget includes a lot of caveats it is typically a sign that the firm lack sufficient experience with your particular matter," Toothman cautions, "And you should look elsewhere."

After selecting outside counsel draft a retainer agreement. Do not sign a retainer agreement that was drafted by the law firm being retained as it generally will be lop-sided in favour of the firm and detrimental to the client.

"If the law firm drafts the retainer agreement it may appear innocuous on its face, but all the vital provisions that protect the client may be missing," Toothman warns. Many of the provisions that law firms slip into retainer agreements according to Toothman are waivers of client's rights. For instance, many law firm retainer agreements will contain arbitration clauses which remove a client's rights to take a fee dispute to court. The retainer agreement should address the following issues with regards to managing legal expenses: billing of fees and expenses, hourly rates, payment terms, staffing and matter management and fee dispute resolution.

Outlining legal fees in retainer agreements

Establishing hourly rates

The Wall Street Journal reported that some U.S. Law firms shattered the \$1,000 (all figures in the U.S. currency) per hour mark for their senior lawyers in September 2007. Not surprisingly many clients think that controlling costs is about negotiating lower hourly rates, according to Toothman. Although Toothman dismisses many of these exorbitant rates as "vanity rates" he maintains that bargaining for discounted rates or insisting that only more junior associates with lower hourly rates work on a file won't necessarily lead to substantial cost savings.

"Lawyers with higher hourly rates generally know more and are more efficient. A senior partner won't waste 20 hours researching an issue like a junior associate," Toothman says. While there is no harm in requesting reduced rates, beyond setting out hourly rates the retainer agreement should also contain a provision that the client will be notified of any changes to hourly rates, to prevent law firms from raising rates without the client's knowledge or consent.

Distinguishing between billable and non-billable work

When it comes to billing clients some law firms aren't shy about billing for work that should be considered non-billable. Case in point: In September 2007, *The National Law Journal* reported that some U.S. Law firms have started to bill clients for time spent billing. "Lawyers should not bill for clerical work," Ross says. Therefore it is essential that the retainer agreement clearly distinguish between billable work and non-billable work, such as administrative tasks.

Detailed billing guidelines

"The biggest challenge in auditing legal bills is that the entries are often too cryptic. There often isn't enough detail to know if the fee is reasonable," Toothman explains. Incorporating detailed billing guidelines in the retainer agreement can establish standards to make bills more transparent.

First, the billing guidelines should set out the minimum billing increments. "Clients should be billed in units of 1/10 of an hour, since lawyers tend to round up time," Ross says. He notes that some tolerate quarterly hour billing rates." When a client is paying a few hundred dollars per hour getting dinged for only 6 minutes rather than 15 minutes every time a lawyer sends a curt e-mail or makes a brief phone call can add up quickly, however.

Secondly, the billing guidelines should establish standards on how to record time, by clearly identifying which lawyer performed each task, how much time was spent on each task and describing the nature and purpose of each task. Too many legal bills are difficult to parse due to the tendency of lawyers to employ "block billing."

"Tasks should not be lumped together under one general time entry. Every individual task should be spelled out, so clients can conduct a meaningful inquiry on how much time was spent on each activity and why," Ross says. He adds that he has seen "clients billed hundreds of hours for entries that stated 'document review' with no explanation as to what documents were being reviewed or why."

Ultimately, hourly billing is an honour system. "It is hard to catch a lawyer who pads their hours," says Toothman, who has personally audited legal bills in which lawyers charged more than 24 hours in a day. Insisting on detailed time entries on legal bills won't necessarily be a panacea for padding legal bills, but at least it will provide some basis to determine if the time spent on a given task was reasonable.

Thirdly, billing guidelines should establish the frequency of billing and payment terms. "Clients should monitor bills as the matter progresses," says Ross, who favours monthly billing. He adds, "Too often clients don't challenge bills until the end of the matter which is too late to wait."

Staffing and staff turnover

"The major factors that drive fees are the number of staff, the hourly rates and the hours billed," says Toothman, who had audited legal bills with over 200 lawyers on a file. He added,

“Of these factors, staffing is the easiest to control. Limit the number of lawyers on your file and you can really pare down the amount of the overall bill.”

Thus, it is vital that retainer agreements address staffing and staff turnover. In-house counsel want to carefully select who they want on their litigation team and require prior approval for the addition of any new team members. “Some firms send several lawyers to court when one or two would suffice,” Ross notes. He adds, “You also don’t want to see lawyers coming and going or firms billing out summer student’s time.”

Legitimate legal expenses

Clients can expect to be charged for a wide range of disbursements during litigation, from court filing fees to photocopies to travel time. The retainer agreement should address which expenses will be reimbursed and the rate of reimbursement. It should go without saying that the client won’t pick up the tab for personal expenses.

Less obvious is which expenses should be regarded as the law firm’s overhead and absorbed in the hourly billable rate and which expenses should be billed to the client on top of legal fees for services rendered. Toothman argues that clients should not be charged for anything that the law firms pays a flat fee for such as long distance phone calls and access to legal research databases, since these services are generally covered in monthly or annual plans.

“If a firm pays a flat fee for something it should not be divided up and charged to each client, it should be included in the hourly rate” Toothman says. In addition he argues that law firms should not be marking up and making a profit off disbursements such as photocopies and faxes.

“There are law firms that make thousands on photocopying charging a quarter per copy when the actual cost is a nickel,” Toothman says. He has also seen firms charge clients “a dollar per page per fax when it hasn’t cost that much to send a fax for 25 years.”

Travel time is another tricky area for retainer agreements to address.

Ross muses, “I reviewed one legal bill in which a lawyer under the heading ‘ground transportation’ charged a client for a new pair of running shoes.”

M. (D.E) v. M (J.M.)

2010 CarswellPEI 58, Gordon L. Campbell J., 20 September 2010

[Headnote]

Parties were engaged in matrimonial litigation—Trial judge granted wife's motion for sole custody, granted wife enforcement provisions with respect to prior order, found husband in contempt of prior order, dismissed husband's application for victim assistance order, and

awarded wife costs on substantial indemnity basis—Wife submitted \$13,671.73 bill of costs, comprised of \$10,860 for legal fees based on 54.3 hours at \$200 per hour, \$408 for 6.8 hours of lawyer's administrative assistant at \$60 per hour, plus disbursements of \$585 for witness fee, \$68.75 for photocopying, and GST—**Held:** Wife was awarded \$13,671.73 in costs, as submitted—Central issue in fixing costs was whether costs reflected what parties would expect as fair and reasonable amount to be contributed by unsuccessful party to costs of successful party—Amounts lawyer claimed on wife's behalf were reasonable—There was extensive judicial history between parties—Extensive, detailed order was put in place after great deal of expense by both parties—Husband repeatedly breached and ignored order and was in contempt of court—But for husband's conduct, entire court proceeding was unnecessary—Given very specific, detailed court orders and husband's clear contravention of orders, husband ought to have predicted result of motion—After spending great deal of time and money in previous proceedings and abiding by resulting order, wife was forced to file motion and pursue it with vigor—Wife should not have been put to expense of bringing motion—Wife's lawyer's times were reasonable, as was time submitted on behalf of administrative assistant who had to attend to matters while lawyer was away for extended period that would otherwise have been performed by lawyer.

"Avoiding 'Wolf in Sheep's Clothing', Disguised Hourly Fees"

Lamb, Patrick J., www.abajournal.com, 20 October 2010

[excerpt]

Sometime in 2009, I was talking to an in-house lawyer who, I had heard, was not a fan of alternative fee arrangements. When I inquired why, he said that he knew how much a certain kind of case had been costing his company. He asked a firm to propose a fixed fee for that group of cases, and the firm proposed a number that was higher than the average amount he had been paying. “Why would I ever want to lock in at a higher amount,” he said in somewhat exasperated tone.

A while later I was at an event where I was seated with the managing partners of two of the largest 50 firms in the country. Separately, both explained their general approach to calculating fixed fees, and the calculation methodology was virtually identical. Estimate the number of hours required to perform the engagement. Round up. Multiply the hours by the hourly rate of the person who would perform the work. Adjust for expected hourly rate increases. Add the numbers. Round up. This yields a total, and the fee is fixed at that total if the estimator feels good about the number or adjusted up if the estimator is less confident in the number. The phrase I apply to this type of calculation is “wolf in sheep’s clothing.” It is simply a disguised, dressed up, hourly fee.

Is it any wonder clients get frustrated when firms quote fees based on this? The proposed fee locks in all of the firm’s profit, and takes away the potential benefit the client would receive

from early resolution, a lower total fee. It is the worst of all worlds from the client's perspective. Accepting a fee calculated in this matter would be a bizarre business decision, to say the least.

A fee that is not hourly based and provides value to the client, in other words, a value fee, must be both lower than a fully loaded hourly fee for the entire matter and transfer some of the risk the client normally bears to the law firm. In other words, law firms must accept the risk that on some matters, they will not earn as much as they would have under an hourly rate fee. Notice I didn't say lose money, because how much they would have made under the hourly fee is not a metric relevant to "losing" unless a firm has unbelievably bad cost structure. Of course, if a firm becomes really efficient and leans (and few firms exist that meet this standard), it could actually increase its profit margin.

In this scenario, the client's risk is that it theoretically overpays if a matter resolves at an early stage. By "overpay," I mean pays more on a value-fee basis than had it paid by the hour. This is really a form of insurance against a runaway fee if the matter did not resolve early, and it is the "juice," the incentive payment to the firm to do everything possible to secure the best result earlier than it otherwise might.

**"Fee for all: are lawyers overbilling clients?
Author alleges law societies turn blind-eye to lawyers overbilling their clients"**

Rappaport, Michael, *The Lawyers Weekly*, 19 November 2010, pp. 20, 27

Men-of-law in medieval England found it unseemly to ask for money to argue for justice. Hence, attorneys in 14th century courts wore a tippet—a hood over their shoulders with a pouch in the back—in which clients could discreetly slip coins as payment of skillful advocacy.

Today, lawyers show no such reticence. Indeed, as R.J. Halina's book, *The 360 –Minute Hour: Why Lawyers Cost So Much* reveals, many lawyers have no qualms about overbilling and occasionally bilking clients. Her book is a detailed expose of lawyers billing practices, and it also offers pragmatic advice on hiring and dealing with lawyers for the lay public.

The title of Halina's book is derived from the practice of lawyers billing in minimum six minute increments, even if a task took considerably less than six minutes, ... [such as] for a task that required a minute [meaning], theoretically, at least, a lawyer could generate 360 billable minutes in an hour.

Halina's account of legal billing practices is based on her 25 years of working in law offices both large and small in Toronto and her 10 experiences as a client. During her career as a law clerk Halina saw how the legal profession evolved from a "fair legal service provider" to a "billing-oriented business."

As a client in five out of 10 engagements she encountered “shoddy bordering on incompetent, quality of legal work” and “ridiculous, on occasion bordering on fraudulent billing practices.”

She lays the blame at the feet of the law societies—which have been “unwilling to seriously oversee and regulate quality and billing practices of their members” and have granted lawyers “a very wide berth to bill in ways that provide them with the greatest financial gain.” Ultimately, lawyers and law firms are responsible for how they bill. Nevertheless, as Halina demonstrates, law societies bear significant blame for failing to protect the public from being gouged. She argues that law societies do not provide sufficient guidelines on acceptable billing practices. Nor do they provide effective protection for clients who are overbilled. Worse still, in the vast majority of cases they fail to discipline lawyers who overcharge clients, unless fraud is involved.

Minimal guidelines

Halina lambastes the law societies for their lack of sufficient rules on billing practices. All that law societies require is that lawyers’ fees be “fair and reasonable.” The Rules of Professional Conduct do provide brief commentary on factors that can be used to assess whether a lawyer’s fees meet this criteria, such as the time and effort involved. Also the rules stipulate that lawyers must separate fees from disbursements when rendering a statement of accounts.

Beyond these mostly vague requirements, the rules provide no guidance on how to bill or how much to bill.

Lawyers may provide monthly detailed invoices itemizing each task performed on behalf of a client or they may simply present their client with a lump sum bill at the conclusion of a matter.

As for “fair and reasonable” fees this appears to be based on how much the market will bear with some Bay Street lawyers charging close to \$1,000 per hour.

Lawyers are not supposed to charge clients the same rates for non-legal work such as acting as an executor for an estate as for legal work, according to case law. But the rules do not spell out what constitutes legal and non-legal work. Nor do the rules prohibit lawyers from charging identical rates for non-legal work.

Even in basic matters such as setting out prescribed fees for disbursements the rules are silent. Many lawyers and law firms charge hefty markups for disbursements, such as software and database fees, photocopying, printing and faxing. Surely these costs should either be absorbed as part of the hourly rate or charged to clients on a cost recovery basis?

Challenging legal bills

Almost as bad as being overcharged for legal work is the law societies’ unwillingness to hear fee disputes, Halina argues. In the event that clients believe they have been overcharged by

their lawyer, they must apply to court within 30 days of receipt of the bill to have it assessed under Ontario's *Solicitors Act*.

How can clients without a legal background determine what is "fair and reasonable," R.J. Halina asks rhetorically. Often to contest a legal bill, clients have to engage a second lawyer, which means paying even more legal fees. To top it off, if clients lose at the assessment hearing, not only do they have to pay the bill in full, they may also have to pay costs to their lawyers for the time they spent defending the bills.

Given the costs and risks involved many clients who are overbilled will simply pay up rather than apply for an assessment. Nonetheless, in 2008, there were 2,489 solicitor client assessment filings received in the Ontario Superior Court of Justice.

Richard Devlin and Porter Heffernan of Dalhousie University Schulick School of Law wrote in their 2007 paper, *The End(s) of Self Regulation?*

...bills which are taxed are overwhelmingly reduced. It is disconcerting that the most effective method of regulating legal fees is one which removes control from the hands of the legal profession. If consumers can be guaranteed fair billing only through recourse to the courts, that would seem to be a significant institutional failure of self-regulation.

Worse still Halina writes: "Incredibly few lawyers have actually been disciplined for charging unreasonably or excessive fees, even though bills that are put to assessment by clients are overwhelming reduced."

Big companies and financial institutions have in-house counsel to keep tabs on external counsel and runaway legal fees. The general public can barely afford a lawyer to represent them in court, let alone a second lawyer to review or contest their legal bills.

While many lawyers are conscientious when it comes to billing, it should greatly disturb the legal profession that the general public would feel compelled to buy Halina's book, *The 360-Minute Hour*, before retaining a lawyer to protect themselves from potentially being ripped-off.

Gaska v. Anderson

(2010), 85 R.F.L. (6th) 387 (Ont. Sup. Ct. J), P.D. Lauwers J.
[Headnote]

Woman retained solicitor with respect to matrimonial proceedings and solicitor rendered seven accounts during period from February 2008 to September 2009 for total of \$16,313.51—Woman paid \$12,050, with remaining balance of \$4,263.51 unpaid—Following particular proceeding [covered by the accounts] in August 2009, woman was awarded costs and solicitor failed to take out order endorsing costs or to act to enforce costs—Solicitor resigned from

representation in August 2009—Woman requested and received itemized back up of accounts in December 2009—Local registrar issued order for assessment [of accounts] pursuant to s. 3(b) of *Solicitors Act*, serving solicitor with notice of pre-assessment hearing in January 2009—Solicitor commenced Small Claims Court action against woman to recover [balance of accounts] owing—Solicitor brought application to set aside order of assessment and notice of reassessment hearing—**Held:** Application dismissed—Woman had absolute right under Act to requisition, as warranted, referral for assessment—Failure of solicitor to follow through on costs award raised legitimate question about value of solicitor’s services—Assessment officer was more competent to determine issue than adjudicator in Small Claims Court proceeding—Solicitor’s imperiousness and defensiveness were contrary to professional attitude and values embodied in Act.

Trignani v. R.

2010 CarswellNat 922, [2010] 6 C.T.C. 2084 (Tax Ct. Can. [Informal Procedure]), J.M. Woods J.
[Headnote; paras. 13-30]

Taxpayer and spouse filed petitions for divorce seeking sole custody of child and claiming child support—Under interim consent order, taxpayer paid child support of \$350 per month—Divorce order issued in 2006 provided for joint custody, with taxpayer paying child support of \$443 per month—Taxpayer paid legal fees in 2006 of \$36,185.35—Taxpayer claimed deduction in amount of \$5,375 as estimate of legal fees attributable to his claim for child support—Minister assessed taxpayer under *Income Tax Act*, disallowing deduction for legal fees—Taxpayer appealed—**Held:** Appeal allowed—Minister’s apparent assumption that taxpayer had not made formal claim for child support was incorrect—Principle that fees incurred to establish rather than enforce right to support were on capital rather than current account had only been applied to spousal support—Legal expenses for child support were on current account as there was pre-existing right by virtue of legislative obligation on each parent to support child—Consent order did not extinguish taxpayer’s right to child support, since legislative obligation did not cease with interim support order—Clause in 2006 court order indicated child support claim was abandoned, but it could well have been abandoned only when settlement was entered into, after most legal services were rendered—Evidence made strong case that claim for child custody and consequently child support was *bona fide*, not frivolous, and had reasonable prospect of success—In absence of evidence to contrary, claim was presumed to have been vigorously pursued in 2006 when legal services were provided.

. . . .

Analysis

13 It has generally been accepted that legal expenses incurred to obtain child support are deductible in computing income: *Wakeman v. R.*, [1996] 3 C.T.C. 2165 (T.C.C.); *McCull v. R.*

2000 D.T.C. 2148 (T.C.C. [Informal Procedure]); *Sabour v. R.* (2001), [2002] 1 C.T.C. 2585 (T.C.C. [Informal Procedure]) (in *obiter* at para. 9); and *Rabb v. R.*, [2006] 3 C.T.C. 2266 (T.C.C. [Informal Procedure]).

14 The principle has also been accepted by the Canada Revenue Agency, as evidenced by Interpretation Bulletin IT-99R5, at para. 17.

15 In making the assessment, it appears that the Minister did not apply this principle because it was assumed that the appellant had not made a formal claim for child support (Reply, para. 19(f)).

16 It is clear from the evidence, though, that this assumption was incorrect. In April 2001, the appellant made a claim for sole custody and child support in an answer and counterpetition filed in the Ontario Superior Court of Justice.

17 At the hearing, counsel for the respondent raised two arguments in support of the assessment. First, it was argued that in 2006 the appellant did not have a right to receive child support from his spouse because the May 2001 order required the appellant to pay child support. Second, it was argued that the appellant had abandoned his claim for child support.

18 The first argument appears to be based on a long-standing principle that has been applied in the context of spousal support. Under this principle, legal fees incurred to establish a right to spousal support were considered to be on account of capital and not deductible by virtue of s. 18(1)(b). This is in contrast to fees incurred to enforce a pre-existing right, which are on current account.

19 More recent judicial decisions have questioned the correctness of this principle and it appears that the CRA no longer follows it: *Nissim v. R.* (1998), [1999] 1 C.T.C. 2119 (T.C.C.); Income Tax Technical News, No. 24, October 10, 2002. At this point, however, the jurisprudence is not clearly established: *Nadeau c. R.*, 2003 FCA 400 (F.C.A.), at para. 7.

20 This appeal does not concern spousal support, however, and I am not aware that the above principle has ever been applied to child support.

21 It appears that with respect to child support, legal expenses have been considered to be on current account on the basis that there is a pre-existing right by virtue of a legislative obligation on each parent to support their children: *McCull*, above.

22 If I understand the respondent's position correctly, it is that the traditional capital distinction applies here. The respondent submits that in 2006 the appellant did not have a pre-existing right to child support because this right was extinguished by the May 2001 order which entitled the appellant's spouse to interim child support.

23 I do not agree with this submission. In my view, the May 2001 order did not extinguish the appellant's right to child support. The legislative obligation to support children does not cease with a court order, and especially a court order providing for interim support only.

24 I now turn to the respondent's second argument, which was that the appellant had abandoned the claim for child support.

25 In order for this argument to succeed, it must be established that the claim for child support was abandoned before the relevant legal services in 2006 were provided.

26 This has not been established by the evidence.

27 In cross-examination, the appellant acknowledged that the child support claim was abandoned, as evidenced by a clause in the 2006 court order. I am not prepared to take the leap that the claim was abandoned before the relevant legal services were provided. It is quite possible that the claim was abandoned only when the minutes of settlement were entered into, which likely was after most of the legal services were rendered.

28 The evidence as a whole makes a strong case that the claim for child custody (and consequently child support) in 2001 was *bona fide*, not frivolous, and had a reasonable prospect of success. In the absence of evidence to the contrary, I am not willing to presume that this claim was not being vigourously pursued in 2006.

29 Finally, I would briefly comment that in reaching this conclusion I have not attached any weight to the 2008 letter from the lawyer which apportioned the legal fees. The lawyer did not testify and was not subject to cross-examination.

30 The appeal will be allowed on this basis. The appellant shall be entitled to costs in accordance with the tariff.

"Appeal court dismisses law firm's claim against rival"

McKiernan, Michael, *Law Times*, 02 January 2011
[excerpt]

The Ontario Court of Appeal has dismissed a Toronto law firm's against a rival firm that took over one of its contingency fee files.

Heydary Hamilton Professional Corp., sued former franchisee clients Thakar and Rajiv Baweja over an unpaid bill of more than \$60,000, but also named Ben Hanuka and his firm, Davis Moldaver LLP as defendants, claiming damages for conspiracy, inducing breach of contract and unlawful interference with economic interests, and unjust enrichment.

In *Heydary Hamilton Professional Corp. v. Hanuka*, appeal court justices Janet Simmons, Eleanore Cronk, and Jean MacFarland agreed with [trial justice] Spence's decision, noting that Heydary Hamilton's claim "contained bald, unsupported assertions of professional misconduct."

“Although it may be generally desirable that successor law firms co-operate in protecting a predecessor law firm’s account, to hold that a successor law firm’s failure to make arrangements to do so, standing alone, could found a cause of action would trench on a client’s unfettered right to change counsel,” they wrote.

""Convicted Ex-Qwest CEO Sues over \$25M Legal Bill, Claims Lawyers Billed Him for Their Underwear""

Neil, Martha, www.abajournal.com, 23 March 2011

Contending that he was “grossly overbilled” for a negligent defense in an insider trading case, the jailed former CEO of Qwest Communications International Inc. has sued over his legal bill of more than \$25 million.

Joseph Nacchio, who is serving a 70-month prison term for illegally selling \$52 million in Qwest stock in reliance on inside information, complains that his defense lawyers even billed him for their underwear, reports Bloomberg.

His lawsuit, which was filed today in state Superior Court in New Jersey, seeks compensatory and punitive damages and attorney’s fees from the defendants, attorneys Herbert Stern and Kevin Kilcullen and their Stern Kilcullen law firm. The two lawyers did not immediately respond to the news agency’s request for comment.

“As a result of bad lawyering, my client has a 70-month jail and nearly \$70 million in fines,” says Nacchio’s current attorney, Bruce Nagel of Nagel Rice, of the ex-CEO’s conviction and sentence in federal court in Denver. “He’s innocent, and he didn’t get his best shot with the lawyer he had.”

""Matrimonial Firm Got Zip after Discussing Divorce Case with Both Spouses""

Neil, Martha, www.abajournal.com, 26 October 2011
[excerpt]

Attorney David J. Grund only met with David Newton for an hour or two. And, Grund said, he told Newton not to give him any confidential information, because he wouldn’t represent him in a pending divorce until a contract was signed.

But a state appellate court found that the 2007 consultation clearly conflicted Grund and his Illinois law firm, Grund & Leavitt, out of representing an adverse party in the same matter—Newton’s wife, Hadley, the ABA/BNA Lawyers’ Manual on Professional Conduct reports.

Upholding a trial court's ruling on all fronts, the Illinois Appellate Court, First District, agreed both that the representation contract between Grund and Hadley Newton in effect never existed because it violated state attorney ethics rules and that it was not enforceable for the same reason [considering that Grund had previously met with the other spouse, David Newton].

There is an irrebuttable presumption in such a case, the court explained, that confidential material was shared between lawyer and client, whether or not it actually was or the lawyer has any recollection of the information or took notes. (Grund said he didn't, as far as his conversation with David Newton as concerned.)

As a matter of policy, "where the ethical rules have been violated and counsel has represented a party with conflicting, adverse interests, counsel's purported good faith is irrelevant," Justice Aurelia Pucinski wrote.

"Sealing the Deal: How to Negotiate Fee Agreements"

Ward, Stephanie Francis, www.abajournal.com, 07 November 2011

[*excerpt*]

Dianne Karpman: I do a program on this every year at the Beverly Hills Bar, and write repeatedly—I've been writing the California Bar Journal for about 15 years now on a monthly basis. And the California State Bar has free sample fee forms available online. And your listeners can either email me and we'll send a link, or they can go to Google and do "sample fee forms". And although they're Californian—which means they're useful for 200,000 lawyers—they're useful for many more than that number because these are clauses that have been tested since about 1987. These are about 31 pages of potential clauses.

And why throw the dice with ambiguity and vagueness being interpreted against the lawyer, when you have clauses that are really a guide to these problems? When I have a state bar investigation and it's about a fee agreement, then it's sort of a gift to me. Because I know the state bar in California doesn't deal with fee agreements. It will be referred out or to the mandatory fee arbitration panel. And in fact, as a way of proactively dealing with a potential fee dispute with a client, I have advised lawyers to obtain the proper forms and send them to the client. So if the bar sends my client a love letter, I'm able to say, "Well, obviously this is a fee dispute and isn't within the purview of your investigation."

And the other great thing about using the state bar fee forms is that if I'm acting as an expert witness, or if I'm at the State Bar of California, or if it's in a fee dispute, when you walk in with the blessed sanctified Good Housekeeping Seal of Approval fee agreement, you've already won half the battle. So I teach fee agreement tune-ups constantly. I strongly recommend these forms. Of course, all of the clauses won't be useful for everyone. But they're free, they're online. And I think they're highly useful for most people.

Right now we are suggesting—I have some celebrity lawyer clients —we’re suggesting very strongly fee arbitration clauses. Because if you do have a dispute with the client, why have it all over the local press and in the media? So that’s just a change we’re using right now.

"Suit by Fired Lawyer Claims Law Firm Encouraged Fraud with 3,000-Hour Billable Quota"

Cassens Weiss, Debra, www.abajournal.com, 12 December 2011

A California lawyer who says he was fired from his law firm because he couldn’t meet a quota requiring 3,000 billable hours a year has filed an employment bias suit over his ouster.

The former associate, Richard Unitan, claims the unrealistic requirement forced lawyers to lie about their hours, *The Los Angeles Daily Journal* reports. Unitan, a Riverside litigator, claims he was essentially fired for not committing billing fraud.

A 3,000 billable hours requirement would require working about eight hours a day, every day of the year. Most firms require no more than 2,100 billable hours a year.

The defendant is the worker compensation defense firm, Adelson, Testan, Brundo & Jimenez in Van Nuys, according to *The Daily Journal* story. The suit filed in Los Angeles superior court says Unitan was required to bill for his “thinking time” and bill every task in six minute increments, no matter how short. “For example, if a lawyer receives and reads an e-mail, he or she may bill .1 hours; and if that same lawyer then responds to the e-mail, that may be another .1 hours ,” the suit says.

Adelson Testan lawyer Darrin Meyer told *The Daily Journal* he was “truly shocked” to hear of Unitan’s claims. “It is completely false, and it is, I think, a desparate fabrication,” he said. “Nobody here commits billing fraud. The allegations are completely untrue.”

"To charge or not charge—a consultation fee"

Paul, David A., *Canadian Lawyer*, 19 December 2011
[excerpt]

For many clients, the consultation is perhaps one of the most valuable services lawyers offer. Unfortunately, people often mistakenly think of the initial consultation as a “kick at the tire” or an opportunity to find out how much the lawyer is going to cost. But for many lawyers, the consultation is much more than the lawyer simply trying to sell his or her service. It’s an

opportunity for the client to ask questions and get a professional legal opinion about the merits of his or her case. By advising the client during the consultation, the lawyer is working and providing a valuable service. Further, as the lawyer's experience increases, so does the value of their advice.

There are no hard and fast rules for determining whether or not to charge clients for initial consultations. That being said, some of the factors to consider in deciding whether to charge a fee include experience and current workload, the area of law practiced, the practice of other lawyers/firms practising in the same area, and the target client base.

For some practice areas, the question is already answered. For instance, for the lawyer practising personal injury litigation who bills primarily on a contingency fee basis, charging a consultation fee is inconsistent with the arrangement of only charging upon successful completion of the litigation. The consultation fee may also be counter-productive, particularly if all of the other lawyers in the community practising in the same area offer free initial consults. On the other hand, not following that practice by charging a reasonable consultation fee may also help to distinguish a lawyer from others in the field.

Charging an initial consultation fee may also be inappropriate or counter-productive for the lawyer whose fees come primarily from legal aid.

For lawyers whose work is primarily charged out at an hourly rate or flat fee basis, the free consultation is certainly an option. On the other hand, if the lawyer is experienced and already has a busy practice, the free initial consultation may make less sense from both a professional, practical, and business point of view. Some of the reasons why these lawyers may choose to charge a fee include the following:

1. The consultation fee can help manage client expectations by setting the tone with potential clients that the lawyer's time is valuable and that his or her advice is worthwhile.
2. The fact a client is willing to pay the consultation fee may be an indication from the start that the client takes the matter seriously and is prepared to invest in it.
3. If a client is unwilling or unable to pay the consultation fee, the odds are he or she will also not be willing or able to pay the retainer. In my experience, clients paying for the initial consultation are more likely to retain the consulting lawyer after the first meeting.
4. Charging a fee helps eliminate those whose sole purpose is fishing for free advice. Over the years, I have come across people who have made their rounds through the local firms seeking free advice with no intention of ever retaining counsel.
5. Oftentimes, lawyers will have a friend/colleague who regularly sends you bad referrals or referrals where the client is looking for a "good deal." The consultation fee can help weed out these clients without offending or discouraging your referral source. The consultation fee can also serve to clarify the client's fee expectation from the beginning.

6. Over a period, free initial consultations can add up to a significant loss in potential revenue. For the practitioner who charges out at the hourly rate of \$250 and does two free one-hour consultations per week, the potential value of them over the year is as much as \$26,000 per lawyer.
7. Charging for the consultation discourages those who seek a consultation with a firm for the specific purpose of conflicting a particular lawyer or their firm from acting for the opposing party. Prior to initiating a consultation fee at my firm, I found that this practice of deliberately conflicting out a firm happened far more than one might expect.

The other issue that often arises for those implementing a consultation fee is how much to charge. Again, there are no hard and fast rules other than the fee should be reasonable and reflective of the value of the service being offered.

For those who are leaning toward charging for the initial consultation but are concerned about how this might discourage potential clients from seeking their services, one option to consider is offering prospective clients a credit off their first bill equal to the initial consultation fee once the client has retained your services. In this way, the consultation is free for those who ultimately hire their lawyer.

Whatever the arrangement, the experience of most lawyers as well as support staff who I have spoken to is that, for the most part, clients calling in for an initial consultation are not usually dissuaded by the request for a consultation fee.

As for the process of setting up the initial consultation, I typically leave that matter to my staff. Prior to the consult, my staff are charged with the task of running the conflict check, advising the client of what they can expect to happen during the meeting including how long it will last, and notifying the client of the fee and ensuring it is paid prior to the consultation. This allows the lawyers to get to work as soon as the potential client is in. From the client's perspective, this is also a good thing as the lawyer is quickly able to cut to the chase and do what he or she is being paid to do—answer questions and provide advice.

Of course, whether the client is paying for the consultation or not, they expect and deserve good value from their consultation. One way to achieve this is to show respect and demonstrate your experience. At my firm, the initial consultation usually last an hour and consists of getting the facts, assessing the client's needs or concerns, reviewing the relevant laws and offering preliminary advice, answering questions, and explaining the process and how we can assist the client to effectively work their way through that process. When possible, we also provide our best approximation of how long the case might be expected to take and how future fees will be charged.

"May Lawyers Offer Groupon Deals? New York Ethics Opinion Allows It, with Caveats"

Cassens Weiss, Debra, www.abajournal.com, 26 January 2012

Lawyers who want to market discounted services with Groupon or similar websites won't run afoul of state ethics rules if guidelines are followed, according to a New York ethics opinion.

The money paid to the website running the ad is not an improper referral fee, as long as it is a reasonable payment for the type of advertising according to the opinion by the New York State Bar Association Committee on Professional Ethics.

The opinion adds other caveats: "A lawyer may properly market legal services on a 'deal of the day' or 'group coupon' website, provided that the advertisement is not false, deceptive or misleading, and that the advertisement clearly discloses that a lawyer-client relationship will not be created until after the lawyer has checked for conflicts and determined whether the lawyer is competent to perform a service appropriate to the client. If the offered service cannot be performed due to conflicts or competence reasons, the lawyer must give the coupon buyer a full refund. The website advertisement must comply with all of the rules governing attorney advertising, and if the advertisement is targeted, it must also comply with all of the rules governing attorney advertising, and if the advertisement is targeted, it must also comply with Rule 7.3 regarding solicitation."

"Toyota Lawyer Drives Into Attorney, Loses \$625K Case, Must Pay Her \$125K Legal Bill +\$5K for Appeal"

Neil, Martha, www.abajournal.com, 22 September 2010

It appears that attorney Granville Webster Burns simply didn't see a fellow California lawyer when he drove into her as she was crossing a street on foot in Manhattan Beach.

Burns, who works as an assistant general counsel for Toyota Motor Sales USA Inc. and was driving a company-owned SUV, told a police officer that his vision was obscured by sunlight, reports *The Metropolitan News-Enterprise*.

But a similar lack of clarity concerning his litigation strategy has offered an expensive lesson on attorney ethics:

The pedestrian, lawyer Ann Grant, sued Burns and Toyota, winning an award of nearly \$625,000 after a jury found Burns' defense—that Grant didn't use due care when crossing the street—wasn't a sufficient contributing cause to the accident to hold her liable. But she also

sought—and won—attorney’s fees and costs, arguing that Burns’ failure to timely admit liability for the accident forced the case into an otherwise-unnecessary trial.

Burns and Toyota appealed the attorney’s fee award, and were ordered to pay another \$5,000 in attorney’s fees to Grant, on top of the \$125,000 awarded by a Los Angeles Superior Court Judge, for filing a frivolous appeal, the article recounts.

“No reasonable attorney would believe that this appeal has any conceivable merit,” presiding Justice Roger Boren wrote in the California Court of Appeal’s opinion.

5.2 Costs

Pellman v. Pustai

(2009), 75 R.F.L. (6th) 121 Ont. Sup. Ct. J.), Andra Pollak, J.

Andra Pollak J.:

1 The parties have not been able to agree on costs and have provided written submissions, which have been reviewed and considered.

2 Ms. Pustai agrees with the Plaintiffs that the Court has awarded the amount of \$39,991.78 to Mr. Pellman and \$70,551.54 to Soberman. Ms. Pustai argues that the cost Rules for a solicitor/client assessment are not the same as the cost Rules for normal civil actions. Several assessment cases are cited as support for this proposition. Further, the case of *Borden & Elliot v. Deer Home Investments Ltd.*, [1992] O.J. No. 2152, 14 C.P.C. (3d) 269, 36 A.C.W.S. (3d) 271 (Ont. S.C.J.) is also cited as authority for this proposition. In that case, Justice Chapnik was considering an appeal of the decision of an assessment officer. This is not the case before this Court. I do not agree that it is authority for Ms. Pustai's argument. In this case, the parties did not have the dispute assessed but proceeded by way of civil action and the account of Soberman is not subject to the assessment procedure. This jurisprudence does not support the argument that where the parties have pursued their remedies in a civil action, (as opposed to an assessment), and one of the parties is not subject to the assessment process, the normal Rules of costs for civil actions do not apply. It is appropriate to apply the normal cost Rules in this case.

3 Pursuant to Rule 49.10(2), Ms. Pustai is entitled to partial indemnity costs against Mr. Pellman as a result of her offer to settle on April 28, 2009 for the amount of \$55,000. Mr. Pellman's recovery is significantly less than that amount. The April 28, 2009 Offer for Soberman was for the amount of \$55,000 which is less than the amount awarded by this Court to Soberman. There are no cost consequences as a result of Ms. Pustai's Offer to Mr. Soberman. Therefore, in the ordinary course, Ms. Pustai is entitled to partial indemnity costs against Mr. Pellman from the date of her offer on April 28, 2009. Mr. Pellman is entitled to partial indemnity costs against Ms. Pustai to April 28, 2009. Soberman is entitled to costs against Ms. Pustai throughout the trial on a partial indemnity basis.

4 The Plaintiffs argue that by reason of Ms. Pustai's conduct, they should be awarded costs on a substantial indemnity basis throughout. The Plaintiffs cite jurisprudence to support this position. I have reviewed the jurisprudence and find that the facts of those cases were extreme and distinguishable. I do not accept this argument made by the Plaintiffs.

5 The parties disagree with respect to the apportionment of legal fees between Mr. Pellman and Soberman. Ms. Pustai argues that their costs should be apportioned on a fifty-fifty basis as the same amount of time was spent for each. The Plaintiffs on the other hand, argue that costs

should be awarded one-third to Mr. Pellman and two-thirds to Soberman, relying on the proportion of damages awarded to each.

6 I have read and considered the submissions of the parties, and I have taken into account the factors set out in Rule 49 and Rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. I am required to award costs that are reasonable and fair. See *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.).

7 I agree that it is fair and reasonable in this case to apportion the costs between Mr. Pellman and Soberman on a fifty-fifty basis.

8 Mr. Pellman is awarded costs against Ms. Pustai up to the date of her Offer dated April 28, 2009 on a partial indemnity basis. This amount is fifty percent of the amount claimed in the Bill of Costs (partial indemnity) submitted by the Plaintiffs to this Court. Ms. Pustai is awarded costs on a partial indemnity basis against Mr. Pellman from the date of the Offer, April 28, 2009 (this is based on fifty percent of the amount claimed by Ms. Pustai in the Bill of Costs that she has submitted).

9 Soberman is awarded costs against Ms. Pustai on a partial indemnity basis throughout. This is fifty percent of the total amount claimed (on a partial indemnity basis) in the Bill of Costs submitted by the Plaintiffs. The previous cost awards of Justice Campbell and Justice Belobaba remain.

10 To the extent that these cost awards can be satisfied from the amount of \$125,000 which is being held in Trust by McDonald and Partners, they should be. Ms. Pustai remains liable for any costs that have been awarded and cannot be satisfied from the proceeds of the McDonald & Partners trust account.

"Lawyer must pay personal costs: BCCA"

**Oakes, Gary, *The Lawyers Weekly*, 01 April 2010, pp. 3, 24
[excerpt]**

A rarely-convened five-judge panel of B.C.'s top court has upheld an order requiring a lawyer to personally pay some of the costs incurred by his conduct in a personal injury case.

Chief Justice Lance Finch noted that the successful application to have Thomas L. Spraggs personally pay was brought by the defendants under Rule 57(37)(c) of the Supreme Court Rules, which gives the judge "a discretion to make such an order where a lawyer had caused costs to be incurred 'without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault.' "

Spraggs' counsel contended the chambers judge "erred in making the order because she made no finding that the lawyer's conduct was 'reprehensible,'" and the decision of this Court in

Kent v. Waldock, 2000 BCCA 357, requires such a finding before an order for costs against a lawyer can be made. In response, the defendants submitted that *Kent* is distinguishable, and if it is not distinguishable, that it was wrongly decided. For this reason, the lawyer's appeal was heard by a division of five judges. The Law Society of British Columbia [LSBC] intervened and made submissions in support of the lawyer's position."

His lead counsel, Katherine Wellburn, told *The Lawyers Weekly* that Spraggs will not seek leave to appeal to the Supreme Court of Canada.

The issue arose as a result of a motor vehicle accident on July 13, 2004.

During the court case, which was subsequently settled, the defendants brought five motions on various pre-trial matters.

The chambers judge held that "the failure to respond to the interrogatories in any fashion whatsoever (application # 3) thus necessitating the motion, and the wholly inadequate response to the request for particulars (application # 4) can only fall at the feet of counsel." None of the steps required in such circumstances were followed.

She considered *Kent* and *Young v. Young* (1990), 75 D.L.R. (4th) 46 (B.C.C.A.), aff'd [1993] 4 S.C.R. 3, among other authorities, and said the words of the applicable Rule "should be given their ordinary meaning [which] does not require ... proof of reprehensible behaviour on the part of the solicitor."

The Chief Justice agreed: "A plain reading of [the] Rule... shows that its purpose is to protect clients from liability for wasted legal costs caused by the client's lawyer. Its function is primarily compensatory. It would be inconsistent with the Rule's purpose if an order designed to compensate a client were to require conduct on the part of his lawyer deserving of punishment and rebuke

"Under [it], mere delay and mere neglect may, in some circumstances, be sufficient for such an order ... Under the Rule there is no requirement for 'serious misconduct,' the standard required under the court's inherent jurisdiction. The requirement in *Young* and in *Kent* of 'reprehensible' conduct applies only in cases of orders against a lawyer for special costs. *Young* and *Kent* are not authority for requiring such a standard when making an order for party and party costs against a lawyer. In such circumstances, the lower standard mandated by the Rule is sufficient."

"The power to make an order for costs against a lawyer personally is discretionary. As the plain meaning of the Rule and the case law indicate, the power can be exercised on the judge's own volition, at the instigation of the client, or at the instigation of the opposing party. However, while the discretion is broad, it is, as it has always been, a power to be exercised with restraint. All cases are consistent in holding that the power, whatever its source, is to be used sparingly and only in rare or exceptional cases."

"The restraint required in the exercise of the court's discretion is not to be confused with the standard of conduct which may support its use. Care and restraint are called for because

whether the unsuccessful party or his lawyer caused the costs to be wasted may not always be clear, and lawyer and client privilege is always deserving of a high degree of protection.”

"Lawyer ordered to pay costs for 'abusive' tactics"

McKiernan, Michael, *Law Times*, 16 May 2010

[excerpt]

A Toronto lawyer has been ordered to pay Warner Bros. almost \$13,000 in costs for what a Manitoba judge called her “obstructive and high-handed approach” to litigation against the entertainment powerhouse.

The latest order is the second such ruling against Kimberly Townley-Smith. Last year an Ontario judge held her personally liable for \$50,000 in costs for her actions in a client’s lawsuit making conspiracy allegations against three judges.

Townley-Smith, a copyright lawyer based in Toronto, represented Winnipeg folk group the Wyrd Sisters in their 2005 lawsuit launched in Ontario against Warner Bros. They attempted to stop distribution to the film *Harry Potter and the Goblet of Fire* because it featured a band called the Weird Sisters.

That action ultimately ended in defeat and a \$140,000 costs award in favour of Warner Bros. Because singer Kim Baryluk, the principal of the Wyrd Sisters, lives in Winnipeg and has assets in Manitoba, Warner Bros. initiated proceedings to collect the judgment there, where Court of Queen’s Bench Justice Christopher Martin heard the matter.

“It would not be an understatement to describe Ms. Townley-Smith’s litigation tactics in Manitoba as generally obstructive, threatening, contemptuous, abusive, and largely without substance,” he wrote in a 14-page ruling on costs. “Essentially, Ms. Townley-Smith’s conduct, as a lawyer and officer of the court, was deplorable.”

Townley-Smith couldn’t be reached for comment, while James Mercury, counsel for Warner Bros. in the matter, said neither he nor his client would be speaking publicly about the award.

The costs award relates directly to a subpoena brought by Townley-Smith to cross-examine Warner Bros.’ lead counsel in Manitoba over its efforts to collect the costs for the previous judgment.

“She had already done the same thing to Warner Bros.’ lead counsel in Ontario, resulting in a 369-page transcript largely of meandering, immaterial, and irrelevant questions and answers,” Martin wrote.

Warner Bros. moved to have the subpoena quashed, but the day before the hearing was due to take place in May 2009, Townley-Smith withdrew it and said the motion was rendered moot, according to the judgment.

“Despite vague explanations to the contrary, its frivolousness was demonstrated by withdrawing the subpoena the evening before the motion to quash was to be heard,” Martin wrote. “Considerable time, effort, and expense were wasted with this tactic. It was an abuse of process.”

Last summer, the Wyrd Sisters switched lawyers and opted to settle all outstanding litigation. As part of the agreement, Warner Bros. agreed not to pursue costs for the most recent motions against the Wyrd Sisters, but both sides decided the company could take action against Townley-Smith.

A hearing on costs was to take place in early September, but Townley-Smith told the judge she wouldn’t be able to attend due to a medical condition.

She also alleged the judge was biased and said he should recuse himself, according to Martin’s ruling. The matter was adjourned until late November to give Townley-Smith time to recover from her condition, but she wrote days before the hearing to say she still wasn’t ready.

Further letters to Martin accused him of conspiring against her and informed him she has reported him to the police for alleged criminal offences.

“Ms. Townley-Smith’s conduct throughout the Manitoba proceedings, especially since the motion in May 2009 and increasingly since being discharged as counsel for The Wyrd Sisters, has deteriorated to the point that her competence is a serious concern,” Martin wrote, noting Townley-Smith ultimately refused to participate in the hearing.

He awarded total costs of \$31,800 but found Townley-Smith liable for only \$) per cent of that amount. He said the Wyrd Sisters bore at least half the blame because they encouraged or “at the very least they acquiesced” to her actions.

M. (J.D) v. L. (A.M.)

**2010 CarswellAlta 1378 (Alta. C.A.); Jean Côté, Constance Hunt, Keith Ritter JJ.A., 14
July 2010
[paras. 7-36]**

7 ... , the Provincial Court had jurisdiction to make this order under the *Family Law Act*. Because of that, I need not express any opinion about whether the Rules of Court applied or could be applied, under s. 8 of the *Provincial Court Act*, R.S.A. 2000, P-31.

8 However, I stress that the criteria (tests) for costs against solicitors may not be the same in the Provincial Court [as on the facts of the appeal] and in a superior court with inherent powers. The Provincial Court has only the powers given by legislation, and no general supervision over solicitors. As will be seen below, the precise test need not be decided in this case. Nor need I decide whether the Provincial Court could properly impose costs merely as punishment of counsel for misconduct, e.g. where the opponent incurred little or no expense.

9 The question is whether that power was properly exercised here.

10 The first hearing by one Provincial Court judge was simply to give some relief on a support application. The second hearing was by a different Provincial Court judge, to fix the terms of the formal order from the first hearing. The third hearing was by the second judge, and it awarded personal costs against the appellant solicitor, which are appealed.

11 To describe fully the test or criteria for granting costs personally against a solicitor in Alberta in the Provincial Court, or in the Court of Queen's Bench, would require one to analyze a number of reported cases. It is both unnecessary and difficult to do so in this case.

12 In my respectful view, the solicitor's work here would not properly ground such personal costs, no matter which of the possible tests suggested in the various reported cases one adopted. As which test one uses cannot affect the result here, it is not necessary to adopt the precise test.

13 What is the strongest arguable criticism here about the properly-proven acts of the appellant solicitor? It is that she made some errors of interpretation of oral reasons by a different Provincial Court judge, when she was drafting a formal order to record that earlier judge's decision. Conversely, it is at least arguable that on some of the disputed points, her draft was right.

14 It was difficult for her (or anyone) to draft an accurate formal order flowing from the first hearing, for several reasons.

15 The most important reason is that the substantive decision had been purely oral, and there was no transcript at the time. (The tape of the whole motion has since been transcribed and we have it.) Almost as important, the first Provincial Court judge's decision was not a discrete set of reasons after the end of all argument and submissions. As is fairly common in chambers [in Court of Queen's Bench], parts of the decision evolved a step at a time, and are found in the interstices of discussion with counsel. And in the third place, the previous judge recognized that he had not tied down all the details. During the substantive hearing, he told counsel that if they could not agree on some of those details, they should raise them with him at the next hearing, which was already scheduled. That somewhat blurred the line between argument and outcome, making somewhat flexible the boundaries between what was decided and what was still open to discussion.

16 Therefore, I see little or no negligence underlying the draft order submitted by the appellant. Even if there was any carelessness, it was slight and caused no permanent harm. There is no ground for personal costs against the solicitor.

17 The tape of the first hearing, plus the draft order from the appellant, could not find any suggestion of oblique motives. Yet the Provincial Court judge based the personal costs partly on oblique motives, a second reason for his decision. That conclusion needed more than a mere comparison of the tape recording of the original oral decision with the appellant's draft order. The judge thought that he had more. He was handed a letter and marked it as an exhibit, and heard factual submissions from opposing counsel.

18 But there was no affidavit, no oath of any kind, and no notice of motion or other document giving notice of the evidence to be adduced. Maybe the judge could take judicial notice of the tape recording of a hearing in open court (even though he was not the judge recorded); but that is not true of the letter or other alleged facts. They needed proper evidence. The appellant argues that her counsel on the costs hearing was taken by surprise, and that appears to be true. The appellant herself was not present then. Her counsel did object to several parts of this "evidence" when it was tendered.

19 There was no real chance for rebuttal evidence, nor any exploration of privilege.

20 Therefore, there was no proper evidentiary foundation for one of the judge's two factual findings.

21 Furthermore, it appears that the appellant and her counsel had no notice of one of the findings against her. One allegation against her (one paragraph of the draft) had been mentioned by the Provincial Court judge six months before his decision, when he told the appellant in May that he was contemplating costs against her personally. He said that was the reason for the personal costs motion. However, I have found no mention in that earlier transcript, nor in any court document, of the other ground for personal costs upon which the trial judge later relied (refusal to approve any draft). Yet the written reasons emphasize the ground not notified: they were largely based upon the appellant's letter later made an exhibit. The ground earlier notified received much briefer mention in the reasons.

22 So there were breaches of some aspects of natural justice.

23 In theory, the remedy for these procedural problems might be to send all this back for a new hearing. But the personal costs awarded were only \$250 (exclusive of costs of the costs hearing, or costs of the appeal). Even though the respondent has no lawyer, it would not be economical for him to relitigate the matter, still less economical for anyone else to do so.

24 Besides, as noted, the flaws which the Provincial Court judge thought that he found in the appellant's draft order are not enough to found a personal costs order. Holding a new hearing on the chance that new admissible evidence next time would found a different ground for personal costs, is not ordinarily the appropriate appellate cure. And it would be even more uneconomical.

25 Therefore, the only fair and practical remedy for the various flaws here is to simply quash the orders in the Provincial Court and the Court of Queen's Bench ordering costs payable personally and ordering costs to the respondent of the costs proceeding. I would so order, so there would be no new hearing.

26 The appellant succeeded on this appeal, but her counsel very fairly told us that a costs order against the respondent himself would be unfair and counterproductive; she sought no such order. Therefore, each side should bear its own costs of this appeal.

"Judge raps law firm for delay"

Kiernan, Michael, *Law Times*, 30 May 2010

A judge has awarded costs against a Toronto-area law firm for holding up an application for an assessment of accounts by a former client unhappy with the service she received.

In an endorsement earlier this month, Justice Thomas Lederer awarded the applicant almost \$7000 in costs and scolded Heydary Hamilton PC for failing to respond to the application in a reasonable time and then attempting to have proceedings adjourned on short notice.

“Lawyers and judges do not act in a vacuum,” Lederer wrote. “They function within a society. The actions they take and decisions they make should bear in mind the public impact of what they are.”

“Parties who wish to question accounts should not be prevented from doing so by the cost of the process of assessment. This is especially so where costs are occasioned by the firm failing to respond or move with reasonable speed.”

The endorsement is an important one for lawyers, says Bruce Baron, a lawyer with Miller Canfield Paddock and Stone who represented the applicant.

“With the costs of litigation being so expensive, it’s so easy to allow costs of the litigation to quickly exceed the benefit of that litigation, and in the context of an assessment hearing, that is extremely true. It sends a message that we need to put our clients first at all times.”

Heydary Hamilton didn’t respond to a request for comment before going to print.

The applicant, Elisa Kennedy, retained Heydary Hamilton and paid the firm almost \$29,000 in retainers.

She received 13 accounts totaling \$27,000, which came out of the retainer, but Kennedy was unhappy with the firm’s work on her case. She wanted court proceedings started more quickly and thought time was wasted on futile settlement talks.

Kennedy eventually retained a new lawyer and in February applied for an assessment of accounts [of her former solicitors]. When the firm refused to consent, material for the application was served in mid-March.

Almost two months passed before Heydary Hamilton's Tanya Walker responded, saying the lawyer concerned had left the firm and that she would be unable to attend court on the date set for the application, just over two weeks from the letter's date.

The firm asked for an adjournment, which Baron refused. Eventually, a junior lawyer appearing in Walker's place told the court she couldn't argue the motion.

"One wonders what significance the firm is giving this matter when it fails to respond until it was impractical to prepare, seeks to oppose the motion on the basis that it wishes to have the merits of the assessment adjudicated by the court, and then effectively assumes an adjournment will be granted by sending a lawyer who cannot argue it," Lederer said in his endorsement.

"To grant this adjournment would be to place greater value to the failings of the firm than the reasonable expectations of its former client that she can obtain an assessment of the accounts at a reasonable cost with a reasonable time."

Lederer allowed the application for assessment, ruling that since the payments were made in retainers, they were not made in response to accounts for work done, and Kennedy should have a chance to set the payment against the service.

Baron says Heydary Hamilton's approach to the application wouldn't raise an eyebrow in conventional litigation. But in this case, he argues that the power imbalance between a law firm and former client demands a different standard of conduct.

"I think there's a serious distinction between how law firms should respond to litigation in the conventional context where they're dealing with individual clients versus when they are dealing with a former client and representing themselves."

"I think Justice Lederer was very mindful of protecting the administration of justice and the environment of fair play between a law firm and its former client."

Martens v. Martens

**(2010), 82 R.F.L. (6th) 264 (B.C. S.C.), Gropper J., 03 February 2010
[paras. 1-6; 12-13]**

1 On October 30, 2009 I dismissed the plaintiff's claim against Dennis Bob Martens and the British Columbia Pension Corporation: *Martens v. Martens*, 2009 BCSC 1477 (B.C. S.C.).

2 This is an application by the defendant Pension Corporation for special costs.

3 At paras. 72-76 of my reasons, I made specific reference to allegations that were made by the plaintiff in the statement of claim and by her counsel in court and stated:

[72] The plaintiff, throughout her statement of claim and her argument before this court, alleges that the Pension Corporation and its counsel have misrepresented and misled the court. Counsel for the plaintiff also asserts that the Pension Corporation should be found in contempt of court. The tenor of the plaintiff's argument is that the Pension Corporation favoured Dennis Martens over the estate of Linda Martens and over Sara Martens as administratrix of the estate. There is no basis in the evidence or in fact that that is the case. The Pension Corporation must divide the pension in accordance with the provisions of the legislation and the divorce order. It has done so. It was unnecessary and offensive for counsel for the plaintiff to engage in submissions to this court that impugned the character of counsel for the Pension Corporation or suggested that he or his client acted in an inappropriate manner.

[73] In this regard, I refer to the *Great West Assurance Co. v. Royal Anne Hotel Co.* (1986), 31 D.L.R. (4th) 37, 6 B.C.L.R. (2d) 175 (B.C.C.A.), where Mr. Justice Esson refers to the famous case of *Rondel v. Worsley* (1969), 1 A.C. 191 at para. 34 [*Rondel*]. Esson J.A. refers to p. 227 of *Rondel* where Lord Reid said:

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession

[74] In this case, counsel for the defendant Pension Corporation did not engage in any conduct which could be described as misrepresentation or misleading of the court. I therefore refer to the quote which refers to counsel for the plaintiff "casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession". In this case, the aspersions were cast not only on the other party, but on [the party's counsel] Mr. Ferris as well, which have no basis and which ignored counsel for the plaintiff's overriding duty to the court and to the standards of his profession and to the public. Such conduct deserves extreme censure.

Conclusion

[75] The plaintiff's action is dismissed against both defendants. The remaining funds held by the Pension Corporation are to be paid in accordance with the formula.

[76] The defendants are entitled to their costs. In light of my comments concerning the nature of the plaintiff's claim and the conduct of plaintiff's counsel, the parties are at liberty to speak to the issue of costs.

Legal Authorities

4 The leading case on the awarding of special costs in British Columbia is *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740, 9 B.C.L.R. (3d) 242 (B.C. C.A.), where the court stated that the test for awarding what was formerly referred to as solicitor-and-client costs applies to special costs. The Court continued at para. 17:

[17] ...[T]he single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". ... [T]he word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

5 Special costs were awarded to the plaintiff in *689531 B.C. Ltd. v. Anthem Works Ltd.*, 2009 BCSC 1005 (B.C. S.C.). The defendants argued that the plaintiff's conduct was contrary to public policy or statutory intent and, in the course of making those arguments, the defendants alleged impropriety and made pejorative comments about the plaintiffs. The defendants' arguments were dismissed by the court.

6 Addressing the plaintiff's application for special costs, Hinkson J. held at para. 28:

[28] ...[The defendants] have deliberately made inappropriate and potentially damaging allegations that I have found to have no evidentiary foundation about lawyers, accountants and businessmen in these proceedings. I find that that conduct is reprehensible within the meaning ascribed to that term ... thus warranting an award of special costs to the plaintiffs as a form of rebuke and chastisement of the defendants for their conduct.

. . . .

12 This conduct was deliberately inappropriate and potentially damaging, without any evidentiary basis to both the Pension Corporation and its counsel. The conduct is reprehensible and warrants an award of special costs.

13 In accordance with R. 57(3) of the *Rules of Court*, this matter is referred to the Registrar to determine fees which the Registrar considers were properly or reasonably necessary considering the factors referred to in that Rule

Ben-Lolo v. Wang

2012 CarswellOnt 1085 (Ont. Div. Ct.); Dambrot J., Swinton J., then R.S.J., 20 January 2012

[Headnote]

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 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, but conduct did not rise to level of abuse of process, negligence or impropriety that warranted personal order of costs.

Covriga v. Covriga

2010 CarswellOnt 3602, Ont. Sup.Ct.J., 26 May 2010, C. Horkins J.,

[Headnote, in part]

Parties were engaged in divorce litigation—Wife did not serve financial statement, comply with disclosure and costs orders, attend pre-trial conferences, or produce evidence substantiating claims—Wife's lawyer, P, did not reply to requests to admit, so wife was deemed to admit certain facts, but neither wife nor P abided by deemed admissions—P brought frivolous requests for disclosure and *ex parte* recusal motion—P was subject to law society suspension of which she denied knowledge—Trial judge dismissed all wife's claims for relief—Husband had to bring motions to force wife to sign documents—P [wife's lawyer] did not respond to letters and e-mails from trial judge and husband's lawyer, S, as to scheduling of costs motion materials—

Costs motion came on for hearing, husband claimed \$111,632 in full indemnity costs or \$98,478.74 in partial indemnity costs to date of offer and full indemnity costs thereafter—Issue arose as to whether P [wife’s lawyer] should pay portion of costs—P was ordered to pay \$39,734.17 of \$105,873.45 costs husband was awarded—**Held:** Order [that P., wife’s lawyer] pay 50 per cent of husband’s costs was more than justified and fairly reflected significant role P’s conduct played in delay and costs husband incurred—Amount reflected 50 per cent of full indemnity costs awarded after date of offer, less disbursements, plus five per cent of partial indemnity costs—Decision suggesting order to pay costs was restricted to lawyer acting in bad faith was rendered before Family Law Rules (“FLR”s) came in to force, and relevant rule, R. 24(9), did not require bad faith—Although wife’s unreasonable conduct was shocking and caused extensive delay, her lawyer, P had to bear responsibility for much of it—P had duty to take reasonable steps to ensure wife complied with orders and FLRs but pursued application with breathtaking disregard for them—Upon retainer, P aggravated and perpetuated existing problems and caused new problems and encouraged and supported wife’s unreasonable conduct, burdening her husband with unnecessary delay enormous costs—P failed to honour principle that advocates should be skilled, knowledgeable, capable and competent within area of law they practiced—P’s contention that husband and his lawyer, S, were in breach of order to disclose, when there was no such order, was unprofessional conduct—P was grossly negligent in handling file—P’s conduct was relentless and infected litigation process, directly causing delay and increased litigation costs—P’s spurious attacks on S and husband were unprofessional and breach of duty to act with courtesy and good faith.

Elgner v. Elgner

2010 CarswellOnt 3918; (2010), 85 R.F.L. (6th) 71 (Ont. S.C.J. [Div. Ct.]), H. Sachs J. [Headnote; para. 4]

Wife's application for retroactive and interim ongoing spousal support was granted—Husband's motion for leave to appeal was dismissed—Wife sought costs on full recovery basis, fixed in amount of \$56,954.42—Wife was awarded costs on partial indemnity basis in amount of \$15,000 for fees, \$750 for G.S.T., and \$527.42 for disbursements—Costs on substantial indemnity scale were not appropriate given that there was no evidence of bad faith—Number of lawyers who worked on wife's file was excessive—Motion was moderately complex—Issues were important to both parties.

. . . .

4 With respect to the quantum of costs I note the following. In this case Mrs. Elgner retained two very experienced family law lawyers to argue her motion. In addition 2 associates, one articling student and three clerks worked on the file. While the result was certainly effective from Mrs. Elgner's point of view, I do not find that the cost of this amount of lawyering is something that Mr. Elgner should reasonably be expected to pay for on a leave application. In

this regard, it is important to note that leave to appeal is rarely granted in family law matters. I appreciate that the application did raise a constitutional issue. However, it was one that had already been decided in Mrs. Elgner's favour by the Divisional Court.

Tarlo v. Boyer

2010 CarswellOnt 6514, Ont. Sup. Ct. J., Perkins J., 27 August 2010
[Headnote]

Parties were engaged in matrimonial litigation—Husband successfully petitioned for divorce and corollary relief, including \$147,866 equalization order—Prior to trial, wife disputed husband's claimed separation date and [position on] payment of child support [on basis of eligibility], and claimed unequal division of family property and child support retroactive to 2000 for two adult children—Trial was delayed by motions, amendments and problems involving wife's counsel—Husband offered to settle for \$100,000 plus interest—Trial judge awarded husband \$147,866 equalization award plus \$14,011 interest, dismissed all wife's claims, and invited submissions as to costs—Husband claimed \$183,292 in costs as partial recovery to date of first offer, and full recovery thereafter—Issue arose as to appropriate costs order—**Held:** After reduction for husband's failure to recover on one offer term, recognition of wife's unreasonable litigation behaviour, attenuated due to ability to pay, husband was awarded \$125,000 costs, including disbursements and GST—\$200,000 for case that took three years to complete and was twice on doorstep of trial court, was not out of range of what totally unsuccessful party should be exposed to—It was sadly not uncommon for costs to exceed amount recovered, but that did not mean it was unreasonable or beyond what losing party should pay, especially if losing party caused costs to accumulate—Husband tried to negotiate as early as 2003 and wife responded by surreptitiously increasing mortgage on matrimonial home with false affidavit—Wife failed to provide evidence on most issues, leaving husband's lawyer to throw away costs spent preparing for several issues, warranting full costs—Husband beat offer on main issues, and it was immaterial that more was recovered on account of principal and less on account of interest than in offer—Nor did wife's submission as to uncertainty of offer terms succeed, as R. 18(11) of Family Law Rules specifically contemplated that court, not offer, might deal with costs—Although wife was correct that husband's failure to achieve all he asked for in relation to personal property removed husband's all-or-nothing offer from automatic costs consequences of R. 18(14), issue did not add to trial time or costs—Husband was justified in having senior, experienced trial lawyer whose preparation work was extensive but necessary, as wife conceded nothing—Neither party had significant assets other than former matrimonial home—Husband had income but was entitled to his share of home and to costs of pursuing rights—Had wife responded to husband's early settlement proposals, she might have been entitled to and able to negotiate both child and spousal support.

"Windsor lawyer ordered to pay for 'meritless' claim"

McKiernan, Michael, *Canadian Lawyer*, 14 December 2011

An Ontario lawyer has been ordered to personally pay \$45,000 for the “irresponsible” issuance of a meritless third-party claim in a New Brunswick fraud case.

Sandra Dawe, the managing partner at Toronto and Windsor, Ont. firm Shibley Righton LLP, has until noon on Dec. 15 to pay the cash or risk enforcement proceedings.

Dawe is representing auditors being sued by Deed Island Credit Union in New Brunswick. The credit union alleges the auditors were negligent for failing to notice that a former employee at Deer Island had embezzled more than \$1.8 million between 1995 and 2007.

The auditors denied the allegations, and in May 2011, issued a third-party claim against 16 directors of the credit union, arguing their negligence contributed to the loss.

On Oct. 7 [2011], New Brunswick Court of Queen’s Bench Justice Hugh McLellan struck out the third part claim, calling it “irresponsible and an abuse of the process of the court.” He said Dawe should have known about an Ontario Court of Appeal case *Piedra v. Copper Mesa Mining Corp.*, which sets a very high bar for actions against directors, and ordered a hearing on costs to send a message that the courts will protect directors from ill-founded litigation.

In his Nov. 30 [2011] decision on costs, McLellan said he could not accept Dawe’s claim that she had “acted in honest belief that the auditors claim against the directors had merit.

He said the claim, which cost the directors \$77,000 in legal fees to respond to, had delayed the main action by six months and that it was his duty to rule that Dawe had “acted in disregard of the interests of justice,” and “caused costs to be wasted or incurred improperly.”

Dawe must pay \$40,000 to the law firm representing the directors, plus another \$5,000 for HST by noon Dec. 15. If she fails, McLellan said he would hear counsel about enforcing the order the following day. If that hearing is needed, he ordered Dawe to attend in person before him in St. John, N.B.

Adams v. Adams

(2011) 5 R.F.L. (7th) 289 (Alta. Q.B.), M.C. Erb J., 22 December 2011
[Headnote; paras. 45-59]

Plaintiff mother was largely successful in divorce trial and sought costs accordingly—Defendant father claimed that there had been misconduct on part of mother and her counsel which should argue for no costs or costs against mother—Submissions on costs were made—Costs awarded to mother—Father's counsel advanced allegations of misconduct at mother and her counsel as well as witnesses without proof, apparently as part of litigation strategy—Father's counsel's conduct was unprofessional and warranted costs award against solicitor personally—This costs award took form of payment by father's counsel of mother's legal expenses.

. . . .

45 Ms. Kirker [counsel for insurer of mother's lawyer, Mr. Aaron] argued at the costs hearing that while Mr. Aaron's actions [as lawyer] do not constitute misconduct attracting a costs penalty, the unsubstantiated allegations of misconduct and dishonesty levelled against Mr. Aaron by Mr. Ruff [father's lawyer] are sufficiently serious to compel a costs award to cover her representation of Mr. Aaron.

46 The Court of Appeal of Alberta recently noted that courts have often visited heavy costs on parties making serious allegations of improprieties which are not proven: *Recovery Production Equipment Ltd. v. McKinney Machine Co.*, 1998 ABCA 239, 223 A.R. 24 (Alta. C.A.) at para. 103.

47 Perhaps Mr. Ruff's approach throughout his conduct of the Defendant's file is best summarized by Ms. Kirker during argument at this costs hearing:

During the course of this litigation, from the time Mr. Ruff first became involved, persons who have opposed or disagreed with the Defendant's [father's] position have been subjected to groundless accusations of serious misconduct, intentional wrongdoing. These accusations have been levelled at Defendant's former counsel, Ms. Shennette, the Plaintiff's [mother's] current counsel, Mr. Aaron [mother's former counsel], the Plaintiff herself, witnesses who have testified on behalf of the Plaintiff at trial, the Court, and now me, appearing on behalf of Mr. Aaron. It seems that if you disagree with the Defendant, Mr. Ruff submits that you are guilty of misconduct.

48 I agree with Ms. Kirker that the Court cannot countenance this approach to litigation by counsel. It is inappropriate and unprofessional. I agree that the unsubstantiated allegations of serious misconduct and dishonesty levelled against Mr. Aaron are in themselves serious enough to warrant the payment of the costs of Ms. Kirker's representation of Mr. Aaron [as his professional liability insurer's counsel].

49 During oral argument, Ms. Kirker submitted that it was within this Court's discretion as to whether a costs award should be on either a solicitor-client basis or whether the costs should be payable by the solicitor personally. Mr. Ruff was present in the courtroom and must be taken to have heard her submission. He had an opportunity to respond but did not do so.

50 It is well-established that costs repose within the discretion of the court and that such discretion must be exercised judiciously and appropriately given the circumstances of the case: *MacCabe v. Westlock Roman Catholic Separate School District No. 110*, 1999 ABQB 666, 243 A.R. 280 (Alta. Q.B.) at para. 61, 2002 ABCA 307, 320 A.R. 194 (Alta. C.A.), at para. 12. This discretion allows the court on its own motion to make an award of costs against a solicitor personally: *155569 Canada Ltd. v. 248524 Alberta Ltd.*, [1997] A.J. No. 296 (Alta. Q.B.) at para. 20. See also Rule 10.50.

51 It is notable to this Court that although Mr. Adams has been represented in the past by various counsel, the accusatorial approach that was pursued in this litigation more recently appears to have begun contemporaneously with Mr. Ruff taking conduct of his file.

52 Mr. Ruff clearly chose to approach litigation using intimidation and bullying tactics as his primary strategy. Anyone, be it counsel, party, witness or even the Court, who disagreed with Mr. Ruff found themselves on the receiving end of a charge of "serious misconduct" or was either named or threatened to be named as a party in separate litigation. It is clear to this Court that these tactics were employed in an attempt to gain some sort of litigation advantage.

53 The type of conduct which might attract such a costs award was the subject of comment in *Robertson v. Edmonton (City) Police Service*, 2005 ABQB 499, 385 A.R. 325 (Alta. Q.B.), (per Slatter J.) at para. 21:

It is apparent from the case law that there must be some finding of positive misconduct by counsel before costs will be awarded against him or her personally. It is not enough that the action was unsuccessful. It is not enough that the client advanced unmeritorious claims, or instructed counsel to pursue the matter in an undesirable way. Nor is it sufficient that counsel did not act in an exemplary fashion. A mere error of judgment, or even negligence, is not enough. Obviously, legitimate tactical decisions by counsel on the conduct of the litigation do not justify personal cost awards. *The conduct of the barrister must demonstrate or approach bad faith, or deliberate misconduct, or patently unjustified actions, although a formal finding of contempt is not needed: Shum v. Mitchell*, supra, at para. 15; *Brown v. Silvera*, supra, at para. 32. [emphasis added]

54 As noted already in these reasons, Mr. Ruff's conduct [representing the father] went well beyond his dealings with Mr. Aaron and included allegations levelled at Dr. Adams, other

witnesses, other counsel and this Court. While *Loates v. Loates*, 2000 ABQB 253, 264 A.R. 287 (Alta. Q.B.), dealt in part with unjustifiable delay, the Court's commentary on a solicitor's questionable conduct and attempts to engage both the court and opposing counsel in personal debate is applicable here. Justice Lee had this to say at paras. 23 and 27:

What these letters show is a discourteous and disrespectful attitude towards the Court, and show an inability to deal properly with the sometimes inevitable disagreements between counsel and the Bench respecting the law. When counsel believe the court is mistaken, the response is either to appeal, or in the case of the settling of Orders, to utilize the procedures outlined in the Rules of Court to inquire whether the Court has been mistaken. Inflammatory criticisms of the fairness and integrity of the Court in letters to opposing counsel, carbon copied to the client, and certainly the tone of the comments in the letter directly to the Court, edge very close to a contempt of the court.

[...]

However, the Court must be extremely cautious in exercising its powers of contempt, particularly in cases of counsel criticizing the Court. Discourtesy and unprofessionalism on the part of counsel does not necessarily reach the point of contempt, unless it can be seen as an interference with the administration of justice. It is my view that such issues of discourtesy and unprofessional conduct are better addressed by the Law Society.

55 Like Justice Lee, I am far less concerned about the effect of Mr. Ruff's conduct on this Court than its effect on the opposing side. In *Markdale Ltd. v. Ducharme*, 1998 ABQB 758, 238 A.R. 98 (Alta. Q.B.) Justice Beilby granted costs personally against counsel on a number of grounds, including "generally acting in bad faith" as well as "unfounded accusations of misconduct" against opposing counsel: paras. 67 and 72. Of particular note here are her closing comments at para. 75:

[the solicitor's] conduct was improper, not negligent. His unsubstantiated allegations of impropriety against [opposing counsel] during the case management process, and his excessive correspondence on trivial matters, in the context of all that had gone on before, imbedded in his history of conduct as a whole caused Lee, J. to become concerned that the case management process was being corrupted. Contemporary Courts cannot operate and modern litigation proceed without access to efficient and effective case management where necessary. Actions which debase or waste that resource must be addressed and deterred.

56 While awarding costs against counsel personally may be considered an extraordinary remedy and is not one which should be made casually, I find it is warranted on the facts before this court. Mr. Ruff's conduct went beyond excessive zeal for the case: it was deliberate, in bad faith, unprofessional and unjustified.

57 Although numerous individuals associated with this case found themselves on the receiving end of allegations of unethical conduct or impropriety, it is Mr Ruff's complete failure to substantiate the allegations of "extremely egregious legal and ethical misconduct" made against Mr. Aaron which attracts a costs award here. It is this type of irresponsible conduct which weakens the perception of the justice system as a whole.

58 Allegations of unethical conduct, misrepresentations before the court and sharp practice should not be made lightly, given the effect such statements may have on a lawyer's reputation, and, in direct connection, his livelihood. As was noted by the majority in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.) at para. 118:

In the present case, consideration must be given to the particular significance reputation has for a lawyer. The reputation of a lawyer is of paramount importance to clients, to other members of the profession and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation.

59 The costs of having Ms. Kirker attend to address the charges of misconduct [by Mr. Ruff against Mr. Aaron] should never have been incurred, given the spurious allegations of unethical behaviour. As confirmed by (then) McLachlin J. in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) the basic principle on which a costs award is granted remains compensatory and costs against a solicitor personally remains an exceptional remedy: at para. 254. See also *Jackson v. Trimac Industries Ltd.*, *supra*.

[Note: Mr. Ruff ordered to pay the costs of counsel for Mr. Aaron's professional liability insurer.]

Thompson Valley Law Corp. (c.o.b. Burke Frame) v. Childs

[2012] B.C.J. No. 23 (B.C.S.C.), Master B.M. Young (as Registrar), 10 January 2012

[Headnote]

Application by the solicitor for review of six outstanding accounts totaling \$62,292—The clients had already paid \$55,803—As there were interim accounts the three-month limitation period for review did not apply—The clients purchased a home and alleged the vendor made misrepresentations about its condition—The solicitor, who was experienced in land use litigation, advised the clients that his fees were \$350 per hour and he did not take contingency cases—The clients and the solicitor discussed seeking rescission of the contract or staying in the home and seeking damages—The clients elected to do the latter—After the initial meeting, the solicitor provided the clients with a letter agreeing to act for them, listing his hourly rate, and estimating discovery costs of \$20,000—The clients were asked to sign and return a copy of the

letter—The clients performed extensive renovations on the home, more than they would have been able to recover from the vendor—The clients began to regret their election but the solicitor advised them that rescission was no longer an available remedy—The clients continued paying interim accounts but ran out of money and advised the solicitor of their financial concerns—The solicitor assured them that they would be given time to pay accounts and that he would not abandon them—The clients were not ready for trial because their expert would not provide an opinion on remediation costs without demolishing parts of the house, which the clients could not afford—The solicitor encouraged the clients to accept a partial settlement for \$175,000 towards remediation costs—The clients were at first resistant, but then agreed—The solicitor then sent the clients a letter advising that he would withdraw as counsel if they did not pay the accounts within 30 days—When the clients did not pay, the solicitor withdrew, leaving the clients to oversee the settlement—The remediation work was so poorly performed that the clients felt the partial settlement was a waste of potential recovery—The clients argued that all accounts should be set aside because the solicitor did not complete his contract with them—The solicitor argued that there was no formal retainer and that he never agreed to see the case to its conclusion—**Held:** Application allowed in part—The clients clearly expected the solicitor to represent them until the conclusion of their litigation and the letter provided after the initial meeting constituted a formal retainer—The estimate provided created expectations for the clients so the solicitor should have notified them when the fees neared that amount and should have asked then for authorization to proceed—The fees for discovery were three times the estimate and the clients were given no warning—The clients expressed financial concerns but agreed to continue with the retainer and to keep trying to pay— The solicitor provided assurance that he would not abandon the clients yet he did just that—The retainer was the entire contract and contained no payment terms, other than the hourly rate— As such, the solicitor was not entitled to demand payment of interim accounts—The clients had a legal right to withhold payment until the matter was completed—The solicitor wrongfully withdrew his services in July 2010, making all work performed in 2010 of questionable value, particularly since the clients were pressured to accept a partial settlement, and were then abandoned— The solicitor was entitled to monies already paid and to payment for work prior to 2010—However, all accounts after January 1, 2010 were disallowed—The accounts were reduced by \$46,361—As the accounts were reduced by 75 per cent, the clients were entitled to costs.

Cassidy v. Cassidy

2011 CarswellOnt 1541, Ont. Sup. Ct. J., Price J., 02 February 2011
[Headnote]

Wife successfully brought motion to enforce terms of divorce order—Husband was found to be in contempt of divorce order for failing to pay wife her share of tax refund and for failing to transfer his interest in matrimonial home—Husband also brought motion for order quantifying and declaring amount of child and spousal support he had paid, but his motion was dismissed—Hearing on costs was held—**Held:** Wife was awarded costs of \$3,350—Wife was substantially successful in both motions—Favourable outcome which wife achieved could not be discounted

by parties' divided success in calculation of amounts that were transferred to wife from husband's pension—Wife did her best to secure correct information and convey it—Indemnification of wife as successful litigant and disapproval of husband's conduct in disobeying divorce order dictated that wife was awarded her costs—There was no reason to depart from principle that contemptor must pay costs of moving party on substantial indemnity scale.

"Court rejects lawyer's bid to question wife—Stephen Durbin must pay \$16,000 in costs in family law matter"

Sebesta, Kendyl, *Law Times*, 05 March 2012

The Ontario Superior Court has delivered an unusual decision that places a limit on when it can grant motions for questioning in family law cases.

Writing in *Durbin v. Medina*, Superior Court Justice Heather McGee reversed an earlier decision by her colleague, Justice Cory Gilmore, and ruled against granting a motion for questioning brought by family lawyer Stephen Durbin in his own divorce matter [in which he represented himself, with counsel to argue the motion for leave to question his wife.]

McGee found the court couldn't grant such motions in cases where a judge determines the motives of the litigant to be questionable. She also made a \$16,000 costs order against Durbin.

Durbin, a 56-year-old lawyer with a family law practice in Oakville, Ont., originally appeared before Gilmore on Jan. 4 in a divorce proceeding involving his ex-wife, Celia Medina, a 33-year-old administrator for the provincial government.

Gilmore found that because the parties were far apart in their respective positions in their sworn affidavits, questioning should take place to work out the discrepancies. But McGee ruled otherwise this month. In her view, Durbin's motives for bringing a motion for questioning were "not plausible."

"I can discern no issue for which questioning of the mother would advance the case at this point," wrote McGee.

"The parties' respective parenting plans will be reviewed and assessed by the assessor. None of the minor irritants listed by the father as a topic for questioning are necessary to a determination of the children's best interests."

McGee then went on to question Durbin's motives. "Mr. Durbin's counsel rests heavily on Mr. Durbin's need to test the credibility of the mother," she wrote. "But the proposed topics are largely *de minimus*, personal to Mr. Durbin and frankly, call into question his litigation

goals.”

McGee added that neither litigants nor their counsel could question the opposing side simply to “diminish, intimidate or attempt to embarrass a former spouse,” particularly if they hope to parent co-operatively.

But Durbin says that wasn’t his intention.

“Justice Gilmore demonstrated clearly that she had read and understood the material on the motions.”

“Following argument, she addressed the respondent’s solicitor, indicating that despite her most able argument, since the parties were diametrically in opposition in what they swore in their affidavits, she could see no way that a judge would be able to deal with the matter effectively unless questioning took place.”

“Thus, I was certain the result was a foregone conclusion. January 25, the matter returned before Justice McGee. It is an understatement to say that I was surprised at both the result in the substantive decision [which denied him leave to question his wife] and the costs award.”

The decision marks a rare move by the Superior Court and family lawyers say it reflects the shock litigants may receive when choosing to bring motions for questioning in sensitive family court matters.

William Abbott, counsel for Medina, says that although the family law rules often follow the Rules of Civil Procedure closely, they deviate from each other specifically in motions for questioning to protect a system often filled with unrepresented litigants who may be emotional and unprepared.

“The central question in this motion was whether or not Durbin had an automatic right to question his wife,” says Abbott.

“A lot of people presume they do have an automatic right, but Justice McGee’s decision shows there is an important distinction between the Rules of Civil Procedure and family law rules in this area.

The deviations are there because there are a lot of self-represented litigants in family court and allowing an unrepresented litigant to come up against a represented one in that way would be seen as unfair.”

Abbott notes McGee’s decision to award significant costs also highlights an important and different approach from the Rules of Civil Procedure.

“The costs she awarded seem to say the court will not allow litigants to potentially disparage clients through questioning.”

“Mr. Durbin’s tactics have often served to show that people should not act as their own lawyer, particularly in family court matters,” says Abbott, who notes it’s very rare “for motions for questioning to be awarded in circumstances like this.”

But Brian Galbraith of Galbraith Family Law Professional Corp. in Barrie, Ont., says placing a limit on which motions for questioning are successful and ensuring the practice is rare in family court serve to protect both sides in sensitive family matters.

“Divorce is inherently emotional,” says Galbraith, who adds he retained counsel in his own divorce several years ago despite being an experienced family lawyer.”

“It is difficult to be objective about your own divorce. ... I knew I could not see the forest for the trees. I needed someone to help me through the process who was a seasoned, objective problem solver.”

Still, Galbraith says the family court doesn’t often grant motions for questioning precisely to protect such litigants.

“The problem with the unrepresented in court from the judicial point of view is that our court system best functions with two strong advocates playing their role well. When parties are unrepresented—so don’t know the rules and don’t present the proper evidence—the judges can’t do their best work.”

The issue, then, is a challenge for judges. “Frankly, judges want to do good work, so I am sure that the numbers of unrepresented in family court is very frustrating for them. Judges would prefer both clients have lawyers so they can do their best job.”

In her ruling, McGee ordered Durbin to pay \$16,000 in costs as well as 80 per cent of assessment costs. Medina must pay 20 per cent.

Family court lawyer Jason Isenberg acted as counsel on a per diem basis in the matter [of the motion for leave to question the wife].