

# **CHILD CLIENTS: AN ONGOING ETHICAL DILEMMA**

**BY**

**CLARE E. BURNS<sup>1</sup>**

The purpose of this paper is to examine how well the legal profession in Ontario is serving children in civil and family proceedings within the confines of lawyers' professional duties.

Lawyers when acting for and/or in relation to children face unique ethical and professional challenges.

In his recent article on the ethics of advocacy, Gavin Mackenzie observed that each of the activities we engage in as lawyers will reflect our concept of our role in the legal system. Specifically, these activities will reflect how we resolve the tension between our duty to represent our clients and our duties as officers of the Court. He observed:

"In the United States the duty to the client is generally seen as the lawyer's primary duty, while in Britain the duty to the Court is pre-eminent. In our rules, the two duties are given equal prominence – which may make ethical choices in advocacy more difficult in our jurisdiction."<sup>2</sup>

In my opinion, the balancing of those two duties is particularly complicated when the lawyer's client is a child. Three matters evidence this: (1) the taking of instructions from children; (2) children's privacy rights; and (3) the use of contingency fees. Although some

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<sup>1</sup> Partner, WeirFoulds LLP. Formerly the Children's Lawyer for Ontario. The views expressed in this paper are my own and do not represent the position of the Office of the Children's Lawyer. I am grateful for the assistance of Kimberly Newton, student-at-law, in her preparation of this paper. Any errors are, of course, my own.

<sup>2</sup> Mackenzie, *The Ethics of Advocacy*, *The Advocates' Society Journal*, Autumn 2008, p. 26.

guidance does exist as to how to resolve this complicated balancing of duties there remains work to be done by the profession so that consistency of approach can be achieved.

- **Duty to the Client**

The Law Society of Upper Canada Rules of Professional Conduct at Rule 2.02(6) set out the lawyer's duty to their client if their client is a child:

*...when a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall as far as reasonably possible, maintain a normal lawyer and client relationship.*

***Commentary***

*A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time. When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to*

*direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.*

*A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.*

This rule begs an answer to the question: what constitutes a normal lawyer client relationship? It is that baseline that a lawyer is to adhere to as closely as possible when meeting their duty to represent a child client. Central to a normal lawyer client relationship are the following:

1. A duty of confidentiality;
2. A duty to execute instructions as given, subject to the duty to resign as solicitor if those instructions are improper; and
3. A duty to act competently within one's fields of expertise.

Thus the Rules of Professional Conduct require that lawyers acting for children meet those duties as closely as possible.

- **Duty to the Court**

As officers of the Court, a lawyer's primary duty is that of candour.<sup>3</sup> Put another way, lawyers may not act in a way that may actively mislead the Court.<sup>4</sup> Also, lawyers as officers of the Court have a duty to educate their clients about Court processes in the interest of promoting the public's confidence in the administration of justice.

1. **The Taking of Instructions**

So, to what extent do the duties of confidentiality and to take instructions get modified under Rule 2.06(2) if a lawyer's client is a child? And, if those duties are abrogated, how is that consistent with the duty to represent the client and the lawyer's duty to act as an officer of the Court?

Developmentally, most children under the age of 10 are incapable of abstract thought. In order to give instructions a client has to understand the advice he or she receives. If a child is incapable of understanding the abstract concept of law about which he or she is being advised then what is the lawyer to do? Take as an illustrative example, a seven year old being advised on the loss of a contingent right to inherit when being adopted. Pursuant to Rule 2.06(2) the lawyer cannot accept instructions on the point when the child cannot understand the concept of contingent inheritance rights. Nevertheless, the child as a potential adoptee is required to receive independent legal advice and required to execute a consent before the adoption can proceed. The answer cannot be that the child must wait until he or she is developmentally able

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<sup>3</sup> Mackenzie, *Lawyers and Ethics* (Carswell, 1993), at 4-1.

<sup>4</sup> Hutchinson, *Legal Ethics and Professional Responsibility*, 2<sup>nd</sup> ed. (Irwin Law, 2006), at 107; *Rondel v. Worsley*, [1966] 3 W.L.R. 950, at 962-63 (C.A.), [1969], 1 A. C.191, at 227 (H.L.); *Meek v. Fleming*, [1961] 2 Q.B. 366 (C.A.).

to understand the advice. Early adoption is acknowledged both legislatively and clinically to be in the best interests of children.<sup>5</sup>

Practically speaking, what is happening is lawyers are providing this advice in as age appropriate language as possible and conducting their own investigations as to what economic interest the child may be releasing. Where major economic interests are at stake for young children who are developmentally unable to appreciate the consequences of their consent, counsel are attempting to find creative solutions with the involved adults.

This places a heavy burden on counsel because the legislation does not have regard to the developmental realities of providing advice to children.

More generally, the procedural law in Ontario presents distinct challenges to counsel trying to resolve the tension between their duties to their child clients and their duties as officers of the Court.

In proceedings under the *Rules of Civil Procedure*<sup>6</sup>, the ethical dilemma of how to represent children who cannot understand abstract thought is largely solved by the existence of litigation guardians. Any person under the age of 18 must have a litigation guardian if they are a party to a civil proceeding. This means a lawyer's instructing client is the litigation guardian and not the child. The lawyer thus escapes the dilemma of the developmentally incapable client. This would be the perfect ethical solution except that situations arise where lawyers are concerned that litigation guardians are not acting in the best interest of the child and/or late

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<sup>5</sup> See: *The Child and Family Services Act*, R.S.O. 1990, C. 11, ss.1 and 70.

<sup>6</sup> R.R.O. 1990, Reg. 194, as am.

adolescents<sup>7</sup> object to steps the litigation guardian is taking. It is here that the lawyer's duty as an officer of the Court may still be engaged and present a dilemma to the lawyer. A lawyer cannot accept instructions from the litigation guardian that are contrary to the best interest of the child. This is evidenced by two elements of the *Rules of Civil Procedure*. First, rule 7.05(2) provides that:

*A litigation guardian shall diligently attend to the interests of the person under disability and take all steps necessary for the protection of those interests, including the commencement and conduct of a counterclaim, crossclaim or third party claim,*

thus making it explicit that a litigation guardian cannot be guided by anything other than the child's interest.

Second, if a settlement for a minor is to be approved the lawyer for the litigation guardian must swear an affidavit opining that the settlement is meritorious.<sup>8</sup>

Where a lawyer believes the litigation guardian is taking steps contrary to the best interests of the child, that lawyer may take steps to have the litigation guardian removed.<sup>9</sup> In this instance the lawyer's duty as an officer of the Court trumps the duty to represent the client and the lawyer may take this step contrary to the litigation guardian's instructions. This sounds simple but it is a very difficult decision for most counsel to come to, particularly where the

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<sup>7</sup> Late adolescents for the purposes of this paper encompass children aged sixteen to eighteen.

<sup>8</sup> See: rule 7.08(4)(b)

<sup>9</sup> Note: Mackenzie in his book *Lawyers & Ethics* suggests at 4-7 this is not the case. However, he relies on an American commentator, Charles Wolfram not Canadian authority. With respect, his position is contrary to Canadian law. See: *Panza vecchia v. Piche*, [1972] 2 O.R. 811, 26 D.L.R. (2d) 690 (H.C.), *Saccon (Litigation Guardian of) v. Sisson* (1992), 9 C.P.C. (2d) 383 (Ont. Ct. (Gen. Div.)).

litigation guardian is a parent of the child and is refusing to accept settlement advice out of a passionate belief that their child deserves more. It is, however, the available solution to the ethical dilemma.

In respect of the scenario in which a late adolescent objects to the steps a litigation guardian is taking, the situation is somewhat less easy to resolve.

If what is objected to is a settlement, the lawyer's obligations are clear. The child's consent to the settlement must be obtained or the Court must dispense with the need for such consent.<sup>10</sup> Where a child refuses to consent, a lawyer's duty as an officer of the Court is, in my opinion, to make full, plain and true disclosure as to the reasons for the minor's refusal so that the Court can evaluate them and determine whether to dispense with the minor's consent. To do otherwise would be to risk misleading the Court. This, in my view, is an adequate resolution to the conflict between the duty to represent the client (the litigation guardian) and the duty as an officer of the Court not to mislead the Court. After all, many late adolescents are developmentally and legally able to make many life altering decisions for themselves<sup>11</sup>.

Where a late adolescent objects to the individual steps the litigation guardian is taking in the litigation the situation is more difficult because there is no automatic mechanism for the Court's review of the litigation guardian's conduct. The lawyer acting for the litigation guardian will again need to consider whether the litigation guardian's instructions are consistent with the best interests of the child. If they are, the lawyer can resolve his competing duties by trying to educate the child about the process and strategy being advanced. This is, in my view,

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<sup>10</sup> See: rule 7.08(4)(c).

<sup>11</sup> They are for instance able to live independently without being apprehended by child welfare authorities. They are also able to drive, give healthcare consent, and be a guardian of the person for an incapable person (see: *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, as am., s.43).

consistent with the lawyer's duty as an officer of the Court to educate the public and is not antithetical to the representation of the litigation guardian. If the instructions are not in the best interest of the child the lawyer must refuse to accept them and seek the removal of the litigation guardian as described above. The lawyer cannot ethically simply seek to be removed as solicitor of record.<sup>12</sup> To do so leaves the case unable to proceed as a litigation guardian cannot act without counsel<sup>13</sup> thus effectively abandoning the child's interests in a fashion that may well prejudice the child.

Thus, the *Rules of Civil Procedure* do provide tools to help resolve tension between representing the client under a disability who is a child and acting as an officer of the Court in ordinary civil proceedings but they are not a complete answer. The profession still has work to do to educate itself about these options as frequently they are not appropriately used.

Matters are more complicated in family law proceedings. Under the *Family Law Rules*<sup>14</sup> in Ontario, children are represented pursuant to rule 4 by legal representatives not by litigation guardians. The scope of the role of the legal representative is nowhere statutorily defined. In practice, this legal representative is generally an agent of The Children's Lawyer although this need not be the case. Lawyers acting as agents of The Children's Lawyer are paid by the Ontario government and are supervised by counsel at the Office of the Children's Lawyer. The Children's Lawyer has expressly addressed the method by which her counsel resolve the tension between a desire on the part of their clients to the represented based strictly on their instructions and counsel's duty as officers of the Court not to mislead the Court by following

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<sup>12</sup> See rule 2.06(2) of the Rules of Professional Conduct which states that "the lawyer has an ethical obligation to ensure that the client's interests are not abandoned."

<sup>13</sup> See: *Re Hrivnak*, [1963], 2 O.R. 729 (H.C.); and *Re Weidenfeld* (November 15, 2007) 2007 Carswell Ont 7457 (S.C.J.).

<sup>14</sup> O.Reg. 114/99, as am.

instructions from a person who may not be developmentally capable of consistent and independent thought. That resolution is set out in the Role of Child's Counsel Policy Statement on the Office of the Children's Lawyer website. The Policy Statement provides that:

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**1. *Duty and Status of Child's Counsel***

*Upon receiving a case from the Children's Lawyer, child's counsel reviews information and advocates a position for the child client.*

*In addition:*

- (a) Child's counsel receives authority to act under the court order requesting legal representation;*
- (b) Child's counsel obtains the child's views and preferences, if any, the child is able to express;*
- (c) Child's counsel does not represent the "best interests" of the child, it being the issue to be decided by the court;*
- (d) Child's counsel is the "legal representative" of the child and is not a "litigation guardian" or "amicus curiae"; and*
- (e) The relationship between child's counsel and the child is a "solicitor-client" relationship.*

**A. GENERALLY**

**1. *Preliminary Review***

*Upon receipt of a case, child's counsel conducts a preliminary review by reading all relevant documents filed in the proceeding and speaks with counsel for the parties to determine whether legal representation is still necessary, and, if so, to narrow the issues.*

**2. *Gathering Information***

*As defined by the issues, child's counsel gathers the relevant information by making inquiries about the child from significant persons in the child's life and obtains the parties' views and plans for the child. In doing so, child's counsel will need a Direction or Release from the parties, authorizing child's counsel to obtain information not available through the normal disclosure rules.*

**3. *Meeting with the Child***

*Child's counsel will always meet the child. Child's counsel will obtain the views and preferences, if any, of the child.*

...

**4. *Position on Behalf of the Child***

*In taking a position on behalf of the child, child's counsel will ascertain the views and preferences of the child, if any, and will consider:*

- (a) *the independence, strength, and consistency of the child's views and preferences,*

(b) *the circumstances surrounding the child's views and preferences, and*

(c) *all other relevant evidence about the child's interests.*

...

## **5. Keeping Child Client Informed**

*Subject to the child's interest and level of understanding, child's counsel will keep the child informed about the status and progress of the proceedings.*

## **6. Contested Hearing**

*If it is necessary for the court or a tribunal to determine the outstanding disputed issues, counsel will advocate a position on behalf of the child and ensure that evidence of*

(a) *the child's views and preferences,*

(b) *the circumstances surrounding those views and preferences, and*

(c) *all other relevant evidence about the child's interests, is before the court or tribunal.*

Thus child clients of the Children's Lawyer will always have their stated views and preferences communicated to the Court. Counsel are therefore not participating in a system which silences their clients' legitimate right to be heard.<sup>15</sup> To do so would be contrary to their duty to represent those children. However, the child's views and preferences will be tempered, in appropriate cases, by counsel leading evidence to demonstrate that those views and preferences

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<sup>15</sup> See: UN Convention on the Rights of the Child, Article 9(2).

are not independent.<sup>16</sup> This is consistent with counsel's duty to the Court not to participate in misleading it.

It is imperative that this approach be taken because to do otherwise would not only violate the lawyer's duty to the Court but would also risk actual harm befalling child clients.

It is however not an uncomplicated approach when put into practice.

By way of example, it is not unusual, in my experience, for children who have made allegations of sexual misconduct against a parent to recant and have a strong desire to return home. If a lawyer was so instructed by a *sui juris* client they would be obliged not to call any evidence contrary to that position in court because that would be contrary to their duty to take instructions. So for example, if the lawyer was aware of physical evidence demonstrating that the assault occurred, they would not be at liberty to lead it. If that traditional approach was taken with a child it is probable that the sexual misconduct physically evidenced would continue in the home and the child would be further harmed. That cannot be allowed to happen: it would represent a true miscarriage of justice. Thus, the compromise set out in the Role of Child's Counsel and the Rules of Professional Conduct between the duty to represent the child and the duty as an officer of the Court actually serves to prevent harm to children. This is consistent with lawyer's more generalized responsibility not to participate in encouraging criminal activity.<sup>17</sup>

The example thus far seems relatively straightforward and the solution appropriate. It becomes much more difficult where the information that calls the independence

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<sup>16</sup> *Strobridge v. Strobridge* (1992), 10 O.R. (3d) 540 (Gen. Div.)

<sup>17</sup> See: *Re J.C. and S.L.C.* (1980), 31 O.R. (2d) 53 (Prov. Ct.)

and consistency of the views and preferences into question is obtained in solicitor-client privileged circumstances. Take the same scenario set out above but instead of physical evidence of the assault, the child tells her lawyer that she has recanted because her mother has told her she will never see her again if she does not and the child cannot bear the idea of losing her mother. The duty of the lawyer is to maintain the solicitor – client privilege. The duty of the lawyer as an officer of the Court cannot trump that privilege on these facts: no crime is threatened or in process. The *Child and Family Services Act*<sup>18</sup> ("CFSA") duty to report circumstances where there are reasonable grounds to believe a child is in need of protection is also of no assistance because it does not allow the abrogation of solicitor-client privilege<sup>19</sup>. What the lawyer can do in these circumstances is to try to convince the child to allow the lawyer to take steps to make this information public, for instance, through cross-examination of the mother or to convince the child to confide this information to someone in non-privileged circumstances. This is not always possible but it remains the only option for counsel who as an officer of the Court cannot mislead the Court about the independence of the child's views and preferences but equally cannot breach solicitor-client privilege.

The profession has not resolved this problem at the moment. However, from my perspective, the answer is not an abrogation of solicitor-client privilege for children. Counsel will be less able to effectively advocate for their child clients if they are not given complete information. Privilege is an important incentive to disclosure by children in that regard. Note that withdrawal from the case is not a viable alternative because it "solves only the lawyers'

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<sup>18</sup> R.S.O. 1990, c. C. 11 as am.

<sup>19</sup> CFSA, s. 72(8).

problem, and may be prejudicial to the (child's) interest".<sup>20</sup> The profession would better serve children if this problem was addressed and resolved.

The compromise between the duty to represent the client and the duty as an officer of the court set out in the Role of Child's Counsel Policy is also more difficult to implement when a child approaches the age of majority. Particularly with late adolescents, it is difficult to know whether it is really appropriate to lead evidence that will decrease the likelihood of a child's views prevailing. This is so because children in this age range may be quite psychologically mature and developmentally capable of giving instructions. Additionally, they are entirely capable of "voting with their feet" in family matters and declining to follow court orders. Obviously, this is contrary to the law and not something any officer of the Court could or would recommend. However, it is a practical reality. As with civil litigation matters, the practical solution to this problem is to try to persuade the late adolescent to accept counsel's advice and impress upon them their duty to comply with Court orders. This does not always work. Advocacy for children would be improved if the profession developed some consistent guidelines about how to deal with this difficult ethical dilemma.

The profession also needs to address the fact that counsel other than counsel from the Office of the Children's Lawyer do represent children in family law proceedings from time to time. This presents a myriad of issues in respect of both the duty to represent the child and lawyers' duties as officers of the court.

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<sup>20</sup> Mackenzie, *Lawyers & Ethics* (Carswell: 1993), at p.4-7, see also Rule 2.06(2) of the Law Society of Upper Canada Rules of Professional Conduct.

Primary among these is how the independence of child's counsel is assured. Put bluntly, the problem is: who pays the lawyer's fees? In cases where one parent or one parent's friends or relations pay the fees the independence of the representation of the child is called into question.<sup>21</sup> In my view, details of the retainer must be disclosed to the Court by the solicitor consistent with their duty as an officer of the Court not to mislead it. Second, counsel acting privately like this are not compelled to follow the Office of the Children's Lawyer Policy on the Role of the Child's Counsel and it is therefore not clear how they resolve the tension between their duty to represent the child and their duties as officers of the Court. There is no consistency of practice in this regard and there is no guidance other than rule 2.06(2) from the profession as a whole as to how these counsel should resolve this dilemma. For these reasons the Court generally discourages counsel acting for children in family matters other than through the Office of the Children's Lawyer. However, given that such retainers are not prohibited the profession does need to address these issues in order to serve children in a consistent ethically appropriate fashion.

In summary, the resolution of the conflict between lawyer's duty to represent their child clients and their duties as officers of the Court when the clients involved are children is not easy. For the most part, the *Rules of Civil Procedure* and the practices in the Family Courts of Ontario do facilitate resolution and results that are in the best interest of child clients. However, the profession could advance the interests of children by turning its collective mind to the issue of how to resolve this tension so that there would be consistency of practice and result.

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<sup>21</sup> See: *Boukema v. Boukema* 1997 CanLII 12247 (On. S.C.).

## 2. Privacy Rights

Another area which evidences the need for the legal profession to have clarity of thought about the tension between lawyer's duties to their child clients and as officers of the Court is the privacy rights of children.

As officers of the Court, lawyers frequently have contact with the media. As is observed in the Canadian Bar Association Code of Professional Conduct, this contact has increased as a consequence of the enactment of the Canadian Charter of Rights and Freedoms.<sup>22</sup>

As officers of the Court, lawyers have a duty to assist the media in conveying accurate information to the public about court proceedings.<sup>23</sup> It is frequently pointed out by the media and leading commentators that public confidence in the administration of justice requires an open court system.<sup>24</sup>

It is in this context that media frequently seek to report on matters concerning children of the wealthy, famous, or notorious.

This raises the issue of whether lawyers have a duty to advise child clients about the availability of civil sealing or *in camera* hearing orders<sup>25</sup> so as to ensure that child client's privacy is maintained. It also raises the issue of whether a lawyer's modified duty to represent child clients requires the lawyer to seek such orders where the client is incapable of understanding or foreseeing the consequences of media coverage by virtue of their stage of development.

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<sup>22</sup> CBA Code of Professional Conduct, Chapter XVIII, para. 6.

<sup>23</sup> Code of Professional Conduct, Chapter XVIII, para. 7.

<sup>24</sup> Panel on Justice and the Media, Report to the Attorney General 2006.

<sup>25</sup> *Courts of Justice Act*, R.S.O. 1990, chap. C. 43, 55, 135(2) and 137.

Generally speaking, adults are only before the courts in civil and family proceedings because they have made personal choices that have resulted in litigation: they are suing or being sued as a result of business transactions or are separating. Children are not similarly situated. They cannot commence civil litigation on their own (an adult litigation guardian will have to have made the decision for them) and in family law, with very limited exceptions, they are the subject of the proceedings not the parties litigant.<sup>26</sup> Moreover, in some civil litigation, for example in trust, estate and guardianship proceedings, children's financial information is only before the Court because of their legal disability. Absent their disability, children could approve estate, trust and guardianship accounts which would eliminate the need for court proceedings. In summary, children are not generally before the courts in civil and family proceedings because of their personal choices.

How then are counsel for children to resolve the ethical dilemma of promoting accurate media reporting while representing this special group of clients? This is not an easy issue given the media's assiduous promotion of their right to access. However, the answer lies, in my opinion, in the Supreme Court of Canada decision in *A.G. (N.S.) v. McIntyre*, in which Justice Dickson (as he then was) observed:

*The authorities have held that subject to a few well-recognized exceptions, as in the case of infants, mentally disordered persons or secret processes, all judicial proceedings must be held in public.*<sup>27</sup>

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<sup>26</sup> The obvious exception in family proceedings is children who are themselves parents. In civil proceedings, late adolescents are occasionally defendants.

<sup>27</sup> (1982), 132 D.L.R. (3d), 385, (S.C.C.), at 402.

In identifying the fact that the media's right to access Court documents has always been restricted in the case of children and mentally incapable adults, Justice Dickson was merely giving voice to the long-recognized view that where vulnerable parties are before the Court solely because of their vulnerability they are entitled to have their privacy protected. Similar thinking should inform lawyers' consideration of how to modify the traditional client relationship when acting for children. Press reports may be harmful to child clients for many reasons.

Among these reasons are:

- (i) identifying the child as a member of a wealthy family when they are not already so identified may increase their kidnap risk;
- (ii) publishing the personal health details of a child may cause them psychological harm; and
- (iii) publishing salacious details of parents' divorce proceedings when they are not within the child's knowledge may also do them psychological harm. This is especially so where the child is of an age where their peer group is internet capable and so likely to have access to all kinds of media reports.

The profession has not, to date, assiduously advanced the rights of child clients in this regard. Perhaps this is because of the view which has been more prevalent since the advent of the Charter of Rights, that we should default to a position in favour of media access consistent with lawyers' duties as officers of the Court. In my view, that default position needs to be revisited in the case of child clients particularly in family law matters where the sins of the parents ought not to be visited on the children in the form of unrestricted media access. The

profession needs to turn its mind to these issues more fully when acting for children and to develop a consistent approach to seeking sealing and *in camera* orders.

Analogously, lawyers in Ontario are not doing as much as they should to see that their clients' privacy rights are being protected in Child and Family Services Act proceedings. Section 45 of the *CFSA* requires that all *CFSA* matters proceed *in camera* with a limited exception for media presence and makes it an offence to publish anything identifying any child who is the subject of a child protection proceeding.<sup>28</sup> On appeal from the Provincial Court to the Superior Court, in *CFSA* matters, it is routine for lawyers to fail to ask for the Court to be cleared for the argument. It is also routine for court staff to inadvertently post the entire title of the proceeding on matter lists outside courtrooms. This should not be allowed to continue. Lawyers have a duty both as officers of the Court and in representing their clients to see that it does not.

Thus the privacy rights of children engage both lawyer's duties to the Court and to their clients. It is imperative that the profession continue to acknowledge that children have special privacy needs and to act to preserve them in a consistent way.

### **Contingency Fees**

In recent years the scope of contingency fees in cases involving children has been highly controversial. This controversy has centred on the duty of lawyers to represent their clients and their duties as officers of the Court, to promote access to justice. In particular, the issue has been whether these duties are in conflict when contingency fees are employed.

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<sup>28</sup> *CFSA*, ss. 45(4), (5) and (8).

As clients, children seldom have the personal means to finance litigation. Moreover, in the case of personal injury and medical malpractice claims, their parents or caregivers are also usually without the means to finance the proper prosecution of the necessary litigation.

As officers of the Court, lawyers have a duty to promote access to justice. It is argued that contingency fees are consistent with this duty. Specifically, through contingency fees lawyers do the necessary work to see if a claim is viable on a speculative basis. That is, they adopt the risk of not getting paid in order to promote access to justice. This is no doubt true.

It is further argued that the percentage recovery in contingency fee agreements needs to be high so as to make it economically possible for lawyers to continue to review cases which, upon review, are not viable. The necessary corollary of this is that child clients with viable claims are financing from their damages' awards the review of other clients' matters.

It is here that the ethical dilemmas lies. Why should one client finance another when the duty to promote access to justice is the lawyer's not the client's responsibility? This is a particularly difficult question with child clients who are incapable of entering into contingency fee contracts so that their litigation guardians negotiate these arrangements. Obviously, the agreements must be approved by the Court before they bind the child.<sup>29</sup> So it is the Courts that have most recently been struggling to resolve the dilemma of the duty to provide access to justice and the duty to represent the individual client.

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<sup>29</sup> *Marcoccia v. Gill* [2007] O.J. 12 (S.C.); *The Solicitors Act*, s. 28.1.

The Alberta Court of Appeal has recently observed that, even with *sui juris* clients, the Court in construing contingency fee agreements must be conscious of the fact that there is an imbalance of information and knowledge between solicitor and client when negotiating contingency fee agreements. The Court observed that there is a clear adversity of interest between client and solicitor and that contingency fee agreements that are unclear or confusing should not be given effect.<sup>30</sup>

However, it has equally been observed that:

*The Ontario legislature intended to promote access to justice and to ensure that the cost of our legal system did not act as a barrier to justice when it amended the Solicitors Act to allow contingency fees. Contingency fees were considered to be particularly important for very complex cases that involve lengthy and costly preparation. [Monday December 2, 2002, Hansard, Second Reading, Justice Statute Law Amendment Act, 2002].*<sup>31</sup>

Justice Smith, in the *Cogan* decision in Ontario found that in deciding whether to approve a contingency fee that there is, together with the other factors to be considered<sup>32</sup>, the need to consider "attaining the valid social objective of ensuring that access to justice is maintained for injured plaintiffs, including children and parties under disability."<sup>33</sup>

Justice Smith then went on to consider two overarching issues: (1) whether the agreement was obtained in a fair way; and (2) whether it was reasonable having regard to all the

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<sup>30</sup> *Morrison v. Rod Pantony Professional Corporation*, 2008 Alta. C.A. 145 (CanLII), at paras. 25-27. See also: *Raphael Partners v. Lam*, 2002 CanLII 4507 8 (ON C.A.).

<sup>31</sup> *Cogan v. M.F.* 2007 CanLII 50281 (S.C.).

<sup>32</sup> Other factors include: financial risk assumed by the lawyer; likelihood of success; nature and complexity of case; expense and risk of pursuing claim; results achieved; expected recovery; who is to receive costs. See: *Cogan*, supra, para. 42.

<sup>33</sup> *Cogan*, supra., para. 41.

other factors. In this respect, his approach and the Alberta Court of Appeal's approach are consistent.

What does this mean for solicitor's acting for children who wish to use contingency fees agreements? The duty to promote access to justice is part of the lawyer's duty as an officer of the Court. So too is full, plain and true disclosure so as to not mislead the Court. I suggest therefore that the apparent conflict between the use of contingency fees to promote access to justice and the individual client's interest can be resolved as follows. First, the solicitor must explain to the client the reasoning behind the use of contingency fee agreements. I suggest the solicitor should be as blunt as saying "we use these agreements so we can finance investigations for other clients." The solicitor has then, in my view, represented the client adequately. Second, in seeking ultimate approval of the fee the solicitor must disclose to the Court what was explained to the client about this issue and give a synopsis of the litigation guardian's level of sophistication so that the Court can decide if the agreement was fairly entered into and should therefore be imposed on the child. It is worth noting that determining this issue will not be determinative of whether the agreement will be approved. All of the other factors will have to be considered. Nevertheless, at least the lawyer's ethical dilemma will be resolved. This is not the current practice of solicitors. However, the profession needs to address this issue and consider if this or some other solution is appropriate so that there can be consistency of approach in the negotiation and approval of contingency fees for children.

## **Conclusion**

In day to day practice lawyers acting for child clients are faced with the need to resolve their modified duty to their child clients with their duties as officers of the Court. Frequently, and particularly in the areas described above, lawyers must resolve these ethical dilemmas almost instantaneously. The profession has made much progress in addressing these issues but there needs to be further thought given to them so that children can be consistently represented in an ethical fashion.