



STANDARDS

- ▶ Family Law Standards
- ▶ Real Estate Standards
- ▶ Law Office Management Standards
- ▶ Criminal Law Standards

The following standards as prepared by the Professional Standards (Family Law) Committee, were, unless otherwise indicated, approved by the Nova Scotia Barristers' Society Council on March 25, 2011.

For full detail on the mandate of the Committee, as well as the nature and scope of its work, please be sure to read the [Introduction](#) from the former chair of the Professional Standards (Family Law) Committee (then D. Timothy Gabriel QC, now The Honourable Judge Timothy Gabriel). The Introduction explains how to read and use the standards and identifies some of the key areas with respect to which feedback from the membership was originally sought.

These resources are not intended to be exhaustive. They should not preclude or replace your own research and are not a substitute for exercising your professional judgment. These standards cannot address every situation which might arise in practising family law.

One resource that family law practitioners may wish to access, or may wish their clients to access is www.nsfamilylaw.ca.

Note: LIANS is not responsible for the accuracy, currency or reliability for the information or content offered by CanLII or other third party websites referred to on this site.

If Members have suggestions of resources, cases or articles of

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Family Law Standards complete PDF package (current to September 8, 2017)

#1 - CONFLICT OF INTEREST

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#1 - CONFLICT OF INTEREST

FAMILY LAW STANDARDS

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STANDARD

A lawyer must take all reasonable steps to avoid circumstances likely to create an actual or perceived conflict of interest.¹

A lawyer should take all reasonable steps to ensure that a conflicts check is complete before confidential information is provided or advice is given in initial contact with the client or client's agent.²

A lawyer should be aware that a solicitor-client relationship and the resulting duty of care may arise prior to a formal retainer.³

REFERENCE MATERIALS

Notes

1. Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012: Chapter 3: "Relationship to Clients"; section 3.4 "Conflicts"; and section 5.2 "Lawyer as Witness". FLSC, *Code of Professional Conduct*, Ottawa: Federation of Law Societies of Canada, 2014, section 3.4 "Conflicts". Limited exceptions to usual standard for conflict may apply for short term summary advice – see Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova

► #9 - Affidavits

► #10 - Children

► #11 - Scope of Representation

► #12 - Independent Legal Advice

► #13 - Adoption

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► #15 - Electronic Information and Social Media

► General Resources

Scotia Barristers' Society, 2012 (January 23/15 amendments), rules 3.4-2B – 3.4-2D.

1. *Canadian National Railway Co. v. McKercher LLP*, [2013 SCC 39](#) (CanLII) - Outlines duties to clients where there is subsequent retainer by another party adverse in interest to existing client. There cannot be a summary and unexpected dropping of a client to circumvent conflict rules and there is a duty of candour requiring lawyers to advise existing clients of all matters relevant to a new client retainer (para. 10). A new retainer “sufficiently related” to matters worked on for a different client raises a rebuttable presumption that a lawyer possesses confidential information that raises risk of prejudice to clients. Law societies can have stricter conflict rules than those the Court applies and while Court not bound by society rules they are considered important public policy statements. “Bright line rule” that a firm cannot act for a client with interests adverse to another existing client unless both clients consent is not unlimited. It applies where clients’ immediate legal interests are directly adverse. It does not apply to condone tactical abuses or where it is unreasonable to expect the lawyer will not concurrently represent adverse parties in unrelated legal matters (para. 32). Where situations fall outside the bright line rule “the question becomes whether concurrent representation creates a substantial risk that the lawyer’s representation of client would be materially and adversely affected” and determination becomes “more contextual” (para. 38).

2. *Sun v. Shao*, [2013 BCSC 532](#) - Lawyer not removed. Staff evidence confirmed intake procedures to avoid taking confidential information. *Fisk v. Land*, [2004 MBQB 192](#) - Lawyer did not have detailed notes of initial conversations but not forced to withdraw. Onus on client to provide sufficient proof of exchange of confidential information not met.

3. *Descôteaux v. Mierzewski*, [1982 CanLII 22](#) (SCC) - Solicitor-client relationship arises from potential client’s first dealings with lawyer or staff when seeking legal representation or advice and solicitor-client privilege can extend to initial conversations even if the retainer is not perfected.

Additional Commentary

Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd., [2008 NSCA 22](#) (CanLII) – Lawyers have a duty not to act against a former client in a related matter whether or not confidential information is at risk. A matter is “related” if the new

retainer takes an adversarial position against former client with respect to legal work the lawyer performed for former client or a matter central to the earlier retainer.

Millhouse v. Millhouse, [2012 SKQB 499](#) – The determination of a conflict of interest when a lawyer acts against a former client involves an objective test assessed from the point of view of a reasonably informed person citing: *Chapters Inc. v. Davies, Ward & Beck LLP*, [2001 CanLII 24189](#) (ON CA)

Strother v. 3464920 Canada Inc., [2007 SCC 24](#) (CanLII), [2007] 2 S.C.R. 177 – Lawyers and their firms owe a fiduciary duty of loyalty to former and current clients which is an element of avoiding conflict. When a lawyer is retained the scope of the retainer is governed by contract but the solicitor-client relationship is overlaid with certain fiduciary responsibilities imposed as a matter of law. Fiduciary duties provide a framework within which the lawyer performs the work and may include obligations that go beyond what the parties expressly bargained for. Binnie, J. (for the majority) held that the test to show that conflict creates a material and adverse impact on a client is the possibility rather than the probability of adverse impact, but that the impact must be “more than speculation” (paras. 60 – 61).

Perry v. Wagner, [2014 NSSC 179](#) (NSSC) - Defendant represented Plaintiff in personal injury litigation. Defendant represented in unrelated matter by counsel for insurer in Plaintiff's case (Barnes). Plaintiff concerned Defendant's conduct and commitment to his case in negotiations with Barnes was influenced by this. Lawyer not disqualified, citing *Canadian National Railway Co. v. McKercher LLP*, 2013 SSC 39 (CanLII), para. 38 as applicable law for assessing conflict claims/fiduciary breaches falling outside “bright line rule.”

Boyd v Boyd, [2008 CanLII 1417](#) (Ont. Sup. Ct.) – Lawyer sued client for outstanding bill while representing client in family matter. Judgment registered against matrimonial home for unpaid fees before equalization payment satisfied. Deemed conflict and judgment set aside. Court held lawyer could not continue to act. Situation distinguished from informing client who has not paid that lawyer unable to continue representation.

R. v. Neil, [2002 SCC 70](#) (CanLII) “Bright Line Rule.” A lawyer may not represent one client with interest directly adverse to immediate interests of another current client even if two mandates unrelated unless both clients consent after receiving full disclosure (and preferably independent legal advice), and

lawyer reasonably believes s/he is able to represent each client without adversely affecting the other.

MacDonald Estate v. Martin, [1990 CanLII 32](#). Standards for disqualifying conflict of interest (junior lawyer actively engaged with client joins another firm in litigation adverse to former client). Court concerned with “three competing values: (1) concern to maintain high standards of legal profession and integrity of justice system (2) countervailing value of not depriving litigant of choice of counsel without good reason and (3) permitting reasonable mobility of legal profession. Test is whether reasonably informed person would be satisfied no use of confidential information would occur. This requires two questions to be answered: (1) Did the lawyer receive confidential information attributable to the solicitor-client relationship relevant to the matter at hand? (2) Is there a risk it will be used to the client’s prejudice? (paras. 44-45). Once client shows existing previous relationship sufficiently related to new retainer Court should infer confidential information imparted unless lawyer can displace this difficult onus. Court unlikely to accept measures to protect confidential client information such as “Chinese Walls and cones of silence” as sufficient until governing bodies of legal profession approve and adopt rules re these methods. “A fortiori undertakings and conclusory statement in affidavits without more [as to screening/walls] not sufficient for the Court nor is it likely to be sufficient to satisfy public (para. 50). HELD: Successor firm disqualified. Majority did not comment on test for transferring lawyer not personally involved in a file and minority left this issue “for another occasion.”

WHAT IS CONFIDENTIAL INFORMATION IN FAMILY LAW FILES?

The nature of family law litigation is emotionally charged and parties are particularly vulnerable. By its nature most information about family law cases will often be perceived as confidential from outset: *L.M.B. v. M.R.B.*, [2003 MBQB 146](#) (CanLII); *Dalgleish v. Dalgleish*, [2001] O.J. No. 2187 (Ont. Sup. Ct.) NO LINK.

Marinangeli v. Marinangeli, [2004] OJ 3082 (Ont. Sup. Ct.) - Much of the relevant information received was confidential but would have had to be disclosed in any event to the opposing party and much became public record in a prior related family proceeding so lost the quality of confidentiality, but confidential information isn’t limited to financial details. When previously

represented by a lawyer now representing her Husband, Wife had disclosed other confidential matters such as concerns and feelings about her marriage and former husband and “the relationship between family lawyers and their clients goes well beyond technical, financial and impersonal information, disclosing whether by direct words or in the very nature of instructions to their counsel their strengths and weaknesses in the processes of settlement discussions, negotiation tactics and litigation strategies, perceptions of the other party’s strengths and weaknesses including the opposite party’s likely approach to various issues and which are likely to be important, and whether a client prefers to “play hardball” on particular issues. These are matters directly personal to a client and affect client directly in pursuit of an effective realization of a just conclusion on the issues. Firm disqualified.

Bell v Nash, [1993 CanLII 845](#) (BCCA) – Lawyer inadvertently had initial phone interview with Wife of an existing client, booked a meeting and had second conversation. HELD: Lawyer must withdraw due to receiving confidential information (citing *Wolfe v. Wolfe*, [2003 SKQB 474](#), para. 46): “The substance of the exchange between these parties that is of significance is not so much the particulars of a concrete sort that were divulged as it is the information that went to the emotional heart of the petitioner’s case.”

DOES “PUBLIC DOMAIN” INFORMATION REMAIN CONFIDENTIAL?

Merrick v. Rubinoff, [2013 BCSC 2352](#) - Lawyer not required to withdraw for various reasons. Among these, the Court noted with respect to the conflict alleged in current proceedings that information given to lawyer during prior divorce proceedings was no longer confidential since the trial concluded in 2001 and was a reported case.

Lewis v. Lewis, [2006 SKQB 77](#) - Counsel unsuccessfully argued against being required to withdraw. He argued in family proceedings the obligation to disclose all relevant financial information means any information received from a client is obtainable in a new related proceeding. Argument rejected (see detailed discussion paras. 14 -15).

PROOF OF EXCHANGE OF CONFIDENTIAL INFORMATION

Marinangeli v. Marinangeli, [2004] OJ 3082 (Ont. Sup. Ct.) - Lawyer formerly representing Wife moved to different firm which represented Husband in new but related proceedings. There is a strong inference lawyers who work together share confidences especially in a family law group even if internal "confidentiality screens" are in place. Where confidential information exchanged in prior related matter sufficiently related to current retainer lawyer must rebut inference confidential information was exchanged. High burden to rebut "not likely to be met where the solicitor whose removal is sought argues the motion himself or herself." Counsel should swear affidavits and not just give assurances as an officer of the Court in argument that no confidential information was exchanged within the family law group. Firm disqualified.

Achakzad v. Zemaryalai, 2010 ONCJ 24 (Ont. Ct. of Justice) - High profile Hague Convention case. Wife unable to keep former counsel (Lewis). On Lewis' recommendation Wife called Brodtkin but unable to pay retainer and later advised Brodtkin of that. Brodtkin later retained by Husband. Brodtkin did not file affidavit but filed law clerk's affidavit deposing Brodtkin had no recollection of calls, not Brodtkin's practice to have detailed discussions with parties who can't afford retainers, Brodtkin receives many general phone calls and usually makes notes but had no notes of these calls, but affidavit still stated Wife's affidavit was "replete with misrepresentations, falsehoods and exaggerations and no confidential information was discussed." Clerk's affidavit did not take issue with content of Lewis' affidavit. Lewis said he called Brodtkin about the file, Brodtkin indicated she was aware of the file because Husband's counsel for Husband mentioned it at a family law conference and Brodtkin indicated willingness to assist with case including precedents for the appeal. HELD: Brodtkin must withdraw. Lawyer did not meet "heavy burden" to rebut presumption confidential information exchanged especially where she had no notes of the call and Wife's evidence corroborated by Lewis.

Fisk v. Land, 2004 MBQB 192 - Wife testified she called lawyer (Stoffman), gave confidential information and left a message the next day requesting an appointment but her call was not returned. Husband retained Stoffman's firm. Stoffman testified he had no recollection of the wife's call and about firm's general practice with prospective clients (only information initially taken was that required to check conflicts and caller told no specific questions could be answered until conflict search done and a written retainer signed). Wife said Stoffman did not advise of this standard practice. Stoffman had no notes of discussion with Wife. HELD: Stoffman not required to withdraw. Wife had not

met onus to establish confidential information divulged, and in particular (at para. 25):

- “...[E]vidence which merely alleges a discussion of the details of the issues and positions on the issues could be as little as saying, “we own this and that and he wants X and I want Y,” which I would not find to be the imparting of confidential information. If there was more, such as the sharing of a litigation strategy or the sharing of fears or concerns so that the lawyer would have obtained confidential or insider information about the person he now proposed acting against, I would have expected that information to have been in evidence. Without it, I am left to guess.”

WHEN DOES A CLIENT RELATIONSHIP BEGIN?

Initial phone calls/conversations

An initial call or conversation can create a client relationship even if no retainer is perfected: *Descôteaux v. Mierzwinski*, [1982 CanLII 22](#) (SCC).

Law Society of Saskatchewan v. Shirkey, [2014 SKLSS 9](#) (CanLII): When a client commenced divorce proceedings in Alberta, he engaged the lawyer to serve the opposing party. When the lawyer served the wife, he met with her and discussed various issues with her. This was interpreted as legal advice by the wife. In proceeding by the law Society of Sask, the member agreed that this was a conflict of interest.

Telephone consultations potential client and lawyer

Shingoose v. Harripersad, [2004 SKQB 526](#). Despite lawyer’s detailed evidence about “warning procedure” during first call from prospective clients to not disclose confidential information, lawyer not permitted to represent Husband in custody/access /child support proceedings because lawyer’s evidence about content of call was “equivocal.” Lawyer/firm had no standing in the appeal from disqualification: *Shingoose v. Harripersad*, [2005 SKCA 102](#).

Telephone consultations potential clients and staff

Where confidential information is given to staff a lawyer may be removed: *Dalgleish v. Dalgleish*, 2001 CarswellOnt 2016 (WC), [2001] O.J. No. 2187 (QL) (Ont. Family Court) NO LINK - Wife contacted firm and spoke three times with an assistant.

Husband later hired the firm for the divorce proceeding. HELD: Wife had disclosed confidential information and firm must withdraw.

Consultation between lawyers

Wolfe v. Wolfe, [2003 SKQB 474](#). Wife's Ontario divorce counsel contacted Saskatchewan lawyer (Merchant) to obtain advice on Saskatchewan law. Husband later retained Merchant. Merchant said he was not retained, did not recall conversation with Ontario counsel, his notes indicated he received no confidential information and purpose of call was to interview lawyers who might be asked to represent Wife. HELD: Rebuttable presumption confidential information was exchanged with "heavy onus." Merchant's notes did not reflect entire conversation and duty of confidentiality arose whether discussion with Wife or her Ontario counsel. Merchant forced to withdraw.

Calls from third parties

Forsyth v. Cross, [2009 SKQB 184](#). Husband's mother called Merchant Law Firm to obtain second opinion on custody/access or perhaps hire a lawyer at that firm. She gave particulars including terms of proposed settlement agreement. Husband and mother received letter confirming opinion given to mother by phone. No meetings with Husband or mother. Merchant Law firm not retained and subsequently retained by Wife. HELD: Lawyer must withdraw due to confidential information received from Mother, file opened and opinion letter being sent.

Free first consultation

Sauter v. Sauter, [2003 CanLII 349](#) (Sask QB) - A 30 minute free consultation can create a solicitor/client relationship. Client said he took notes at meeting. Lawyer's affidavit indicated he had client's name in his diary, but could not recall meeting, locate time records or meeting notes and did not open a file or send a bill. His practice at first free meetings was to only give general advice such as reference to the presumption of equal property division and applicability of the Federal Child Support Guidelines and that he would not get into "significant specifics" or paly strategy or do any detailed analysis in that short meeting time. HELD: Lawyer must withdraw.

First consultation no formal retainer

Popowich v. Saskatchewan, [1995 CanLII 5956](#), (Sask QB) - Initial client intake interview occurred. No formal retainer. Client recalled imparting confidential information. Lawyer disagreed. HELD: Context to determine relationship is if client believes s/he is dealing with a solicitor in a professional capacity. No need for

formal retainer. Client's perception confidential information exchanged disqualified lawyer.

CLIENTS WITH COMPETING INTERESTS

NSBS v. Whitehead, [2014 NSBS 1](#) (CanLII) – A lawyer must not represent clients with competing interests in the same transaction and even if informed consent is obtained this does not obviate the lawyer's duty not to act. It is also a conflict to practice law with a lawyer who holds investment or other financial relationships with the firm's clients.

NSBS v. MacIsaac, [2014 NSBS 4](#) (CanLII) – Lawyer disciplined for failing to advise clients purchasing land he was also representing the Vendors and for not obtaining their waiver of conflict until so close to closing that purchasers had no alternative but to proceed with him as counsel.

Ryan and Schwartz v. Schwartz, [2000 NSCA 82](#) (CanLII) – A lawyer cannot act for two clients who have similar but competing interests.

CORPORATE V. INDIVIDUAL CLIENT

Johnson v. Rudolph, [2013 NSSC 210](#) - Prior representation of companies linked to an individual did not make the individual a current client in his personal capacity.

Thoma-Lovell v. Lovell, [2011 ONCJ 384](#) (Ont. Ct. of Justice). - Motion by Husband for removal of Wife's lawyer from application to vary child support based on Husband's increased income. Husband claimed Wife's firm did work for his corporations from which he derived employment income. HELD: No conflict as it was clear any of Husband's relevant income information was not held in firm records.

Racey v. Racey, [2007 CanLII 47156](#) (Ont. SC) - Firm previously did corporate work for Husband. Wife retained firm in family matter. HELD: Firm must withdraw. The value of the company on separation, its current value, circumstances of incorporation, including its corporate structure and the conduct of both spouses as officers and shareholders, both before and after separation are or may well be matters of considerable dispute. There was both perception of conflict and real conflict and issues referred to also highlight that it is more than a mere possibility that prior corporate counsel might be a required witness.

Watt v Nicholls, [2011 ONSC 2814](#) (CanLII): Husband asserted that lawyer for wife in a conflict of interest because he had been a family friend for 20 years, had acted for his company and had been privy to information about the husband's income. Lawyer ordered removed as Solicitor of Record.

NEW SPOUSES/PARTNERS

Hermant v. Secord, [2010 ONSC 6444](#) – Wife applied to void separation agreement. At his prior firm, her lawyer represented Husband's second wife and also now employed an assistant who worked for the Husband's lawyer when the separation agreement was signed. HELD: Wife's lawyer not required to withdraw. Representation of Husband's second wife did not result in disclosure of relevant confidential information.

FORMER CLIENTS

Shaver v. Logan, [2016 NSSM 3](#)

Lappin v. Bauer, [2015 NSSC 108](#)

Canadian National Railway Co. v. McKercher LLP, [2013 SCC 39](#) (CanLII) – See Footnote 1 Reference Materials.

Merrick v. Rubinoff, [2013 BCSC 2352](#) - Between 1999 and unspecified date after 2008, lawyer acted for Merrick in divorce, later had some (disputed) drafting involvement with Merrick's marriage contract with new wife, limited consultation on an intellectual property referred to other counsel and consultation about legal aspects of home renovation. The Court characterized the evidence about the last consultation as "unattributed hearsay" and not relevant to Merrick's application to have lawyer removed as counsel for lienholder on Merrick's home. Court did not agree lawyer's involvement gave him so much insight into Merrick's character including his "risk tolerance" that lienholder had a litigation advantage, also noting information given to lawyer during divorce proceedings was no longer confidential since the 2001 trial was a reported case. Lawyer not required to withdraw.

Johnson v. Rudolph, [2013 NSSC 210](#) onus on former client to give clear and cogent evidence of how prior retainers would provide firm with confidential information that would result prejudice in a new unrelated matter.

Millhouse v. Millhouse, [2012 SKQB 499](#) –The Wife's first divorce

was uncontentious. A settlement was negotiated while the Wife had counsel. Her first Husband's lawyer drafted the separation agreement. By then, the Wife was in a relationship with her second Husband and his lawyer gave her independent legal advice about the agreement. The Wife waived conflict but approximately five years into the protracted second divorce she asked to remove Husband's lawyer. HELD: Service to the Wife was confined to determining that she understood and agreed to terms of the agreement giving her sole custody of children from her first marriage. Any parenting attitudes or beliefs discussed in that context would lead an objective observer to conclude such discussions while confidential would have "tended toward the mundane." The current parenting issues were only as to the parties' child. The Wife's other children were now approaching adulthood. Risk that Wife might have disclosed any views prejudicial to the present custody suit would not be readily apparent to the reasonable observer and had she done so the information would be "obsolete." so the issue was not so much if the subject matter of the two retainers was the same, but whether confidential information learned during the first retainer would now be relevant. The two retainers were insufficiently related to disqualify Husband's counsel.

Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd., [2008 NSCA 22](#) (CanLII) – Lawyers have a duty not to act against a former client in a related matter whether or not confidential information is at risk. A matter is "related" if the new retainer involves the lawyer taking an adversarial position against the former client with respect to legal work the lawyer performed for the former client or a matter central to the earlier retainer.

Lewis v. Lewis, [2006 SKQB 77](#) – Lawyer represented Wife in a child support variation in her first divorce. Several years later he represented her second Husband in their divorce. Lawyer unsuccessfully argued that since information obtained in the first proceeding was information the Wife had been obliged to disclose it was not confidential (argument rejected, see paras. 14-15), that this information was irrelevant to the current divorce and he had limited recollection of it in any event. HELD: The Wife's prior solicitor-client relationship was sufficiently related to require withdrawal, her past earning capacity was relevant to present determination of spousal support and lawyer had not met the heavy onus required to rebut presumption of exchange of confidential information.

Montreal Trust Company of Canada v. Basinview Village Ltd., [1995 CanLII 4247](#) (NSCA) – It is unethical for a lawyer to

represent a client on a foreclosure where the lawyer, his partner, or anyone with whom the lawyer was associated had represented the mortgagor and mortgagee in respect of the mortgage being foreclosed. The existence of conflict in this case does not depend on imputation of confidential information to the lawyer.

FORMER JOINT CLIENTS LATER OPPOSITE IN INTEREST

Card v. Card, [1997 NSCA 2211](#) (CanLII) – Spouses jointly consulted a lawyer for estate planning advice and documents to implement joint plans for management and ultimate disposition of their assets. Parties later separated. The same lawyer sought to represent Husband in property sale and as to how Husband might best protect assets. Lawyer removed given he had previously represented Wife.

Mullen v Mullen, [2011 NSSC 326](#) (CanLII): Spouses jointly consulted lawyer in sale of a milk farm. Subsequently parties separate. Jollimore, J determines a conflict of interest for that lawyer to act for either party and orders costs against lawyer.

FORMER JOINT CLIENTS/NEW ASSOCIATES

Reagh v. Reagh, [2005 NSSC 365](#) (NSSC) - Lawyer Parker did various types of work for the Reaghs between 1980 and 2001, while a partner with Gillis. Gillis and Parker worked out of separate office locations and kept their files separate. The partnership dissolved in 2003. Wife started divorce proceedings in 2003. Schumacher joined Gillis in 2005 and was retained by Mr. Reagh for the divorce. While solicitor-client relationship with Parker was imputed to Gillis due to prior partnership, physical and organizational structure of partnership negated any real impact/consequences as between Gillis and the Reaghs. Schumacher did not and could not receive any confidential information Parker might have acquired that could be used to the detriment of the Wife. No conflict.

LAWYER AS A WITNESS

Brogan v. Bank of Montreal, [2013 NSSC 76](#) – If a lawyer may be a witness in a proceeding it is a conflict for the lawyer to represent a party to a proceeding. It may not be a conflict for another member of that lawyer's firm to act, depending on other relevant factors especially at an early stage in the proceedings

there is uncertainty whether a lawyer giving discovery evidence will be a trial witness. Plaintiffs given right to bring a future motion as case proceeded to remove Brogan's partners/associates and cautioned their counsel might "get heavily involved" and be removed before trial.

Mazinani v. Bindoo, [2013 ONSC 4744](#) (Ont. Sup. Ct.) - Detailed outline of factors to consider and applicable law to compel lawyer to withdraw if a potential witness.

Clarke v. Penney Estate, 2013 NLTD(F) 34 (Nfld. and Labrador SCTD) - Clarke sued late husband's estate for division of matrimonial property and support. Respondent daughter and Executrix represented by lawyer from a firm that included lawyer Stack. Trial issues included validity of cohabitation agreement. Respondent filed Stack's affidavit recounting conversations with deceased about Cohabitation Agreement and subsequent amendments. Respondent maintained Stack's Affidavit met all requirements for an acceptable and admissible "Solicitor's Affidavit" and did not support the conclusion he might be a witness cross-examined by his own firm and also argued proceedings were at a stage where too late to assert conflict. HELD: Proceedings not at a stage where prejudice from delay outweighed conflict concerns and there was likelihood Stack might be a witness. Firm could not represent estate.

PERSONAL INVOLVEMENT WITH CLIENTS

Zaldin v. Zaldin, [2014 ONSC 6504](#) (Ont. Superior Court of Justice): Custody dispute. Husband's lawyer was his uncle. Lawyer had close personal relationship with Husband, and close personal and business relationship with Husband's father. Lawyer must withdraw.

Windsor-Essex Children's Aid Society v. D.(B.), [2013 ONCJ 43](#) (CanLII) – Lawyer was Respondent's father and found to be personally and emotionally involved with both Respondent and her child. Respondent had cognitive limitations, relied on her father and was influenced by him. Father had conflict of interest with Respondent due to personal interest in outcome. Father had also expressed concerns about paternal grandmother and likely to be called as a witness. Father cannot represent.

Law Society of Upper Canada v. Stuart Martin Ghan, [2012 ONLSHP 98](#) (CanLII) - Lawyer acted for girlfriend in contentious dispute with girlfriend's ex-partner. Initial assistance was personal regarding access to child while girlfriend initially had

(but later lost) counsel. Boyfriend subsequently arranged for his firm to represent her, assisting as junior counsel. He was eventually removed for conflict, although senior counsel from his firm continued with the trial. Evidence by girlfriend and senior counsel differed as to discussions of retainer especially whether involvement of her boyfriend as junior counsel was “considered and approved” by girlfriend. Findings at discipline proceeding included that there was insufficient disclosure to permit proper waiver of conflict by girlfriend and “even with full disclosure” the girlfriend was “in such a vulnerable position (in part due to issues around abuse, mental health problems and substance abuse) that she could not provide the consent required by Ontario’s Professional Conduct Rule 2.04(e). Other circumstances of vulnerability arose from the personal relationship (see para. 78) and the boyfriend’s personal dealing with girlfriend’s ex-partner giving rise to potential he would be a witness either for or against her. Lawyer disciplined.

Kam v. Hermanstynne, [2011 ONCJ 101](#) (CanLII) - Respondent cohabited with his lawyer. She was removed as counsel citing Ontario Code referencing potential impaired judgment of counsel in such situations.

Burgess v. Burgess, [1997 CanLII 788](#) (BC S.C.) – The Wife sought to retain counsel in a divorce who represented the Husband shortly before separation to prepare a will. The Husband also had a “loose” social relationship with the lawyer. The “loose social relationship” was not grounds for disqualification but the wills retainer was sufficient to trigger the lawyer’s disqualification.

WAIVER OF CONFLICT

Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch, Inc., [2014 NSSC 105](#) - Initial retainer by corporation where shareholder subsequently involved in divorce proceedings. Husband’s conflict motion in receivership proceeding had “unmistakeable flavour” of tactic designed to delay receivership proceeding. Husband voluntarily provided information about divorce that might otherwise be confidential with awareness of potential conflict. No conflict previously asserted. Motion dismissed.

Millhouse v. Millhouse, [2012 SKQB 499](#) - Wife had limited independent legal advice from her second Husband’s lawyer during her uncontentious first divorce. Wife initially waived conflict but about five years into second protracted divorce

sought to remove Husband's lawyer. HELD: Insufficient connection between first advice and current proceedings to force withdrawal. If finding of insufficient connection was incorrect, disqualification was equitable remedy that could consider delay, waiver or estoppel. Wife actively participated in litigation for over five years with full knowledge of option to seek disqualification and willingly assumed risk associated with Husband's lawyer remaining on the file. Recent events did not materially affect the underlying circumstances that led to initial waiver and at late stage of proceedings in child's best interest that custody be determined without further delay caused by forcing Husband to change counsel.

Francis v. Cook, [2004 SKQB 57](#) - Lawyer Graf represented Cook when he divorced his first Wife. Cook consented to Graf representing his second Wife on the understanding Graf believed the first divorce file had been destroyed. Without notice to Cook that Graf had been able to retrieve the file, Graf produced excerpts from the file that were favourable to the Wife in a conference brief. HELD: When Graf discovered he had the file he should have withdrawn or at least informed Cook he had the file. Finding the file changed the "factual foundation and basis" for Cook's waiver. Graf disqualified and ordered to pay solicitor-client costs to Wife for all steps in litigation from the date Graf knew he had the file and failed to withdraw and to Cook for all costs of the application to have him withdraw.

DELAY IN ASSERTING CONFLICT

Johnson v. Rudolph, [2013 NSSC 210](#) - Excessive delay in raising conflict may result in dismissal of motion to disqualify.

Merrick v. Rubinoff, [2013 BCSC 2352](#) - No conflict found with Court also noting removal of counsel is a "drastic remedy" that should not be imposed where pleadings closed, document discovery completed and cross-examination on affidavits scheduled, and where over a number of months applicant had implicitly accepted that his former lawyer was now acting against him, including responding twice to interlocutory steps.

Brett v. Superior Propane Inc., [2002 NSSC 78](#) (affirmed [2002 NSCA 111](#)) - Delay does not always bar disqualification, especially if conflict previously raised before the motion.

Fisher v. Fisher, (1986), 73 NSR (2d) 181 (NSTD) Wife had lengthy consultation re: divorce with firm before commencing divorce but did not retain firm. Firm unable to represent

Husband. Wife's delay in asserting conflict resulted in costs against her, costs reversed in *Fisher v. Fisher* [1986 CanLII 2000 \(NSCA\)](#).

REASONABLE STEPS TO AVOID CONFLICT: LAWYERS TRANSFERRING BETWEEN FIRMS

Her Majesty the Queen v. Chartis Insurance Company of Canada, [2014 ONSC 4221](#) (Ont. Sup. Ct) - Lawyer representing plaintiff in three class action lawsuits moves to new firm with extensive knowledge of confidential information. Lawyer not working on plaintiff's file but working extensively on other files with counsel representing defendants. Ethical screening procedures suggested by Law Society Guidelines implemented before transfer in and supervised by senior partner. Application by defendants' firm for declaration that screening procedures sufficient to prevent conflict. HELD: No need for withdrawal. Small chance of "inadvertent disclosure" in professional interactions between counsel balanced against impact of disqualification on opposing parties' right to counsel of choice, with reference to "particular challenge" to avoid contact between lawyers in small firms (paras. 37, 40, 42).

Berg v. Bruton, [2005 SKQB 525](#) – Detailed outline of procedures put in place as written firm policy when lawyer transferring in including policies for assistants accessing information. HELD: Firm took all reasonable steps required and not required to withdraw from custody/access file.

Howard v. Howard, [2015 ONSC 1499](#) (CanLII): Application to remove wife's lawyer, after husband's former counsel joined the firm of wife's lawyer. Not every transfer of lawyers from one firm to another will automatically raise a conflict of interest requiring a client to obtain new counsel. A contextual approach is required depending on the facts of the case. This is a family law matter, where parties are most vulnerable. The court was satisfied that a reasonably informed person, having considered all of the facts in this case, would have a concern, notwithstanding any institutional measures, when a client's lawyer, possessing confidential information, joins a law firm representing the client's former spouse.

ARTICLED CLERKS

G.C. v. Family & Children's Services of Lunenburg County (2000), 185 N.S.R. (2d) 163, 2000 CarswellNS 145 (WC),

[2000] N.S.J. No. 146 (QL), FC31 (Fam. Ct.) NO LINK – Clerk previously worked as a child protection social worker. Firm where student articling retained by applicants in child protection matter. Clerk previously attended case conferences as a social worker regarding older sibling of child at issue. HELD: No conflict because clerk not in solicitor-client relationship with Agency and Court satisfied no relevant information was or would be imparted.

Gouveia v Fejko (1992), CarswellOnt412 (Ont. General Division) NO LINK – Rules pertaining to conflicts that apply to lawyers apply equally to law clerks.

STAFF

A non-professional employee's change of firms can give rise to a disqualifying conflict of interest: *Hildinger v. Carroll* (2004), 2 R.F.L. (6th) 331 (Ont. C.A.); *Chern v. Chern* (2006), 55 Alta. L.R. (4th) 28 (C.A.) 18; *Ocelot Energy v. Jans*, (1998), 165 Sask.R. 252 (Q.B.); *Dalgleish v. Dalgleish*, [2001] O.J. No. 2187 (Ont. Sup. Ct.) NO LINK.

MSK V. TLT, 2011 ONSC 5478 (Ont. Sup. Ct.) – Custody case. Legal assistant who had worked for Mother's former counsel now worked at firm that had represented Father throughout entire matter. Mother insisted she had met assistant and given personal information. Father's lawyer argued assistant's work was only clerical at both firms and assistant never had access to confidential information. HELD: Previous litigation related to current file. Clients frequently give assistants confidential information and Court had no doubt during work for Mother's firm assistant would have been apprised of file status, issues and various proceedings even if not part of lawyer-client meetings. Clients often tell assistants information to pass along when lawyers are unavailable and there is no doubt assistant received confidential information even if she cannot recall this. Lack of recollection also has no bearing on issue of solicitor/client confidentiality, lawyer failed to meet heavy onus to establish no confidential information exchanged, did not file affidavit and Father did not adduce evidence to establish prejudice caused by having to find new counsel. Firm required to withdraw.

Hermant v. Secord, 2010 ONSC 6444 (Ont. Sup. Ct.) – Wife applied to void separation agreement. At his prior firm, her lawyer represented Husband's second wife. He also now employed an assistant who worked for Husband's lawyer when

the agreement was signed. HELD: Lawyer not required to withdraw. Representation of Husband's second wife did not result in disclosure of relevant confidential information and adequate steps were taken before hiring the assistant to ensure compliance with conflict of interest rules of professional conduct. The Court noted Ontario Rules of Professional Conduct contained commentary to state that adoption of procedures to protect confidential information may be adequate in some cases and professional standards do not always have to be complied with to overcome disqualification and each case must be analyzed on the particular facts citing *Bank of Montreal v. Dressler*, (2002), 253 N.B.R. (2d) 37 (C.A.) and *Robertson v. Slater Vecchio*, (2008), 81 B.C.L.R. (4th) 46 (C.A.).

Krupp v. Krupp (2003), 27 C.P.C. (5th) 301, 2002 CarswellOnt 2799 (WC), [2002] O.J. No. 3299 (QL) (Ont. Sup. Ct.) NO LINK
- Assistant transferred from a firm representing Husband in a divorce to firm representing Wife. HELD: No conflict. Assistant's ability to access a file did not establish she had in fact accessed it and new firm did not permit assistant to work on the file.

DOWNLOADS

Related Ethics

Nova Scotia Barristers' Society, [Code of Professional Conduct](#), Halifax: Nova Scotia Barristers' Society, 2012:

Chapter 3: "Relationship to Client"

section 3.4 "Conflicts"

section 5.2 "Lawyer as Witness"

Resources

Family Court Liaison Committee see:

[InForum 2009-12-21](#) - Divorce matters in which one lawyer represents both parties may be rejected (see page 3: Notice from the Supreme Court Liaison Committee (Family Division))

[CLIA](#) (Canadian Lawyers Insurance Association) - [Issue 48 - Winter \(2010\)](#) - Bulletin # 190 - Does a 7-Minute Call Create a Solicitor/Client Relationship?

CLIA (Canadian Lawyers Insurance Association) – [Issue 42](#) –

Winter (2008) - Bulletin # 173 Retainer Letters and Conflicts of Interest

CLIA (Canadian Lawyers Insurance Association) – Issue 22 – September (1998) - Bulletin # 83 Conflict of interest extends to legal support staff

CBA Task Force Conflicts of Interest: Final Report, Recommendations and Toolkit - 2008

Conflicts of Interest Checklist - LIANS

Checklist of essentials of conflict checking systems (see Appendix 5) from practicePRO.ca

PODCASTS

CBA: Protecting Your Client, Yourself and Your Firm: When and How to Use an Engagement Letter Jan. 27, 2011.

CBA: Short-term Agreements for Legal Services: Avoiding Conflicts through Plain Language Drafting (Recording), Jan. 24, 2012

ARTICLES AND BOOKS

Cotter, Brent / The Supreme Court of Canada speaks on lawyers' conflicts of interest (1991), in Nova Scotia Law News vol. 17 p. 125.

Devlin, Richard; Rees, Victoria / Conflicts of interest : where are we since R v. Neil?: case comment (February 2006), in Nova Scotia Law News, vol. 30 no. 6, p. 113.

Gillis, Deborah E. / Effective Intake Procedures (Part 1) (August 2006) in Society Record, vol. 24, No. 4

Gillis, Deborah E. / Effective Intake Procedures (Part 2) (October 2006) in Society Record, vol. 24, No. 5

Macnair, M. Deborah / Conflicts of interest: principles for the legal profession—Aurora, Ont. Canada Law Book, 2005. [KB 29 .L5 M169 2005]

Murray, Donald C / A conflict of interest refresher (2000), in

Nova Scotia Law News, vol. 25, p. 29.

Parish, Alan V. / Conflict of interest: the continuing saga of *Martin v. Gray* (January 1994), in Bar refresher 1994. [KB 7.25 N935 1994]

Perell, Paul M. / Conflicts of interest in the legal profession —Toronto : Butterworths, 1995. [KB 265 P437 1995]

Pinnington, Dan / Conflict of Interest: The Third Most Common and second most costly Malpractice Error (March 2003) in *LawPro Magazine*

Approved by Council on March 25, 2011

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#2 - CLIENT COMPETENCE

FAMILY LAW STANDARDS

- ▶ [#1 - Conflict of Interest](#)
- ▶ [#2 - Client Competence](#)
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- ▶ [#5 - Dispute Resolution Options](#)
- ▶ [#6 - Documentation of Advice and Instruction](#)
- ▶ [#7 - Unrepresented Party](#)
- ▶ [#8 - Domestic Contracts](#)

STANDARD

A lawyer must take reasonable steps to ensure that a client is competent throughout a matter to give instructions.¹

Consideration of the client's competence involves consideration of all factors known to the lawyer which may impair a client's judgment. These include factors such as age, emotional state, the presence of threatened or actual physical or emotional abuse or coercion and other of the client's personal circumstances and the impact that these circumstances may have on a client, his or her ability to instruct, negotiate freely and to communicate or make decisions.²

REFERENCE MATERIALS

Notes

1. *Nova Scotia (Minister of Health) v. J.(J.)*, [2003 NSSF 42](#) (CanLII), 217 N.S.R. (2d) 264. - The test of capacity (under [Adult Protection Act](#)) must be related specifically to the task being performed; *Finlayson Estate (Re)* [2008 NSSC 58](#) ([Probate Act](#)) there can be capacity to act as Executor despite limited cognitive capacity if there is ability to

- ▶ #9 - Affidavits
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- ▶ #15 - Electronic Information and Social Media
- ▶ General Resources

communicate with/instruct counsel. *Nova Scotia (Minister of Health) v. C.R.* [2011 NSSC 299](#): Order requiring adult to accept services offered by Minister; *McClenahan v. Clarke*, [2004 CanLII 25843](#) (Ont. Sup. Ct.). - Competency may be impeded by emotional state, situational or environmental considerations, medication, psychological factors, addictions or other issues. *Weldon McInnis v. John Doe*, [2014 NSSM 13](#) (CanLII)

2. *K. (M.) v Nova Scotia (Minister of Community Services)* (1996), 153 N.S.R. (2d) 20 (N.S. Fam. Ct.) – Inquiry into fitness and competency (application to set aside permanent care/custody order – alt cit. *M.K. v. Nova Scotia (Minister of Community Services)* – see especially paras. 64 – 86 review of differences in capacity in civil v. criminal matters); *McClenahan v Clarke*, [2004 CanLII 25843](#) (Ont. Sup. Ct.) - Circumstances that may impact on a client's ability to receive information, make decisions and provide instructions in the normal course.

Related Legislation

[Adult Protection Act](#), R.S.N.S. 1989, c. 2

Civil Procedure Rule 60 - [Child and Adult Protection](#)

[Children and Family Services Act](#), S.N.S. 1990, c. 5, amended 1994-95, c. 7, ss. 11-15, 150; 1996, c. 10; 1996, c. 3, ss. 37, 38; 2001, c. 3, s. 4; 2002, c. 5, ss. 2, 3; 2005, c. 15; 2008, c. 12.

[Domestic Violence Intervention Act](#), S.N.S. 2001, c. 29, amended 2002, c. 30, s. 2

[Regulations - Domestic Violence Intervention](#)

[Family Homes on Reserves and Matrimonial Interests or Rights Act](#), SC 2013, c 20

[Hospitals Act](#), R.S.N.S. 1989, c. 208

[Incompetent Persons Act](#), R.S.N.S. 1989, c. 218

[Involuntary Psychiatric Treatment Act](#), S.N.S. 2005, c. 42

[Probate Act](#), S.N.S. 2000, c. 31, amended 2001, c. 5, ss. 12 –

33, 2002, c. 5, s. 47; 2004, c. 3, s.31; 2007, c.9, s. 35; 2007, c.50; 2009, c.5, s. 26; 2001, c. 8, s. 20; 2013, c. 3, s. 13

Public Trustee Act, R.S.N.S. 1989, c. 379

Trustee Act, R.S.N. S. 1989, c. 479

Civil Procedure Rule 71: Guardianship

Law Reform Commission / "Discussion Paper" regarding the Powers of Attorney Act (March 2014).

Additional Commentary

Rick v Brandsema, 2009 SCC 10 (CanLII)., [2009] 1 S.C.R. 295.
- Unconscionable agreement – Emotional environment – Mental state – Informational and psychological exploitation.

Miglin v Miglin, 2003 SCC 24 (CanLII)., [2003] 1 S.C.R. 303.-
Emotional stress – Effect of professional assistance – Referring a client for advice or counselling before negotiating a final settlement or agreement.

D.(G.) v. Family & Children's Services of Lunenburg (County), 1997 CanLII 14392, [1997] 160 N.S.R. (2d) 270. (NSCA) –
CFSA statutory duties – failure to question appellant as to her understanding and voluntary consent to Order – Appellant suffering from chronic stress; history of mental illness; below average intelligence.

Stevens v. Stevens, 2012 ONSC 706 (CanLII): Marriage contract set aside on multiple grounds including wife's active and unmedicated bipolar condition during negotiations. Affirmed [2013] ONCA 267 (capacity finding not ground of appeal).

Nova Scotia (Minister of Community Services) v. S.P. 2006 NSFC 40 (CanLII); *Nova Scotia (Community Services) v. T.C.*, 2010 NSSC 69 (CanLII): Child's capacity to instruct counsel and receive advice.

Children's Aid Society of Halifax v. V. (C.) and F. (L.), 2005 NSSC 170 (CanLII), [2005] 235 N.S.R. (2d) 67. – Child in need of protective services - psychiatric assessment ordered of parent - Charter challenge; Appeal dismissed - 2006 NSCA 2; 2005 NSCS 49 – application to amend notice of appeal - appointment of counsel – appointment of amicus curiae.

Hemphill Estate v. Hemphill, 1998 CanLII 2284 (NSCA):

Capacity to marry. Presumption of Competency until proven otherwise. Onus on applicant asserting incapacity.

Ocean v. Economical Mutual Insurance Co. [2009 NSCA 81](#): No inherent or Civil Procedure Rule jurisdiction to order a psychiatric assessment to determine competency to self-represent where competency not at issue in proceeding.

Nova Scotia (Public Trustee) v. I.W. [2014 NSCA 10](#): As neither trustee nor guardian of W's property, Public Trustee had no recourse to Court's inherent jurisdiction to authorize sale of W's property.

Vernon v. Sutcliffe, [2014 NSSC 376](#) - Application to remove the lawful attorneys was dismissed. Conduct of attorney pre-dating incapacity of donor is reviewable under s.5 (c) of the [Powers of Attorney Act](#). It is preferable but not always necessary for a court to have expert opinion evidence to establish a state of "legal incapacity". To remove an attorney under the *Powers of Attorney Act*, the court must gauge the attorney's duty towards the donor according to the attorney's abilities and remove the attorney only upon a finding of misfeasance or compelling evidence of misconduct or neglect, as stated by LeBlanc, J. in *Isnor Estate, Re*, [2001 CanLII 25721](#) (NS SC).

McInnis v. McGuire, [2014 NSSC 437](#) - Appeal of taxation of legal accounts from Small Claims Court decision. Principle of reasonableness applies when reviewing the decision of a lawyer to retain an expert to assess her client's capacity. Lawyers may differ in their approach to various legal problems. Sometimes, many different approaches are reasonable. All persons are presumed to be competent but the circumstances of the client created some doubt. Lawyer's decision to seek an expert's report was reasonable. The lawyer had determined that the client was capable of giving instructions; she was therefore entitled to act on those instructions to retain an expert. Onus was on the Appellant law firm to establish on a balance of probabilities that the account was reasonable. Adjudicator did not provide sufficient reasons for discounting the remaining legal bill.

Burke v Hillier, [2015 NSSC 144](#) - determined whether matriarch of family should be ordered to submit to a mental capacity assessment

Domestic Violence and Undue Influence

Geffen v. Goodman Estate, [1991 CanLII 69](#), [1991] 2 S.C.R.

353. – Estate Matter – Discussion of Undue Influence.

M.C.S. v. T.L.M., R.H.(R.M.) and W.G.R., [2005 NSSC 112](#) (CanLII). - Domestic violence is not limited to physical assault; it includes yelling and demeaning one another.

E.M.G. v. G.R.W. [2007 NSSC 356](#) (CanLII): *Emergency Application Domestic Violence Intervention Act*. Termination of Emergency Protection Order. No violence for almost two years and combined with other facts mother's motivation found outside jurisdiction of Act.

E.A.W. v. M.J.M. 2012 CarswellNS 404 (NSSC): The fact that domestic violence has occurred is not sufficient reason in itself to grant order (paras. 23 et. seq.); *D.B. v. H.M.*, [2011] N.J. 448 (Nfld. & Labrador Prov. Ct.) – extensive review of law in various jurisdictions re emergency protection orders.

Crouse v. Crouse (1988), 88 N.S.R. (2d) 199. – Family Law- Undue Influence – Wife emotionally distraught during negotiation and signing of agreement; *Harrington v. Coombs*, [2011 NSSC 34](#). Cohabitation Agreement upheld as fair and without undue influence on wife. Pressure wife felt to sign was self-created by imposing of ultimatums and time lines when aware husband about to be deployed.

DOWNLOADS

Related Ethics

Nova Scotia Barristers' Society, [Code of Professional Conduct](#), Halifax: Nova Scotia Barristers' Society, 2012, rule 3.2-9 "Clients with Diminished Capacity"

Forms and Information

[Related Rule 60 Forms](#)

[Domestic Violence Intervention Act brochure](#) (PDF)

[Domestic Violence - Victim Resources](#) (Govt. of Canada)

Legal Information Society website

[Family Violence](#)
[Violence familiale](#)

How to Apply for a Peace Bond

Faire une demande d'engagement de ne pas troubler l'ordre public

Competency

Law society of Upper Canada: Determining Competency – Mental Health

Legal Information Society website: Power of Attorney

Community Resources

- Directory of Nova Scotia Family Resource Centres
- L'Association des juristes d'expression française de la Nouvelle-Écosse can provide assistance to francophone Nova Scotians.
- NS Victim Services
- Halifax Regional Police: Victim Services Unit

NS Government

- About Child Abuse-Nova Scotia Department of Community Services
- Dealing With Separation or Divorce
- Intimate Partner Violence

ADDITIONAL RESOURCES

Vicarious Trauma (2008, Headington Institute)

Resources by Dr. Lori Haskell, Ph.D., Clinical Psychologist with the Centre for Research & Education on Violence Against Women & Children, Western University

ARTICLES AND BOOKS

Daylen, Judith; Dennis O'Toole and Wendy van Tongeren Harvey, "Trauma, Trials, and Transformation: Guiding sexual assault victims through the legal system and beyond" (October 2006)

Haskell, Dr. Lori, "Women, Abuse and Trauma Therapy" (March

2006)

Domestic Violence

Chewter, Cynthia L. "[Violence Against Women and Children: Some Legal Issues](#)" (2003) 20 Can. J. Fam. L. 99.

Chewter, Cynthia L., "[The Domestic Violence Intervention Act in a nutshell](#)", (May 2007), in *Understanding the Domestic Violence Intervention Act*.

Chewter, Cynthia L., "[Statistics for the Domestic Violence Intervention Act](#)", (May 2007), in *Understanding the Domestic Violence Intervention Act*.

Nova Scotia Barristers' Society. Continuing Professional Development / *Understanding the Domestic Violence Intervention Act*—Halifax, N.S. The Society, 2007. KB 139.C2 N935 2007

[National Clearinghouse on Family Violence](#): a national resource centre for all Canadians seeking information about and solutions to violence with the family.

Schmitz, Cristin. "[Bullying spouse gets harsh reprimand](#)". (July 2009) in *The Lawyers' Weekly*.

Surtees, Doug. "The Evolution of Co-Decision-Making in Saskatchewan" (2010) 73 Sask. L. Rev. 75.

Vaccaro, Ivana and Medhekar, Archana. "Representing Victims of Domestic Violence".

Mental Disability and Competence

Birnbaum, Rachel, Barbara Jo Fidler & Katherine Kavassalis / *Child Custody Assessments: A Resource Guide for Legal and Mental Health Professionals*. (Toronto: Thomson Carswell, 2008). KB 137 B617 2008

Moutlon, Donalee. "Capacity to instruct a question with aged clients". (February 13, 2015) in the *Lawyers' Weekly*.

Montigny, Ed. "[Notes on Capacity to Instruct Counsel](#)".

Robertson, Gerald B. *Mental disability and the law*. Scarborough, Ont.: Carswell, 2nd ed. KB 93 R649 1994

Approved by Council on March 25, 2011

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#3 - LAWYERS' COMPETENCE

FAMILY LAW STANDARDS

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STANDARD

A lawyer must be competent to perform all legal services undertaken on behalf of a client.

In the family law context, competence also includes an ability to recognize issues including client competence or impairment, the need to seek out expert advice for the lawyer or client, the ability to recognize if a matter is too complex for the lawyer and ensuring the lawyer has adequate resources available to properly represent the client.

REFERENCE MATERIALS

Notes

1. Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, Chapter 3: "Relationships to Client"; and section 3.1: "Competence."
2. *Central Trust Company v. Rafuse and Cordon* (1986), 75 N.S.R. 2d 109 (SCC) – solicitor negligence – standards required of a specialist and non-specialist lawyers; *Sobey v.*

▶ #9 - Affidavits

▶ #10 - Children

▶ #11 - Scope of Representation

▶ #12 - Independent Legal Advice

▶ #13 - Adoption

▶ #14 - Assisted Human Reproduction

▶ #15 - Electronic Information and Social Media

▶ General Resources

Sobey, [2000] N.S.J. 276: Parties can't be asked to negotiate a final settlement absent financial information and it "would be negligent on counsel's part to do so" (para. 19). *Mardling v. Malvern*, [1983] O.J. No. 212 (QL) (Ont. S.C. (H.C.): lawyer found competent despite lack of experience.

3. Family Law Professional Standard 2 Client Competence; *Miglin v. Miglin*, [2003 SCC 24](#) (CanLII), [2003] 1 S.C.R. 303: Referring a client for advice or counselling before negotiating a final settlement of agreement to overcome systemic power imbalance between parties; *Rick v. Brandsema*, [2009 SCC 10](#) (CanLII), [2009] 1 S.C.R. 295: Unconscionable agreement due to lack of full and honest disclosure of relevant financial information and wife mentally unstable at time agreement negotiated and signed.

Legislation

Regulation 9.1.3(b) [*Regulations made under the Legal Profession Act*](#), S.N.S. 2004, c. 28:

When considering complaints or charges, the Complaints Investigation Committee and a hearing panel may determine that conduct constitutes:

(b) professional incompetence, if the lawyer fails to apply relevant knowledge, skills and attributes in a manner appropriate to matters undertaken on behalf of a client, and within the reasonable parameters of the lawyer's experience and the nature and terms of the lawyer's engagement.

Civil Procedure Rule [55: Expert Evidence](#)

Additional Commentary Lawyer Competence

MacLean v. Van Duinen, [1994 CanLII 4333](#) (NS SC), 131 N.S.R. (2d) 60 (NSSC): No lawyer undertakes perfection, no client is entitled to that expectation.

Rowe v. Lee, [2007 NSSC 31](#): Costs awarded against counsel for filing late memorandum with consequent adjournments.

Morash v. Morash, [2004 NSSF 58](#): Costs award against counsel for filing late adjournment request.

Additional Commentary Expert Evidence

Conrad v. Thompson-Sheppard, [1998 CanLII 1402](#), 167 N.S.R. (2d) 282 (S.C.). A lawyer who failed to recognize a complex problem and who did not do careful research or refer to an expert found negligent.

McInnis v. McGuire, [2014 NSSC 437](#) - Appeal of taxation of legal accounts from Small Claims Court decision. Principle of reasonableness applies when reviewing the decision of a lawyer to retain an expert to assess her client's capacity. Lawyers may differ in their approach to various legal problems. Sometimes, many different approaches are reasonable. All persons are presumed to be competent but the circumstances of the client created some doubt. Lawyer's decision to seek an expert's report was reasonable. The lawyer had determined that the client was capable of giving instructions; she was therefore entitled to act on those instructions to retain an expert. Onus was on the Appellant law firm to establish on a balance of probabilities that the account was reasonable. Adjudicator did not provide sufficient reasons for discounting the remaining legal bill.

Areas which may require expert assistance

Tax

Pension

Medical & Psychological assessments

Accounting (including electronic forensics accounting)

Corporate & Commercial matters

Property valuations

Foreign Law

NSBS Discipline Cases

Nova Scotia Barristers' Society v. Tan, [2008 NSBS 3](#) – Communication – failure to communicate, including failing to make interim reports where reasonable to expect and completing work belatedly so value to client was lost.

Nova Scotia Barristers' Society v. Richey, [2002 NSBS 8](#); DD5/109 – Competence and quality of service

Nova Scotia Barristers' Society v. McNeil, [2006 NSBS 3](#); HP1/14 – Competence and quality of service

Nova Scotia Barristers' Society v. Corkum, [1996 NSBS 4](#) (May 29, 1996) DD3/76 - Communication - failure to communicate.

Maintaining a Solicitor-Client Relationship

- Assist the client to develop realistic expectations. This may include discussing various options, as well as what the legal process can and cannot achieve, and when necessary, what legal ethics will or will not permit.
- Do not delay in completing agreed upon work, answering client phone calls or other communications.
- Keep clients informed of file progress - preferably in writing.

DOWNLOADS

Forms

The [Family Division](#) of the Supreme Court in the HRM and CBRM.

Outside the HRM and CBRM family law matters (except for Divorce and Property) are dealt with in the [Family Court](#).

For [Family Court Forms](#) outside the HRM & CBRM if you are dealing with divorce or division of property, you will go to the Supreme Court.

Practice Memoranda

Supreme Court Family Division (Jan 29, 2010) [Re: CPR Practice Memoranda](#)

Related Ethics

Nova Scotia Barristers' Society, [Code of Professional Conduct](#), Halifax: Nova Scotia Barristers' Society, 2012:

section 3.1 "Competence"

section 3.2 "Quality of Service"

section 3.3 "Confidentiality"

section 3.4 "Conflicts"

section 3.5 "Preservation of Client's Property"

section 3.6 "Fees and Disbursements"

section 3.7 "Withdrawal from Representation"

Resources

[Nova Scotia Lawyers Assistance Program](#) provides its members access to a full range of confidential health and wellness services. 1 866 299 1299

[CLIA](#) - (Canadian Lawyers' Insurance Association) – provides helpful links and Bulletins related to Family Law issues.

[NSBS](#) - (The Nova Scotia Barristers' Society) – Professional Development; helpful links; etc.

[LIANS](#) – (Lawyers' Insurance Association of Nova Scotia) – Report potential issues.

[Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia](#) (as amended) with supporting additional resources.

[CBA Practice Link](#); and see especially [Great Expectations: A Lawyer-Client Handbook](#)

[Halifax Regional Police: Victim Services Unit](#)

[Vicarious Trauma](#) (2008, Headington Institute)

[Resources by Dr. Lori Haskell, Ph.D.](#), Clinical Psychologist with the Centre for Research & Education on Violence Against Women & Children, Western University

ARTICLES & BOOKS

Daylen, Judith; Dennis O'Toole and Wendy van Tongeren Harvey / "Trauma, Trials, and Transformation: Guiding sexual assault victims through the legal system and beyond" (October 2006)

Gillis, Deborah E. / [Communication is Key](#) (January 2007), in *Society Record*, vol. 25 No. 1

Gillis, Deborah E. / [Effective Intake Procedures \(Part 1\)](#) (August 2006) in *Society Record*, vol. 24 No. 4

Gillis, Deborah E. / [Effective Intake Procedures \(Part 2\)](#) (October 2006) in *Society Record*, vol. 24 No. 5

Gillis, Deborah E / [Managing client expectations, fulfilling professional obligations and achieving balance in your life](#) (March 2009), in *Calling all sole practitioners : risk and practice management seminar*. [KB 267 N935C 2009]

Haskell, Dr. Lori / "Women, Abuse and Trauma Therapy" (March 2006)

Kruzick, Emile / [Negligence in family law](#) (October 1988), in *Family Law* 1988. [KB 135 C760 1988]

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#4 - RECONCILIATION

FAMILY LAW STANDARDS

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- ▶ #3 - Lawyers' Competence
- ▶ #4 - Reconciliation
- ▶ #5 - Dispute Resolution Options
- ▶ #6 - Documentation of Advice and Instruction
- ▶ #7 - Unrepresented Party
- ▶ #8 - Domestic Contracts

STANDARD

A lawyer must comply with the obligation regarding Reconciliation imposed by Section 9 of the *Divorce Act*.¹

[**See also:** [Standard 5: Dispute Resolution Options](#), if those options rather than or as a substitute to marriage counselling/guidance facilities in s. 9 of the [Divorce Act](#) might assist in reconciliation.]

REFERENCE MATERIALS

Notes

1. [Divorce Act](#), R.S.C. 1985 (2nd Supp.), c. 3, s. 9 (CanLII) - duty of a legal advisor.

Duty of legal advisor

9. (1) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding:

- (a) to draw to the attention of the spouse the provisions of

[▶ #9 - Affidavits](#)[▶ #10 - Children](#)[▶ #11 - Scope of Representation](#)[▶ #12 - Independent Legal Advice](#)[▶ #13 - Adoption](#)[▶ #14 - Assisted Human Reproduction](#)[▶ #15 - Electronic Information and Social Media](#)[▶ General Resources](#)

this Act that have as their object the reconciliation of spouses, and;

(b) to discuss with the spouse the possibility of the reconciliation of the spouses and to inform the spouse of the marriage counseling or guidance facilities known to him or her that might be able to assist the spouses to achieve a reconciliation, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.

ADDITIONAL COMMENTARY

Karach v. Karach, [1995 CanLII 9228](#) (AB QB): When Parliament passed the *Divorce Act*, 1985, in Section 9, it established strict duties on legal advisors. It has imposed serious obligations on lawyers to obtain information about reconciliation and mediation services, and to provide that information to their clients.

ADDITIONAL RESOURCES

Fishman, Kenneth (April 11, 2014) "[The risks of reconciliation](#)", The Lawyers' Weekly.

DOWNLOADS

[Law Society of British Columbia, Practice Checklists Manual, Family Law Proceeding](#)

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#5 - DISPUTE RESOLUTION OPTIONS

FAMILY LAW STANDARDS

- ▶ #1 - Conflict of Interest
- ▶ #2 - Client Competence
- ▶ #3 - Lawyers' Competence
- ▶ #4 - Reconciliation
- ▶ #5 - Dispute Resolution Options
- ▶ #6 - Documentation of Advice and Instruction
- ▶ #7 - Unrepresented Party
- ▶ #8 - Domestic Contracts

STANDARD

A lawyer must be knowledgeable about dispute resolution options¹ relating to family law matters to a degree sufficient to advise the client of their characteristics, availability and the appropriateness² of each for a particular client.³

REFERENCE MATERIALS

Notes

1. Dispute resolution options include but are not limited to, judicial settlement conferences, non-judicial settlement conferences, mediation, arbitration, litigation, collaborative family law process, negotiation and conciliation.

2. McClenahan v. Clarke, [2004 CanLII 25843](#) (ON S.C.): The solicitor failed to meet the standard of care of a reasonably competent, prudent and diligent generalist lawyer practicing matrimonial law. He had been negligent by failing to consider the emotional health of the client and its impact on her decision-making in settling a matter. Wainwright v. Wainwright, [2012 ONSC 2686](#) (Ont. Superior Court of Justice): Beginning at para.129, discusses appropriateness of mediation when domestic violence is present. Includes helpful cites of related

▶ #9 - Affidavits

▶ #10 - Children

▶ #11 - Scope of Representation

▶ #12 - Independent Legal Advice

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▶ General Resources

literature. Related prior decisions in this proceeding also discussed appropriateness of court ordering future obligation to resolve parenting issues through mediation/arbitration.

3. Divorce Act, R.S.C. 1985, c.3 (2nd Supp.), s. 9: (2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters; section 9(3) Every document presented to a court by a barrister, solicitor, lawyer or advocate that formally commences a divorce proceeding shall contain a statement by him or her certifying that he or she has complied with this section.

Related Legislation

Divorce Act, R.S.C. 1985, c.3 (2nd Supp.), s. 9.
Nova Scotia Annotated Civil Procedure Rules - 10, 11, 12, 59, 60A (Child/Adult Protection), 60.

Additional Commentary

Be aware that some forms of alternative dispute resolution, such as mediation or settlement conferences, may not be appropriate where a significant imbalance of power exists between the parties.

Armoyan v. Armoyan, 2015 NSSC 46 (CanLII) A settlement conference was agreed upon by both parties, with filing deadlines for the required documents. Costs were awarded when the wife sought to cancel the settlement conference after the husband had already prepared and filed the required documents.

Wainwright v. Wainwright, 2012 ONSC 2686 (CanLII): A negotiated agreement on parenting issues may be over-ridden by the Court's parens patriae jurisdiction; see also *McAlister v. Gallant*, 2012 ONCJ 565 (CanLII), para. 60.

Thomson v. Thomson, 2012 ONCJ 141 (CanLII): Breach of part of an agreement to resolve issues through mediation/arbitration may not eliminate the obligation to pursue a solution through mediation/arbitration. The father's breach was failing to provide financial disclosure. Once that was remedied the mother was

obliged to pursue resolution of financial issues through the agreed process.

In *Webb v. Birkett*, [2011 ABCA 13](#), the Alberta Court of Appeal held that the defendant solicitor Birkett was negligent in representing the plaintiff Webb in a collaborative family law settlement. The Alberta Court of Appeal held that CFL practitioners must meet the same standard of care required of other family law practitioners including taking appropriate steps to get the financial information needed to properly advise the client. A lawyer must obtain sufficient reliable information to be able to ascertain what the client would likely receive, or be required to pay, for spousal support, child support and matrimonial property division should the matter be resolved at trial, and so advise the client. A lawyer should tell a client who takes the position that he or she wants to settle without having received full information from the other side that they may therefore be accepting less, or paying more, than what would be required according to law, and provide to that client an assessment of the impact of the risk, including estimates of the value of what might be lost, or paid above what was necessary, to the extent possible, on the basis of the information then available. A prudent solicitor would put this advice in writing.

Chapman v. Chapman, [1996 CanLii 5383](#) (NS S.C.): "Without Prejudice" communications are only without prejudice if a settlement is not achieved. However, once an unconditional and complete settlement is reached, the privilege which existed is removed. When negotiations are clearly finalized, the negotiations were clear, and both counsel and clients knew the terms of settlement and accepted them, the settlement is concluded and binding on the parties.

Comeau v. Comeau, [2007 NSSC 8](#) (CanLII): The court found that a property settlement agreement rendered by way of settlement conference was enforceable despite the wife's claim that she had fundamentally misunderstood the agreement. The court must conclude that the agreement was obtained by duress, undue influence, was unconscionable or based on a fundamental mistake in order to set it aside.

Durocher v. Durocher, [1991 CanLII 4237](#), 106 N.S.R. (2d) 215 (T.D.): The courts encourage settlement, and respect agreements. Once a separation agreement is executed, the affairs have been settled on a permanent basis. Once a written agreement is entered into, there is a heavy onus in law that arises to set aside the agreement or vary without consent, specifically that there was duress, undue influence or the

agreement is unconscionable.

Rother v. Rother, [2005 NSCA 63](#) (CanLII): Agreements rendered through settlement conferences are binding.

DOWNLOADS

Related Ethics

Nova Scotia Barristers' Society, [Code of Professional Conduct](#), Halifax: Nova Scotia Barristers' Society, 2012:

- rule 3.1-1 "Competent Lawyer"
- rule 3.2-4 "Encouraging Compromise or Settlement"
- rule 3.2-9 "Clients with Diminished Legal Capacity"
- section 5.1 "The Lawyer as Advocate"
- section 5.6 "The Lawyer and the Administration of Justice"
- section 5.7 "Lawyers and Mediators"
- section 7.2 "Responsibility to Lawyers and Others"

Resources

ADR Generally

[ADR Institute of Canada](#) provides information about ADR and access to mediators and arbitrators.

[Resolving your disputes: Think about your options](#), Canada, Department of Justice

[Best Practice Guidelines for Lawyers Practicing Family Law](#) (2011) Law Society of British Columbia

Mediation

[Supreme Court \(Family Division\)](#) - Mediation program. Each spouse pays a fee based on his or her income.

[Family Mediation Canada](#) – contains a list of trained mediators.

[Family Mediation Nova Scotia](#)

[Mediation Information in the Family Division](#)

[Mediation - what do I need to know?](#)

[La médiation: ce qu'il faut savoir](#)

Private Mediation Information
Informations sur la médiation privée

Mediation and collaborative family law, Legal Information
Society of Nova Scotia

Conciliation

Conciliation - A First Step
La conciliation: Première étape

Collaborative Family Law

Collaborative Family Lawyers Association

Mediation and collaborative family law, Legal Information
Society of Nova Scotia

From the Family Law Nova Scotia website:

- Conciliation
- Mediation
- Settlement Conferences

ARTICLES

Casey, Patrick L / Looking ahead: the challenges facing collaborative law in Nova Scotia (December 2003), in Society Record vol. 21 no. 6 p. 8.

Elliott, Robyn L. / Collaborative family law (2002), in Nova Scotia Law News vol. 27 p. 33.

Haynes, John M; Haynes, Gretchen L. / Mediating divorce: casebook of strategies for successful family negotiations -- San Francisco: Jossey-Bass, 1989. [KB 138 H424 1989].

Howieson, Jill and Lynn Priddis. A Relational Model of Family Lawyering: Exploring the Potential for Education, Practice and Research (2014), in Canadian Journal of Family Law (2014 29 Can J Fam L 173-210).

Irving, Howard H. / Family mediation: theory and practice of dispute resolution -- 2d ed. -- Toronto: Carswell, 1987. [KB 138 I72 1987]

Landau, Barbara; Wolfson, Lorne; Landau, Niki. / Family mediation, arbitration and collaborative practice handbook -- 5th

ed. -- Markham, Ont.: LexisNexis Butterworths, 2009. [KB 138 L253 2009]

MacDonald, James C; Wilton, Ann. / The 2009 annotated Divorce Act -- Toronto : Thomson Carswell, 2008. KB 138 M135 2009

Macfarlane, Julie / "[*What is beneath the hype of collaborative family law?*](#)" (September 23, 2005), from The Lawyers' Weekly.

Noble, Cinnie. / Family mediation: a guide for lawyers -- Aurora, Ont.: Canada Law Book, 1999. [KB 138 N747 1999]

Nova Scotia Barristers' Society / [How lawyers resolve family law disputes](#)

Palliser Conflict Resolution / Explaining collaborative law to a family law client (September 2005), in *Collaborative law: a useful tool for any area of practice*. [KB 137 N935C 2005]

Shields, Richard W; Ryan, Judith P; Smith, Victoria L. / Collaborative family law: another way to resolve family disputes -- Toronto: Thomson Carswell, 2003. [KB 125 A7 S556 2003]

See also: Department of Justice Canada, 2005: [The Emerging Phenomenon of Collaborative Family Law](#)

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#6 - DOCUMENTATION OF ADVICE AND INSTRUCTION

FAMILY LAW STANDARDS

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- ▶ #2 - Client Competence
- ▶ #3 - Lawyers' Competence
- ▶ #4 - Reconciliation
- ▶ #5 - Dispute Resolution Options
- ▶ #6 - Documentation of Advice and Instruction
- ▶ #7 - Unrepresented Party
- ▶ #8 - Domestic Contracts

STANDARD

A lawyer should document, in writing:

- (a) advice and explanation of risk given to a client;
- (b) instructions received from a client and changes to the instructions;
- (c) instructions arising out of the lawyer's advice described in clause (a) and;
- (d) instructions limiting the lawyer's authority to act.¹

REFERENCE MATERIALS

Notes

1. *Edmond & Associates v. Angelatos* (1997), 120 Man. R. (2d) 70, 1997 CarswellMan 327 (WC), [1997] M.J. No. 311 (QL) (Q.B.) - Importance of documenting explanations of risk to client and subsequent instructions from client; *Credit Foncier (Canada) v. Grayson, Rushford, Cooper, Nidesh and Arendt* (1987), 54 Sask. R. 203, 1987 CarswellSask 576 (WC), [1987] S.J. No. 119 (QL) (Q.B.) - Importance of documenting changes in advice and instructions; *Mardling v. Malvern*, [1983] O.J. No. 212 (QL) (Ont. S.C. (H.C.)) - failure to obtain client's instructions

- ▶ [#9 - Affidavits](#)
- ▶ [#10 - Children](#)
- ▶ [#11 - Scope of Representation](#)
- ▶ [#12 - Independent Legal Advice](#)
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- ▶ [#14 - Assisted Human Reproduction](#)
- ▶ [#15 - Electronic Information and Social Media](#)
- ▶ [General Resources](#)

in writing and to write a reporting letter following closing - A retainer that excludes responsibility for usual tasks, should be in writing; *Garwood v. Garwood Estate*, [2006 M.B.Q.B 261](#) (CanLII) - important to ensure that your file contains documented evidence that you have followed your client's instructions appropriately and competently; *Garwood v. Garwood Estate*, [2007 MBCA 160](#) (CanLII) - reversed on appeal or other grounds.

Related Legislation:

[Client Identification and Verification Regulation 4.5.2\(b\)\(ii\)](#) made pursuant to the [Legal Profession Act](#), S.N.S. 2004, C.28

Additional Commentary

In *Webb v. Birkett*, [2011 ABCA 13](#), the Alberta Court of Appeal held that the defendant solicitor Birkett was negligent in representing the plaintiff Webb in a collaborative family law settlement. The Alberta Court of Appeal held that CFL practitioners must meet the same standard of care required of other family law practitioners including taking appropriate steps to get the financial information needed to properly advise the client. A lawyer must obtain sufficient reliable information to be able to ascertain what the client would likely receive, or be required to pay, for spousal support, child support and matrimonial property division should the matter be resolved at trial, and so advise the client. A lawyer should tell a client who takes the position that he or she wants to settle without having received full information from the other side that they may therefore be accepting less, or paying more, than what would be required according to law, and provide to that client an assessment of the impact of the risk, including estimates of the value of what might be lost, or paid above what was necessary, to the extent possible, on the basis of the information then available. A prudent solicitor would put this advice in writing.

Rother v. Rother, [2005 NSCA 63](#) (CanLII) – Evidence at trial included lawyers' recollection of client instruction.

Webb v Tomlinson, [2006 CanLII 18192](#) (ON S.C.) - Importance of documenting advice / instructions in ILA context.

O'Connell v. Romney, [1992 CanLII 2567](#), 111 N.S.R. (2d) 268 (S.C. (A.D.)). - Importance of putting retainer (and subsequent changes to the retainer) in writing.

Mazerolle v. Maynes, Mahoney & Tremblay, [2001 NBCA 101](#)

Mazerolle v. Maynes, Mahoney & Tremblay, [2000 CanLII 17213](#), [2000] N.B.R. (2d) (Supp.) No. 5 (Q.B.) - Lawyer's detailed file notes re: advice/instructions determinative in negligence action.

Fisk v. Land, [2004 MBQB 192](#) – the lawyer did NOT document the conflict check. See paragraphs 8, 9 and 24.

Sun v. Shao, [2013 BCSC 532](#) – the lawyer did document the conflict check. See paragraphs 6, 7 and 19.

Rhodenizer v. M.W., [2014 NSSM 30](#)

PRACTICE TIPS

Upon separation, many clients do not want to benefit their former partner or spouse. Therefore, a lawyer should review the contents of wills, power of attorney, beneficiary designations and personal directives with clients.

Recommending a new will after a divorce

Lawyers should provide clients with written advice about the effect of a separation and/or divorce and remarriage on existing wills. Section 19A (a-c) of the Wills Act notes that a divorce invalidates certain provisions of a will dealing with a former spouse. A client should be encouraged to meet with their lawyer to determine if a new will needs to be executed.

Power of attorney

Lawyers should provide clients with written advice about the effect of a separation and/or divorce on Power of Attorney documents. A divorce has no effect on a Power of Attorney document. A client should be encouraged to meet with a lawyer to determine if existing POAs should be revoked. If such POAs are cancelled, financial planners and other professionals should be advised of the change.

Beneficiary designations

Lawyers should provide clients with written advice about the effect of a separation and/or divorce on beneficiary designations in RRSPs, RRIFs and/or insurance policies. A divorce does not result in the revocation of such beneficiary designations. A client should be encouraged to meet with a lawyer to determine if such beneficiaries should be changed.

Personal directives (formerly known as “living wills”)

Lawyers should provide clients with written advice about the effect of a separation and/or divorce on a Personal Directive. These documents allow a person to give advance written instructions on future health care and/or personal care decisions. The Personal Directive Act permits the appointment of a substitute decision maker in the event of incapacity. A Personal Directive is not automatically revoked upon divorce. A lawyer should review Personal Directives with clients.

DOWNLOADS

Related Ethics

Nova Scotia Barristers' Society, [*Code of Professional Conduct*](#), Halifax: Nova Scotia Barristers' Society, 2012:

section 3.2: "Quality of Service"

section 3.6: "Fees and Disbursements"

section 3.7: "Withdrawal from Representation"

Resources

[CLIA](#) - (Canadian Lawyers Insurance Association) – provides helpful links and Bulletins related to Family Law issues, including: [Issue 34 - January 2003](#) - Keep records of work being completed by others.

Precedents

[ILA Checklist](#) (Prepared by Philip Epstein QC and publicized by LAWPRO)

[Conflicts of Interest Checklist](#) (located at LIANS Loss Prevention)

PracticePRO Checklist - [Essentials of a Conflict Checking System](#)

[PracticePRO Retainer Precedents](#)

Including:

- Family Law Agreement Retainer
- Client Billing Information Document
- Client Information Document

From [CBA PracticeLink](#), read "[7 Keys to Great Client Service](#)"
- This handbook is described as "designed to help Canadian Bar Association members across the country improve the crucial lawyer/client relationship." It is available to anyone accessing the CBA website.

ARTICLES

Gillis, Deborah E / [The Importance of Securing Your Electronic Data](#) (July 2007) in *Society Record*, Vol 25, No 3

Masella, Laura & Marie Ferguson / Family Law for Legal Professionals - Toronto: Thomson Carswell (2006). KB 135 M396 2006

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#7 - UNREPRESENTED PARTY

FAMILY LAW STANDARDS

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- ▶ #4 - Reconciliation
- ▶ #5 - Dispute Resolution Options
- ▶ #6 - Documentation of Advice and Instruction
- ▶ #7 - Unrepresented Party
- ▶ #8 - Domestic Contracts

STANDARD

Where a party is not represented by counsel, a lawyer must inform the person:

- (a) which party the lawyer is representing;¹
- (b) that the party's interests are not being protected by the lawyer;² and
- (c) that the party should retain independent legal counsel.³

This information should be conveyed in writing.

REFERENCE MATERIALS

Nova Scotia Barristers' Society, [Code of Professional Conduct](#), Halifax: Nova Scotia Barristers' Society, 2012

- "Conflicts": section 3.4
- "Communications": rules 7.2-4 and 7.2-9

Notes

▶ #9 - Affidavits

▶ #10 - Children

▶ #11 - Scope of Representation

▶ #12 - Independent Legal Advice

▶ #13 - Adoption

▶ #14 - Assisted Human Reproduction

▶ #15 - Electronic Information and Social Media

▶ General Resources

1. A lawyer must advise an unrepresented party that the lawyer is not acting for him/her and is only representing the lawyer's client. This is especially (but not limited to) circumstances where an unrepresented party might believe from past dealings that the lawyer was still representing him/her or was the "family lawyer": *Hants County Business Development Centre Ltd. v. Poole*, [1997 CanLII 12656](#) (NSSC) aff'd *Poole v. MacKenzie*, [1998 CanLII 4993](#) (NSCA).

2. A lawyer who reasonably foresees that an unrepresented party will rely on the lawyer's skill and knowledge even if only for "reassurance" and that this reliance might cause serious loss may then have a negligence liability to the unrepresented party: *Gateway Building Management Limited v. Manjit Singh Randhawa*, [2013 BCSC 350](#) (CanLII), para. 21. These claims turn on the particular facts; liability is the exception not the norm. Relevant factors to assess liability include (but are not limited to), the unrepresented party's business/legal sophistication, whether there were meetings at the lawyer's office and/or documents prepared as part of the transaction for the client creating a perception that the lawyer owed a duty of care to the unrepresented party and whether the lawyer provided a written disclaimer confirming non-representation. The risk of ambiguous disclaimers is borne by the lawyer: *363440 Alberta Ltd. v. Clark*, [2010 ABQB 806](#) (CanLII), paras. 63 – 78.

3. The threshold for determining whether to set aside agreements can be lower if one party does not obtain independent legal advice and that creates vulnerabilities/inequality of bargaining power: *Miglin v. Miglin*, [2003 SCC 24](#) (CanLII); *Rick v. Brandsema*, [2009 SCC 10](#) (CanLII). See also: NSBS Professional Family Standard #12: [Independent Legal Advice](#).

Additional Commentary

E.K. v. J.K., [2012 BCPC 48](#) (CanLII). Husband with severe suicide/alcohol/drug issues signed Minutes of Settlement. His roommate presented these for his signature in final form. Soon after the Wife initiated a motion to convert the Minutes to a Consent Order. The Husband appeared unrepresented and the Order issued. At a later hearing the Minutes and Order were set aside. At this hearing the Husband testified he was unaware the Minutes were prepared by a lawyer and signed them due to the Wife's threats to move the children to the US. The Wife did not deny the threats to move the children. Additional reasons to set

aside Minutes/Order were that on the day of the first hearing when Husband met the Wife's lawyer and signed the Consent Order he was not advised to obtain independent legal advice either from a lawyer or duty counsel (either verbally or in writing), or that the Wife's lawyer solely represented her. The emotional stress of repeated threats to move the children was a "compelling factor" particularly given the Husband's "deeply entrenched...substance abuse."

Connell v. Connell, [2011 ONSC 4868](#) (CanLII). Husband consulted a lawyer but did not retain one to negotiate Minutes of Settlement due to the cost. His later application to set these aside was declined despite assertions that the Wife and/or her counsel had bullied him (and in particular correspondence on file suggested to the contrary). Wife's "threats" to enforce her legal support claims and the frequency of her calls to the Husband with concerns about finances and the children were not "harassment" and the Husband did not complain about inadequate disclosure. Husband asserted he was under distress from the marital breakdown. No evidence of "debilitating mental or emotional issues" impacting on the Husband's choices was found with the comment that most family law litigants are "distraught, fearful and not at their best" but absent inequality of bargaining power the remaining test was whether the Minutes were unfair.

Rogerson v. Rogerson, [2004 NSSF 37](#) (CanLII): Minutes of Separation set aside because one party did not have independent legal advice; *Lang v. Lang*, [2003 MBCA 158](#) (CanLII). While the absence of counsel does not automatically mean the unrepresented party was vulnerable during negotiations of a separation agreement, absence of counsel is a factor relevant to weight to be given to a Separation Agreement. An Agreement not in substantial compliance with the *Divorce Act* is to be scrutinized even more closely if both parties do not have counsel throughout the entire negotiation and execution process. (Wife became unrepresented towards the end of the negotiation process).

Ocean v. Economical Mutual Insurance Co., [2009 NSCA 81](#) (CanLII). Trial level order requested by insurer to have a plaintiff in a motor vehicle claim undergo psychiatric assessment to determine competence to self-represent reversed on appeal. No order can be made when competency is not a fact at issue in the proceeding. No decision made whether there is inherent jurisdiction to order this in exceptional circumstances because in this case no suggestion the self-represented litigant was incompetent under the [Incompetent Persons Act](#), RSNS 1989,

c. 218.

Williams v. Williams, [2015 ABCA 246](#) (CanLII). Summarizes responsibility of judges towards self-represented litigants, adopting with approval remarks in *P.G.B. v. Nova Scotia (Community Services)*, [2014 NSCA 113](#) (CanLII).

Practice Tips

Consider communicating only in writing with an unrepresented party whenever possible. If written communication is not possible, consider documenting all conversations and contact and/or whether verbal communications could be witnessed by a third party, or taping verbal communications with the knowledge and consent of the unrepresented party.

You may wish to provide an unrepresented party with contact information on [Nova Scotia Legal Aid](#), the [Legal Information Society of Nova Scotia](#) (902-455-3135, www.legalinfo.org), and the [Lawyer Referral Service](#) (1-800-665-9779); and alert them to the written materials available at Court locations and on www.nsfamilylaw.ca, and of materials available through the Courts including those in the Downloads section below and if available in the relevant Court, the availability of Duty Counsel and how to contact Duty Counsel.

An unrepresented party should be advised (ideally in writing) of the implied duty of confidentiality with respect to information received during negotiations, discovery and litigation: *Ryan and Schwartz v. Schwartz*, [2000 NSCA 82](#) (CanLII).

Assess the dynamics between your client and the unrepresented party and advise the unrepresented party of prohibitions on direct contact with your client in terms of legal issues arising in the file. This prohibition applies even if the unrepresented party is a lawyer: *Powers v. Powers*, [2004 ONCJ 281](#) (CanLII), para. 58. Further, consider if restrictions should be requested on the unrepresented party's rights to conduct discovery examination. The Court may restrict this in appropriate circumstances: *Zanewycz v. Manryk*, [2009 CanLII 44290](#) (ONSC), paras. 22 – 34

Become familiar with the jurisprudence surrounding “fair trials” to ensure that judges do not move past assisting an unrepresented litigant into compromising the represented party's legal rights to a fair and impartial trial. Be prepared if necessary to object for the record if an unfair/impartial trial

appears to be occurring. A useful summary of the relevant principles can be found in *Malton v. Attia*, [2016 ABCA 130](#) (CanLII), but be aware of jurisprudence suggesting there may be wider latitude for judicial intervention in trials where the best interests of the child are at issue: *Powers v. Powers*, [2004 ONCJ 281](#) (CanLII), paras. 51, 55 -57.

DOWNLOADS

Definition

The terms *Unrepresented* and *Self-Represented* are often used inter-changeably in case law.

[Terms and Definitions used in Family Law in Nova Scotia](#)

[Termes et définitions utilisés en droit de la famille en Nouvelle-Écosse](#)

Videos

[Presenting Your Case in Court](#) — Representing Yourself in the Family Division, Supreme Court of Nova Scotia (13:18)

[Your Day in Court](#) — Representing Yourself in the Family Division, Supreme Court of Nova Scotia (10:08)

Online Resources

The [Nova Scotia Department of Justice – Self Representation](#) site contains information for a self represented person.

Representing yourself in Family Court [Information Kits](#)

[Family Law Nova Scotia](#)

[Prepare Yourself for Court - checklist](#)

[Tips for representing yourself in court](#)

[Self-help litigants information guide](#)

[FAQs](#)

[Courtroom Procedures](#)

[Overview - the Nova Scotia Family Court](#)
[Vue d'ensemble - du Tribunal de la famille](#)

[Overview - the Nova Scotia Family Division](#)
[Vue d'ensemble de la division de la famille](#)

ARTICLES

Cochrane, Carol / [Surviving SRLs \(Self Represented Litigants\)](#) (Winter 2006) in *LAWPRO Magazine* .

[What Keeps Family Law Lawyers Up At Night?](#), LawPro Magazine Volume II, Issue 3: Contains some tips about helping self-represented litigants understand your role (as opposing counsel) and a sample disclaimer letter.

Caldwell, Chelsea / [Dealing with the Self-Represented Litigant: Challenges and Strategy, or Things I Wish I Had Known Five Years Ago](#) (May 2011), BC Continuing Legal Education Society of British Columbia, © Chelsea C. Caldwell.

Burkholder-James, Carolynne / [Tips for dealing with self-represented litigants](#) (December 2, 2016) CBA National Magazine.

Balbi, Lonny L. / Self-represented Litigants from the Mediator's Perspective: Walking the Line, [2001], 19 CFLQ 583.

Thompson, D.A. Rollie and Reiersen, Lynn / A Practicing Lawyer's Field Guide to the Self-Represented, [2001], 19 CFLQ 529.

Martin, Bronwyn / Fair play: How to be an advocate with a self-represented opponent, The Advocates' Journal Winter 2017.

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#8 - DOMESTIC CONTRACTS

FAMILY LAW STANDARDS

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STANDARD

A lawyer who engages in the negotiation, drafting or review of a domestic contract, including a pre-nuptial agreement, a cohabitation agreement and a separation agreement should consider the factors and circumstances against which the documents may be tested if later challenged and subjected to judicial scrutiny.¹

REFERENCE MATERIALS

Notes

1. *Miglin v. Miglin*, [2003 SCC 24](#) (CanLII), [2003] 1 S.C.R. 303; *Hartshorne v. Hartshorne*, [2004 SCC 22](#) (CanLII), [2004] 1 S.C.R. 550; *Rick v Brandsema*, [2009 SCC 10](#) (CanLII), [2009] 1 S.C.R. 295

Related Legislation

[Divorce Act](#), R.S.C. 1985, c. 3 (2nd Supp.) ss. 11(1)(b), 15.1 (5)(a), 15.1 (8), 15.2 (4)(c), 17 (6.2)(a), and s. 17 (6.5)
[Matrimonial Property Act](#), R.S.N.S. 1989, c. 275, as amended 1995-96, c. 13, and ss. 23-29

- ▶ #9 - Affidavits
- ▶ #10 - Children
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- ▶ General Resources

Maintenance and Custody Act, R.S.N.S. 1989, c. 160 s. 4(c) and s. 52. ([Nova Scotia Child Maintenance Guidelines](#))
Maintenance Enforcement Act, S.N.S. 1994-95, c. 6.
Testators Family Maintenance Act, RSNS 1989, c. 465 s. 16(2).
Law Reform (2000) Act
Vital Statistics Act, RSNS 1989, c 494

Additional Commentary

L.M.P. v. L.S., [2011] 3 SCR 775, [2011 SCC 64](#) (CanLII) - The Supreme Court of Canada clarified the test for changing an order under section 17 of the Divorce Act and at paragraph 36 confirmed that this also applies to separation agreements incorporated into an order.

Rick v Brandsema, [2009 SCC 10](#) (CanLII), [2009] 1 S.C.R. 295 - Unconscionable agreement - Full and honest financial disclosure - Mental state

Hartshorne v. Hartshorne, [2004 SCC 22](#) (CanLII), [2004] 1 S.C.R. 550. - discusses test to override a marriage agreement made pursuant to provincial matrimonial legislation

Miglin v. Miglin, [2003 SCC 24](#) (CanLII), [2003] 1 S.C.R. 303. - discusses test to override a separation agreement made arising from marriage breakdown.

In *Webb v. Birkett*, [2011 ABCA 13](#), the Alberta Court of Appeal held that the defendant solicitor Birkett was negligent in representing the plaintiff Webb in a collaborative family law settlement. The Alberta Court of Appeal held that CFL practitioners must meet the same standard of care required of other family law practitioners including taking appropriate steps to get the financial information needed to properly advise the client. A lawyer must obtain sufficient reliable information to be able to ascertain what the client would likely receive, or be required to pay, for spousal support, child support and matrimonial property division should the matter be resolved at trial, and so advise the client. A lawyer should tell a client who takes the position that he or she wants to settle without having received full information from the other side that they may therefore be accepting less, or paying more, than what would be required according to law, and provide to that client an assessment of the impact of the risk, including estimates of the value of what might be lost, or paid above what was necessary, to the extent possible, on the basis of the information then available. A prudent solicitor would put this advice in writing.

LeVan v. LeVan, [2008 ONCA 388](#) (CanLII) – Pre-nuptial contract – ILA obtained – Lack of financial disclosure – Egregious conduct of spouse. Leave to appeal dismissed without reasons and with costs: [2008 CanLII 54724](#) (SCC)

Stevens v. Stevens, [2012 ONSC 706](#) (CanLII) contract set aside. No initial consensus on fundamental term. Husband trying to take advantage of known drafting error. Affirmed [2013 ONCA 267](#).

Rizzo v. Rizzo, [2007 NSSC 358](#) (CanLII) –Separation Agreement found to be unconscionable.

R.P. v. R.C., [2011 SCC 65](#) - Application to vary spousal support order denied due to no finding of material change in circumstances. Husband did not provide evidence as to his circumstances at the time of the original Order. Without evidence of the husband's original circumstances, proving material change would not be possible. See also companion case of *L.M.P. v. L.S.*, 2011 SCC 64; need to specifically define circumstances which will be considered material change.

Baker v. Baker, [2012 NSCA 24](#) (CanLII) - Need to demonstrate net effect of Separation Agreement provisions as a whole are not unduly harsh.

Langdon v. Langdon, [2015 MBQB 153](#) (CanLII): Review of various grounds to attempt to set aside a cohabitation agreement: Contra proferentum; non est factum, unconscionability, discussion value of detailed versus long release clauses (para. 186).

Ramdial v. Davis, [Litigation guardian of] [2015 ONCA 726](#) (CanLII): Trial judge justified in finding husband's representative did not take advantage of wife's health problems in negotiation process. Wife's appeal of trial motion to set aside separation agreement dismissed.

Shair v. Shair, [2015 ONSC 5816](#) (CanLII): Marriage contract valid but waiver of spousal support set aside. Translator used for wife during negotiations. Translator called as witness. Pages 19 – 20 of decision contain example of letter from wife's counsel where wife signed agreement against counsel's advice.

FACTORS TO CONSIDER WHEN ADVISING A CLIENT (ADAPTED FROM *Miglin* (SCC),

Hawthorne (SCC), Rick v. Bandsema (SCC) and MacLean (NSSC):

Cases considered: Langdon v. Langdon, [2015 MBQB 153](#); Ramdial v. Davis, [Litigation guardian of] [2015 ONCA 726](#) (CanLII)

- (1) Do you have a concern about the capacity of your client? Assessments of capacity should include whether any physical or mental health issues or any other particular vulnerability that impacts the client's ability to enter into/understand the contract.
- (2) Has there been complete disclosure of material information?
- (3) Does your client suffer from any particular vulnerability that might reduce or negate the usefulness of that advice?
- (4) Does your client appear to understand the provisions of the Agreement and its effect?
- (5) Does the Agreement meet the objectives of the legislation with which it deals?
- (6) Are the terms of the contract unclear or uncertain, such that the agreement could later be vulnerable to an argument about contra proferentum?
- (7) Is your client a vulnerable person or under influence or stress that may lead him or her to sign a document against their interest?
- (8) Is there any concern regarding fraud, misrepresentation or mistake?
- (9) What is your client's understanding of the relationship, what are their intentions and their expectations for the future? What do they say as to their spouse or intended spouse's view on these issues?
- (10) Under what circumstances is the contract being negotiated?
- (11) What is your client's level of education, literacy level, understanding of financial issues? Is the contract in the client's first language?

DRAFTING PRESUMPTIONS: The fact that the first (or any)

draft of this Agreement was prepared by counsel for one of the parties does not create a presumption when interpreting this Agreement and in particular shall not cause any ambiguities of wording to be construed against that party.

HEADINGS: Headings of paragraphs are inserted for ease of reference and have no further meaning, force, or effect.

Areas which may require expert assistance:

- Tax;
- Pension;
- Medical & Psychological assessments;
- Accounting (including electronic forensics accounting);
- Corporate & Commercial matters; and
- Property valuations

PRACTICE TIPS

When assessing checklists and/or case law remain aware that standards of fairness for division for dividing property and what is included in divisible property varies in the provincial matrimonial property legislation: *Langdon v. Langdon*, [2015 MBQB 153](#), paras. 156 – 157.

All agreements should specify how an unsuccessful reconciliation affects the the ongoing validity of the terms of the agreement: *Langdon v. Langdon*, [2015 MBQB 153](#).

A client who has concluded an Agreement and/or Order without financial disclosure may not be able to demonstrate a material change in circumstances for the purpose of future variation. If full sworn financial disclosure is not being exchanged, it is advisable to have your own client's financial information on file. Alternatively, you should obtain an acknowledgement from your client that you have advised in favour of full financial disclosure, explained the risk of NOT having full financial disclosure (including the problem of future variation) and that the client has declined your advice.

DOWNLOADS

Related Ethics

Nova Scotia Barristers' Society, [Code of Professional Conduct](#),
Halifax: Nova Scotia Barristers' Society, 2012.

Checklists

[Family Agreement Checklist](#) (Law Society of British Columbia)

[Family Practice Interview Checklist](#) (Law Society of British Columbia)

[How to Conduct an Interview to Prepare a Separation Agreement](#) (Law Society of Upper Canada)

[Marriage Agreement Checklist](#) (Law Society of British Columbia)

[Separation Agreement Checklist](#) (Law Society of British Columbia)

Resources

CLIA (Canadian Lawyers Insurance Association): [Loss Prevention](#) – provides helpful links and Bulletins related to Family Law issues.

ARTICLES

McCutcheon, Beatrice C. / [“Knowing Me, Knowing You: Drafting Agreements and Consent Orders that Provide for Review or Variation of Spousal Support”](#); National Family Law Program, Federation of Law Societies, 2014

Rogerson, Carol / [“Spousal Support Agreements and the Legacy of Miglin”](#), (2012) 31 *Canadian Family Law Quarterly* 13

Siegel, Brahm D. / [“The Compact: A Proposed New Way Forward for Marriage Contracts & Cohabitation Agreements,”](#) March 30, 2015.

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#9 - AFFIDAVITS

FAMILY LAW STANDARDS

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STANDARD

A lawyer must ensure that the contents of an affidavit filed in support of a proceeding are relevant to that proceeding and provide the evidence and information required by the courts as outlined by legislation, regulation, and common law.

A lawyer should avoid language which embellishes or dramatizes an event unless such language is relevant in the circumstances and does not contain inadmissible evidence, unnecessary commentary and/or opinion.¹

A lawyer must balance the reasonable needs, desires, expectations, and instructions of the client against the requirements outlined in the rules of court, legislation, regulations and common law when drafting an affidavit.²

REFERENCE MATERIALS

Notes

1. *Village Commissioners of Waverley et al. v Nova Scotia (Minister of Municipal Affairs) et al.* 1993 CanLII 3403 (NS S.C.), 123 N.S.R. (2d) 46 (S.C.); [Rule 39 \(Affidavits\)](#) of the Nova Scotia Annotated Civil Procedure Rules; NS Family Court Rule

▶ #9 - Affidavits

▶ #10 - Children

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▶ General Resources

13.02 – Contents of Affidavits

2. Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012: section 5.1 "The Lawyer as Advocate" and section 7.2 "Responsibility to Lawyers and Others"; Rule 39 (Affidavits) of the Nova Scotia Annotated Civil Procedure Rules; and NS Family Court Rule 13.02 – Contents of Affidavits

Related Legislation

Civil Procedure Rules

Part 9 Rule 39 - Affidavit - PDF version

Additional Commentary

Annapolis County (Municipality) v Heritage Wooden Shingles, 2016 NSCA 58 (CanLII). The decision to strike portions of an affidavit is a discretionary one and the standard of review on appeal is whether the judge applied the wrong principles of law or produced a 'patent injustice' ((*Hall v. Horn Abbot Ltd.*, 1999 CanLII 7240 (NS CA), [1999] N.S. J. No. 124 (C.A.)). It is an error of law to make a finding of fact where there is no evidence. Farrar JA described the paragraph of the affidavit as a 'bold assertion' as opposed to a belief or matter of fact relevant to the proceedings and concluded that it ought to have been struck.

D. v. Nova Scotia (Community Services), 2015 NSSC 74 (CanLII). A grandmother and foster parent were seeking standing as intervenors in an adoption application. DCS objected to significant portions of the filed affidavits but, "In the interest of time" asked only that they be ignored rather than struck. Justice Warner agreed and stipulated that the only evidence he relied on was what he referred to in his decision.

Sweetland v Glaxosmithkline Inc., 2014 NSSC 216 (CanLII). The plaintiffs prepared affidavits in support of certification in a class action. The defendants filed a motion to strike portions of the affidavit. The affidavit in question was prepared by a doctor who attached a report prepared by the Committee on Finance for the U.S. Senate. On this procedural motion hearsay is admissible but the source of the hearsay must be identified and the proponent's belief in the hearsay established. The attached report was inadmissible because the source could not be identified. The report was prepared by a number of people and relied on documents not in evidence and anonymous sources.

Trinity Western University v. Nova Scotia Barristers' Society, [2014 NSSC 395](#) (CanLII). A motion was brought by TWU to strike certain portions of the NSBS affidavits. The affidavits were from a historian and an educational psychologist. Both had special expertise with respect to gender discrimination and sexual minorities. The issues with the affidavits was summarised by Justice Campbell as follows:

"These affidavits, as evidence, occupy a grey area. Affidavits are intended to be statements of facts. They do not contain opinions about evidence or speculation about what evidence could be. But expert reports are intended to convey an opinion based on assumed facts using specialized knowledge, training or experience. These are both affidavits and expert reports. Strictly applying the rules that pertain to affidavits would be impractical." (Emphasis added)

Justice Campbell stated that typically an expert report would begin with a statement of assumed facts and proceed from there but "Charter litigation has changed that." Social science evidence is now critical to Charter decisions and the evidence drawn from these sources has different expectations attached to it. Justice Campbell applies the test from *R. v. Abbey*, [2009 ONCA 624](#) to determine whether the evidence contained in the affidavits is admissible. This involves two steps. The first applies the usual preconditions for experts (qualified expert, subject matter subject to expertise, relevance, no exclusionary rule); the second requires the judge to engage in a cost-benefit analysis.

Justice Campbell determined that the affidavits contained valuable context and must, by their nature, rely on facts not proven and present conclusions that aren't subject to the usual rules of evidence.

Moore v. Moore, [2013 NSSC 175](#) – portions of affidavit struck because inadmissible personal opinion, inadmissible hearsay, and other affidavit struck almost in entirety as non-factual "oath helping".

Burden v. Burden, [2012 NSSC 214](#) – portions of one affidavit struck because irrelevant and/or, inflammatory and other affidavit struck in its entirety because of inadmissible opinion evidence

H.M.Y. v. T.G.Y., [2006 NSSC 185](#) – admissibility of discovery transcript attached to affidavit at interim hearing

Stening-Riding v. Riding, [2006 NSSC 155](#) – court allows

application to strike entire affidavit because “replete with offending, inadmissible material”

M.Q.C. v. P.L.T., [2004 NSFC 22](#) – affidavits with inappropriate content considered on application for leave (given low threshold); distinction between admissible content at application stage vs at trial

Moore v Darlington, [2011 NSCA 101](#) (CanLII): This was a motion by a self-represented party to set the matter down for an appeal. Case dismissed. At Paragraph 37, the Court of Appeal commented that the affidavit in the case did not contain affirmation of relevant facts, based on personal knowledge or reveal secondary sources of information and belief.

MacKay v Boucher, [2001 NSCA 171](#) (CanLII), 199 N.S.R. (2d) 248 (N.S.C.A.) – award of 75% solicitor-client fees against deponent of a false affidavit.

C.K. v C.S. (1996) 157 N.S.R. (2d) 387 – the time to deal with objections to affidavit contents is at a pre-trial conference.

Tkach v. Tkach (1984) 147 N.S.R. (2d) 378 (T.D.); *C.K. v C.S.* (1996) 157 N.S.R. (2d) 387 – appropriate content in an affidavit

Veinot v Dohaney, [2000 CanLII 4513](#) (N.S.S.C.) - affidavit by lawyer.

White v. Stevens-White, [2013 NSSC 368](#) – 2013-11-07, Forgeron, J. (even though neither party made an motion to strike), "Given the significant time constraints under which the court was operating, and the voluminous amounts of inadmissible material, it was not productive for the court to individually identify and strike each offending portion, rather the court globally rejected all inadmissible material contained in the affidavits. Neither the parties... were served by the glaring infringement of affidavit evidence rules"

Armoyan v. Armoyan, [2013 NSCA 99](#) — 2013-09-10- The words "unfairness" "chaos" and "hardship" allowed to remain in an Affidavit and all challenges to the wife's affidavit were unsuccessful.

Practice Tips

Family Law Nova Scotia website (<http://www.nsfamilylaw.ca/>):
[“Affidavits & Exhibits”](#)

Canadian Bar Association - Nova Scotia / "Roll the Dice: Evidentiary Issues at Trial - Dealing out tips on Affidavits, Business Records, Hearsay and Other High Stakes Trial Issues" (May 6, 2011) from *CBA-NS Family Law 1/2 Day Conference*

Goodfellow, Walter R.E / [An introduction to chambers practice: notes](#) (April 2009), in *Chambers practice*. [KB 190 N935CP 2009]

Harney, Gregory N. and Madani, David / [Affidavit Tips: Baker's Dozen](#) (February 2011) for Continuing Legal Education Society of British Columbia

DOWNLOADS

Related Ethics

On January 1, 2012, the Nova Scotia Barristers' Society, [Code of Professional Conduct](#), Halifax: Nova Scotia Barristers' Society, 2012, replaced the *Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia*.

The new Code references are:

section 5.1: "The Lawyer as Advocate"

rule 5.2-1: "Submission of Evidence"

section 5.6: "The Lawyer and the Administration of Justice"

section 7.2: "Responsibility to Lawyers and Others"

ARTICLES

Eaton, K. / *Practicing Ethics: Advocates' Affidavits* (1978) 5:2 NSLN 1.

Thornhill, R. / [The Ten Evidence "Rules" That Every Family Law Lawyer Needs to Know](#) (2013)

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#10 - CHILDREN

FAMILY LAW STANDARDS

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STANDARD

Best interests

A lawyer must explain to the client that the best interests of the child is the test considered by the courts in all matters concerning an issue which may impact on a child.¹

Evidence

A lawyer must be aware that there are evidentiary issues that are specific to children.²

Duty to Report: Client

Where appropriate, a lawyer must advise a client of the legal requirement to make a report to a child protection agency if the client has information indicating a child is in need of protective services or if the client has reasonable and probable grounds to suspect that a child is suffering abuse, may be suffering abuse, or may have suffered abuse. In such situations, a lawyer must advise the client that the obligation to report exists even where the client's information comes from a confidential or privileged source.³

Where appropriate, a lawyer must advise a client of the legal requirement not to make a malicious report against a parent or third party. If the client persists in making such a report, the lawyer should consider withdrawing.⁴

▶ #9 - Affidavits

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▶ #15 - Electronic Information and Social Media

▶ General Resources

Solicitor-Client Privilege and Child Protection

A lawyer who is considering whether to report information obtained in the course of a solicitor-client relationship to a child protection agency must be aware of the applicable provisions of the *Code of Professional Conduct*⁵; the *Children and Family Services Act*, and case authorities determining what factors are taken into account when determining whether legislation abrogates solicitor-client privilege.⁶

Any legislation intended to alter solicitor-client privilege with reference to child protection must do so in the clearest possible terms because of the ramifications of such an alteration.⁷

A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless authorized by the client; required by law, a court or the Nova Scotia Barristers' Society to do so; or otherwise permitted by the *Code of Professional Conduct*.⁸

REFERENCE MATERIALS

Notes

1. *Young v. Young*, [1993] 4 S.C.R. 3; *Divorce Act* R.S.C. 1985, c. 3 (2nd Supp.), s. 17(5) - 16(8) Factors; *Matrimonial Property Act*, R.S.N.S., c. 275, s. 26 - The court may disregard any provision of a marriage contract or separation agreement affecting a child where, in the opinion of the court, it is in the best interests of the child to do so; *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 2 - Best interest is the only test; *Maintenance and Custody Act*, RSNS 1989, c 160, s. 18(5) and (6).
2. *United Nations Convention of the Rights of the Child*, Can. T.S. 1992, No. 3, Article 3.2 and 12; See cases listed under "Ways of Getting a Child's Views in front of a Court"; *Evidence Act*, R.S.N.S. 1989 c.154, s.63. - Children of Tender Years; *Canada Evidence Act*, R.S.C. 1985, c. C-5, s.16 and 16.1.
3. *Children and Family Services Act*, S.N.S. 1990, c.5, sections 23(1), 24(2), 24(3), 24A(2) and 25(2); *Wedsworth v. Wedsworth*, 2005 NSCA 10 (CanLII)

4. *Children and Family Services Act*, S.N.S. 1990, c. 5, sections 23(5), 24(8), 24A(6), 25(6); See also *Young v. Bella*, [2006] SCC 3 (CanLII); *Wedsworth* (2005), 229 N.S.R. (2d) 168 (S.C.) Aff'd at (2005), 229 N.S.R. (2d) 350 (C.A.); *Wedsworth v. Wedsworth*, 2005 NSCA 10 (CanLII)

5. Nova Scotia Barristers' Society *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, Commentary 3.3-2[1] "Confidentiality", Commentary 3.3-3[2] "Future harm exception" (see *Smith v. Jones*, [1999] 1 S.C.R. 455 at para 83); and FLSC, *Code of Professional Conduct*, Ottawa: Federation of Law Societies of Canada, 2014, rule 3.3-3.

6. Re: Cameron (1976) 5 WWR 271, para 14 and 33 "Since solicitor-client privilege was not specifically referred to, and since there is ambiguity as described, there is strong doubt in my mind that the solicitor/client privilege is abrogated ..." See also *Descoteux v. Mierzajski*, [1982] 141 D.L.R. (2d) 590 (S.C.C) page 12; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* (2008) SCC 45; *R. v. McClure* (2001) 1 S.C.R. 445

7. Re: Cameron, supra, para 14

8. Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, rule 3.3-1.

Related Legislation

Proceedings in Family Division of the Supreme Court in the HRM & CBRM are governed generally by the Civil Procedure Rules but Civil Procedure Rule - Part 13 is of particular relevance.

NS Civil Procedure Rule 59.28 - Disclosure and discovery under Part 5

(3) A child may not be examined for discovery, and a prothonotary or court officer may not issue a discovery subpoena that requires a child to be examined, unless a judge permits.

(4) A judge who permits discovery of a child may give directions for the conduct of the examination, such as directions limiting the duration of the examination and the kinds of questions that may be asked.

Civil Procedure Rule [59.40\(6\) and \(7\)](#) - Judge's permission needed for child under age of majority to testify.

Civil Procedure Rule 60 - [Child and Adult Protection](#)

[Children and Family Services Act](#), S.N.S. 1990, c. 5, sections 23; 24(2), 24(3), 24A and 25(2).

[Evidence Act](#), R.S.N.S., 1989, c.154 s.63

[Family Court Act](#), R.S.N.S. 1989, c. 159.

[Maintenance and Custody Act](#), R.S.N.S. 1989, c. 160. ([Nova Scotia Child Maintenance Guidelines](#))

[Maintenance Enforcement Act](#), S.N.S. 1994-95, c. 6.

[Reciprocal Enforcement of Custody Orders Act](#), R.S.N.S. 1989, c. 387.

International Agreements

[United Nations Convention of the Rights of the Child](#), Can. T.S. 1992, No. 3.

[Hague Convention on the Civil Aspects of International Child Abduction](#), 25 October 1980 (entered into force 1 December 1983).

Federal Legislation

[Divorce Act](#), R.S.C. 1985, c. 3 (2nd Supp.)

[Family Orders and Agreements Enforcement Assistance Act](#), R.S.C. 1985, c. 4 (2nd Supp.).

[Federal Child Support Guidelines](#), SOR/97-175.

[Canada Evidence Act](#), R.S.C. 1985, C-5, s.16

Additional Commentary

Best interests of a child

Gordon v. Goertz, [\[1996\] 2 SCR 27](#): Best interests in the context of mobility

Foley v Foley, [1993 CanLII 3400](#) (NS S.C.), 124 N.S.R (2d) 198 at p. 201 - gives a nonexhaustive list of the factors to be taken into account when considering the best interest of the child. (This case has been cited with approval by the Nova Scotia Court of Appeal in *Wedsworth v. Wedsworth*, [2005 CanLII 10](#))

Jessome v. Jessome, [2014 NSSC 285](#): Not in a child's best interests to order access to a parent who does not want access.

Nova Scotia Community Service v S.C.P., [2006 NSFC 40](#) (CanLII), N.S.J. No. 567 (F.Crt) - Issues relating to a child and his or her participation should be addressed early on in the litigation process to avoid unnecessary delay (ethical considerations).

Ways of getting a child's views in front of a court

BJG v. DLG, [2010 YKSC 33](#): Children have legal rights to be heard during all parts of the judicial process, including judicial family case conferences, settlement conferences, and court hearings or trials. An inquiry should be made in each case, and at the start of the process, to determine whether the child is capable of forming his or her own views, and, if so, whether the child wishes to participate. If the child does wish to participate, then there must be a determination of the method by which the child will participate.

Strobridge v Strobridge, [1994 CanLII 875](#) (ON CA) – Children's preferences must be presented by appropriate evidentiary means.

1. Assessments

Judicature Act, RSNS 1989, c 240 (Court's jurisdiction to order), s. 32 (F)

Linton v Clarke, [1994 CanLII 8894](#), 21 O.R. (3d) 568, 76 O.A.C. 363, (ON S.C.D.C.) – Assessments should only be ordered if there are clinical issues and not just a vehicle to promote settlement; authority for the same principle: *D. v. R.*, [2004 NSSF 105](#) (CanLII).

Weaver v Tate, (1989) 24 RFL (3d) 266 (Ont. H.C.) affd (1990) 28 RFL (3d) 188 (Ont. C.A.): An expert assessor's recommendation is just one piece of evidence to be considered when determining who should be granted custody. Ultimately, it is up to the trial judge to determine which parent is entrusted with custody.

a. Wishes of the Child Assessments

Parent v. MacDougall, [2014 NSCA 3](#): it is for the judge to decide weight be given to children's wishes.

John v. John, [2012 NSSC 324](#): A child's wish report deemed to

satisfy the need for unbiased information about the children's preferences. The UN Convention on the Rights of the Child is cited.

Jarvis v. Landry, [2011 NSSC 116](#) (CanLII) - the burden is on the party requesting the assessment to show that a professional opinion is required. Children's wish report not ordered in absence of evidence of children's capability to form their own views.

Paul v. Paul, (1998) CarswellNB 84 (NBQB): The Court ordered that the wishes and concerns of the children be canvassed with the assistance of a professional (profession was not specified).

Burgmaier v Burgmaier, [1986 CanLII 2908](#) (SK CA) – A child's wishes were not considered at trial and this was determined to be an error of law.

Jandrisch v Jandrisch, (1980) 16 R.F.L. (2d) 239 (Man. C.A.) – possible determination of error of law if a child's wishes are relied on at trial when the process of procuring the evidence is questionable.

Hamish v. Hamish, 1998 CarswellNB 381 (NBQB): The children were interviewed by the social arm of the Court for the purposes of ascertaining the children's wishes and preferences with respect to their living arrangements. They were not asked directly with whom they would prefer to live.

McIntyre v. Veinot, [2016 NSSC 8](#) (CanLII)

b. Custody and Access Assessment/Parental Capacity Assessment (with psychological component)

Jarvis v. Landry, [2011 NSSC 116](#) (CanLII) - the burden is on the party requesting the assessment to show that a professional opinion is required. Children's wish report not ordered in absence of evidence of children's capability to form their own views.

Fisher v. Fisher, [2004 NSSF 104](#), Coady, J. the Court ordered an assessment (children had changed residence to father, one child now refused contact with the mother). He held with the acrimony between the parties, the court did not expect either to give the objective and independent evidence needed to determine the children's best interests and that the son's estrangement from his mother was a clinical issue.

Doncaster v. Field, [2014 NSSC 234](#): Mental health must be in issue for a parental capacity assessment or psychological assessment to be ordered.

MacLean v. Boylan, [2011 NSSC 314 \(CanLII\)](#): Application for an assessment which would include psychological testing was dismissed as no need for a professional given modest changes sought. The information that would be generated by the assessment and testing would not address how decision-making was best structured, whether there should be parallel parenting or if one parent should have decision-making authority in some domains while the other made decisions in others.

Farmakoulas v. McInnis, [1996 CanLII 5447 \(NS SC\)](#): Reports should be ordered where there's a specific need for the type of information they generate and the information would not otherwise be available because it falls within the special knowledge of the expert. The request for a report was dismissed on the basis that the assessment really was a fishing expedition.

E.P. v. S.P., [2016 NSSC 173](#) (CanLII)

2. Judicial Interview

Lubin v. Lubin, [2012 NSSC 31](#): child was interviewed by the judge.

Demeter v. Demeter, [1996 CanLII 8111](#) (ON S.C.): interview of children individually in judge's chambers with consent of parents, parents advised of the children's wishes in general terms but not the full content of the interview. Considerations when children's lawyer requests permission to withdraw from the case.

Uldrian v. Uldrian, (1988) 14 RFL (3d) 26 (Ont. C.A.): Even where a judge is obligated to consider the views and preferences of a child, there is no obligation to interview the child where the evidence is otherwise available.

Wakaluk v Wakaluk, (1976) 25 R.F.L. 292 (Sask. C.A.) at p. 304 – procedural - taking evidence from an expert who met with a child.

3. Child as Witness

[NS Civil Procedure Rule 59.40 \(6\) and \(7\): Hearing](#)

6) A child who is under the age of majority may not testify, and

a prothonotary or court officer may not issue a subpoena that requires a child to appear at a hearing, unless a judge permits.

(7) A judge who permits a child to be a witness may give directions for the presentation of the evidence, such as directions limiting the duration of the testimony and the types of questions that may be asked

Ezurike v. Ezurike, [2006 NSSC 73](#): Mr. Ezurike served *sub poenas* on his 19 year old daughter and 14 year old son. Justice Dellapinna said, at paragraph 27, the daughter was “clearly uncomfortable in the role of a witness in a trial between her parents and appeared guarded in her responses” while the son “was very diplomatic”, crediting his parents approximately equally for their parenting efforts.

Beck v. Beck, [1993 CanLII 6898](#) (PEI SCAD) - The children testified at trial about their preferences as to where they wanted to live. The parents were excused from the courtroom when children gave their evidence. Appellant argued that the trial judge focused on the children's preferences as the determining factor. The Court of Appeal found it was clear the trial judge was aware that the wishes of a child are only one of the factors to be considered. The trial judge considered all of the evidence at arriving at his decision on custody.

Reddin v. Reddin, (1992) 39 RFL (3d) 151 (PEISC): The trial judge did not err when she declined to force a thirteen year old boy to testify against his will.

Fairchild (Ashe) v. Ashe, (1991) 103 NSR (2d) 231 (NSTD): The judge erred when she told counsel that it was distasteful to call a child as a witness and that the evidence of the child would likely be unhelpful.

4. Guardian Ad Litem/Child as a Party (Child Protection)

NS Civil Procedure Rule 59.54 (1) and (2): Litigation Guardian

(1) A judge may appoint a person to act as litigation guardian for a child who is under the age of majority, or a party who is not capable of managing their affairs under Rule 36 - Representative Party, if the person consents to act as litigation guardian and certifies that they are not a party, and that they have no interest in the proceeding adverse to the interests of the child or the party.

(2) A person under the age of majority is not required to start or

respond to a proceeding by a litigation guardian unless a judge orders otherwise.

[Children and Family Services Act](#), S.N.S. 1990, c. 5, Sections 36 (1) and 37; 41(4)(b) - Child as a Party; section 37- Guardian Ad Litem.

Nova Scotia (Community Services) v. T.C., [2010 NSSC 69](#): The CFSA not only permits a child to have counsel but mandates it by virtue of s. 41(4)(b). representation by counsel is consistent with Charter values and the need to balance a child's maturity with restrictions on Charter Rights.

Smith v. Jones 1999 1 SCR 455 – factors for a lawyer to consider in assessing whether disclosure of confidential information is justified to prevent death or serious bodily harm; scope of “serious bodily harm”

DOWNLOADS

Related Ethics

Nova Scotia Barristers' Society, [Code of Professional Conduct](#), Halifax: Nova Scotia Barristers' Society, 2012, Chapter 3.

For the Family Division of the Supreme Court in the [HRM & CBRM](#); while family law matters outside the HRM and CBRM (except for Divorce and Property) are dealt with in the [Family Court](#). For Family Court Forms outside the HRM and CBRM when you are dealing with divorce or division of property, you will go to the [Supreme Court](#).

[Voice of the child report guidelines](#), Nova Scotia Department of Justice, Court Services 2015

Practice Memoranda

Supreme Court Family Division (Jan 29, 2010)
[Re: CPR Practice Memoranda](#)

[National Council of Juvenile and Family Court Judges](#)

[Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia](#), 2nd ed. (Halifax: Nova Scotia Barristers' Society, 1998) c. 5-7, 18.

Resources

Greene, Elizabeth / Children's voices, children's interests and children as litigants in family matters (August 2008) CBA Newsletter.

Federal Government / [Parenting after separation and divorce](#)

[Parent Information Program](#) - Nova Scotia Supreme Court: Family Division

The Family, Children & Youth Section of the Department of Justice Canada has produced two public legal education and information documents for parents:

- "Making Plans: A guide to parenting arrangements after separation or divorce; How to put your children first": <http://canada.justice.gc.ca/eng/fl-df/parent/mp-fdp/index.html>; and
- "Parenting Plan Tool": <http://canada.justice.gc.ca/eng/fl-df/parent/ppt-ecppp/index.html>

Community Resources

Legal Information Society website: legalinfo.org

[Youth Resources map](#)

[Directory of Nova Scotia Family Resource Centres](#)

[APNS Association of Psychologists](#) - Frequently Asked Questions

[About Child Abuse](#) - Nova Scotia Department of Community Services

Loose Leaf Series

McLeod, James G./ Child Custody Law and Practice, loose leaf (Scarborough, Ont.: Carswell, 1992). [KB 137 M165 1992]

Wilson, Jeffery. / Wilson on Children and the Law, (3d ed.), loose leaf (Markham, Ont.: Butterworths, 1994) [KB 137 W749 1994]

[Family Law Resource list](#) from Library & Information Services of the Nova Scotia Barristers' Society.

ARTICLES AND BOOKS

Bala, N., Birnbaum, R., Cyr, F., & McColley, D. / (2013). Children's voices in family court: Guidelines for judges meeting children. *Family Law Quarterly*, 47 (3), 381-410.

Bala, N., Maur, Mary Jo / (2014). [The Hague Convention on Child Abduction: A Canadian Primer](#). *Canadian Family Law Quarterly*, 33 CFLQ 267

Beaton, Janice E. "A Lawyer's Duty to report Child Abuse, Neglect or Need for Protective Services" (2011)

Chewter, C. / "[Violence Against Women and Children: Some Legal Issues](#)" (2003) 20 Can. J. Fam. L. 99.

Anderson, John; Bordage, Mona / [When children lie - the S.A.I.D. syndrome \(sexual allegations in divorce\)](#) (April 1993), in Family Law 1993. [KB 135 C760 1993]

Casey, Patrick L / [Children's wishes](#) (April 1993), in Family Law 1993. [KB 135 C760 1993]

McLeod, James G. / Child Custody Law and Practice, looseleaf (Scarborough, Ont.: Carswell, 1992) KB 137 M165 1992

Birnbaum, Rachel; Fidler, Barbara Jo; Kavassalis, Katherine / Child custody assessments : a resource guide for legal and mental health professionals -- Toronto : Thomson Carswell, 2008. [KB 137 B617 2008]

Continuing Legal Education Society Of British Columbia / Children's participation in family justice processes -- Vancouver, B.C. CLEBC, 2007. [KB 137 C762C 2007]

Grover, Sonja C. / The child's right to legal standing -- Markham, Ont. LexisNexis Butterworths, 2008 [KB 137 G883 2008]

Savoury, Carolyn / [A Voice for "The Small": Judicial "Meetings" in Custody and Access Disputes](#), 2013 28 Can. J. Fam. L. 225

Thompson, Rollie / Children Should be Heard but Not Seen: Children's Evidence in Protection Hearings, (1991-1992) 8 C.F.L.Q. 1

Huddart, Justice C. and Ensminger, J.C. / Hearing the Voice of Children (1991-1992) 8 C.F.L.Q. 95

Let the Child Speak Out (February 1999) by Justice R. James Williams

The Duty to Report Child Abuse, 17 C.F.L.Q. 277.

Schmitz, Cristin. "[Bullying spouse gets harsh reprimand](#)", (July 2009) in *The Lawyers' Weekly*.

Amended by Council on November 22, 2013

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#11 - SCOPE OF REPRESENTATION

FAMILY LAW STANDARDS

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STANDARD

A lawyer must establish the scope of the representation, including any limits. Once the scope of the representation is established, it should be confirmed in writing.¹

A lawyer who accepts a limited scope retainer² with a client must be clear in setting out the nature, extent, and scope of the retainer and must confirm in writing with the client what services will be provided, including how communication with opposing counsel will be managed, prior to completing the work.³ The lawyer should caution the client on the risks associated with entering into a limited scope retainer. A lawyer should consider whether disclosure to the Court of the limited nature of the retainer is required.⁴

A lawyer must obtain sufficient information to properly identify the client.²

Exception: Legal aid lawyers and volunteer lawyers in community-based legal clinics who provide summary advice, which is basic information about legal rights, duties and positions, are exempt from the requirement to document a consultation.

[▶ #9 - Affidavits](#)[▶ #10 - Children](#)[▶ #11 - Scope of Representation](#)[▶ #12 - Independent Legal Advice](#)[▶ #13 - Adoption](#)[▶ #14 - Assisted Human Reproduction](#)[▶ #15 - Electronic Information and Social Media](#)[▶ General Resources](#)

REFERENCE MATERIALS

Notes

1. *Strother v. 3464920 Canada Inc. v. Strother*, [2007 SCC 24](#) (CanLII), [2007] 2 S.C.R. 177. - the scope of the retainer is governed by contract - Retainer Agreements are important in defining the scope of the work and the relationship.

Ross, Barrett & Scott v. Simanic, [1994 CanLII 3983 \(NS CA\)](#) (appealed on other grounds): Where there is no written retainer agreement between the lawyer and the client, the lawyer bears a "special onus" to prove the contractual terms;

Hants County Business Development Centre Ltd. v. Poole, [1998 CanLII 5604](#), 165 N.S.R. (2d) 365 (S.C.); Where a retainer has not been reduced to writing, the court should not in such a case strain to resolve the ambiguities in favour of the lawyer over the client;

McClenahan v. Clarke, [2004 CanLII 25843](#) (Ont. Sup. Ct.). - Clear boundaries must be established when others are involved with instructing and paying the lawyer fees.

2. Nova Scotia Barristers' Society, [Code of Professional Conduct](#), Halifax: Nova Scotia Barristers' Society, 2012, rule 1.1-1(g): "limited scope retainer" means the provision of legal services for part, but not all, of a client's legal matter by agreement with the client.

3. Nova Scotia Barristers' Society, [Code of Professional Conduct](#), Halifax: Nova Scotia Barristers' Society, 2012, rule 3.2-1A: "Limited Scope Retainers"; rule 7.2-6A: "Communications."

4. Nova Scotia Civil Procedure Rule [33.09 – Counsel for a Limited Purpose](#): A judge may permit a lawyer to act as counsel for a limited purpose on behalf of a party who otherwise acts on their own. The lawyer should advise the Court of the scope of the limited retainer, so Court staff know whether communication should be directed to counsel or to the party.

Nova Scotia Barristers' Society, [Code of Professional Conduct](#), Halifax: Nova Scotia Barristers' Society, 2012, rule 3.2-1A (Commentary): Where the limited services being provided include an appearance before a tribunal a lawyer must be careful not to mislead the tribunal as to the scope of the retainer

and should consider whether disclosure of the limited nature of the retainer is required by the rules of practice or the circumstances.

5. [Reg. 4.5.2\(b\)\(ii\)](#) made pursuant to the [Legal Profession Act, S.N.S. 2004](#), c. 28. - Client Identification and Verification Regulation

Related Legislation

[Legal Profession Act, S.N.S. 2004](#), c. 28. – s.66 – reasonable and lawful accounts

[Reg. 4.5.3 and 4.5.4](#) made pursuant to the [Legal Profession Act, S.N.S. 2004](#), c. 28 (amended July 19, 2013) - Client Identification and Verification Regulation

Additional Commentary

Retainer Agreements (Generally)

Nova Scotia Barristers' Society v. Solicitor "Y", [2004 NSCA 75](#):
If changes are made to the terms of a written retainer agreement, those changes should be made in writing.

David L. Parsons & Associates v. Reid, [1998 CanLII 1483](#) (NS CA) – no written contract or retainer – third party not responsible to pay account.

O'Connell v. Romney, [1992 CanLII 2567](#), (NS CA), 111 N.S.R. (2d) 268 (S.C. (A.D.)). - A retainer agreement should be in writing – Subsequent changes should be discussed and the retainer agreement amended to avoid misunderstanding.

McClenahan v. Clarke, [2004 CanLII 25843](#) (Ont. Sup. Ct. of Justice): Lawyer found negligent for several reasons. Decision includes finding retainer was general, not limited and extensive commentary on the need for clarity as to who is giving instructions (emotionally vulnerable wife in family litigation with domineering father extensively involved in decisions leading to settlement).

Bruhm v. Feindel and Conrad, [1999 CanLII 2312](#), 175 N.S.R. (2d) 173 (S.C.). - Solicitor did not explain basis for fees - Solicitor-client relationship cannot be created by presumption as it is founded in contract.

MacLean v. Van Duinen, [1994 CanLII 4333](#) (NS SC) – Written retainer – Taxation – Reasonableness.

ABN Amro Bank Canada v. Gowling, Strathy & Henderson, [1994 CanLII 7334](#), (ON SC), 20 O.R. (3d) 779 (Ct. J. (Gen. Div.)) – use of “simple, concise and precise language” when drafting.

LIMITED SCOPE RETAINERS

Broesky v. Lüst, 2011 ONSC 167 (CanLII) aff'd [2012 ONCA 701](#) (CanLII): A limited retainer is one which limits the retainer to a scope less than that required of a reasonable competent and diligent solicitor such as providing advice on a separation agreement without obtaining financial disclosure. The lawyer owes a duty within the retainer not to simply accept instructions blindly but rather to advise as to the wisdom of them, the legality of them and so forth, all still within the scope of the retainer.

Trillium Motor World Ltd. v General Motors of Canada Limited, [2015 ONSC 3824](#) (CanLII): Lawyers and law firms who use limited scope retainers must clearly define the scope of the legal services to be provided and candidly explain these limitations to their clients. The ambiguity in the retainer was resolved against the law firm.

Poulain v. Iannetti, [2015 NSSC 181](#) (CanLII): A solicitor in a personal injury case was held liable for negligence advice pertaining to a section B settlement. Although the Court found that the defendant lawyer was not retained to handle the section B claim, he was nevertheless liable in negligence once he had undertaken to give advice pertaining to the section B claim.

Law Society of Upper Canada v. Eversley, [2015 ONLSTH 136](#) (CanLII): The evidence makes it clear that the Lawyer was providing pro bono legal services to congregants under a limited scope retainer. There is no need for a lawyer to be “on the record” in litigation or accept payment for there to be a lawyer-client relationship.

Levina v. Levine, [2014 ONSC 2774](#) (CanLII) Counsel for the Wife made it known to the court the scope of his limited retainer.

Jordan v. Stewart, [2013 ONSC 5037](#) (CanLII): Lawyers and the Law Society of Upper Canada now recognize limited scope retainers or unbundled legal fees as one way to attempt to address access to justice and legal representation. Consistent

with this need, courts addressing costs should consider Bills of Costs certified by lawyers who have provided assistance, even if not on the record throughout the case.

HSBC Securities (Canada) Inc v. Davies, Ward & Beck, [2004 CanLII 30077](#) (ONSC): Even in cases where there is a limited retainer in place, solicitors still have a duty to advise their clients of any material information that comes to the solicitor's attention and about which the client should be informed.

Rye and Partners v. 1041977 Ontario Inc., [2004 CanLII 8988](#) (ON CA): The scope of a lawyer's retainer is a factual issue. Where an issue arises as to the scope of the retainer and the retainer has not been reduced to writing, there is an onus on the lawyer to satisfy the court that his or her version of those terms is the correct one.

Discipline Cases

Avis (Re), [2011 CanLII 21681](#) (NL LS): The lawyer failed to identify his perceived limits on his retainer and was therefore liable for failing to disclose information to his client that he mistakenly assumed was not covered by his retainer.

Nova Scotia Barristers' Society v. MacIsaac, [2001 NSBS 6](#) – Fees – Account Rendered for services not yet provided.

Practice Tips

Considerations when drafting a retainer agreement:

- Identify the client; describe the services you have been retained to perform;
- Describe any services which you have recommended but the client has declined;
- Describe what, if anything, the client is to provide or do;
- Identify key personnel in your firm who will be working on the file;
- Outline timetable, deadlines, limitation periods where appropriate;
- Indicate how communication with the client will be carried out, including (after canvassing the appropriateness of each with the client, email, phone/phone messages, correspondence, etc.);

- Address client expectations as required;
- Describe what will cause the lawyer to terminate the retainer;
- Outline what will happen upon the transfer or termination of the retainer;
- Outline the agreement as to fees, disbursements and payment, including the amount of retainer to be paid prior to the commencement of work (if applicable);
- Describe how long a client has to pay a bill and what will happen if they are late with payment;
- Payment of disbursements, including the cost of expert reports, assessments, and professional services, are the responsibility of the client.
- Bankruptcy: In appropriate cases lawyers should exercise judgment as to clarifying their retainer agreement to show how much of funds received relate to different kinds of work, in case the client may go bankrupt during work on the file. Without a breakdown, a bankruptcy trustee may be successful in asserting a claim to some or all of any unused retainers depending on if the funds were paid to deal with a “personal” matter (such as divorce, custody, access or support - probably exempt from seizure) or with property issues on separation/divorce (perhaps not exempt). For reference to recent cases see Bankruptcy, Insolvency and Family Law, by Klotz, 2nd Edition (Carswell) especially section 14.7.

Additional Considerations when drafting a limited scope retainer agreement:

In considering whether, and how, to render services under a limited scope retainer, the lawyer should consider the factors relevant to the retainer, which may include such things as:

- The nature and urgency of the legal work sought by the client;
- The nature of the decision maker (such as a Court, Tribunal, Arbitrator or Mediator)
- The status and particulars of any adverse or related party, including whether there is other Counsel involved
- The nature and importance of the problem at issue;

- The availability of alternate resources to the client;
- The scope of what a normal full-service retainer would involve, and the extent to which the client seeks to “de-bundle” the engagement from that full-service retainer;
- Whether, and to what extent, other counsel or professionals are involved in rendering other services to the client;
- The lawyer’s ability to engage in the limited scope retainer without negatively affecting the client’s legal rights or overall position in the matter or transaction;
- The expectations, sophistication and means of the client, and any disability of the client;
- Any pertinent orders or directions by competent authorities, such as Courts and tribunals;
- The stage of development of the matter under consideration;
- Real or potential conflicts of interest;
- The competence of the lawyer to handle the scope of the matter under consideration;
- Relevant substantive law, including the Code of Professional Conduct, applicable professional standards, duties to the Court and other counsel, and whether there are matters out of which the lawyer and client cannot contract.
- Beware of potential “retainer creep.” The lawyer who is asked to “answer a quick question” about a matter outside the scope of the agreed-upon retainer not only risks expanding the business scope of the representation (either with or without compensation) but runs the substantial risk of actionable negligence in the event of an incomplete or inaccurate answer.

In “Unbundled Legal Services: Pitfalls to Avoid” (2012: LawPro Magazine, 11:1, pp 7-8, Dan Pinnington lists the following as items to keep in mind in reducing exposure to claims in an LSR:

- Limited scope representation does not mean less competent or lower quality legal services
- Identify the discrete collection of tasks that can be undertaken on a competent basis
- Confirm the scope of the limited retainer in writing
- Clearly document work and communications

- Be careful with communications when opposing counsel is acting on an unbundled basis
- Recognize that unbundled legal services are not appropriate for all lawyers, all clients, or all legal problems
- Be careful providing further assistance to a client after a limited scope retainer is terminated

Practice Tools

LIANS: For sample checklists and forms, see [Limited Scope Retainer Resources](#)

PracticePRO – [Finances booklet precedents](#)

PracticePRO – [Limited Scope Retainer Agreement](#)

DOWNLOADS

Related Ethics

Generally

Nova Scotia Barristers' Society, [Code of Professional Conduct](#), Halifax: Nova Scotia Barristers' Society, 2012:

- section 3.1: "Competence" (especially rule 3.1-2)
- rule 3.2-9: "Clients with Diminished Capacity"
- rule 4.2-1: "Marketing of Professional Services"
- rule 7.2-6: "Responsibility to Lawyers and Others" (Lawyers require the consent of any represented party's lawyer before communicating directly with the party. The "unbundled lawyer" should clarify to all involved how the limited retainer affects communications with his/her client).

Limited Scope Retainers

Nova Scotia Barristers' Society, [Code of Professional Conduct](#), Halifax: Nova Scotia Barristers' Society, 2012:

- rule 1.1-1(i) as "the provision of legal services for part, but not all, of a client's legal matter by agreement with the client".
- rule 3.1-2A: Limited Scope Retainers

- rule 7.2-6A: "Responsibility to Lawyers and Others" - The "unbundled lawyer" should clarify to all involved how the limited retainer affects communications with his/her client.

Additional Information

Nova Scotia Barristers' Society - [Lawyers' Fees](#)

Forms

O'Brien's Encyclopedia of Forms - Useful Client Information forms specifically for family law

ARTICLES

Canadian Bar Association, Alberta: [Limited Scope Retainers](#)

Pinnington, Dan / [Limited Scope Representation Resources](#) (March 21, 2016), in SLAW

Pinnington, Dan / [Unbundled Legal Services: Pitfalls to Avoid](#) (January 2012), in *LAWPRO Magazine* (online)

Pinnington, Dan / [The Most Common Malpractice Error: a Failure to Follow Client's Instructions](#) (October 2002), in *LAWPRO Magazine* (online)

Balbi, Lonny / ["Flat-fee billing: replacing time with value"](#) (July 3, 2009) in *The Lawyers' Weekly*

[The Responsibilities Within A Retainer](#) (August 1995), in *LAWPRO Magazine* (online)

TEXTS

Kimbro, Stephanie L.: [Limited Scope Legal Services: Unbundling and the Self-Help Client](#), ABA 2013; hereinafter "Limited Scope Legal Services" (available at the NSBS Library call # KB 252 K49 2012)

Amended by Council on May 27, 2016

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#12 - INDEPENDENT LEGAL ADVICE

FAMILY LAW STANDARDS

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STANDARD

A lawyer retained to provide Independent Legal Advice must review the documents, facts and circumstance to a degree sufficient to ensure that a client, has enough information to make a voluntary, informed decision.¹

REFERENCE MATERIALS

Notes

1. *Hartshorne v. Hartshorne*, [2004 SCC 22](#) (CanLII), [2004] 1 S.C.R. 550 - Independent legal advice at the time of negotiation is an important factor in determining whether a decision to enter an agreement was informed and voluntary; *Miglin v. Miglin*, [2003 SCC 24](#) (CanLII), [2003] 1 S.C.R. 303 - The degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties; *Rick v Brandsema*, [2009 SCC 10](#) (CanLII), [2009] 1 S.C.R. 295 - Disintegration of a spousal relationship means that the negotiation of separation agreements takes place in a uniquely difficult and vulnerable context. Special care must be taken to ensure that the assets of the former relationship are distributed through a process that is, to the extent possible, free from informational and psychological exploitation. An agreement

▶ #9 - Affidavits

▶ #10 - Children

▶ #11 - Scope of Representation

▶ #12 - Independent Legal Advice

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negotiated with full and honest disclosure and without exploitative tactics will likely survive judicial scrutiny.

Additional Commentary

Tian v. Cheung, [2016 BCSC 950](#) (CanLII). Pre-nuptial agreement was partially set aside. The wife, who had poor English comprehension, had never seen it before she spoke to the lawyer from whom she received advice. Ms. Tian was concerned about the expense of the consult so she spent little time with the lawyer. She did not ask what rights she would have if she did not sign the agreement. The Court concluded that the process was pro forma, and there were no negotiations that ILA could have informed.

C.M. MacNeill & Associates v. Toulon Development Corporation, [2016 NSSC 16](#) (CanLII). Appeal from a Small Claims Court decision regarding an "Offer to Lease." MacNeill was a lawyer but did not have a Canadian legal education and claimed: 1) he had never signed a commercial lease before, 2) did not review the lease, and 3) did not receive ILA. MacNeill attempted to repudiate the lease. The adjudicator found that MacNeill's experience meant that he did not need to be told to obtain ILA. Justice LeBlanc agreed that, in light of his education and work experience, there was no inequality of position.

Poulain v. Iannetti, [2015 NSSC 181](#) (CanLII). The plaintiff, Poulain, sued his former lawyer, Iannetti, for negligence in relation to a Section B claim. Justice Rosinski concluded that, even though Iannetti had only been retained in relation to the Section A claim he had a duty to either advise Poulain "clearly and emphatically" to obtain ILA or to obtain the information needed to offer competent legal advice himself. His failure to do so, and his failure to provide Poulain with sufficient information to allow him to make an informed decision, was a breach of his duty of care. Appealed by the defendant. Appeal allowed on other grounds in *Iannetti v Poulain*, [2016 NSCA 93](#) (CanLII).

Northumberland's Fisherman's Association v. Patriquin, [2015 NSSC 30](#) (CanLII). The Fisherman's Association (NFA) entered into a contract with Patriquin as part of a buy-back program for lobster licenses. The contract was presented to Patriquin by Mr. Maclean, counsel for the NFA who had had prior dealings with Patriquin. Patriquin claimed that Mr. Maclean was his lawyer due to this history and the attitude adopted by Mr. Maclean when the two spoke. Patriquin claimed that this relationship made the contract unconscionable due to the lack of ILA.

Justice LeBlanc, cited the test for independent legal advice from *Gold v. Rosenberg*, [1997 3 SCR 767](#) which states:

"Whether or not someone requires independent legal advice will depend on two principal concerns: whether they understand what is proposed to them and whether they are free to decide according to their own will. The first is a function of information and intellect, while the second will depend, among other things, on whether there is undue influence."

Justice LeBlanc rejected the claim that it was reasonable for Patriquin to have believed Mr. Maclean was his lawyer and therefore the arguments based on the inadequacy of his 'advice.'

Hyatt v. Ralph, [2015 ONSC 580](#) (CanLII). Mr. Ralph was in an acrimonious marriage with Ms. Hyatt, a law clerk with experience in family matters. A separation agreement required him to pay support for a child of Ms. Hyatt's previous marriage. Mr. Ralph received no independent legal advice except what he heard from Ms. Hyatt who used Mr. Ralph's perception of her knowledge and experience.

Baker v. Baker, [2012 NSCA 24](#) (CanLII) – Separation Agreement overturned at Trial but upheld on appeal – The Wife's lawyers advised her not to sign Separation Agreement but the Wife signed it anyway – Separation Agreement must be looked at in totality and not in two silos of "spousal support" and "property division".

Quinn v. Epstein Cole LLP, [2008 ONCA 662](#) (CanLII) - As between the parties, when one party makes choices with the benefit of ILA, that party cannot resile from the agreement unless the financial disclosure received was inaccurate, false or misleading.

LeVan v. LeVan, [2008 ONCA 388](#) - affirmed at 2008 ONCA 388 – A Marriage Contract was set aside. The wife did not receive effective independent legal advice, and some advice provided was wrong. The wife did not understand the nature and consequence of the marriage contract, and the husband misrepresented the nature and terms of the marriage contract. The husband's failure to disclose his entire assets to his wife was deliberate.

Dillon v. Dillon, [2014 ONSC 2236](#) - A Marriage Contract was upheld. Documented ILA provided. The Court found that Ms. Zivcakova had ample opportunity to review the draft marriage

contract, ask questions or request further information. The lawyer providing ILA addressed those matters in their initial meeting. As a result of receiving ILA the Court concluded that the Wife was content with the disclosure received

MacNeil v Hedmann, [2014 YKSC 16](#) (CanLII) – Adequate time needs to be provided to enable a party to seek meaningful independent legal advice. Appeal dismissed by Yukon Court of Appeal in *MacNeil v. Hedmann*, [2015 YKCA 6](#).

Richards v. Richards, [2013 NSSC 127](#) – Agreement set aside. There was no financial disclosure or ILA. Full and complete financial disclosure is a necessity before settlement agreements can properly be created, especially in the child support context. is helpful to ensure the parties understand their rights and obligations and to ensure agreements accurately reflect the intentions of the parties.

Giebelhaus v. Giebelhaus, [2012 BCSC 1100](#) (CanLII) – Separation Agreement overturned despite ILA for both parties – ILA must be meaningful - The Husband's lawyer was inexperienced and did not know how to gross up the Wife's untaxed Veteran's Affair pension, nor that the wife's pension could be divided at source and provided to the Husband – The Husband's lawyer did not enquire about his income in previous years and did not know how to calculate the husband's income given that he had only worked 6 months in the previous year.

E.K. v. J.K., [2012 BCPC 48](#) (CanLII) - A Consent Order was overturned. The Father was abusing crack cocaine and alcohol when he entered into the agreement. The mother had counsel. There was a duty on counsel for the Mother to ensure that the Father was aware that legal counsel only represented the Mother and to advise the Father in writing of such and, further, to recommend that the Father seek independent legal advice or even speak to duty counsel. This did not occur. [See also: Standard #7 - [Unrepresented Party](#)]

Stevens v. Stevens, [2012 ONSC 706](#) (CanLII) – Marriage Contract was set aside. The Wife's lawyer did not pick-up a drafting error that advantaged the Husband. The Husband and his counsel were aware of the error and took advantage of this error. The wife had bi-polar disorder and lacked the capacity to understand and appreciate the nature and consequences of the agreement. The husband was aware of the wife's vulnerabilities when the contract was being drafted. He knew that clarification of a major inconsistency was needed before the contract could be finalized, yet he persisted in authorizing his lawyer to put the

agreement in a form ready for signing before he obtained the required clarification. Decision upheld by Ontario Court of Appeal in *Stevens v. Stevens*, [2013 ONCA 267](#).

Connell v. Connell, [2011 ONSC 5814](#) (CanLII) – Motion by husband to set aside Minutes of Settlement that had been incorporated into an order and terminate spousal support was dismissed – The court commented that the duty a lawyer owed to an unrepresented opposing party was to advise them to obtain ILA and did not extend to assisting them in understanding family law concepts – A lawyer must ensure that the unrepresented opposing party understands that they are acting exclusively for their client and not for the opposing party.

Peraud. v. Peraud, [2011 NSSC 1](#) (CanLII) – A Separation agreement barring a claim for spousal support was overturned - There was a lack of ILA – The solicitor simply drafted the Agreement presented by the parties and did not provide ILA to either party – The Agreement did not meet the objectives of the *Divorce Act* for spousal support.

Andrist v. Andrist, [2010 NSSC 285](#) - Ms. Andrist retained counsel to draft a separation agreement. She brought the separation agreement to Mr. Andrist in Halifax and drove him to a lawyer's office the same day to have the agreement signed. Mr. Andrist acknowledged he was advised to obtain independent legal advice concerning the separation agreement, but did not do so. The agreement was set aside because Mr. Andrist did not have independent legal advice before signing the agreement, Ms. Andrist's income was misrepresented, and there was an unequal division of the parties' matrimonial assets in Ms. Andrist's favour.

MacLean v. MacLean, [2009 NSSC 216](#) (CanLII) – The Husband did not receive ILA. The Agreement was changed on its face multiple times with hand noted changes. There was a lack of understanding by the Husband of the financial situation. All circumstances surrounding the negotiation and execution of this agreement were fundamentally flawed the Agreement was set aside

Haughn v. Haughn, [2008 NSSC 265](#) – The Agreement was upheld. The Wife received ILA two months before signing the Agreement. The lawyer requested that she obtain further information. The Wife did not return to the lawyer before signing the Agreement. The Court found that the Agreement was in keeping with the objectives of the *Divorce Act* in any event.

Dimick v Dimick, [2008 NSSC 333](#) – The parties concluded a separation agreement in 2001, which incorporated their marriage contract “as amended.” The Agreement was upheld. The Respondent did not establish that there was any impropriety in the circumstances of the execution of the marriage contract or the amendments. The parties had counsel and there was no evidence of the Respondent being under a disability, or that inappropriate pressure was brought to bear, when the separation agreement was negotiated.

Webb v Tomlinson, [2006 CanLII 18192](#) (ON S.C.) - A lawyer provided ILA to a client who entered into a amnortgage transaction, which was risky. She lost on the venture and sued the lawyer for compensation arguing that she had not received adequate ILA. The court preferred the evidence of the lawyer who had used a detailed checklist and had taken detailed notes.

Rogerson v. Rogerson, [2004 NSSF 37](#) (CanLII), 222 N.S.R. (2d) 324. - Minutes of Separation set aside because the Wife did not independent legal advice. Although the agreement states that she “had had the opportunity to be advised” of her rights, the evidence disclosed that she in fact did not have such an opportunity. She did not have the financial ability to retain counsel and was unaware that Legal Aid was available.

Lang v. Lang, [2003 MBCA 158](#) (CanLII) - Absence of counsel is a factor relevant to weight to be given to a Separation Agreement. An Agreement not in substantial compliance with the Divorce Act is to be scrutinized even more closely if both parties do not have counsel throughout the entire negotiation and execution process. (Wife became unrepresented towards the end of the negotiation process).

DOWNLOADS

Related Ethics

Nova Scotia Barristers' Society, [Code of Professional Conduct](#), Halifax: Nova Scotia Barristers' Society, 2012:

- rule 3.4-1: "Duty to Avoid Conflicts of Interest"
- rule 3.4-2: "Consent"
- rule 3.4-5: "Joint Retainers"
- rule 7.2-9: "Communication with Unrepresented Party"

Precedents and Practice Tools

[ILA Checklist](#) - prepared by Philip Epstein QC & publicized by LAWPRO

[PracticePRO Retainer Precedents](#)

Includes:

- Family Law Agreement Retainer
- Client Billing Information Document
- Client Information Document

[Independent Legal Advice Checklist – Family Law Matter](#)
(Canadian Bar Association)

[CBA: Conflicts of Interest Toolkit](#): Guidelines for giving independent legal advice

LIANS: Independent Legal Advice - http://www.lians.ca/rpm/risk_management/independent_legal_advice/

Community Resources

[Nova Scotia Legal Aid](#): There are 16 offices across the province: Call 1 877 420 6678

[Dalhousie Legal Aid \(DLAS\)](#)

[Legal Information Society of Nova Scotia](#)

[Legal Resources in Nova Scotia: Brochure](#)

[Nova Scotia Family Law Website](#)

ARTICLES

Tjaden, Ted. / The law of independent legal advice --
Scarborough, Ont. Carswell, 2000, [KB 261 T625 2000]

Lawyers Weekly, "Independent Legal Advice in Family
Law", (Nov. 25, 1994)

Creighton, J. Ronald / [Undue Influence and Independent Legal Advice](#) (October 1992), [KB 170 C760 1992]

Approved by Council on March 25, 2011

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#13 - ADOPTION

FAMILY LAW STANDARDS

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- ▶ [#5 - Dispute Resolution Options](#)
- ▶ [#6 - Documentation of Advice and Instruction](#)
- ▶ [#7 - Unrepresented Party](#)
- ▶ [#8 - Domestic Contracts](#)

STANDARD

A lawyer must not provide any payment or reward in consideration of a placement for adoption or for the procuring of a child for the purpose of adoption.

REFERENCE MATERIALS

Notes

1. [Children and Family Services Act](#), SNS 1990, c. 5, s. 69(3)

"69 (3) Any person who gives or receives, or agrees to give or to receive, any payment or reward, directly or indirectly, **(a)** in consideration of the placement for adoption of a child; or **(b)** to procure a child for the purpose of adoption, is guilty of an offence and upon summary conviction is liable to a fine of not more than ten thousand dollars or to imprisonment for a term of not more than two years or to both. 1990, c. 5, s. 69."

2. [Hague Adoption Convention](#), 29 May 1993 article 4 c (3)

"An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin -
c) have ensured that

[▶ #9 - Affidavits](#)[▶ #10 - Children](#)[▶ #11 - Scope of Representation](#)[▶ #12 - Independent Legal Advice](#)[▶ #13 - Adoption](#)[▶ #14 - Assisted Human Reproduction](#)[▶ #15 - Electronic Information and Social Media](#)[▶ General Resources](#)

(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn"

3. [United Nations Convention on the Rights of the Child](#). Sixth Session 13-31 January 2014-

The criminalization of improperly inducing consent by intermediates without influence or payment.

Related Legislation

[Children and Family Services Act](#), SNS 1990, c. 5, ss 67-87
[Vital Statistics Act](#), RSNS 1989, c. 494, ss 13-14

Case Law

D. v. Nova Scotia (Community Services), [2015] N.S.J. No. 101, [2015 NSSC 74](#): The maternal grandmother and foster parents of the child sought standing in an adoption proceeding. A permanent care and custody order was in place. The only parties to the adoption were the Minister and the adoptive parents. Determined that adoption proceedings are private and the *Children and Family Services Act* does not authorize persons such as the applicants to be parties or intervenors. There was no legislative gap warranting use of *parens patriae* powers.

Practice Tips

For private adoptions from other jurisdictions, the requirements of section 70A(l) of the CFSA must be met prior to filing a Notice of Proposed Adoption. Review this document re: [Private Adoptions from Other Jurisdictions](#).

[Nova Scotia Civil Procedure Rule 61: Adoption](#)

Forms

[Nova Scotia Civil Procedure Rule 61: Adoption](#)

Online Resources

["Hague Convention"](#), Bureau of Consular Affairs, U.S. Department of State

["33: Convention of 29 May 1993 on Protection of Children and](#)

Co-operation in Respect of Intercountry Adoption", Hague
Conference on Private International Law

"International Adoption", Nova Scotia Department of Community
Services

Family Law Nova Scotia

Frequently Asked Questions about Adoption (from Family Law
Nova Scotia site)

Approved by Council on January 20, 2012

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#14 - ASSISTED HUMAN REPRODUCTION

FAMILY LAW STANDARDS

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- ▶ #5 - Dispute Resolution Options
- ▶ #6 - Documentation of Advice and Instruction
- ▶ #7 - Unrepresented Party
- ▶ #8 - Domestic Contracts

STANDARD

A lawyer must not accept consideration for arranging the services of a surrogate mother, offer to make such an arrangement for consideration or advertise the arranging of such services.¹

REFERENCE MATERIALS

Notes

1. *Assisted Human Reproduction Act*, S.C. 2004, c. 2, s. 6(2).

Any violation of this section, by anyone, is an offence and is subject to a fine of up to \$500,000 and to imprisonment for a term not exceeding 10 years. See Section 60.

Related Legislation

Assisted Human Reproduction (Section 8 Consent) Regulations, SOR/2007-137

Birth Registration Regulations made under Section 51 of the *Vital Statistics Act*, R.S.N.S. 1989, c. 494, N.S. Reg. 390/2007.

▶ #9 - Affidavits

▶ #10 - Children

▶ #11 - Scope of Representation

▶ #12 - Independent Legal Advice

▶ #13 - Adoption

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[United Nations Convention on the Rights of Children, Article 7](#)

See also: Health Canada's [Assisted Human Reproduction – Legislation and guidelines](#)

Case Law

Reference re *Assisted Human Reproduction Act*, [2010 SCC 61](#), [2010] 3 S.C.R. 457: The Court held that certain sections of the Act are unconstitutional, because the federal government infringed on the provincial government's jurisdiction by imposing its powers in the health arena. Sections 5 through 9 of the Act continue to be in force.

ARTICLES AND BOOKS

Emerging Issues

Deckha, M. / *Situating Canada's Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding*, (2015) 61:1 McGill LJ 31 - 86, (2015) 61:1 RD McGill 31 - 86

Grubben V. & Cameron, A. / *Donor Anonymity in Canada: Assessing the Obstacles to Openness and Considering a Way Forward*, (2017) 54:3 Alta L Rev 665 – 680

Grubben, V. / *Freezing as Freedom? A Regulatory Approach to Elective Egg Freezing and Women's Reproductive Autonomy*, (2017) 54:3 Alta L Rev 753 - 774

Leckey, R. / *Identity, Law, and the Right to a Dream?*, Law Journal 38 Dalhousie L.J. 525

[Assisted Reproductive Technology: Wide Implications for Canadian Lawyers](#) (April 18, 2017) CBA - Available by purchase only

Other Articles and Books for Review

Rivard, Glenn and Hunter, Judy / *The Law of Assisted Human Reproduction* -- Markham: Buttersworth, 2005. [KB 93 R618 2005] Available through the [NSBS Library & Information Services](#).

Burns, Clare E., [“Future Child’s Rights in New Productive Technology: Thinking Outside the Tube,”](#) National Family Law

Conference, July 2006.

Canada. Royal Commission on New Reproductive Technologies. *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993).

Chipeur, Gerald and Chipeur, Stephanie / COMMENTARY: Updated approach needed on reproductive technology law (September 21, 2007) in Lawyer's Weekly

Jordan, K.D. & Debele, G.A. / *Trends and Developments in Assisted Reproduction Law and Practice: An Overview for Family Law Practitioners* (July 2014) National Family Law program.

Kahn, Lawrence, "Assisted Human Reproduction", National Family Law Conference, July 2010.

Levitan, Shirley Eve / *Parentage determination across the 49th parallel, a national overview of parentage determination across canada in assisted reproductive technology situation* (July 2014) National Family Law Program.[no link]

Raphanel, Gayle, "Assisted Human Reproduction and the Courts", National Family Law Conference, July 2010.

See also: Canadian Bar Association, September 2007, *Reimbursement of Expenditures under the Assisted Human Reproduction Act*.

See also: Health Canada, *Reimbursement of Expenditures under the Assisted Human Reproduction Act: Public Consultation Document* [no link].

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#15 - ELECTRONIC INFORMATION AND SOCIAL MEDIA

FAMILY LAW STANDARDS

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STANDARD

A lawyer who wishes to enter electronic information into evidence must be aware of potential ethical issues. A lawyer must comply with the disclosure requirements regarding electronic information as imposed by Rules 14 and 16 of the Nova Scotia Civil Procedure Rules, to the extent that such rules apply in the particular court.¹

A lawyer must be aware of the ethical considerations involved with the use of social media, including but not limited to Facebook accounts and text messages and must advise a client not to do anything that a lawyer would consider dishonest or dishonourable², including secretly obtaining text messages³ and/or private Facebook information⁴.

REFERENCE MATERIALS

Notes

1. Pursuant to Rule 14.02 of the Civil Procedure Rules "electronic information" means a digital record and includes emails, text messages, databases, spreadsheets, images, sound, electronic calendars and social media (i.e. Facebook, Twitter etc.) Rule 16 deals with the disclosure of electronic

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information. There is a duty on each party to an action to review the electronic information that it controls, to disclose relevant electronic information (not subject to privilege) and to preserve electronic information once a legal proceeding commences. Pursuant to Rule 59.19(4) of the Civil Procedure Rules, Rule 16 do not apply under this Rule 59, unless a judge otherwise orders. (A production order is needed). Pursuant to Rule 59.28(1) of the Civil Procedure Rules, there is a list of exceptions to the application of Disclosure and discovery rules under Part 5.

2. Nova Scotia Barristers' Society, [Code of Professional Conduct](#): rule 5.1-2(b) "The lawyer as Advocate"; *Armoyan v. Armoyan*, [2011 NSSC 242](#) (Supreme Court, Family Division) The wife had "cloned" the contents of the husband's computer hard drive. Wife's possession of documents deemed inappropriate, if not criminal.

3. *SC v. JC*, [2009 SKQB 87](#) (Queen's Bench) batches of text messages were secretly copied from daughter's cell phone - not admitted into evidence. See also *DD v. JD*, [2017 NSSC 147](#) where Facebook posts obtained from a child were admitted.

4. *Campeau et Services alimentaires Delta Dailyfood Canada Inc.*, [2012 QCCLP 7666](#). A fictitious account on Facebook was set-up to obtain information regarding an employee. The evidence obtained from Facebook was not admissible as it was obtained in conditions that infringe fundamental rights and liberties and whose use would cast the administration of justice in disrepute (see this case referenced in Teaching Old Dogs New Tricks: Using Text Messages and Social Media As Evidence, Co-authored by James N. Korpan and Aadon R. Fieger).

Commentary

Examples of Social Media used as evidence in Family Law cases:

a) Parenting and Custody:

DD v. JD, [2017 NSSC 147](#) The mother tendered Facebook communications sent to the children by the father in cross-examination, the Court considered whether the communications were properly before the Court given that they were obtained by the mother from the children's Facebook accounts. The court concluded that these messages were properly before the court

for the following reasons: (1) they showed evidence of alienating conduct and the court required all relevant and probative evidence at its disposal; (2) they were used for impeachment purposes; (3) the messages were not secretly recorded – the father voluntarily produced the writings; (4) the court questioned how there could be an expectation of privacy when a “prudent parent” would likely monitor their child’s social media communication.

E.S.M. v J.B.B., [2011 NSFC 21](#) (Family Court). Facebook photographs are evidence. Mother did not exercise judgment in the best interest of the child.

b) Child Support:

Tran v. Tran, [2015 ONSC 5838](#) (CanLII), Ontario Superior Court ordered a trial on the issue of child support after the mother used Instagram and Facebook posts to bolster her claim that the father was employed and had bought a sports car rather than pay support.

V.A. v. R.A., [2011 NSFC 23](#) (Family Court). Wife introduced the Husband’s postings on Facebook that contained bravado about sponsorship of racing cars by his company.

Dayton v. Dayton, [2011 NBQB 239](#) (New Brunswick Queen's Bench). The Wife obtained photographs from Facebook which supported the position that the Husband was working and earning income. There were photographs of the Husband operating heavy machinery. The court used this information to impute income of Husband for the purposes of child support.

c) Child’s Best Interests:

Wolodka v. Wolodka, [2013 NSSC 207](#) (Supreme Court, Family Division); [Maintenance and Custody Act](#), RSNS 1989, c. 60, s. 18(6), as amended (impact of family violence, abuse or intimidation). Mother relied on Facebook postings of Father. Wilson J. concluded that it was best to have the custody of children with the Mother and not shared care as requested by the Father.

d) Paternity:

D.F. v. K.G., [2018 NSSC 65](#); Mother advised father the child was not his. In 2015, a co-worker showed him photographs from the Mother’s Facebook page. He was “shocked” to see images of a young boy who looked very much like he did as a child. The

court did not order paternity testing at this time. The Court found that “ordering paternity testing now because of the Applicant’s belief he’s D’s biological father largely based on Facebook pictures he saw in 2015, is not warranted”.

Civil Procedure Rules and Facebook

Conrad v. Caverley, [2014 NSSC 35](#) (CanLII) – the defendant went to court to ask for an order requiring the plaintiff to produce a full, printed copy of her Facebook profile, including the information and photographs that – due to her privacy settings – were only visible to her “friends”. He also asked for a printed copy of her Facebook usage history, including her login/logout information. Order for disclosure of Facebook usage history only. McDougall J. stated that the burden is on the party requesting the Facebook information to satisfy the court that the materials sought meets to the standards of trial relevancy. Civil Procedure Rule 14.01(1) defines “relevant” as having the same meaning as at the trial of an action.

Murphy v. Perger, (2007) O.J. No. 5511 (unreported – court file no.: 45623/04 – released October 3, 2007 – Ontario Superior Court of Justice). - Facebook “documents” as evidence. Facebook pages ordered to be produced because of the public nature of the website. Court concluded that “any invasion of privacy [was] minimal and outweighed by the defendant’s need to have the photographs in order to assess the case.” He further stated that the plaintiff does not have any serious expectation of privacy because 366 people (the plaintiff’s friend’s list) were granted access to the plaintiff’s private site.

Practice Tips

It should be noted that if counsel wish to rely on emails, text messages or Facebook information, it is suggested that it should be included in an exhibit book.

Pinnington, Dan, [“Nine Rules to Help Family Law Clients and Their Lawyers Avoid Social Media Dangers”](#), July 20, 2012, in the Lawyer’s Weekly;

1. There are really no secrets on Social Media sites;
2. Friends means friends forever, or at least friends of friends forever;
3. Give clients a “Don’t be Stupid on Social Media” warning;
4. Don’t use social networking tools for lawyer/client

- communication;
- 5. Be aware of electronic evidence and eDisclosure obligations;
- 6. Social Media can prove interesting things;
- 7. All of the above comments apply to everyone else that touches a case;
- 8. Family lawyers shouldn't be friends with clients on Facebook;
- 9. You cannot be anonymous on the web.

Clients should be advised that pursuant to section 94(1) of the *Children and Family Services Act* sharing identifying information, from a court proceeding verbally, in writing or through the Internet, including through social media such as Facebook, Snapchat or Instagram, is an offence.

Other electronic sources of information may include Instagram, Snapchat, LinkedIn.

Articles

Arnott, Kim. "Social media postings creating a litigation 'gold mine'", March 2017, The Lawyer's Daily.

Chisolm, Patricia. "Grappling with Social Media", Canadian Lawyer, July 4, 2016.

Korpan, James; Fieger, Aadon. "Teaching Old Dogs New Tricks; Using Text Messages and Social Media as Evidence" (2014).

McDonald, Bryson. "Think twice before your post; Can posts on Facebook be used as evidence in my family law matter?" (2015)

McKiernan, Michael. "Social media evidence plays important role in litigation", July 2017, Law Times.

Pantekoek, Kellie. "Nine Times Facebook Can Get You In Ethical Trouble" (2014).

Thompson, Rollie, "The Ten Evidence 'Rules' Every Family Lawyer Needs To Know" (2014) National Family Law Program Conference – note Rule 8-Illegally Obtained Recordings, Emails etc.

Wong, Anna. "Social Media Increasingly Relevant To Litigation" (November 14, 2014) in The Lawyers Weekly.

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Dundee, David / [The Branch Adopts Best Practices for Family Law](#) (August 2011) in *BarTalk*, Canadian Bar Association

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