

# SAFE AND EFFECTIVE PRACTICE

Jean Côté  
and others

Edited by  
Barry Vogel, Q.C.



CANADIAN LAWYERS INSURANCE ASSOCIATION  
CANADIAN BAR EXCESS LIABILITY ASSOCIATION



YES OF COURSE-  
IT'S IN MY FILES  
HERE...

Hardaway ☺



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Edited by  
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Published by Canadian Lawyers Insurance Association

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Fourth Edition, 2010



## **PREFACE**

Insurance arranged through Canadian Lawyers Insurance Association (CLIA) and Canadian Bar Excess Liability Association (CBELA) is the response by lawyers to a volatile and uncertain market for professional liability insurance coverage. It is a response which results from the hard work and commitment of a small group of people representing the Law Societies of Alberta, Manitoba, New Brunswick, Northwest Territories, Nova Scotia, Prince Edward Island, Saskatchewan, Yukon, the Canadian Bar Insurance Association and the Federation of Law Societies of Canada. It is a response which results from this group acting on the best information and advice available, but acting boldly. Their efforts and foresight have already proven themselves in the efficient and sound operations that CLIA/CBELA has demonstrated from the outset. Needless to say, such performance will be enhanced if there are fewer claims. It is with this object in mind, and also as an expression of appreciation for your support, that this booklet is being provided by CLIA/CBELA to you.

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## EDITOR'S NOTE

The General Comments found in the material on interviewing are those of Peter Owen, Q.C. of Edmonton. The Chapter "Limitation Diaries and Reminder Systems" is the effort of Maurice I. Dumont, Q.C. of Edmonton. Both have kindly given their permission for the use of these materials in this publication.

The balance of this publication reflects efforts of the Honourable Mr. Justice Jean Côté of the Court of Appeal of Alberta, which in their original form, were distributed to attendees at a series of Loss Prevention Seminars sponsored throughout Alberta by the Law Society of Alberta in the fall of 1984. His Lordship was then in private practice, and devoted himself to a wide range of law related extracurricular activities. In this regard, he committed much of his time and energy to loss prevention concerns and was a frequent lecturer and panelist. Many of his writings on this subject reflecting his wide knowledge and unique style are contained in this publication. In addition, there is included at the beginning Mr. Justice Côté's excellent article on "Time Management" which was first presented at seminars on "How to Practise Efficiently" held throughout Alberta and Saskatchewan. CLIA is most grateful to Mr. Justice Côté for his agreeing to make them available to it for this publication.

Thanks are due, as well, to Sheila Redel, Director of Publications for Legal Education Society of Alberta, and her staff, for valuable assistance in completing this project.

Barry Vogel, Q.C.

P.S. Mr. Justice Côté advises that the portion of this booklet headed "The Human Element in Interviewing" is a summary of the efforts of authors David A. Binder and Susan C. Price, in their book "Legal Interviewing and Counselling – a Client-Centred Approach", published by West Publishing Co., St. Paul, Minnesota, and wishes to thank the authors and the publisher for permission to reproduce such summary.

P.P.S. Recent updates to the "LIMITATION DIARIES AND REMINDER SYSTEMS" are thanks to Karen Dyck, CLIA's Loss Prevention Co-ordinator.



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# TIME MANAGEMENT

## INTRODUCTION

This chapter is probably unlike anything you have ever read in your life. After you have read it, you will find yourself drawn to come back to it again. Your wife or husband should read it too.

### WHY?

Because it may save your career. It will make your life more enjoyable.

Almost all lawyers are frustrated with their work. They have too much to do and not enough time to get it all done. The pressure of work to do keeps mounting. Many lawyers grow to hate their work; almost all hate it part of the time.

Complaints by clients that their lawyers are slow or unreliable, grow in number. Most clients do not complain but do feel most lawyers are far too slow.

Lawyers suffer from stress-related diseases, Their days are spent "fighting fires" and handling emergencies. Work is done because of the fear of what will happen if it is not done: that their clients will leave. Or sue them. Or complain to the Law Society. Or all three.

Many lawyers work longer and longer hours to keep up with the work. Evenings and weekends are often spent at the office. Often with a briefcase full of work at home. Many lawyers become "workaholics", spending almost all of their working hours on office work and feeling very guilty in the few hours they spare for themselves or their families.

Negligence claims against lawyers increase every year, and most are not for complicated mistakes. Most are for failing to do something, and something simple and easy at that. Such as issuing a Statement of Claim before the limitations deadline. Does any of this sound like a lawyer you know? Will you be like that in a few years? Does your spouse think that describes you now?

It is all unnecessary. Other professions can give their clients or patients fast dependable service. So can ours.

You can be an effective and efficient lawyer. You can get your work done quickly and economically. You can have satisfied and

grateful clients. You can enjoy your work. You can work reasonable hours and spend the rest of your time on hobbies or your family, without guilt. Even if you have no special abilities you can do all that and still be a successful lawyer. Anyone who can get a law degree can. You can.

## **HOW?**

By managing your time. By planning what you do. In other words

“WORK SMARTER NOT HARDER”

The following pages tell you how. They cover the following topics:

- (A) How and Why to Plan
- (B) Priorities: What They Are and How to Set Them
- (C) Interruptions
- (D) When and How to Delegate
- (E) Meetings, Interviews and Phone Calls
- (F) Paper Handling
- (G) Bad Time Habits: How they Upset Your Time Plans and How to Cure Them
- (H) Psychology and Conclusion

### **A. HOW AND WHY TO PLAN**

The key to all your time problems is planning your time so as to apply yourself both more efficiently and more effectively.

Will that take too long and be too much bother? What if you think you are too busy and pressed by emergencies, to plan?

No one is too busy to plan time. Some of the most effective plans take no time whatever. None. Others take 10 or 20 seconds. None take more than 5 or 10 minutes a day and many of them can be done while you are also doing other things: driving to work or shaving, for example.

Besides, why not take a few minutes to plan? If 5 minutes planning now will save hours of grief later why not take the time? Would you invest a dollar it is was sure to bring you \$120.00 in a day or two?

A number of specific time-planning skills and short cuts are discussed in the sections which follow. We will look at a few basics first.

## 1. EXPAND YOUR TIME HORIZONS

Once every day think about what you have done, what you want to be doing today and be doing after today. What would you like to do that can't be finished in one day? Is there anything you have to do tomorrow or next week or next year which requires something done today? Or would it be easier or quicker if you did something today? Is there anything which can be done now before it becomes a critical emergency next week or next year? Is there something you want to do or be which is important but has no set time deadline?

Let's consider a few examples.

You have to do a fairly big project this month, such as sorting through a pile of papers, looking up some law, and then drafting a Statement of Claim. If things follow their normal course you will leave it until the last few days, at which point there's no time to get outside help, delegate part of it out, or the like. But if you think about it now, you may be able to have someone else (such as clerical help) do part of it (such as sorting the papers) and still have time to double-check their work. Or you may be able to contact others (or ask a librarian) to see if someone else has done the same things so you can just copy their work or at least have a precedent or checklist to follow.

You mean to update your computer skills, or read the new "Planning Act" or take some important clients out to lunch, or interview some witnesses. It isn't urgent but it isn't getting done. It can't be done in one day and it can't be organized in one day. But two minutes today to make a phone call or write a short letter or order a book or a record, would get you started

There's a contract which has to be drafted and executed and filed in another city by the end of the month. If you dictate the instructions now, it can be forwarded with plenty of time left over, and the necessary communications will only take a few minutes to dictate. But if it is left to the last day you will need personal attendances on execution and special arrangements to send the document on an urgent basis. And you will get gray hairs in the process

This mental review of what you want to do, or be, or be doing, days, weeks, months or years from now, takes about two to five minutes a day and is an ideal task for odd moments; while eating breakfast, driving to work, waiting in traffic or in a queue at the bank, and so forth. If you keep a pad of paper with you wherever

you go and jot down the ideas you get, you will be well started on managing your time.

## **2. USE YOUR BEST TIME OF DAY**

Are you a night person or a morning person? Are you half asleep until 11 a.m.? Or do you reach your peak at 8 a.m. and slide downhill from there? Are you tired and irritable before lunch and dinner? Or are you sleepy after a meal? We all have good and bad times of the day and they vary a lot from person to person. But few of us make any use of the fact.

Do you spend your best time of day doing trifling things such as rearranging papers on your desk or handling routine correspondence or answering minor phone calls? Do you leave big important projects until you are tired, hungry and frustrated?

Your best time of day is precious. During your best hour or two you can get more done than in all the rest of the day put together. Do you work evenings because there are fewer interruptions and you can get more done in an evening's uninterrupted hour than in a whole day at the office? If you are brightest in the evening, that may be fine. But if you are tired by then and are brightest in the morning, you should be doing big important things in the morning and trying very hard to move interruptions or minor tasks to later in the day.

## **3. DO HARD THINGS FIRST**

It is human nature to do easy things before hard things. And little tasks before big ones. And pleasant things rather than unpleasant ones. But that is a fatal mistake and leads to procrastination and worse. Instead, when you have decided what things to do in a day and have a number of approximately equal priority, start first with the one you dislike the most.

### **WHY?**

First, because you have the greatest will power earliest and before you tire.

Second, because the rest will seem so easy when you have accomplished the hard task. They will almost seem a reward for tackling the big bad job.

Third, because the job you have dreaded usually turns out not to be so bad as you imagined, especially once you get into it and begin making progress.

Fourth, because what you like and dislike is a self-reinforcing process. If you put off tasks you dislike they get worse. You feel guilty and dislike them more. The things you like, you do promptly and so they go well and you feel proud and like them more. If you break the vicious cycle and get up to date on the things you don't like, then you won't feel so bad about them, and the next stage in them won't seem so bad to you.

## **B. PRIORITIES: WHAT THEY ARE AND HOW TO SET THEM**

### **1. THE PROBLEM**

Your time is in limited supply. You have only 24 hours a day and most of that isn't available for work. Besides, if you work 12 hours a day you will become stale, a compulsive drudge and a poor lawyer and your family won't know you. So your time is a very scarce commodity. Your problem is like that of an explorer in the desert with a limited supply of water. You have to ration the commodity or you will die. Just as the explorer in the desert can't take baths or grow roses, you can't do all the things you want to. You can't. You just can't.

Therefore, there is no use kidding yourself. There are going to be things you want to do and can't because there isn't enough time.

There isn't enough time this decade or this month and some things will have to wait until next month or not be done. There isn't enough time today and some things will have to wait until tomorrow or next week or not get done.

### **2. FIRST SOLUTION: DON'T DO THINGS**

How many things did you do today which saved you from disaster? If you had been run over by a truck this morning and hospitalized and no one had done any of the things you in fact did, would you or your clients be in any real trouble? Mentally review the things you did today in your mind and see. Surely much of what you did today:

- (a) could have been eliminated, or
- (b) at least postponed in the hope it would become unnecessary, or
- (c) could have been done by someone else.

The most valuable word which a lawyer can learn is "no". Associates, clients, friends, neighbours, and family all ask far more than can conceivably be done in 25 hours a day. Most lawyers say "yes" to most of these things. Many then become so busy that they accomplish almost none of them and become

known to their clients as incompetent, to their associates as liars, and to their families as workaholics. They are doing no one a favour by saying “yes”. Not even the people they say “yes” to.

A client who asks if you can have this done by the end of the week is often just inquiring, not insisting. Or if he really does want it quickly, he may not realize that it would cost more on an emergency basis, and might not want to pay extra for speed. Or even if he is willing to pay extra, he may know (or quickly find out) there isn't any other lawyer in town who could do it that quickly. Your clients and other lawyers in your firm will often greatly respect a frank answer that you can't do the thing that quickly. Often their reaction is pleasure at your candor and a request you do it as quickly as you can manage. A client is almost proud to say “My lawyer is a busy man and he can't always do things right away but when he does make a promise he lives up to it”.

Oddly enough, most overworked lawyers are overworked because they can't say no, and they can't say no because they are afraid of losing business and starving to death. In fact it is extremely rare for lawyers' business to turn quickly from feast to famine and in the cases where it does that is due to general economic conditions completely outside the control of the lawyer or the clients, and applying equally to all lawyers. Students take on more than they can handle for fear of disappointing their principals. But broken promises are a bigger disappointment than a warning that a task may not get done by a given date.

If you begin to refuse some “extra-curricular” tasks such as serving on community or church groups you will not be shunned by your neighbours or hanged in effigy. Doing one or two community tasks well will produce more gratitude than promising 8 or 10 and doing them poorly or not at all. Your friends and neighbours would rather have you say “no” than say “yes” and let them down. If you have trouble saying “no”, here are a few tips which may help.

Ask yourself if it is worth a divorce or a bleeding ulcer or being reported to the Law Society or sued.

Suggest someone or something else instead.

Ask if you could do the thing, but later. Promising something by the end of the week is saying “yes” to two requests, not just one.

Say you will try but cannot promise anything and point out one or two other existing commitments you have which may not leave you enough time.

Say you will give an answer tomorrow. You may explain that you sleep overnight on all such request or that you will have to check with your spouse to see if she or he has made any conflicting commitments. Or that you will have to review your (other) diary or appointment book.

### **3. THE SECOND SOLUTION: SET PRIORITIES**

The heart of time management is setting priorities. Once that is done you can do the most vital things first and leave until last (or never) those less vital. You know some things will never get done, so make sure they are the less important ones.

#### **(i) Different Meanings of Priorities**

The first thing which we have to notice about setting priorities is that the word “priority” is ambiguous. When we say that one thing has greater priority than the other, we may mean that:

- (a) they are both important but one is somewhat more important than the other, or
- (b) one is so much more important than the other that we will concentrate entirely on it and only devote any resources to the other one when we have resources left over not needed by the first one, or
- (c) that both will be given attention and that one will be preferred over the other only if the two conflict, or
- (d) both are equally important but one is to be completed before the other

We therefore can see that “giving priority” is something that may mean a great deal or very little.

Part of the ambiguity in the expression arises from the fact that the time period over which we are to assess and implement the project is not specified. It is rare that we give something such absolute priority over a length of time that it excludes all other activities. On the other hand, at any given moment, it is not possible to be doing two things at once, but only one. Therefore at any given moment, we must be giving something absolute priority over something else.

What we are speaking of here and for purposes of time planning is priority over the next few hours or the next day

and in that sense the priority is absolute simply because one cannot do two things at once. But we do not mean absolute priority over a period of weeks or months because one's plan of time should be reviewed at least daily and revised as often as necessary.

### **(ii) Important v. Urgent**

It is vital to distinguish between what is important and what is urgent. The two are not at all the same things. Clients often fail to grasp the distinction and a fair number of lawyers fail to grasp it as well. Something which is urgent may be of trivial worth. If you are working on matters involving life and death or millions of dollars then a matter which (if neglected) will waste \$1.00 is not important. The fact that the \$1.00 matter involves deadlines does not make it more important. It only makes it urgent. Conversely, there may be very important things which you have to do which have no particular deadline (or a distant deadline) for doing them. Yet, serious consequences may flow from not doing them, or if they are left too long they may become urgent as well as important. For example, making a will for yourself or a client is important but is not urgent so long as the intended testator is in good health. But if he dies unexpectedly without a will the effects can be catastrophic. And if he suddenly becomes ill or is suddenly required to make a dangerous trip or undergo a dangerous operation on short notice, then the matter becomes extremely urgent as well as important.

Attending always to the urgent without regard to what is important leads one to a perpetual state of fighting fires, which both makes life not worth living and also just tends to produce more fires which have to be fought. The lawyer who is always fighting fires and therefore always behind the "8" ball is often not a person who is sloppy or stupid or lazy; usually just a lawyer who has priorities wrong because urgency is confused with importance.

Therefore in setting priorities, one should review all the things which one has to do and mentally, at least, grade each of them according to whether they are important and also whether they are urgent.

### **(iii) Setting Priorities**

Every day you should prepare a list of things to do, or review, update and correct the previous day's list. If it becomes too messy it should be rewritten. You should arrange items on it in order of priority. It may even be desirable to mark the ones with the highest grade of priorities

by a special colour or symbols, such as stars or red or yellow underlining. The order of priorities should be as follows:

1. Top Priority: important and urgent
2. Second Priority: important but not urgent
3. Medium Priority: urgent but not important
4. Lowest Category: neither urgent nor important

The items on the list should be the sort of things which can be done within a day or two. In other words, they should be concrete steps, and not long-term projects.

#### **(iv) Following Priorities**

The daily to-do list should be kept in a place where it can be seen throughout the day. It may be in your computer, made on the appropriate blank in your daily diary or clipped to the pages of your diary and moved forward each day, being rewritten or retyped when it becomes messy. You should review it and add to it constantly during the day. As developments occur, you may have to shift priorities on it, add or delete items.

The golden rule of time management is as follows:

START AT THE BEGINNING OF THE DAY WITH THE HIGHEST PRIORITY ITEM ON THE LIST AND KEEP AT IT. AS OFTEN AS YOU ARE INTERRUPTED, RETURN TO IT. DO NOT BE DRIVEN FROM IT. HOWEVER MANY NEW TASKS YOU MAY ACQUIRE KEEP RETURNING TO IT. DO NOT GO TO ANY OTHER ITEMS UNTIL THE TOP PRIORITY ITEM IS FINISHED AND CROSSED OFF THE LIST. THEN GO ON TO THE SECOND ITEM AND SO FORTH.

Charles Schwab (the organizer of United States Steel) is said to have paid a vast sum of money for this single piece of advice and at a late stage in his career. One of the leading works on time management says that surveys have shown that every successful, busy person uses such a list of things to do.

The importance of this cannot be over-estimated. It is sometimes tempting to accomplish a number of the items on the list with lower priority because they can be done more quickly, but that is a dangerous and false economy. It results in doing all the unimportant things until the important ones become disasters.

Following priorities yields great advantages. Even if one day (because of interruptions) you cannot complete the top priority item, you still have gained something, for you have done as much of that item as was possible, and any time that has been lost has probably been lost because of events beyond your control. It is still better to have half the top priority item accomplished than none of it accomplished.

### **C. INTERRUPTIONS**

The description above, of how to follow your list of things to do obviously brings to mind the perennial problem of interruptions. Many lawyers work evenings and weekends, when they find that they accomplish much more because of the relative freedom from interruptions.

Interruptions are dangerous for a number of reasons:

1. They break your train of thought and can cause you to lose an important idea forever, or to make a serious mistake. If you are drafting an important contract and are interrupted a number of times while doing it, it is very likely that you will leave out important provisions or put in provisions which are to some degree inconsistent with each other.
2. Because it takes some time to regain your train of thought, interruptions waste time disproportionately. A thirty second interruption which the interrupter thinks is trivial in amount, may lose you four or five minutes of working time.
3. Interruptions disrupt the order in which you do things, tending to leach away your most effective and productive time for trivial matters.
4. Interruptions lead to reverse delegation or other forms of inappropriate assignment of work, causing the wrong person to be asked to do a task.
5. Interruptions make it difficult to record communications. You should be making notes or memos of things to do, or of phone messages given or received. That becomes difficult if you are interrupted in the midst of dictating something else.
6. Most interruptions are not completely unexpected. You know that in your office at 3 p.m. the chance of working for 10 or 15 minutes without interruptions is slight. Therefore you are tense and can't fully concentrate on

what you are doing. Working at a quiet time or place, on the other hand, frees you both from interruptions, and from the fear of them.

7. Most insidious of all, interruptions can totally prevent any useful results being achieved.

Many tasks are of no use until they are completed. An example is trying to telephone someone: nothing has been achieved until you speak to him. Another example is checking or counting something, for a half-completed check or count is probably useless and has to be recommenced. The lawyer who says "I have had a busy day, and yet achieved nothing", may be quite accurate. If every task, when half completed, was interrupted by another task, which in turn was interrupted when only partly completed, it may be that the net result of all that was nothing, and that all the tasks thus begun and not finished will have to be recommenced. One popular book on time management describes the factory manager's very busy morning. We follow him in our minds through half a morning of interruptions and consultations and receiving mail which requires an answer. And yet when we analyze it carefully, every train of inquiry or inspection was interrupted by something else, with the result that nothing actually was inspected or inquired into or answered. In fact, the manager had achieved nothing and would have been better off to have slept in for two hours.

Therefore interruptions are far worse than minor annoyances. If interruptions reach the point where the interruptions are interrupting the interruptions, then it may be that nothing whatever is being achieved. Obviously, important steps are worth taking to minimize the degree of interruptions. What can be done to minimize interruptions?

Some lawyers simply try the expedient of never being available to callers or telephoners. How often have you tried to phone a lawyer only to be told that he was in conference, and then left a message which was never returned? Obviously that sort of thing can be carried to too great an extreme, for a lawyer who cannot communicate with other lawyers or with clients end up in other, but equally serious, difficulties.

Nevertheless, a number of things can be attempted to combat interruptions. Some of them are as follows:

1. Try to do your important work at a time and place when interruptions are likely to be few so that you need not resort to artificial means to head them off. If you are a morning person, and find yourself to be reasonably bright in the morning, try coming into the office early. All

other things being equal, working from 7:30 to 4:30 at the office is probably more productive than working from 8:30 to 5:30 (for example). That is not only because telephone calls and callers are rare (or impossible) before the normal opening hour of the office. It is also because telephone calls tend to be frequent at the end of the business day but infrequent at the beginning. You are likely to receive very few telephone calls before 9:00 in the morning and not many more between then and 10:00 a.m.

2. There is nothing the matter with holding your calls or leaving e-mails unread for a reasonable length of time if it is not carried to excess and if you do faithfully return the calls or answer the e-mails when the time period is over. Very few people will object to your holding calls if they learn that you do in fact return them soon. For instance, you might find it useful to hold your calls and close your door to avoid interruptions before 10:00 or 10:30 in the morning, and between lunch and, say 2:30 in the afternoon. At the end of each time period, you would gather the phone messages and faithfully return all the messages which had accumulated. You would be available for calls the rest of the half day. No client or other lawyer could seriously object to a proceeding like that and yet it would probably treble the amount of time available in the day free from interruptions.
3. Another more insidious form of interruption is the inquiry from within the office. Again a closed door will minimize these if it is done in moderation in case of real emergency. But obviously no law office could function if your door were closed and you were not open to see other people in the office for any very large part of the day. Nevertheless, there are some other things which you can do. One is to encourage having such consultations in the other person's office so that when the matter at hand has been discussed you can leave gracefully without having to socialize for 5 or 10 minutes and without having to feel that you are throwing someone out of the office. Then again when someone comes to your office and wishes to discuss something with you, if it is a particularly awkward moment to be interrupted you might ask if the person would mind if you walked down the hall a few minutes later. It may be that 5 to 10 minutes later you will have completed some stage in what you are doing and an interruption then will not only be less harmful, but may actually provide a welcome break to stretch your legs for a minute.

4. Whenever and wherever you work best is when and where you should work. If you have an important and urgent task which has to be done and serious consequence will flow if it is not done soon, and interruptions are a problem, then go somewhere else. Work at the Court House library. Or work at home. Or go to the Public Library. Or borrow someone else's office or a friend's house. It is up to you to get the work done and you should know when and where you can work effectively. Never fall into the frame of mind in which you feel that you are earning your living or carrying the load of your firm just by being at your office nine to five even if you are pushing little pieces of paper around and accomplishing very little. Making yourself uncomfortable is not the same thing as working. Another advantage to working away from your office, in serious cases where interruptions could be fatal, is this: People rarely resent finding that you are away from your office when they telephone, particularly if they learn that you will be back in a reasonable time and will return your call then and they know from experience that in fact you will do so. But people very often take offence when they phone or visit your office and learn that you are in but will not accept telephone calls or callers. They often regard that as a slight to themselves or feel that their particular call is of a rare and unusual urgency and importance. The client who will be offended to hear that the call cannot be put through will not be offended to learn that you have gone over to the Court House for an hour but are expected back then and that you will return the phone call at the end of the hour.

#### **D. WHEN AND HOW TO DELEGATE**

Too many lawyers think that the only possible improvement in their use of time is to become more efficient. They think that the solution is to do the things that they are doing, but better and in a little bit less time.

But, that is completely false. The first question to ask is whether you should be doing the task at all. In many cases the task that you are spending time on is one that you should not be doing. Sometimes it can be eliminated entirely. More often someone else can be gotten to do it much more effectively and at much less expenditure of money and even time. There are many, many things which a lawyer can and should delegate. The average lawyer's file is built up of a lot of work done by the lawyer. Two-thirds of it is probably clerical and often very little of it requires a University degree let along an LL.B. Some of the areas of perfectly legitimate delegation are as follows:

1. **Mental Blocks.** Every lawyer, no matter how good from time to time develops mental blocks on files. Sometimes when the next task is completed on a file the mental block disappears, but sometimes it does not. You should be alert to detect the symptoms of your having a serious mental block on a file. When this happens, it is no time for false pride. You should go to another lawyer and ask for help, or to take the matter off your hands. It is unlikely that another person will have the same attitude to develop the same mental blocks that you do on the file and the net result will be to make you and the client happier.

There is no need to be ashamed of having a mental block on a file, for it is extremely doubtful that there is any lawyer who can honestly say that he or she does not have such things arise from time to time.

2. **Getting Advice.** Another reason for delay on files is stewing over the making of a difficult decision. Should you bring on a motion in Chambers or go to trial with the thing the way it is? Is this clause in this contract (or are these trust conditions) strong enough or should you obtain extra assurance? Can you rely on this opinion? Is this good enough evidence to go to trial on? Your client's position sounds as though it should be right in law but you simply cannot find the right authorities.

In all these and many other similar situations, the matter can hang fire for months, and the time for a really thorough check never seems to arrive and the uncertainty never seems to disappear. Yet it is amazingly easy, often, to consult experts in the field. Senior and eminent lawyers elsewhere in your own city or elsewhere in the province or elsewhere in Canada are often approachable and are willing to discuss problems like this. If they do charge you a fee for a brief consultation, you will often be surprised to find that it is not very expensive. If you wish, you can just pay that fee yourself and not tell the client that you have done it; but you will find that it is better policy to tell the client that you have consulted someone else. Your client does not expect you to know all the answers and is not going to be insulted or offended by being told that you have consulted an eminent lawyer who has confirmed that your strategy is basically correct but suggested a few changes. There is no excuse whatever for giving half-baked opinions in matters you are not sure about, at an enormous expenditure of time and effort and adrenalin,

when a phone call can get you some of the best advice available in Canada for a moderate expenditure.

3. **To Accountants.** Most lawyers are not very good with figures and will take an inordinate amount of time sorting through vouchers and preparing summaries, whether this be out-of-pocket expenses in a torts claim or the accounts for an estate or the filling out of a tax form. Yet Canada abounds in accountants of every degree of experience and skill and qualification ranging from large international firms to chartered accountants through various levels of accounting bodies down to untrained backroom bookkeepers. It is probable that all of these, even the most untrained, are better at arranging vouchers and adding up columns of figures than is an ordinary lawyer. In many cases (again at small expense) they can be called upon to do a much better job in a shorter period of time than the lawyer would have done.
4. **Experts.** If you have a problem which seems to involve expert knowledge, do not hesitate to call on an expert to give you some assistance at the earliest possible stage. Again you will find that in a moment or two over the phone, the expert may take you off the wrong track and set you on the right track of an enquiry for little or no charge. Experts can be found who will tell you not only about obvious matters such as medical or engineering problems but also such things as how to measure the square footage of buildings for leases, the significance of skidding distances in automobile accidents, every aspect of cost accounting, and indeed every topic or specialty that a university teaches. Many others spring to mind. If you are ever having difficulty with any question, stop and ask yourself whether you are the best qualified person to be answering the question or whether there is not someone else you might telephone or meet.
5. **To Your Legal Assistant.** Many things which have to be done on a file require intelligence and some experience of a law office but have nothing to do with a law degree. If you have to summarize something, or index it or arrange it or look for something, your assistant can probably do the job at least as well as you can, and should be encouraged to do so. Delegating responsibilities will free you to do matters that come closer to real lawyer's work, and it is probable that your assistant, being more used to paperwork and having fewer telephone interruptions, will do a better job than you can. Never assume that a task which does not

involve detailed knowledge of the law is not appropriate for your assistant to complete. For example, how many lawyers put off dictating accounts because of the time involved, and spend a long time doing it? How many, instead, have their assistant prepare a draft of an account? How many lawyers make routine telephone calls to obtain pieces of information, verify the availability of dates, and that sort of thing, when an assistant with a little guidance would be perfectly capable of doing the same thing?

6. **To Clerks and Runners.** See whether any of the things you have to do can be done by any of the other clerical help in the office. If an errand has to be run or something sorted out or tabbed or arranged or inquiries have to be made, maybe your firm has a clerk or a runner who could do this. It takes some judgment of the persons concerned, but it is often possible. If you are given a task inquire of the person who gave it whether it needs your personal attention or whether it is all right to delegate it, so long as you see that it gets done.
7. **To Machinery and Devices.** Never do anything yourself that you can have machinery or equipment to do much quicker for you. Do not sit for half an hour making notes from a book when you could copy (or have someone copy for you) a few relevant pages and simply mark the passages in coloured pen. Don't send someone a letter when a copy of a document or of another letter would inform just as well. Don't send someone a letter when a polite reply neatly written on the bottom of such letter would do as well. (For your file, you can keep a copy.) Don't do calculations by hand if a ten-dollar pocket calculator can do it better. Have graphs or spreadsheets or chronologies prepared on a computer or by your assistant. Don't spend a lot of time trying unsuccessfully to reach someone by long distance telephone when an e-mail or fax would do the trick just as well. And above all, don't handwrite drafts of correspondence or dictate out loud to your assistant if you can use a computer or a Dictaphone. You are not only taking three times as much of your own time as you should be, but twice as much of your assistant's time.

One common objection made to delegation is that the person to whom the work is delegated will not do as good a job as the person giving the task. As noted above, that is often the reverse of the truth. But even if it is the truth, that is still not a good reason for avoiding delegation. If you have studied elementary economics

you may remember that Samuelson's elementary textbook points out that even in a mythical law office in which the lawyer was a better typist than the assistant, it would still not be desirable for the lawyer to do the typing. That is partly because the lawyer's time is so much more valuable than the assistant's and partly because the lawyer can do legal work or typing. The person to whom you delegate the work may be a little slower or not quite as good as you are but you will still have a chance to check the work when it is done. And if he is paid a lower salary than you are it is obviously more economical to have him do it even if he takes longer. These comments apply equally to word processing on one's computer.

Another reason why you may hesitate to delegate is that it seems lazy or likely to offend the client, although sometimes you do not consciously appreciate this.

Again it is necessary to realize that the object is not to work hard, still less to make yourself miserable. The object is to have things done in the most economical fashion possible.

Your client really doesn't care whether you find your work hard or easy. You are not being paid to be miserable; you are being paid for results, and the quicker the better. If you can have the thing done faster, your client will be happy, and if you can have the thing done faster at a lower expense, your client will be delighted.

The longer you practice law and the more senior you become, the more vital will become this question of delegation. But it in turn is just one aspect of systematizing your work.

Much of what you do becomes repetitive. Every house sale or Chambers motion or court case has many elements in common with each other one. Indeed, opening each new file and having an initial interview has much in common with each other one.

Therefore, as soon as you find you are doing one type of work a number of times you should try to list the individual steps which you take each time. And the paperwork involved. You will then have a checklist to work from and from which you can note which individual steps are capable of delegation. And which things can be reduced to a form, or for which a precedent is useful.

## **E. MEETINGS, INTERVIEWS AND PHONE CALLS**

Many of us find that meetings, interviews and phone calls take up our whole day, leaving no time for any productive work. What can be done to combat this?

### **1. ELIMINATE THEM**

#### **(a) Meetings**

Many meetings are unnecessary, either for all concerned or for you. Don't plan meetings unless it is necessary and don't attend them unless your presence really is important. A meeting of several persons is only necessary when a number of people have to discuss something, i.e. hear each other's views and react to them and then offer more views of their own. Meetings provide a useful give and take of ideas and allow the ideas of individuals to be modified and synthesized. If that is the task at hand, then a meeting is quicker than an exchange of letters or phone calls. But meetings take time to arrange, for busy people's free times rarely coincide. And they usually are lengthy, both in the time taken to meet and socialize and in the traveling time involved.

If 3- or 4-way discussion is essential it may well be more efficient to have a brief conference telephone call. Or even to telephone each other in turn and then send out to all concerned a summary of the results obtained.

A meeting is a very inefficient way of merely imparting information, as distinguished from discussions and modification of views. A circular letter or e-mail is much more efficient and also more effective.

#### **(b) Interviews**

Similarly, an interview takes time to arrange and eats up traveling and waiting time for at least one person. Unless it has to be lengthy or involves delicate negotiation or sizing up someone, or reactions, a letter, e-mail or phone call is often just as good.

#### **(c) Phone Calls**

Most communication today is by telephone, and that is probably a bad thing. You spend amazing amounts of time trying to get through, returning each other's calls,

and being put on hold. In due course you speak to someone who has just had his train of thought interrupted and give him an oral message which he promptly forgets at least a quarter or, and may well misunderstand. He makes no note of the call, and soon overlooks or forgets all of it. Finally, a telephone conversation involves constant repetition: just listen carefully the next time you are sitting in someone's office waiting for him to get off the phone. If the purpose of your call is to impart information (or even to request information) and not really to have a back-and-forth discussion it will be better to write a letter or send an e-mail.

A simple phone call will take 4 or 5 minutes at the very least and may eat up 20 if the other person is not in when you call and wants to chat a bit when you do reach him. Yet a simple letter can be dictated in 40 or 50 seconds. If the mail is not quick enough, have it delivered by a messenger. Or use a fax. Or do it by e-mail. A written communication cannot be erroneously remembered or noted down, can be reread as often as necessary, leaves a permanent record of the communication for both parties, and is much harder for both parties to overlook or ignore.

## **2. SHORTEN THEM**

If you must have a meeting or interview, beforehand jot down the topics you want to cover. You'll be amazed how you forget the obvious if you don't. And such a list keeps the conversation on track and therefore cuts time by a factor of 3 or 4.

If you have any say in the matter, start on time. If you start late, those who came on time this time and had to wait for the tardy ones, won't make the mistake the next time: they'll come late too and you'll have to wait twice as long.

Try to assist in keeping the conversation on track: if it goes off, try to lead it gently and politely back. If that doesn't work, become a little more insistent. The structure of formal meetings has a point. You don't need formal procedure in your meetings, but it is vital to have one topic on the floor at a time (not 2, not 0) and a final conclusion at the end.

Another trick is to schedule meetings at times when people won't want to dawdle. If the meeting is held late

in the morning or afternoon people may want to get to lunch or dinner or go home. If it is first thing in the morning people will want to get away for they have other things to do. Evening meetings are a very bad idea, for many people feel talkative and sociable after dinner, and having driven out to see you they feel that have all evening to kill.

Finally, when the meeting's subject (or one topic at it) seems reasonably well covered, suggest that it end. Put the question, see that all agree with your understanding of the decision and jot it down.

Minutes make a meeting much more effective. They need not be formal, but a brief note of:

- who attended, and when
- what was decided
- who has the task of following up or doing things

circulated promptly to all concerned, advances things enormously.

Because meetings or interviews are not a very efficient way of getting information, try to separate that function. Thus if a client wishes to tell you the facts, it is inefficient to spend an hour telling you while you try simultaneously to listen, question, and scribble notes in illegible longhand. Have a brief interview to get the basic outline of the problem. Then help the client fill out a form with the information you need to open the file, to contact him and his opponents, and to diarize important dates. Then inform as to what documents or correspondence you need and ask the client to return home and write out the full story in detail and sent it to you or bring it in with the documents or correspondence. You can have it typed, read it and then jot down a few notes of what other information you need. You can get that over the phone and by interviewing or searching elsewhere. Not only do you cut the time in half (or better) but you get more detail and record it better.

## **F. INFORMATION HANDLING**

Practicing law is an information war. You are out in "no man's land" and everyone is firing information at you. Everything has some potential importance and must be recorded and preserved. Yet much of it is routine or petty and takes too much time. How can you cope with all that?

Don't get in the habit of reading your mail or e-mail and then putting it aside to deal with later. If you do, you have accomplished nothing. The cleanest desk becomes a minefield in 3 or 4 days if you do that. Instead, take definite action with every piece of information coming to you. You should, at the time of reading, give your assistant instructions as to what to do with each one.

- (a) file it or save it
- (b) send copy to client, then file it or save it
- (c) dictate a brief reply or query
- (d) file it or save it and diarize for recall
- (e) file it or save it, get a certain piece of information and return to file
- (f) throw it out or delete it.

Even if the mail calls for action by you which you can't take now because you have more urgent things to do or need more information, then at the very least file the mail and diarize the file for when you can work on it. If the mail is unfiled and you can't find it, the file is not up to date. A letter may well get scooped into the wrong file. At the very least it will be overlooked because it is not diarized anywhere

A desk is for writing on, not storage.

When you have read your mail, don't procrastinate without good reason. Your first reaction (unless taken in anger) is probably more correct than any other. Waiting 3 or 4 days, or weeks, is not likely to improve the quality of the reply. For conventional letters, you will have a chance to reconsider later, when you sign the reply you dictated today.

All pieces of paper should be on some file so they can be found easily. And every file should be noted for recall in your diary, your assistant's diary (or both) so it can't be overlooked.

E-mail should be either printed and filed, or otherwise organized by you or your assistant so as not to drop out of sight. Incoming e-mails can be automatically sorted into folders; e-mails requiring you to carry out a task can be moved to an electronic task list; your assistant can reply to routine enquiries

The Canadian Bar Association publishes an electronic paper by Janice Mucalov entitled "Guide to Time Management for Lawyers". See <http://www.cba.org/cba/practicelink/cs/>. On it's page 5 are some useful tips for "Dealing with the E-mail Deluge".

## **G. BAD TIME HABITS: HOW THEY UPSET YOUR TIME PLANS AND HOW TO CURE THEM**

### **1. THE DISEASE**

By now you may be thinking that all of the foregoing pages contain some good ideas for some people, but they just don't seem to work for you. That may mean one of two things. It may mean that you just assume these things would not work for you, but have not actually tried them out. If that is the case you are wrong. And stubborn too. They will work. They are for the most part universal truths.

But instead you may mean that you have tried a number of these things and still not had much success. Precisely why that is, can only be determined if a careful watch be kept for a time on what you do. Ideally that should be by some impartial bystander with a knowledge of the principles of time management.

But if you will keep a careful time log for a few days of what you did during those days, and then review it at the end, you will gain some good clues as to where all the time is disappearing. And it does require a careful time record, for your memory is most misleading. You don't clock watch naturally when you are busy, for one thing. What you think takes only seconds or a minute at the most, can amount to 12 to 15 minutes half a dozen times a day. What you think you spend a lot of time on may be 6 minutes once or twice a week.

When keeping such a time log, when analyzing it after, and when planning your time, you have to be aware of your bad time habits. Experience shows that most people know many of the principles of time management, and everyone can be taught what they are, but most people let them be displaced by bad habits. The solution then is to identify your bad time habits, break them, and replace them with good ones.

In the foregoing pages, we have looked at the general principles and theory of managing your time.

But that discussion is given in fairly general terms and with little regard to the little quirks of human behaviour which get in the way of putting those principles and theory into good use.

And we are creatures of habit: we cannot always be thinking, throughout a busy and distracting day, of how to work effectively and efficiently. We have to rely upon work

habits. So the trick is to achieve good habits and eliminate bad ones.

Therefore you will find next a catalogue of common bad habits, and then some hints on how to conquer them, a sort of trouble-shooting guide. There is some repetition of what you have already read, but that is both deliberate and unavoidable.

We are about to apply the general principles to cure even the most serious case of bad time management.

We will see which of the time management techniques you particularly need and just where to apply them.

And this will help you to see whether you really are managing your time.

And it may give you some clues as to where all the time is going, and which are your biggest and most urgent time problems.

## 2. THE SYMPTOMS OF BAD TIME HABITS

- (a) **Being easily distracted. Taking everything as it comes.** Here the interruptions interrupt the interruptions and in the result, nothing is being finished, nothing is accomplished. If the problem is very persistent, find out more about attention deficit disorder and see if you might have it to some degree.
- (b) **Doing easy or pleasant things first.** There are always lots of these, so the big important files never get worked on and so they become more urgent and the client complains and you feel guilty and develop a mental block. If there are not enough little or easy things to do first they are manufactured, either by little make-work projects or by “reverse delegation”, i.e. stealing clerical work from the assistants.
- (c) **Fighting Fires.** Nothing is done unless it is “urgent”. This is easy to do, for;
  - (1) it is easier to ask if things are urgent than if they are important
  - (2) everyone tells you what is urgent; no one tells you what is important
  - (3) clients think everything is urgent

- (4) if you leave things because they are not urgent pretty soon everything will become urgent from neglect.
- (d) **Putting Off Big Tasks.** This might be called “never bite off what you can’t chew in a day”. If you don’t start big things because you can’t complete them in one sitting, then they never will get started, let alone completed
- (e) **“Just Can’t Say No”.** Most lawyers are reluctant to turn down unpaid volunteer work. It never even occurs to them to turn down paying work, even if they are already behind in their existing work. And yet often the new client is a poor credit risk, or the case is uneconomical for all concerned, or the client has (or thinks he has) impossible time deadlines.
- (f) **Wasting Time.** You feel tired or disinclined to work and wish you were jogging or golfing, but it’s only 3:20 p.m. and you think you have to put in the time until at least 4:30. You look for something easy to do such as chatting with a client or your assistant or the lawyer in the next office, or pushing little pieces of paper around aimlessly.
- (g) **Doing things others could do.** You send in your own tax and Registry searches, handwrite your draft letters and spend half the night sorting out vouchers to prepare an income tax return for an estate, Xerox a long document because you want it now, and then go to the library to handwrite long notes and quotes from several textbooks.
- (h) **Mental Blocks and Fears.** One of your phone messages is from a client whose file is a hairy nightmare in your credenza and if you don’t get on it soon he will report you to the Law Society. You would rather go to your dentist for a root canal, than talk to that client or wade through that file again.
- (i) **Perfectionism.** Things aren’t quite right to work on this file yet. You should sit down with the other lawyer and negotiate, but this week is a bit busy and you’d like to wait until the decision comes out on another case which may raise this issue and you really should complete one or two searches or verify some information. (Which will raise the possibility of other information and further legal searches).

- (j) **Over Planning.** You allocated time for this task every day last week but every day something unexpected came up

### 3. THE CURE

Generally, the overall and fundamental cure for this disease in all its forms is to set your priorities and write your “Things To do” List and adhere to it. Don’t be driven off #1. Keep coming back to it, whether or not it is pleasant. Each day, review and revise the list and then go straight to #1. And keep a log of your time so you can see where it is going. If you are short of money, you need to draw up a budget, or at least look over a list of last month’s expenditures. If you are short of time, the same applies.

Now let’s turn to treatment for the more specific symptoms.

- (a) **The Cure for Distraction.** Do your essential work at times and places when interruptions are unlikely. Come into the office early in the morning. Have a 1 or 2 hour period when you close your door and hold calls. Ask those interrupting if you can see or call them in half an hour. And when interrupted, return to what you were doing. Don’t go on to the interruption, still less to a third thing.
- (b) **The Cure for Doing Little or Easy Things.** The basic cure is to follow the “to-do” list rigidly and start on #1 at once. And if something seems to get pushed aside too often so that it is becoming more urgent, try to see if it can be made your #1 for today so as to get it out of the way and improve your morale.
- (c) **The Cure for Doing the Urgent Only.** Adhere to your “to-do” list and its priorities. Set priorities with a view to importance more than urgency. In assigning priorities look to the lead time involved in projects, and when minutes invested early will save hours later. Find whether everything which is said to be urgent really is. Don’t promise completion earlier than you are sure you can give it. Don’t promise to comply with deadlines unless there is a good reason for each deadline.
- (d) **The Cure for Never Getting Started on Big Things.** Break them down into their component parts. For instance, instead of putting on your list “Do factum”, put on items such as “reread appeal books”, “make list of cases to read” or the like. Remember that in 10 minutes a day even the largest project can be done in 6 or 7

months. And if it has to be done in 6 or 7 months and there are only 10 minutes a day available, then doing the first 10 minutes today is both important and urgent.

- (e) **The Cure for Saying Yes Too Often.** Postpone giving an answer until tomorrow morning, then review your time schedule. Suggest someone else who may be able to do the task. Or say you can do the task but:

- you can't guarantee the completion date
- you want a sizeable retainer
- you will charge more than usual if it has to be done on a basis of urgency.

- (f) **The Cure for Wasting Time.** Remember that a lawyer is really paid on a piecework basis for what gets done, not for putting in time at the office. You don't punch a clock either. The office is for working - your home is for socializing.

Try setting yourself 2 or 3 important tasks to complete with going home early as a reward if you can get them done in less than the 1 ½ hours remaining. Or go golfing and come back to the office this evening or early in the morning when there are no interruptions.

- (g) **The Cure for Doing What Others Could.** Become intelligently lazy. Push off onto the clerical staff everything you can. Have them do things in draft form for you to check before it goes out. Give a bit of thought to when you need things for, so that you have enough time to have others do them for you.

Record everything, whether in writing, on your computer or your Dictaphone; thoughts, memos, instructions to your assistant, communications with others.

Make for your desk a little sign only you can see saying

“DOES THIS TAKE A LAW DEGREE?”

Use commercial messenger services, e-mail and faxes.

Don't write a letter where a copy of something will do.

- (h) **The Cure for Mental Blocks and Fear.** Sometimes it helps, to bring your fears out in the open and think about them, to discuss them with another lawyer. You may then see the worst possible isn't that bad and that it isn't that likely either.

Give the bad file top priority tomorrow and show yourself that progress is possible. If need be take it to a quiet place and do a solid hour's work without interruptions. Any file is better and tastes better, after an hour's work on it. Most files can be put in good shape in 2 hours' work.

Consult counsel or a senior lawyer. In a few minutes he or she may well be able to reassure you or put you on the right track.

If none of the above works, get rid of the file. Get another lawyer to take the file over. Say, frankly, that you have a mental block. Offer to return the favour.

- (i) **The Cure for Perfectionism.** None of the world's work is done under ideal conditions. Eisenhower set the date for D-Day from very imperfect weather reports. Is the last bit of information you are waiting for very likely radically to transform the whole picture? Surely not. Even if it did is there any chance to repent later? Often there is. Pleadings can be amended. Contracts can be drafted with a clause warranting there are no such other facts, or calling for amendment if there are. Wills can be amended or revoked anytime until death.

If you have been setting the stage for action for over 2 months and have 80% or more of what you want, you probably have enough. Unless you will have the rest of what you want in the next 48 hours, it is probably best to act now without further delay.

- (j) **The Cure for Meetingitis.** Don't phone if you can write. Don't see a person if a phone call will do. Don't have or attend a meeting if a few phone calls (or conference calls) or letters or faxes will do. Keep the meeting very brief and on track.
- (k) **The Cure for Overplanning.** Leave 20 or 30% of each day unplanned for the inevitable interruptions and emergencies which every lawyer has. Not to mention the fact many tasks take longer to complete than originally estimated! Never plan interviews and meetings and court appearances which fill the whole day. If you have on your calendar for a given day 4 hours' worth of them, you are fully booked for that day. Don't accept any more appointments for that day.

## H. PSYCHOLOGY AND CONCLUSION

The last section on bad time habits may have made you suspect that if we were all fully rational beings, time management would be a simpler matter and far easier to put into practice than it is.

If you are having real troubles implementing good time habits, then ask yourself two questions. And ask your co-workers and your spouse or partner the same questions about yourself.

1. Are you sincerely trying hard to discipline yourself to plan your time and stick to your plan, or are you just letting things drift?
2. Or are there some deep-seated reasons why one or more bad time habits can't be overcome?

If the problem is very persistent, find out more about attention deficit disorder and see if you might have it to some degree. The bad time habits discussed above are based 10% on a misunderstanding of time management, and 90% on emotion, fear or other irrational mental processes.

Remember your university days and the trauma of exam times? Some people came early and well-rested to exams, neatly dressed and with a big supply of pens, pencils, erasers and rulers. Others came late, unshaven, and unkempt, telling everyone who would listen that they had been up all night studying and had eaten no breakfast. In retrospect, their behaviour was foolish. So why did they act that way? To show they had tried their utmost? Because they panicked? To dramatize their position? To provide excuses against a possible failure? Because they confused work with self-punishment?

Are there any lessons there for the practice of law? Do you sincerely believe that all that anyone wants from you is results, not hard work? Or instead: Are you afraid of being thought lazy? Or suspected of not having enough work to do? Or suspected of doing routine unimportant work?

Are you afraid of incurring people's displeasure by saying no? Are your time problems really just a manifestation of being all things to all people?

Are you afraid to admit there are things you can't do? Or things you can't do quickly? Or things you are afraid of?

It is best to admit all these things freely. A lawyer is supposed to be frank and open. But at least ask yourself the questions and be honest with the answers to yourself.

If you can understand your own feelings and emotions, and allow for them, you will find it easier to deal with your bad time habits and to acquire good ones in their place.

And if you can manage your time well and do your work reliably and effectively you will almost certainly become a happy lawyer with devoted clients and time to enjoy your family, fiends and hobbies.



## **CLAIMS AGAINST LAWYERS**

### **A. INTRODUCTION AND SCOPE**

#### **1. IMPORTANCE**

This topic is very important for several reasons. For one thing, any claim against a professional is frightening and upsetting. Lawyers have enough worries without having to ruin their health over needless claims. In the second place, the public's confidence in lawyers is already fairly low, and the profession is under attack because of a number of ill founded concerns. There is no reason whatever for the public or the profession to labour under the burden of justifiable criticisms of lawyers which are preventable. Finally, the number and size of claims against lawyers is growing, and experience shows that any downturn in the economy is likely to increase the number still further. The more and larger the claims, the more and larger the exposure of all lawyers, for the profession is, to all intents and purposes, a self-insurer.

#### **2. DIFFERENT TOPICS**

This chapter will speak of suits against lawyers for damages or the like. We will not consider here discipline by the Law Society for conduct unbecoming (or other breaches of its Statute or Rules). Nor will we consider criminal or quasi-criminal liability such as contempt of court, or personal liability of a lawyer to pay the costs of proceedings in court. But it must be remembered that the conduct which gives rise to a suit against a lawyer might well give rise to one or more of these other types of liability as well.

### **B. WHAT IS OR IS NOT ACTIONABLE**

There is a great tendency here (as in other areas of the law) to think only of negligence. Indeed, many discussions of this topic are headed "professional negligence". But it is important to note that the relation between lawyer and client in Canada is usually considered to be contractual, and that a lawyer may break the contract with the client in ways which do not involve negligence.

#### **1. INSTRUCTIONS**

If a lawyer accepts instructions from the client to do or not to do a thing, the lawyer must in general obey those instructions. If they are not impossible of execution and are not unethical or illegal or otherwise sharp or unfair, then the lawyer who causes loss to the client by disobeying them will be liable for the result. Thus if a client specifically instructed a lawyer to insist upon a

certain kind of security before proceeding with a transaction, the lawyer who failed to do so would be liable for any resulting loss. It would add nothing to the point to argue that that kind of security was not usually taken in that type of transaction, or that the loss was unlikely, or that a careful lawyer would still not have required such security. Similarly a lawyer who released security or settled or abandoned a claim contrary to the client's express instructions would be liable for any loss resulting.

Somewhat similar is any excess of instructions or authority. In many cases a lawyer has **ostensible** authority to vary the terms of a transaction or to compromise a dispute. If the lawyer purports to do so, the client will be bound. But if the lawyer has been given express instructions which do not go that far, then there is liability to the client for any loss resulting. The client may be bound to the opposite party, but the lawyer will have to underwrite the loss to the client (if any). What is more, if the agreement made is one which is not self-performing (such as a release) or is one where there is not ostensible authority, then the client may not be bound but the lawyer may be liable to the opposing party for breach of warranty or authority.

## 2. CONFLICT OF INTEREST

Because a lawyer is a fiduciary, he or she must avoid any situation in which he or she is subjected to duties which may conflict with each other, or duties which may conflict with his or her interests. For example, a lawyer could not (in general) act for someone suing a company in which the lawyer had a substantial financial interest. However much the lawyer might try to act only in the interest of the Plaintiff, there would be a temptation to temper the vigour of the blows to protect the investment. The offence lies not so much in doing what is wrong as in putting oneself in a situation of inevitable temptation. Not only will a lawyer doing so be liable to pay for any loss resulting, but may also have to disgorge any profits resulting, even if no wrongdoing was involved. And if harm results, the lawyer may very well have the onus of proving that the wrongdoing did not contribute in any degree to the loss.

What may be a conflict of interest is described as well starting on page 53, "How to Avoid Being Sued". Here it is enough to note that the conflicts may be either of duty, or of interest and duty. If the lawyer has an interest which conflicts with the duty to the client, the lawyer must let go at once of one or the other. Such an interest may arise where the lawyer's dealings with the client raise the interest. For example, the lawyer may have been guilty of negligence whose effect may be uncertain. One result in the transaction or suit may make the lawyer liable to pay a significant sum; the other result may be to make the lawyer liable to pay

little or nothing. If the client will be better off in the matter with the former result, then there is a conflict of interest. A similar result might be found where the client would be seriously prejudiced by any delay at all, but the lawyer wants to delay until the client can afford a large retainer. A conflict between duties may arise where two client's affairs overlap, as where one wants to hurry and the other to go slowly, or one gives information which must not be disclosed to the other.

### **3. FIDUCIARY DUTIES**

A lawyer is at times the client's trustee or agent, and at all times acts in a fiduciary capacity. We have noted above that the lawyer therefore cannot act where there is a conflict of interest. What other duties and disabilities are imposed?

#### **(a) Great Honesty**

It goes without saying that a lawyer must be completely honest in any dealings with the client, and will be liable for any loss caused by breach of that duty, and liable to turn over to the client any profit realized through such dishonesty. But the definition of honesty goes far beyond the need to avoid lies. The lawyer is under a duty to reveal pertinent facts and not remain silent, hoping that the client will not discover unpleasant truths. There must be no tricky or sharp or unfair practice.

#### **(b) Undertakings**

While laymen may be free to disregard their promises if they do not form a binding contract (e.g. because consideration is lacking) that is often not true of a lawyer. A promise to a client or to the court or to other lawyers is legally enforceable if seriously made and intended to create legal consequences. What is more, in many cases such undertakings will be interpreted as being personal, so that the lawyer cannot say "I merely undertook as my client's agent", leaving performance and liability to the client.

#### **(c) Trust**

Money, valuables and information are given to a lawyer by a client in trust for the client, and must not be used without the client's permission. Any profit realized from them is held as a trustee for the client. What is more, it is common for other persons to give money or valuables to a lawyer under an express trust, often in complicated terms. Most land transactions involve sending a conveyance on trust for payment of money, for example. Breach of such trust is

actionable under the rules of equity, which can involve the harshest penalties on the trustee in breach.

#### **(d) Breach of Confidence**

Almost everything which a client tells his or her lawyer is confidential and must not be revealed without the client's permission. Information given to a lawyer is often of a nature whose disclosure could lead to disgrace, loss of employment, domestic trouble, prosecution, civil liability, or serious impairment of competitive position for a business. Unfortunately lawyers sometimes fail to remember this, and gossip about their client's affairs. Luckily financial loss rarely results, but the danger is nevertheless present. If loss resulted, there is little doubt that the lawyer would be liable for breach of contract.

#### **(e) Directors' Duties**

For some reason many lawyers are willing (even eager) to serve as directors of companies which are owned by their clients. Residence requirements in some jurisdictions regarding directors have doubtless increased the pressures put upon some lawyers to so serve. Unfortunately, however, the duties of a director are very great. A director is a fiduciary, and owes to the company not only all the duties of honesty and accountability which any fiduciary owes, but also considerable duties of care and skill in supervising the company's affairs. There is no such thing as a nominal or passive director. And the ownership of a company can change from someone friendly to the lawyer-director to someone far less friendly. Where a company has any active business of significance it is doubtful that many lawyers in active practice could find the time to give enough active attention to the affairs of the business to discharge duties as a director. Whole books have been written on the liability of directors, and should be consulted by any lawyer still interested in being a director.

Apart from common-law and equitable duties, directors of a company are personally liable to pay taxes and the like withheld from payrolls, and to pay unpaid wages. What is more, they may well be guilty of acquiescing in the evasion or nonpayment of various other taxes or sums ordered paid by courts or other authorities, and so become personally liable to pay those as well.

#### **4. FAILURE TO INFORM CLIENT**

Quite apart from any duties arising where a lawyer wishes to deal with his or her own client, there is a general duty on a lawyer to keep the client accurately informed. Suits of this sort are rare, but there seems to be little doubt in principle. It has been held that a lawyer may be liable for failing to inform a client of an offer of compromise for an existing lawsuit or dispute. Furthermore, in many cases failure to keep a client properly informed exacerbates the effects of some other shortcoming by a lawyer, such as a failure to act promptly or a clerical error. And failure to keep the client informed very often irritates the client or creates an unfounded appearance of inaction or dishonesty.

#### **5. ABUSE OF PROCESS**

There is in general no liability (apart from costs) for wrongfully commencing a lawsuit, but there are some types of liability which come close to being exceptions to that rule. In the first place, instituting or instigating a prosecution for a criminal or quasi-criminal offence on insufficient grounds may constitute the tort of malicious prosecution. And compromising a criminal liability (e.g. taking money to drop a prosecution) can in many circumstances constitute extortion, creating civil and even criminal liability. Finally, it is a tort to levy civil execution (such as seizure or garnishment) for improper purposes or for excessive amounts or in modes or on occasions not authorized by law.

While it is unlikely that the client who asked you to do any of these things would sue you, the party harmed by such proceedings (your opponent) might well sue you, and you would be jointly and severally liable with your (former) client, who might well not be liable (or able) to indemnify you against such liability, and might complain that you had failed to warn of the possibility of such liability.

#### **6. NEGLIGENCE**

Liability to perform most contracts is strict. A baker contracts that the cake will be baked on time, whether or not there are unpreventable floods or flour shortages. An electrician contracts that the wiring he installs will work, however difficult the job may be. But a doctor or lawyer does not guarantee success. So long as a lawyer tries to produce the result for which he or she was retained, it is sufficient to use a reasonable degree of skill, care and training in that attempt.

If the lawyer fails because he or she only has as much skill or only used as much care or as much training, as most practitioners in the jurisdiction, the lawyer will not be liable. And

of course a *fortiori* if the failure could not have been prevented by any likely exercise of skill or care or training.

There is some dispute as to whether one has regard to the particular community in which the lawyer practices to find the proper standard. But it is clear that the standard is objective. A lawyer is only bound to do what a reasonably careful, reasonably skilled, reasonably trained lawyer would have done in the circumstances. One can often find another lawyer who would have used enough care or brought to bear enough skill or training that it is at least arguable the failure would have been avoided had that other lawyer been retained. But a lawyer is not bound to act as does the best lawyer in the community or in Canada. The lawyer need only meet a fair ordinary standard. This objective test is subject to one exception: a lawyer who holds himself or herself out as having extra or special training or experience or skill, may be liable to meet a higher standard. Thus a lawyer who practices as a tax specialist would be required to know and call into play a much deeper knowledge of taxation law and pitfalls and assessment procedures than would a "general practitioner".

Almost all cases of liability to a client for professional negligence can be reduced to one of these heads:

- (a) Lack of Skill: This springs to mind first, but is curiously enough one of the rarest grounds for suit.
- (b) Lack of Knowledge of Law, or Procedure, or Customary Methods: Suits on this ground are also fairly uncommon.
- (c) Lack of Care in Acting: This covers not only a host of forms of carelessness by the lawyer but also a myriad of clerical slips by his or her employees.
- (d) Failure to Act, or Failure to Act Soon Enough: In theory this might be another name of head (a) or (b), but in practice it comes usually from a pure oversight. This is one of the most common heads of liability.

A more detailed examination of examples which are and are not actionable is found below in Parts 7 and 8, page 36 to 42.

It is not safe to assume that liability in negligence can only be to one's client. At least two other classes of person may be able to sue the lawyer. The first is a quasi-client. A lawyer may act in such a way as to lead a non-client to believe that he or she was a client, or in any event that the lawyer would do something for him or her. It has been settled for centuries that there may be

negligence for doing carelessly something which one undertook to do purely gratuitously. The second class of person who may be able to sue is someone to whom careless statements have been made. For example, when a client is about to come into money he or she often directs creditors (or prospective creditors) to telephone the lawyer to verify the impending gain. A negligent misstatement then (such as a failure to warn that the proceeds were already charged or assigned) might produce liability to the person inquiring, under the doctrine of *Hedley Byrne v. Heller*.

## 7. EXAMPLES OF THINGS NOT NEGLIGENT

### (a) A Pardonable Mistake of Law

It would doubtless be actionable to advise a client that a contract did not require consideration, or to say the limitation period in personal injury was six years. But almost every appeal (and many a trial) involves some dispute as to the law, and many of the losing lawyers in those cases probably thought they were right. They cannot all be negligent. Indeed probably few if any of them are. If a legal point is fairly arguable either way, or is uncertain, then it is unlikely that any opinion on the point can be actionable. But the permissible scope of legal error goes even farther than that. A lawyer is bound at peril to know only those laws and procedures and customs which the average practitioner knows or can find readily. A lawyer is not bound to know rules which are difficult or less generally known, even if they are not truly obscure. In judging an individual case, presumably attention would have to be paid to the amount of time involved, the importance of the question, and how prominent was the question. A lawyer in the heat of a transaction or suit might be pardoned for assuming the law took a certain form, without further research. The same lawyer retained at leisure to advise on the same point of law and render a formal opinion might be expected to engage in more research.

### (b) Errors of Judgment

The Courts seem most reluctant to hold a lawyer (or doctor) liable for a mere error in judgment, where the practitioner saw that he or she had an option and *bona fide* considered the alternatives and the facts, weighed them, and decided upon one rather than the other. Hindsight has many advantages, and some of them are subtle to the point of being intangible. A choice which seems easy after the event may appear most perplexing at the time.

Again the lawyer will be in a stronger position where (when time and the client's intelligence permit) he or she explains the choices and thinking to the client. For one thing, the choice will

sometimes be influenced by the relative weight which the client places upon competing goals or looming dangers.

An error in judgment is even more easily pardoned if made in the heat of the moment. For example, a barrister is theoretically liable in Canada for negligence in court. But it is doubtful that liability has been found in such a case, and it may be years before that will occur. The tension, excitement and haste of a trial will often produce a decision which a cooler bystander (such as the judge) will see to be unwise even at the time. All barristers make such errors.

### **(c) Not relying on Others' Slips**

Law is a profession, not a gladiators' trade union, and therefore a lawyer is not bound to take advantage of an opponent's slips or fine technicalities. Indeed, this really should not be done. Therefore, if a lawyer fails to defend through an oversight and his or her client plainly has a good or arguable defence on the merits, the plaintiff's lawyer can consent to opening up the consent judgment without worrying about becoming liable to the plaintiff.

### **(d) Relying on the Advice of Counsel**

While the roles of barrister and solicitor are not the same in Canada as they are in England, nevertheless it may well be that advice of counsel is a good defence here too. In other words, a lawyer should not be liable for an error of law or procedure where the error was made only because of reliance upon advice on the point from another apparently competent and respectable lawyer. *A fortiori* where the lawyer consulted was a specialist or an eminent and experienced practitioner in the field.

### **(e) Use of Agents**

Much the same may be said of the use of agents. A lawyer is not to be expected to travel to other places on behalf of clients where there are lawyers already there willing to perform services. Nor should a lawyer undertake difficult matters in specialized areas where specialists are available. And so a lawyer should not be liable for the misfeasance or nonfeasance of an agent or counsel who has been hired, where there was no reason to think the agent or counsel was incompetent.

### **(f) Failure to Detect Criminal Fraud**

While a lawyer is often expected to carry out the usual checks (of title or of the law) for a client, a lawyer is not ordinarily expected to be a detective or night watchman or auditor. A lawyer is

entitled to assume that the documents presented are genuine and that copies are true copies. If there are no particularly suspicious circumstances, a lawyer is not bound to suspect or check for criminal fraud. It is not negligent to believe that statements of fact made by, or documents proffered by, apparently respectable people are true or genuine. One is not bound to double check all information and documents on the chance that they may be forged or fraudulently altered, in the absence of some suspicious circumstances or special instructions to that effect.

### **(g) Failure to Look for Breaches of Law**

Many legal transactions are invalidated by illegality and many titles to land would be of little worth if there were violations of zoning or health or similar laws. But ordinarily a lawyer retained to act on a purchase or advise on a contract is presumed to be hired to interpret the contract or to check the title only. Unless there are suspicious circumstances or special instructions, a lawyer is not bound to inquire for breaches of by-laws or other laws, or look for pending prosecutions, stop orders, or the like.

### **(h) Failure to Look for Death**

Limitation periods for suit and some other legal rights depend upon the continued survival of the persons concerned. But a lawyer retained to conduct an ordinary lawsuit or commercial transaction is not bound to make enquiries as to the possible death of anyone concerned unless there is special ground for suspicion, or special instructions have been given to do so.

## **8. EXAMPLES OF NEGLIGENCE**

In theory, the test of legal negligence is just what a reasonably skilled or prudent practitioner in the jurisdiction would have done in the circumstances. But precedent and custom refine the question considerably. It is usually not negligence to rely upon the established practice of lawyers in the field, and precedents as to what is or is not negligent in particular fact situations do tend to be cited and followed in this field. Therefore a brief digest of some of the findings in the reported cases can be very useful.

### **(a) Commercial and Conveyancing Transactions**

The following things have been held actionable negligence:

- (i) clerical errors, such as omitting a phrase or copying down the wrong legal description;

- (ii) making incorrect or incomplete searches, e.g. title or encumbrances or taxes;
- (iii) accepting (on behalf of a purchaser or mortgagee) a title encumbered with charges not usually accepted by purchasers, or accepting less than a fee simple absolute in possession, without the informed consent of the client;
- (iv) failing to register documents or give proper notices, in time to preserve one's claim and priority, before giving up one's chance to resolve or rectify the situation, e.g. advancing funds under a mortgage before it is registered;
- (v) accepting documents (such as mortgages or leases) in unusual form without the informed consent of one's client;
- (vi) giving up security;
- (vii) failing to tender, perform or do what is necessary to close the transaction, on or before the date appointed for closing;
- (viii) failing to warn the client of approaching serious deadlines, such as the last day to exercise an option or to exercise a tax election;
- (ix) leaving large sums of money idle or deposited without interest, for significant lengths of time;
- (x) accepting title without checking size or location (or identity) of property in some manner, or warning the client of the dangers of not doing so;
- (xi) expressing an opinion as to whether someone has title to, or a first charge upon, chattels (except in unusual circumstances);
- (xii) failing to follow up suspicious indications, such as suggestions of fraud or breach of zoning by-laws;
- (xiii) failing to observe well-known statutes, such as bulk sales or bills of sale securities registration or land titles or lien statutes;
- (xiv) failing to try to correct or warn where descriptions of property (real or personal) appear not to be correct or adequate or complete;

- (xv) failing to give any elementary warnings about the need for insurance coverage of the various interests and individuals involved;
- (xvi) failing to inspect (and warn of unusual features in) any agreement being assumed, such as mortgages or leases;
- (xvii) failing to check on or warn of rent controls which are likely to be applicable, when drawing up a lease;
- (xviii) failing to check on or warn of the implications of non-performance of conditions of importance in the agreement in question;
- (xix) tardiness in applying for things prerequisite to closing, such as approval by taxing or subdivision authorities;
- (xx) failing to observe assignments or directions to pay.

**(b) Litigation and Collections**

- (i) failing to file or serve a defence or objections within the deadline set;
- (ii) failing to file or serve a claim or similar document within the deadline set (missing a limitation period);
- (iii) failing to tell the client of an opportunity to compromise the dispute, or to give some advice on such a proposal, particularly if it appears favourable;
- (iv) failing to plead or argue obvious beneficial points;
- (v) failing to plead or join likely causes of action or defendants, etc.;
- (vi) giving advice which is plainly badly mistaken, or failing to inform of obvious and important matters the client should know;
- (vii) failing to try to find or interview or call obvious witnesses likely to be needed and helpful;

- (viii) acting and relying upon plainly defective procedure, e.g. getting a default judgment and seizure based upon the obviously defective service;
- (ix) omitting a well known procedural step or using what is plainly the wrong court or wrong procedure;
- (x) failing to warn of obvious risks of expense or liability or loss, in procedures being adopted, particularly where these are avoidable;
- (xi) failing to correct names and whereabouts of parties concerned;
- (xii) failing to register a judgment or execution in the usual places to preserve its priority or validity;
- (xiii) extremely dilatory prosecution of a claim thereby seriously delaying recovery or seriously prolonging the plaintiff's suffering;
- (xiv) making serious unauthorized admissions or concessions. (This would have to be a very strong case, for counsel are not expected to deny what is not seriously to be doubted.)

**(c) Other**

- (i) Failing to observe proper formalities of execution of documents, e.g. completing an agreement for sale without dower consent or affidavit;
- (ii) Failing to renew securities or executions when left in charge of them;
- (iii) Giving seriously defective advice on reasonably clear points;
- (iv) Losing or damaging papers entrusted by the client;
- (v) Not looking carefully at information furnished;
- (vi) Witnessing execution of papers by strangers without checking identity;
- (vii) Overlooking obvious serious tax implications of transaction, especially where these are avoidable;
- (viii) Allowing clerks or paralegals to do work beyond their training or without adequate supervision;

- (ix) Acting in disregard of a well known statute or rule of law, such as the *Statute of Frauds*;
- (x) Acting when too ill or tired to do a reasonable quality of work;
- (xi) Failing to proofread documents one has prepared or rewritten;
- (xii) Failing to check numbers, dates names, legal descriptions, etc.;
- (xiii) Undertaking work one is plainly not competent to handle without expert or senior advice or assistance.

COURT OF APPEAL  
— AND GO  
LIKE HELL!



Maxwell Jones

### C. SALVAGE AND REPAIR

The lawyer who has been negligent should not try to be the one who repairs the situation (unless with the concurrence and instructions of the insurers and the client). But it is important to realize that if the insurers makes use of able and imaginative lawyers from the earliest possible moment, they may be able to repair the situation in whole or part, or at least salvage some rights or recovery of some value. The number of ways in which this may be done are infinite, and vary according to the facts of each individual case, so that one cannot really generalize on this topic. However, the following are examples of some of the things which are possible;

- (a) Securing the consent of those affected to put the client in the position in which the client would have been without the malpractice: e.g. compromising the whole lawsuit where it is not certain the client's position is totally hopeless even now.
- (b) Inducing the court to put the client in the position in which the client would have been without the malpractice: e.g. opening up a judgment allowed to go by default, renewing a statement of claim allowed to expire.
- (c) Obtaining the rights which the client appears to have lost through the malpractice, in some other way: e.g. where a defence has been carelessly lost or prejudiced, uncovering or proving a different but valid defence; purchasing the rights of someone else with a similar position; exercising another cause of action against someone else which is open to the client or to the solicitor, e.g. against the Land Titles Assurance Fund (in appropriate jurisdictions) or the Motor Vehicles Accident Claims Fund.
- (d) Realizing on what the client has left ("Salvage value"): e.g. collecting upon remaining judgment assets or causes of action which were assumed to be of inferior value or use.
- (e) Spreading or shifting the liability for the malpractice: e.g. suing or claiming over (in the name of client or solicitor) against others causing or participating in or exacerbating the malpractice or its consequences.

It is very instructive to see what can sometimes be done in what is usually assumed to be the most hopeless of cases: missing a limitation period. We all know that in most jurisdictions the court

has no power to extend the period just because of hardship or negligence. And the defendant is usually unlikely to waive it retroactively (though that should never be assumed to be totally hopeless). So what can possibly be done to repair the situation? Some or all of the following have at times been possible:

- (a) Suing anyway, in the hope that the defendant will not see the passage of time (or compute it differently somehow) and so not raise the defence, for it is a defence which the defendant must raise and the court cannot raise for him or her.
- (b) Tacking the claim on to an existing lawsuit in a number of different manners;
  - (i) if the plaintiff has already sued the right people (or any of them) for something else, by amending the statement of claim to cover the claim missed;
  - (ii) if someone subrogated to the rights of the plaintiff has sued as in (i);
  - (iii) having the parties to an existing lawsuit amended to include those missed, bearing in mind that:
    - limitation periods are sometimes not a bar in case or misnomer, or where there is no substantial difference in parties or cause of action, and
    - the limitation period for joining another defendant at the instance of an **existing defendant** (not the plaintiff) may be **six** years, not the usual and
    - limitation periods are extended in tort for third-party claims and counterclaims, and
    - limitation periods are extended for cases or mistakes caused by unknown death or misleading motor vehicle searches.
- (c) Proving grounds estopping the defendant from raising the limitation period, such as
  - (i) its waiver before it expired, or
  - (ii) concealment of the cause of action; or
  - (iii) concealment or misrepresentation of the identity of the wrongdoer.

- (d) Proving grounds extending the limitation period, such as
  - (i) disability from infancy, mental illness without a trustee or committee, or absence abroad, or
  - (ii) acknowledgement of liability or payments on account.
- (e) Finding an additional cause of action not yet expired, such as one with a longer period (e.g. contract, 6 years, or express trust, indefinite) or accruing later (e.g. negligence, only on damages or conversion, only on wrongful act).

#### **D. WHAT TO DO ON LEARNING OF A POSSIBLE CLAIM AGAINST YOU**

1. Tell the insurer's staff at once. They don't mind being told at an early stage. They don't mind being told of a claim which is contingent and may never materialize. They do mind being told after it is too late to repair the damage or investigate properly. If you delay enough the insurer may deny coverage. Needless to say you should give the insurer full details, with copies of relevant papers.
2. Tell the client in detail. Explain what you have done wrong and what harm might flow. Encourage the client to consult another lawyer. It is unethical and negligent to fail to warn the client at once.
3. Preserve all notes and memos or drafts pertaining to the matter. That includes scribbles on the backs of envelopes, and old phone and electronic messages. Have everyone concerned do a memo describing all the events. Do it now before you forget or mingle your memory with that of others. That includes you!
4. Make all these records and details available as requested by the insurance staff.
5. Do nothing more in the matter without the concurrence of the insurance staff and the client. But warn them of anything which has to be done soon.

## COMMON RECURRING PROBLEMS SEEN IN PRACTICE

The following is a list of errors or problems in the practice of law which have given rise to most claims. It is not suggested that each one of the errors in question will automatically result in liability to the solicitor. These problems are, however, set forth for discussion purposes on the basis that the problems themselves have led to the advancement of a claim, which every practitioner would like to avoid.

### COMMON PROBLEMS

#### A. Litigation Practice

1. Failing to commence an action within the time prescribed in Limitation of Actions legislation.
2. Failing to commence proceedings within the time prescribed in special circumstances:
  - (a) Insurance claims – failing to commence an action within the contractual limitation period set out in the policy or failing to file proofs of loss within the applicable time limits;
  - (b) Failing to file builders' or mechanics liens or failing to commence and prosecute the builders' or mechanics' lien action within the appropriate statutory limitation period;
  - (c) Failing to advance *Public Works Act* claims at all or within the appropriate statutory time limits (in appropriate jurisdictions);
  - (d) Failing to advance claims on behalf of contractors within the appropriate time periods provided for pursuant to construction bonds;
  - (e) Failing to commence an action and file a Certificate of *Lis Pendens* within the time prescribed in a notice to take proceedings on a Caveat (in appropriate jurisdictions);
  - (f) Failing to give notice of claim under municipal legislation.
3. Failing to file and serve Notice of Appeal within the time prescribed within the Rules of Court.

4. Failing to file a Statement of Defence within the time limit stated in the Statement of Claim or within the time set by Plaintiff's counsel on an extension.
5. Failing to issue Third Party proceedings within the time limit prescribed in the Rules of Court after expiry of a limitation period.
6. Failing to issue a Counterclaim at the time of filing of a Statement of Defence in circumstances where the limitation has expired.
7. Failing to serve a Statement of Claim within the required time or failure to obtain a renewal.
8. Acting for parties with common interests in litigation but with conflicting positions – for example, insurer and insured.
9. Applying for a foreclosure Order in circumstances where the client has not provided instructions or alternatively has not been informed as to the effects of such an action (in appropriate jurisdictions).
10. Seizing under a Conditional Sales Contract when in fact the proper action should be to commence an action for recovery of a debt (in appropriate jurisdictions).
11. Careless treatment of Affidavits – swearing to truth of pleadings, Affidavit sworn by counsel.
12. Making disparaging remarks about the character of parties or counsel involved in litigation.
13. Issuing demands on mortgage arrears which are alleged to have the effect of accelerating the amount due on the mortgage (in appropriate jurisdictions).
14. Indiscriminate hiring of experts during litigation, which hiring is subsequently challenged by the client.
15. Treating a 180-day limitation period as a six-month limitation period.
16. Settling an action without proper instructions or without ensuring full understanding by the client.
17. Failing properly to document file as to telephone conversations and meetings and providing less than an adequate record when called upon to reconstruct events.

18. Failing to provide client with proper instructions upon closing file as to the method of renewing Writs of Execution.
19. Failing, upon taking partially completed work from another lawyer, to see what steps have been taken to date to protect clients' position.
20. Giving advice to a client without first clearly establishing the scope of the retainer.
21. Incorrectly naming parties to litigation.
22. Becoming involved in extra-provincial litigation and not immediately checking the jurisdiction of the Courts or the applicable limitation period in the other jurisdiction.

## **B. CONVEYANCING, CORPORATE AND COMMERCIAL PRACTICE**

1. Acting for both sides on a purchase and sale of a property.
2. Failing to check all encumbrances or other deficiencies in title (for instance, mortgage term) prior to registering transfer or closing.
3. Ensuring client understands that you do not check:
  - (a) Size of parcel;
  - (b) Location of the buildings – set backs, etc.,
  - (c) Appropriate
  - (d) Sufficiency of insurance;
  - (e) Utilities
4. Failing to explain the ramifications of the tenancy at will agreement and the delay and expense on eviction (where possession is granted prior to conclusion of registration).
5. Failing to ensure that all aspects of the matter are ready for closing.

6. Failing to understand the obligations imposed by undertakings and trust conditions. This problem is reflected in some of the following circumstances:
  - (a) Relying on a course of construction mortgage draws yet to come, as your future source of funds to comply with your obligations under trust conditions or undertakings;
  - (b) Failing to search the general registry before accepting trust conditions or giving undertakings requiring you to pay money on use of documents (in appropriate jurisdictions);
  - (c) Failing to do a proper calculation or accurate calculation of the monies that are available in accepting trust conditions or giving undertakings.
7. Overlooking assignments of sale proceeds in distributing money.
8. Making a representation to a lending institution of the amount of money that will be available from a sale without doing the appropriate calculations or searches.
9. Failing to recognize the effects of planning legislation in selling lands ultimately to be subdivided.
10. Making payout and advances under mortgages before searching title to determine that there are no liens or other encumbrances prior to advance.
11. Improperly completing a Guarantees Acknowledgement Certificate by failing to comply with the Act, or preparation of an inaccurate Certificate (Alberta only).
12. Giving business or accounting advice resulting in your clients being influenced into either accepting or rejecting a commercial enterprise.
13. Failing to consider the ramifications from a tax point of view of a transaction which you otherwise have recommended to your client.
14. Failing to check guarantees outstanding with respect to the vendor of a business or of a property.
15. Doing business with a client.

- (a) The onus is on a lawyer to prove that all duties have been lived up to.
  - (b) Is such activity covered under the error and omissions insurance?
16. Failing to obtain copies of all documents which may affect title or ownership when acting for the purchaser of a chattel or business or of a property.
  17. Failing to consider the delay in the various registry systems.
  18. "Certifying" a security position, as opposed to expressing an opinion relative to the validity of a security.
  19. Failing to consider the *Canada Interest Act*, the provisions of the *Criminal Code* or relevant provincial legislation in the drawing of loan or security documents.
  20. Accepting directorships and acting as director of companies without considering the legal ramifications or insurance coverages.
  21. Failing to consider the tax consequences of disposal of property through foreclosure or similar process.
  22. Failing to consider the legal consequences or counseling a client in financial trouble.
  23. Failing to consider the provisions of Company or Business Corporations Acts and the consequences of a company incorporated thereunder guaranteeing another person's debt.
  24. Endeavouring to do matters in short form or at a bargain rate.
  25. Failing to review surveyor's certificate or have clients identify property on subdivision plan and surveyor's certificate.
  26. Using standard forms without reviewing the same for the circumstances of the transaction.
  27. Allowing paralegals to work unsupervised, take instructions from client and report to client.
  28. Missing deadlines of all kinds, especially:
    - (a) Commercial options;

- (b) Renewing conditional sales contracts or chattel mortgages;
- (c) Forwarding conveyancing documents to the Registry Officers and Land Titles Offices for unqualified registration rather than conditional registration.

## HOW TO AVOID BEING SUED

### PREFACE

You (like most lawyers) think you know how to avoid having your clients sue you. Yet such suits are multiplying. Why is that? Are the standards of conduct too high? The cases show that is far from true. One clue to this anomaly may be several persistent fallacies on the subject among lawyers:

**FIRST FALLACY:** That legal negligence usually comes from not knowing the law, or making poor decisions. In fact, however, most malpractice consists of not doing something the lawyer knew he or she had to do, or some clerical error. Most malpractice stems from poor office systems, or general sloppiness, not legal thinking.

**SECOND FALLACY:** That if I do a good job for my client, I can't be sued. In fact many suits against lawyers are by people who were not clients (at least according to the lawyer's understanding). And there are some claims by former clients which are not well founded, requiring the lawyers to prove what they did and why. There are also some people who try to trap lawyers, or are congenitally dissatisfied.

**THIRD FALLACY:** That to protect myself against my client would require me to treat them as the enemy and so not do a proper job for them. In fact there is almost total overlap between the rules of how to do a good job for the client and those on how to avoid suit. And the clients who sue are often already justifiably annoyed over several matters. If you communicate well and realistically, work carefully and avoid conflicts you will do a good job, keep your clients happy and protect against their becoming adversaries.

**FOURTH FALLACY:** Legal malpractice suits all involve lawyer's errors. In fact many involve simple clerical mistakes by assistants,

paralegals, land titles runners, and so forth.

FIFTH FALLACY: I could never forget this matter, so I don't have to record it. In fact, can you even remember your children's grades in school, or what you had for dinner on Tuesday?

## A. KEEPING RECORDS

It is amazing how many commercial lawsuits boil down to a dispute as to who said what to whom, especially over the telephone. Proper records of what was and was not said will not only enable you to win such suits but will prevent such a dispute from ever getting off the ground. This is particularly true of claims against lawyers, which often centre around what precise instructions were given, or what warnings were received or what consents were given. Then again it may be negligence *per se* not to record significant communications with your opponent.

### 1. MAKE RECORDS

You should therefore make a record of every communication. Even one which seemed trivial at the time may assume great significance later especially if its scope is misrepresented or the client denies all knowledge of the matters of which this communication is a sample. An invented or remodeled recollection often can get caught on some trivial obstacle -- if an obstacle has been left in place.

Generally speaking the better the proof the better your position, according to this hierarchy:

- (a) **Best:** written signed communication with proof of delivery or receipt.
- (b) **Next Best:** written signed communication without proof of delivery or receipt.
- (c) **Middling:** oral communication confirmed by written communication in a letter or e-mail.
- (d) **Second Last:** oral communication, with contemporary written private note.
- (e) **Bad:** purely oral communication.

### 2. POOR EXCUSES

Everyone agrees with these sentiments. Better lawyers usually follow them. Poor ones usually do not. Why? No one knows what lurks in the minds of lawyers, but these are common excuses;

## (a) "I'm Too Busy"

The trouble with this excuse is that:

- (i) A written communication (such as a letter, e-mail or fax) is often quicker than an oral one (such as phoning and finding your quarry is in conference).
- (ii) Doing a note or confirming letter about the gist of the conversation will rarely take more than 60 seconds, often much less.
- (iii) The job is not done until it is recorded. To warn or demand orally is to accomplish little.

## (b) "The Matter is Too Urgent"

This is rarely true, for:

- (i) Important and urgent are not the same thing. Indeed if a thing is important it must be done properly, not in an ineffective manner.
- (ii) Often the matter is not so urgent as you think. The matter which is nothing but a string of "urgent" phone messages usually meets hitches and takes weeks or months. "Hurry up and wait" is not confined to the Army.
- (iii) There are other ways of communicating besides the post office: messengers or couriers, fax or e-mail.
- (iv) Sending a later letter, fax or e-mail confirming a phone call does not slow up the phone call, and 19 times out of 20 the confirmation will also arrive before anything further happens.

## (c) "A Confirming Letter Would be Insulting"

Comments:

- (i) Not to any businessman or lawyer, and probably not even to a layman
- (ii) Surely you can word a letter more politely than a bare confirmation; for example, thank the other party for his advice, or comment on it or promise to pay attention to it.

- (iii) Then why not send the original communication in writing, such as a letter, fax or e-mail?
- (d) "I Trust the Addressee"

That's fine but:

- (i) How good is the addressee's memory, especially if the communication is brief and the addressee is a busy person?
- (ii) You don't even know who their successor will be.
- (iii) Are you sure you can trust all the other people involved in the file, such as the opposing lawyer's client?

### **3. SIDE BENEFITS**

Avoiding malpractice is not the only reason for written communications. They also will often:

- (a) Save you time.
- (b) Help refresh your memory later.
- (c) Help keep your clients informed early, by sending them copies. See part B, below.

### **4. PRACTICAL TIPS**

- (a) A note on your file need not be very elaborate. Often a scribbled sentence with a date will do the truck.
- (b) Get into the habit of using your Dictaphone. A short memo or letter only takes 20 or 30 seconds to dictate and 5 minutes to type up.
- (c) Always date everything. A simple rubber date stamp is inexpensive, handy and legible, and gets you into the habit.

### **5. WHAT TO RECORD OR CONFIRM**

Obviously you need to record or confirm statements to your opponent, or authority received from your client to compromise something. Your client will expect to sign settlement

agreements. But there are other things more likely to get you in trouble, and rarely recorded:

- (a) The basis of your payment and whether or not there is any guaranteed maximum;
- (b) Just what your task is and is not. At the end of the first interview or two with your client this is often hazy. The exercise of putting it in simple written language will expose fuzzy thinking and dangerous misunderstandings.
- (c) Phone messages you have received, returned, or left (for clients and others will sometimes allege strenuous attempts to reach you or deny your attempts to reach them).
- (d) The facts which your clients tell you in interviews. You may have misunderstood, or they may inadvertently have omitted an important fact. Or they may change the story once they are under oath. It is wise either to get them to write the story, or to send them a copy of your interview notes.





A POSTCARD  
FROM YOUR LAWYER  
IN HAWAII — IT  
JUST SAYS "OOOPS!"

Madley @mg

## **B. KEEPING YOUR CLIENT INFORMED**

### **1. WHY?**

Or to put it another way, what has this to do with malpractice, as distinguished from motherhood and the flag?

#### **(a) Negligence**

It may often be negligent per se not to inform your clients. They may know or see some aspect of the events which you do not or could not. Things may have changed, and only combining your knowledge with your client's knowledge may reveal the significance.

#### **(b) Motive**

MOST PEOPLE WHO SUE THEIR LAWYERS DO SO BECAUSE THEY FEEL THEIR LAWYER HAS NOT TRIED VERY HARD FOR THEM. USUALLY THEY HAVE NO IDEA OF ALL THE THINGS THE LAWYER HAS DONE FOR THEM OR OF THE OBSTACLES MET, BECAUSE THEIR LAWYER HAS NOT TOLD THEM. The preceding passage is vital: read it again. If your clients think you have worked hard for them and made a reasonable effort, they will probably never think of suing you. They may well explicitly reject the suggestion, even if you do make a mistake. Most claims against lawyers are motivated (even if not founded) on lack of information.

#### **(c) Avoiding Misunderstandings**

If you and your client have misunderstood each other in some manner, little harm will be done if the error is detected before irrevocable steps are taken. If you tell your client of all you are doing (e.g. by copies of letters) errors will be likely detected before the die is cast. A significant number of the claims against lawyers are based on allegations of failure to follow instructions.

#### **(d) Preventing Retroactive Misunderstandings**

There are clients who change the tune when things do not go well, and seek to blame you by any means possible. Their most fruitful and plausible method is to deny the accuracy or existence of the instructions which you think you got. Those may be the initial task assigned, the facts related, or authority to take certain steps such as electing a remedy or tendering documents or settling out of court. Most of these clients are not crooks, but they do have weak

memories and strong emotions. The emotions govern the memory. You cannot always detect this type of person in advance. Some appear very trustworthy at first, not to say hard done by. They have plausible complaints against other people. You can guard against those clients to a degree by seeing that communications with them are in writing or confirmed by writing. But just as necessary is the practice of giving your clients copies of everything you do, send, or receive. Your clients can scarcely say they were opposed to a course of conduct if they saw it unfolding before their eyes for weeks or months.

## **2. HOW?**

### **(a) Explanations**

Whenever you see your clients, state in simple non-technical words what you will do, when, and how long it may take. Ask if there are any questions and if so answer them similarly.

### **(b) Copies**

Routinely and automatically send your clients copies of every piece of paper which crosses your desk and every e-mail relating to their file.

### **(c) Letters**

When some new development of significance looms on the horizon (such as a Caveat on title, or forthcoming discoveries) take 30 seconds to dictate a brief letter explaining its general significance. If you do a lot of work in one area, have a few standard letters of explanation.

### **(d) Drafts**

Whenever you draft a document you do not need for a few days, send your client a photocopy stamped "DRAFT ONLY". They may well have suggestions for its improvement. You may well wish to ask for their comments.

## **C. PLANNING AHEAD**

Legal malpractice rarely involves any conscious decision. It usually involves the omission of some obvious steps whose value you would not question. Sometimes you have never thought of the point. It is more likely that you knew of it and merely overlooked it in the heat and haste of the moment. How can you guard against this?

## 1. DON'T TRY TO REINVENT THE WHEEL

That's hard work, you may not do as good a job as the first inventor did, and your design certainly won't equal the latest improved models now on the market. To avoid that,

- (a) consult good or widely approved precedents,
- (b) consult checklists,
- (c) check off the relevant parts of the precedents and checklists as they are followed,
- (d) for routine and repetitive work, elevate your checklists and precedents into a full-fledged system with detailed written instructions.

## 2. PLAN EVERYTHING YOU DO

Don't fly by the seat of your pants.

- (a) Adapt the precedents or checklists if they do not fit this particular file
- (b) Make your own checklist for this file if you don't have a ready-made one.
- (c) Don't draft a document off the top of your head. If you are not closely following a checklist or precedent, then first make out an outline and work from it. The mere act of making the outline will enable you to capture ideas quickly and will suggest further ideas to you. Outlines are easier to review, correct and cross-index than are full text drafts.
- (d) Make lists of tasks "TO DO" on each file and review and correct them periodically.
- (e) Put a warning on the file cover in red about something easily overlooked but crucial, such as a limitation date, an assignment of proceeds of a sale, or a deadline.

## 3. REVISE WHAT YOU DO

Every outline or draft or list of things to do should be first attempted at the earliest possible time, even if some data are incomplete. If you leave your draft alone for a time and then reread it, you will find many new ideas for improvement occur to you. That way, your client will ultimately get not your first effort,

but a much improved version of it. You can never think of all the useful points at one sitting and hindsight (even 24 hours' worth) is always better than foresight.

#### **D. CONFLICTS OF INTEREST**

It is surprising how often malpractice claims arise where the lawyer was acting for more than one party in a transaction, even where the claim has no direct or obvious relation to any possible conflict of interest. One can only speculate why, but maybe such files betoken:

- corner-cutting, or
- cheap clients who want to save a fee, or
- a hidden conflict of interest, real or apparent, or,
- hidden resentment or suspicion of the lawyer's apparent position as a mediator rather than advocate.

We all know that you can act for both sides in a non-contentious matter until a dispute emerges, but you **should NOT**. Why is that, and when is that, and what can you do about it?

When do you have a conflict of interest with your **sole** client?

#### **1. WHAT IS A CONFLICT OF INTEREST?**

Obviously there's a conflict if one client gets in a fight with the other and threatens to sue. But a lot of other things constitute a conflict too. Here are some examples, but the list is very incomplete.

##### **(a) Conflicts Between Clients:**

- (i) One client wants to (or should) move more slowly than the other wants to (or should). That is very common in conveyancing.
- (ii) Significant terms remain to be negotiated between the parties.
- (iii) The transaction appears to be unwise for one of the parties.
- (iv) There is great disparity in bargaining power between the parties, or, one owes the other a fiduciary duty.
- (v) One client has grounds to avoid the transaction: e.g. for misrepresentation.

- (vi) You get information (e.g. from one client) which you or that client think should not be passed on to the other client. That is fairly common in mortgage situations.

**(b) Conflicts Between You and Your Client:**

- (i) You have some information which is relevant but you are forbidden or reluctant to communicate to your client.
- (ii) You have some financial expectations connected with the matter besides your fee, even if these are only contingent on potential
- (iii) You have made a mistake of significance and the client should consider suing you, and it is in your interest that what the client has lost should appear to be of little value. If you deal with a client when you have an interest you will keep the deal if it turns out poorly for you. If it turns out well for you, the client and court will undo it. Why gamble with those rules?

**2. THEN DANGERS OF REPRESENTING BOTH SIDES**

- (a) A dispute may arise, in which case you will probably have to send both clients to other lawyers, in which case neither will be eager to pay your bill.
- (b) You may overlook a conflict, real, imaginary, or potential and get sued.
- (c) Your motives or judgment will be questioned.
- (d) Neither client will feel obliged to pay you more than one-half of the proper fee for acting for one client. So you will either do more work (for two clients) for less money, or have one or two disgruntled clients.
- (e) Your clients will be disappointed at having to share your services, and forego your partisanship. This disappointment may ripen into something stronger.

**3. HOW TO AVOID ACTING FOR BOTH SIDES**

- I. Say "NO". It's a lot easier than you think. And you can explain at the same time. Clients will respect you all the more for being careful and ethical.
- II. Help find another lawyer for one party.
- III. Offer to do all the work but in the interests of one party. Many clients are so confident (or cheap) that they do not

want legal advice or safeguarding. They just want the “necessary” things done at little or no cost. So long as someone gets a transfer or bill of sale executed and registered, that’s all they care. Where you are under pressure from **both** sides to act for both sides (i.e. one client asks you to act for the other person too) then you should advise both (in writing) that they should have separate advice and checking. If they insist, you can offer to separate advice and checking. If they insist, you can offer to act for one party only but do the necessary papers, giving the other party no advice or checking. Needless to say such a position should be immediately and carefully confirmed in writing.

## **E. UNPLEASANT RELATIONSHIPS**

### **1. PRELIMINARY**

A legal retainer is like a marriage; it does not work properly unless there is complete trust and confidence on both sides. Therefore if there is any sign of unpleasantness or distrust between you and your client, investigate it at once. If you can remove the source (e.g. by explaining something), then do so at once. If you cannot suggest that your client would be better off to get a lawyer he or she felt confidence in. If your suggestion is not taken, cease to act if you possibly can. That may well require proper notice, and at times (e.g. shortly before a complex trial) may be impossible. All of this applies whether or not there is any logical or justifiable basis for the lack of confidence existing between you and your client.

### **2. EXAMPLES**

These are some examples of such relationships:

- (a) The client who thinks you are not competent or experienced or tough enough;
- (b) The client whose file you have handled badly;
- (c) The client who does not trust you;
- (d) The client whom you distrust for good reason, e.g. having deliberately misled you, the court, or an opponent while you were acting;
- (e) The client who is a slow or reluctant payer and who will not give you appropriate interim payments or security;

- (f) The client who persists in disregarding your advice on legal matters. (These differ from business matters where the client understands the risks and decides to run them so long as no crime or dishonesty is involved);
- (g) The client who persists in being uncooperative and will not give instructions, turn up for meetings or hearings, provide documents or the like.

### **3. REASONS**

There are three reasons why you should decline or cease to act for such people:

- (a) Someone who does not like you, or who is untrustworthy, is much more likely to sue you, and to sue you without real cause.
- (b) Consciously or not you are unlikely to do your best for such a person.
- (c) Clients are usually like the little girl who had a little curl on her forehead; if they are good they are very good, but if they are bad, they are horrid. For some unaccountable reason a client who is bad in one respect is very often bad in all respects. There is no logical or *a priori* reason for this but bitter experience shows it to be so. Clients who won't cooperate question your advice, and make unreasonable demands on you (as to quantity and speed) will rarely pay your bill on time or at all. They will protest the amount, get it cut and then still not pay, and will (when threatened with suit) allege serious incompetence and misconduct on your part.

### **4. MENTAL BLOCKS**

Lawyers are just as often at fault in deteriorating relationships with clients. If you feel that you have developed some sort of a mental block on a file or regarding a client, get rid of the file or client at once before the matter gets serious. You will make everyone more happy that way.

### **F. DON'T CUT CORNERS**

#### **1. PARTIAL JOBS**

Be careful of the client who comes in and says "only want a bill of sale, nothing fancy" or "just a very short agreement, nothing complicated". In theory you can be retained to do just part of a job, but in practice that is fraught with danger.

- (a) You cannot contract out of liability for negligence. The difference between doing that and contracting to do a partial job is often subtle or non-existent.
- (b) An agreement to do only part of the job must be extremely clearly worded and proved.
- (c) Such an agreement would be valid only if based on informed consent. But explaining clearly and fully the dangers in cutting corners and not doing a full job will usually be far more difficult than doing the usual job. Many routine practices of conveyancers or commercial lawyers guard against dozens of dangers which some lawyers have never heard of, and none could list fully at a single sitting.
- (d) Your reputation will suffer, for others, who can never know that your instructions were peculiar, will see the incomplete job.

If you must accept instructions to do only a limited thing, confirm your understanding of that in writing to your client at once.

## 2. RUSH JOBS

- (a) **Warning.** Those are even more common than partial jobs, yet are in many ways even more dangerous. Virtually **every** botched transaction or error culminated in a rush on a Friday afternoon, often before a long weekend. (Friday the 13<sup>th</sup> is unlucky, but so are all the other Fridays!)
- (b) **The Dangers.** Here are some of the dangers of rush jobs:
  - (i) If there is not enough time to do everything (or there appears not to be) then they are in essence partial jobs, on which see 1 above.
  - (ii) Hurry means pressure. **No one** “works better under pressure”. That is a myth fostered by procrastinators who don’t work **at all** without pressure. Their work under pressure is just as bad as anyone else’s. Under pressure you do routine tasks (such as arithmetic or copying down information) badly. And you do not think or imagine at all. You are sure to make mistakes.

- (iii) There is little or no time to consult precedents, use checklists, confirm instructions, revise drafts, or just plain think. A request to do serious legal work in a hurry is equivalent to a request to fix the plumbing in a tank of alligators, without breathing apparatus, firearms, or plumber's tools.
- (iv) Your client probably will not perform any better in this situation than you will and you should not aid and abet such foolishness. "Contract in haste, repent at leisure."

### **3. CHEAP JOBS**

Marrying Sam (the preacher in a defunct comic strip) used to give his clients their choice of the two-bit wedding or the four-dollar wedding. The clients of a professional should not be put in that position even if they request it, and still less should a professional let himself or herself be put into that position. Why?

It either amounts to a full job for part pay, which is ridiculous for the lawyer; or it amounts to a partial job, on which see 1 above.

## **G. AVOID FEE FIGHTS**

### **1. PRELIMINARY**

Many allegations of malpractice stem from disagreements over legal fees, either as:

- (a) a direct defence to your suit for fees,
- (b) your client's later psychological rationalization for unwillingness to pay your fees, or,
- (c) a product of litigation over fees, leading to insistence on legitimate claims which would otherwise have been allowed to perish unspoken.

### **2. GET THE BASIS OF PAYMENT CLEAR AT THE BEGINNING**

- (a) All paying clients want to know the basis of payment at an early stage, but most are too shy to ask, especially the so-called better class of client. The client who does not plan to pay you!

- (b) Explain the basis clearly.
- (c) Get a clear agreement.
- (d) Get it in writing, preferably something signed by the client but failing that, a confirming letter by you. If it is a contingency agreement, follow all the provisions of applicable local rules.

### **3. AVOID CERTAIN PITFALLS**

- (a) Never quote a maximum fee. The unexpected can and will occur
  - (i) more often than you think
  - (ii) because of Murphy's Law, on the very file where you quote a ceiling.
- (b) Estimates are dangerous too because they have to be hedged in with many qualifications which your clients cannot or will not fully understand or remember. They will seize on the number and discard all the words in which you wrapped it. Instead it is better to explain the basis of billing and tell your clients that they can ask at any time how much fee has accrued, and can (within limits) call off the enterprise if it gets too dear.

### **4. KEEP CAREFUL TIME RECORDS**

### **5. SEND INTERIM ACCOUNTS ON BIG MATTERS**

- (a) Most clients (big or small) prefer them.
- (b) Clients then know where they stand.
- (c) You know where you stand.
- (d) Misunderstanding will be detected before much harm is done.
- (e) Unreasonable clients, cheapskates, and deadbeats will be exposed at an early stage.

### **6. COMPROMISE FEE DISPUTES**

It is worth knocking off something from a disputed account in return for payment and the abandonment of any claims by the client. That applies even if the account is perfectly proper, for any dispute over fees

- (a) wastes many unproductive hours, days or weeks,
- (b) takes years off your life,
- (c) leaves bitterness and creates an enemy to denigrate you in the community,
- (d) encourages the ex-client to make, enlarge or press some sort of a malpractice suit against you, for that is almost the only conceivable defence he or she could have. Why should you parlay a \$250.00 fee dispute into a \$4,500.00 negligence claim?

#### **H. DON'T PRETEND TO BE COMPETENT IN EVERYTHING**

(See also Part L)

We live in an age where business, technology and law are very complex and more and more specialties are emerging. Clients know and expect that. GP's do not do brain surgery, and you should not attempt the legal equivalents. Again to do so is usually negligence *per se* and conduct unbecoming to a barrister and solicitor as well. Instead you should decline certain types of employment where the work is very specialized, or where a good deal of experience is required which you do not possess.

In other cases you may quite easily take on the engagement, but make use of paid consultants or counsel. An hour's consultation with the best expert in the field will cost the client less than four or five hours fumbling by you, and will produce infinitely better results.

It is extremely doubtful that any worthwhile client would really object to those procedures. Lawyers fear that clients will be deterred, but experience does not bear that out. Clients like frankness and lack of pomposity in lawyers, they appreciate care and caution, and value topflight advice at reasonable prices. Indeed the solicitor who consults experts and retains counsel often has a more devoted following of clients than does the more able expert or counsel!

Don't ever try to give advice on the law of another province or country, or draft documents for use there. Who knows what traps there may be?

## I. MEET DEADLINES

### 1. PRELIMINARY

- (a) Note that the heading says “deadlines”, for this involves many more things than deadlines for suing. There are deadlines to tender performance in most sales (of lands or chattels), deadlines to exercise options, deadlines to register mortgages or caveats or personal property security statements and deadlines to renew the latter. And litigation involves other deadlines: to serve pleadings, to defend or reply, to take the next step. This category gives rise to more claims against lawyers than any other.
- (b) Few lawyers deliberately let a deadline go by, though sometimes there may be a misunderstanding as to who is to watch and obey a deadline (as with renewing chattel mortgages). 99% of missed deadlines were simply overlooked. You may not address your mind to the problem at the right time. Often you feel that the deadline is so far away that all steps are certain to be taken in time; but as any client could tell you, the law’s delays are infinite in number and duration.

### 2. MECHANICAL AIDS

Therefore it is essential that you have a proper system of diarizing your files. And use it. And it is essential that every law firm have a backup control diary for deadlines, and use it. If these aids are followed faithfully, no skill is required. You will then no more be able to miss a deadline than you will be able to arrive at the office in your pajamas.

### 3. IDENTIFYING DEADLINES

- (a) Very often deadlines are missed because the responsible lawyer has not addressed the question of whether there was a deadline, or how serious would be its violation, or exactly when the time would expire. Such a thing is obvious in the context of litigation, but really just as dangerous in a commercial context.
  - (i) New Files: The **great majority** of new files involve one or more significant deadlines. Therefore when you take on a new matter you should **at once** determine what deadlines may apply and diarize them. The staff member who opens the file for you should have the task of checking on this and ensuring that you have

located and diarized deadlines. If you think there are none, a signed statement to that effect should be required by your assistant or file clerk.

- (ii) Existing Files: The great majority of existing files involve one or more significant deadlines. Often meeting one deadline just creates a new one. Issuing a statement of claim creates a deadline for serving it. Registering a chattel security creates a deadline for renewing it. Exercising an option creates a deadline for closing the deal. Signing an agreement for sale creates deadlines for making payments. Filing a builders or mechanics' lien creates a deadline to sue. And so on. Therefore there should be attention paid to deadlines at every significant step. When a deadline is met and removed from a personal or control diary its replacement or successor deadline should be diarized. If there is no replacement, the person running the control diary should demand a signed statement to that effect.

#### **4. DO IT NOW**

Few deadlines expire while the responsible lawyer is actively at work on the very task for which there is a time limit. Usually the task is not being worked on. There is rarely much if any reason for that.

Therefore, tasks involving deadlines should be given higher priority and done well before the deadline if at all possible. There is no need to defer work on a statement of claim because of negotiations for example. And a statement of claim may well assist the negotiations.

Indeed there are grave dangers in postponing prescribed tasks until the last moment:

- (a) Some slip such as illness, postal delays, misplacing a file, or dropping a piece of paper, may intervene at the critical moment.
- (b) The thing may be done defectively and the defect not be noticed until after the deadline when it is too late to correct.
- (c) Imminence or expiry of the deadline may tempt an opponent to either

- (i) postpone revealing the error or defect until after the expiry, or
- (ii) exercise ingenuity in finding or alleging defects now too late to cure.

For example, failure to sue all the right parties under the right names is often fairly harmless unless the suit is brought shortly before the limitation period expires.

## **5. WATCH FOR ORPHANS**

It is wise to have some backup system to detect neglected files, particularly those where no lawyer thinks he or she is in charge, or those with no definite and fixed deadline for attention. These are some methods which may be used:

- (a) Periodically review your ledger cards and time records for files with open cards or sheets but no activity for (say) 6 months or more.
- (b) Periodically look in all filing cabinets for files in a similar condition, and for files not diarized. (That is why most firms write on the file folder the date for which the file is diarized.)
- (c) Don't keep any more files in your office than you are currently working on actively. Maximum, ten files. **THIS MEANS YOU!** Diarize the others and get them out of your office. Most limitation periods were missed by a lawyer within arm's reach of the file in question at the time it expired. A file on a window ledge or the floor is a time bomb.
- (d) Have someone else go into private offices and enforce rule (c), if need be with tact, firmness, whips and scorpions.

## **J. UNREPRESENTED PARTIES**

People involved in transactions who do not have lawyers can be exceedingly dangerous. They often contend that you were their lawyer, or that in any event you misled or swindled them in some manner. The sympathetic relative who accompanies the injured person to your office may later claim you were supposed to prosecute their claim as well. Almost half the suits against lawyers are by people whom the lawyer did not think was a client at the relevant time.

Foolproof defence would be difficult, but some common sense steps will give very reasonable protection:

1. If the opposite party is unrepresented tell him or her clearly that “You need legal advice. I am not your lawyer. You should hire your own. I am acting solely in the interests of my client, your opposite party.” And confirm that in writing.
2. Follow much the same procedure for friends, relatives, employees, or hangers-on who come along to meetings or consultations, varying the inquiry and the wording of the confirmation to fit the facts.
3. Be exceedingly careful of remittances, or tender of documents, from unrepresented parties. They sometimes think (and often allege) that you are some sort of escrow agent or trustee. Indeed many people think that a lawyer’s trust account has some magic or neutral properties and do not realize that the beneficiary is (without more) the lawyer’s client and no one else. Any suggestions or hints of such an attitude should be counteracted. Be careful of statements to an unrepresented party as to what you will do with the money or documents, which could possibly be twisted into promises or undertakings.
4. Be careful of requests that you explain to opposite (unrepresented) parties the nature or import of the document they are to sign or accept. Your casual statement that it is “the usual form” or “just a mortgage to secure the balance” is very likely in all strictness partially untrue.
5. If you:
  - (a) decline to act for a prospective client, or
  - (b) cease to act for a client, or
  - (c) are consulted but never get final instructions to proceed,

then record and confirm that fact carefully, pointing out to the putative client any likely deadlines or dangers of inaction which you can see.

Category (c) is a terrible trap, for it is very common for people to consult you and then leave the matter in a woolly state. They will “think about it and let you know”

particularly if you want a retainer or they hope they can solve the problem more cheaply elsewhere. Or they have not brought in their papers and promise to send them in. When they consult another lawyer often it is too late to do anything and they may forget you warned them of the time limits involved. Or did you?

6. If papers or e-mails arrive which seem to have little bearing on the clients or tasks you are aware of, try to identify the sender and inquire as to the object. There may be a misunderstanding, or some neglect to mention some other task to you. This occurs more often than you might suppose.

## **K. HAVE AN ORGANIZED UNIFORM FILE**

Where malpractice allegations are made against lawyers, the file is rarely informative or complete, almost always messy, and is often the product of two different lawyers assuming the other has done something. Your memory is a lot worse than you imagine, a file may drag on for longer than you could anticipate, and illness, holidays or emergencies may require another lawyer to do some of the work on the file. Therefore you should:

1. Record everything. See A, above.
2. Use a uniform arrangement for files in your firm.
3. Arrange the contents in some discernible order (e.g. chronological) and then fasten them.
4. Keep things filed on the file, and not in nests on your desk, or your assistant's "Things to file when I run out of absolutely everything else to do" folder.
5. Keep lists of things to do and checklists marked up to date and in a prominent place on the file (such as the front or inside the cover). See C, above.

## **L. EXPLAIN YOUR LIMITS (See also Part H.)**

A client who sues you without good reason has excessive expectations. That usually means that you have failed to dispel those expectations, and usually have contributed to them in some manner. 99% of the time your client does not know what to expect: your slightest offhand comment is all there is to go on. How can you try to avoid that?

1. Do not make unreasonable estimates. Don't blithely say it will be all wrapped up in a couple of weeks if the

average is longer and you are busy. Warn of the chances of unexpected hitches in any matter.

2. Do not make promises you may not be able to keep. There are few things you can absolutely guarantee in the practice of law.
3. If problems emerge, inform the client at once and explain the likely consequences in clear simple terms. Do not rush around silently behind the scenes trying to put the difficulties right before the client learns of them, as if they were your fault. Or even if they were your fault!
4. Be very slow to give advice in non-legal matters such as how to invest money or what is a good price for land. If you must, warn that the question is not legal and you may not be any more knowledgeable than your client.
5. Explain to your client that limits of the advice you do give, particularly the distinction between business and legal decisions. You can advise of the likely consequences of a given action and select the means most likely to achieve a set goal. But you cannot select the goals, or determine how much risk your client wants to run. Some clients like to gamble, others do not (or do not dare to). Most decisions in life involve compromise of many kinds, including compromise of goals. Only your client can make those decisions. Your job is to explain the alternative and the odds.
6. Similarly explain to your client the likely effect on your advice or opinion should any of the facts related or assumed, but either incorrect or difficult to prove. Some classes of facts are notoriously hard to prove or inherently improbable, but a layman will not realize that.

#### **M. SUPERVISE YOUR NON-LEGAL STAFF**

1. Non-lawyers may misunderstand your shouted instructions as you fly out the door to court or tennis. They may forget or modify your standing procedures. Written instructions are often better. Oral instructions may be overlooked or superseded by "Do as I do not as I say". Among inconsistent example of practice, new staff will copy the sloppiest.
2. Able conscientious conveyancing assistants or paralegals will fairly often be beyond their depth, either to show initiative, or spare you the bother, or because

you are out at the time. Do not let them work unchecked and unsupervised. Still less uninstructed.

3. Proofread important documents, especially amounts and legal descriptions or names. Never let a paper leave your office (or be executed) until a lawyer has seen it.
4. Make sure your staff always know where they can reach you in an emergency.
5. Watch what Court House staff do. Some will reject documents for no good reason or misfile them. Make sure papers sent for filing come back with appropriate endorsements.

#### **N. WATCH TRUST CONDITIONS, UNDERTAKINGS, ETC.**

1. Note and mark them clearly on receipt and mark or attach the documents sent in trust.
2. Make prominent notes on the file (e.g. inside the file cover) or trust conditions, undertakings, or assignments.
3. If you receive trust conditions likely to give you trouble, object at once and get an amendment or return the documents. For example, a trust condition requiring you to supervise or guarantee your client's future performance or behaviour, or unclear trust conditions.

#### **O. WITNESSING SIGNATURES**

If you witness the signature of someone you do not know, that may be negligence. If you then swear an Affidavit or Execution that is perjury and probably some other kind of misconduct as well.

Therefore if the party signing is not well known to you, **always** ask to see some identification. **No one** ever objects to that: we live in an age of identification, and a legal document seems to a layman even more important than cashing a cheque in a department store. Only lawyers treat legal documents' execution cavalierly. If you always see identification then you will be able to testify someday that that was your invariable practice, without remembering the individual document at hand.

#### **P. ACTING AS DIRECTOR**

Do not be a director of your client's company. Do not sign the incorporating documents, for that makes you a provisional director which is really the same thing.

**WHY?**

1. A director has many positive duties of care and management which you will never be able to fulfill.
2. How can you then contract with the company over your fees and services?
3. You can become personally liable in some provinces for payroll deductions and unpaid wages. The *Income Tax Act* may make you liable for unpaid taxes in many circumstances. Almost any company is in danger of going under.
4. Your liability insurers may take the position that you have no insurance coverage for whatever you do for that company, even if it is a lawyer's work and you become a director only to accommodate your client.

**Q. KEEP INFORMED**

Watch new amendments to legislation. Subscribe to and read one set of law reports at least. Have a system for telling lawyers and staff in your office about important changes or pitfalls in law or procedure.

**INTERVIEWING****A. GENERAL**

The client is not in your office because he or she wants to be in your office.

The client is in your office for one reason only: A Problem

It's a big problem

It's a special problem.

The Client is worried.

The client is resentful, bewildered, embarrassed or all three about having to "go to the lawyer".

Respect these feelings as you try to determine what the problem is through the interview process.

## **B. THE HUMAN ELEMENT OF INTERVIEWING**

### **1. INTRODUCTION**

Law School teaches us to boil down a set of facts to those few items which are legally relevant. We quickly learn that clients do not tell their story that way and we are tempted to think that the task in interviewing is to make clients hurry up and get to the point. Yet we are disappointed that they often are not frank with their own lawyer or seem to change their minds disconcertingly. That may be because of other more human elements which we overlook in the interviewing process. We should learn to recognize them, allow for them, and even use them.

### **2. WHEN AND WHERE TO INTERVIEW**

#### **(a) Preliminary**

We all realize that there is little point in trying to interview or advise a client who is very upset or ill. Yet it rarely occurs to us that the same mental impediments to a proper interview may often be present in milder doses, or that we can actually try to foster an environment which will enhance the quality of the interview.

#### **(b) The Place**

At times somewhere other than your office may be preferable, especially if the client is very young or ill or unused to business matters. But if that is not possible or desirable you should try at least to look at your office through your client's eyes. Go out and come back in and see what impression you think it would make on a client. Ask a friend or relative to make the same assessment for you. To the extent that you are able, try to change those things which would tend to create these feelings in a large number of likely clients:

- (i) Fear of being overheard or watched (no private office).
- (ii) Fear that you are too expensive or unsympathetic (lavish furnishings).
- (iii) Fear that you are too busy (interruptions by phone calls, large stacks of files).
- (iv) Fear that you are inefficient (interruptions by phone calls, large stacks of files).

- (v) Fear that you are incompetent (shabby offices).

To the extent that you are not able to control such matters at least try to decide which clients may have such fears and try to set their minds at rest at a fairly early stage in the interview.

### **(c) Your Manner**

It is important that your client talk freely and frankly, be reasonably calm, and trust your advice or statements. Therefore your manner must encourage all these states of mind. It must be friendly, courteous, mildly sympathetic, low-key, and appropriately responsive. You should avoid these bad habits:

- (i) Cutting off your clients.
- (ii) Trying to cross examine (in the first interview).
- (iii) Telling them what they want before they can tell you.
- (iv) Censuring their conduct.
- (v) Acting as though you do not approve of them or their stories in some manner.
- (vi) Acting as though the matters they relate are of an unusual degree of shameful.
- (vii) Using language difficult for some clients (e.g. words like "prior").

Indeed you may well have to go further and explain secrecy to clients who are unused to lawyers or who seem to distrust you. What they tell you will be kept secret and it is necessary to hear all the facts in an unvarnished manner. What you do in that regard will have to be tailored to the individual client. What the clients say may seem largely irrelevant to you but it will surely give clues as to their mental state and attitude. Besides, they think it is all relevant, and it might be more relevant than appears at first blush either as to the facts, or as to the basic mental attitude to the problem brought to you for solution.

In short try to imagine yourself in your client's shoes both as to general position in life and also in the particular problem, and *vis-à-vis* you, and try to guess what impediments to frank and free speech there may be and remove them.

### **(d) Barriers to Frankness**

There are many things which might cause a client to perspective client to be reluctant to speak freely and frankly with you. These are some of the most likely mental impediments:

#### **(i) Shame**

Many clients may fear that the facts to be related may directly or incidentally make them seem stupid or careless or hot-headed or lascivious. Or they may hesitate to tell you that their present motives are not disinterested, or are not purely financial. It is difficult to appreciate how frequent or deep are such feelings unless you have been in such situations yourself.

#### **(ii) Concealment Strategy**

Many clients feel that a secret is best kept by telling no one, including you. They believe that if you know they are guilty or liable you will lack interest in their case, or reveal the facts, or be inhibited in your defence of them. That attitude is all the more dangerous for being a half-truth, and careful explanation is often necessary to dispel it.

#### **(iii) Shyness**

You may be able to discuss your problems haltingly with your close family or best friend, but are you willing to tell total strangers, especially those who seem to be wealthy, educated, powerful, and disapproving. If you have just messed up an important matter through pure neglect, how would you like to fly to Toronto or New York and explain the facts to one of the top lawyers there? Particularly a lawyer of the other sex and very different age and personality? Imagine how your clients must often feel.

#### **(iv) Preconceived Ideas of Station or Role**

Very few clients have an accurate idea of the proper function of lawyer and client or the proper demarcation between the two. That includes many businessmen who have hired lawyers for years. Many clients may think that you are the boss and determine what to do and what to talk about. Or, they may think that they are. Neither view is really correct and you should each take a part in such discussions. But such mental states are often very hard to detect, particularly because they are in

considerable part not emotional and can beset very calm intelligent clients as well as ignorant excited ones.

(v) Painful Topics

Even matters which are in no way discreditable may be very unpleasant to remember or think about let alone discuss. If you don't believe that, ask yourself whether you have any files (or personal matters) which you dislike and tend to put off.

(vi) Ignorance

The lawyer wants to know everything relevant, but the client often does not know what is or is not relevant. Thus the client will often come to an interview without his papers or correspondence. Or the client may tell you that the accident was over two years ago but never think to mention that he or she has been under legal disability in the meantime or that a potential defendant has been overseas much of the time.

(vii) Distraction

One fault of many lawyers is that they can concentrate on only one problem at a time on a file and so often surmount six obstacles in sequence taking six months, rather than simultaneously in one month. Clients are the same. A large worry tends to drive smaller worries from our minds. A person being sued for prosecuted will not think of suing anyone else until the immediate threat is over.

(viii) Combinations

One of these factors operating alone can be difficult enough. But two or more combined can have synergistic effect of amazing power. What is more, mixed feelings or thoughts can be very difficult to recognize, untangle, or deal with.

### **3. THE OBJECTS OF AN INTERVIEW**

There are more of these than meet the eye at first. For a first interview probably all these aims are relevant.

- (a) To let the client see you and conclude he or she can try to trust you and use you.

- (b) To let you see whether you think you can and will act for this client.
- (c) To find the general nature of the problem
- (d) To elicit the facts which both lawyers and client think are relevant.
- (e) To find the client's goals and evaluate them.
- (f) To find all possible solutions from the client and the lawyer.
- (g) To evaluate them.
- (h) To hire the lawyer and set the terms of engagement.
- (i) To set the further tasks which lawyer and client must each perform.
- (j) To enable ready communication between lawyer and client in the future.
- (k) To let the client know what acts, delays, communications and silences are to be anticipated in the future.

Many of these aims are self-explanatory though even some of those are often overlooked. You may not think that the interview has all of those aims, but your client does. These expectations are reasonable and your client should not be disappointed.

Heading (e) requires more explanation however. No task can be understood (let alone performed) if its object is not known or is unclear or contradictory. Yet that is the hallmark of many lawsuits and negotiations and even some commercial ventures. Do not assume you know what the clients want. Ask. Maybe they want an apology not money. If their first choice is possibly not available find out the second choice, for life is the science of second (or third) choices. What is even more important is, consider that the answer you get may not be the final answer:

- (a) Clients may be reluctant to voice their true aims, out of shyness or shame, or a desire to please you.
- (b) Clients may not fully realize their real aims themselves. "It is not the money it's the principle of the thing" can mean many different things. "I want to collect every last cent from the rotten son of a bitch" probably means something having little to do with money.

- (c) The clients' aims may change when the mood evaporates or other interests emerge. Time heals all. The delays of litigation have more beneficial effects than are generally realized.
- (d) The advice that you (or a social worker, psychologist or chartered accountant) give the clients may alter the goals, either deliberately or otherwise.

#### **4. WHAT TO WATCH FOR IN AN INTERVIEW**

##### **(a) General**

Because information from humans is fallible and their goals are largely their own, you need to know what sort of a person you are dealing with. You do not interview a credit manager and a deserted spouse in the same manner or with the same objectives in view. Therefore all clues to personality and feelings are valuable.

##### **(b) Relevance**

Almost everything the clients say or do in the interview is relevant, if only as an indirect clue to their minds or their view of you. But a great many clues may be necessary, for most people act most of the time out of mixed (even contradictory) motives. Therefore you should not be in a hurry or cut off or discourage any chances to see or hear such behaviour, verbal or non-verbal. You may have to encourage the client to talk about feelings.

##### **(c) Truthfulness and Dependability**

It is very important in most cases to establish how reliable is the information given to you. All people distort things with great emotional content, some people deliberately lie, and most people repeat inaccurately things they do not fully understand. Some techniques for assessing reliability are as follows:

- (i) Elicit facts which you can check yourself later for accuracy of recollection, even by interviewing other witnesses.
- (ii) If need be, interview members of a family or a company separately.
- (iii) Encourage some repetition of the contentious parts of the story to see if the variations between telling are too small or too great (in number and type). (Either indicates the likelihood of untruthfulness.)

- (iv) Don't use leading questions or indications of approbation or disapprobation, or otherwise suggest the facts.
- (v) Delicately and subtly ask a few questions to cross-check on the information given to make sure there are no serious improbabilities or contradictions.

#### **(d) You**

The real scientific experiment is an observation which does not influence the thing observed, but that is rarely possible. The observer and the act of observation usually have their own influence, as much as opening the oven door to look at the cake which has just risen may cause it to fall. Therefore you have an influence on your clients and they will have one on you, and so on back and forth. You cannot and should not eliminate that but you should be aware of it and try to direct it into neutral and helpful channels. You may well have to find out from others what sort of an impression you make, particularly on different classes or people, so that you can modify this or allow for it.

### **5. HOW TO INTERVIEW**

#### **(a) Shut Up**

You can't present your case in court if the judge keeps talking and asking silly questions out of sequence about matters you were coming to or will turn out to be irrelevant. Your client finds your questions in the early part of the interview much the same. The hardest thing to do is nothing. Yet you must do it. Just let your clients tell their story. Don't greet it with stony and impassive silence, but little more than a nod or a murmur or word of encouragement is needed. Begin with loose open ended questions to put the client at ease and start him or her talking. The advantages of this approach are that:

- (i) You will not frighten or annoy your client.
- (ii) You will find out more about your client.
- (iii) You don't really know what questions to ask anyway.
- (iv) You often can't stop the client until he or she has blown off steam his or her own way anyway.
- (v) You don't really know yet what is or is not relevant

#### **(b) Be Flexible**

Adapt your approach to the particular client and subject matter and task at hand. You may have to change your approach as you get further into the interview.

### **(c) Questions by the Client**

This is not a cross-examination. Clients have an equal right to ask questions of you, but most are too shy to do so. Encourage them to do so, not only to put their minds at ease and give them information but also to get clues to their mental state and how well they follow anything you tell them.

### **(d) Notes**

When or how to take a record of the interview is one of the hardest questions. Some record is essential, for clients do forget and you certainly will. Besides you have to protect yourself from clients who lie or change their minds. Yet taking notes slows down a free expression of ideas, takes your eyes off the client, and may unduly inhibit or encourage the client. There is no ideal solution but some possibilities are:

- (i) Listening at first, then writing later
- (ii) Tape recording.
- (iii) Asking the client to go home and write out the story.
- (iv) Making skeletal notes at the time and expanding them after.
- (v) Dictating into a Dictaphone as you go along.

### **(e) Talk the Client's Language**

Make absolutely certain you and the client understand each other. Differences in mother tongue, age, temperament or education are very important. Few lawyers have a vocabulary which all clients can understand: would you readily grasp an orthopedic surgeon's report if it were read to you over the phone? Would you have grasped it readily before you went to high school?

This goes beyond language and vocabulary. You must use or understand attitudes which may be very different from your own because of differences between you. For example, suppose that you are a woman 28 years old who appears to be modern, liberated, educated, urbane, expensively dressed, and impatient and busy. Suppose your client is a man 65 years old, a Lithuanian immigrant farmer with little education or money, whose wife threatens to desert him. Suppose further that your client is all of those things but his dress, manner and speech do not make them very obvious. Indeed he looks at first like an ordinary city businessman. There will be real problems if you do

not make allowances for the differences between you, both real and perceived.

**(f) Watch for Omissions**

Just as emphasis on what to you seems unimportant may be significant, so may omissions be. If a person or a thing or a feeling is not mentioned though you would expect it to be, that probably means something. It may indicate negative feelings about it.

**(g) Watch Phrasing Carefully**

Repeated use of a phrase, a tense, a number, an adjective, or a gender may mean something. The past or the future tense may mean the situation at present is not as described. Sometimes *expression unius est exclusion alterius* (a partial list means omission of the rest). The client may have turns of speech or vocabulary which are idiosyncratic.

**(h) Watch Non-Verbal Communication**

Whole books have been written on this subject, and most of us are fairly adept at recognizing facial expressions though many lawyers will not take the time to do so. Children and the uneducated are often much more accustomed to reading such signs. Among the clues to be noticed are:

- (i) EYES: movement, pupil size, blinking, averting eyes
- (ii) VOICE: volume, timbre, sounds of strain, harshness or choking
- (iii) POSTURE: head angle, leaning forward or back, tension or relaxation
- (iv) INCIDENTAL ACTIVITIES: smoking, drinking coffee, doodling, fumbling with objects
- (v) ARMS: open, crossed
- (vi) HANDS: clenched, fidgeting, over face
- (vii) LEGS AND FEET
- (viii) DRESS: clues as to mood, social class, taste
- (ix) PALENESS, FLUSHING, PERSPIRATION, TREMBLING, HICCUPS

Similarly, be aware of the same thing in yourself. If you are tired, ill, tense, rushed or preoccupied your clients will be aware they are receiving negative signals and will wonder if they have done something wrong.

## (i) How to Question

### (i) Preliminary

We have given a few do's and don'ts above on this subject, but a few more connected observations are needed.

### (ii) Don't Discourage or Lead

Most questioning has to be delicately steered so as to avoid two opposite dangers. Too stony a silence may discourage or frighten the clients. But too warm and detailed a reception and questioning may raise false hopes or encourage embroidery of the clients' story. Indeed leading questions will often secure affirmative answers, whether or not they are really understood. Therefore much of the time you should use vague expression of mild encouragement, and requests such as "Go on" or "Then what happened?" It is dangerous to control the interview with narrow questions too soon, lest aspects of facts or attitudes be present which you do not see or suspect at first. Clients and types of file are **not** all the same.

### (iii) Then Zero in on Target

You cannot leave things vague and loose forever, though. Once clients have said their piece and you have done what you can to get them to talk freely and frankly and have a general idea of the problem, you must get them to be more specific. You will want to know more details of some items. And you will want to steer them away from excessive repetition or plainly irrelevant matters. However, even at this stage don't lead too much. You will have to use questions which you could not ask in court of your own witness (such as "Was the door open or closed then?) but do not suggest the answer if you can help it (e.g. don't say "Well the door must have been open by then mustn't it?"). Pressing too hard may lead clients to force their memories too far and to guess or reconstruct.

One proper use of a leading question may be to elicit information which the client would otherwise be too shy to reveal, such as adultery, dishonesty, neglect, or other misconduct. You may have to ask a question suggesting mildly that this existed in order to negate the suggestion that it is too shameful

to have occurred or be discussed. You might have to say “By then the two of you were having an affair?” or “He was letting you in on these under the counter payments too?” It is unlikely the client would agree with your suggestion if it were not so.

(iv) Be Tactful About Delicate Matters

Very often the matters which the client dislikes talking of are not directly on point. For example, you may want to talk about how the accident happened, not how the client held his injured daughter as she died. In such a case you can explain this and use questions directed to the relevant but less painful aspects and show that the client need not go into any (more) detail about the unpleasant matters.

(v) Leave Conclusions Until a Late Stage

It is unwise to ask a client (or witness) in the early stages of your discussion to form a conclusion such as whether someone’s conduct was reasonable, someone had knowledge or another state of mind, or whether someone was intoxicated. The answer to such a question may be ill-conceived, over-hasty, or based on shame, over-caution, or other emotion. Yet once given the answer will tend to colour the whole interview, especially the facts bearing on that aspect. It may be better to creep up on the matter step by step, especially if it will involve admission by the client (or witness) which is shameful or involves other emotions or strongly influences the strength of the case.

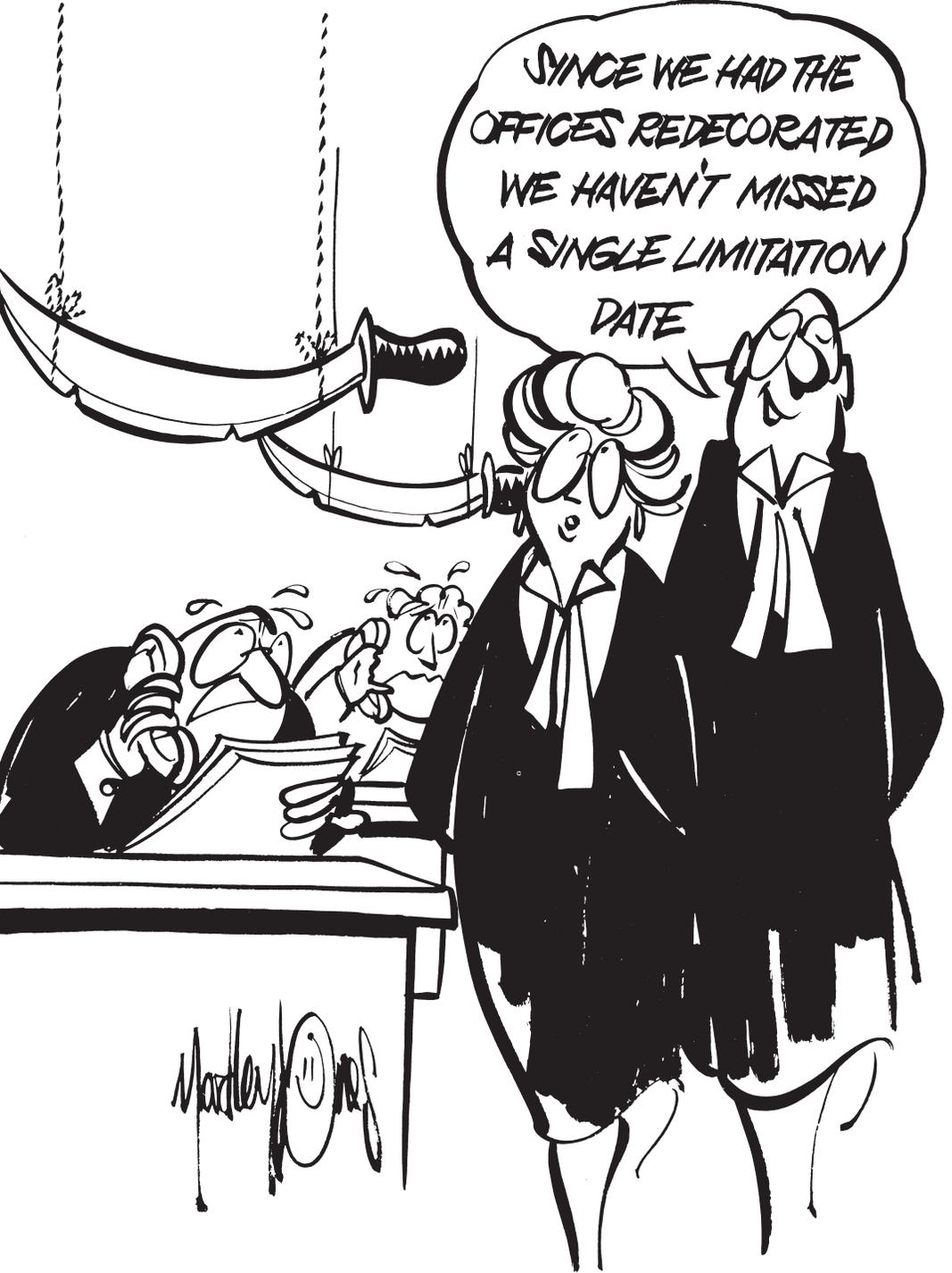
## 6. OTHER USES OF INTERVIEWING

The foregoing speaks throughout of interviewing clients or prospective clients. The techniques suggested here have to do with human beings and so are not confined to the lawyer-and-own-client situation. Many of the insights and suggestions given here should be of some use in some of these situations:

- (a) Interviewing witnesses
- (b) Interviewing prospective employees
- (c) Examining and opposing party for discovery
- (d) Leading evidence in chief at trial
- (e) Cross-examining a witness



SINCE WE HAD THE  
OFFICES REDECORATED  
WE HAVEN'T MISSED  
A SINGLE LIMITATION  
DATE



## LIMITATION DIARIES AND REMINDER SYSTEMS

In order to operate an efficient law practice it is imperative that the lawyer maintain a systematic control of all obligations. The pressures and volume of work, and the amount of detail simply do not allow a lawyer to rely on his or her memory no matter how good that memory is. A lawyer who seeks to rely on memory in order to meet the various obligations takes on an unnecessary burden and at the same time increases exposure to malpractice suits. Lawyers are responsible for the important affairs of other people and are expected by the public to discharge their duties in an efficient and timely fashion. Numerous benefits will naturally flow from an effective reminder system. A reminder system will:

1. Ensure that important dates, such as limitation periods, are not overlooked and thereby avoid possible financial loss to the client and the lawyer;
2. Keep the stream of office work moving systematically and efficiently. This will in turn:
  - (a) increase the lawyer's productivity and thereby increase income, and
  - (b) provide for a better solicitor/client relationship;
3. Allow time for proper preparation by bringing a matter to the lawyer's attention at a date sufficiently ahead of time to allow the lawyer time to do the work;
4. Permit the lawyer to keep on his or her desk only those files which require action on that given day. The lawyer can then remove everything from the desk except for the files which have come up for action on that given day. All other files should be removed from the lawyer's office and placed in filing cabinets. The lawyer then need not worry that something will be forgotten on a file because the file is out of sight. A reminder system will ensure that files will automatically come forward on the appropriate date for the necessary action to be taken. The lawyer will then find it far easier to set priorities because he or she need only organize in order of priority the tasks which have to be done on that given day. The clean desk policy will not only make it easier for the lawyer and assistant to locate files, it will be psychologically beneficial to the lawyer to know exactly what work has to be done that day. It is also well to remember that a sloppy office with a desk and credenza stacked high with files will not leave a client with a favourable impression. The objective is to leave the client with an impression of efficiency both in appearance and in fact;

5. Take away the strain and the worry which naturally flow from trying to keep things in your head. (The lawyer will be conserving energy and brain power for more important tasks.);
6. Allow the lawyer to schedule tasks to be done at any time in the future and to know with confidence that the system will bring the matter forward on the appropriate day;
7. Allow a lawyer at any time to determine what the workload will be at any future date and thereby assist in scheduling additional future commitments as well as scheduling vacations;
8. Allow the lawyer to assess priorities and to do work in the order of the priorities set; and
9. Save the lawyer's valuable time.

The particular type of reminder system employed is not as important as the maintenance of some system: any system, no matter how inefficient it may be, is better than no system at all. The prime consideration in choosing a system should be to adopt a system which suits the particular needs of your firm and your practice with a minimum of expense and disruption of your existing systems. In some instances it may mean trying out some of the various systems to determine which one best suits your needs. See the system of other firms or at least discuss with other lawyers the system they are employing. While you may not implement their exact system, you may find that the system can be adapted to your needs with a minimum of alteration.

Remember that it is you who must live with the system and it must therefore be one which you will be comfortable with. However, it is well to remember the natural resistance of human beings to change. The best test is a conscientious trial period: if you still don't like the system after you have conscientiously tried it out, go on to another one.

We have up to this point talked about a reminder system without differentiating between reminders for important dates such as limitation periods (commonly referred to as a "limitation diary") and reminders for less important dates, follow-ups etc. (referred to by many names but which for the sake of convenience we will merely call a "reminder system"). It is generally felt that this differentiation should be made and that an entirely separate reminder system should be set up exclusively to keep track of

the expiry of limitation periods. For this reason, we propose to deal with the two separately.

## **I. LIMITATION DIARIES**

A limitation diary is absolutely essential in a law office. A large percentage of claims against lawyers arise from limitation periods which have been overlooked. Since limitation periods are so important, it is felt that the limitation diary should be separate and apart from all other systems. There is a fear that combining the limitation diary with other systems increases the possibility of error and, as we all know there is no room for error when it comes to limitation periods, these errors can be very damaging to both the pocket book and to the lawyer's professional reputation. Some feel that there are other deadlines or dates which are sufficiently important that they should also be placed in the limitation diary. Some examples of these are appeal periods, the deadline for the exercise of an option, real estate closings, the deadline for taking the next step in an action, the renewal of chattel mortgages and conditional sales contracts, the renewal of writs of executions, etc. There are various types of limitation diaries, some more complex than others. In adopting a system one should look for the presence of the following characteristics:

1. The first step in any system should provide for the review of all new matters coming into the office to determine whether some limitation of time is involved. The exact day on which the limitation expires should be immediately ascertained and the appropriate entry made in the limitation diary;
2. The file itself should immediately be marked in some conspicuous manner to warn anyone handling the file of the limitation period;
3. The diary should be maintained by a responsible individual in the office, preferably a senior assistant;
4. The system should be a central system to ensure uniformity of procedure;
5. The system should be designed to give sufficient advance notice to allow sufficient time to perform the task required;
6. Reminders should continue at appropriate intervals until such time as some positive act stops the operation of the diary – the signature of the lawyer in charge is one desirable method;

7. There should be a uniform procedure established to introduce the information into the diary and also to notify the lawyer of the impending date. (Simple forms can be designed for this purpose);
8. There should be two completely independent systems so that they can serve as checks on one another. Usually this will mean a central system as well as a system maintained by the individual lawyer.

The following are four of the most commonly used systems:

(a) Book System

A loose leaf binder is set up with a separate page for each day of the year. Separate pages can also be set up for subsequent years without dividing those years into days. When the person in charge of the diary is notified of the limitation period, that person enters particulars of the file and the limitation on the page of the limitation date and at suitable intervals prior to the limitation period and thereafter at frequent intervals.

A desk diary can serve the same purpose as the loose leaf binder provided it is large enough and has sufficient space to make the necessary entries.

(b) Card Index

This consists of a desk card index tray with twelve "month" guides and two sets of "day" guides numbered 1 to 31. When the person in charge of the diary is notified of a limitation period, that person completes a 3" x 5" card showing particulars of the file and the limitation. The card is then placed behind the appropriate month and day. A second card (preferably of a different colour) is then prepared with the same information and this card is then placed in the tray so that it will come up at a suitable time prior to the expiry of the limitation period. The card keeps going back into the tray so that it recurs at frequent intervals and until the diary keeper is informed that the necessary action has been taken. The advantage of this system is that as the file keeps recurring in the system the same card is being used. Under the book system the diary keeper must keep entering particulars of the file and the limitation period on the appropriate page. The disadvantage however, is that it is easier to misfile a card and therefore there is more possibility of error.

## (c) Desk Diary

Under this system the lawyer simply makes a notation of a file and the limitation under the appropriate date in the desk diary. Additional entries are made so that the file will come up sufficiently ahead of the limitation date to allow sufficient time to do what is required and thereafter for short intervals until the necessary action has been taken. As a safeguard, the lawyer can also have an assistant make identical notations in his or her desk diary. Under this system there is the disadvantage that the limitation diary gets mixed in with appointments and dates and deadlines of lesser importance. Some people are also of the view that the system is not sufficiently formal to ensure a rigid adherence.

## (d) Electronic Calendaring System

A computer-based limitation diary is becoming the default choice in many law offices. While in some offices, it may provide the backup to one of the paper-based systems described above, in other offices, the electronic calendar will be the primary system in use.

When notified of a limitation date in respect of a particular matter, a staff member responsible to maintain the electronic diary system enters the appropriate data into the system, including the limitation date and reminder dates set at suitable intervals prior to the limitation period.

These dates may also be noted in the individual lawyer's electronic or paper diary, which will be supplemented with printed reports or electronic reminders from the central system provided to lawyers on a weekly, daily or other basis.

One advantage of an electronic system over a paper-based system is that reminder notifications can be set for delivery to any number of persons within the firm, whether via email or other internal messaging system, and these reminders can typically be set to repeat at specified intervals until the limitation date arrives, thus ensuring that more than one person is keeping an eye on the relevant limitation periods.

**II REMINDER SYSTEMS**

(also known as ticklers, calendars, follow-up, come-up, recall, etc.)

There are several types of reminder systems that are in use, some of which are extremely simple while others are extremely complex. Again there is no magic in the system, there is no ultimate system and a lawyer should choose a system which

suits his or her needs. The prime requirement for a reminder system is that it be rigidly adhered to so that its use becomes second nature to the lawyer and the assistant. The system is merely a technique for jogging the memory and it should be frequently evaluated and adapted to the constantly changing needs of the lawyer's practice.

In addition to a reminder system, there are other procedures which can be followed to serve as additional safeguards in ensuring that important dates are not overlooked or that work is left undone:

1. Someone in the office should be responsible to obtain and review on a regular basis the various court lists (Chambers, trial, appeal, etc.). Cases appearing on the list should immediately be brought to the attention of the lawyer in charge. This responsibility is usually assigned to the articling student or to one of the junior lawyers.
2. A very good practice is for the lawyer to review on a regular basis all of the files in the file cabinets. By doing so, the lawyer will ensure that files have not been overlooked as a result of a slip-up in the reminder system.
3. Files should also be reviewed in a reasonably thorough fashion prior to being closed out to ensure that everything which was supposed to have been done has in fact been done. Ideally, the lawyer in charge of the file will do so relying upon a file closing checklist. As soon as a file has been completed it should be reviewed using the appropriate checklist, closed out, and put in storage. It is difficult enough to keep track of your current files without having them mixed in with files that are closed.

A lawyer who is efficiency-minded will be constantly alert to possible improvements in office procedures. He or she will look for methods of increasing the quality as well as the quantity of work, to the benefit of both the lawyer and the client.

The following is a brief summary of the most commonly used reminder systems:

(a) File Notation System

With this system the lawyer indicates in the file what it is he or she is waiting to receive and waiting to do. The majority of items that need follow-up are described in correspondence and a note is not required. If the lawyer

however feels he or she may not remember what it is that will have to be done he or she merely makes a brief notation on the last correspondence or places a brief handwritten note on a piece of note paper which is placed on the file.

In some cases, there may be numerous things which the lawyer is either waiting for or waiting to do. In such case there may be a typed memorandum on file setting all of these out. As the work is completed, each item is crossed out. Under this system the lawyer looks to the file for the reminder of what has to be done. In some cases this may be accomplished through the use of checklists.

When the lawyer is finished with the file he or she notes on the outside file cover a date on which the file should be returned for action. The assistant will then make note of the bring-forward or tickler date in the office reminder system. Such systems may be as simple as a notation of the date in either a desk diary or an electronic calendaring system.

Some firms rely on a card filing system in which each file has a corresponding file card upon which bring forward dates are noted and then filed accordingly in one of 12 monthly folders and two sets of daily sub-folders labelled 1 – 31. When the reminder date has been noted, the file is returned to the appropriate cabinet and the recall card is filed in the card index tray behind the appropriate month and day. Each day the assistant pulls the files which have come up in the recall box for that day.

#### (b) Personal Diary System

Some law offices rely upon the diaries or calendaring systems of individual lawyers instead of a central reminder system. When the lawyer has completed work on a particular file, a reminder date for follow up or further action is entered into that lawyer's personal desk diary or electronic calendar. Upon doing so the file is returned to the assistant for filing.

A specific notation as to what follow up action is required may go in the file or on the calendar. The assistant is responsible to review the calendar daily and pull those files noted for each day for review and/or action by the lawyer.

This is a simple and easy to use system, particularly with an electronic calendar that is shared with or accessible by the assistant but requires notation of sufficient information to identify the files.

(c) The Tickler System

With this system the lawyer does not look to the file as a reminder what has to be done or what he or she is waiting for. Each matter which has to be done or followed up is entered on a 3" x 5" index card with the date on which the matter must be done or followed up. Some firms use 3" x 5" paper instead of cards because paper will be less bulky when placed in the index tray.

The assistant then has a desk card index tray with twelve "month" guides and two sets of "day" guides numbered 1 to 31. The assistant places the reminder cards behind the appropriate month and day. In order to avoid having too bulky a system, the assistant at any one time keeps only one or two months separated into days. Each day the assistant pulls the reminder cards for that day and gives them to the lawyer. The lawyer can then have the assistant bring whatever files are to be attended to that day. In some cases the lawyer will be able to give the assistant immediate instructions without even seeing the file.

One variation of the tickler system provides what is called a letter tickler. A letter tickler is made up of extra copies of correspondence placed in dated file folders, one folder for each date of the month. The copies are pulled as each day arrives to remind the lawyer of what has to be done or followed up. For matters which have been promised verbally, a card tickler is also maintained.

(d) Client and File Management System

A client and file management system refers to a more complex computer-based system that functions not only as a reminder and limitation diary, but also provides the necessary mechanism for communication and regulation of work flow throughout the office. It is a central form of system consisting of a number of integrated systems which together control virtually every aspect of the law practice. Such systems may be based on commercially available software developed for law offices, but also may be specifically tailored to the needs of the individual firm. Such a system, by virtue of its comparative complexity is more difficult to implement and more expensive to maintain but the benefits achieved as a result of efficient case control, scheduling and planning, make it a worthwhile effort for firms of virtually any size.

