CHAPTER HIGHLIGHTS

- Meaning of “sophisticated client”
- The role of the lawyer
- When to hire a lawyer and when to represent yourself
- How to find a good lawyer
- Legal aid
- How lawyers bill their clients
- How to complain about your lawyer
- Ethics of lawyers and of clients
- Code of business conduct

“The first thing we do, let’s kill all the lawyers.”
—William Shakespeare, Henry VI, Part II, Act IV, sc. ii

The meaning of this very popular quotation is open to debate. It has been characterized as a “lawyer-bashing joke.”¹ On the other hand, it has been interpreted by the president of the Canadian Bar Association as “a comment on the importance of the ‘rule of law’ in an enlightened society.”²

Whatever meaning Shakespeare intended, it is clear that the above quotation is commonly used to deride lawyers. Business law students often refer to this quotation at the beginning of the business law course. Most of these students, when asked, admit that they have not read the play in which the quotation appears. They are usually unaware of the possible meanings of the quotation. They are usually repeating the quotation in a humorous attempt to embarrass the lawyer who is teaching the course.

1. Seth Finkelstein, “‘The first thing we do, let’s kill all the lawyers’ – it’s a lawyer joke,” The Ethical Spectacle (July 1997), online: The Ethical Spectacle www.spectacle.org/797/finkel.html.
“I Think I Need Legal Advice . . . ”

Sometimes a student who recites the quotation at the beginning of the semester (or a friend or relative of the student) becomes involved in a “legal situation” during the semester. She may have been charged with a criminal offence. She may have become eligible to apply for a pardon for a crime for which she was previously convicted. She may have received a traffic ticket, or been charged with a drinking-and-driving offence. She may have been involved in a car accident and be facing charges, or be having difficulty dealing with the insurance company in obtaining benefits. She may not have received her damage deposit from her former landlord, or be in some sort of dispute with her landlord. She may be unable to collect from someone to whom she lent money. She may have been involved in a house deal that has collapsed. She may be involved in divorce proceedings, or a custody dispute. She may have been served with a restraining order. She may have a business idea involving a product she has invented. She may have written a song, or a software program for a computer game. She may be thinking of setting up a business with one of her friends or relatives.

All of the above situations (and many more) have been experienced by students of the authors of this textbook during recent semesters. (Some of these situations have in fact been going on for extended periods of time.) In every case, the involved student approached her business law instructor, to ask for advice. That is, while the typical student may publicly participate in the criticism of lawyers, when faced with a personal problem involving legal aspects, she will unashamedly seek advice from a lawyer.

The student often approaches the instructor because she has suddenly realized that the situation in which the student (or her friend or relative) is involved relates to legal issues, or requires decisions that require legal input if they are to be dealt with appropriately. The student often says, “My parents don’t know that I am speaking to you about this issue.” Alternatively, she may say, “My friend heard me talking about the business law course I’m taking and asked me to ask you about this issue.”

This usually indicates that the student has been listening during her business law classes and has been reading the relevant course materials. She has begun to realize that many decisions in today’s world involve legal issues and that good decisions can be made only if appropriate attention is paid to the relevant legal advice. She therefore puts aside the bias against lawyers with which she started the course, and approaches a lawyer (her business law instructor) in order to obtain the relevant legal advice.

This textbook attempts to help the student develop the attitude that it is often best to obtain legal advice before making business decisions. Obtaining relevant legal advice on a timely basis requires putting aside the usual derision and public mistrust of lawyers and, instead, building a good long-term relationship with a lawyer. We will refer to someone who understands the importance of the solicitor–client relationship and who knows how to form and utilize such a relationship in order to enable the making of good business decisions, as a “sophisticated client.” This textbook will try to help business law students become sophisticated clients, so that they can manage their legal affairs more efficiently and effectively.
Becoming a Sophisticated Client

The first step in becoming a “sophisticated client” is to understand what is meant by the phrase. The dictionary meaning of “sophisticated” would suggest that a sophisticated client is confident, knowledgeable, and very up-to-date. A sophisticated client understands the role of the lawyer and of the client. A sophisticated client knows when to represent herself, when to hire a lawyer, and how to hire a lawyer. She understands the costs associated with hiring a lawyer. A sophisticated client also knows what can be done if she is dissatisfied with the conduct of her lawyer. All these topics will be discussed later in this chapter.

Taking a business law course often helps students understand the significance of becoming a sophisticated client. It also marks the beginning of their development into sophisticated clients. One of the authors of this textbook asked the question “Explain the meaning of ‘sophisticated client’ and discuss whether the objective of helping you develop into a sophisticated client has been achieved during the course” on the final exam for a law course. The following is the answer to the question provided by Mike Enzsol, one of the students in the class:

I had never heard the term “sophisticated client” before this course and I may never hear it again. However, if I only remember two words from these two years in the finance diploma program, these are them.

To me, a sophisticated client does one thing. He protects himself. As they say, “Ignorance is bliss.” However, I have learned the complete opposite is true. Ignorance is idiotic. For any decision made in life, the more research done, information collected and general reasoning used, the better will be the decision. By taking guesses and relying on assumptions, perhaps instinct, we are exposing ourselves as vulnerable in this cruel world.

I can easily say that I am not the ideal sophisticated client that we talk about in class. However, I can also easily say that I am much more sophisticated after taking this law class. However, it takes more than an hour on Tuesday and two on Friday to make a sophisticated client. This leads to what I believe the main goal of the law course is . . .

Like many other courses, I will have forgotten most of the course material shortly after I finish this exam, but that’s okay, they’ll change the laws anyway. What I won’t forget? I learned a way of thinking. A way of living. A logical process to analyze everything that happens in life.

Lately, before I act I’ve had questions running through my head when it comes to decision-making. Is this sophisticated? Do I know enough to make a good choice? What would the instructor do if he was in this situation? Am I acting logically? Should I do more research? Stuff like that.

To repeat, I am not the ideal sophisticated client. Yet I am not unsophisticated. I am still young and still learning to present myself as an adult and a contributing member of society. That’s what life is, a learning process. As long as I stay productive, and keep learning, one day I will be that ideal sophisticated client. Until that day I will continue to read my contracts before I sign them, do research before I form an opinion and, most of all, THINK.

Like I said, I will not remember most of the material in this course in a year’s time, but I will be more sophisticated than I am now. Two years from now I will be more sophisticated than I will be one year from now. . . This course gave me the ball and I’m going to run with it!

Many other business law students have expressed similar thoughts. A business law course, with its practical emphasis on general legal principles as they apply to many different areas of business, often works as a catalyst in the development of students. It provides a spark which results in a sense of empowerment of the students. They come to realize that business decisions are made all of the time, and that these decisions usually have serious consequences. They begin to understand that it is therefore critical that good decisions be made.

The business law course also makes it obvious that good business decisions cannot be made without consideration of the appropriate laws. The students start to appreciate that sometimes, through their own research, they can find the legal information required to enable them to make sound business decisions, but that sometimes the necessary information must be obtained from a lawyer. This understanding of the importance of having a good lawyer on your team is a critical component of being a sophisticated client.

A useful example illustrating how students come to understand the advantages of considering the relevant laws when making business decisions involves the importance of evidence. Students learn that the burden of proof borne by the plaintiff in a civil lawsuit is that he must prove his case on a balance of probabilities. The students see that evidence is introduced during the trial through the testimony of witnesses, on direct examination, cross-examination, and re-examination. They learn that the evidence can be a tangible object (“the bloody knife”), a piece of documentation (“the contract”), or simply an eye-witness account. They learn that hearsay (second-hand) evidence is not admissible. Once the students learn about the importance of evidence in satisfying the relevant burden of proof, and the different types of admissible evidence, their behaviour changes. They will take pictures after a car accident, for example, and get the names and telephone numbers of any witnesses. They will also understand the significance of having a written contract for a business transaction. They know that they may not win a case based on a verbal contract, when the evidence will consist of their word against the word of the other party. They then realize that the lawyer is not advising her clients to “Get it in writing!” simply to generate legal work for which the lawyer will be paid. They will instead understand that the lawyer has provided legal advice to facilitate the making of good business decisions. They are now approaching the situations that they encounter as sophisticated clients.

The Role of the Lawyer

One of the reasons for the general lack of respect for lawyers is that many people do not understand the role of the lawyer in the solicitor–client relationship. This misunderstanding is shown by the student who, after consulting with a lawyer, claims, “My lawyer told me to do this.” This statement implies that the decision-maker in the relationship is the lawyer, not the client.

The better approach is to see the client as the decision-maker. She has encountered a problem and must make a decision. She needs to collect certain information before she can make an informed decision. In this regard,
she consults her “experts,” namely, her accountant, her marketing manager, her human resources officer . . . anyone who can provide relevant information. She thereby gathers all of the useful information which she then takes into consideration when she is making her decision.

The lawyer is simply one of the experts the businessperson consults. The lawyer provides legal advice relevant to the client’s situation. The client is, of course, free to ignore the legal advice she receives, just as she is free to ignore any other advice she receives. Sometimes it would be unwise to ignore the lawyer’s advice. (“If you do this, then you will be committing a crime for which you will go to jail if you are convicted.”) But the businessperson makes her decisions in light of all of the relevant factors. She may therefore choose to accept some legal risk because she deems some other business factors to be of greater importance.

A clear understanding of the nature of the solicitor–client relationship will de-mystify the role of lawyers. While they typically are experts in their area of practice and can provide invaluable assistance to their clients, lawyers are simply providers of advice. They are hired by the client, who provides them with instructions. The lawyer is bound to follow these instructions, provided that they are lawful.

It is useful to examine this relationship in the context of a small business. From start-up to the selling of the business, the owner has many decisions to make. As a sophisticated client, when should the small business owner consult his lawyer for advice?

When to Hire a Lawyer

The first thing the owner should do is consider how he will organize his business. Will he operate as a sole proprietor? Will he have a partner? Should he incorporate? Will the business be operated as a franchise? The decision as to the form of business organization is very significant, with many implications (including liability, income taxes, and estate planning). The lawyer can provide information and advice that will help the owner make decisions appropriate for achieving his objectives.

If the owner is buying an existing business, the lawyer can provide advice and information which will enable the owner to minimize his potential risk and liability. What if the current owner has unsatisfied judgments against her? What if the assets of the current business have mortgages registered against them? Can the owner make good business decisions in these situations without receiving appropriate legal advice?

Anyone starting a business should ensure that all relevant laws will be complied with. How will the owner of the business determine which laws are relevant to his business? Can he understand the laws and whether his business plan will result in compliance with these laws? The lawyer can, of course, determine the relevant municipal, provincial, and federal laws which are relevant to the business, and provide advice as to what is required to ensure compliance with them. This could cover everything from obtaining a business licence, to complying with municipal noise bylaws, to satisfying provincial and federal environmental standards.

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4. This approach was used in Glenna Erikson, “Pay me now or pay more later,” LawNow (March 1993) 19.
Most businesses require a physical location, which usually means that there will be a lease to be negotiated. As is the case with all contracts, the owner should read the form of lease provided by the landlord. What if the owner doesn’t understand various clauses of the document? Should he just sign the lease anyway, or should he consult his lawyer as to the meaning of the clauses, before he signs?

The same questions apply to the documents provided by the bank or other lending institution. The owner of a small business usually must finance the start-up of the business or the purchase of an existing business. In particular, the extent of the personal liability of the owner for losses incurred by the business should always be carefully analyzed and understood by the owner before he signs the relevant documentation. This may require the provision of legal advice by the owner’s lawyer.

There are other contracts that may need to be prepared in connection with the business. Examples include contracts with employees, suppliers, and customers. Can the owner of the business draft these documents himself? Would he be wise to do so without obtaining legal advice from his lawyer?

Most businesses today have intellectual property issues. These vary from the naming of the business, to the protection of the business’s intellectual property such as patents, trade-marks, and copyrights, to ensuring that the business is not infringing on someone else’s property rights. This is a very complicated area, which is changing rapidly. Is it prudent for the business owner to make decisions involving intellectual property without obtaining relevant legal advice?

Even when selling his business, the owner may need to seek legal advice from his lawyer. Should the sale involve the assets of the business, or the shares of the corporation which owns the assets? What are the income tax implications? Is there any potential future liability for the seller to consider? How does the seller ensure that he will get paid? It is clear that there are many issues for which a seller should consult his lawyer, in order to ensure that he makes good business decisions, even when he is selling his business.

**When to Represent Yourself**

The above section suggests that a good approach to understanding the solicitor-client relationship is to view the client as the decision-maker. The lawyer is one of the “experts” that the client approaches, in her efforts to collect the information necessary for her to make good business decisions. This approach assumes that good business decisions will be based, at least in part, on relevant legal information and advice.

It is not, of course, necessary (or desirable) for the client to seek legal advice for every decision she must make. To do so would not only be prohibitively expensive, but it would also result in delays in the client’s decision-making. The crucial question, then, is “When should you hire a lawyer?”

If you need to make a business decision, and you do not retain a lawyer, then you will either not be considering relevant legal information when you are making your decision, or you will be obtaining the legal information yourself. For small, insignificant decisions, it may be appropriate to proceed without taking the time to find the relevant legal information. But, in most cases, it would be prudent to proceed only after completing some research of the relevant law.

A sophisticated client will understand this and will know how to find the relevant information. This is facilitated, of course, by the availability of legal information online. In the past, lawyers were “the keepers” of legal information.
It was necessary to consult a lawyer to access legal information. This added to the “mystification” of (and the resentment against!) lawyers. This has recently changed, as anyone with a computer and access to the internet can find legal information online. A sophisticated client will capitalize on this; she will do her own legal research whenever she requires legal information to make a business decision and it is not appropriate to hire a lawyer to find the necessary information.

This textbook will help students realize that legal information is readily accessible and will assist them in overcoming their fear of the law. It will also serve as a valuable resource, with many references to online legal information and specific legal websites. The Companion Website that accompanies this textbook (www.pearsoned.ca/yates) also emphasizes the availability of online legal information, by providing relevant provincial law and legal information, as well as direct links to significant legal websites.

For sophisticated clients, the availability of an abundance of easily accessible legal information is a positive development. Not only do they understand the need for legal input when business decisions are being made, but they know how to access relevant legal information. This is an important aspect of the empowerment experienced by business law students as they start to develop into sophisticated clients.

The question asked earlier in this chapter, “When should you hire a lawyer?” is therefore more difficult to answer than it was in the past. As always, the businessperson must consider the time and the cost which will be incurred if a lawyer is consulted for assistance in making a particular business decision. But there is now another alternative, namely, the businessperson’s doing her own research and finding the relevant legal information herself. If this approach is used, the time it takes to find the information must be considered. Furthermore, if the businessperson is unable to find the relevant information, or if she is unable to understand the information she did find, then she should call her lawyer for advice. This is an important attribute of a sophisticated client, being able to know when it is necessary to consult her lawyer.

One example that illustrates the above discussion involves small claims court litigation. Each of the provinces has set a monetary jurisdiction for small claims court. (The limit in Alberta, for example, is currently $25,000.) A sophisticated client will understand that any litigation involving an amount greater than the small claims court maximum limit will take place in a superior court, and that a lawyer should therefore be retained. A sophisticated client, however, will also appreciate that a case may involve an amount of money less than the monetary jurisdiction of small claims court, and that a lawyer should be retained because of the complexity of the case.

Another example showing how a sophisticated client will manage his legal affairs in an appropriate manner involves the collection of accounts receivable. Assume that all of the accounts involve amounts less than the monetary jurisdiction of small claims court. One form of contract is used for all credit sales. A sophisticated client would realize that it is not necessary to retain a lawyer to secure judgment against customers who don’t pay their accounts. The client, or one of his employees, can go to small claims court on behalf of the business. The client could hire a lawyer to train him, or his employee, with respect to how to
conduct a trial in small claims court. The lawyer can be consulted if there are any complications on any particular collection file.

There is one issue that always needs to be considered when someone is deciding whether to represent herself. If you break the law, and harm someone else, there will likely be two different legal proceedings. First, there will be a criminal prosecution in which you will be charged by the government with committing a crime. If you are convicted, you will be punished and you will have a criminal record. Given this, it is wise to always retain legal counsel when you are facing criminal charges.

If the person you harmed sues you, you may be liable for damages, whether you were convicted of a crime or not. The civil litigation may take place in small claims court; in most of these cases you could represent yourself. If the litigation involves an amount of money greater than the monetary jurisdiction of small claims court, then you should hire a lawyer to represent you, as the trial will take place in a superior court. Given the growing complexity of the law and the resulting specialization of lawyers, you may even have two lawyers, one to represent you in your criminal trial and the other to represent you in your civil trial.

Reducing Risk

This textbook will try to help students become sophisticated clients, so that they can better manage their legal affairs. Such management involves managing legal risk, which is therefore a primary focus of this textbook. This emphasis will be highlighted by the inclusion of “Reducing Risk” boxes throughout the textbook. These boxes will contain suggestions as to how legal risk can be successfully managed.

Sophisticated clients understand that success ultimately depends on the making of good business decisions, and that good business decisions can only be made if they are based upon appropriate information. One type of information required for good decision-making is legal information. Sophisticated clients have the skills and the confidence that enable them to find basic legal information. Sophisticated clients will, however, understand that there will be situations in which it will be necessary to retain a lawyer to obtain the required legal information. Sophisticated clients will not be afraid to request legal advice from a lawyer in such situations. They will then incorporate the legal advice received in their decision-making process, thereby reducing their legal risk.

How to Find a Good Lawyer

Assume that you are going to start a small business. You have decided that you need to retain a lawyer to help you. How do you find a good lawyer?

This question deals with an important issue, but it is not worded correctly. It would be better to ask “How do you find an appropriate lawyer?” This emphasizes that a lawyer may be very knowledgeable and successful, but may not be appropriate for you. What, then, makes a lawyer “appropriate” for a particular client?

The first step in finding an appropriate lawyer is to make a list of lawyers who may be appropriate. There are many possible sources of lawyers’ names. The first source most students think of is the telephone book, specifically, the YellowPages. This source can be overwhelming; as of May 1, 2006, there were 1452 lawyers listed on the online Edmonton YellowPages! It is possible to tell where a lawyer’s
office is located, and perhaps what type of law the lawyer practises, but there is definitely not sufficient information in the YellowPages advertisements to help you decide whether a particular lawyer is appropriate for you. The same conclusion can be made with respect to advertisements, regardless of the media — radio, television, website, print — used.

Another important source of lawyers’ names involves getting referrals from friends or relatives. It is important that the referral be given by someone whose judgment you trust. Also, it is important that the referral be provided by someone who had the same type of legal problem which you are now facing. Being referred to a highly recommended real estate lawyer is not much help to you if you have just been charged for committing a serious crime. If you are considering setting up a small business, then you want a referral from someone who operates a small business and is willing to recommend the lawyer who has provided legal advice to him in this context.

Another possible source of lawyers’ names is the provincial law society. These organizations are self-governing bodies for lawyers. Their mandate usually involves regulating the legal profession, in the public interest.6

Some of the provincial law societies (such as the Law Society of Alberta and the Law Society of Upper Canada) offer a Lawyer Referral Service. These services provide the names and phone numbers of lawyers who practise in the relevant area of law. In Alberta, this service is offered by the Law Society free of charge, while in Ontario there is a fee of $6. In both provinces, the lawyers who are referred will provide up to 30 minutes of free consultation.

In British Columbia, the Legal Referral Service is operated by the B.C. Branch of the Canadian Bar Association (CBA).7 The CBA is a professional organization which represents judges and lawyers. One of its purposes is to enhance the profession and the commercial interests of its members. The Lawyer Referral Service is offered by the B.C. branch free of charge. The lawyer to whom you are referred will charge you $25 for a half-hour interview.

The website of the Law Society of British Columbia contains the following warning:8

Members of the public should exercise caution when seeking referrals from lawyer referral services or lawyer directory websites that are not sponsored by the Canadian Bar Association or a provincial law society. The Law Society has received a report of an on-line lawyer referral website that was charging a fee for referrals but not providing appropriate services.

Once you have the name of a lawyer near you who practises the type of law relevant to your situation, you should set up a meeting for an initial consultation. It is best to confirm the cost (if any) of this meeting when you are setting it up. You do not want any unpleasant surprises, such as receiving an unexpected bill from the lawyer after the meeting.

6. This discussion will refer to three of the provincial law societies, the Law Society of Alberta (online: www.lawsocietyalberta.com/), the Law Society of British Columbia (online: www.lawsociety.bc.ca/index.html) and the Law Society of Upper Canada (online: www.lsuc.on.ca/index_en.html). All of the information in the textbook referring to these law societies may be accessed through these websites.


8. Supra note 6 at www.lawsociety.bc.ca/public/finding_lawyer.html.
The primary purpose of the initial consultation is for you to decide whether to retain the lawyer. At the same time, the lawyer will decide whether to agree to represent you. Both of these decisions should be made on the basis of trust, as the solicitor–client relationship will not function as it should unless there is mutual trust between the lawyer and the client. Unfortunately, there are no objective criteria which can measure “trust.” Both you and the lawyer must use your instincts in deciding whether to form a solicitor–client relationship.

With respect to someone who is setting up a small business, the best approach to follow is to assume that the lawyer you choose to assist you in the start-up of the business will continue to represent you even after the business has been set up and commences operating. There are several advantages to maintaining an ongoing relationship with your lawyer. She will know and understand you and your business. This will enable her to provide you with her legal advice more efficiently, thereby reducing your legal costs. It will also enable her to customize her legal advice, so that it will be even more useful to you when you are making your decisions. As she will view you as her client, she will give you, and your requests for legal advice, priority. This can be very important when you are facing matters that must be dealt with urgently. Finally, the more you deal with your lawyer, the more comfortable you will become, which means that you are more likely to call her when you require legal advice.

Legal Aid

You may be eligible for legal aid if you have a legal problem and you can’t afford a lawyer. The provision of legal aid varies from province to province. If you believe that you are eligible for legal aid, it is best to check the website of the organization in your province that administers the legal aid program.\textsuperscript{9}

In British Columbia, for example, the Legal Services Society (LSS),\textsuperscript{10} an independent, non-profit organization, provides legal aid for people with low income. LSS may pay for a lawyer if the client has a legal problem involving criminal charges, mental health and prison issues, serious family problems, or immigration problems. To receive legal aid, a client must meet certain financial guidelines involving household income and assets. If the client doesn’t qualify for legal representation but meets other financial guidelines involving household income, he may be eligible to receive legal advice. Anyone can obtain legal information, provided by a toll-free telephone service, LSS publications, a family law website, and links to other sources identified as reliable.

It must be emphasized that not everyone qualifies for legal aid, and that even some of those who do qualify may have to pay some of the legal costs incurred. Furthermore, if you collect money as a result of a settlement or judgment, you will probably have to repay some of all of the benefits you received from legal aid. Finally, not all types of cases are covered by legal aid. Legal Aid Ontario,\textsuperscript{11} for example, states that the following will not be covered by legal aid: wrongful

\textsuperscript{9} In Alberta, legal aid is administered by the Legal Aid Society of Alberta, online: www.legalaid.ab.ca/. In Ontario, legal aid is administered by Legal Aid Ontario, online: www.legalaid.on.ca/en/default.asp.

\textsuperscript{10} Online: www.lss.bc.ca/legal_aid/what_is.asp.

\textsuperscript{11} Supra note 9.
dismissal, change of name, personal bankruptcy, power of attorney, money lent or borrowed, sponsorship of relatives, commercial litigation, defamation, libel and slander, and real estate matters. It is clear that the owner of a small business will usually not be able to receive legal aid with respect to the legal issues involving the business.

There is one aspect of legal aid that deserves special mention. Duty counsel are court lawyers who assist individuals who are not represented by a lawyer. Duty counsel may be available in criminal courts, family courts, or immigration courts.

In British Columbia, the assistance of duty counsel is considered “legal advice,” not “legal representation.” In criminal court, duty counsel may provide advice to an accused about the charges he faces, the relevant court procedures, and his legal rights. Financial eligibility tests do not need to be satisfied to receive duty counsel services but, as the LSS website states, Duty counsel cannot replace the advantages of having your own lawyer. Duty counsel will not take on your whole case and will not represent you at a trial.

This statement is generally also true with respect to duty counsel in other provinces.

How Lawyers Bill Their Clients

One of the reasons people don’t retain lawyers even when they clearly require legal advice is that they are afraid of the cost. While the provision of legal services is not cheap, an understanding of how lawyers bill their clients will help someone determine whether to retain a lawyer. In this regard, the issue of fees should be discussed during the initial consultation with the lawyer.

Every legal problem is unique. Also, there are many factors a lawyer will consider when calculating the fee to charge a client. It is therefore important that the client understand from the very beginning exactly how the lawyer will bill him for providing assistance with his particular problem. It is prudent to confirm this understanding in a fee agreement with the lawyer.

Each of the provincial law societies provides online information on lawyers’ fees. It appears that there are three main ways that lawyers calculate their fees. First, the lawyer may charge a fixed fee for the work required, regardless of the time involved. This method of billing is often used for specific tasks, such as preparing a will, purchasing a house, or incorporating a business.

Second, the lawyer may bill the client for all of the time she spends working on his file, using her hourly rate. Hourly rates usually vary with the number of years that the lawyer has been practising law. A senior lawyer may have a higher hourly rate than a junior lawyer, but the experience of the senior lawyer may enable her to complete the required legal work more efficiently, perhaps resulting in a fee lower than that charged by the relatively inefficient junior lawyer, who will be learning as she does the work.

12. Supra note 10 at www.lss.bc.ca/Legal_aid/Legal_advice.htm.

Third, the lawyer may receive a percentage of the amount the client collects, either through a settlement or a court judgment. If the client does not collect anything, then the lawyer does not receive anything. This is a contingency fee agreement, which is often appropriate in personal injury claims, or product liability cases, when the client does not have any funds to pay the lawyer at the beginning of the case. The provincial law societies may restrict the use of contingency fee agreements, or set a maximum contingency fee for certain types of cases. The Law Society of British Columbia, for example, does not permit contingency fee agreements for family cases involving child custody or access. The maximum contingency fee allowed in claims for personal injury resulting from a motor vehicle accident is one-third of the amount received.14

The client is also responsible for paying the out-of-pocket costs incurred by the lawyer on the client’s behalf. These costs are called disbursements. Disbursements usually include costs such as the court fees for filing documents, long distance telephone charges, courier charges, the fee charged by an expert for testifying or preparing a report, and photocopying costs.

If a client decides to hire a lawyer, and the lawyer agrees to represent the client, the lawyer will usually request that a retainer be paid before she commences work on the matter. A retainer works as a deposit. The amount paid by the client is deposited into a trust account, to the credit of the client. When the lawyer bills the client, the amount owed will be paid from the retainer. The lawyer may require the client to “top up” the retainer as funds are withdrawn from the trust account.

How to Complain about Your Lawyer

As indicated above, the provincial law societies are self-governing bodies for lawyers. Their mandate involves regulating the legal profession. Part of this regulation involves dealing with complaints regarding a lawyer’s conduct.

In general, the law societies do not assist clients with complaints about the fees being charged by their lawyers. In such cases, the client is usually advised to first discuss his concern about the fee with his lawyer. Some law societies15 offer a fee mediation service. Participation in such a program is voluntary. These programs usually involve a neutral mediator who tries to facilitate a mutually acceptable resolution of the dispute.

If the client cannot resolve the fee dispute directly with the lawyer, and if any mediation is unsuccessful, then the client can have his lawyer’s bill reviewed by a court official. In Alberta, for example, the review is conducted by a Taxation Officer of the Court of Queen’s Bench.16 In Ontario, the review is conducted by an Assessment Officer of the Superior Court of Justice.17 Court officials such as taxation officers and assessment officers have the power to decide that the

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14. Ibid.
15. One that does is the Law Society of British Columbia, supra note 6 at www.lawsociety.bc.ca/public/lawyers_fees/resolving_disagreements.html.
17. See the Law Society of Upper Canada, supra note 6 at www.lsuc.on.ca/public/a/complaints/your-lawyers-bill—too-high/.
lawyer’s bill is fair and does not need to be changed. Alternatively, they can decide that the bill is too high, and reduce it accordingly.

For complaints regarding a lawyer’s conduct other than fee disputes, each of the law societies has a complaint-resolution process.\textsuperscript{18} This process usually begins with an attempt at mediating the dispute between the client and the lawyer. If mediation fails, and the law society decides that the complaint is valid, then there will usually be a more formal investigation. This could result in a hearing before a panel. This hearing will involve the testimony of witnesses, the entering of other evidence, and submissions by the legal counsel for the lawyer and for the law society. If the panel finds the lawyer guilty of misconduct, the penalty could include a reprimand, fine, suspension, disbarment (termination of membership in the law society), and costs of the hearing.

It is important to note that the complaint resolution process does not result in compensation being paid to the client who made the complaint. If the client believes that he has suffered a financial loss because of his lawyer’s misconduct (negligent or deliberate), it is necessary for the client to take other steps. This may require the client to seek legal advice from another lawyer. Clients should not procrastinate with respect to these matters, as limitation periods may exist, meaning that they may not be able to pursue their claims after a certain period of time.

Ethics

Ethics of Lawyers
While understanding how to complain about a lawyer is important, it is equally important to know when to complain about a lawyer. In this regard, the website for the Law Society of British Columbia contains the following statement:\textsuperscript{19}

High ethical standards are a hallmark of the legal profession—and a reason that people place their confidence and trust in lawyers. The Law Society sets standards of professional responsibility for BC lawyers and articled students and upholds those standards through a complaints and discipline process.

All of the provincial law societies have mandates to govern the conduct of lawyers in the public interest. The professional and ethical obligations of lawyers are set out in rules of professional conduct.\textsuperscript{20} Lawyers who fail to satisfy these obligations will be subject to the complaint resolution procedure, as discussed in the previous section. As the rules of professional conduct consistently emphasize the need for ethical behaviour, it is important to know what is meant by ethics and ethical behaviour.

\textsuperscript{18} See the Law Society of Alberta, supra note 6 at www.lawsocietyalberta.com/publicservices/complaintsprocesspublic.cfm, the Law Society of British Columbia, supra note 6 at www.lawsociety.bc.ca/public/lawyer_conduct.html and the Law Society of Upper Canada, supra note 6 at www.lsuc.on.ca/public/a/complaints/.

\textsuperscript{19} See the Law Society of British Columbia, supra note 6 at www.lawsociety.bc.ca/regulation_insurance/conduct.html.

\textsuperscript{20} See the Law Society of Alberta, supra note 6 at www.lawsocietyalberta.com/files/Code.pdf, the Law Society of British Columbia, supra note 6 at www.lawsociety.bc.ca/publications_forms/handbook handbook_toc.html; and the Law Society of Upper Canada, supra note 6 at www.lsuc.on.ca/regulation/a/profconduct/.
Law provides a set of rules for behaviour. If these rules are not complied with, the person breaking the rules will be punished. Law therefore tells us what we must do. Ethics, on the other hand, tells us what we should do. When a person breaks the law, he has also acted unethically. However, if a person acts unethically, he may not have broken the law. Ethical behaviour therefore implies integrity, honesty, and professionalism. This is illustrated by a dictionary definition of “ethics” as “a system of moral principles governing the appropriate conduct for an individual or a group.”21 Ethics thus relates to issues of right and wrong; these depend on a person’s conscience, rather than on what the law says.

Referring back to the Shakespearean quotation at the beginning of this chapter, and how many people use it to deride lawyers, it seems that many people today do not trust, or have confidence in, lawyers because they do not appear to meet the standards of professional responsibility set by their governing bodies. A review of the website for the Law Society of Alberta,22 for example, shows that, between January 23 and March 3 of 2006, there were eight suspensions, and one disbarment, of Alberta lawyers. The reasons for these penalties include

- failing to serve a client in a timely fashion
- failing to respond to clients
- failing to disclose to a judge that another judge had previously refused the same application
- swearing a false affidavit
- poor accounting of a trust account
- improper transfers from trust accounts
- misappropriation of trust funds

The last three offences resulted in the disbarment of the responsible lawyer under investigation. The Law Society referred the case to the Minister of Justice and the Attorney General. It is required to do so whenever there are reasonable and probable grounds to believe that a lawyer has committed a criminal offence.

While the vast majority of lawyers are completely honest and ethical, it only takes a few well-publicized cases involving lawyers being penalized for unethical behaviour to taint the reputation of the entire profession.

For sophisticated clients, there are a few important points to keep in mind. First, lawyers operate under strict rules governing their professional and ethical obligations. You can therefore place your confidence and trust in your lawyer. But, second, there are some lawyers who unfortunately do not meet the standards of the profession. It is necessary therefore to understand the types of behaviour that are unacceptable, and the steps that can be taken if your lawyer violates your trust and confidence by breaching the professional standards. Third, as is the case with all professionals, it is necessary to be vigilant with respect to your lawyer and, if he breaks the rules he should be following, to take whatever action is appropriate, on a timely basis.

The discussion on the ethical behaviour of lawyers emphasized the need for lawyers to comply with the relevant rules of professional conduct. Unfortunately, there is not an equivalent set of rules for businesspeople. That is, there is not a “Code of Professional Conduct” for businesspeople in Canada, or even in any of the provinces.

There have been many recent cases involving influential and powerful people being charged with and, in some cases, convicted of, crimes relating to the ownership and operation of businesses. The situations involving WorldCom, Enron, Martha Stewart, and Conrad Black are four well-known examples. In recent months, there have been several other high-profile cases involving businesspeople who have been entangled in questionable situations:

- Madonna was found liable for plagiarizing the words of a song she wrote.
- The Chairman of Hyundai was arrested because of allegations that he embezzled more than $100 million.
- The CEO of RadioShack resigned after admitting he “misstated” his academic records on his résumé.
- A Calgary stockbroker was fired for soliciting a prostitute and taking her back to the office, after hours.
- Several people were fired and/or have pleaded guilty to crimes, because of the “sponsorship scandal,” which involved the improper payment of federal government money to certain businesses.
- A tobacco company executive pleaded guilty to conspiring to smuggle cigarettes and to defrauding the Canadian government of more than $1 billion in taxes.

The increasing occurrence of cases such as these caused Gwyn Morgan, former CEO of EnCana Corp., to cite the 2005 Transparency International Survey, which

23. For an interesting timeline showing the significant events of the WorldCom saga, see “The WorldCom story,” online: CBC News Online www.cbc.ca/news/background/worldcom/.
25. For a timeline of the events that took place after Martha Stewart sold her shares in ImClone Inc. in 2001, see “Timeline,” online: CBC News Online www.cbc.ca/news/background/stewart_martha/timeline.html.
32. “Senior tobacco exec won’t go to jail in massive fraud case” (4 May 2006), online: CBC News Online www.cbc.ca/story/canada/national/2006/05/04/cigarette-fraud.html.
showed that Canada now ranks 14th among countries perceived as free of corruption. Mr. Morgan made the following statement:\textsuperscript{33}

There can be nothing more crucial to the integrity and prosperity of our country than to protect Canada from the proliferation and acceptance of corruption . . . When it comes to business and government, there is an especially heavy responsibility that comes with leadership . . . It’s up to Canadian business leaders to act as role models with strong ethical values . . . If you don’t have a moral compass, haven’t got the discipline to steer in a direction of strong values, it doesn’t matter whether you’re rich or poor, you’re still going to act unethically.

**Code of Business Conduct**

For a sophisticated client who is starting a business, the best approach would appear to be to make a commitment to ethical behaviour. This would involve being a role model for employees, showing them, by example, the type of behaviour that is expected of all employees. As Dempsey\textsuperscript{34} said:

A more proactive approach for public sector, private, and non-profit organizations is to foster internal cultures that make ethical values, individual and collective accountability, integrity, and trust explicit priorities . . . As demonstrated by the transgressions that have shaken the corporate world and these lessons being learned with the public sector, an organization’s continued good reputation and respectability depends on building and maintaining a culture founded on ethical values, integrity and trust.

A tangible step that can be taken in this regard is to prepare, and communicate to employees, a statement of values and principles of ethical conduct. Such statements are usually referred to as a “Code of Conduct,” or a “Code of Ethics.” In a recent article, Julie Walsh\textsuperscript{35} provides an overview of codes of conduct and ways to make them effective. She states:

A code of business conduct is a formal statement adopted by a company that sets out its values and standard of business practices. It essentially codifies a company’s organizational values and establishes procedural norms and standards of expected behaviour for all employees, officers and directors involved with that particular company. There is no prescribed format—it can be a short mission statement or a sophisticated declaration.

\textsuperscript{33} "Corruption threatens our values, EnCana exec says" (2 March 2006), online: Business Edge News Magazine [www.businessedge.ca/printArticle.cfm/newsID/12066.cfm].

\textsuperscript{34} Alison L. Dempsey, “Build an Ethical Organizational Culture before the Whistle Blows,” LawNow (February/March 2005) 9 at 10.

\textsuperscript{35} Julie Walsh, “Setting the tone at the top,” LawNow (February/March 2005) 16 at 16.
of business practices with articulated values, standards and compliance required as a term of employment.

Even a sophisticated client starting a small business can follow this approach. In fact, this is probably the best way to ensure the long term adoption of ethical behaviour by employees of the business. The organizations whose top management practises ethical behaviour are those which are most likely to experience compliance with a code of ethics.

Walsh\textsuperscript{36} goes on to suggest that at least the following issues (taken from a policy proposed by the Canadian Securities Administrators) should be included in a code of ethics:

- conflicts of interest;
- protection and proper use of corporate assets and opportunities;
- confidentiality of corporate information;
- fair dealing with the issuer’s security holders, customers, suppliers, competitors, and employees;
- compliance with laws, rules, and regulations; and
- the reporting of any illegal or unethical behaviour.

The remaining question is to determine the content of the code of ethics. What should such a code say, for example, about the proper use of corporate assets and opportunities? While these sorts of decisions are very personal, the Josephson Institute for Ethics identified six core values and their supporting ethical principles: \textsuperscript{37}

<table>
<thead>
<tr>
<th>Core Ethical Values</th>
<th>Supporting Ethical Principle</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trustworthiness</td>
<td>truthfulness, sincerity, candor, integrity, promise keeping, loyalty, honesty</td>
</tr>
<tr>
<td>Respect</td>
<td>respect, autonomy, courtesy, self-determination</td>
</tr>
<tr>
<td>Responsibility</td>
<td>responsibility, diligence, continuous improvement, self-restraint</td>
</tr>
<tr>
<td>Fairness</td>
<td>justice, fairness, impartiality, equity</td>
</tr>
<tr>
<td>Caring</td>
<td>caring, kindness, compassion</td>
</tr>
<tr>
<td>Citizenship</td>
<td>citizenship, philanthropy, voting</td>
</tr>
</tbody>
</table>

These core values are fundamental to the relationships that individuals have with the people with whom they come into contact. It is apparent that they could form the basis of a code of conduct for a small business. It would therefore appear that a sophisticated client who starts a small business could enhance the success of the business by personally adopting these core values and then incorporating them into a code of conduct for the business.

\textsuperscript{36} Ibid. at 17.

Summary

Becoming a sophisticated client

- Knowledgeable, confident, up-to-date
- Understands role of lawyer and of client

Role of lawyer

- Client is decision-maker
- Lawyer is expert who provides legal advice
- Small businesses face many issues lawyer can advise on

When to represent yourself

- Client makes many business decisions without consulting lawyer (time, cost)
- Sophisticated client can find relevant legal information
- Sophisticated client knows when to retain lawyer (e.g., criminal law)

How to find an appropriate lawyer

- Many sources of lawyers’ names
- Initial consultation
- Importance of mutual trust

Legal aid

- Available for certain types of legal problems
- Client eligible if meets financial requirements
- Even if client qualifies for legal aid, he may have to pay some or all of legal costs

How lawyers bill their clients

- Fixed fee
- Time spent and hourly rate
- Contingency fee
- Disbursements must be reimbursed by client
- Retainer is a deposit

How to complain about your lawyer

- Mediation may be available to resolve fee disputes
- Lawyer’s bill can be reviewed by court official
- Other complaints made to law society
- Investigation may be followed by hearing
- Penalties range from reprimand to disbarment

Ethics

- Rules of professional conduct contain professional and ethical obligations of lawyers
- If rules broken, lawyer may be penalized
- Many recent cases involving legal/ethical situations
- Sophisticated client will make commitment to ethical behaviour
- May prepare code of conduct for business
- Should be based on ethical values and principles
Questions

1. Explain the meaning of “sophisticated client.”
2. Why should the owner of a small business have a lawyer on “the team”?
3. Distinguish the role of the client from the role of the lawyer.
4. What are some examples of the decisions that owners of small businesses make? What role can a lawyer play with respect to the making of these decisions?
5. What role has the computer played with respect to the solicitor-client relationship?
6. “It is a good idea to hire a lawyer when you have been charged with a crime.” True or false? Explain your answer.
7. When you are trying to find a lawyer to help you, what are some sources of lawyers’ names?
8. What is the primary purpose of an initial consultation with a lawyer?
9. “Legal aid is available to anybody with a legal problem.” True or false? Explain your answer.
10. Briefly explain three ways lawyers bill their clients. Which of the three is most commonly used?
11. What can a client do if she is unhappy with the bill she received from her lawyer?
12. “If a client loses money because of the carelessness of his lawyer, he will be compensated for his losses if he makes a complaint to the law society.” True or false? Explain your answer.
13. When will a lawyer be disbarred?
14. “When a person acts unethically, she will also have broken the law.” True or false? Explain your answer.
15. What is a code of business conduct? Should such a code be used by a small business?