

WHAT CAN LAWYERS SAY IN PUBLIC?

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Lawyers increasingly appear in the media to discuss their clients' cases. Such public appearances are governed by a complex set of rules, both ethical and legal. The first part of this article examines the provincial rules of professional conduct which regulate public statements made by lawyers. The article then proceeds to examine those aspects of the law of defamation, contempt and fiduciary duty which form the legal framework for assessing the propriety of any public statement made by a lawyer during various stages of a lawsuit.

De plus en plus, les avocats apparaissent dans les médias pour discuter des affaires de leurs clients. De telles apparitions en public sont régies par un ensemble complexe de règles tant de droit que d'éthique. Dans une première partie, cet article se penche sur les règles de conduite de la province concernant une déclaration publique faite par un avocat. Puis l'article examine la diffamation, le mépris de cour et le devoir de fiduciaire, lesquels constituent le cadre juridique pour décider si une déclaration publique faite par un avocat, à divers stages d'une poursuite, est correcte.

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I. Introduction

Hardly a day goes by without a newspaper quoting a lawyer about a recent case or the face of a lawyer gracing the television screen. Lawyers talk frequently, and sometimes too freely, to the media about their clients' cases. Twenty years ago such familiarity between lawyers and the media would have been regarded as unethical and unbecoming of a professional.¹ Whereas in 1983 Chief Justice Laskin suggested that a lawyer was "very close to contempt" for speaking to reporters about a case on the steps of the Supreme Court of Canada,² that court

¹ See for example, the Editorial, "Lawyers and the Press" (1980) 22 Crim. L.Q. 129.

² "Supreme Court to consider argument that cruise tests violate human rights" (*The Globe and Mail*, December 21, 1983) p.1.

now permits reporters to interview parties and their counsel in the foyer of the court building.

Today lawyers play a legitimate role in informing the public, through the media, about the legal process and cases before the courts, but such liberty comes with rules and with risks. One risk is that by resorting too frequently to the media to discuss cases lawyers may jaundice the public's perception of lawyers and the fairness of the legal system. A poll conducted by the American Bar Association in 1997 showed that 58% of the American public believes that it is never appropriate for lawyers to use the media to influence public opinion about pending cases, and 55% said that the large degree of publicity some cases received had a negative impact on their views of lawyers.³

A second risk involves lawyers exposing themselves to legal action for making statements to the media about a case - a statement by a lawyer may contravene the laws of defamation, give offence to a court or run afoul of provincial rules of professional conduct. Several recent libel cases involving lawyers graphically illustrate that any contact by a lawyer with the media must be done with caution and due consideration for the lawyer's personal liability.

Third, contact with the media may risk harming the client's case. As a matter of professional responsibility a lawyer always must be satisfied that any communication with the media is in the best interests of the client and within the scope of the retainer.⁴ Many judges do not react well to counsel whom they perceive are trying their cases in the media, and a client's interests may suffer as a result of media contact.

This article will review the legal and ethical rules which apply when lawyers make public statements to the media about clients' cases. Part II of the article will examine the provincial rules of professional conduct which govern lawyers in their public appearances. While professional rules of conduct have changed to acknowledge that lawyers may discuss legitimately their cases with the media, this liberty remains subject to professional obligations. Part III will consider the potential legal liability which may arise for any public statement by a lawyer about a case. It will follow the various steps which take place in a legal proceeding and will review the relevant principles of defamation, contempt and fiduciary duty which form the legal framework for assessing the propriety of any statement made by a lawyer about a case.

³ American Bar Association Press Release, "Lawyer Stunts on Courthouse Steps Endanger Justice, Warns ABA Leader Jerome Shestack" (4 August, 1997). In August, 1988 the American Conference of Chief Justices published "A National Action Plan on Lawyer Conduct and Professionalism", which at page 31, recommended that in high profile cases lawyers should refrain from public comment that might compromise the rights of litigants or distort public perception about the justice system.

⁴ Law Society of Upper Canada, Rules of Professional Conduct, Rule 21(2).

II. *The Rules of Professional Conduct*

i) *The Traditional Prohibition Against Media Contact*

Until the middle of the 1980's provincial rules of professional conduct strictly regulated contact between a lawyer and the media, to the point of effectively prohibiting lawyers from discussing clients' cases with the media. The 1974 Code of Professional Conduct of the Canadian Bar Association reflected the position of the time:

The lawyer should not solicit appearances on radio, television or other public forum in his or her professional capacity as a lawyer or attempt to use any such appearance as a means of professional advertisement.⁵

A more comprehensive prohibition appeared in Ontario's Rules of Professional Conduct:

A lawyer should not initiate contact with the news media on behalf of himself in respect of any cause or matter which is, or which reasonably may become, a cause or matter in which he is involved in his professional capacity. Furthermore, a lawyer should not, whether he initiates contact with the news media or is contacted by them, use that opportunity to publicize himself. The lawyer may initiate contact with the media for the purpose of requesting a correction of any published error relating to his conduct, the conduct of his client or the cause or matter involved. The lawyer should be careful not to make any statement to the media which could constitute contempt of court.⁶

If this rule left any room for doubt, the public position of The Law Society of Upper Canada (the "LSUC") was crystal clear: "... any interview with the media about court proceedings invites the inference that it was given to publicize a lawyer and carries the danger of being a contempt of court. The Society intends to institute discipline proceedings where appropriate to ensure that the Rule is observed."⁷

This rule against initiating contact with the media rested on the long-standing English tradition prohibiting lawyers from engaging in advertising. As put by Mark Orkin, in *Legal Ethics, A Study of Professional Conduct*:

The reasoning behind ... the (English) Canon is obvious. If it is unprofessional to advertise directly, it is equally improper to do so indirectly. As Mathers, C.J., said, writing after the Canons were promulgated: "The discussion of causes, in which the lawyers may be retained, in the newspaper, the unfolding of the particular line of attack or defence which they propose to adopt, is most unbecoming. The lawyer who has a regard for professional propriety will refrain from such meretricious publicity."⁸

⁵ Commentary 8, Chapter XIII, "*Making Legal Services Available*", Code of Professional Conduct, Canadian Bar Association (1974).

⁶ Commentary 18(a), Rule 13, *Rules of Professional Conduct*, Law Society of Upper Canada (1984).

⁷ Law Society of Upper Canada, Communiqué No.145, (March 22 and 23, 1984).

⁸ M.M. Orkin, *Legal Ethics, A Study of Professional Conduct*, (Toronto: Cartwright & Sons Limited, 1957) at 185.

Two additional rationale were advanced to support keeping the muzzle on lawyers: the high degree of confidentiality required in the lawyer-client relationship, and the need for the court to remain untouched by information or opinion from a source other than the process before it.⁹

ii) *Pressures to Relax the Prohibition: the Dvorak Case*

In the early 1980's pressure emerged from three sources to permit some contact between lawyers and the media. First, some lawyers simply ignored the rules of conduct and engaged in repeated contact with the media, notwithstanding criticism of their activities. Then, at the 1984 annual meeting of the Canadian Bar Association Chief Justice Dickson urged both lawyers and judges to give the media reasonable co-operation in order to help the public learn about their legal system. The Chief Justice saw a need for the media to obtain greater background information on legal issues of current interest.¹⁰ Finally, and most significantly, a failed effort by the LSUC to discipline a lawyer who had engaged in advertising and media contact ultimately resulted in a change to Ontario's Rules of Professional Conduct.

Like many young lawyers called to the Bar in 1983 at the end of a deep, long recession, Robert Dvorak could not find a job and elected to set up his own practice. To secure clients, Dvorak placed ads in the Toronto Star outlining the fees he charged for various services, and sent a form letter to businesses advising them about his incorporation package. His advertising practices resulted in a complaint by the Law Society in late 1983 alleging professional misconduct. Dvorak then contacted the Toronto Star to recount the facts leading up to the complaint and to advise that he intended to bring a legal challenge against the Law Society's Rules of Professional Conduct. The Toronto Star published an article about the story, which prompted the Law Society to amend its complaint to include a charge that Dvorak had initiated contact with the news media and used that opportunity to publicize himself. Dvorak launched his court application.

The Ontario Divisional Court concluded that Dvorak's contact with the Toronto Star constituted protected expression under section 2(b) of the *Charter* because "...it serves a social purpose and provides information on a matter of potential public interest and debate, namely, the manner of fee advertising for lawyers."¹¹ The court declared invalid Commentary 18 of Rule 13 of Ontario's Rules of Professional Conduct and quashed the complaint against Dvorak. In reaching its decision, the Ontario Divisional Court portrayed lawyers as playing

⁹ B.G. Smith, *Professional Conduct for Lawyers and Judges*, (Fredericton: Maritime Law Book, 1998) c.5 at 1.

¹⁰ "Talk to media, Chief Justice tells lawyers, judges", *Ontario Lawyers' Weekly*, (7 September, 1984); see also Smith, *supra* at 90.

¹¹ *Re Klein and Law Society of Upper Canada* (1985), 50 O.R. (2d) 118 (Div.Ct.), at 169d.

an important role in informing the public, through the media, about the workings of the justice system:

A lawyer has a moral, civil and professional duty to speak out where he sees an injustice. Furthermore, lawyers are, by virtue of their education, training and experience, particularly well-equipped to provide information and stimulate reason, discussion and debate on important current legal issues and professional practices: see Rule 12. Speech of this kind surely lies at the core of the constitutional right guaranteed by s.2(b). Rule 13, Commentary 18, restricts such right. Again, a client's interest in many situations and, more particularly, a client's freedom of expression may be legitimately served by having his lawyer initiate contact with the news media. The effect of this Rule is to prevent or impede the client through his lawyer from exercising his constitutionally-guaranteed right. In addition, the public has a legal constitutional right to receive information with respect to legal issues and matters pending in the courts and in relation to the profession and its practices. This right is substantially impaired by the said Rule in that it significantly restricts the right of the press and other media to offer - and the right of the public to receive and discuss - information of important public issues relating to the law and the operation of legal institutions.¹²

In striking down the restriction against contact with the media the court minimized, perhaps naively, the potential for lawyers abusing their contact with the media:

It may be that to initiate contact with the press will, in some circumstances, invite the inference of self-aggrandizement, but such circumstances must, in my mind, be rare, if only because the press, in all likelihood, will be unwilling to print stories whose only relevance is to the lawyer's ego.¹³

Nor did the court fear that increased contact between lawyers and the media would interfere with the duties owed by a lawyer as an officer of the court:

If the concern is that a lawyer may disparage the courts, the Law Society or a fellow lawyer, then adequate safeguards already exist. To contact the press and denigrate improperly a fellow lawyer or the Law Society would surely be conduct unbecoming a barrister and a solicitor and it would not be protected by the *Charter* since its purpose was one for which the *Charter* was not designed. And as to a contact made in contempt of court, that is a matter for the court, not the Law Society, to regulate (though such a judicial finding might be grounds for further discipline by the Society).¹⁴

iii) *Modifications to the Rules of Professional Conduct: Ontario-style rules*

The Law Society of Upper Canada's decision to lay a complaint in the *Dvorak* case prompted much criticism that the Law Society was attempting to limit lawyers' freedom of expression. The then Treasurer, Laura Legge, responded to the criticism by articulating the concerns underlying the Law Society's rules:

Sometimes the client is not consulted before the media are contacted and therefore the lawyer is acting without his client's authority. A breach of the solicitor-client

¹² *Ibid.* at 169h-170d.

¹³ *Ibid.* at 170g-171b.

¹⁴ *Ibid.* at 171b-d.

privilege may result or there may be a contravention of the broader requirement of confidentiality. Consent to speak to the media may have been obtained, but the possible ramifications may not have been explained to the client. The resulting publicity may annoy or embarrass the client and may constitute an invasion of his privacy. Moreover, there is always the possibility that media publicity may in some way jeopardise the client's case. A lawyer cannot act without his client's authority, either express or implied, and there is no implied authority in a solicitor's retainer that he is entitled to seek publicity for his client's case.¹⁵

In April, 1984 the LSUC appointed a special committee to consider the subject of lawyers and the media.¹⁶ The committee recommended that the Law Society adopt a new rule on contact with the media, but the committee refrained from attempting to set down guidelines which anticipated every possible circumstance. Guidelines based on hypothetical fact situations, in the view of the committee, risked resulting in over-regulation or the creation of impractical guidelines; instead the committee recommended the adoption of general principles. It also decided that the controversial issue as to whether the lawyer could initiate contact with the media, or simply should respond to it, was not as important as the substance of what was done or said after the contact.¹⁷

On April 26, 1985 the Law Society enacted Rule 21, "Lawyers in their Public Appearances and Public Statements", which incorporated many of the principles enunciated by the Divisional Court in the *Dvorak* decision, as well as extensive comments received from the legal profession. The Canadian Bar Association Council amended its Code of Professional Conduct in August, 1987 to adopt a rule very similar to Ontario's Rule 21. Subsequently, the professional codes in Saskatchewan,¹⁸ Manitoba,¹⁹ and Nova Scotia²⁰ were amended to incorporate many of the elements of the new Ontario rule. As well, Prince Edward Island adopted the 1987 edition of the CBA Code as its own.

These revised provincial rules justify public communications by lawyers with the media on the basis that lawyers can contribute to an increased accuracy in the public's understanding of the judicial process. For example, Commentary 1 to the Ontario rule states: "Where the lawyer, by reason of professional involvement or otherwise, is able to assist the media in conveying accurate information to the public, it is proper that the lawyer do so, so long as there is no infringement of the lawyer's obligations to the client, the profession, the

¹⁵ L. Legge "Freedom of Expression of Lawyers: The Rules of Professional Conduct" (1985) 23 U.W.O. L. Rev. at 165-66.

¹⁶ *Ibid.* at 165; "Law Society plans review of its order on lawyers' silence" *The Globe and Mail* (7 April, 1984) 19.

¹⁷ "Lawyers and the Media", report of the Law Society of Upper Canada Subcommittee on Lawyers and the Media, September 7, 1984, at 6 (quoted with the permission of the Law Society of Upper Canada).

¹⁸ The Law Society of Saskatchewan, Code of Professional Conduct, ch.XVIII, "Public Appearances and Public Statements by Lawyers".

¹⁹ The Law Society of Manitoba, Code of Professional Conduct, ch.18, "Public Appearances and Public Statements by Lawyers".

²⁰ Nova Scotia Barristers' Society, Legal Ethics and Professional Conduct Handbook, ch.22, "Public Appearances and Public Statements by Lawyers".

courts or the administration of justice and provided also that the lawyer's comments are made *bona fide* and without malice or ulterior motive."²¹ In the broadest terms, the propriety of a lawyer's statement to the media will be measured against this purpose of enhancing the public's understanding of the judicial system.

Ontario's Rule 21 provides as follows:

1. Lawyers in their public appearances and public statements should conduct themselves in the same manner as with their clients, their fellow practitioners, the courts, and tribunals. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal, or the lawyer's office does not excuse conduct that would otherwise be considered improper.²²
2. The lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer. The lawyer owes a duty to the client to be qualified to represent the client effectively before the public and not to permit any personal interest or other cause to conflict with the client's interests.²³
3. The lawyer should, when acting as an advocate, refrain from expressing the lawyer's personal opinions as to the merits of a client's case.²⁴
4. The lawyer should, where possible, encourage public respect for and try to improve the administration of justice. In particular, the lawyer should treat fellow practitioners, the courts, and tribunals with respect, integrity, and courtesy. Lawyers are subject to a separate and higher standard of conduct than that which might incur the sanction of the court.²⁵
5. Public communications should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that the lawyer's real purpose is self-promotion or self-aggrandizement.²⁶

There has been little judicial commentary on this Rule. However, in *Stewart v. Canadian Broadcasting Corp.*,²⁷ the court noted that paragraphs 2 and 3 of the rule, apply only to existing clients, while others, such as paragraphs 1, 4 and 5, may also apply to former clients.²⁸

²¹ LSUCr.21, Commentary 1. See also, Commentary 6 of ch.XVIII of Saskatchewan's Code of Professional Conduct; Commentary 7 of c.18 of Manitoba's Code of Professional Conduct; c.22, Commentaries 22.5 and 22.6 of the Nova Scotia Legal Ethics and Professional Conduct Handbook.

²² CBA, ch. XVIII, Commentary 1; Saskatchewan, ch. XVIII, Commentary 1; Manitoba, ch. 18, Commentary 1; Nova Scotia, ch. 22, Guiding Principles.

²³ CBA, ch. XVIII, Commentary 2; Saskatchewan, ch. XVIII, Commentary 2; Manitoba, ch.18, Commentary 2; Nova Scotia, ch. 22, Commentary 22.1.

²⁴ CBA, ch. XVIII, Commentary 3; Saskatchewan, ch. XVIII, Commentary 3; Manitoba, ch. 18, Commentary 3.

²⁵ CBA, ch. XVIII, Commentary 4; Saskatchewan, ch. XVIII, Commentary 4; Manitoba, ch. 18, Commentary 4; Nova Scotia ch. 22, Commentary 22.3

²⁶ Nova Scotia, ch.20, "Seeking Business", Guiding Principles.

²⁷ *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 (Ont. Gen. Div.).

²⁸ *Ibid.* at 118.

(a) *Media contact as an extension of professional conduct:*
Ontario Rule 21(1)

Notwithstanding their freedom to talk with the media, lawyers remain professionally accountable for such contact. Public appearances and statements by lawyers, wherever made, are extensions of their conduct in a professional capacity and remain matters of professional conduct, subject to review by the provincial governing bodies and the potential of discipline proceedings.²⁹ As put by the commentary to the CBA rule: "The fact that an appearance is outside of a courtroom or law office does not excuse conduct that would be considered improper in those contexts."³⁰ Or, as stated in the Nova Scotia rule: "Involvements with the news and other media require the same degree of compliance with the rules of ethical behaviour and professional conduct as exist in the lawyer's more conventional environment such as a law office or courtroom or boardroom."³¹ Accordingly, the rules require lawyers to behave in the same way with the media as when dealing with clients, fellow practitioners and the courts.³² In making public statements, the CBA Code requires that lawyers treat fellow practitioners, the courts and tribunals with respect, integrity and courtesy.³³ The Code provides, however, that the rule should not be construed in such a way as to discourage constructive comment or criticism.³⁴

(b) *Communications in the best interests of the client: Ontario Rule 21(2)*

As a matter of professional duty, before making any communication with the media, a lawyer must ensure that such a statement will be within the scope of the retainer and in the client's best interests.³⁵ In practical terms, this means a lawyer must obtain the client's consent to making public statements about the case, either by way of a term of the retainer or by seeking specific consent as the occasion arises. Indeed, the Nova Scotia rules provide that a lawyer must not comment on a specific case without the instruction and consent of the client, and the lawyer has a duty "not to disclose confidential information about the client or the client's affairs without the informed consent of the client, preferably in writing".³⁶ A lawyer must satisfy

²⁹ CBA ch. XVIII, Commentary 1; LSUC r.21; Manitoba, ch. 18, Commentary 1; Saskatchewan ch. XVIII, Commentary 1; Nova Scotia, ch. 22, Guiding Principles.

³⁰ *Supra*, CBA.

³¹ Nova Scotia, c.22, Guiding Principles.

³² CBA, ch. XVIII, Commentary 1.

³³ CBA, c. XVIII, Commentary 4; see also: Ontario, r.21, Commentary 4; Nova Scotia, c.22, Commentary 22.3; Manitoba, c.18, Commentary 4; Saskatchewan, c. XVIII, Commentary 4.

³⁴ CBA, c.XVIII, Commentary 13; Saskatchewan Commentary 11; Manitoba Commentary 13.

³⁵ LSUC Commentary 2; CBA Commentary 2; Sask. c.XVIII, Commentary 2.

³⁶ Nova Scotia, Commentary 22.2. See also The Law Society of British Columbia, Professional Conduct Handbook, c.14, "Marketing of Legal Services", para 6.1.

two further professional duties to a client before deciding to make a public statement: the lawyer must be qualified to represent the client effectively before the public,³⁷ and the lawyer must ensure that no personal interest or other cause conflicts with the client's interests. Simply put, any personal desire by a lawyer to see his or her name in print must be subordinate to the fundamental consideration of whether a public statement will further the client's legal interests.

(c) *No expression of personal opinion on a case: Ontario Rule 21(3)*

Ontario Rule 21(3) prescribes that the lawyer should refrain from expressing a personal opinion on the merits of the client's case. Most provincial codes modelled on the Ontario rules contain similar proscriptions.³⁸ The British Columbia rules prohibit a lawyer from commenting "publicly on the validity, worth or probable outcome of a legal proceeding in respect of which the lawyer acts."³⁹

This prohibition reflects the proper role of lawyer as advocate. A lawyer presents factual and legal arguments to a court in an effort to persuade it to decide an issue in the client's favour. Judges repeatedly remind counsel that they are not interested in hearing counsel's personal opinions, but will listen only to counsel's submissions on the facts and the law.⁴⁰ Under Rule 21, the situation should be no different outside the courtroom: lawyers should avoid expressions of personal opinion on a case.

A lawyer's duty to the client also requires no less. When commencing a proceeding before the courts, the client signals his or her desire for the courts to adjudicate on the matter. A lawyer who freely expresses a personal opinion to the media about a client's case in advance of a hearing risks antagonizing the judges who ultimately hear the case. Judges are being asked to listen to and decide upon the case, and many have little patience for counsel who attempt to pre-empt or influence a hearing by making advance statements to the media.

While the Nova Scotia Rules do not contain such an express prohibition they do deal in a sophisticated manner with the content of a lawyer's comment about any specific case. Commentary 22.12 states that the Rules do not prevent "a specific lawyer from commenting upon the issues and implications of a case before the court or after the rendering of a decision as long as the comment is reasoned, informed and made *bona fide* in accordance with the spirit and the letter of the Rules in this Handbook". Explaining to the media the "issues and implications of a case" furthers the interest of educating the public about legal

³⁷ LSUC r.21, Commentary 2.

³⁸ *Supra* note 25.

³⁹ British Columbia Professional Conduct Handbook, c.14, para 6(a).

⁴⁰ See, for example, R. Reid and R.E. Holland, *Advocacy. Views From the Bench* (Aurora: Canada Law Book, 1984) where, at 111, the authors write: "You must never express a personal opinion. You are an advocate and it is not your opinion that matters."

matters before the courts. Yet the line between explaining an issue and repeating a client's allegations, or expressing a personal opinion, must be walked with great care. The Nova Scotia Rules deal squarely with statements made after a court has released its judgment: "A lawyer, if asked, may comment on a specific case after the final determination of the matter and the case report has become a matter of public record. In doing so the lawyer has a duty not to malign the court or any officer of the court."⁴¹

(d) *Encouraging public respect for the administration of justice:
Ontario Rule 21(4)*

Rule 21(4) overlaps Rule 11 of the Ontario Rules of Professional Conduct which requires that a lawyer "... shall encourage public respect for and try to improve the administration of justice", a responsibility which stems from the lawyer's position in the community and is not restricted to professional activities.⁴² As noted by the courts, the language of the rule is not mandatory but hortatory. In essence, the rule speaks by way of ethical directive rather than compulsory requirement.⁴³

Public respect for the administration of justice starts with an understanding of the operation of the judicial system, the promotion of which is a key goal underlying Rule 21. As stated in Commentary 3 to Rule 21:

The lawyer is often called upon to comment publicly on the effectiveness of existing statutory or legal remedies, on the effect of particular legislation or decided cases, or to offer an opinion with respect to cases that have been instituted or are about to be instituted. This, too, is an important role the lawyer can play to assist the public understanding of legal issues.

General statements as well as critical assertions made by lawyers designed to educate the public about the workings of the judicial system, fall within the spirit of the rule provided that they are accurate and fair in the circumstances.⁴⁴

(e) *Avoiding self-aggrandizement: Ontario Rule 21(5)*

The Ontario rule specifically cautions that public communications should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that the lawyer's real purpose is self-promotion or self-aggrandizement,⁴⁵ (i.e. an exaggeration of one's skills or accomplishments). Rule 21(5) contains two parts: a direction that a public communication should not be used for the purpose of publicizing the lawyer, and a direction that any

⁴¹ Nova Scotia, Commentary 22.11.

⁴² LSUC r.11, Commentary 1.

⁴³ *Supra*. Stuart at 116.

⁴⁴ *Ibid.* at 120.

⁴⁵ LSUC, r.21, Commentary 5.

public communication should be free from any suggestion that a lawyer's real purpose is self-promotion or self-aggrandizement.

The recent case of *Stewart v. Canadian Broadcasting Corporation*⁴⁶ illustrates the fine line which exists between a lawyer engaging in self-promotion and general education about the justice system. While the case will be analysed in some detail later in this article, a brief review of the facts is appropriate at this point. Stewart was convicted of criminal negligence causing death for striking a woman with his automobile and dragging her to her death. Following his conviction, Stewart discharged his counsel and retained Edward L. Greenspan, Q.C. to represent him during sentencing and his conviction appeal. Although Stewart's appeal was dismissed, Mr. Greenspan succeeded in obtaining a sentence of three years imprisonment for Stewart, a very favourable result in light of the circumstances surrounding the offence.

Many years after the trial, the Canadian Broadcasting Corporation (CBC) contracted with Mr. Greenspan to assist in preparing an episode describing the Stewart trial for the popular television series, *Scales of Justice*. Mr. Greenspan acted as a consultant for the episode helping to prepare the script, and he hosted and narrated the programme. Stewart learned about the preparation of the programme and ultimately asked Mr. Greenspan to stop its production. The production proceeded and after it aired, Stewart sued the CBC and Mr. Greenspan, alleging that Mr. Greenspan had breached the terms of his retainer and his fiduciary duties to Stewart.

In reviewing the duties owed by counsel to a former client, the court found that Mr. Greenspan's participation in the episode violated the prohibition in Rule 21(5) against self-promotion:

I find the facts to be as follows. Mr. Greenspan identified himself in the broadcast as Mr. Stewart's counsel during the sentencing. He spoke of his work as counsel. He referred indirectly to his success on Mr. Stewart's behalf, in that he was sentenced to three years in prison when another person convicted of the same offence by the same Judge was sentenced to five years. There is also Mr. Greenspan's broadcast presence. To the viewer, he explained the case and its legal issues. He was thus seen by close to one million people in the role of knowledgeable professional adviser. His image and his voice were prominent throughout. His name was mentioned and displayed. In my opinion, this broadcast was not just education about the justice system. It was also education about Edward Greenspan, his role in the justice system, and his effectiveness as counsel. I find that Mr. Greenspan's primary purpose in involving himself in this production and broadcast, in which educational content was otherwise assured, was to publicize himself and his services as counsel to a national audience.⁴⁷

The court, however, rejected an allegation that Greenspan had engaged in self-aggrandizement, commenting that "... Mr. Greenspan's description of the legal services which he provided to Mr. Stewart was somewhat restrained when

⁴⁶ *Supra* note 28.

⁴⁷ *Ibid.* at 121.

compared to the superb representation which he provided to Mr. Stewart, which was in fact responsible for a moderate sentence in difficult advocacy circumstances.”⁴⁸

(f) *Practical considerations concerning contacting the media*

Codes modelled on Ontario's Rule 21 acknowledge that hard and fast rules covering every possible circumstance are impossible to formulate. As Commentary 5 to the Ontario rule emphasizes, any decision whether to contact or deal with the media must be assessed in the context of each specific case and the interests of each client.⁴⁹ Where a lawyer decides to contact the media, he should take steps to minimize the chances that the media may misconstrue his statements. The Nova Scotia Rules suggest that it would be prudent to issue a written release or to give a statement from a prepared text.⁵⁰ Issuing a written release provides the maximum protection for a lawyer and the client because the statements are limited to the text, and it does not require personal contact between the lawyer and the media. Yet a written release invariably will be followed by telephone calls from the media to which a lawyer must be prepared to respond. In many circumstances, especially the announcement of the commencement of a legal proceeding which makes serious allegations about the conduct or character of the defendants, the best policy is to inform any reporters who call that no comment will be made beyond what is contained in the release. Where circumstances warrant providing the media with more information about the case or its background, a lawyer should prepare in advance, and stick to a list of points or comments which he or she is prepared to make. Also, a lawyer should retain a reliable record of any statement so that if misquoted, quoted out of context or misinterpreted by the media, he or she can readily and effectively attempt to correct the error.⁵¹ Experienced legal affairs reporters have indicated that they invariably tape record their telephone interviews with lawyers. A similar practice by the lawyer may well be prudent.⁵²

As Commentary 6 to the Ontario rule cautions: “Lawyers should be conscious of the fact that when a public appearance is made or a statement is given the lawyer will ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used or under what headline it may appear.” When dealing with the media, no matter how sympathetic they may appear, lawyers should always operate from the principle

⁴⁸ *Ibid.* at 122.

⁴⁹ LSUC r.21, Commentary 5; CBA Commentary 11. For a discussion about whether lawyers can bill for their time spent speaking with the media on behalf of a client, see B.G. Smith, *supra* c.5 at 13-14.

⁵⁰ Commentary 22.14.

⁵¹ Nova Scotia, c.22, Commentary 22.14.

⁵² “Staying Silent when press calls doesn't serve clients well”, *The Lawyers' Weekly* (20 November, 1992).

that one is more likely than not to be misquoted in some respect by reporters. Where the media have misinterpreted or misconstrued a lawyer's comments about a client's case, the lawyer has a duty to the client to contact the media involved and attempt to correct the problem as soon as the error comes to the lawyer's attention.⁵³

iv) *Other Provincial Approaches*

British Columbia deals with public statements by lawyers as part of its rule on marketing.⁵⁴ The rule provides that a lawyer shall: (1) not comment publicly on the validity, worth or probable outcome of a legal proceeding in respect of which he or she acts; (2) be satisfied that any communication is in the best interest of the client and made with the client's consent before making a public statement concerning the client's affairs; and (3) not state publicly that he or she speaks on behalf of the legal profession unless expressly authorized to state the official position of the legal profession.

Alberta's rule on "Accessibility and Advertisement of Legal Services" simply states that "a lawyer must not invite public or media attendance at any proceeding involving a client unless the client has consented."⁵⁵ The commentary to the rule stipulates that it is considered a violation if the lawyer solicits the client's consent to publicity that is solely intended for the lawyer's benefit, or that is otherwise incompatible with the client's best interests.⁵⁶

Quebec's Code of Ethics of Advocates,⁵⁷ in its section on an advocate's general duties and responsibility to the public, contains several provisions regarding public statements by lawyers:

2.08. The advocate must not, directly or indirectly, publish or circulate any report or commentary which he knows to be false or is manifestly false with respect to a court or to one of its members.

2.09. The advocate must not, directly or indirectly, in any manner whatsoever publicly comment on a cause pending before a court which he or one of his associates has undertaken.

2.10. The advocate must perform educational and information measures pertinent to the field in which he practises.

As mentioned above, Prince Edward Island has adopted as its provincial code the 1987 edition of the Canadian Bar Association's Code of Professional Conduct, which includes the provisions of Chapter XVIII dealing with lawyers'

⁵³ Nova Scotia, c.22, Commentary 22.15.

⁵⁴ The Law Society of British Columbia, Professional Conduct Handbook, c.14, "Marketing of Legal Services", paras 6(a), (c) and 6.1.

⁵⁵ The Law Society of Alberta, Code of Professional Conduct, c.5, r.7.

⁵⁶ *Ibid.* at Commentary 7.

⁵⁷ R.S.Q., c. B-1, r.1.

public statements. In addition, Regulation 42 made pursuant to the province's *Legal Profession Act*⁵⁸ limits the ability of a lawyer to initiate contact with the media about a client's case. The regulation reads:

(1) A lawyer shall not solicit a media interview, invite or connive attendance of the media on any judicial, quasi-judicial or other proceeding at which the lawyer appears in a legal or professional capacity.

(2) A lawyer may, with the consent of the lawyer's client, indicate to the media that the lawyer acts in a proceeding or a possible proceeding for a particular client, and may succinctly and fairly state the issues, but they shall not comment on the validity, worth or probable success of the client's case or that of other parties prior to and during the proceeding.

Newfoundland's professional code is in a state of transition. For many years that province used the 1974 CBA Code of Professional Conduct which frowned upon lawyers dealing with the media. In 1998, the Benchers of the Law Society of Newfoundland decided to adopt the 1987 CBA Code of Professional Conduct as the province's professional code. This is likely to take effect over the summer of 1999. The Rules of the Law Society of Newfoundland also deal specifically with the need for a client's consent to any media contact. Rule 8.09(1) reads: "A member shall not request or induce attention from or an interview by the media in relation to any judicial, quasi-judicial or other proceeding, hearing or meeting where the member is appearing in a legal capacity unless a client of the member has directed the member to make the request or inducement."

While all of the provincial rules described so far implicitly rest on the principle that a lawyer owes a duty to the court not to engage in conduct which attempts unfairly to influence the outcome of a legal proceeding, few of the professional codes give much in the way of specific guidance about what a lawyer may or may not say about a case to the media.⁵⁹ The New Brunswick Professional Conduct Handbook is an exception. It sets down detailed rules governing a lawyer's contact with the media before, during and after a case.⁶⁰ In the part of the handbook dealing with "Marketing and Promotion of Services", Rules 8 to 11 offer a list of permissible and impermissible statements:

Newspapers and Broadcasting

8. A lawyer, when acting in a civil or criminal matter can make out of court statements of confidential, factual information based on public records or evidence at a public hearing, but should not make any statements that relate to:

(a) the evidence to be offered;

⁵⁸ S.P.E.I. 1992, c.39.

⁵⁹ Prince Edward Island's Regulation 42 under the *Legal Profession Act* provides more detail than most Ontario/CBA-style code jurisdictions.

⁶⁰ Law Society of New Brunswick, Professional Conduct Handbook, Part F, "Marketing and Promotion of Services" r.8-11.

- (b) the character or credibility of a party or witness, or
 - (c) any other matter likely to interfere with a fair trial.
9. A lawyer who makes public statements to media representatives about an anticipated or pending trial or matter must not do so in such a manner that:
- (a) it will affect the impartiality of the court or the tribunal which hears or will hear that case;
 - (b) such statements about himself serve no purpose other than self-advertisement, or
 - (c) the making of such statements or the divulging of such information will tend to undermine in the public mind the confidential nature of the relationship between client and lawyer.
10. A lawyer involved in a criminal investigation or prosecution should not make any public statements relative to:
- (a) the character or criminal record of the accused;
 - (b) the names of the prospective witnesses;
 - (c) the evidence to be offered including statements and confessions,
 - (d) the guilt or innocence of the accused, or
 - (e) any likely pleas and any other matter likely to interfere with a fair trial.
11. Lawyers may appear on radio or television or give interviews to the print media to discuss well known cases of the past and hypothetical cases provided that:
- (a) no actual case is to be considered until finally adjudicated;
 - (b) no hypothetical cases be used which could be easily identified as current cases;
 - (c) the program be conducted in good taste and in accordance with the dignity of the profession.

In their detailed statement of principles and illustrations the New Brunswick rules reflect the approach taken by the American Bar Association in its Model Rule 3.6 which deals with lawyers' public statements. The ABA rule will be examined shortly.

v) *Comments on Matters not Involving a Client*

Several provincial codes of conduct explicitly recognize that the media often contact lawyers on matters not involving their clients, and that lawyers can play an important role in assisting public understanding of current legal issues by commenting on existing laws, cases pending before the courts or proposed legislation.⁶¹ For instance, the media may seek out the views of lawyers who represent special interest groups, or who have recognized expertise in a field, in order to obtain background information and to provide commentary on the issues in a case.⁶² Lawyers may also

⁶¹ LSUC, r.21, Commentaries 3 and 4; CBA, c.XVIII, Commentaries 9 and 10.

⁶² LSUC, r.21, Commentary 1.

properly act as advocates for special interest groups seeking changes in legislation or government policies.⁶³ In these contexts the lawyers are governed by the general principles that there must be no infringement of the lawyers' obligations to the client, the profession, the courts or the administration of justice, and a lawyer's comments must be made bona fide and without malice or ulterior motive. The American Conference of Chief Justices, in a 1998 report on lawyer professionalism, cautioned that lawyers not involved in a case, but who are asked to comment on it should be circumspect. They should restrict their comments to procedure and process, and refrain from predicting outcomes, evaluating performances or weighing evidence.⁶⁴

vi) *Statements in a Non-Legal Setting*

Lawyers traditionally participate in charitable activities and public organizations, often publicizing fund-raising events or acting as the voice for various racial or religious organizations or other special interest groups. Many of the provincial codes recognize these as well established and proper roles for lawyers because of the obvious contribution such activities make to the community.⁶⁵

vii) *The American Approach*

The professional codes of many American states contain rules regulating contact between lawyers and the media but, as one commentator has put it:

...the media-comment rule in most American jurisdictions is a sieve with very large holes. Some of the holes are there because of considerations of fairness. The most important of them are because of decisions of the United States Supreme Court, which have substantially restricted the ability of the bar and courts to suppress lawyer media comment.⁶⁶

The 1908 American Bar Association Canons of Ethics strongly discouraged lawyers from talking to the press about pending cases; yet the ABA Canons were hortatory and often ignored.⁶⁷ In response to concerns about the degree of media coverage of the 1960's criminal trial of Dr. Sam Sheppard, who was accused of murdering his wife, the ABA enacted Rule 7-107 of its 1969 Model

⁶³ LSUC r.21, Commentary 4; CBA, c.XVIII, Commentary 10.

⁶⁴ *Supra* note 4 at 31.

⁶⁵ LSUC, r.21, Commentary 2; CBA Code c.XVIII, Commentary 8; Manitoba Code c.18, Commentary 8; Saskatchewan Code, c.XVIII, Commentary 7; Nova Scotia Handbook, c.22, Commentary 22.7.

⁶⁶ C.W. Wolfram, "Lights, Camera, Litigate: Lawyers and the Media in Canada and the United States" (1996) 19 Dalhousie L.J. 373 at 388.

⁶⁷ This brief history of the ABA professional code, is taken from Wolfram, *supra* at 388-97. See also S.L. Nelson, "Dealing with the Media" (1988) 21 The Trial Lawyer 223.

Code, which mandated a “no-comment” rule for lawyers, with some limited exceptions. Subsequent judicial decisions weakened the force of the rule, many holding that First Amendment rights of lawyers would be infringed upon by enforcement of the rule as written.

In its revised 1969 Model Code, the ABA enacted Model Rule 3.6, which consisted of a more permissive standard to judge media dealings by lawyers. Model Rule 3.6 contained a general rule prohibiting a lawyer from making an “extra judicial statement” about a case ...if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter”. The rule proceeded to give examples of statements which would contravene the rule (e.g. statements relating to the credibility of a party or to inadmissible evidence), but then cut down the scope of the prohibition by listing statements which would not offend the rule (e.g. a statement without elaboration of information contained in a public record).

Numerous states adopted professional codes embodying the test of “substantial likelihood of materially prejudicing” a proceeding. In its 1991 decision in *Gentile v. State Bar of Nevada*,⁶⁸ the United States Supreme Court gave the rule a constitutionally mixed verdict. While upholding as constitutionally permissible the “substantial likelihood” test, the court ruled unconstitutional the “safe harbour” portion of the Nevada/ABA rule which provided that a lawyer was permitted to state without elaboration the general nature of his or her client’s defence. In the court’s opinion, language such as “elaboration” and “general” was too vague to provide lawyers with fair notice of its contours and therefore the “safe harbour” was constitutionally infirm.⁶⁹

In August, 1994 the ABA responded to the *Gentile* decision by amending Model Rule 3.6. It now reads as follows:

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), a lawyer may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) information contained in a public record;
 - (3) that an investigation of the matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;

⁶⁸ 501 U.S. 1030 (1991).

⁶⁹ *Ibid.* per Kennedy, J. at 1048.

- (6) a warning of danger concerning the behaviour of a person involved, where there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6);
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effects of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.⁷⁰

In Canada, as noted above, only the New Brunswick Professional Conduct Handbook comes close to providing the practical guidance that Model Rule 3.6 offers practitioners, although proposed Rule 6.06(2) of the Redrafted Ontario Rules of Professional Conduct released for comment in April, 1999 represent a move in a similar direction.

In view of the media circus surrounding the O.J. Simpson murder trial, one might wonder whether American lawyers operate under any professional restraints when dealing with the media. Professor Charles Wolfram has attempted to summarize the current reality of American practices:

*"Gentile has not meant the end of attempts to discipline perceived violations of the anti-comment rule. Occasional decisions can be found in which courts find violations. Nonetheless, discipline appears to be quite rare, with several courts, faithful to the Supreme Court majority, requiring a demonstration of each of the rule's elements, including the required demonstration that the lawyer's remark in fact had a substantial likelihood of materially prejudicing the trial. There seems to be widespread professional belief - at least among many segments of the American legal profession - that there is no effective prohibition against improper media comments by lawyers involved in cases."*⁷¹

This state of American law has led one commentator to suggest that less attention should be focussed on designing rules to curtail lawyers' public statements, and more emphasis should be placed on ensuring that public statements about any case can be attributed to an identifiable source. Citing the prevalence of "leaked" statements during high-profile trials and investigations, Professor Gerald Uelmen suggests that professional conduct rules should encourage the clear identification of the maker of any statement about a case.⁷² At least when the public can see who is making the statement, they will be in a position to analyse and critically weigh

⁷⁰ Nelson, *supra* at 225.

⁷¹ Wolfram, *supra* at 395-6.

⁷² G.F. Uelmen, Leaks, Gags and Shields: Taking Responsibility (1997) 37 Santa Clara L. Rev. 943.

the statement. While this proposal contains an element of realism, at the same time it appears to throw in the towel and concede that professional rules regulating lawyers' public statements are unworkable.

viii) *A Final Caveat*

Although most provincial codes of professional conduct have changed to permit some communication by lawyers with the media, judges remain divided on whether lawyers should discuss cases with the media. Consider, on the one hand, the following comments made by the former Chief Justice of Ontario, The Honourable Charles Dubin, in a 1988 address:

"I am puzzled by what appears to be a practice these days of advocates thinking that in a case which he or she is conducting, you can leave the courtroom, throw off the mantle of responsibility, of independence, and take the case to the public. Trials are not like elections. They are not to be fought or won in the town hall or in the media. The advocate is not the mouthpiece of his client, nor the press agent, nor an advertising agency. When an advocate undertakes a case, he or she carries the responsibility of an advocate throughout, inside the courtroom and out. And I am concerned and worried when I see a practice developing in this province of lawyers holding press conferences announcing the commencement of an action and announcing judgment at the same time - a commitment to the client that the case is won...It unduly enhances the expectations of his client who will be puzzled after a commitment of victory goes awry. It alarms the opponent who will want his or her advocate to respond in kind and have a public debate. The advocate knows that what is said outside the court room will not and should not affect in any way the trial.

...The advocate who takes his case to public does not advance the client's case and indeed we intuitively subjectively hurt him because the court might be more hesitant to accept the submissions of an advocate, accept his frankness, his candour and credibility, if outside the court room he has prejudged the matter and made a commitment to his client."⁷³

Chief Justice Dubin's comments were echoed by Mr. Justice Daniel Chilcott of the Ontario Court, General Division at a 1992 panel discussion. Justice Chilcott argued that lawyers advocating their position in the media were "hurting their profession", and suggested that lawyer's comments to the media should be confined to providing background information on a case. By contrast, a fellow panellist, the late Mr. Justice John Sopinka of the Supreme Court of Canada, considered contact with the media appropriate provided the lawyer addressed two basic considerations: "First of all, am I doing something that will get me in trouble with either the criminal process or the law society? And secondly, should I do it as a matter of tactics?" Justice Sopinka emphasized that a lawyer must ensure his or her comments do not prejudice the ability of a party to obtain a fair trial.⁷⁴

⁷³ Address by the Honourable Charles Dubin, Chief Justice of Ontario to the 7th Annual Advocacy Symposium, Toronto, May 6 and 7, 1988.

⁷⁴ "Staying silent when press calls doesn't serve client well," *The Lawyers Weekly* (20 November, 1992).

In view of the provisions of the provincial rules of professional conduct, the question of tactics raised by Justice Sopinka essentially requires a consideration of whether dealing with the media will be in the best interests of the client. This decision is not one made by the lawyer alone. The rules of professional conduct make it quite clear that the informed consent of the client first must be obtained before a lawyer deals with the media. Many judges hold the same view as former Chief Justice Dubin about "trying cases in the media", and a client must be made aware that including media contact, as part of an overall case strategy, may turn out to be a double-edged sword.

III. *Defamation, Contempt and Fiduciary Duties*

While rules of professional conduct provide one benchmark against which to measure the propriety of any public statement made by a lawyer, an offending statement made by a lawyer about a client's case also may run afoul of the laws of defamation, contempt or fiduciary duty. Each area of the law imposes a different obligation: defamation, an obligation to third parties; contempt, an obligation to the court; and fiduciary duty, an obligation to the client. The balance of this article will examine these principles as they may affect statements made by a lawyer at various stages of a client's lawsuit.

i) *Statements Made at the Start of a Client's Case*

A defamation action poses the greatest risk of personal liability for a lawyer who comments on a case initiated by a client. By its very nature the litigation process involves the assertion of allegations by one party against the other. Until the court pronounces a final judgment, the truth of these allegations remains unproved. Accordingly, a lawyer, who makes statements about the allegations at issue in his or her client's case prior to trial, usually will not know with certainty whether he or she will be able to rely on a defence of justification – or the truth of the statements – in response to a defamation action brought by a disgruntled opposing party.

(a) *Before a lawsuit commences*

The common law of defamation provides some protection for statements made in connection with a judicial proceeding. An absolute privilege attaches to any statements made *coram judice*, which includes statements made by counsel in open court and the contents of documents put in as evidence, as well as to everything done from the inception of the proceeding onwards, extending to all pleadings and other documents brought into existence for the purpose of the proceeding.⁷⁵ In addition, absolute privilege may exist to protect statements made prior to the

⁷⁵ *Lincoln v. Daniels*, [1962] 1 Q.B. 237 (C.A.), *supra* at 257-58.

commencement of an action; this category has variously been described as extending "to the precognition or proof of that evidence taken by a solicitor",⁷⁶ or "to all preparatory steps taken with a view to judicial proceedings".⁷⁷

As might be expected, the scope of this last category has been narrowly construed to include only statements or matters which are intimately connected with and necessary to the commencement of a judicial proceeding. Where a lawyer has made a pre-proceeding statement to a person not in the media, the courts have reached differing results on the protection afforded the statement by absolute privilege. The case of *Dingwall v. Lax*,⁷⁸ for example, involved the publication of a draft pleading before it was filed in court. Against the background of previous litigation between the parties, Lax's client decided to commence a fresh action against Dingwall and others relating to the management of a commercial office. Lax drafted a statement of claim which made allegations against Dingwall and others. Lax then sent it to one of Dingwall's partners who had acted in related proceedings and to a lawyer for Dingwall's firm appointed by the law society's insurers. The covering letter read:

"Prior to issuance and out of courtesy I am enclosing a draft copy of a Statement of Claim which we anticipate issuing on April 13, 1987 unless a satisfactory resolution of this matter has been effected before that date."

The receiving lawyer asked for and received an extension of time from Lax to consider the matter. Once the extension date had passed, Lax issued the statement of claim. Dingwall then sued Lax for defamation alleging that in sending the letter and draft pleading to his partner and the insurer's lawyer Lax had published the documents to Dingwall's detriment.

The court struck out Dingwall's statement of claim as disclosing no cause of action. It held that Lax enjoyed a defence of absolute privilege for the publication of the draft statement of claim.⁷⁹ The court regarded Lax's letter, and the draft pleading, as "properly incidental [to] and necessary for the [judicial] proceedings" and entitled him to an extension of absolute privilege.⁸⁰ Critical to the court's conclusion was the limited distribution given to the letter and draft pleading, which were sent only to the lawyers involved in the case, and their publication in the context of inviting a resolution of the dispute without further court proceedings.⁸¹

A much narrower application of absolute privilege occurred in *Dashtgard v. Blair*.⁸² Following the departure of an employee, counsel for the company

⁷⁶ *Ibid.*

⁷⁷ Fleming, *The Law of Torts* 7th ed. (Sydney: The Law Book Company Limited, 1987) at 535.

⁷⁸ (1988), 63 O.R. (2d) 336 (H.C.J.).

⁷⁹ *Ibid.* at 339-40, citing *Lincoln v. Daniels, supra* and *Watson v. McEwan*, [1905] A.C. 480.

⁸⁰ *Ibid.* at 341a.

⁸¹ *Ibid.* at 341f. See also the discussion in R. Brown, *The Law of Defamation in Canada*, 2d ed. (Toronto: Carswell, 1994) at 12-62 to 12-67.

⁸² (1990), 4 C.C.L.T. (2d) 284 (Alta. Q.B.).

wrote a letter to the company's clients advising of the employee's departure, her establishment of a new, competing company and the possibility that the employee might have transferred the clients' files to her new company. The lawyer's letter warned the clients that they should not pay the former employee any fees in connection with the transferred files, and further stated that the employee and her new company would have to make an accounting in litigation which was being concurrently commenced. The letter was sent to numerous clients of the departed employee's new company.

When the former employee brought an action against the lawyer for defamation, he sought to strike out her statement of claim on the basis that his letters enjoyed an absolute privilege. The court denied his motion, holding that an absolute privilege only exists in the course of judicial proceedings. Acknowledging that absolute privilege may attach to documents, such as letters which initiate proceedings, the court held that the letter written by the lawyer to the former employee's clients did not constitute a step initiating a judicial proceeding.⁸³

A contrary result was reached in the Ontario case of *G.W.E. Consulting Group Ltd. v. Schwartz*.⁸⁴ A lawyer retained by an employee for a wrongful dismissal case, wrote to the employer before starting an action requesting copies of the contracts between the employer and its charity client in order to determine whether the employer had engaged in double docketing, that is, charging certain expenses to the employee and to the charity clients. Counsel for the employer refused to produce the contracts, whereupon the lawyer wrote directly to the charity clients requesting the contracts. In this letter, the lawyer explained that his client was about to commence an action for wrongful dismissal and that part of the claim involved the double docketing of certain expenses by the employer against both the charities and the employee. Two weeks later, the lawyer started the action.

The employer commenced a separate action against the lawyer and the employee, alleging that the lawyer's letters to the charity clients were defamatory and directed to persons who were not parties or contemplated parties to any litigation. In response to a motion by the lawyer to strike out the statement of claim, the court dismissed the action holding that the letters written by the lawyer were protected by privilege. The court concluded that the lawyer had the right, and perhaps the duty, to look at the contracts in question. As he was refused copies of them by the employer, he was within his rights to communicate directly with the employer's clients.⁸⁵

(b) *When a lawsuit begins*

Statements made by a lawyer to the media at the commencement of an action fall outside the scope of absolute privilege. As put in one American case: "Dissemination of the contents of a complaint to the public or to third parties

⁸³ *Ibid.* at 292.

⁸⁴ (1990), 66 D.L.R. (4th) 348 (Ont. H.C.J.).

⁸⁵ *Ibid.* at 356.

unconnected with the underlying litigation ... generally is not sufficiently related to the judicial proceeding to give rise to the privilege."⁸⁶

By contrast, qualified privilege may protect some such statements. Historically, the defence of qualified privilege extended to the publication of fair and accurate reports about the conduct of a trial and the contents of any document filed as an exhibit during the trial. Until recently, Canadian common law did not extend this privilege to when lawyers distribute, or publish, pleadings or court documents not yet filed or referred to during the course of a hearing in open court. Duff C.J. explained the reasoning for this rule in *Gazette Printing Co. v. Shallow*:

The publicity of proceedings involving the conduct of a judicial authority serves the important purposes of impressing those concerned in the administration of justice with a sense of public responsibility, and of affording every member of the community an opportunity of observing for himself [sic] the mode in which the business of the public tribunals is carried on; but no such object would appear to be generally served by applying the privilege to the publication of preliminary statements of claim and defence relating only to private transactions; formulated by the parties themselves...⁸⁷

Following the enactment of the *Charter* the Supreme Court of Canada reconsidered and modified this traditional common law position in response to changing societal standards about access to court documents. The erosion of the *Gazette Printing* principle began with the Court's 1989 decision in *Edmonton Journal*⁸⁸ in which the court struck down, as a violation of the *Charter*'s guarantee of freedom of expression, provisions in the *Alberta Judicature Act* which prohibited the publication by the media of certain court documents filed before trial, including pleadings. The court found that the right of the media to report on court proceedings extended to pleadings and court documents filed before trial since access to those documents serves the same societal need as reporting on trials.⁸⁹

Then, in its 1995 decision in *Hill v. Church of Scientology*,⁹⁰ the Supreme Court of Canada expressly extended qualified privilege to cover the publication of pleadings and court documents filed before trial.⁹¹ In that case, the Church of Scientology decided to bring a contempt application against Hill, a crown counsel who was acting on a motion by the Church to

⁸⁶ *Hoover v. VanStone*, 540 F. Supp 1118 (U.S. Dist. Ct. 1982) at 1123.

⁸⁷ (1909), 41 S.C.R. 339, at 360. During a seminar given to members of the media in 1962, the late J.J. Robinette, Q.C. stated: "Although [pleadings] are filed in the court house, anything that you print from the pleadings you print at your own risk, because they are one-sided. There is no qualified privilege with reference to the statements of fact made in pleadings." *Libel, Defamation, Contempt of Court, and the right of people to be informed* (Toronto: Thomson Newspapers Limited, 1979) at 88.

⁸⁸ *Edmonton Journal v. Alta. (A.-G.)* (1989), 64 D.L.R. (4th) 577 (S.C.C.).

⁸⁹ *Ibid.* per Cory, J. at 610.

⁹⁰ *Hill v. Church of Scientology* (1995), 126 D.L.R. (4th) 129 (S.C.C.).

⁹¹ *Ibid.* at 73, para 153.

quash a search warrant. On the day the Church commenced the contempt application, its lawyer attended a press conference called by the Church. As described by Cory, J:

“Manning [the lawyer], accompanied by representatives of the appellant Church of Scientology of Toronto (“Scientology”), held a press conference on the steps of Osgoode Hall in Toronto. Manning, who was wearing his barrister’s gown, read from and commented upon allegations contained in a notice of motion by which Scientology intended to commence criminal contempt proceedings against the respondent Casey Hill, a crown attorney. The notice of motion alleged that Casey Hill had misled a judge of the Supreme Court of Ontario and had breached orders sealing certain documents belonging to Scientology. The remedy sought was the imposition of a fine or the imprisonment of Casey Hill.

At the contempt proceedings, the allegations against Casey Hill were found to be untrue and without foundation.”⁹²

The press and television media published some of the allegations contained in the Notice of Motion, as well as the following comments by Manning:

The documents were ordered sealed by Mr. Justice Osler, pursuant to a request by counsel, in a very serious matter, and they were opened and revealed to persons whom we say were unauthorized to do so.”

and,

They were confidential documents which have been ordered sealed by Supreme Court of Ontario Justices which were opened with the permission of counsel for the Crown. And this constitutes, in the opinion of the Church, a contempt of court.⁹³

To the question of whether a lawyer can publicly recite to the public the contents of a pleading filed by his client in court, the Supreme Court answered with a qualified “maybe”. The court determined that qualified privilege could extend to statements made by a lawyer to the media about documents filed in court prior to a hearing. The scope of the privilege is a narrow one, however, protecting only statements which are reasonably appropriate in the circumstances.⁹⁴ In the circumstances of the *Hill* case, the Supreme Court of Canada found that the statements made by the Church of Scientology’s lawyer had stepped beyond the boundaries of the qualified privilege:

... it is my conclusion that Morris Manning’s conduct far exceeded the legitimate purposes of the occasion. The circumstances of this case called for great restraint in the communication of information concerning the proceedings launched against Casey Hill. As an experienced lawyer, Manning ought to have taken steps to confirm the allegations that were being made. This is particularly true since he should have been aware of the Scientology investigation pertaining to access to the sealed documents. In those circumstances he was duty bound to wait until the investigation was completed before launching such a serious attack on Hill’s professional integrity. Manning failed to take either of these reasonable steps. As a result of this failure, the

⁹² *Ibid.* at 134, para 1.

⁹³ *Ibid.* Appendices “A” and “B”, at 188-9.

⁹⁴ *Ibid.* at 171, para 147.

permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated.⁹⁵

This reasoning effectively limits the availability of a defence of qualified privilege to circumstances where the lawyer has investigated personally allegations made by the client in the pleading and further determined that evidence exists to establish the allegations. The standard set by the court is a high one. In the *Hill* case, Manning had relied on evidence obtained by other senior criminal counsel acting for the Church, and had conducted his own legal research.⁹⁶ Yet where serious allegations are made in the pleading against a person's professional integrity, the court has clearly suggested that a lawyer should interview all potential witnesses, both on his client's side and opposite, before making statements about the allegations contained in the lawsuit.⁹⁷

Several practical guidelines emerge from the *Hill* decision. First, although a lawyer can advise the media that his or her client has commenced a legal proceeding, the scope of any comment about the allegations contained in the lawsuit will depend upon the nature of the lawsuit. For instance, an action against a government challenging the validity of a statute might give room for considerable comment by the lawyer on the nature of the factual and legal assertions contained in the client's pleading. By contrast, an action calling into question the integrity and reputation of an individual would call for great circumspection in any comments made, perhaps even limiting them to the date of commencement of the action, the names of the parties and the damages claimed.

Second, where an action alleges misconduct by a defendant the lawyer should not describe, quote or comment on the validity of the allegations made against the defendant unless the lawyer, through proper and reasonable investigations, has found the allegations to be true. Barring this, the proper course is to let the media read the pleadings, themselves; the lawyer should refrain from commenting.

Third, the location of a public statement may be just as important as what the lawyer says. In the *Hill* case the Supreme Court took exception to the press conference being held on the steps of Osgoode Hall in Toronto.⁹⁸

Finally, a lawyer should disseminate court documents to the media with caution, in a manner that is "reasonably appropriate"⁹⁹ in the circumstances. For example, where the pleading contains serious allegations against an individual, many lawyers require a reporter to furnish a written request for the pleading. This indicates that the reporter is asking the lawyer to act as his or her agent in obtaining the document from the court file. While this may appear unduly formal, it does demonstrate that the lawyer has responded to, rather than

⁹⁵ *Ibid.* at 174, para 155.

⁹⁶ *Ibid.* at 137-38, para 18.

⁹⁷ *Ibid.* at 174, para 155.

⁹⁸ *Ibid.* at 174, para 156.

⁹⁹ *Ibid.* at 171, para 147.

initiated contact with, the media, and that the lawyer has limited his or her activity to providing a document available from the public court files. By contrast, in a public policy case, such as a constitutional matter, where individual reputations are not engaged, lawyers may provide the media with copies of factums, to allow them to better understand the issues which will be argued.

Less than a year after the decision of the Supreme Court of Canada in the *Hill* case, Senator Anna Cools introduced Bill S-4 in the Senate. The Bill proposed amendments to the *Criminal Code* which would make it an offence for counsel in any judicial proceedings to make any out-of-court public statements about the facts in the lawsuit, including reading from court documents, where the lawyer knew that some of the facts asserted in the statement were not true or where he had no reasonable grounds for believing that the facts asserted in the statement were true.¹⁰⁰ The Bill drew strong criticism from the Canadian Bar Association. The CBA argued that there was no justification for imposing special sanctions on lawyers since they are subject to the same laws of defamation and libel as others. It also disputed the Bill's premise that lawyers were under pressure to use the media to promote their clients' interests and to extend their activities to unethical conduct.¹⁰¹ Bill S-4 died on the order paper.¹⁰²

ii) *Public Statements Made During the Discovery Process*

As a case progresses through productions and examinations for discovery a fuller evidentiary record is formed, and new information may come to light which either strengthens or weakens the initial allegations made in the claim or defence. Lawyers for either party may be tempted to improve the client's public image by making statements about the evidence obtained during the discovery process. Two principles operate to discourage such public statements: the undertaking of non-disclosure relating to information obtained during discovery, and the limited scope of privilege afforded such statements by the law of defamation.

(a) *The Undertaking of Non-Disclosure*

Although documentary production and examinations for discovery constitute part of a judicial proceeding, a lawyer is not free to make public statements about the evidence obtained during discovery. Most Canadian courts have held that evidence obtained during the discovery process is subject to an implied undertaking by the parties and their counsel not to use the information or

¹⁰⁰"Bill S-4 restricts lawyers' freedom of speech", *The National*, Addendum (2 May, 1997).

¹⁰¹Bill S-4, Second Session, 35th Parliament, introduced February 28, 1996. The Senate debated the bill on March 26, June 4, 1996 and October 28, 1996.

¹⁰²Parliament was dissolved on April 27, 1997.

documents for any collateral or ulterior purpose.¹⁰³ In *Goodman v. Rossi* the Ontario Court of Appeal explained that the implied undertaking "... is based on recognition of the general right of privacy which a person has with respect to his or her documents. The discovery process represents an intrusion on this right under the compulsory processes of the court. The necessary corollary is that this intrusion should not be allowed for any purpose other than that of securing justice in the proceeding in which the discovery takes place."¹⁰⁴

The implied undertaking requires a party, or its counsel, not to make "improper" use of documents or information obtained on discovery. Generally this is interpreted to mean that the evidence can only be used in the litigation in which the disclosure was made. Canadian courts generally regard the House of Lords' decision of *Home Office v. Harman*¹⁰⁵ as setting out the scope of the basic obligations contained in the undertaking. In that case Lord Diplock explained the meaning of "improper" use of information as follows:

"I take the expression 'collateral or ulterior purpose' ... to indicate some purpose different from that which was the only reason why, under a procedure designed to achieve justice in civil actions, she was accorded the advantage, which she would not otherwise have had, of having in her possession copies of other people's documents."¹⁰⁶

In the same case Lord Keith described the obligation as being "not to make use of the documents for any purpose other than the proper conduct of the litigation in the course of which the order [for discovery] was made".¹⁰⁷

An implied undertaking possesses the character of an obligation owed to the court for the benefit of the parties. It is not simply owed to the parties. The court possesses the right to control the implied undertaking and can modify or release a party from it. By the same token, where a party breaches the implied undertaking and there is no other appropriate remedy, contempt proceedings may be taken against the offending party.¹⁰⁸

Ontario has codified the obligation of the implied undertaking in Rule 30.1 of the *Rules of Civil Procedure*. Under Rule 30.1.01(3) "all parties and their counsel are deemed to undertake not to use evidence or information to which this rule applies for any purposes other than those of the proceedings in which the evidence was obtained." This undertaking applies to evidence obtained in an examination for discovery, documentary discovery and other pre-trial discovery and inspection mechanisms, as well as to "information obtained from" such evidence.¹⁰⁹ The rule

¹⁰³ *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.), and the cases from other provinces referred to therein at 372. See also, J.B. Laskin, "The Implied Undertaking in Ontario" (1990) 11 Ad. Q. 298 at 304-305.

¹⁰⁴ *Goodman v. Rossi*, *supra* at 367g-h.

¹⁰⁵ [1982] 1 All E.R. 532 (H.L.).

¹⁰⁶ *Ibid.* at 536.

¹⁰⁷ *Ibid.* at 540; quoted with approval by the Ontario Court of Appeal in *Goodman v. Rossi*, *supra* at 374.

¹⁰⁸ *Goodman v. Rossi*, *supra* at 370-711 and 377b.

¹⁰⁹ Rule 30.1.01(1)(b).

sets out narrow exceptions to the undertaking: a lawyer may use the evidence for other purposes to which the person who disclosed it consents,¹¹⁰ and the rule also does not prohibit the use, for any purpose, of evidence that is filed with the court or that is given or referred to during a hearing.¹¹¹ Unless the evidence or information falls within one of the enumerated exceptions, a lawyer can only be relieved of his or her implied undertaking by an order of the court which, the rule provides, may be granted where the interests of justice outweigh any prejudice that would result to a party who disclosed the evidence.¹¹²

(b) *Limits of the Privilege Protecting Statements Made On Discovery*

The narrow scope of privilege under the law of defamation also limits the extent to which a lawyer may make statements about evidence disclosed during the discovery process. The protection afforded by absolute privilege applies to statements made at and during examinations for discovery,¹¹³ including defamatory statements made by a lawyer or witness while on the record during the course of an examination for discovery. If, however, a lawyer steps outside the protective cocoon of the discovery process, the privilege is lost. In *Gutstadt v. Reininger*,¹¹⁴ during an adjournment of the examination for discovery, while both counsel, the deponent and the court reporter were present, one lawyer alleged that the opposing law firm had produced a "fraudulent document" and that opposing counsel was "involved in creating" it. The lawyer who was the object of the allegations sued for slander. The court refused to strike out his statement of claim as disclosing no cause of action. While courts in the United States have expanded the doctrine of absolute privilege to include discussions between counsel, even when made outside the court room, the court stated that Canadian law had not extended absolute privilege that far. As well, it was unclear whether the defendant lawyer's statement would attract qualified privilege.¹¹⁵

Whether statements made by a lawyer regarding evidence obtained during an examination for discovery enjoys a qualified privilege remains an unanswered question in light of the decision in *Hill v. Church of Scientology*. An argument could be made that just as the public, through the media, have an interest in learning about proceedings commenced before the courts, so too they have an interest in receiving information about the evidence disclosed on discovery, especially where the commencement of the action was accompanied by extensive publicity. Whatever interest the public might have, in most probably is outweighed by the absence of any duty on the lawyer (or his or her client) in

¹¹⁰ Rule 30.1.01(4).

¹¹¹ Rule 30.1.01(5)(a)(b).

¹¹² Rule 30.1.01(8).

¹¹³ *Razzell v. Edmonton Mint Ltd.*, [1981] 4 W.W.R. 5 (Alta. Q.B.).

¹¹⁴ *Gutstadt v. Reininger* (1995), 27 O.R. (3d) 152.

¹¹⁵ *Ibid.* at 156b-157c.

making public statements about information obtained during the discovery process. In fact the presence of statutory or implied undertakings of non-disclosure with respect to discovery evidence, strongly indicates that the law expects parties engaged in litigation to maintain a high degree of confidentiality during the pre-trial proceedings in order to protect their privacy interests. It is difficult for a lawyer to argue that he or she is under a duty to publicize discovery evidence when simultaneously procedural rules impose upon him or her an obligation not to use such evidence other than for the conduct of the proceeding.

iii) *Statements Made During or After a Judicial Hearing*

Given the central importance of open judicial proceedings to the health of a democratic society, it is not surprising that the law affords strong protection to statements made in open court. Even so, a lawyer's obligation as an officer of the court imposes some limits on the scope of statements which he or she may make with impunity in the courtroom. Once outside the courtroom the ground rules change significantly, and the lawyer must use great circumspection when making statements to the media about a case in progress or which has just concluded.

(a) *Contempt of Court*

Conduct which constitutes a contempt of court falls into two categories. First, contempt "in the face of the court" encompasses any word spoken or act done in, or in the precinct of the court, which obstructs or interferes with the due administration of justice, or which is calculated to do so. Second, acts committed outside the court may constitute a contempt "not in the face of the court", which would include words spoken or published or acts done, which are intended to interfere or are likely to interfere with the fair administration of justice, or statements which scandalize or otherwise lower the authority of the court.¹¹⁶

(i) *Contempt in the Face of the Court*

The most highly publicized case in recent times of a charge of contempt in the face of the court involved Bruce Clark, a lawyer actively involved in representing bands in aboriginal land claims. During the 1995 occupation by a group of Indians of an armed encampment at Gustafsen Lake, British Columbia, Bruce Clark spoke and negotiated on behalf of some of the occupants of the camp. When several Indians voluntarily left the encampment, they were arrested and charged with trespass. At their bail applications, Clark announced to the presiding judge that he was acting for all the accused. The judge refused

¹¹⁶R. v. Kopyto, (1987), 62 O.R. (2d) 449 (C.A.) per Cory J.A. at 457 c-e.

to recognize Clark's right to do so because he was not a member of the British Columbia bar. The events which then ensued were described by the trial judge:

Clark did not sit down or leave. He lost his composure and became very angry. Without warning he flung a tightly stapled brief at the clerk. She was busy taking notes and not looking at him. It did not flutter, but hit her hard on the elbow as Clark shouted "Filed. Do you hear me, it is filed." He was extremely agitated when he yelled "This kangaroo court will not succeed". Clark continued an angry tirade and still did not leave nor sit down as Gibbs Q.C. rose and unsuccessfully attempted to speak.

As Clark was shouting, one of the police officers moved closely behind him and nudged Clark, apparently to be in a better position to prevent further violence. Clark remained agitated while shuffling about. There was some further contact with the officer when Clark complained about the officer at his back.¹¹⁷

The judge thereupon ordered Clark's arrest for contempt in the face of the court. Clark was convicted and sentenced to three months' imprisonment.¹¹⁸

Judges recognize that lawyers often walk a fine line between discharging their duty to their clients of fearlessly raising every issue and advancing every argument which the lawyer thinks will help the client's case,¹¹⁹ and showing due courtesy to the courts.¹²⁰ Two cases illustrate the fineness of the dividing line. In the first, during sentencing submissions for a motor vehicle offence, the accused's counsel directed a series of abusive remarks at the judge suggesting that the judge had set a trap for the counsel by hiding a legal authority. The defence counsel stated that he had "nothing but shame" for the judge and that the judge "should be ashamed" of himself. Although the conviction of the defence counsel for contempt was overturned by the Supreme Court of Canada on jurisdictional grounds, the Alberta Court of Appeal found that the evidence was overwhelming that the lawyer was in contempt of court.¹²¹

A contrasting case involved a criminal defence counsel who sought to stay sentencing proceedings alleging an infringement of the accused's *Charter* rights. In the course of his submissions counsel stated that "we believe we cannot have full and complete justice, and in addition, there can never be an appearance of justice, regardless of the sentence that you render." The presiding judge cited the lawyer for contempt and referred his trial to another judge.¹²² Drawing upon the Ontario Court of Appeal decision in *R. v. Kopyto*,¹²³ the judge

¹¹⁷ *R. v. Clark*, unreported decision [1997] B.C.J. No.715, (B.C. Prov. Ct., Crim. Div.) at paras 6 and 7.

¹¹⁸ The conviction and sentence were upheld on appeal, [1997] B.C.J. No.763 (B.C.C.A.), with leave to appeal to the Supreme Court of Canada denied July 31, 1997.

¹¹⁹ LSUC, Professional Conduct Handbook, Rule 10, Commentary 2; quoting Lord Reid's description of the role of counsel in *Rondel v. Worsley*, [1969] 1 A.C. 191 (H.L.) at 227F.

¹²⁰ *R. v. Barker* (1980), 53 C.C.C.(2d) 322 (Alta.C.A.), at 339.

¹²¹ *R. v. Doz* (1987), 38 C.C.C. (3d) 479 (S.C.C.), reversing (1985), 19 C.C.C.(3d) 434 (Alta.C.A.).

¹²² *R. v. Bertrand* (1989), 49 C.C.C. (3d) 397 (Que. Sup. Ct., Crim. Juris.).

¹²³ *Supra* note 117.

held that for a lawyer to be held in contempt it must be proved that his misconduct would cause a serious, real, imminent risk of obstruction of the administration of justice, accompanied by dishonest intention or bad faith.¹²⁴ In delimiting the parameters of proper conduct by counsel, the trial judge adopted guidelines set out in the American case of *Re Dellinger*:¹²⁵

Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows. Given this extreme liberality necessary to a vital bar and thus the effective discovery of truth through the adversary process, an attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth.¹²⁶

The judge acquitted the lawyer of the charge of contempt.

(ii) *Contempt Out of the Face of the Court*

In December, 1985 an Ontario Provincial Court Judge released his reasons for judgment dismissing a claim by a political activist against members of the R.C.M.P. alleging a conspiracy to injure him. The press contacted the plaintiff's lawyer, Harry Kopyto, for his comment about the decision, which Kopyto gave the following day in a long statement. The *Globe and Mail* reported the following parts of Kopyto's statement:

The decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone above you said to do it.

Mr. Dowson and I have lost faith in the judicial system to render justice.

We're wondering what is the point of appealing and continuing this charade of the courts in this country which are warped in favour of protecting the police. The courts and the RCMP are sticking so close together you'd think they were put together with Crazy Glue.¹²⁷

Kopyto was charged with contempt of court by scandalizing the court, and he was convicted by the trial judge. The Ontario Court of Appeal reversed the conviction. While noting that the Kopyto's statement would constitute grounds for convicting him of contempt not in the face of the court under the common law as it stood before the *Charter*,¹²⁸ the court considered Kopyto's statements to be protected speech under the *Charter*, constituting statements of a sincerely held belief on a matter of public interest, even if intemperately worded. All three judges of the Ontario Court of Appeal expressed confidence in the ability of the courts to withstand public criticism and erected a high threshold for any

¹²⁴ *R. v. Bertrand*, *supra* at 408.

¹²⁵ *Re Dellinger*, 461 F. 2d 389 (1972).

¹²⁶ *Ibid.*, quoted in *R. v. Bertrand*, *supra* at 409.

¹²⁷ *R. v. Kopyto*, *supra*, recited at 455g-h.

¹²⁸ *Ibid.* at 459f.

offence of scandalizing the courts. As expressed by Cory, J.A. (as he then was), courts must expect public comment on their decisions:

“Not all will be sweetly reasoned. An unsuccessful litigant may well make comments after the decision is rendered that are not felicitously worded. Some criticism may be well founded, some suggestions for change worth adopting. But the courts are not fragile flowers that will wither in the hot heat of controversy.”¹²⁹

Justice Cory went on to hold that the offence of contempt by scandalizing the court did not constitute or impose a reasonable limitation upon the guaranteed right of freedom of expression contained in the *Charter*. In his view the courts could modify the elements of the offence to meet the requirements of the *Charter*, by requiring that the prosecution demonstrate that the statements made posed a clear and present danger to the administration of justice.¹³⁰

In his concurring decision Goodman J.A. thought that the offence could be recast to require that offending statements be limited to those which brought justice into disrepute resulting in a clear, significant and imminent or present danger to the fair and effective administration of justice.¹³¹

“It would take an extreme combination of unusual circumstances at the present time to suffice to convince a court that utterances or statements constitute a real, significant and imminent or present danger to the fair and effective administration of justice.”¹³²

In his view, such an offence could apply to statements made with reference to cases still before the courts and those which had concluded.¹³³ Houlden J.A. expressed the view that even a reformulated offence would not satisfy the demands of the *Charter*: “I feel confident that our judiciary and our courts are strong enough to withstand criticism after a case has been decided no matter how outrageous or scurrilous that criticism may be.”¹³⁴

A court’s ability to make counsel accountable for out-of-court statements is not limited to formal contempt proceedings. In 1995 Paul Bernardo went on trial in Toronto for the murder of two young women. The Crown intended to introduce into evidence videotapes made by Bernardo which recorded his assaults on his victims. Given the extensive media coverage the trial was attracting and the horrific nature of the videotapes, the parents of the victims sought to exclude the media and the public from the courtroom while the

¹²⁹ *Ibid.* at 463c-e.

¹³⁰ According to Cory J.A. the Crown would be required to prove: “that an act was done or words were spoken with the intent to cause disrepute to its administration of justice or with reckless disregard as to whether disrepute would follow in spite of the reasonable foreseeability that such a result would follow from the act done or words used; and that the evil consequences flowing from the act or words were extremely serious; and as well demonstrated the extreme imminence of those evil consequences, so that the apprehended danger to the administration of justice was shown to be real, substantial and immediate.” *Ibid.* at 477d.

¹³¹ *Ibid.* per Goodman, J.A. at 499c.

¹³² *Ibid.* per Goodman, J.A. at 501d.

¹³³ *Ibid.* per Goodman, J.A., at 449 d-h.

¹³⁴ *Ibid.* per Houlden, J.A. at 491g.

videotapes were shown to the jury. The trial judge heard submissions on the issue from the prosecution, defence counsel, media counsel and counsel for the parents, and took the matter under reserve.¹³⁵

Before the judge had ruled on the issue, the lawyer for the parents issued a press release urging news outlets that opposed the bid to restrict the viewing of the tapes to reverse their position. The press release quoted from a letter from the chair of a television network supporting the parents' bid.¹³⁶ Defence counsel objected to the release of the statement, characterizing it as an attempt to influence the jury. On the day following the release of the statement, the trial judge called the actions of the parents' lawyer "improper, inappropriate and maybe worse than that",¹³⁷ and the lawyer was required to appear in court to apologise to the trial judge.¹³⁸

(iii) *The Sub Judice Rule*

A further application of the principles of contempt of court may be found in the *sub judice rule*. Designed to ensure the fairness of the trial process to the parties involved, the *sub judice rule* makes it a contempt of court to publish statements before or during a trial which may tend to prejudice a fair trial or to influence the course of justice.¹³⁹ The rationale for this power of contempt was succinctly stated by Wills, J. in *R. v. Parke*¹⁴⁰ as follows:

"The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency and sometimes their object is to deprive the Court of the power of doing that which is the end for which it exists – namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it."

For contempt to be found, it is necessary for a court to be satisfied, beyond a reasonable doubt, that the words published were calculated to interfere with the course of justice in the sense of being apt, or having a tendency, to do so.¹⁴¹ The *mens rea* necessary for the offence is not an intention to commit a criminal contempt, but to knowingly and intentionally publish the material, irrespective of the absence of an intention or bad faith with respect to the question of criminal contempt itself.¹⁴²

¹³⁵*The Toronto Star*, (27 January, 1995) A8.

¹³⁶*The Toronto Star*, (25 May, 1995) A10.

¹³⁷*The Toronto Star*, (26 May, 1995) A8; *The Globe and Mail*, (26 May, 1995) A6.

¹³⁸Bar and Bench Daily News Digest, (27 November, 1995) item 8; *The Globe and Mail*, (25 November, 1995) A6.

¹³⁹The rule was strongly criticized by Professor Robert Martin in "An Open Legal System" (1985), 23 U.W.O. L. Rev. 169.

¹⁴⁰[1903] 2 K.B. 432 at 436-7

¹⁴¹*R. v. Froese and British Columbia Television Broadcasting System Ltd.* (No. 3) (1979), 54 C.C.C. (2d) 315 (B.C.C.A.) at 324.

¹⁴²*R. v. Vairo and C.F.C.F. Incorporated* (1982), 4 C.C.C. (3d) 274 (Que. Sup. Ct.) at 276.

Although the rule is most often applied in cases involving media publicity of a trial, the cases offer lawyers detailed guidance on what statements can or cannot be made to the media during the course of a trial. The basic rules were summarized by former Chief Justice McEachern of the British Columbia Supreme Court:

It is therefore a grave contempt for anyone, particularly the members of what is now called the media, to publish, before or during a trial, any statements, comments, or information which reflect adversely upon the conduct or character of an accused person, or to suggest directly or indirectly that he has been previously convicted of any offence, or to comment adversely or at all upon the strength or weakness of his defence. The harm that may be done is incalculable because in most cases it is impossible to determine what effect, if any, such statements or comments may have upon the jury.¹⁴³

Notwithstanding the strong protection given to freedom of expression under the *Charter*, the Supreme Court of Canada has signalled its willingness to restrict or limit the making of statements about a case to prevent the real and substantial risk of an unfair trial.¹⁴⁴ Courts therefore may continue to apply the *sub judice* rule against lawyers who make prejudicial out-of-court statements during a trial since no real effective alternative exists to guard against the risk of endangering the fairness of the trial.¹⁴⁵

(b) *Defamation*

At common law an absolute privilege attaches to statements made by a lawyer during judicial or quasi-judicial proceedings,¹⁴⁶ and no action for defamation will lie against the lawyer for statements made in open court or incidental to the proceedings. In Quebec, on the other hand, the protection afforded is only one of qualified privilege.¹⁴⁷ Absolute privilege rests on the public interest in the full disclosure of facts essential to the unfettered administration of justice,¹⁴⁸ and the privilege attaches even where the words spoken may be totally false, and spoken with malice.¹⁴⁹ The absolute privilege

¹⁴³ *R. v. Forese and British Columbia Television Broadcasting System Ltd.* (No. 3) (1979), 50 C.C.C. (2d) 119 at 121 (B.C.S.C.).

¹⁴⁴ *Dagenais v. Canadian Broadcasting Corporation* (1994), 120 D.L.R. (4th) 12 (S.C.C.).

¹⁴⁵ *Ibid.* at 40a. See also the observation made by Goodman, J.A. at 499d-h of the Kopyto case (*supra*) that the offence of scandalizing the court could apply to statements made about cases still before the courts where those statements constitute a real, significant and present danger to the fair and effective administration of justice.

¹⁴⁶ Statements made in hearings before administrative bodies enjoy the protection of absolute privilege, as do some statements made prior to a hearing to officials charged with conducting an inquiry. For a full treatment of the issue, see Brown, *The Law of Defamation supra* at 12-35 to 12-38.

¹⁴⁷ Brown, *The Law of Defamation, supra* at 12-22 to 12-23.

¹⁴⁸ *Ibid.* at 12-25.

¹⁴⁹ *Ibid.* at 12-23.

enjoyed by lawyers for statements made in the courtroom evaporates once the lawyer leaves the hearing room.¹⁵⁰

Statements made by lawyers outside the courtroom reporting on the proceedings which took place in open court may enjoy the protection of a common law qualified privilege.¹⁵¹ To fall within the reasonable limits of the privilege any statement must be: made without malice; a fair and accurate report of the proceedings, without comment; and impartial, in the sense of fairly presenting both sides of the case.¹⁵² This can be a difficult standard for counsel to meet given that they have been retained to advocate one side of the case. Any post-hearing interview therefore requires great vigilance on the part of a lawyer between explaining a client's position while not impugning the character of the opposite party. Further, while lawyers frequently give interviews to the media outside courthouses immediately after they have left the courtroom, such a location may weaken the ability of the lawyer to claim the defence of qualified privilege in the event that any of his or her statements prove defamatory, as in the *Hill* case.¹⁵³ Choice of location is just as important as choice of words.

iv) *Statements Made About Former Cases*

Canadian lawyers have not shown the same propensity as their American counterparts to write about their past victories and defeats. Yet a recent Ontario case¹⁵⁴ involving one of Canada's preeminent counsel, Edward Greenspan, illustrates that even after a case has concluded, a lawyer still owes important duties to a client which may limit the extent to which a lawyer can speak publicly about the case.

As has already been described above,¹⁵⁵ Greenspan was retained by Mr. Stewart to represent him at the sentencing hearing following Stewart's conviction for criminal negligence causing death resulting from a "hit and run" incident. At trial Stewart's defence counsel had engaged in some highly questionable tactics, including trying to implicate the deceased woman's husband in her death. When Stewart retained Greenspan to act for him, Greenspan knew that the media coverage of the trial had been very negative, portraying Stewart as an inhumanely cruel and wicked person.¹⁵⁶

¹⁵⁰ While most provincial libel statutes cloak with absolute privilege "a fair and accurate report without comment" of proceedings which take place in open court, the protection usually extends only to reports made by newspapers and broadcasters: see Brown, *supra* at 14-12.1 to 14.3.

¹⁵¹ *Ibid.* at 14-3 to 14-12.

¹⁵² Brown, *supra* at 14-46.3.

¹⁵³ Hill, *supra* at 174, para 156.

¹⁵⁴ *Stewart v. Canadian Broadcasting Association*, *supra* note 28.

¹⁵⁵ See above at 16-18.

¹⁵⁶ Stewart, *supra* at 42.

¹⁵⁷ *Ibid.* at 43.

In his sentencing submissions Greenspan sought to change the public's perception of Stewart, and he persuaded Stewart to authorize the making of a public apology to the victim's family.¹⁵⁷ Greenspan used the court as a public forum from which to influence public perceptions about his client,¹⁵⁸ and as noted by the court, he "went to extraordinary lengths as counsel to protect his client from the public."

About ten years after Stewart's conviction Mr. Greenspan entered into contracts with the CBC to act as a consultant and narrator for an episode of a program called "*The Scales of Justice*" which involved a re-enactment of the Stewart trial.¹⁵⁹ Although the idea for the program did not originate with Mr. Greenspan, he enjoyed some control over the contents of scripts for the program,¹⁶⁰ including the way his former client would be portrayed.¹⁶¹

Mr. Stewart found out about the program before taping started, and wrote to Mr. Greenspan expressing his concerns and asking that production cease and desist.¹⁶² Despite the objections of this former client, Greenspan continued his part in script writing, filming and recording the program.¹⁶³

Following the broadcast of the program on CBC Stewart sued Greenspan for breach of fiduciary duty and confidence. At trial the court concluded that there was no basis for a claim of breach of confidence as Greenspan did not disclose any confidential information to the producers of the programme. More troubling in the court's view was the issue of whether at the time of the broadcast in 1991 Greenspan owed a duty of loyalty to Stewart for counsel work performed over 10 years before.

In examining whether a duty of loyalty existed, the court first compared the approach taken by Greenspan at the sentencing hearing with the content of the *Scales of Justice* program, and identified several significant omissions in the program. For example, the program failed to mention that Mr. Stewart was not complicit in his defence counsel's unsavoury trial tactics or that the trial judge had accepted Mr. Stewart's apology as genuine.¹⁶⁴ Those omissions, the court found, were neither sympathetic nor fair to Mr. Stewart, leaving it open to the public to infer that Stewart was behind his counsel's unsavoury trial conduct.¹⁶⁵ Contrasting Mr. Greenspan's approach as counsel in 1979 to that as a member of the media in 1991, the court stated:

In 1991, as part of the media, Mr. Greenspan left out of this nationally broadcast portrayal of his former client and his case the very things he had put before the public

¹⁵⁸ *Ibid.* at 44.

¹⁵⁹ *Ibid.* at 61.

¹⁶⁰ *Ibid.* at 67.

¹⁶¹ *Ibid.* at 68.

¹⁶² *Ibid.* at 78.

¹⁶³ *Ibid.* at 80 and 82.

¹⁶⁴ *Ibid.* at 72.

¹⁶⁵ *Ibid.* at 73.

in 1979, as Mr. Stewart's counsel, to guard against public revulsion and repercussions in the years to come.¹⁶⁶

The court also found that Mr. Greenspan's narration in the program substantially exaggerated the distance that Mr. Stewart dragged the victim screaming under his car, thereby portraying his former client's conduct more negatively than the court had found it to be.¹⁶⁷

The court rejected Greenspan's assertion that any decision to discuss publicly a former client's case was solely a matter of personal discretion for counsel.¹⁶⁸ Stewart's retainer of Greenspan did not authorize him to act as he saw fit in respect of the issues arising from the case after the completion of the sentencing and appeal process,¹⁶⁹ and Greenspan owed his client a fiduciary duty of loyalty even after the retainer had terminated. Central to this finding was the fact that Mr. Greenspan's involvement in the broadcast dealt with the very subject matter of their former solicitor and client relationship.¹⁷⁰ While the rules of professional conduct demonstrate that a lawyer is not bound indefinitely to serve the former client's interests which were subject to a retainer, the court pointed out that a lawyer and client relationship does not end the fiduciary relationship: "Duties arising from that fiduciary relationship may well restrain the lawyer from speaking about the former client's issues or business which were the subject of the concluded retainer, or from taking steps which affect them."¹⁷¹

In approaching the issue of a duty of loyalty, the court canvassed the rules of professional conduct, the terms of Greenspan's retainer and the general principles of fiduciary duty. As discussed above¹⁷² the court found that Greenspan had violated the rule against self-promotion: "... Mr. Greenspan's primary purpose in involving himself in this production and broadcast, in which educational content was otherwise assured, was to publicize himself and his services as counsel to a national audience."¹⁷³ Although the terms of Mr. Greenspan's retainer were very broad, empowering him to act as he saw fit, they did not specifically deal with the issue of post-retainer publicity and, the court concluded, did not prevent the existence of a fiduciary duty of loyalty after the conclusion of the case. In the court's view, express language would be required for a retainer to allow a lawyer to engage in post-trial publicity about a case.¹⁷⁴

Nor did the passage of time since the termination of the retainer in 1981 prevent the existence of a fiduciary duty. The court concluded that the

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.* at 74-76.

¹⁶⁸ *Ibid.* at 97-98.

¹⁶⁹ *Ibid.* at 48.

¹⁷⁰ *Ibid.* at 133-34.

¹⁷¹ *Ibid.* at 152-53.

¹⁷² *Supra* at 18-20.

¹⁷³ *Stewart, supra* at 121.

¹⁷⁴ *Ibid.* at 127.

relationship between Stewart and Greenspan in 1991 was not independent of the original solicitor-client relationship because Greenspan's involvement in the programme revived the very issues which had been the subject-matter of their dealings as solicitor and client.¹⁷⁵ As part of his retainer Greenspan had endeavoured (and succeeded) in changing the public perception of Stewart's conduct; his participation in the programme threatened to undo some of the long term advantage which his work as counsel had achieved.¹⁷⁶ While a lawyer is not bound to be a client's advocate forever, as this obligation ends when the retainer does, the court found that a lawyer continues to owe a fiduciary duty to the client not to undo the benefits achieved by his or her professional services.¹⁷⁷ The court went on to suggest that a lawyer might not be violating his or her duty of loyalty if he or she presented public information about the client's case in a way which did not undo any benefit obtained for the client by his or her professional services.¹⁷⁸

In view of the nature of the services performed by Greenspan for Stewart at the time of his sentencing, the court found that Greenspan's participation in the *Scales of Justice* program breached his fiduciary duty of loyalty to his former client by: (i) favouring his financial interests over his client's interests; (ii) putting his own self-promotion before Stewart's interests; and (iii) publicizing his former client's case in a way which undercut the benefits and protections he had provided as counsel, thereby increasing the adverse public effect on Stewart.¹⁷⁹

The court awarded Mr. Stewart damages in the amount of \$2,500.00 for the emotional upset caused by the broadcast and a further \$3,250.00 representing the profit which Mr. Greenspan received from the broadcast. Yet for Mr. Stewart the victory was a Pyrrhic one: the court ordered Stewart to pay part of Greenspan's legal costs, including substantial trial costs, because Stewart's judgment fell far short of a pre-trial settlement offer made by Mr. Greenspan.¹⁸⁰ Mr. Greenspan filed an appeal from the trial judgment, but in early 1998 the parties settled the case: Greenspan waived his costs award in return for a statement from Stewart that he acted "in accordance with the highest standards of the legal profession".¹⁸¹

The trial court's reasons for judgment raise some troubling issues. The *Scales of Justice* series was widely acclaimed and acknowledged as one which contributed to the public's education about the workings of the justice system.

¹⁷⁵*Ibid.* at 133-38.

¹⁷⁶*Ibid.* at 135.

¹⁷⁷*Ibid.* at 160.

¹⁷⁸*Ibid.* at 161.

¹⁷⁹*Ibid.* at 163.

¹⁸⁰*The Globe and Mail* "Legal victory over top lawyer proves costly" (14 October, 1997) A9; *Stewart v. Canadian Broadcasting Corp.* (1997), 152 D.L.R. (4th) 102 (Ont. Ct. Gen. Div.).

¹⁸¹*The Globe and Mail*, "Legal costs waived" (19 March, 1998) A8.

All of the information used in the program on the *Stewart* case was in the public domain. Greenspan had persuaded the show's producer to make script changes which in some respects showed Stewart in a more sympathetic light, and Greenspan's participation in the series and the program was motivated by a genuine desire to advance the public's understanding of principles of sentencing in Canadian criminal cases. Notwithstanding these facts, Greenspan was found to have breached his duty of loyalty to his client and, in the eyes of the court, his offending conduct lay primarily in his acts of omission.

Further, the finding that Greenspan owed Stewart a fiduciary duty of loyalty some 10 years after the retainer had ended may mark an undue extension of the existing jurisprudence on the scope fiduciary duties owed by a lawyer to a client. The trial judge interpreted several English and Canadian cases as permitting the conclusion that a fiduciary duty would survive the termination of a solicitor-client retainer even in circumstances which did not involve disclosure of confidential client information.¹⁸² A recent decision of the House of Lords in *Prince Jefri Bolkiah v. K.P.M.G. (a firm)*¹⁸³ casts some doubt on this conclusion, for in that case Lord Millett stated:

The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interest of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.¹⁸⁴

Since the parties settled the *Stewart* case, Canadian lawyers unfortunately will not have the benefit of an appellate court considering the nature of any fiduciary duty owed by a lawyer who wants to recount publicly the cases of former clients.

As the law now stands in light of the decision in the *Stewart* case, any involvement by a lawyer in a television, radio program or book about past cases may be fraught with peril. The rules fashioned by the *Stewart* court would appear to be as follows:

1. the content and the selection of material in any work about a former case must be faithful to and consistent with the advocacy approach taken by the lawyer on the client's behalf during the retainer;
2. a lawyer must ensure that every major argument made, or step taken to advance the interests of the client, must be recounted in any subsequent publication about the case, otherwise the lawyer will risk being accused of undoing the advantage he sought to achieve for the client during his or her retainer;
3. a lawyer cannot justify a more critical work about a former case as an effort to promote education about the legal system if the educational message could be achieved without his participation, which invariably it could be; and,
4. any contact or involvement by a lawyer in a work about a past case could risk being construed as the lawyer exercising control over the program or book. Although in the *Stewart* case it was true that Greenspan was under contract as a

¹⁸²*Ibid.* at 140-45.

¹⁸³[1999] 1 ALL E.R. 517 (H.L.).

¹⁸⁴*Ibid.* at 527.

consultant for the programme, the finding that he exercised control over the script seemed to flow from the producer's agreement to change portions of the script at Greenspan's request. If having a producer make changes as a result of the lawyer's suggestion is construed as the lawyer exercising control over the script, few lawyers would be willing to review media programmes about their past cases for accuracy.

While an assessment of whether a lawyer fulfilled his or her duty of loyalty to a former client always will involve questions of degree and emphasis, the *Stewart* case applies a rigorous test, one which may dissuade lawyers from commenting on past cases, much to the detriment of improving the public's understanding of the Canadian judicial system.

v) *Statements Made When Acting For Public Organizations*

Most provincial rules of professional conduct encourage lawyers to act for community organizations and recognize that lawyers frequently make public statements in non-legal settings.¹⁸⁵ Yet a recent decision of the Supreme Court of Canada demonstrates that public statements by lawyers in a non-legal setting risk being subjected to closer scrutiny than those made by other members of the public.

In *Botiuk v. Toronto Free Press*,¹⁸⁶ the plaintiff, Botiuk, a prominent lawyer in the Toronto Ukrainian community, assisted the Ukrainian-Canadian Committee (the UCC), a very important institution in the Toronto Ukrainian community, in co-ordinating the legal defence of protestors who had been arrested during a visit by the Soviet Premier. Botiuk also assisted a lawyer retained by the UCC at a subsequent judicial inquiry into the conduct of the police at the demonstration. While Botiuk donated much time to the UCC, the executive of that body agreed that he should be permitted to retain, as payment for some of his legal fees, funds the UCC obtained from the provincial government in the wake of the judicial inquiry.

Several years after the events, at an annual meeting of the UCC, a member, Mr. Maksymec, tabled a report alleging that Botiuk had reneged on a promise to turn over to the UCC the funds he had received from the government as legal fees. The executive of the UCC responded with a public statement calling Maksymec's allegations "groundless and untrue." Maksymec thereupon prepared a rebuttal, styled a "Declaration", signed by eight lawyers who had been involved in the judicial inquiry proceedings. In the Declaration the lawyers

¹⁸⁵For example, Commentary 2 to Rule 21 of the Ontario rules provides:

The lawyer is often involved in a non-legal setting where contact is made with the media with respect to publicizing such things as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations, or in acting as a spokesman for organizations which, in turn, represent particular racial, religious or other special interest groups. This is a well-established and completely proper role for the lawyer to play, in view of the obvious contribution it makes to the community.

¹⁸⁶*Botiuk v. Toronto Free Press*, [1995] 3 S.C.R. 3.

confirmed Maksymec's original report and alleged that Botiuk had agreed to render his services on a voluntary basis. A local Ukrainian newspaper published the Declaration, and Maksymec mailed copies of it to members of the Ukrainian community. Maksymec also published his own reply to the statement by the UCC executive in which he incorporated the Declaration by the lawyers.

The Supreme Court of Canada upheld the trial judge's decision that Maksymec's report, the lawyers' declaration and Maksymec's reply were libellous. While the court was prepared to recognize that the lawyers were entitled to respond to the statement by the UCC executive in order to protect their interests in the matter, it determined that the lawyers went well beyond what was reasonably appropriate to the occasion thereby losing the protection of qualified privilege.¹⁸⁷

The Supreme Court also upheld the award of aggravated damages against the lawyers, finding that they had acted recklessly and with malice in publishing the declaration. In this regard the court was prepared to hold lawyers to a higher standard of responsibility than lay persons:

... When the defendants are lawyers who must be presumed to be reasonably familiar with both the law of libel and the legal consequences flowing from the signing of a document, their actions will be more closely scrutinized than would those of a lay person. That is to say, actions which might be characterized as careless behaviour in a lay person could well become reckless behaviour in a lawyer with all the resulting legal consequences of reckless behaviour. That is the very situation presented in this case.¹⁸⁸

... Taking into account the appellants' status as lawyers and influential persons in the community, and the effect of their concerted action in signing the Lawyers' Declaration, I am satisfied that their conduct in signing the document without undertaking a reasonable investigation as to the correctness of the document, which they were duty-bound to do, was reckless. This same conclusion can be reached from their failure to place any restriction or qualification upon the use that could be made of it. The legal consequence of their recklessness is that their actions must be found to be malicious.¹⁸⁹

Common sense seems to underlie the court's decision. Members of the public usually give great weight to statements made by lawyers about legal matters. It does not seem unduly harsh, then, to place a greater responsibility on lawyers than other members of the public when making statements about legal matters, especially where the statements involve the reputation of another individual.

IV. Conclusion

While most provincial rules of professional conduct now recognize that there are occasions on which lawyers may make statements to the media about their cases, both current and former, the courts continue to hold lawyers to high standards of responsibility when making such statements. As the *Hill* case

¹⁸⁷*Ibid.* at 32, para 88.

¹⁸⁸*Ibid.* at 35, paras 98 and 99.

¹⁸⁹*Ibid.* at 36, para 103.

demonstrates, the timing and location of a statement are just as important as its content in assessing its permissibility and lawfulness. *Stewart* requires an exacting precision and scrupulousness from lawyers when commenting on past cases, and *Botiuk* appears to place a higher standard of care on lawyers even when making statements on matters not related to cases. Nor have the courts been prepared to expand significantly the scope of qualified privilege available to protect the content of lawyers' statements. Lawyers therefore must continue to approach the making of any public statements about cases with a caution approaching reserve, prudence and a strong dose of common sense.