lawyer Ron Smith, QC understands the prestige that comes with winning big cases. Today, however, he believes the winner-take-all approach is outdated, particularly in family law. Improved access to justice, he believes, depends on "the willingness of us old grizzly bears to see that our job is not to win in court, but to resolve disputes. I still see too many grizzly bears who count professional success on the basis of scalps on their belt."

It's an attitude that may help explain why clients like Jennifer Muller are so easily persuaded that placing their case in the full control of a lawyer is the only option. Smith suggests that, rather than approach the initial consultation as an opportunity to convince clients they need to hire a lawyer, lawyers might view the initial consultation as an opportunity to explain the legal process, outline the options and explain what services a lawyer can provide.

Clients also bear some responsibility for educating themselves before hiring a lawyer, Smith says, as well as for asking questions at the initial consultation. "Imagine building a house. If a contractor tells you, 'I'll build it, but I can't tell you how much it will cost, how long it will take or what it will look like,' would you hire him? No, but that's what people do with lawyers all the time."

As Smith describes it, a lawyer might provide just one piece in a complex array of professional services. A divorce coach, for example, might offer advice about resolving conflict, or a tax specialist might suggest a mutually beneficial way to divide assets.

Such an approach has the potential to make a significant improvement in access to justice, Smith says. "What unbundling really means is how can we provide better access to justice for the public by providing them with smaller chunks, and realizing that as counsel our job is not to win cases but to resolve disputes."

Perhaps the concern most often cited by lawyers reluctant to offer limited scope representation is that they may be held responsible for matters beyond the scope of the retainer agreement. That's understandable, but not borne out by experience, says Victoria lawyer Aesha Faux.

Faux is a family lawyer who offers a range of services, from collaborative dispute resolution and mediation to full-service litigation. She estimates that about 30 per cent of her practice involves unbundled services of one kind or another.

Clients seeking unbundled services are in fact less likely to complain, Faux says, because they know what they're looking for: "They don't want you to be involved in everything. They understand you're not responsible for the larger scope and they only want you to be involved in a small piece of it."

Where problems are likely to arise, Faux says, is when a client thinks they're hiring a lawyer on a full retainer but the lawyer thinks it's a limited retainer. That's why it's important, she says, to draft an agreement that very clearly specifies which services are and are not included — and then to stick to the agreement. Scope creep is a very real possibility: "You get busy and the client asks you to do something and you think, okay, I need to do this." The solution, Faux says, is not to simply draft an agreement and consider the matter closed, but to continually reassess the agreement as a case proceeds, and revise it or draft another one if necessary.

What unbundling really means is how can we provide better access to justice for the public by providing them with smaller chunks, and realizing that as counsel our job is not to win cases but to resolve disputes.

– Kelowna lawyer Ron Smith, QC

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While Muller was fortunate to find a lawyer willing to help her on a limited scope basis, lawyers offering such services remain the exception rather than the rule, and finding those who do remains a challenge. A number of initiatives aim to educate lawyers about the potential benefits of offering limited scope retainers, and to make such services more accessible to the public.

Access to Justice BC, headed by the Honourable Robert Bauman, Chief Justice of British Columbia, is a leadership group committed to improving the family and civil justice systems. As an executive member of Access to Justice BC, Jennifer Muller is a co-lead of a working group focused on promoting unbundled legal services. That working group will gather input from lawyers currently offering limited scope representation in an effort to promote the practice among the profession.

Muller's co-lead in that working group is Kari Boyle, executive director of Mediate BC, an organization that has launched its own initiative aimed at encouraging more lawyers to offer unbundled services. Boyle explains that Mediate BC's Family Unbundled Legal Services Project is currently in an initial research phase, which has two goals: to find out who is already offering such services and what is working for them, and to find out what is keeping more lawyers from offering unbundled services.

As part of that initial research, Mediate BC has launched a two-part online survey: one for lawyers and one for members of the public. The survey will remain online until the fall; to participate, visit mediatebc.com/unbundle. Boyle reports a strong early response from lawyers, with about 40 responding in the early weeks of the survey.

According to Boyle, two themes have emerged in early responses from lawyers: fear that unbundled services could lead to a complaint and potential disciplinary action by the Law Society, and fear that judges or colleagues on the bar will think poorly of lawyers offering unbundled services.

The second phase of the Family Unbundled Legal Services Project will be to develop resources aimed at making more unbundled services available to the public. Boyle explains that the goal is to produce a toolkit for lawyers, including sample limited scope retainer agreements with checklists specifying which services are and are not included. Mediate BC also hopes to produce a roster of lawyers offering unbundled services so that members of the public seeking such services will have an alternative to searching the Internet. ❖

More information is available on the Law Society website, including an online seminar and sample documents. Go to www.lawsociety.bc.ca and type "limited scope retainers" into the search box.

Supreme Court of Canada releases decisions concerning CRA notices of requirements

THE ISSUE CONCERNING lawyers' professional obligations where they receive a notice of requirement to produce information from the Canada Revenue Agency (CRA) in connection with a client's information or documents has been discussed several times over the last number of years in previous *Benchers' Bulletins*. Most recently, in the Spring 2016 issue it was noted that the Quebec Court of Appeal had declared the provisions for the *Income Tax Act* under which the notices of requirement were issued to be constitutionally invalid, and that the decision was appealed to the Supreme Court of Canada.

The Supreme Court recently released its decisions in *Canada (Attorney General)* v. *Chambre des Notaires du Quebec*, 2016 SCC 20, and *Canada (National Revenue)* v. *Thompson*, 2016 SCC 21.

In the former case, the court concluded that a notice of requirement issued under the *Income Tax Act* constitutes a seizure within the meaning of s. 8 of the Charter, and that the seizures made under s. 231.2 of the Act were unreasonable and contrary to s. 8 because the requirement scheme did not provide adequate protection for solicitor-client privilege.

In particular, the court held that the procedures set out in the *Income Tax Act* did not require the holder of the privilege (that is, the client) to be informed of the notice of requirement or of any proceeding brought by CRA to obtain an order to provide the information or documents required to be produced. Moreover, the procedure also placed the entire burden of protecting the privilege on the lawyer. The court also concluded that neither the Attorney General nor CRA had established that it was absolutely necessary to impair solicitor-client privilege. Because the impugned provisions did not minimally impair the right to solicitor-client privilege, they could not be saved under s. 1. As such, the sections in question (ss. 231.2(1) and 231.7 of the *Income Tax Act*) were declared to be unconstitutional and inapplicable to lawyers and Quebec notaries in their capacity as legal advisors.

The court also held that the definition of "solicitor-client privilege" in s. 232(1) of the *Income Tax Act* was unconstitutional and invalid. The manner in which it limits the scope of solicitor-client privilege is not absolutely necessary to achieve the purposes of the *Income Tax Act*, and therefore the exception is contrary to s. 8 of the Charter.

In *Thompson*, the court noted that the definition of "solicitor-client privilege" in s. 232(1) of the *Income Tax Act* is unequivocal, and Parliament's intent to define privilege so as to exclude a lawyer's accounting record from its protection "could hardly be clearer." While Parliament may, with clear and unambiguous language, evince an intent to abrogate privilege in respect of specific information (see *Canada (Privacy Commissioner)* v. *Blood Tribe Department of Health*, 2008 SCC 44), the question of whether a legislature can abrogate solicitor-client privilege over a class of documents in which the seizure of such documents is permitted cannot be answered, the court concluded, on the basis of *Blood Tribe* alone. In *Thompson*, the Supreme Court noted that Parliament's intent and its ability, in constitutional terms, to define solicitor-client privilege in a particular way are not necessarily equivalent.

Where a seizure is involved, s. 8 of the Charter comes into play. As noted in *Chambre des Notaires*, the court concluded that the purported abrogation of solicitor-client privilege over accounting records in s. 232(1) of the *Income Tax Act* is constitutionally invalid because it permits the state to obtain information that would otherwise be privileged to a far greater extent than is absolutely necessary for the administration of the *Income Tax Act*.

As a result of the court's decisions, ss. 231.2 and 231.7 of the *Income Tax Act* are unconstitutional and inapplicable to lawyers and Quebec notaries in their capacity as legal advisors, and the exception in the definition of solicitor-client privilege in s. 232(1) of that Act is constitutionally invalid.

Lawyers who are currently the subject of an outstanding notice of requirement pursuant to s. 231.2 or who are a party to an application for a compliance order under s. 231.7 should contact Barbara Buchanan, QC (bbuchanan@lsbc.org) or Michael Lucas (mlucas@lsbc.org) at the Law Society if they have any questions.❖

PRACTICE ADVICE

Top 10 questions asked of practice advisors

LAW SOCIETY PRACTICE Advisors typically answer thousands of emails and telephone calls a year. It doesn't take long for patterns to emerge, so we thought it would be useful to compile our list of the top 10 questions asked of Practice Advisors.

The answers will not fit all fact patterns and may not go into sufficient detail for every situation. Lawyers should consult the *Code of Professional Conduct for British Columbia* (the website version contains annotations of Ethics Committee opinions, discipline decisions and case law), the *Legal Profession Act*, the Law Society Rules, and the numerous manuals, checklists, forms or practice resources on the Law Society website.

Contact a Practice Advisor if you remain unclear or have further questions. All calls to Practice Advisors are confidential, except in the case of trust fund shortages. Read about the role of Practice Advisors on our website at Lawyers > Practice Support and Resources > Practice Advisors.

1. When do I have a duty of confidentiality?

Refer to section 3.3 of the *BC Code*. The duty of confidentiality is broader than the common law concept of privilege (rule 3.3-1, commentary [2]); it continues indefinitely even if others share the same knowledge.

The exceptions to the ethical duty of confidentiality currently set out in the Code include:

- authorization by the client, as required by the court, or to deliver information to the Law Society (rule 3.3-1);
- as necessary until a representative is appointed to protect a client from imminent harm when he or she is lacking in capacity (rules 3.2-9, commentary [5] and 3.3-1, commentary [10]);
- to prevent future harm for risk of death or serious bodily harm (rule 3.3-3);
- to defend against criminal or civil liability, allegations of negligence involving a client's affairs, or alleged professional misconduct (rule 3.3-4);
- to collect fees (rule 3.3-5); and
- to secure legal or ethical advice from another lawyer about your proposed conduct (rule 3.3-6).

In all cases, the lawyer should only disclose as much confidential information as is necessary. Also, a lawyer who is required under federal or provincial legislation to produce a document that is privileged must, unless the client waives privilege, claim solicitor-client privilege (rule 3.3-2.1).

The Code currently does not explicitly provide an exception for the exchange of confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from a lawyer's change of employment or from changes in the composition or ownership of a law firm. Such an exception is under review and a rule may eventually be included in the Code to address this. In the meantime, lawyers are encouraged to read rule 3.3-7 of the Federation of Law Societies Model Code at www.flsc.ca (National Initiatives > Model Code of Professional Conduct) and speak with a Practice Advisor.

The exceptions to the duty of confidentiality can be difficult to discern at times and a call to a Practice Advisor is recommended in most situations where one is contemplated.

2. Am I in a conflict of interest on this file?

Refer to the definition of "conflict of interest" in rule 1.1-1 and section 3.4 (Conflicts) of the *BC Code*. See also the Model Conflict of Interest Checklist on our website (go to Lawyers > Practice Support and Resources > Confidentiality/privacy/conflict of interest). There is a wide variety of topics covered in the Conflicts portion of the Code, including the duty to avoid conflicts of interest, joint retainers (Practice Support and Resources > Retainer agreements, limited scope retainers and joint retainer letters), conflicts arising from transfer between law firms (see also Appendix D of the Code; "Ethical considerations when a lawyer moves on," Practice Watch, Summer 2014 *Benchers' Bulletin*; and E-Brief, May 2016, Consultation on transferring lawyer rules), conflicts with clients and doing business with clients, how to give independent legal advice under the Code (Lawyers > Lawyers Insurance Fund > Preventing claims > Independent legal advice), and space sharing arrangements (Practice Support and Resources > Lawyers Sharing Space).

3. Can I withdraw from this file?

Refer to section 3.7 and rule 3.6-2, commentary [2] of the *BC Code*. The basic rule for withdrawal is found in rule 3.7-1, which in essence says a lawyer can only withdraw for good cause and on reasonable notice. Unless your situation fits one of the exceptions found in rules 3.7-2 and 3.7-7, you must always give reasonable notice to your client before withdrawing. Withdrawal for nonpayment of fees is no exception to the reasonable notice requirement (rule 3.7-3). If you are in process with a transaction or have an upcoming proceeding set on behalf of a client, contact a Practice Advisor to determine whether there is sufficient time for you to withdraw in the circumstance. The manner of withdrawal is dealt with in rules 3.7-8 to 3.7-10.

There are additional aspects to consider when withdrawing in a criminal case (rules 3.7-3, commentary [2] and [3], and 3.7-4 to 3.7-6), and where a contingency agreement is in place (rule 3.6-2, commentary [2]).

For information on the ownership of the file contents, see the article "Ownership of Documents in a Client's File" on our website at Lawyers > Practice Support and

Resources > Client Files. If you are withdrawing from a file because you are changing firms, refer to rule 3.7-1, commentary [4] to [10] and the information available at Practice Support and Resources > Lawyer leaving law firm.

4. Does my client have capacity?

Refer to rules 3.2-9 and 3.3-1, commentary [10] of the *BC Code*. When a client's ability to make decisions is impaired because he or she has a mental disability (or is a minor), the lawyer must maintain a normal lawyer and client relationship as far as reasonably possible. Although a doctor's assessment may assist in determining capacity, ultimately it is a legal test, and you must make the decision whether the client has capacity. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision (rule 3.2-9, commentary [1]).

If you decide to engage a doctor or other professional to assist in making the determination, it is crucial that the professional understand the nature of the decision to be made by the client. Often the client has the capacity to make certain decisions, even though the doctor's opinion may be that she or he generally has an impaired mental state. It can be worthwhile to find out if the client has better times of day or conditions (e.g., before or after medication) that can assist with his or her mental functioning when a decision needs to be made.

Further information on capacity is on our website at Lawyers > Practice Support and Resources > Capacity: "Acting for a client with dementia" (Practice Watch, Spring 2015 *Benchers' Bulletin*) and the BC Law Institute Report on Common-Law Tests of Capacity. If there are issues with a client's capacity, there may also be concerns about undue influence. For insight into undue influence and a checklist for recognition and prevention, see the BC Law Institute's Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide (Practice Support and Resources > Wills).

If the client is incapable of giving instructions and if you reasonably believe he or she has no other agent or representative and a failure to act will result in imminent and irreparable harm, you may take action to the extent necessary to protect the person (rule 3.2-9, commentary [2] to [5]). Rule 3.3-1, commentary [10] makes an exception to the duty of confidentiality in such a circumstance.

5. Where can I find information on client identification and verification?

Read Law Society Rules 3-98 to 3-109. See also the extensive information available on our website at Lawyers > Practice Support and Resources > Client Identification and Verification. You will find a Client Identification and Verification Checklist, a sample attestation form for verification of identity attached to the Checklist as Appendix I, a sample agency agreement attached to the Checklist as Appendix II, and FAQs devoted to this topic.

6. How do I deal with the tax components of my bill?

There are several resources on our website at Lawyers > Practice Support and Resources > Law office management > Tax. However, the Law Society is not able to provide tax advice. We suggest you contact your bookkeeper or accountant or a tax lawyer if you have specific questions and refer to the following resources:

- BC Ministry of Finance Bulletin PST 106 – Legal Services at www.sbr.gov.bc.ca/documents_library/bulletins/pst_106.pdf;
- Provincial Sales Tax FAQs at www2.gov.bc.ca/gov/content/taxes/sales-taxes/pst/faqs (or email CTBTaxQuestions@gov.bc.ca);
- Canada Revenue Agency (CRA) GST/HST Policy Statement P209R – Lawyers' disbursements (taxable/nontaxable) at www.cra-arc.gc.ca/E/pub/gl/p-209r/README.html; and