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Legal Ethics & Financial Issues: Navigating Choppy Waters With Integrity[1]

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1. Introduction

At first blush "legal ethics" and "financial disclosure" sound like mutually exclusive concepts. Clients come for help with their parenting and financial disputes but they also want, very much, to "win".[2] Often, in the client's mind, the way to achieve that "win" is to gain an advantage by refraining from providing information or documents to the other side which would otherwise impair the complexion of their case. In the heat of battle, it is sometimes lost on the client and the practitioner that the best way to protect the client against a cost award or future attack from re-opening any settlement is to provide the disclosure rather than resist it.

From the lawyer's point of view, it can be a delicate line to walk. Naturally, we want to do our very best for the client. Success with future referrals and a reputation in the legal community for getting good results depends on it. On the other hand, we are subject to various canons, obligations and long-standing legal principles – commonly known as legal ethics – which bump up against the tendency to win at all costs.

This paper outlines our general legal obligations as family law litigation counsel, frames them in the context of financial issues in a typical file and offers practical suggestions for practitioners who seek to successfully walk that delicate line: the line of practicing with ethics *and* achieving solid results with honesty and integrity.

2. Our Duties as Officers of the Court

(i) General Principles

Practising law is not simply a business – it is a public service as well. Although we are mandated to serve our clients faithfully, loyally and competently, we are also officers of the court and, accordingly, required to preserve the integrity of the legal system itself. In other words, the profession as a whole has the duty not just to serve clients' interests but to do so within a framework of social values and norms inherent in the legal system.

As highlighted by philosopher Richard A. Wasserstrom, there is a suspicion, held by layman and lawyer alike, that practising law is sometimes "morally problematic".[3] Isn't it right that the lawyer who may

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[1] Brahm D. Siegel, C.S., Nathens, Siegel LLP, November 2010.

[2] At the very least, they want to walk away at the end of the day believing they got the best deal possible.

[3] Richard A. Wasserstrom, "Lawyers as Professionals: Some Moral Issues" (1975), 5 *Human Rights* 1.

think his client is guilty of the crime charged try his best to have him acquitted? Why shouldn't the family lawyer, faced with an arsenal of claims in a nasty lawsuit, use every avenue and technicality at his disposal to achieve the best result? Is it not our job, as trial counsel, to discredit the opposing witnesses in cross-examination, even when the witness is known to be truthful? To help guide us through these thorny and often contradictory questions, we as a profession have established over the years a system of norms, values and standards of behaviour that are intrinsic to our professional role as lawyers. These can be simply referred to as "legal ethics".[4]

It has been stated that legal ethics prescribe what *ought* to be sought and what *ought* to be done.[5] Practically, three principles may be deduced therefrom. The first is that ethics deal with matters of conduct. The second is that ethics imply an active role of conduct rather than a passive one. The third is that ethics deal with the "oughtness" of conduct – strongly reminiscent of certain basic principles found in the equity side of the law.[6]

Examined from another perspective, why is it important for lawyers to be ethical? In his seminal text on ethics in the legal profession, former Law Society treasurer Gavin MacKenzie highlights that almost all decisions made by lawyers affect others and therefore have ethical implications. We do not, like clergymen, deal in vague generalities learned from Sunday sermons, but try to find acceptable solutions to the moral problems of everyday life.[7] We have the power to do great harm but are also positioned to elevate our own conduct and that of others to a higher plane. Thus, resolving moral dilemmas which arise in the daily business of lawyering requires "a peculiar combination of pragmatism and detachment".[8]

(ii) Rules of Professional Conduct

The principal device used to create and maintain the framework for legal ethics in Ontario is of course our Law Society's *Rules of Professional Conduct*.[9] It is these rules to which we look to satisfy the principles and deductions set out above. Consistent with these principles, Rule 1.03(1) provides that they shall be interpreted in a way that recognizes that:

> (a) a lawyer has a duty to carry on the practice of law and discharge all responsibilities with integrity,
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> (b) a lawyer has special responsibilities by virtue of the privileges afforded the legal profession,

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[4] Defined, according to *Black's Law Dictionary*, 9th ed. (West: 2009), as follows:

> (a) Standards of professional conduct applicable to members of the legal profession.
> (b) The study of such standards.
> (c) A lawyer's practical observance of or conformity to established standards of professional conduct.

[5] *Great Treasury of Western Thought*, eds. Adler and Van Doren (New York and London: R.R. Bowker Co., 1977), p. 553.

[6] B. Smith, *Professional Conduct for Lawyers and Judges*, 3rd ed (New Brunswick: Maritime Law Book Ltd., 2007), Chap 1, p. 5.

[7] G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1993).

[8] Ibid, pp. 1-8, 1-9.

[9] Effective November 2000. Current as of April 22, 2010.

(c) a lawyer has a duty to uphold the standards and reputation of the legal profession,

(d) the rules are intended to express to the profession and to the public the high ethical ideals of the legal profession,

(e) the rules are intended to specify the bases on which lawyers may be disciplined, and

(f) since the rules cannot address every situation a lawyer should observe them in spirit as well as in the letter.

3. Financial Issues and the Rules of Professional Conduct

In the context of working with clients' financial issues in a family law matter, various rules and commentary are applicable:

Being Competent – Family law is complicated, ever-changing and requires a high level of skill and understanding, especially in regards to financial issues. The Rules set a high bar for competence, outlined in Rule 2.01:

"Competent lawyer" means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client including:

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises,

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action,

(c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including, (i) legal research, (ii) analysis, (iii) application of the law to the relevant facts, (iv) writing and drafting, (v) negotiation, (vi) alternative dispute resolution, (vii) advocacy, and (viii) problem-solving ability,

(d) communicating at all stages of a matter in a timely and effective manner that is appropriate to the age and abilities of the client,

(e) performing all functions conscientiously, diligently, and in a timely and cost-effective manner,

(f) applying intellectual capacity, judgment, and deliberation to all functions,

(g) complying in letter and in spirit with the Rules of Professional Conduct,

(h) recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served,

(i) managing one's practice effectively,

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills, and

(k) adapting to changing professional requirements, standards, techniques, and practices.

Competency cannot be achieved and maintained in isolation, by reading only one book or by having one special computer program. It is submitted that only by utilizing various resources, including competent support staff to ensure excellent service to clients, retaining financial experts to help provide guidance in regards to complex valuation and income issues and regular attendance at continuing legal education programs in order to keep abreast of changing caselaw, can a lawyer truly be competent.

Of all these, family counsel, particularly younger counsel unused to complicated financial issues, should strongly consider retaining the services of a well-respected "CBV" or chartered business valuator. Their expert and independent help[10] is often invaluable in understanding the nuances of the other party's (or your client's) business financial statements, tax returns, disposition costs, not to mention more complicated issues like double-dipping, lump-sum arrangements for spousal support, corporate and tax issues. Although clients may at first chafe at the prospect of paying for another professional on their "team", experience has taught me that this kind of a disbursement is almost always money well-spent.

Being Honest – Rule 2.02(1) provides that when advising clients, a lawyer shall be honest and candid. The lawyer's duty to the client who seeks legal advice is to give a competent opinion based on sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise. The advice must be open, undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

An example where this regularly arises in family law is in the context of the issue of alleged loans, specifically, where the client claims that at separation money is owed to a family member. After vigorous questioning of the client, if you glean that there is no loan documentation in writing supporting the alleged loan, no history of repayment or repayment made only after separation, consider advising the client not to pursue the issue and not to include the item as a debt in the financial statement. Inform the client that including it will engender suspicion on the other side and cast a pall on his credibility which will impact on the entire financial statement and create significant and likely unrecoupable costs. Most of the time, the client will listen, and respect you for the candid and ethical advice. If not, you should include the item as a debt but ensure you have documented your advice in writing so as to protect yourself later.

Dishonesty/Fraud by Client – Rule 2.02(5) provides that when advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment. Although this rule is designed to address a situation where the lawyer becomes the tool or dupe of an unscrupulous client, it is applicable to family law clients, most notably with self-employed clients who have a history of under-reporting their income on their income tax returns and in court.

In some cases it is not hard to discern that the income a client has reported on a tax return is vastly lower than his true income for purposes of support. A more diplomatic way of putting it is that the documentation does not provide an "accurate reflection of reality"[11]. Some easy signs are monthly expenses much higher than reported net income, clients' employees earning significantly more than the owner-client and a lifestyle which is way out of proportion with the reported income to CRA.

While it is easy to simply include last year's reported income to CRA on page 2 of the client's Financial Statement[12], the better, and, it is submitted, more ethical approach, is to state the income is "to be

[10] The best CBVs are ones that give you the same answer regardless of which side you act for.
[11] *Skinner v. Coles* (2001), 2001 CarswellOnt 4862 (Ont. C.J.) at 20.

[12] I am referring here to the part of page 2 of the Financial Statement which requires the client to show all of the income that he is currently receiving, not the part which asks for gross income from all sources last year.

determined" and retain a chartered business valuator to assist with determining the client's true income for support purposes. Although there are cases where the CBV's opinion coincides with the income reported to CRA, these, in the writer's experience, are rare. Further, even when the CBV's conclusion as to income is the same as the client's reported income to CRA, the case will not be settlable until the CBV has completed his report. Why? Without the assistance of an independent expert report, often a self-employed payor has little chance of having his or her income accepted by the other side or the court, so the expense in proceeding with a CBV report is usually invaluable.

Managing the client's expectations is not only ethical, it's good client service. If the income found by the CBV is much higher than on the client's return - as is often the case - the file will usually be ripe for settling. On the other hand, if the income found by the CBV coincides with your client's income in his tax returns, this will put him in good stead at a settlement conference or, if necessary, trial in seeking to have this income applied by the court.

Being a Good Advocate – Rule 4.01(1) provides that when acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect. Commentary to the rule explains that this means the lawyer has a duty to "fearlessly" raise every issue, advance every argument, and ask every question, however distasteful, which she 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.

A good example where this rule sometimes leads to ethical dilemmas is in regards to assets owned at the date of marriage. After a long marriage the client will usually not have good records proving ownership of a substantial asset at marriage, for example, money in a bank account. Lawyers sometimes, I find, will simply advise the client to drop the issue. However, if the sum is substantial and worth fighting for, there is absolutely nothing wrong with including it in Part 4(c) of the Financial Statement notwithstanding there is no proof. At the same time, however, counsel should advise the client that *he* has the burden of proving the asset and its value at marriage and that his chances of having it accepted by opposing counsel and the court significantly increase if he has any proof, even indirect,[13] of its existence or value close to the date of marriage. The client should also be told that even if he does not find any supporting documentation the court can always make a finding at trial that the asset and value were as per his claim based on testimony and general credibility.

Discovery Obligations – Rule 4.01(4) provides that where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, the lawyer, when acting as an advocate, shall: (a) explain the need to make full disclosure of all documents relating to any matter in issue and the duty to answer, to the best of his or her knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal; (b) assist the client in fulfilling his or her obligations to make full disclosure; and (c) not make frivolous requests for documents or frivolous demands for information at questioning.

In addition to a sworn Financial Statement, personal income tax returns, notices of assessment and all of the other documentation legislated under section 21 of the *Child Support Guidelines*[14] and Rule 13 of the

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[13] For example, sometimes the client may not have the RRSP statement proving the value of the asset as of marriage but you can show from contributions to tax returns that an RRSP existed at marriage. Another example is a T5 slip from a tax return shows interest from an investment, which can enable a CBV to determine the principal amount existing at marriage.

[14] Sections 21(1) and (2) of the *Guidelines* provide:

> **21.** (1) A parent or spouse who is applying for an order for the support of a child and whose income information is necessary to determine the amount of the order must include with the application,
>
> (a) a copy of every personal income tax return filed by the parent or spouse including any materials that were filed with the return for each of the three most recent taxation years;

Family Law Rules[15], by now it is accepted practice that the following documents must be disclosed in relation to a family law matter where the client's income is relevant for purposes of child or spousal support:

(a) if not self-employed, a copy of the client's employment contract;

(b) if self-employed, business financial statements for the past three years;

(c) if the client is a shareholder in a corporation, complete corporate tax returns for the last three fiscal years, minute books and shareholder register;

(d) if self-employed, all personal and company bank statements, usually for not more than the past three years;

(e) if self-employed, all personal and business credit card statements, usually for not more than the past three years; and

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(b) a copy of every notice of assessment and reassessment issued to the parent or spouse for each of the three most recent taxation years;

(c) where the parent or spouse is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime, or, where such a statement is not provided by the employer, a letter from the parent's or spouse's employer setting out that information including the parent's or spouse's rate of annual salary or remuneration;

(d) where the parent or spouse is self-employed, for the three most recent taxation years,

(i) the financial statements of the parent's or spouse's business or professional practice, other than a partnership, and

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the parent or spouse does not deal at arm's length;

(e) where the parent or spouse is a partner in a partnership, confirmation of the parent's or spouse's income and draw from, and capital in, the partnership for its three most recent taxation years;

(f) where the parent or spouse controls a corporation, for its three most recent taxation years,

(i) the financial statements of the corporation and its subsidiaries, and

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;

(g) where the parent or spouse is a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust's three most recent financial statements; and

(h) in addition to any information that must be included under clauses (c) to (g), where the parent or spouse receives income from employment insurance, social assistance, a pension, workers compensation, disability payments or any other source, the most recent statement of income indicating the total amount of income from the applicable source during the current year or, if such a statement is not provided, a letter from the appropriate authority stating the required information. O. Reg. 391/97, s. 21 (1); O. Reg. 446/01, s. 7; O. Reg. 25/10, s. 5.

Obligation of respondent

(2) A parent or spouse who is served with an application for an order for the support of a child and whose income information is necessary to determine the amount of the order, must, within 30 days after the application is served if the parent or spouse resides in Canada or the United States or within 60 days if the parent or spouse resides elsewhere, or such other time limit as the court specifies, provide the court, as well as the other spouse, an applicant under section 33 of the Act or the order assignee with the documents referred to in subsection (1). O. Reg. 391/97, s. 21 (2).

[15] Rule 13(6) of the *Family Law Rules* provides that a party who serves and files a financial statement shall make full and frank disclosure of the party's financial situation, attach any documents to prove the party's income that the financial statement requires, follow the instructions set out in the form and fully complete all portions of the statement.

(f) if self-employed, proof of all major business expenses.

Most judges will have no problem ordering these items and will thoroughly castigate your client (and you) if you create obstacles to producing them. Any request for some or all of these documents should be granted before the court case starts, lest your client run the risk of having income imputed, adverse inferences being made and/or facing a motion to strike pleadings. Failure to provide this sort of information will almost always lead to the judge believing that your client is engaging in self-serving conduct, trying to avoid an honest and critical look at his financial situation and less than credible.[16]

Sometimes there is a temptation to advise the client to agree to any and all requests the other side's CBV may put forth. Sometimes the disclosure requested by a CBV runs pages long and seeks highly complex information and documents. Simply advising the client to produce everything can be dangerous. The better course of action is to carefully review each item with the client, try to determine if and how the request is relevant to the issue before the court and whether or not the client actually has or can easily obtain the disclosure or information requested. Even though this exercise may take a lot of time it is necessary. In high-stakes cases, it may be better to confer with your own CBV to get a sense of whether he or she believes the requested disclosure is relevant – and if not, why not. If the information sought appears to be irrelevant, designed to put the client to unnecessary effort and will not assist in any meaningful way, the lawyer should inform opposing counsel in writing of the reasons why the request will not be granted and not be afraid to fight it. Opposing counsel can then take the matter up with the judge and let him/her decide.

In *Buttrum v. Buttrum*[17] Aitken J. stressed the importance of counsel's role in ensuring full financial disclosure. The wife's lawyer had her client swear and file a financial statement which showed no gross revenues from her business at a time when the business was in fact producing revenues but no profits. Business expenses, however, were set out, resulting in her financial shortfall appearing to be more than it actually was.

This displeased the court greatly. Justice Aitken's comments below serve as a reminder of our ethical responsibilities associated with assisting clients in completing their Financial Statements:

> Complete, honest and on-going financial disclosure is required during the course of a family law case. That is the very purpose of r. 13. Lawyers must devote their full attention to the accurate completion of financial statements. The purpose of financial statements is to ensure disclosure is made quickly and repeatedly as circumstances change, and in a manner that is consistent and easy to follow. That is the spirit in which these forms must be completed. Although I am not suggesting such was the case here, I caution lawyers that they are providing poor service to their clients if they delegate responsibility to the clients to figure out how to complete the forms, with the lawyers' assistants merely typing them. Completion of a client's financial statement must be done under the direction of the lawyer. The lawyer must ask pertinent questions to ensure that disclosure has been accurate and complete, the form has

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[16] Less clear in the writer's experience are cases where the support recipient requests copies of all company invoices and contracts with customers, mortgage applications, medical records and reports by valuators on income and business values. While beyond the scope of this paper, in these kinds of cases it is far less predictable whether a judge will order this kind of disclosure. Some have general rules that they routinely will or will not make such orders. Others approach it on a case by case basis. Practitioners are wise to honestly assess the importance of the disclosure requested before engaging in a full-court press on the issue.

[17] *Buttrum v. Buttrum* (2001), 2001 CarswellOnt 1308 (Ont. S.C.J.).

> been filled in clearly, and all necessary notes and explanations have been added to make it comprehensible to the opposing client, the opposing counsel and the court.
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> The active and critical involvement of a lawyer in the preparation of a client's financial statement can foster a realistic assessment of the merits of each client's case at the earliest possible stage. Not only does such a thorough approach facilitate an early settlement of financial issues, but also it reduces the opportunities for a lack of trust between the parties to fester. So frequently that lack of trust prevents meaningful settlement discussions and encourages protracted and costly litigation.

Similarly, in *Bhoi v. Bhoi*[18], Aitken J. continued her theme from *Buttram* that lawyers are not simply vehicles for their clients' instructions. Judges expect us to ask pertinent questions from our clients and clarify ambiguities so that the product presented to the court is as complete and coherent as it can be. She also reminded the parties, the lawyers, and anyone reading her reasons of R. 13(15)–(17) and the requirement that family litigants correct and update financial statements as necessary.[19] At paragraphs 18 & 19, she wrote:

> The role of a lawyer representing a family law client goes beyond being a conduit of unclear information from the client to the court. The court expects the lawyer to ask pertinent questions, identify ambiguities, seek clarification from the client and third parties if necessary and then present meaningful information to the court. It is unacceptable for a lawyer to appear in court and say I cannot figure it out and there is nothing further that I can do to figure it out when the most simple and obvious steps have not been taken to sort out the mystery. These comments are especially relevant to the situation where the lawyer's client has already been ordered by three other judges to make further and better disclosure, and when the lack of clarity relates to a point that is critical to the determination of an issue in dispute.

The court's comments in *Bhoi* were echoed by Justice Hennessy in *Lepine v. Lepine*[20]. Since courts have broad powers to make orders affecting family law litigants financially and personally - orders which go to the heart of their sense of identity as parents and often have significant long-term financial consequences - we have the *Family Law Rules* which require early, full and frank disclosure. In addition, we are bound by the traditional obligations imposed on us as officers of the court:

> Counsel have the duty to ensure that all information which they put before the court is accurate. In order to do this, they must ensure that they have the correct information from their client. In addition, they may not to sit back and allow a judge to be misled.[21]

From the above it should be apparent that lawyers are doing their clients and the profession a disservice if they simply ask them to fill out the financial statement and have their clerks type the statement in proper form. As tedious and time-chewing as it may be, the lawyer should personally meet with the

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[18] *Bhoi v. Bhoi* (2001), 2001 CarswellOnt 4405 (Ont. S.C.J.).

[19] As discussed in *Lepine v. Lepine, infra,* on a plain reading of the Rule 13(17), the court has authority to make remedial orders only after there has been a disclosure order under Rule 13(16): see *Quesnel v. Nadon-Quesnel* (2001), 24 R.F.L. (5th) 89 (Ont. S.C.J.) at para. 19. Rule 13(17) does not provide authority to set aside an order simply on the basis that a party has not met their initial disclosure obligations, which means if there is no order for disclosure under Rule 13(16), there is no remedy available under Rule 13(17). On the other hand, Rule 1(8) is more broadly worded and permits the granting of relief where just and appropriate, in cases where a party has wilfully failed to follow the rules or obey the order.

[20] *Lepine v. Lepine* (2007), 2007 CarswellOnt 6644 (Ont. S.C.J.).

[21] *Lepine*, at 23.

client, ask pertinent questions to ensure that disclosure has been accurate and be curious when inconsistencies arise. This will ensure (although not guarantee) the form has been filled in meaningfully and that all necessary notes and explanations have been added to make it comprehensible to the opposing side and the judge. Although it takes substantial time to get it right and often causes the client to wonder if the lawyer is truly on "his side", the lawyer's active and critical involvement in preparing the financial statement helps ensure its' reliability, provides a more realistic picture of the client's circumstances and reduces the opportunities for lack of trust between the parties to fester.

Disclosing Error or Omission – Rule 4.01(5) provides that a lawyer who has unknowingly done or failed to do something that if done or omitted knowingly would have been in breach of this rule and who discovers it, shall, subject to rule 2.03 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it. The commentary to the rule states that if the client desires that a course be taken that would involve a breach of this rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done the lawyer should, subject to rule 2.09 (Withdrawal from Representation), withdraw or seek leave to do so.

In relation to financial disclosure, sometimes during the course of a proceeding it will come to light that a client had certain debts at separation that he simply omitted when the Financial Statement was first signed. The lawyer in these cases will have no difficulty (nor will the client) in simply sending a letter to opposing counsel pointing this fact out and attaching proof of the debt as it existed at separation.

The exact same approach *should* be followed when the lawyer learns that an asset has similarly been omitted. Rule 13(15) of the *Family Law Rules* provides that as soon as a client discovers that information in his financial statement or net family property statement or in a response given at questioning is incorrect or incomplete, or if there has been a material change in the information provided, he shall "immediately" serve on every other party to the claim and file the correct information or a new statement containing the correct information, together with any documents substantiating it. If the omitted asset is something that can be easily proven with supporting documentation (like an RRSP or bank account), a letter with proof should be sent over with an explanation (and apology) for the omission. If the omitted asset is a corporate interest, all of the minute books, shareholder registers and corporate statements should be sent forthwith.

In the writer's experience, it matters terribly *how* the non-disclosure came to light. If it was something the client simply discovered on his own after his financial productions have been made *and* the undisclosed asset had nominal value, the impact will usually be minimal.[22] If however, the disclosure came from the other side (who, for example, had proof of it in her possession unbeknownst to your client), the consequences can be devastating. For even if the non-disclosure was truly inadvertent and unintended to deprive the other side of knowledge, your client will never get the benefit of the doubt.[23] Do not therefore be surprised when the other side brings up the non-disclosure at each and every step in the case and assails your client for his lack of credibility.

The word "immediately" in R. 13(15) was the downfall of the support payor in the recent case of *Zanewycz v. Manryk*.[24] The father received a severance from a former employer in April 2008 of over $200,000 but failed to mention it in his motion to change filed shortly thereafter. All he attached to his Financial

[22] E.g., an account long inactive or an account in the client's name that clearly is beneficially owned by a child. In cases such as this, counsel acting for the other party needs to be careful of appearing too aggressive and overzealous in criticizing the "non-disclosure." Common sense should be used at all times.

[23] If you have a good reputation for ethical dealing and a good relationship with the other lawyer you will get the benefit of the doubt even if your client will not.

[24] *Zanewycz v. Manryk* (2009), 2009 CarswellOnt 2238 (Ont. S.C.J.).

Statement were paystubs showing earnings from his new, lower paying job. Three months prior to trial, he brought a motion to change his support obligations based on this lower.

In dismissing the motion, Justice Shaw found that the father deliberately flouted the spirit and content of R. 13(15). It was no defence to say, as the husband did, that he did nothing wrong because he fully intended to include his severance in his 2008 income tax return. The judge correctly emphasized the word "immediately" in R. 13(15) in finding that he failed to disclose the severance in a timely basis and failed to provide an accurate picture of his income.

The importance of updating a client's financial information was also highlighted in *Marchese v. Marchese*[25] where Justice Vogelsang found the *Family Law Rules* require immediate and complete disclosure of a change in financial circumstances as a broader view of the general duty to bring fresh information forward immediately. He concluded that since the husband disregarded these requirements, the case became " one of the unusual cases where a second temporary order must be made before trial to remedy unfairness. The unfairness was created by Mr. Marchese's refusal to comply voluntarily with the rules designed specifically to avoid obfuscation like this."

Marchese was followed in *Werden v. Werden*[26] where, at trial, Justice Czutrin was asked to retroactively increase the amount made under a temporary consent court order two years earlier. The request was made after it was determined that for the year in question the father earned far more than anticipated at the time of the temporary order. Even though the husband did not deliberately misstate his income, the court invoked R. 13(15), finding that since the *Rules* require financial updating it was incumbent on him to make the necessary adjustments on consent and without delay. Since he did not do so, it was contrary to the intentions of the *Rules* and the *Guidelines* to not commence the appropriate level of support from the date of the interim order since it was clear the information relied on for that order was inaccurate.[27]

Sometimes the non-disclosure only comes to light *after* a case has settled. This does not, in and of itself, mean the settlement will be set aside. In *Quesnel v. Nadon-Quesnel,*[28] Mackinnon J. made it clear that a spouse has an obligation to make ongoing disclosure during settlement negotiations and that failure to do so *may* result in a court setting aside all or part of a resulting agreement.[29] The judge wrote that many factors emerge from the caselaw as relevant to the court's discretion in setting aside an order or agreement where the duty to provide financial disclosure has not been met, including:

- Whether the party seeking to set aside on this basis knew the facts were different than originally stated but decided not to inquire further about details, or neglected to pursue full legal disclosure.

- Whether there was concealment or misrepresentation.

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[25] *Marchese v. Marchese* (2004), 2004 CarswellOnt 202 (Ont. S.C.J.).

[26] *Werden v. Werden* (2005), 2005 CarswellOnt 7161 (Ont. S.C.J.).

[27] *Werden* has been followed in other cases: see *C.(K.) v. B.(S.)* (2008), 2008 CarswellOnt 370 (Ont. Div. Ct.) at 10.

[28] *Quesnel v. Nadon-Quesnel* (2001), 2001 CarswellOnt 4684 (Ont. S.C.J.).

[29] See, for example, *Picavet v. Paul* (1998) 1998 CarswellOnt 3633 (Ont. C.A.); *Dochuk v. Dochuk* (1999), 1999 CarswellOnt 353 (Ont. Ct. Gen. Div.); and *Underwood v. Underwood* (1995), 1995 CarswellOnt 88 (Ont. Ct. Div. Ct.).

- Whether the non-disclosure was material, i.e., How important would the non- disclosed information have been to the negotiations?

- Whether the agreed-upon terms are fair and reasonable, i.e., Would they have been different had all the facts been known?

- Whether the request to set aside is made expeditiously.

A final example is *Rizzo v. Rizzo*.[30] In this case there was an issue of whether an advance from parents to a spouse-child was a debt or gift. The parents sued their son, failed to notify his spouse and tried to enforce the judgment from proceeds of the matrimonial home that had been paid into court. The spouse applied to court to have the judgment set aside.

Invoking R. 13(15), Nelson J. found that parties involved in family law litigation have an obligation to act towards one another with utmost good faith. While he observed, somewhat depressingly, that this may at times seem like a naïve hope, he stressed there is no question the court must strive to ensure that parties behave fairly towards one another. Rule 13 means full, frank and fair financial disclosure which means complete, detailed and timely disclosure.

While all of the plaintiff creditors were aware their son was involved in a family law dispute with his wife, it was clear that *she* had no knowledge of the action and certainly no knowledge that her husband intended to consent to judgment. She disputed the legitimacy of the debts and should have the opportunity to put the husband to the test of proving them before the funds were paid out. She had a right to be notified of the lawsuit as soon as the husband was served with it and he (the husband) knew, or should have known, that his wife would not have been agreeable to the manner in which he handled this lawsuit. The subject matter of the lawsuit clearly affected her rights in a material way; therefore, he had a duty under the rules to bring it to her attention immediately. The judgment against the husband was set aside.

Undertakings – Rule 4.01(7) provides that a lawyer shall strictly and scrupulously carry out an undertaking given to the tribunal or to another legal practitioner in the course of litigation. Unless clearly qualified, a lawyer's undertaking is a personal promise and responsibility, breach of which will never be regarded lightly and constitutes unprofessional conduct.[31]

A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given[32]. Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer does not intend to accept personal responsibility for an undertaking, this should be stated clearly in the undertaking itself. In the absence of such statement, the person to whom the undertaking is given is entitled to expect that the lawyer will honour it personally. The use of such words as "on behalf of my client" does not relieve the lawyer giving the undertaking of personal

[30] *Rizzo v. Rizzo* (2001), 2001 CarswellOnt 275 (Ont. S.C.J.).

[31] Commentary, R. 4.01(7). See also *Kruger v. Booker* (1961), 1961 CarswellOnt 61 (S.C.C.) at 110.

[32] *Rules of Professional Conduct,* R. 6.04(10).

responsibility.[33] For all these reasons, extreme caution should be taken when asked to provide a solicitor's undertaking.

More common are cases where the *client* has provided an undertaking that one party believes has not been fulfilled. As all practitioners know, a client who provides an undertaking, usually at a questioning, is subject to a wide variety of sanctions in the event of non-compliance, including an order striking pleadings. An interesting and recent case on this point is ***Stuyt v. Stuyt.***[34]

In this case, there was a questioning. The husband provided thirty-two undertakings. The wife's lawyer felt the husband did not answer them or failed to answer them adequately and wrote to the husband's lawyer. He agreed to answer them by a certain date or else his client would consent to an order dismissing pleadings. The deadline came, the husband's lawyer provided answers to the undertakings but the wife's lawyer felt they had not been answered fully and properly. Then, instead of writing to the husband's lawyer informing of precisely what was outstanding, counsel for the wife wrote to the judge, attached the draft order to strike pleadings and informed the court he had the husband's consent to same – but failed to refer to the exchange of letters in which counsel for the husband had made clear his position that all undertakings had been complied with.

The motions judge made the order striking pleadings. The husband appealed, and won.

The Court of Appeal found for the husband for two reasons. First, the letter to the judge was made without any sworn evidence by affidavit. The motions judge was not advised of the correspondence from counsel purporting to answer the undertakings. Had he been provided with the appropriate information it is most unlikely that the pleadings would have been struck.

Second, the Court referred to "well-settled jurisprudence" that an order striking pleadings is an order of last resort. Given that the discoveries had been held "barely three months earlier" and the husband's "considerable efforts" to answer the undertakings, this was "clearly" not a case for such an order. In so far as the conduct by the wife's lawyer was concerned, the court wrote that while the husband's lawyer could have "shown more initiative" in protecting his client's position, the obligation was on the wife, when seeking an *ex parte* order, to make "full, fair and frank disclosure of the relevant facts for the motions judge". [35]

4. Navigating Financial Statements With Integrity

[33] Commentary to R. 6.04(10).

[34] *Stuyt v. Stuyt* (2010), 2010 CarswellOnt 1021 (C.A.).

[35] *Ibid*, at 15.

The Financial Statement (Form 13.1[36]) is the most important financial document your client will sign in his case. From first impressions down to detailed cross-examination, what's in it, how it's been completed and whether or not he can provide proper supporting documentation about his assets, debts, values for each and explanations for any omissions, are often at the heart of how easy a case can be resolved.

From counsel's point of view, completing this form with integrity is essential. Integrity is the fundamental quality of any person who seeks to practise law.[37] If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship is missing. If integrity is lacking, the lawyer's utility to the client and reputation within the bar will be destroyed regardless of how competent he or she is.[38]

Another way of looking at it is from a systemic point of view. Because our system is so dependent on sworn testimony, ultimately the integrity of the entire family law justice system depends on the truthfulness of statements made under oath or affirmation. Although no reported cases of perjury in a family law case have been found, the consequences for lying under oath are significant.[39]

In this section, the writer attempts to provide some helpful tips to some ethical dilemmas which arise when completing the form with clients:

Part 1 – Income – The form asks you to show all income that your client is "currently" receiving. For "T4" clients this is easy. If they are paid at the rate of, say, $65,000 per year, simply include that number as their "employment income" and divide by twelve. But what if the client was earning at this rate for six months, then got laid off and is now earning Employment Insurance and nothing else? Since child support is based on "current" income[40], there is nothing wrong with including only the E.I. income. But, if the client received a lump-sum severance package, disclosure should either be made in the form of allocating it on a monthly basis for the number of months it was provided for or including it in Schedule "A" - Additional Sources of Income.

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[36] Or Form 13 as the case may be.

[37] *Rules of Professional Conduct*, R. 6.01(1).

[38] Commentary to Rule 6.01(1).

[39] Perjury is an indictable offence punishable by up to 14 years in prison, see section 132 of the *Criminal Code*. To constitute perjury, there must be some type of statement made under oath or solemn affirmation. The statement must be false. Third, the false evidence must have been given with the intent to mislead: for further details on perjury, see Manning, Mewett & Sankoff's *Criminal Law*, Fourth Edition (LexisNexis: 2009), pp. 633-642. As mentioned above, there are no reported cases of perjury in a family law case. In the case of *Bemrose v. Fetter*, [2005] O.J. No. 3362 (Ont. S.C.J.), Justice Perkins states, at para 26:

> The discrepancy between the father's admission and declarations of income and the findings of actual receipts by the trial judge do not come close to the standard of deliberate deceit, "fraud" or "perjury" necessary to invoke rule 15(14)(a). They are explained by the father as poor record keeping combined with the stress of the separation and the litigation. On the record before me, I am unable to find deliberate dishonesty. This case is no different in this respect from thousands of others. If this case resulted in a reopening of an order made after a trial, no family law trial decision would ever be safe from attack.

[40] *Child Support Guidelines*, s. 2(3).

What about a salesperson whose compensation changes all the time and does not know until the end of the year what his income will be? The lawyer should question the client in detail about what he's earned so far, obtain proof of same, and get a good sense of what he expects to earn for the rest of the year and once satisfied with the response, insert the expected annual amount, with a note in the margin that it is "estimated".

With respect to commissions, tips and bonuses, whatever the client has earned so far from January 1st or reasonably expects to receive up to December 31st should be included, divided by twelve, with a note in the margin of the estimated or known total. If the client knows he'll be receiving a bonus in December but does not know the amount and cannot even guess, counsel should include a note in the margin beside this item and note "Will be received in December, amount to be provided once received".

In the writer's experience, the information I include depends not only on *how much* my client is earning but *when* he earned it. For example, if the Financial Statement is being completed in October 2010, the other lawyer is much less interested in seeing numbers for 2009 than he is with numbers from January 1st of 2010. On the other hand, if the Financial Statement is being completed in February 2010, what my client earned in 2009 is usually, absent unusual circumstances, the baseline for setting temporary child and spousal support on a go-forward basis. I know when I see an opponent's Financial Statement late in the year with no useful information from January 1st onwards of that same year that there are "integrity" issues with that opponent – and often his counsel – and I warn the client accordingly.

Part 1 – Other Benefits – Clients sometimes get tripped up in questioning because they forget to include the personal component of a car allowance. Counsel should try to ascertain the value of the car allowance and include the personal portion in this part. For self-employed payors who have not yet determined the personal component of various business expenses, they should list them with a note that the value has not yet been determined.

Part 2 – Expenses – The question that clients inevitably ask in this part is whether they should complete it based on their newly separated budget or their family life *before* separation. It is suggested the answer depends on how fresh the separation is. The purpose of the budget is to provide meaningful information to the other side and the trier of fact as to what the individual is spending now or, if the family is still in the same home, was spending up to separation. So, where the separation is fresh and the client has been out of the home for less than a month, I will complete this part based on the family's total expenses over the past twelve months. If, however, by the time the client gets to me, he has been out of the home for six months, I am more interested on how he has been spending his money since he left the home, for I feel it is that information which the judge will be interested in.

Although it is sometimes hard-slogging to go through this part of the form with clients, lawyers should be doing this job, not clerks. It is harder, I submit, for clients to fib to their lawyers than to clerks. Also, lawyers in general do a better job at what I call "reality-checking", gauging the reasonableness of the numbers compared with the amount of income coming in. Nothing's frustrates a judge more than a "budget" that is $6,000 per month more than the monthly income without a readily apparent explanation.

If this occurs when you first complete the budget, find out what is going on and go back over it. Ask the client whether some of the expenses are exaggerated. Perhaps the income section needs to be revisited. Often the client will recall that in addition to employment income, he received a bonus or loans from family which help explain the difference. Simply ignoring a big budget deficit here and moving on to the

next section all but guarantees the other lawyer and court will be viewing your client's Financial Statement with suspicion.

Part 3 – Other Income Earners – This section of course need only be completed if a client is making or responding to a claim for undue hardship or spousal support. There is a real tendency here on the part of counsel to simply omit the information in this part or not come fully clean with it. Failure to do so will open your client up to accusations of not fully completing the form at best or lack of honesty and credibility at worst.

Sometimes the client will say they are not cohabiting with someone when the other side claims they are. The lawyer with integrity will have a thorough conversation with the client on this point, asking about how many nights a week do they sleep together, where the partner's mail is directed, how long the relationship has been ongoing and what address is used for tax and employment purposes. At some point, it will become clear whether there is cohabitation or not and the lawyer should advise accordingly, regardless of whether it is cumbersome – or worse detrimental – to your client to make such disclosure. If requested by the other side, tax returns and paystubs from the partner should be provided forthwith.

Part 4(a) – Land – Do not fall to the temptation of simply including a number that assists your client with a buy-out or sale to the other spouse. Also, try not to go with the MPAC assessment without any other corroborating evidence.

In the absence of any appraisals or agent opinion letters, the best evidence is what the client thinks the home would sell for on the open market to a third party. This is sometimes a very different number than what the client wants the home to be sold for or what he wishes to pay to buy out the spouse. Completing the Financial Statement with integrity however, dictates nothing less. If, however, you have an appraisal or agent opinion letter the client is very satisfied with, do not hesitate to send it to opposing counsel. Finally, if you are using an agent's opinion, make sure it is not a family member or family friend, otherwise the other side will reject the value, even if it's correct. Remember, an independent arm's length agent is always preferable.

Part 4(b) – Contents – Unless the parties have extremely valuable art, it is the writer's experience that instead of inserting a figure in this section, the lawyer simply writes "to be divided in specie" or "have been divided to the parties' satisfaction", if of course that is what your client alleges. Inserting an unreastically high number will often cause a judge to offer that your client purchase the other side's interest in the contents for half, something I find clients are not too keen to do.

With respect to contents at marriage, absent unusual circumstances I stay clear of inserting any big numbers here, especially if the marriage was long-term, as the chances that the client had any contents of significant value is generally remote and not worth the expense and effort of the dispute to resolve.

Part 4(b) – Vehicles – I strongly recommend subscribing to the Canadian Red Book service, which provides current and historical figures on the retail sales figures for practically every car and truck sold in Canada.[41] Using the figure from the Book and sending a copy of the relevant abstract to the other side usually ends any dispute about fair market value. Also, in cases where the client has acquired the vehicle close to separation, say, within a year or two, it does not hurt to include in the margin the details of the purchase price and the date of acquisition, as it will serve as a good "reality-check" for you and the other side in case of a dispute.

Part 4(b) – Jewelry – I always ensure that in addition to getting a sense from the client of what his jewelry is worth at separation that I ask what he had at marriage and what it was worth then. Particularly in the case of husbands, I find there is no difference between the numbers.

Part 4(b) – Other Special Items – I make sure always to ask the client if there are any collections, baseball cards, coins, stamps, plates and dolls being the most common. Clients usually have difficulty ascribing a value to these at separation, especially given they often have sentimental value. Usually however, after some pushing and prodding, a number emerges. Whether the other side agrees with it or not depends on the size of the collection. In cases where the collection is sizable and will materially affect equalization, it is better to simply say "unknown – to be valued" and obtain a valuation from a qualified appraiser.

[41] candianredbook@cogeco.ca. Tel: (905) 469-6468. Ask for Mr. Imants Grotans.

Part 4(c) – Bank Accounts, Savings, Securities and Pensions – I am always struck at how many credibility points are won and lost with this part of the form. Here are some tips for avoiding pitfalls and ensuring you and your client are seen as honest:

- Make it clear in the "category" section whether the account is solely owned or joint;

- If the account is "joint" with someone other than the spouse, indicate who that other person is;

- If the account is in joint names with someone other than the spouse, but your client alleges he has no beneficial interest in the account, explain to the client the difference in law between "legal interest" and "beneficial interests". Include all details about the account but do not include any value as valuation date. This way the other side will be able to properly challenge whether your client has a beneficial interest in the account or not;[42]

- In the "institution" section, if the account is joint, include the total amount with a note that the amount shown at valuation is half or 50%, so it is clear your client's portion;

- If your client holds, or alleges he holds, an "in trust" account for someone else, note this in the "category" section, include the full amount of the account in the "institution" section but do not include the sum at valuation. Avoid the temptation not to include any reference to it all;

- If your client has a business account, even though the balance is an asset which will be considered as part of the valuation at separation, do disclose its existence with full particulars, although there is nothing wrong with inserting "To be determined" in the value section;

- If your client has a defined contribution pension, insert the value at separation;

- If your client has a defined benefit pension, note that the value is "unknown – to be valued" and retain a qualified pension valuator to provide the value;

[42] Extreme caution should be exercised here. Personally, only after being satisfied after a vigorous questioning of my client that he had no beneficial interest in a joint account would I insert "nil" – but it does occur, particularly in cases where a spouse has a joint account with a parent solely to enable the parent to do financial transactions: see *Pecore v. Pecore* (2007), 2007 CarswellOnt 2752 (S.C.C.).

- If you have the pension valuation complete and your client gives you a reasonable explanation for why he expects to retire at the highest "assumed retirement date", include it. There is nothing wrong with this. Similarly, if acting for the non-pension member spouse, there is nothing wrong in asserting that the value of the pension should be based on the earliest assumed age of retirement the member spouse will retire with an undiscounted pension. Whether or not you will be able to convince a judge of that at a conference will depend on various criteria[43] but there is nothing unethical or unprofessional about including it in one's NFP Statement;

- In order to protect yourself and make it clear to the other side that it's been considered, if the pension report on a defined benefit pension has considered the issue of taxes, as it almost always will, make a note in the "institution/description" section that the figure is "after-tax";

- If your client opened an account after separation, include the value as of "today" and insert the following as of valuation: "Opened after separation".

- If your client opened an account after separation, ask the client about the source of funds from the new account, paying particular attention if any of them came from monies owned at separation by the parties jointly or by either of them. Advise the client to be prepared to provide proof that the account was opened after separation if requested;

- If your client has an RESP or "in trust" account for a child, disclose it with full particulars of the amount but do not include the value as his property at separation;

- Be consistent with precise figures "at valuation date". If the valuation date is the 15th of the month, do not cherry pick and include the value for the 15th on some assets but the 16th or 14th on others. Consistency even when it doesn't suit your client is a hallmark of integrity;

- As much as possible, ensure your client brings supporting documentation to prove the value of everything in this section and send it with the Financial Statement. Where he doesn't have proof, use approximate figures where comfortable and make sure to indicate same under the number in the "valuation date" section; and

[43] The most relevant criteria here are usually whether there are children, their age, whether any are in post-secondary education, its cost to the parties, how many years before they complete said education and whether it is reasonable to expect the spouse will retire given his or her commitments to funding said education.

- Where your client fails to bring sufficient back-up documentation that you do not have a good sense of the reliability of the Financial Statement overall, do not have him sign it. Mark it "draft", give the draft to the client with a letter outlining what documents he needs to bring for his next appointment and set him for another appointment. Do not send the draft to opposing counsel. Also, do not simply wait for the client to obtain the documents before making the next appointment, otherwise you might wait a long time.

Part 4(d) – Life and Disability Insurance – There is usually one ethical issue which arises here, namely, the client asks you whether he can or should change the beneficiary on his life insurance policy. The best advice you can give is that if you forsee him having significant child and/or spousal support responsibilities over the forseeable future, there is no ethical dilemma in leaving the designation in place since a court will easily order him to do it anyways, so there is no reason why you would not advise him not to change anything about the policy. This does not stop you however from informing the client that if he wants he can obtain at any time a new policy and list anyone else (usually a new partner) as beneficiary – as long as all other policies remain as is with no change.

Part 4(e) – Business Interests – Unless you are certain of the value of your client's business, the best advice is to say "Unknown, to be valued" and refer the matter to a CBV. Opposing counsel and judges treat counsel (and clients) with a lot of respect when you retain the CBV and begin the valuation process well before the first court date. It is an easy way to gain "credibility" points. Similarly, absent circumstances where a valuator is not necessary, refusing to engage one is the easiest way to have a judge "peg" your client as non-compliant.[44]

I tend to avoid inserting a value of nil unless the client is perfectly willing to sell the company – including all debt attendant thereto – to his spouse for **$1.00**, something a judge or opposing counsel will sometimes ask.

Finally, there is no downside to disclosing inactive companies in which your client has an interest. Although the client may chafe and say there is no point, often this is an important issue to the opposing side who may allege undisclosed assets are in said company.

Part 4(f) – Money Owed To You – Counsel should resist including monies which the client alleges are owed for retroactive support. What is meant by this section are monies owed to the client from any income tax refund, court judgments or loans, including shareholder loans.

Part 4(g) – Other Property – I always ask if there is any other property "you haven't told me about" and I make sure to ask the question three times, once as of marriage, once as of separation and finally as of the date of signing. Only when the client answers "no" to all three questions do I move on, but not before inserting a big "NIL" in the "category" section so it's clear it's been covered.

[44] It is worth noting here that some judges have no compunction about ordering a party to obtain a business and/or income valuation while others believe the asset-owning party must simply provide all relevant disclosure and if the other side wishes to engage in a valuation that is her choice. The corollary, however, is if that happens and the asset-owning party receives a thorough CBV report from the other side, he will be hard-pressed to challenge it without an expert report of his own – or else go to trial without a report and risk losing with costs. Often the only alternative is agreement with the other side's expert and be prepared to reimburse for the cost of the report.

Part 5 – Debts and Other Liabilities – Suggested tips for avoiding ethical problems for your client in this section include the following:

- Ask the client whether he had credit card debt or student loans at marriage and include all amounts, even if approximate. Failing to include them, while often simply overlooked, will make the other side think you deliberately were trying to mislead as to net family property;

- As mentioned above, do not include advances or so-called loans from non-arm's length third parties as debts at separation unless you stand a reasonable chance of proving them. Cases of no documentation, sporadic advances for different amounts instead of a lump-sum and advances on inheritances should be stopped in their tracks before becoming large issues in the litigation that your client will later regret. This advice is equally applicable, it is submitted, even when the other side puts every gift ever received from his or her parents in as an alleged debt;

- There is nothing wrong with inserting a figure for notional disposition costs on RRSPs, usually somewhere in the range of 15% to 35%. If the issue becomes significant in the case later on, refer it to a CBV, which is only sensible if the dollars at stake justify the cost;[45]

- Do not include the capitalized value of a car lease. This is not generally acceptable "debt" for purposes of family law;

- Do not include monies that a client has borrowed from an RHOSP and has to repay by a certain deadline. Although beyond the scope of this paper, this is not generally acceptable as "debt" either;

- Indicate clearly whether any debt is joint and include the total amount with your client's share being 50%. If any debt is joint with someone other than the spouse, indicate who the other joint debt holder is;

- If the client alleges he has a beneficial interest in one-half of any real estate, it only makes sense to keep things consistent and include a half-interest in any mortgage on said real estate. Otherwise, the numbers get very wonky and hard to reconcile;

[45] I always use 25% to be consistent.

- If your client is adamant a debt existed at separation but does not have any supporting documentation (or any hope to obtain any), *do* include it but inform the client he has the onus of proving the debt through his testimony or testimony of others at trial;

- Although trite to say, send to the opposing side as much supporting documentation your client has to support each allegation of debt. Do not wait until you have every last stitch of documentation as this tends to create suspicion in the other side's mind that you are withholding material information or "fudging" numbers;

- With respect to line of credit and credit card balances at separation, although there is nothing wrong with calculating to the penny the balance on each debt precisely at separation, there is usually nothing wrong with using the closest date to separation as indicated on each statement. Opposing counsel will not take exception with this practice unless some very different numbers result from using a different date;

- Since most pension reports include a bottom-line number after tax has been considered, do not insert a figure for notional disposition costs for taxes on defined benefit pensions. As mentioned above, however, in Part 4(c) do note the figure is "after-tax";

- Recognize that if your client had a large debt at separation but no longer has it the other side will ask, quite rightly, what happened to it, and, in cases shortly after separation, how it was retired so soon. Advise the client to be prepared to answer such questions in full and to provide full disclosure; and

- Do not include a figure for notional disposition costs for shares owned by your client in his business. Wait until you receive the report from the CBV; they will be considered fully there. Remember, sometimes there are no tax implications due to small business qualifying deductions which exclude capital gains of up to **$750,000.**

Part 6 – <u>Property, Debts and Other Liabilities at Marriage</u> – If it hasn't already been included in part 5, including notional disposition costs of RRSPs at marriage is an easy way to gain "integrity" points with opposing counsel and judges. Unless there is a compelling reason to do otherwise, use the same percentage used in Part 5.

Part 7 – <u>Excluded Property</u> – Make sure that any allegation of excluded property actually exists at separation, even if traceable to another asset gifted or inherited during marriage. Make sure you inform the client that no part of a matrimonial home that was received by gift or inheritance is included.

Also, it is submitted there is nothing unethical about including the entirety of a gift or inheritance at separation when the asset relates to a bank account which has funds co-mingled with other non-excluded funds. Do advise the client, however, that a full forensic analysis may be required which will prove expensive and may result in a far lower number at the end of the day.

Finally, if gifted or inherited money was received by one spouse during the marriage but at separation is traceable to a joint account between the spouses, consider avoiding a big fight and simply claim that only 50% of the asset is excluded. Although there is nothing technically wrong with alleging that *all* of the funds should be excluded by your client because they are all beneficially his, you should make him aware that this is a hard road to plough which will require lots of solid evidence to prove and that generally judges like to grant only 50% of an exclusion in cases like this.

For all other categories in this section, I go through each one and write "nil" in the "details" section to show opposing counsel and the court each has been fully canvassed with the client.

Part 8 – Disposed-Of Property – By the time you get to this part of the statement you are usually eager to finish. There is thus the tendency to overlook this section, which can sometimes later backfire on the client who has cashed in some portion of his RRSPs, sold shares or exercised stock options. All of these must be disclosed with full particulars provided, failing which opposing counsel will definitely criticize for lack of disclosure and integrity.

As a final measure of protection, I always ask the client to fully review the statement and, before he signs, I have him do two things: look me in the eye and tell me it's all true, and second, initial each page after signing. While nothing can guarantee a client won't lie to you, I find all these tips are generally very useful at preventing your client – and you – from looking foolish and deceptive later on.

5. Conclusion

Sometimes it feels like financial statements, although sworn documents, are taken far too lightly by litigants and their lawyers. As noted by one judge, the oaths and affirmations under which they are executed can appear "debased".[46] We do not want the system – our system – to be considered in this manner, so it is up to all of us as counsel to do our part in ensuring that our clients live up to their obligations, and for us to live up to ours.

It is hoped the suggestions and strategies in this paper will help navigate the often choppy waters of family law litigation. Although by no means should the reader take everything here as gospel, experience has taught that they will take you far in getting you where you want to ultimately go: convincing the other side, the other lawyer and the judge that your client is what he says he is – honourable, fair and correct and that *you* are what you say you are and what you want everyone to believe – trustworthy and reliable. Above all, a lawyer with integrity.

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[46] Quinn J., in *Lawson v. Lawson* [2004] O.J. No. 3206 (Ont. S.C.) at 37. His frustration apparent, he suggests that perhaps the laying of a few criminal charges would bring some much-needed integrity to Form 13.