THE ADVOCATES' SOCIETY SYMPOSIUM ON PROFESSIONALISM

A LAWYER'S DUTIES TO CLIENTS AND WITNESSES

Linda Plumpton and Peter Henein*

Introduction

Some consider the duty owed by a lawyer to his or her client to be paramount over all others. In the famous words of Henry Brougham: "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty".[1] In Canada, this perspective is not the prevailing view. Nor is it consistent with a robust understanding of lawyer professionalism. While lawyers must pursue the interests of their clients "resolutely", within the bounds of the rules and law, and to the best of their abilities, the duty to clients must exist alongside and find harmony with the myriad other duties that collectively embody the concept of professionalism.

In this paper, we first discuss the scope of the duty to clients, and some limits placed upon it. We then highlight areas in which the need to balance the duty to client with other duties is the subject of current debate. Finally, we discuss the scope of the duty to witnesses.

Scope of the Duty to Clients

The title of this paper and workshop aside, there is no single duty owed by lawyers to clients. Lawyers owe clients many duties which overlap and occasionally conflict. The content of the duty to clients comes from a variety of sources, including case law, rules and commentaries, and academic writing. In our jurisdiction, the principles expressed in the Law Society of Upper Canada Rules of Professional Conduct (the "Rules") and the Canadian Bar Association's Code of Professional Conduct (the "Code") are the primary (but not only) source for an analysis of these duties, the most significant of which are discussed below.

---

* The authors gratefully acknowledge the assistance of Emily Kirkpatrick of Torys LLP in the preparation of this paper.

[1] *Trial of Queen Caroline* (1821), by J. Nightingale, vol. II, The Defence, Part 1, at p. 8, quoted in *R. v. Neil* [2002] 3 S.C.R. 631 at para 12.

Duty of Competence[2]

The lawyer owes the client a duty to be competent to perform legal services undertaken on the client's behalf. Lawyers must be knowledgeable, skilled and capable in the areas of law in which they practice. The duty of competence not only protects individual clients, but also the reputation of the legal profession. Lawyers who act in areas where they lack competence not only breach their obligations to their clients but bring discredit to the profession in general. Clients are entitled to assume that their lawyer has the capacity to adequately address the legal matters that the lawyer undertakes on the client's behalf. A lawyer has a duty not only to know the law and procedure relevant to the client's matter, but to use each effectively in the furtherance of the client's interests.

Duty of Honesty and Candour[3]

A lawyer must be honest and candid with a client at all times. A client is entitled to receive clear, undisguised and open advice, reflecting the lawyer's honest belief – informed by experience and expertise – regarding the merits and probable result in a matter. Professionalism requires that lawyers be wary of overstatement and not give bold or overly confident assurances, particularly when the lawyer's employment depends on advising in a certain way. Where appropriate, lawyers should encourage settlement and the use of alternative dispute resolution mechanisms, and should discourage clients from undertaking useless or unnecessary legal proceedings.

The lawyer is also obliged to disclose to his or her client all information he or she receives pertaining to the matter for which he or she was retained. Without specific instructions, a lawyer cannot receive information, such as a medical-legal report from a physician or health professional, on behalf of a client without sharing that information with the client.[4]

---

[2] *Rules*, r. 2.01; Code, Ch. II, Rules 1 and 2.
[3] *Rules*, r. 2.02; Code, Ch. III.
[4] *Rules*, r. 2.02(7).

Duty of Confidentiality[5]

Subject to a few exceptions, the duty of confidentiality prohibits a lawyer from revealing, at any time or in any circumstance, any and all information obtained by the lawyer during the course of his or her relationship with the client. The duty covers all information, whether or not relevant to the matters for which the lawyer was retained, and whether or not received from the client or from a third party. The duty extends even to the fact of having been consulted or retained by a person. It survives the lifespan of the professional relationship between the lawyer and client. It survives even the death of the client.

This extraordinarily broad duty is a cornerstone of the lawyer-client relationship. Its purpose is to engender trust and open communication between the client and the lawyer. In this sense, it is closely related to the duty of honesty and candour. These two duties together ensure that clients can be confident that lawyers will communicate to them, and only to them, all information relevant to the lawyer-client relationship.[6]

The importance of the duty of secrecy and confidentiality to the preservation of trust and confidence in the legal profession is difficult to overstate. The near absolute nature of solicitor-client privilege instills public confidence in the lawyer-client relationship, and in the administration of justice in our adversarial system. To maintain this confidence, lawyers are discouraged from discussing client affairs, even on a "no names" basis. Lawyers ought not to be perceived by the "overhearing public" as being indiscreet about client confidences.

Duty Not to Withdraw[7]

In Canada, the obligation placed on a lawyer to agree to represent a given client is relatively limited.[8] Once engaged, however, the lawyer may withdraw only where permitted under the

---

[5] *Rules*, r. 2.03; Code, Ch. IV.

[6] Note, however, that where a lawyer has knowledge of confidential information from one client that is relevant to a matter involving another client, the lawyer's duties of confidentiality and candour may come into conflict. In such cases, the lawyer may have to decline or resign from a retainer.

[7] *Rules*, r. 2.09.

[8] Some commentators have advocated greater focus on lawyer's professional obligations in the context of client selection. See Earl Cherniak, Q.C. and Shelby Austin, "Standing for Justice: The Lawyer's Role in the Client Selection Process".

applicable rules.[9] These circumstances vary across jurisdictions. In British Columbia, it is sufficient that the withdrawal be neither unfair to the client nor done for an improper purpose.[10] In Ontario, a higher bar is set – a lawyer may not withdraw except for good cause and upon notice.[11]

The lawyer's duty not to withdraw his or her services helps foster a lawyer-client relationship based on openness and trust. It ensures that, absent unusual circumstances, the client may feel confident that he or she will not be left without legal representation for reasons such as the lawyer's personal feelings about information disclosed by the client. For this reason, the duty not to withdraw is particularly important in the criminal law context. So much so, in fact, that in several Canadian provinces (including Ontario), the court retains the power to refuse to allow a lawyer to withdraw his or her representation of a client in a criminal matter.[12]

The Lawyer as Advocate[13]

The Rules and the Code express the overarching duty of a lawyer as advocate in similar terms. A lawyer shall represent the client resolutely and honourably within the limits of the law. Rule 4.01(1) adds an additional requirement that elevates the duty to the court to equal or near equal footing with the duty to client. In representing the client, the advocate must also treat the tribunal with candour, fairness, courtesy and respect.[14] In accompanying commentary, the Rules and the Code cite similar guiding principles:

> The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.

---

[9] Withdrawal may be mandated where, for example, the continuance of the relationship would involve the lawyer assisting the client in the furtherance of dishonest or illegal conduct. For this and other examples see *Rules*, r. 2.09(7).

[10] *Professional Conduct Handbook*, The Law Society of British Columbia, r. 10(3).

[11] *Rules*, r. 2.09(1).

[12] In addition to Ontario, leave of the court is also required in Alberta, Manitoba and Saskatchewan.

[13] *Rules*, r. 4.01; Code, Ch. IX.

[14] The Code refers to this same requirement in commentary.

Adversarial proceedings are necessarily partisan. The lawyer is generally not obligated to assist an adversary or advance issues that are unhelpful to a client's case. But when acting as advocate, the lawyer must still maintain independence and avoid identifying too closely with the client's cause by, for example, expressing a personal opinion to the tribunal on the merits of a client's case.

In the advocacy context, the lawyer's duties to his or her client and to the court must co-exist and occasionally may conflict. The professional conduct rules attempt to address these areas of potential conflict by prohibiting lawyers from engaging in certain specific practices. For example, when acting as an advocate, among other things, a lawyer shall not do the following:

- Institute proceedings which, although legal, are motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party.
- Knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable.
- Knowingly misstate facts or law, the contents of documents, the testimony of witnesses, or the substance of an argument to a tribunal.
- Knowingly assert a fact as true when its truth cannot reasonably be supported by the evidence.
- Deliberately refrain from informing the tribunal of binding authority that the lawyer considers to be directly on point and that has not been mentioned by opposing counsel.
- "Needlessly" abuse, hector or harass a witness or inconvenience a witness.

If a client wishes to adopt a course that would involve the above conduct, the lawyer should refuse and do everything reasonably possible to prevent it. If the client persists, the Rules provide that the lawyer should withdraw or seek leave to do so.

The content of the duty owed by a lawyer as advocate depends on the role played by the lawyer, particularly in the criminal law context. A lawyer acting as prosecutor owes duties to the public and to the administration of justice. The prosecutor's prime duty is not to seek a conviction, but

to present all available credible evidence in order that justice may be done through a fair trial on the merits. Prosecutors owe a duty to exercise the broad discretion bestowed upon them in a manner that is fair and dispassionate.

In contrast, the duties owed by a lawyer defending an accused person lie at the most partisan end of the spectrum. The defence lawyer is to protect the client from being convicted except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction. The lawyer may rely on any evidence or defences in support of the client's cause, including so-called technicalities, notwithstanding the lawyer's private opinion on credibility or the merits. A lawyer is constrained, however, where admissions are made by the accused to a lawyer. A lawyer may not suggest that some other person committed an offence or call evidence which, by reason of admissions the lawyer believes to be true and voluntary, the lawyer believes to be false.

In civil litigation, partisanship and adversarialism have their limits. The commentary to Rule 4.01(1) states that a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, or from attempts to gain advantage from slips or oversights not going to the merits, or from tactics that will merely delay or harass the other side – all practices that can bring the administration of justice and the legal profession into disrepute.

In the United States, the ABA Model Rules adopt a somewhat different approach to the duty of the lawyer as advocate. The duty of a lawyer to both the client and the legal system under the Model Rules is to represent the client zealously within the bounds of the law. Where the bounds of law are uncertain, however, the nature of a lawyer's duty may depend on whether the lawyer is serving as advocate or adviser. The two roles are considered differently under the Model Rules. An advocate deals mostly with past conduct and must take the facts as they are. An adviser primarily assists the client in determining the course of future conduct and relationships. The Model Rules provide that a lawyer serving as advocate should resolve any doubts as to the bounds of the law in favour of the client. When serving as adviser, a lawyer should give his or her professional opinion as to what the ultimate decision of a court would likely be as to the

applicable law.[15] The rules of professional conduct in Canada generally draw no such distinctions.

Duty to Avoid Conflicts of Interest[16]

The Rules and the Code deal extensively with the requirement that lawyers avoid actual or apparent conflicts of interest in carrying out their duties to clients. The duty to avoid conflicts has a number of aspects as described below:

- Acting on both sides of a dispute is strictly prohibited, even if the client consents. This strict rule is based on the understanding that a lawyer is not capable of adequately discharging his duties to either side of a dispute if he has been retained to act for both.
- A lawyer may act against a former client only in matters wholly unrelated to the work for which the lawyer was retained by the former client, and only where all confidential information previously obtained with respect to the former client is irrelevant to the new matter. In all other circumstances, the lawyer is prohibited from acting against the former client without consent.
- A lawyer may only act for multiple parties in a matter if the parties make an informed decision to consent, based on adequate disclosure from the lawyer. Where the clients involved are relatively unsophisticated, independent legal advice may be needed before an informed decision can be made. Once retained, the lawyer must not keep any information received in connection with the matter confidential as between the joint clients. If a conflict subsequently arises between the parties, the lawyer may not continue to act for both.
- In order to enter into commercial transactions with a client, the lawyer must ensure that the client had independent legal advice or it must be clear that the absence of such advice did not prejudice the client. In Ontario, independent legal advice is mandatory in such circumstances.

---

[15] ABA Model Rules, Canon 7, EC 7-3.

[16] *Rules*, r. 2.04; Code, Ch. V-VI.

- Where the lawyer and client are involved in a sexual or intimate personal relationship, there may be a risk that the lawyer's ability to exercise independent judgment and to fulfill his or her other duties to the client are compromised. Although lawyers in Ontario are not precluded from acting for a person with whom they have a close personal relationship, lawyers must carefully consider a number of factors before accepting or continuing a retainer, including the vulnerability of the client, the power imbalance that may arise and the possibility that the relationship may jeopardize the confidentiality of the lawyer-client relationship or interfere with the lawyer's obligations to the court and to the administration of justice..
- Where a lawyer transferring to a new firm has relevant information respecting a client from his old firm who is involved in a matter with a client of the lawyer's new firm, and the clients' interests conflict, specific obligations arise. In particular, if the lawyer is in possession of confidential information that, if disclosed to the new law firm, could prejudice the client of the old law firm, the new law firm must withdraw from representation of its client.
- Although in some cases, conflicts of interest can be neutralized by disclosing the conflict to the client and receiving the client's consent to continue acting, consent alone may not be enough in all situations. In some cases, independent legal advice will also be required to adequately protect the client. In other cases (such as where the lawyer acts for both sides of a dispute) no amount of disclosure or consent will suffice to neutralize the conflict. In these situations, the lawyer must withdraw.

Duty of Loyalty

As the above discussion illustrates, the rules of professional conduct tend to adopt a compartmentalized approach to the duty to client. Most if not all of these duties, however, are aspects of the duty that very much defines the lawyer-client relationship – the duty of loyalty. In the view of some commentators, loyalty is the *sine qua non* of professionalism.[17] In *R. v. Neil*,

[17] Richard Devlin and Victoria Rees, "Beyond Conflicts of Interest to the Duty of Loyalty: From *Martin v. Gray* to *R. v. Neil*" (2005) 84 Canadian Bar Review 434 at 443.

the Supreme Court of Canada confirmed that the duty of loyalty includes at least the following aspects:[18]

(a) the duty of confidentiality;

(b) the duty to avoid conflicting interests;

(c) a duty of commitment to the client's cause (referred to sometimes as "zealous representation") from the time counsel is retained; and

(d) a duty of candour with the client on matters relevant to the retainer.

Some Limits on the Duty to Clients

Mandatory or Permitted Disclosure of Confidential Information

Notwithstanding the duty of confidentiality (and any other duties that may be engaged), there are circumstances in which a lawyer may be required or permitted to disclose confidential information in his or her possession. These include:

- Disclosure necessary to comply with a statute or court order. The lawyer must take care, however, to disclose only what is strictly necessary, and no more, in order to balance his own legal obligations with his ethical duty to the client.[19]

- Disclosure where a lawyer has reasonable grounds to believe that the risk of death or serious bodily or psychological harm to an identifiable person or group is imminent. As with disclosure where required by law, only the information necessary to prevent death or harm may be released.[20] In Ontario, the commentary to Rule 2.03(3) recommends that a lawyer apply to the court for an order that he disclose information in these circumstances.[21]

- Disclosure where it is alleged that the lawyer or his or her associates are guilty of a criminal office in respect of a client matter, or civilly liable in respect of a client

---

[18] [2002] 3 S.C.R. 631 at para. 19 ("*Neil*").
[19] *Rules*, r. 2.03(1).
[20] *Rules*, r. 2.03(2).
[21] *Rules*, r. 2.03(3).

matter, or guilty of malpractice or misconduct. The lawyer is permitted to disclose confidential information to defend against those allegations.[22]

Avoiding Being a Tool or Dupe of Unscrupulous Persons

A lawyer has an obligation to never assist in or encourage any dishonest or illegal conduct, or instruct the client on how to avoid legal penalties.[23] Lawyers are also prohibited from bringing or threatening to bring criminal or quasi-criminal prosecutions in order to secure civil advantages for their clients.[24]

Client Under Disability

Many of the duties encompassed under the lawyer's duty to client assume the existence of an exchange of ideas between the lawyer and client, and the client's ability to instruct the lawyer on the basis of the client's own decisions. Where, by reason of age, intelligence, experience, health or similar factor, the client is unable to make decisions, the client is considered to be under a disability. In this case, the lawyer's obligation is to maintain, as far as possible, a normal lawyer-client relationship. Where that is not possible, the lawyer's obligation is to ensure that the client's interests are preserved[25].

Getting the Balance Right

Canadian lawyers clearly have ethical and professional obligations that extend beyond their clients' interests. Nevertheless, as the Supreme Court confirmed recently in *Neil*, the requirement of zealous representation remains an integral part of the duty of loyalty owed to clients. In considering the meaning of professionalism in the context of the duty to clients, the primary challenge is to determine how to balance this duty with the other duties owed by lawyers – to the court, to witnesses, to the individual lawyer, to the administration of justice, to opposing counsel, and to society at large. Some areas requiring particularly careful consideration, including areas in which these duties may come into conflict, are highlighted below:

---

[22] *Rules*, r. 2.03(4).
[23] *Rules*, r. 2.02(5).
[24] *Rules*, r. 2.02(4).
[25] *Rules*, r. 2.02(6).

Discovery Tactics

Discovery abuse has become one of the most vexing problems facing the judicial system today. Exhaustive examinations for discovery lasting for days on end; information "dumps" in which clients produce huge volumes of documents of limited relevance to the issues in the case in an effort to swamp the other side in paper or electronic data; unnecessary motions on undertakings and refusals; obstreperous behaviour by lawyers who make groundless objections to legitimate questions – all of these tactics are unfortunately common, resulting in increased cost and unnecessary delay across the judicial system. While clients may gain short-term advantages when their counsel engage in this conduct, it reduces the efficacy of the adversarial system and over the long-term, as noted in the commentary to Rule 4.01, harms the administration of justice and risks bringing the profession into disrepute. Cooperation between counsel is necessary for matters to proceed expeditiously to trial and for pre-trial discovery to be meaningful. This is an area where the lawyer's duty to the court and to the administration of justice must be given equal, if not greater, weight than the duty to client.

Civility

It is unacceptable in our system of justice for lawyers to dispense with civility in the interests of pursuing their client's goals "by all means and expedients". As the Ontario Court of Appeal noted in *R. v. Felderhof*, "professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client".[26] Civility maintains the dignity of the profession and contributes to the continuation of a just society. Uncivil conduct, in contrast, impedes the goal of efficient conflict resolution, in turn delaying or even denying justice.[27] As with abusive discovery tactics, uncivil, disrespectful and insulting behaviour by counsel in the courtroom diminishes the public's respect for the court and the administration of justice and risks undermining the legitimacy of the results of the adjudicative process, to the detriment of all litigants and the profession in general. This does not mean that counsel should retreat from the "fierce and fearless pursuit" of their client's cause: Hard fought litigation is after all not a "tea party". However, counsel must at all times balance their vigorous, zealous representation of their client's

---

[26] (2003), 68 O.R. (3d) 481 at paras. 83-84 (C.A.).

[27] Kara Anne Nagorney, "A Noble Profession? A Discussion of Civility Among Lawyers" (1999), 12 Georgetown Journal of Legal Ethics 815 at 816-17, as cited in *Felderhof*, note 26 at para. 83.

interests with their responsibilities as officers of the court. Professionalism requires that counsel represent their clients responsibly, civilly and with integrity.

Unrepresented Litigants

For cost and other reasons, the number of unrepresented litigants active in the justice system is increasing. What impact, if any, does it have on the professional obligations of a lawyer where an opposing litigant is unrepresented? In certain circumstances, it may be in the interest of a client to have his or her lawyer take advantage of a litigant who lacks counsel solely on the basis that they have no representation. To do so, however, would be contrary to the lawyer's duty to the court and to the administration of justice. While a lawyer facing an unrepresented litigant should not have to advance his or her client's cause any less "fearlessly", special care needs to be taken by the lawyer to assist the court in applying principles of justice and fairness. A lawyer may be under a higher standard of conduct as an officer of the court in the presence of an unrepresented party. Duties already provided for under the Rules, such as to present unfavourable authority, draw the court's attention to relevant legislative provisions or ensure that evidence is not misstated, take on even greater significance.[28]

The Independent Advocate and the Role of Personal Morality

How can a lawyer agree to act or continue to act for a person whose cause the lawyer finds morally repugnant? The traditional model of "zealous advocacy" leaves little room for a consideration of lawyers' own moral preferences. Lawyers are to maintain independence from their client's cause and keep their personal moral opinions separate from the actions undertaken by their clients:

> As an advocate you are the legal representative of your client, not his general agent, or public relations adviser. The advocate should not identify himself or herself with the client's cause. The advocate speaks for the client in court, as a professional representative, not as a partisan…The public perception that there is this "distance" between advocate and client may make it easier for us to take on unpopular causes. But whether that is so or not, it

[28] Thomas G. Heintzman, O.C., Q.C., "Ethical Issues Relating to Lawyers and Unrepresented Litigants in the Civil Justice System", Papers from the 9th Colloquium, October 2007, online at http://www.lsuc.on.ca/latest-news/a/hottopics/committee-on-professionalism/papers-from-past-colloquia.

> provides an honourable basis on which we can give our professional services to a client whose integrity we doubt, whose cause we see as damaging to persons who may have our sympathy and whose conduct we regard as contrary to the public good.[29]

Some academic commentators have recently argued, however, that the traditional approach to the representation of clients in causes the lawyer finds distasteful or morally wrong does not take adequate account of the needs and aspirations of lawyers, and the duty of integrity that lawyers owe as a component of professionalism.[30] The writers are of the view that, once retained, it is not the role of the lawyer to make personal judgments about the morality of a client's cause but to represent the client to the best of the lawyer's abilities within the boundaries of the law and the rules of professional conduct.

Scope of the Duty to Witnesses

For reasons that are readily apparent, there is substantially less commentary on the duty lawyers owe to witnesses than the duty to clients. The scope of the duty itself is considerably more narrow. Our adversarial system depends on the lawyer adopting a partisan attitude in favour of his or her client's cause, and resolutely advocating in his client's best interests. Without counterbalance, the duty to clients could lead to circumstances in which a witness is subject to abuse and public confidence in the administration of justice is subverted.

Professionalism in the context of the duty to witnesses means, at a minimum, complying with the principles contained in the rules of professional conduct:

- An advocate must not "needlessly" abuse, hector, or harass a witness.[31]
- A lawyer may seek information from any potential witness but shall disclose the lawyer's interest in so doing.[32]

---

[29] Sir Sydney Kentridge, K.C.M.G., Q.C., "The Charles L. Dubin Lecture", (Winter 2001) 20 Advocates' Soc. J. No. 3, 16-23.

[30] Trevor C.W. Farrow, "Sustainable Professionalism", (2008) 46 Osgoode Hall L.J. 51 at paras 76-81; Alice Woolley, "Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer", (1996) 9 Can. J.L. & Juris. 6.

[31] *Rules*, r. 4.01(2)(k).

[32] *Rules*, r. 4.03.

- A lawyer shall take care not to subvert or suppress any evidence or procure a witness to "stay out of the way".[33]

- A lawyer should not approach or deal with a represented party save through or with the consent of that party's lawyer.[34]

- A lawyer should not permit a witness to be presented to the court in a misleading way.[35]

- A lawyer should treat witnesses, as well as other counsel and the court, with fairness, courtesy and respect.[36]

The Rules also prohibit a lawyer from trying to "influence the course of justice by…suppressing what ought to be disclosed".[37] As Gavin MacKenzie notes in his recent article "The Ethics of Advocacy", this requirement may create ethical challenges for lawyers in the preparation of a witness to give testimony. In preparing witnesses, lawyers necessarily must probe and test their memories, direct their attention to certain facts and documents and focus their attention on the specific issues that are relevant to the case. Although there is no prohibition against asking leading questions when interviewing witnesses, lawyers still need to be cautious in framing questions. Witnesses' recollections of events may be influenced unwittingly by the form and content of lawyers' questions and "there is a fine line between what you can properly do to influence a witness's evidence and what may influence it improperly".[38]

---

[33] *Rules*, r. 4.03.
[34] Code, Ch. IX, commentary 6.
[35] Gavin MacKenzie, "The Ethics of Advocacy", (Autumn 2008) 27 Advocates' Soc. J. No. 2, 26-27 at para. 17.
[36] *Felderhof*, note 26 at para. 96.
[37] *Rules*, r. 4.01(2)(e).
[38] MacKenzie, note 35 at para. 22.

APPENDIX A

Sample Fact Scenarios

The following fact scenarios are drawn from the American College of Trial Lawyers' *Trial Ethics Teaching Programme – Canadian Manual, 2005*.

Scenario 1:

A significant client of the law firm of which you are senior partner, who is also a friend, is served with a claim in which the plaintiff seeks money owed and interim relief, including a writ of attachment on some of the client's assets. The client tells you he owes the money and has no defence to the action but needs to delay for as long as possible because an immediate judgment would cause personal and financial ruin and extreme embarrassment. He expresses hope that other pending business deals will enable him to pay his creditors in due course, and he asks you to do everything you can to stall, to defeat the claim for interim relief, and to delay judgment until he can get his affairs in order.

Assume the same facts, except that you are a fifth year associate in the firm and will be reviewed for partnership in six months. A commercial partner who is on the firm's Management Committee relates the client's problems and instructs you to handle the matter.

In each case, what do you do?

Scenario 2:

You are a junior Crown Prosecutor handling a sexual assault case against a teacher for conduct that occurred 15 years ago. Negotiations have been proceeding for several months toward a guilty plea that will satisfy the complainant and her family. You know from your discussions with defence counsel that the accused is very remorseful and willing to accept a sentence of the type under negotiation. Near the end of negotiations, but before any agreement for a joint submission has been made, you learn that the complainant, who is the only witness against the

accused, suffered an injury that significantly affected her memory and ability to testify about the events in question.

Are you under an obligation to disclose this change in circumstances?

Scenario 3:

You are retained by a client in a product liability matter involving a relatively new product. You think the case has potential merit and could lead to many other consumers retaining you or even become a significant class action. You conduct a confidential investigation and learn things that lead you to believe the product is defective and the case has significant merit. Before you actually file the action for the client or do anything toward making it a class action, the manufacturer hears about your investigation and offers a very substantial sum to settle with your client, with a generous cost component, if you take no further action against the manufacturer, destroy your investigative file, and communicate to no one about it. The client is pleased with the settlement offer and is willing to accept the money.

Can you accept the manufacturer's offer?

Scenario 4:

You represent the defendant in a very contentious commercial dispute in which there have been numerous discovery motions and production of documents. Settlement negotiations have been proceeding and there is every reason to think that settlement can be achieved at a sum that your client is willing to pay.

While these negotiations are going on, your client gives you a new box of documents which appear to be adverse to your client's case and could therefore affect the plaintiff's position on settlement. The client is adamant that you complete the settlement before plaintiffs make a specific request on discovery that requires their production.

Can you complete the settlement without producing these documents?