

EXCESSIVE FEES & LAWYER DISCIPLINE

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I. Introduction

A lawyer's bill may be reduced on taxation¹ or by arbitration² because it is deemed to be unfair or unreasonable, but when this happens it is not necessarily always a matter which should also lead to disciplinary action by the Law Society. An honest misjudgment can happen within a margin of discretionary uncertainty involved in applying the fair and reasonable standard. What is equally true, however, is that there may be circumstances in a particular case of overcharging, or in a series of cases of overcharging involving the same lawyer, where the Law Society should take disciplinary action. For this purpose we need to clarify what the ethical standard for disciplinary purposes should be in respect to excessive fees.

The Law Society is given the authority to protect the public interest by upholding and enforcing proper standards of lawyer conduct.³ In the area of overcharging, there is no judicial precedent to prevent the Law Society from taking proper action. Rather, the lack of disciplinary action in the field only indicates what I take to be a serious deficiency in fulfilling our responsibility to govern the legal profession in the public interest. While the number of complaints made to the Law Society involving fees is a large percentage of the overall number of complaints made,⁴ I am not suggesting that overcharging in fact is at the root of most of these complaints. Lack of communication would more likely top the list. But there have been, nevertheless, several *prima facie* cases where the amount of fees seemed grossly disproportionate to the services rendered, yet the Law Society did not take any disciplinary action.⁵ A Gallup poll done in connection with the Canadian Bar Association Symposium on Advertising in 1978 found that 53 percent of the respondents listed overcharging as their main complaint against the legal profession.⁶ The harm to members of the public caused by actual problems of overcharging and also the harm to the profession's standing in the community incurred by misperceptions about lawyer's fees must be dealt with on two fronts.

NOTES

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- 1. In *Re a Solicitor* (1955), 16 W.W.R. 463 (Man. Q.B.), Tritschler, J., as he then was, held that *The Solicitor's Act*, 6 and 7 Vict., ch. 73 (U.K.) was still in force in Manitoba and accordingly that there was jurisdiction to tax a solicitor's bill of costs for services rendered other than in a Court matter. See, *The Law Society Act*, R.S.M. c. L100, s.40(3) and s.49 (hereinafter referred to as *LS.A.*); *The Queen's Bench Act*, R.S.M. 1970, c. C280, s.102(1)-(4), s.103(1)(g) and *The Queen's Bench Rules*, (hereinafter referred to as *Q.B. Rules*), s.620- s.657; *The Surrogate Courts Act*, R.S.M., 1970, c. C290, s.73(1)(e) and *The Surrogate Court Rules*, ss.57-70.
- 2. "Rules Relating to Arbitration of Solicitor and Client Fees By the Law Society of Manitoba," Rule 73(1)-(14). Fee arbitration is not mandatory. A lawyer may refuse to have a fee complaint submitted to arbitration, thus forcing the client to go to taxation to pursue the claim.
- 3. *LS.A.*, s.29(1)(q).
- 4. Based on this author's experience as a member of the Discipline Committee of the Law Society of Manitoba.
- 5. *Ibid.*
- 6. "Highlights of Gallup Poll," *Materials from Public Forum on Lawyer Advertising*, May 12 & 13, 1978, Toronto, Canadian Bar Association.

The preventative front includes formulating and enforcing standards of practice dealing with lawyer disclosure, preferably in writing at the outset of representation, as to the kind, manner of calculation, and fair estimate of the amount of the fees and costs involved, and continued communication between lawyer and client when circumstances change.⁷ Also involved is the need for much more public information about the right to taxation and the availability of arbitration, as well as public information about the costs of running a law office and the work involved in particular transactions. I am not going to address these issues, but they are just as crucial as the second front, namely disciplinary action for overcharging in appropriate cases.

Admittedly, the failure to take disciplinary action in the area of excessive fees is not simply related to a conspiracy by the Law Society to protect lawyers rather than the public interest. Some may argue that this matter is taken care of by the right of the client to have any bill taxed. But even if there existed a rule that every client must be informed of this right (which is a rule we need), I would argue that we still need to take, as a matter of protective deterrence, disciplinary action in appropriate cases. In the area of incompetence, the analogous argument that the right of the public to sue for negligence, absolves the Law Society of responsibility to protect the public from incompetent lawyers has been shown to be inadequate.⁸

However, some may argue that it is impossible to formulate and apply a disciplinary standard for overcharging, because the issue of fees involves complex subjective factors and not every case of deemed overcharging upon review by taxation or arbitration should lead to the heavy hand of discipline. This is the crux of the matter. There are indeed difficult issues to clarify in this regard, but the conclusion of this paper is that nothing prevents the Law Society from disciplining lawyers based on the current Canadian Bar Association *Code* "unreasonable fee" standard,⁹ but for greater clarity and adequacy in the future, the *Code* standard needs some revision. If some of the uncertainties in our current *Code* standard on overcharging could be overcome, we might be in a stronger position to take action. However, the bottom line is that as things stand now, a disciplinary committee can take action forthwith in cases felt appropriate, based on the *Code* standard. To a large degree, the difficulties are less conceptual than they are a lack of will on the Law Society's part to take such action.

In this paper no attempt is made to survey or comment on all probable issues involved in disciplining lawyers for overcharging. Notably the issues of mitigating circumstances related to penalty, sources of complaint, and the process of discipline are largely ignored. Rather, the approach is to look

7. See, ABA Standing Committee on Professional Discipline, *Avoiding Unintentional Grievances*, (1975); The Continuing Legal Education Society of B.C., *Lawyer's Fees*, (1981); The Continuing Legal Education Society of B.C., *Costs and Fees in Family Law Cases*, (1982).

8. See, eg.: *The Legal Profession and Quality of Service: Report and Materials of the Conference on Quality of Legal Services*, (1978), C.I.A.J.; and *The Legal Profession and Quality of Service: Further Report and Proposals*, (1980), C.I.A.J. The Law Society of Manitoba now has a Standards Committee which investigates complaints about lawyer competency and has the ultimate power to lay charges. *The Law Society Act* s.29(1)(q.1) and Rules 18 and 20.

9. The Canadian Bar Association, *Code of Professional Conduct*, (1974) (hereinafter referred to as the *Code*), Chapter X on "Fees". The *Code* standard will be discussed *infra*.

at the basic issue of discipline for the amount of fees charged, and what the ethical standard to be enforced should be on that issue. To this end, Canadian judicial decisions on excessive fees, Code provisions from several jurisdictions, and American judicial decisions are surveyed.

II. Canadian Judicial Decisions on Excessive Fees

A. Disciplinary Cases

There are only a few reported Canadian judicial decisions that have anything to do with discipline for excessive fees.¹⁰ This follows logically from the fact that lawyers are not in fact being disciplined for overcharging. There are of course many cases discussing the fairness and reasonableness of fees in taxation matters or when a lawyer or client has sued to recover a fee.¹¹ Before discussing some of these cases, it should be noted that the formulation of ethical standards for the legal profession is within the jurisdiction of the Law Society, not the judiciary. Historically (and still so in the U.S. generally),¹² there was a time when the jurisdiction to discipline was in the hands of the judiciary, but this is no longer the case. Section 46(1) of the *Law Society Act* gives a right to appeal disciplinary actions to the Manitoba Court of Appeal, but the court according to well established administrative law principles, does not itself exercise the power given by statute to the governing body to determine what is professional misconduct or conduct unbecoming.¹³ The court only reviews the legality of the governing bodies' exercise of those powers in a particular case.

In *Prescott v. Law Society of B.C.*¹⁴, the B.C. Court of Appeal made it clear that it was the Benchers who were the guardians of the proper standards of professional conduct. In that case the issue was one of unbecoming conduct involving gross negligence by a lawyer in some business affairs, leading to income tax violations. Despite the lack of intent to evade income tax, the Benchers found it to be unbecoming conduct and the court affirmed that unbecoming conduct included "any matter, conduct, or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or of the legal profession."¹⁵ The court should not review the substance of the decision unless it is manifestly wrong. Overcharging would be unprofessional conduct (when acting as a lawyer) rather than conduct unbecoming (when not acting as a lawyer), but the same idea of judicial deference to the Law Societies' powers applies. It is true that the judiciary sometimes seizes upon the appeal provisions in administrative law matters to substitute its own substantive views for that of the authority and thus some thought must be given to the judicial acceptance of any proposed standards for overcharging. However, the Law Society has formally adopted

10. *Infra*, n. 19 and n. 24.

11. See, eg.-4 Can. Abr. (2nd) [1966] with updates, "Barristers and Solicitors" Note titles XI "Compensation"; XII — "Bill of Costs"; and XIII — "Taxation of Costs".

12. See, Jack Nordby, "The Burdened Privilege: Defending Lawyers in Disciplinary Proceedings" (1979), 30 S.C.L. Rev. 363.

13. *L.S.A.*, s.45(1) and s.29(1)(q).

14. [1971] 4 W.W.R. 433 (B.C.C.A.).

15. *Ibid.*, at 440, (emphasis added).

the Canadian Bar Association *Code of Professional Conduct*¹⁶ as a standard for conduct and also can add to it or modify it with further conduct guidelines, and thus there is no need to find authority in existing judicial precedents for discipline before the Law Society can act on the *Code* standards. At minimum, if clarification is needed, a new standard can be adopted, giving notice to all, including the judiciary, what the disciplinary standard for overcharging will be.

Whether and how the *Canadian Charter of Rights and Freedoms* (1982) applies to the Law Society is still an open question at this time. In the recent case of *Law Society of Manitoba v. Savino*¹⁷ the Manitoba Court of Appeal dealt with the issue of whether the advertising rules of the Society violated freedom of expression under the *Charter* (section 2) and whether the hearing given to the lawyer by the Judicial Committee violated section 11(d) of the *Charter* (fair and public hearing by an independent and impartial tribunal). Chief Justice Monnin concluded that the rights enumerated in section 11 of the *Charter* apply to criminal or quasi-criminal offences created by federal or provincial legislation, but do not apply to the setting and enforcing of rules of professional conduct by professional bodies. Furthermore, if the *Charter* did apply, there was in Monnin, C.J.M.'s view, no infringement of the rights contained therein anyway, because the advertising regulations of the Law Society were according to section 1 of the *Charter*, "reasonable limits . . . demonstrably justified in a free and democratic society." The tone and theme of Chief Justice Monnin's judgment, however, seems to support the view that the *Charter* should not apply to the activities of the Law Society of Manitoba at all. Mr. Justice Huband on the other hand, in a separate concurrence and Mr. Justice O'Sullivan, in dissent concluded that at least on the issue of freedom of expression the *Charter* did apply to the Law Society. Huband, J.A. then found the advertising rules to be "reasonable" while O'Sullivan, J.A. thought they violated the *Charter*. However, Huband, J.A. also agreed with Monnin, C.J.M. that section 11 of the *Charter* did not apply to professional bodies. Thus, only Mr. Justice O'Sullivan's dissenting judgment implies that the *Charter* in general applies to the Law Society.

Despite the current uncertainty, it is likely that the era of the *Charter* will have a substantial effect on both the content of ethical standards and the process of enforcement. For example, if the standard for overcharging is too vague, it might be struck down as violating "due process." In the *Charter* (section 7), the phrase "due process" is not used, but rather we find the phrase "principles of fundamental justice." If you argue that this phrase includes a formalist adoption of the "principle of legality — rule of law" idea and apply it to lawyer discipline, you could argue that if the standard is so vague that the lawyer cannot predict adequately ahead of time what is and what is not proper professional behaviour, then the standard violates the "principle of legality" and is void for vagueness. In my

16. The *Code*, *supra*, n. 9, was formally adopted (1976) by the Law Society of Manitoba as an expression, *in part*, of the ethical principles governing lawyers in this province.

17. At time of writing unreported. Suit No. 5183. Judgment delivered Sept. 8, 1983.

view, however, the movement to reduce professional ethics to formal rules is undesirable and hopefully the judiciary will not interpret the *Charter* to mandate such a development. This argument is made later when discussing the nature of Codes.¹⁸

Subject to the future judicial interpretation of the *Charter*, the two existing Canadian judicial decisions on point may be read as standing for the proposition that some judicial restraint on the Law Society's power to discipline for overcharging exists. They do not, however, stand for that proposition at all. Indeed, if anything, they support the idea that discipline in appropriate circumstances may occur for charging excessive fees.

In the Manitoba case of *In Re H*¹⁹, Chief Justice Mathers in 1912 found a barrister guilty of unprofessional conduct for overcharging. It should be noted that at this time discipline over lawyers was lodged in the Court of Queen's Bench, not in the Law Society. In this case a "simple minded" person was sent a letter by some Scottish solicitors. The person could not make out what the letter meant and thus contacted the barrister in question. The thrust of the letter was that the person was entitled to some of the proceeds of an estate under a will, and that these proceeds would be sent to him upon signing and forwarding a simple discharge. The barrister, however, wrongly represented to the client that there were difficulties involved and stipulated a fee of 50 percent of the estate, but later agreed to take 1/3 of the estate. All that was involved was the writing of a letter to the Scottish solicitors and the execution of the discharge. Upon taxation of the fee agreement, the taxation officer set aside the 1/3 fee as unfair and unreasonable. He also asserted that the barrister had tried to suppress the initial letter from the Scottish solicitors during the taxation hearing. Thus Chief Justice Mathers was dealing with two matters of discipline, the formation and amount of the fee, and the conduct of the lawyer before the taxing officer. However, it is clear from the judgment that Mathers, C.J.M. suspended the lawyer for 9 months largely due to the fee issue. He stated:

It does not necessarily follow that because an agreement has been set aside as unfair the conduct of the solicitor or barrister who obtained it *must* be regarded as unprofessional. Each case must depend upon its own circumstances. The facts of this case leave no room for doubt or hesitation. The conduct of the accused member pertaining to the agreement in question under the circumstances stated was extortionate and in my opinion highly unprofessional.²⁰ [my emphasis]

Mathers, C.J.M. is not saying that a lawyer can never be disciplined for overcharging. He is simply saying that not every case of having a fee agreement set aside upon taxation leads to a finding that the lawyer has been unprofessional. In this case you have an example of where a lawyer should be found guilty in that the fee charged and the work actually done were grossly disproportionate. Thus *In Re H*²¹ may be seen as a precedent supporting discipline, not denying it! Furthermore, the fact that Chief Jus-

18. *Infra*.

19. (1912), 2 W.W.R. 483 (Man. K.B.).

20. *Ibid.*, at 486.

21. *Supra*, n. 19.

tice Mather's term "extortionate" is found in the judgment, does not mean that only such obvious cases are subject to discipline. An easy case may include something akin to "extortionate" but that is not necessarily what the disciplinary standard for overcharging is or ought to be.

It should be kept in mind that when we talk about fees we sometimes need to separate two matters, namely the fairness of the fee versus the reasonableness of the fee. In the Manitoba case of *Galbraith v. Murray*²² the court said:

In deciding whether a contract between a solicitor and client is "fair and reasonable to the client" within the meaning of s. 73 of the *L.S.A.*, the word "fair" is to be taken as relating to the means by which the contract was brought about, and "reasonable" as relating to the quantum of remuneration.²³

In Re H might be distinguished as only dealing with fairness and not with quantum of remuneration. However, after reading the judgment, one has to conclude that both fairness and reasonableness were dealt with by Chief Justice Mathers *re* the suspension of the lawyer.

The second Canadian case on point is *Re German and Law Society of Alberta*²⁴, a 1974 case from the Alberta Court of Appeal where a lawyer appealed the decision of the Benchers to reprimand him for overcharging a client. The lawyer's account had been reduced on taxation from \$1,409 to \$500. Upon referral of the matter to the Law Society, the lawyer objected, by stating that the Law Society had no jurisdiction to discipline for overcharging. It should be noted that at the time in question, the C.B.A. *Code* was not yet in existence.²⁵ The *Code* more explicitly deals with the charging of an unreasonable fee and outlines a test for what is reasonable. The old 1920 *Canons of Legal Ethics*²⁶ were less forthright. As to the lawyer's duty to the client, the old *Canons* stated:

He is entitled to reasonable compensation for his services but he should avoid charges which either over-estimate or under-value the service rendered. When possible he should adhere to established tariffs. The client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge or even none at all.²⁷

Despite the vagueness of the *Canons*, the Benchers in Alberta met and agreed that they did have jurisdiction and they determined that in proper cases overcharging should be a matter of discipline. The Court of Appeal on this point agreed with the Benchers. Nowhere in the judgment does the Court allege that you cannot discipline for overcharging or for the manner in which the fee is arrived at. The question the court addressed was not whether it was proper to discipline in an appropriate case, but rather whether this was such an appropriate case.

The Court in *German* concluded that in the particular circumstance of the case before them the Benchers were wrong in reprimanding the lawyer.

22. [1930] 3 W.W.R. 120 (Man. K.B.).

23. *Ibid.*, at 120 (headnote).

24. (1974), 45 D.L.R. (3d) 535 (Alta. C.A.).

25. The question arose in 1972, while the *Code*, *supra*, n. 9, was published in 1974.

26. Canadian Bar Association, *Canons of Legal Ethics* (1920); Orkin, *Legal Ethics* (1957) reprints these in an Appendix, at 269-274.

27. *Ibid.*, at s.3(9).

The *German* case, despite the amount of reduction on taxation, deals primarily with the manner in which the lawyer rendered the account rather than with the amount *per se*. The facts clearly indicate that the client was a difficult one to deal with and the litigation involved was tenuous and complex. The lawyer withdrew from the representation and submitted an account based on a rate of \$100.00 per hour. No allegation was made that the lawyer had not spent 14 hours or so on the case. What bothered the taxation officer and the Benchers, was the lawyer's admission that he set the hourly figure for the fee, fully expecting that the client would protest and he would then negotiate with the client for a smaller amount. Surprisingly, the client did not negotiate but went straight to taxation. At the hearing before the Benchers, the lawyer admitted to other cases where he did the same thing. The implication was that his client might not object and pay the full fee, but if the client objected, the fee might be reduced. So the figure of \$100.00 per hour was not itself necessarily unreasonable. What was unfair was the "negotiative" posture to fee setting, even if the initial amount was a defensible fee. Mr. Justice Kane for the Court of Appeal, while not encouraging or affirming what the lawyer had done, stated:

In my opinion, on the evidence, with deference to the conclusion which was reached by the Benchers, I have reached the conclusion that the appellant's conduct in rendering and sending out his account to Miss Cutler was not such as could be reasonably regarded by his professional brethren of good repute and competency, disgraceful or dishonourable either because of its amount or because it might have been subject to adjustment downward if settlement had been offered by the client.²⁸

Thus the reprimand was set aside. Whether we agree with the result or not, it is important to note that one cannot use this case to argue that the Law Society has no jurisdiction to discipline for overcharging.

This point has been belabored because discussions have arisen in the past about judicial restraint on discipline for incompetent performance. There were indeed judicial decisions in that area which suggested that the Law Society did not have jurisdiction to discipline even for the grossest forms of negligence.²⁹ In my opinion, the explicit adoption of the *Code* in 1976, with the duty of competent service contained therein,³⁰ made these cases obsolete, and even if we had not embarked on the elaborate statutory amendments and rules dealing with the Standards Committee,³¹ we could still have disciplined for incompetency without them. But at minimum, the point is that there is no comparison between the overcharging and incompetency issues in terms of prior judicial restraint.

It is interesting that the two Canadian cases on point deal with cases on the margins. *In re H* is an obvious case at one end of the spectrum akin to fraud or theft, while *German* is a case at the other end of the spectrum, where the amount *per se* at least by an hourly rate and time spent basis

28. *Supra*, n. 24, at 547.

29. *See, In re a Solicitor* [1935] 3 W.W.R. 428 (Sask. C.A.); *Re Solicitor* (1916) 37 O.L.R. 310 (C.A.); and *Re Fitzpatrick* (1923) 54 O.L.R. 3 (C.A.).

30. *Supra*, n. 9, Chapter II, "Competence and Quality of Service".

31. *Supra*, n. 8.

was reasonably debatable. Thus while the cases support the principle of discipline in appropriate cases, they do not provide a substantive standard for when it is appropriate and when not.

In New South Wales there is the reported case of *Re Vernon*³² where a solicitor acting for a number of plaintiffs in "ordinary running down" actions involving very little court work or contested issues of liability, charged on the average around 1,000 pounds per case. The court determined that a reasonable fee in these cases would be around 250 pounds. In all cases the solicitor had prior agreement from the client as to the amount of the fee, but the court noted that the clients had no basis on which to judge whether they were being overcharged or not. The court concluded that the fees "were exorbitant and grossly excessive" and the solicitor was struck off the rolls. The court noted that not every case, even with a substantial reduction upon taxation, necessarily amounted to unprofessional conduct, and admitted that the taxation standard had uncertainties at the margin. But, in a very quotable passage the court says:

As with all questions of degree, cases may occur in which it is difficult to decide on which side of the borderline they fall. This particular difficulty was referred to in *Chapman v. Chapman* [1954] A.C. 429, 445 by Lord Simonds L.C. who said that he was not as a rule impressed by an argument about the difficulty of drawing the line, since he remembered "the answer of a great judge that, though he knew not when the day ended and night began, he knew that midday was day and midnight was night." Likewise the court in these present proceedings is in no difficulty in deciding which side of the line the solicitor's conduct falls.³³

This quote needs to be kept in mind as we proceed.

B. Taxation and Litigation Cases

Before discussing *Code* provisions and American cases, it should be noted that many of the issues involving discipline for excessive fees relate to the existing law of taxation of accounts and the law arising out of general litigation involving lawyers' fees. While not giving here any exhaustive treatment of the law of legal fees and costs, a few points are necessary for contextual understanding of some of the disciplinary issues. This is necessary, because a fundamental issue is just how much the taxation standard and the disciplinary standard should parallel each other.

1. The "Fair and Reasonable" Standard

The golden thread running through the law of taxation of fees and costs is the "fair and reasonable" standard.³⁴ This same standard is applied when a lawyer sues for a fee or a client attempts to recover a fee already paid by way of alleging unjust enrichment. The standard is not in dispute; the difficult issue is how to apply it. Before dealing with this issue, however, an important point must be clarified.

32. (1966), 84 W.N. (N.S.W.) 136 (N.S.W.C.A.)

33. *Ibid.*, at 144.

34. *R. v. Ellis* (1895), 33 N.B.R. 141 (C.A.); *Veitch v. Noble and Inkster* (1956), 20 W.W.R. 382 (Man. C.A.); *Re Malone* (1961), 34 W.W.R. 699 (Sask. C.A.); *Re Burr*, [1938] O.W.N. 69 (Ont. C.A.).

2. Contracting Out of the Standard

It is a common misconception that if a lawyer and client agree to a fee, and all the problems of the informed and voluntary nature of the client's acceptance are dealt with by way of client waiting time, offer of independent advice, and full disclosure, a lawyer can thereby charge as high a fee as he or she can get agreement for. Not so! A fee based on prior agreement, even in writing, can still be taxed down or upon litigation reduced, for not being fair and reasonable.³⁵ The lawyer-client relationship is primarily fiduciary and thus freedom of contract is constrained. This is not to say that prior agreement is irrelevant or not to be encouraged, but rather that agreement alone does not preclude review. What some would like to think is that if you have an agreement, then you only have to show "fairness" but not "reasonableness". You will recall that fairness may be thought of as relating to the means by which the agreement is brought about, while reasonableness relates to the quantum of remuneration. However, except perhaps for one kind of retainer,³⁶ the lawyer's fee, even if based on agreement, must nevertheless be fair and reasonable.

First, in regard to contingency fees, the *Law Society Act*³⁷ makes it clear that despite the client's prior agreement to the contract, the manner and amount of the contract may still be reviewed by the Queen's Bench as to its fairness and reasonableness. In the case of *Re Macfarlane and MacLoughlin*³⁸ a contingency fee was reduced from 40% of recovery to 20% of recovery. Mr. Justin Hutcheon referred to an earlier Manitoba authority:

"In the case of *Re Law Society Act; Galbraith v. Murray*, [1930] 3 W.W.R. 120, [1930] 4 D.L.R. 1005 (Man.), Kilgour J. was asked to determine whether a contract between solicitor and client was fair and reasonable within s. 73 of The Law Society Act, R.S.M. 1913, c. 111. He approached that determination in two parts. Firstly, he considered whether the circumstances disclosed any unfairness in the way in which the contract came into being. Secondly, he considered whether the remuneration received by the solicitor was reasonable, taking into account, on the basis of the outlook at the time of the contract, the amount of work expected normally to be done and the reality and extent of the risk assumed by the solicitor. I agree with that approach."³⁹

Numerous cases have dealt with the fairness and reasonableness of contingency agreements.⁴⁰

Of course, if the client does not make an application for a declaration, there will be times, without a disciplinary regime, when a lawyer will get away with charging a contingency fee which might be considered unfair or unreasonable or both. But the fact of agreement alone does not preclude review.

The more common situation, than the contingency fee agreement, is where a lawyer and client agree to a non-percentage fee at the outset of

35. *Infra.*, n. 41.

36. *Infra.*, n. 46.

37. *L.S.A.*, s. 49.

38. [1975] 1 W.W.R. 764 (B.C.S.C.).

39. *Ibid.*, at 767.

40. *See, e.g.: Speers v. Hagemester* (1974), 52 D.L.R. (3d) 109 (Sask. C.A.); *Smulon v. Katzenbach*, [1981] 1 W.W.R. 400 (Sask. Q.B.); *Re Dolan* (1980), 33 N.B.R. (2d) 88; *Re McElman* (1982), 40 N.B.R. (2d) 234.

the representation. The agreement may be oral or in writing. It may be based on a lump sum for handling the particular matter involved, or it may be based on an hourly rate, or some other manner of calculation. If it is a lump sum then the total amount of the bill, aside from disbursements, has been agreed upon at the outset. Obviously, if based on an hourly rate, only an estimate of the final bill can be made until the matter is completed. In either case, despite the prior agreement between lawyer and client, the bill is still subject to the fair and reasonable standard.⁴¹

In most cases, of course, there is no prior agreement as to the fees, but rather either periodic bills are sent during the course of the representation, or at the end of the matter a bill is rendered. Here the question of contracting out of the fair and reasonable standard does not arise. The lawyer is entitled to a *quantum meruit* which is fair and reasonable.⁴²

In some cases you have a difficult "fairness" question when there is something in between the prior agreement and post-bill situations, namely an estimate as to the fees and costs. If the bill when rendered is substantially different than the estimate, without client information subsequently about the changing circumstances, it may be that in fairness to the client the bill should be reduced downward.⁴³

Prior agreement does not stop the bill from being reduced as unreasonable, but conversely, once an agreement has been entered into, the lawyer may not "accelerate" the fees over the amount of the agreement.⁴⁴ It may seem unfair to hold the lawyer to a contract which provides inadequate fees, but not a client to a contract for excessive fees, but that is part of the fiduciary concept.

The point has been made that the fair and reasonable standard applies to all lawyers' fees, of whatever kind. There is one kind of fee, however, which currently may not have to conform to the reasonable standard, but only to a fairness standard. This fee is one of the kinds of retainers that a lawyer may seek. First, however, let us look at the kind of retainer that is not problematic in that the fair and reasonable standard clearly applies to it. One kind of retainer is a part or whole "pre-payment" of fees for the work to be done. Thus, you not only have prior agreement, but also some or all prior payment. In due course, the lawyer must render an account to the client for fees and expenses to be taken from the retainer and pay back to the client any pre-payment that is not earned. The fair and reasonable standard applies to the amount taken from the retainer. The lawyer cannot keep unearned portions of the retainer, but only such amounts as are fair and reasonable in relation to what the lawyer actually has done.

On this point, it might be noted that a few years ago the Benchers here in Manitoba debated a very contentious proposed rule. It was passed by a

41. See, *Re Solicitor* (1955), 17 W.W.R. 97 (Man. C.A.); and *Re Malone* (1961), 34 W.W.R. 699 (Sask. C.A.); and *Diligenti v. McAlpine* (1978), B.C.L.R. 153 (B.C.C.A.).

42. *Yule v. City of Saskatoon* (1955), 17 W.W.R. 296 (Sask. C.A.).

43. See, e.g.: *Re Murphy* (1980), 32 N.B.R. (2d) 281 (Q.B.).

44. See, e.g.: *Re Paolini and Evans, Keenan* (1976), 13 O.R. (2d) 767, and *Shute v. Nova Scotia* (1977), 27 N.S.R. (2d) 521 (T.D.).

narrow margin. Now in our Rules respecting Accounts, trust money "... includes money advanced to a solicitor on account of fees for services not yet rendered or money advanced on account of disbursements not yet made."⁴⁵ The effect of this is that a lawyer may not put money into his own pocket until he has earned it and billed for it. I think that it is a good rule, because the likelihood of the lawyer keeping amounts over the fair and reasonable standard is increased when the lawyer already has the retainer and likely has already spent it, too. For example, a matter may be suddenly settled, though the retainer was paid in full expectation that a trial would take place. I venture to think that some lawyers would simply keep all the retainer, particularly if the settlement was favourable to the client, even if by the "fair and reasonable" standard the fee was excessive. If the retainer is substantial there is also a possibility of taking "short cuts" in the work knowing that the fees have already been paid, anyway. I suppose that all of these activities can still be managed through unethical billing practices in any case, but the rule is at least somewhat more protective of the client. Clearly, the central point here though, is that the pre-payment of fees is no different than the post-payment of fees. The fair and reasonable standard applies when the client goes to taxation.

Now for the problematic kind of retainer. In *Stevenson v. Nagel*⁴⁶ a lawyer made a retainer agreement with a "difficult" client in a divorce matter. The retainer was in writing, the client was given time to take the agreement home and read it, and a suggestion to seek independent advice was made. The lawyer also testified that he explained the effect of the retainer to the client. The retainer paid by the client could be divided into two parts. One part was an advance of \$3,000 for fees and expenses in the case. The lawyer's fees were to be \$50/hour. This is the "unproblematic" part. But the first part of the retainer asked for \$2,000 in order to secure the services of the lawyer and induce him to act. This is the problematic part. The agreement made it clear that even if the lawyer or client withdrew from the case, the \$2,000 had already been vested absolutely in the lawyer. The client withdrew after a period of time and upon taxation the question of jurisdiction over the \$2,000 retainer was raised. This issue ultimately went to the Saskatchewan Court of Appeal.

Chief Justice Culliton, with Hall J.A. concurring, concluded that the \$3,000 payment for fees and expenses could be taxed in relation to the well-known fair and reasonable standard, but that the \$2,000 payment to retain the services of the lawyer was not subject to the fair and reasonable standard. He characterized this retainer as being in the nature of a gift to the lawyer for taking the case and thus a promise to pay such a retainer by the client could not be enforceable, but, equally, once the client had paid it, it could not be reviewed on the fair and reasonable standard.⁴⁷ This does not mean that it was totally insulated from review. Culliton referred to the Ontario case of *Re Solicitor*⁴⁸ and summarized a purely "fair" test *vis* the

45. Rules of the Law Society of Manitoba, Rule 61(c).

46. [1980] 2 W.W.R. 417 (Sask. C.A.).

47. *Ibid.*, at 425.

48. (1977), 4 C.P.C. 275 (Ont. H.C.).

manner of making the agreement, but no "reasonable" test *vis* the amount of the retainer. In upholding the retainer in this case, Culliton said:

In my respectful view, the validity of a preliminary fee given to retain the services of a solicitor and not to be considered in the determination of the fees payable for services rendered does not depend upon establishment that the amount of the retainer is fair and reasonable, but upon establishing that:

(1) The agreement unequivocally sets out that the fee was for the purpose of retaining a solicitor and that such fee was in no way to diminish the fees for the services to be rendered, and

(2) The agreement which so provided was clearly and carefully explained to the client.

If the solicitor meets the foregoing requirements, the validity of the agreement is established and the court has neither the right nor the duty to question the propriety of the amount of the retainer.⁴⁹

Brownridge J.A., in a carefully reasoned dissenting judgment emphasized the fiduciary relationship between the lawyer and the client. He agreed that such a retainer is in the nature of a gift, but due to the fiduciary relationship between lawyer and client, such gifts should on equitable principles require a heavy burden on the lawyer upon review to show fairness, not just in the manner of how the agreement came into being, but also reasonableness with reference to the amount. He said:

However, as to the reasonableness of the retainer fee, I regret to say that I can find no basis upon which to sustain it. The gift is so large that it shocks the conscience! I cannot think of anything more detrimental to the public image of the profession than if this court were to put the stamp of approval upon this kind of retainer fee.⁵⁰

While disapproving of this kind of fee in general, Brownridge suggested that the court should at minimum only support very nominal retainers of this sort. Here he would have allowed the lawyer \$150.00 rather than the \$2,000.

The *Stevenson* case is not binding in Manitoba because even the highest appellate court of one province does not bind the courts of a different one.⁵¹ If the question is open in Manitoba, I would suggest that a fair and reasonable standard ought to apply to these kinds of retainers, and certainly any disciplinary standard should apply as well. Different factors may be involved in regard to this fee as compared to the factors involved in determining the reasonableness of other kinds of legal fees. Some institutional and corporate clients obviously keep a firm of lawyers retained on a regular basis where the retainer is a mixture of prepayment for services to be rendered from time to time and some as a "gift" for priority availability. The reasonableness of these amounts would in some cases be more than nominal. One situation that should always be considered unfair and contrary to public policy is the payment of a retainer, not to secure the availability of the lawyer to act, but rather to induce him or her not to act. It is well known that some law firms in the past have been "bought off" by powerful interests

49. *Supra*, n. 46 at 425.

50. *Ibid.*, at 435.

51. *Wolf v. The Queen* (1974), 27 C.R.N.S. 150 (S.C.C.).

who do not want the law firm to take cases against them. Once a retainer is paid, then the law firm cannot act against its own "client", even though it does no work for the client.

Other factors could be mentioned in relationship to this kind of retainer, but one could argue at minimum that such a fee should be subject to a fair and reasonable standard. Thus we can argue that all forms of lawyers' fees, whether involving prior agreement or not, are subject to the standard. Applying this to the disciplinary arena, should all lawyers' fees, whether based on prior agreement or not, be subject to a disciplinary standard, or should the factor of client agreement be taken into account to preclude discipline? My view, given the fiduciary nature of the lawyer-client relationship, is that the disciplinary regime should parallel the taxation law and now allow "contracting out" of ethical standards.

3. Determination of "Fair and Reasonable"

The reported cases on the application of the fair and reasonable test to different kinds of legal fees is voluminous⁵² and I wish to deal with the matter only to raise issues that recur if we try to discipline lawyers for setting excessive fees. Obviously, discipline may be desirable, not just for the amount of the fees (reasonableness) but for other aspects of the lawyer's conduct in relation to fees (fairness). For example, a recurring problem is the tactic of some lawyers to withdraw a bill and render a new higher bill when the client protests the first one or threatens to go to taxation. This intimidating tactic by lawyers may well be an aspect of "fairness" that deserves disciplinary action.⁵³ However, I wish to deal primarily in this paper with the issue of the amount of the fee.

An important issue here is whether there is one basic approach to the fair and reasonable test that applies to all cases, namely that what is fair and reasonable must be determined by examining and weighing a list of factors. These factors may be given different weights depending on the form of the legal bill and the particular circumstances involved in the case. A different approach, however, would be to suggest that the fair and reasonable test varies in method of determination, depending on what basic kind of legal fee we are dealing with to begin with. The application of the standard may vary as to whether we are dealing with a contingency fee, a prior contract on amount or basis of fee, a pre-payment, a matter involving a tariff, or a post-performance bill and so forth. We must not forget that the issue here is not whether the fair and reasonable test applies, but rather how to apply it.

It would be preferable, perhaps, to have one approach for all cases, even if some factors would be irrelevant for some forms of fee setting, but probably the second approach is closer to the current practice of taxing fees and costs. For example in the 1982 case of *Sellner v. Pesto*⁵⁴ the Manitoba

52. *Supra*, n. 11.

53. *See, e.g.: Greer v. Borserio*, [1972] 1 W.W.R. 73 (B.C.S.C.); *Re Reiter* (1979), 24 O.R. (2d) 302; *Sequeira v. Noble* (1979), 13 C.P.C. 235 (Ont. T.O.); *Re Kesthelyi's Estate* (1981), 8 Man. R. (2d) 64 (Sur. Ct.).

54. (1982), 17 Man. R. (2d) 101 (Man. C.A.).

Court of Appeal appeared to distinguish cases of prior agreement, tariff matters, and the most common post-performance bill. Mr. Justice O'Sullivan suggested that in the absence of agreement, hourly rates alone are not the proper approach to setting reasonable fees.⁵⁵ The implication is that an hourly rate as the sole manner of setting the fee may be agreed upon. This does not of course mean that you can contract out of the fair and reasonable standard. The rate per hour, the amount of hours in terms of whether the work was necessary, the quality of the work done, and so forth may still be looked at *vis* "reasonableness", but the fact of prior agreement may displace the approach to determining what is fair and reasonable that is used in the post-performance bill cases. However, some courts have taken the same approach whether the case involves prior contract or post-performance. For example, the B.C. Court of Appeal in *Diligenti v. McAlpine*,⁵⁶ dealt with a prior agreement based on billing by the hour, and applied the "factors test" discussed below. Of course, on some matters, there will be tariffs in the court rules that give guidance to a court or taxing officer.⁵⁷

In the post-performance bill cases there appears to be fundamental agreement as to the basic approach to applying the fair and reasonable standard, though the list of factors is not completely standard from case to case. Clearly a leading authority is *Yule v. City of Saskatoon*⁵⁸ where the court affirmed the following often quoted test:

After an exhaustive review of the authorities the learned trial judge stated that all factors essential to justice and fair play must be taken into account referring to the words of Middleton, J. in *Re Solicitor* (1920), 47 O.L.R. 522. He then proceeded to enumerate the matters to be considered in arriving at a proper amount on the basis of a *quantum meruit*; among these matters he enumerated the extent and character of the services rendered, the labour, time and trouble involved, the character and importance of the litigation in which the services were rendered, the amount of money or the value of the property involved, the professional skill and experience called for, the character and standing in his profession of the counsel and the results achieved.⁵⁹

The weight given to various factors will depend on the circumstances of each case.

Another prominent case is that of *Re Solicitor*⁶⁰ which is probably the best reported example of a taxing officer going through the factors one by one in view of the particular circumstances of the case. The basic point of that case was that just because the matter involved a lot of money in a matrimonial settlement and the client had the ability to pay did not justify the lawyer in charging \$24,000 for his 30 to 35 hours of work that involved no particular unusual or complex matters. His fee was reduced to \$4,000. The factors used in that case were as stated by McBride:

1. The time expended by the solicitor.
2. The legal complexity of the matters dealt with.

55. *Ibid.*, at 105, (my emphasis).

56. (1978), 9 B.C.L.R. 153.

57. *Supra*, n. 1.

58. *Supra*, n. 42.

59. *Ibid.*, at 299.

60. [1972] 3 O.R. 433 (H.C.).

3. The degree of responsibility assumed by the solicitor.
4. The monetary value of the matters in issue.
5. The importance of the matters to the client.
6. The degree of skill and competence demonstrated by the solicitor.
7. The results achieved.
8. The ability of the client to pay.⁶¹

This Ontario case with its 8 factors is often followed as the proper approach to determining what is fair and reasonable.⁶² A similar factors test was affirmed by the Manitoba Court of Appeal in *Sellner*⁶³ where the court cited section 4(6) of Tariff "A" of the *Q.B. Rules*:⁶⁴

In all cases of fees or allowances which are in the discretion of the taxing officer or which may be increased in the discretion of the taxing officer, the taxing officer shall have regard to all of the circumstances, including (but not in any way restricting the generality of the foregoing) the nature, importance, or urgency of the matters involved, the time occupied, the circumstances and interest of the person by whom the costs are payable, the general conduct of the proceedings, and the amount, skill, labour, and responsibility involved, and the preparation and consideration of any written argument when requested by a judge, master or referee.⁶⁵

If we look to the fair and reasonable standard applied by adopting a factors test as a model for a disciplinary standard we run squarely into the problem of vagueness. The fair and reasonable standard, even when helpfully broken into factors to be looked at, is not a "rule" that can be applied with a high degree of deductive rationality. Obviously general standards like the "reasonable man" test for negligence involve discretionary judgment and thus a kind of margin of uncertainty exists at the borders. This is inevitable and we accept this in our legal regime in all kinds of areas. Law would be intolerable if we attempted to reduce all standards to rules containing factual details as to when the rule applies. Imagine that a panel of lawyers were asked to apply a "factors test" to see if a bill was "fair and reasonable". One lawyer might put more weight on one factor in relation to another factor than a different lawyer would. It is likely that if the lawyers were asked to set the fee in the circumstances they would not all set the same fee. However, in terms of the value of the fair and reasonable test, the question is rather whether there would be agreement, not at the margins, but within a defensible range. That is, they might all say that the fee actually charged was definitely out of the range of what is fair and reasonable. So the application of a fair and reasonable test does involve some inevitable margins of purely subjective judgment, but one can argue that there is a core range of objective determination possible within it.

The objective rationality range would be enhanced, however, if we had a complete list of factors and more guidance as to what the weights and

61. *Ibid.*, at 436.

62. *See, e.g.: Kovacs v. Appleby*, [1978] 1 W.W.R. 341 (Man. Q.B.); *Re Kesthelyi's Estate* (1981), 8 Man. R. (2d) 64 (Sur.Ct.); *Re MacNeil* (1982), 43 N.B.R. (2d) 1 (Q.B.); *Schmidt v. Schroeder* (1981), 15 Sask. R. 230 (Q.B.).

63. *Supra*, n. 54.

64. *Ibid.*, at 105-106.

65. *Q.B. Rules*, Tariff "A", s.4(6), made pursuant to *Q.B. Rule 638(1)*.

balances between these factors should be generally. For example, the ability of the client to pay as a factor surely should not mean that doing a routine service for a rich client leads to a windfall as opposed to doing it for a middle class or poor client. But, of course, it would be difficult to discount this factor altogether. The fact that lawyers are encouraged to make legal services available to all, results in an inevitable subsidization of services for the poor from paying richer clients, absent a fully 'equal' legal aid system. This illustrates that any attempt to prioritize the factors would be difficult indeed. Similarly, the monetary value of the matter in issue in a case may involve greater risk of lawyer liability, but may nevertheless involve a routine service that does not justify greatly disproportionate fees simply because of the dollars involved. As you can see, one might put very little weight generally on some factors as opposed to the time spent or legal complexity, etc. But one might not agree. Thus, although we say that what is fair and reasonable depends on the application of the factors to the unique circumstances of each case, we still ought to know in general some tentative factor weights, though it would be difficult to agree to this.

Here is undoubtedly the core problem when we move from taxation to discipline. A discipline standard based in some way, even if only as a starting point, on a taxation standard suffers from the uncertainties of the taxation standard at the margins. This marginal uncertainty may be acceptable in taxation matters but not in laying the serious charge of unprofessional conduct. Thus, while we accept broad standards in many areas of the law, when dealing with criminal law, the ideology of having only clear, fixed, accessible rules becomes mandated by the serious consequences on individual liberty that a finding of criminal liability usually results in. Lawyer discipline may be viewed as purely protective of the public, not as geared to punishment *per se*. However, the serious effect of discipline on the lawyer cannot be denied, so we must be sensitive to the problem of the *ex post facto* application of punishment on the basis of a breach of a subjective standard. Thus, the "reasonable" standard may form the basis of the disciplinary standard, but the amount of the fee should clearly or substantially be in excess of the reasonable standard for disciplinary purposes. The fair and reasonable test may be thought by some to include such large margins of uncertainty as to prove useless as a guide to discipline. I disagree, but I certainly acknowledge the need to include all relevant possible factors and, if possible, prioritize the factors generally. Having done this, I think that the fair and reasonable test should be the basic starting point for a discipline standard on overcharging.

There are of course reported decisions on taxation or litigation that involve some issue of what weight to give one factor as opposed to another in a particular matter. For example, in *Pelletier v. Cormier*⁶⁶ a bill was reduced from \$5,000 to \$100 on taxation. The lawyer did nothing more than write a demand letter of three paragraphs to the husband as a preliminary to a separation agreement. Subsequently the husband and wife privately negotiated their own separation agreement in an amicable fashion

66. (1981), 35 N.B.R. (2d) 52 (Q.B.).

with a monetary value involved for the wife of \$100,000. But the husband and wife then reconciled and the lawyer claimed a fee of \$5,000 from the wife. Clearly the court put the factor of time spent and other factors way above any question of monetary value involved or ability to pay. However, I do not think that the cases, taken as a whole, provide enough guidance in the difficult task of attempting some prioritization of the factors test.

4. Fee Schedules

If the "factors" test is problematic as being too vague, would it be logical to adopt a "sophisticated" and standardized fee schedule to use as a yardstick to determine whether a fee was excessive? That is, would it be desirable to have a complete, detailed and formal set of tariffs as possible that would both deter overcharging by giving lawyers information as to what fees to charge, and which could also be used as the major standard for disciplinary cases involving excessive fees?

The Manitoba Bar Association, adopted a "Guideline to Solicitors' Fees" in 1974,⁶⁷ which has not been appropriately updated. It is not a mandatory, minimum or maximum fee tariff, but is stated to be "average fees in ordinary or routine situations."⁶⁸ The Guide makes great use of percentage based fees for this purpose.

In taxation matters the use of existing voluntary bar tariffs would depend on the currency of the tariffs in a province, and in any case, the tariff is not binding, but may be thought of as just one of the factors that may be taken into account as to whether the fee was fair and reasonable. In *Rees, Newsham and Weir v. Stanek*⁶⁹ the court quoted *Braun v. Thiessen*⁷⁰ as follows:

The Law Society tariff does not purport to have nor does it have any legal force and effect binding either the members of the profession or their clients, but it deserves the careful consideration of the court as evidence of what the profession as a whole considers to be fair charges . . .⁷¹

The use of tariffs as a factor in taxation has been accepted in other cases, as well.⁷²

Any mechanical use of tariffs is problematic however. Neither legal services nor legal practitioners can be standardized adequately to avoid being thrown back into a "factors" test in many cases. Legal services vary in complexity and practitioners vary in experience, skill, and overhead costs. Furthermore, a fee schedule compiled by the profession is subject to the criticism that it amounts to price-fixing and thus serves as an anti-competitive influence that harms the public.⁷³ Even a voluntary tariff may be

67. Manitoba Bar Association, *Guideline to Solicitors' Fees*, (1974).

68. "As expressed in a covering 'memorandum' " to *Guideline, Ibid.*

69. (1982), 16 Sask. R. 288 (Q.B.)

70. [1972] 5 W.W.R. 114 (Sask. Q.B.).

71. *Supra*, n. 69 at 296, quoting *Ibid.* at 118.

72. See, e.g.: *Main Line Oil Seeds v. Rendek* (1982), 17 Sask. R. 168 (Q.B.); *Re Dube* (1981), 37 N.B.R. (2d) 179 (Q.B.); *Re Solicitors*, [1969] 1 O.R. 737 (T.O.); *Re Solicitors*, [1970] 1 O.R. 407 (T.O.).

73. See, John Crispo, *Fee-Setting By Independent Practitioners, A Study for the Prices and Incomes Commission*, (1972). In the United States, minimum fee schedules have been struck down as unconstitutional price fixing. *Goldfarb v. Virginia State Bar* 421 U.S. 773 (1975).

utilized by many members of the profession to legitimate fees in a way which suggests that the client cannot bargain for lower ones. Given the increasing numbers of lawyers in the profession, there is pressure to discipline for undercharging, rather than overcharging, in the name of upholding standards of quality.⁷⁴ This could be interpreted as a veiled conspiracy at price fixing in the profession in the face of a more competitive market. Standards of quality should be left to the Competency Committee.

The use of tariffs may be very helpful, nevertheless, in giving a basic yardstick both to a lawyer and to a client of what fees generally are charged in the profession. But the crucial question is whether those tariffs are reasonable in the first place. The use of percentage-based fees, for example, sometimes allows grossly disproportionate "windfalls" between time spent and fees recovered merely because the matter involves more dollars. Such percentage based fees also may lead to the denial of legal services when the amounts are small and thus the matter is not worth the tariff. However, assuming that a process of formulating tariffs was devised that was sensitive to the public interest of equal and informed access to legal services, and that tariffs were not used in an anti-competitive way, would we be in a better position on the issue of uncertainty in disciplining for overcharging by adopting tariffs? Perhaps we would be, but the point should be emphasized that fee tariffs should remain only one of the factors on the list. More complete tariffs would simply strengthen the value and priority of that factor on the list, but would not displace the overall reasonableness standard and the problem of discretionary judgment. If the factors test standard is too vague, any fixed and certain fee schedule standard is too inflexible. The issue, then, remains as to how a disciplinary standard for excessive fees should relate to the fair and reasonable factors test on taxation-litigation.

III. Codes of Professional Conduct on Excessive Fees

A. Codes: Generally

1. Formality v. Informality

The status, desirability, and format of a Code of Ethics involves controversy.⁷⁵ One issue is informality versus formality.⁷⁶ Should a Code of Conduct contain general principles and aspirational guidance for lawyers with no pretense of covering the whole field and leaving the decision as to what is conduct unbecoming or professional misconduct largely to the judgement of peers on the Discipline and Judicial committees? The Code is then used for guidance but is not necessarily controlling. Would this sort of Code violate the *Charter of Rights and Freedoms* in terms of vagueness? Or should the Code read like a statute, giving as formal and detailed rules

74. In Ontario, the Practice Advisory Service of the Law Society of Upper Canada, has communicated to members the intention of the Law Society to discipline for undercharging. See, "Reduced Fees — Conveying Matters", *The Advisor*, October, 1982. The C.B.A., Code Chapter XII, commentary 7 states: "The lawyer should not offer generally to provide legal services at reduced rates for the sole purpose of attracting clients".

75. See, e.g.: L.R. Patterson, "The Function of a Code of Legal Ethics" (1981), 35 U. of Miami L. Rev. 695; M.P. Moser, "Model Rules: Is One Format Better Than Another?" (1981), 67 A.B.A.J. 1624; R.L. Abel, "Why does the A.B.A. Promulgate Ethical Rules?" (1981), 59 Texas L. Rev. 639.

76. See, R.W. Damtoft, "Lawyer Disciplinary Standards: Broad vs. Narrow Prescriptions" (1980), 65 Iowa L. Rev. 1386.

as possible covering the whole field of the minimum conduct expected of lawyers? In this case the Code would become a form of "lawyer's law".

Support for the latter view (formalism) might be related to the idea that discipline obviously has serious effects on a lawyer, and by analogy to Criminal law and the principle of legality, someone should not be found guilty except by breach of formally promulgated law that one can have prior notice of. But a powerful counter-argument is that legalism of this sort has serious negative repercussions. Instead of doing the best as a matter of conscience, the lawyer goes to the Code to see what the minimum duty is. Even the detail of such a Code, while positive in the potential for giving guidance, has the negative effect of supporting moral reasoning by rules (like a child) instead of moral reasoning by the independent weighing of affected interests and principles, by "sweat, tears, and prayer". Furthermore, legalism is often related to lawlessness. A rule cannot be drafted in such a way that the rule determines the scope of its own application in terms of the purposes behind it. This means that the rule has loopholes which will be seized upon to violate the purpose of the law, particularly when the judiciary adopts literalist interpretive techniques. Legalism not only fosters minimalistic thinking but also nihilistic thinking. In my view, full blown legalism is inappropriate to professional ethics, though I admit our profession is awash in it. It is the game lawyers play on behalf of clients every day.

On the other hand, support for a formalistic Code may be found in the reality of moral pluralism. One argument advanced is that because we do not share a common moral posture, or indeed since we have no basis to know personally what is right and what is wrong, much less what is in the public interest, we cannot leave judgment up to the whims of some committee, but rather we must agree on some process of making law and then doing so, usually by majority vote. Legalism then arises inevitably out of moral pluralism, which is in fact our situation.

But another problem of having detailed and formal rules of professional conduct is the paradox of not covering enough, but at the same time covering too much! Discretion to be immoral may also at times open up discretion to be moral in situations that might otherwise be covered by rules which are in themselves immoral. If we try to formalize a rule for all the ethical dilemmas of law practice we may well end up with some essentially unethical rules. For example, if we pass a rule that prohibits a lawyer from ever disclosing a confidence when disclosure would prevent severe harm (not just illegality) from occurring, many lawyers would say that it is a good rule. Client confidences should be placed above every other interest (except for the lawyer's own in collecting fees or protecting his or her own reputation!). But it might be argued that it is a bad rule and one could marshal some strong moral reasons for allowing disclosure of confidences in some situations that are now arguably prohibited in our *Code*. If a rule is passed saying you *must* disclose, strong disagreement arises from one camp of lawyers. If a rule is passed saying you *cannot* disclose, strong disagreement arises from another camp. If you say you *may* disclose, perhaps no one has been satisfied, but at least the discretion to do what you think is morally right has been granted.

On the other hand, the profession must be governed with a firm grasp on protecting the public interest. A professional by reason of his or her essential role, specialized knowledge, and unequal power has great potential to abuse the interests of a client, a third party or the public generally. We cannot leave everything to discretion. Somewhere there must be authority, judgment and enforcement. Thus, a balance must be struck between formalism and informality, between mandatory rules and discretion, between rules and principles, between detailed rules and more general standards.

On this issue of formality versus informality, it must be remembered that law is a matter of "principles" and "standards", not just "rules". In the field of "lawyer's law" it is both undesirable and impossible to have some rule in the form of "if x (detailed description of the fact situation) then y (the legal effect)" for every duty or right that we posit. The role of general principles of legal ethics, with the application of the principles to specific facts and the balancing of conflicting or other principles in the fact situation involving something more than formalist reasoning, is important, desirable and inevitable. It must not be thought that lawyer discipline, any more than judicial decision-making, can operate on the rule level only. Thus the argument that "if the Code is not in rule form it can't be used in discipline" is false, just as false as those who would deny legal status to the general moral principles repeat in, above, and through our body of law. The suggestion that more formality is needed, that a clearer standard in regard to overcharging is needed, does not mean that we can have an inflexible "rule" that by its definition contemplates every possible instance of its effect. Thus, arguments to strike down standards of conduct as too vague and therefore violating the *Charter* must be carefully considered by the judiciary.

The Canadian Bar Association *Code of Professional Conduct* (1974)⁷⁷ is not drafted like a statute, but is not totally aspirational either. It states a "rule" in each chapter and then follows the rule with commentary that sometimes is very "rule-like" and other times is more "considerations-like", and then there are the notes. The interpretation section of the *Code*⁷⁸ makes it clear that the basic rule is to be interpreted by reference to the commentary and notes, but the rules are often so general that it is really the commentary that must provide a rule, if one is to be found. Some of these rules might be better classified as principles in their generality. The *Code* is thus an amalgam of informality and formality that is a vast improvement over the 1920 *Canons*.⁷⁹ But is it a happy and successful blend of formality and informality? I venture to say that it needs some improvement, both in laying down more detailed rules and also in providing informal guidance and principles in the difficult ethical dilemmas for which rules are inappropriate. The Law Society of Manitoba has adopted the *Code* as an expression in part of the ethical principles that govern us. The *Code* does not cover the whole field.

77. *Supra*, n. 9.

78. *Ibid.*, at p. xi.

79. *Supra*, n. 26.

The American Bar Association *Code of Professional Responsibility* (1970)⁸⁰ is probably more successful in format, with ethical considerations first (aspirational), followed by a detailed disciplinary rules and principles (mandatory). However, the controversial movement to even greater formality in the United States can be seen in the new American *Model Rules of Professional Conduct* (1982).⁸¹

The American practice of publishing interpretations of the *Code*, very similar to statutory interpretation case law is an interesting development for Canadian jurisdictions to consider. The A.B.A. standing committee on ethics and responsibility publishes formal and informal opinions on matters referred to it by lawyers who seek advice on an issue.⁸² The committee's interpretation of the *Code* and supplementary opinions then become a kind of body of case law on the *Code*. Various state jurisdictions have such committees which publish opinions as well.⁸³ Added to this, you have many more reported judicial decisions interpreting the *Code* than you have in Canada. Also, recently the A.B.A. has developed a centralized, computerized, information bank collecting the disciplinary hearings and dispositions from every jurisdiction in the country so that precedents and trends in discipline can easily be found.⁸⁴ Thus even general *Code* principles can be utilized better in concrete situations due to the precedential examples available. Compare this to the Manitoba situation, where only in the last year has a rule been adopted that the judicial committee must give at least some minimum written reasons for its decision.⁸⁵ Of course the issue of the availability of these judicial committee reports to members of the profession, and even to the public, is apparently at the stage of "no availability" due to the problem of keeping confidential the names of lawyers involved. This difficult issue should be addressed, because with proper safeguards in terms of lawyer reputation, these decisions should be made available.

On the issue of overcharging, a certain degree of formality is justified. A lawyer or firm has to be able to earn reasonable fees in an era where the spiralling cost of legal services places difficulties on both clients and lawyers. But a weighty ethical dilemma does not seem to be at stake, calling for purely discretionary judgement in the setting of fees. The principle that excessive billing is unprofessional conduct must be established as well as a fair mechanism for determining what is excessive and what circumstances may lead to discipline. The standard does not need to be a long and detailed rule excluding all questions of judgment in application, however.

80. A.B.A., *Code of Professional Responsibility*, adopted by the A.B.A. in 1969, with an effective date of January 1, 1970. It has been adopted by most states and bar associations. For historical sources and interpretation, see, American Bar Foundation, *Annotated Code of Professional Conduct*, (1979).

81. A.B.A. Commission on Evaluation of Professional Standards, *Model Rules of Professional Conduct, Final Draft* (1982), (pullout supplement to the November, 1982 issue of the A.B.A.J.). Notice the movement from the use of the earlier term *Code* (1970) to the new term *Rules* (1982).

82. See, Olavi Maru, *Digest of Bar Association Ethics Opinions*, American Bar Foundation, (1970); Maru, *1975 Supplement to the Digest of Bar Association Ethics*, A.B.F., (1977).

83. *Ibid.*, see also: Wayyski and Pimsleur, *Opinions from Committees on Professional Ethics* (Association of the Bar, City of New York, N.Y. County Bar Association, N.Y. State Bar Association).

84. See, National Center for Professional Responsibility, A.B.A., *Disciplinary Law and Procedure Research System*, looseleaf.

85. Rules of the Law Society of Manitoba, Rule 22(4).

2. Myth v. Reality

Before looking at the *Code* provisions on the overcharging issue, another point about codes in general should be noted. Code provisions must be backed ultimately by enforcement. This issue involves what has been called the problem of myth v. reality.⁸⁶ The myth of legal ethics is that we have these codes of conduct and present them to the public to illustrate our responsibility as a profession, but the reality is that a considerable number of the principles and rules are never enforced. This is due to various factors. Some rules and principles involve matters that clients do not see and therefore do not complain about. Some involve matters that clients do not complain about because they are advantaged by the conduct. Further, the failure of the profession to take at all seriously any duty to report breaches of the *Code* is well established and entrenched.⁸⁷ Some principles like the one on overcharging are not enforced partly because it is felt that it is not a "rule", or simply because it has not been done before. Then there is the problem of disciplinary manpower and costs. Enforcement is expensive and most of it is paid by the "upright" members of the profession. Thus we are left with only the myth of legal ethics rather than the reality. The lack of discipline for overcharging is a good example.

3. Unity v. Plurality

One last issue that should be noted is the controversy regarding the representational nature of any code of conduct. Are the standards passed by the profession truly representative of the profession's view of what is in the public interest, or are they based largely on the views of the powerful interest groups in the profession, namely the big urban law firms. Sometimes this is expressed as Big Law Firm versus Small Law Firm (B.L.F. v. S.L.F.).⁸⁸ However other divisions in the profession could be noted: recent members of the profession v. older; urban v. rural; sole practitioner v. multiple lawyer firm; generalist v. specialist, and so forth. Raising this issue implies that the profession is not so unified that standards of conduct can always be justified without attention to plurality of views and interests that transcend mere personal disagreements on controversial issues. For example, the B.L.F. lawyer may have no need for advertising (the lawyers are conveniently affiliated with the clubs where rich and powerful, actual or potential clientele are readily available for meeting). Thus, the B.L.F. lawyer may consider advertising demeaning to the profession, as compared to the interests of the S.L.F. lawyer, doing middle or lower income legal services, who might consider informational advertising as part of the ethical duty of making legal services available equitably to all.

The issue of discipline for excessive fees is certainly one in which the fairness question could be raised. B.L.F. lawyers may be much more insulated from taxation and discipline for excessive fees than S.L.F. lawyers,

86. See, E. Schnapper, "The Myth of Legal Ethics" (1978), 64 A.B.A.J. 202.

87. See, D. Ramage-White, "The Lawyer's Duty to Report Professional Misconduct" (1978), 20 Ariz. L. R. 509.

88. See, P. Shuchman, "Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code" (1968), 37 Geo. Wash. L. Rev. 244.

not because B.L.Fs never overcharge, but because B.L.F clients are less likely to lodge formal complaints, and have more power to negotiate out of unsatisfactory bills. The plurality of the profession should be kept in mind when setting a disciplinary standard and applying it.

B. Code Provisions on Overcharging

1. England

The Council of the Law Society dealing with the conduct of solicitors has stated:

16:10. For a solicitor to overcharge his client will amount to unbecoming conduct where this constitutes taking unfair advantage of his client. It should be noted that although a solicitor may make an agreement with his client as to remuneration under ss. 57 and 59 of the Solicitors Act, 1957, these provisions would not of themselves prevent the solicitor being subject to disciplinary proceedings if he had made an agreement with his client to charge fees which were so wholly unreasonable as to amount to taking unfair advantage of the client.⁸⁹

Thus, the English *Guide*⁹⁰ clearly makes overcharging a matter of discipline. The standard is "when it constitutes taking unfair advantage of the client" and you cannot contract out of this standard if your fees are "wholly unreasonable" despite the client's agreement to them. It seems that the question of what is "unfair advantage" and "wholly unreasonable" is left to the disciplinary tribunal to decide. The *Guide* notes some past decisions of the disciplinary committee in this regard:

16:11. The following decisions of the Disciplinary Committee on overcharging are relevant:

- (1) A solicitor received a payment in settlement of an accident claim which included his costs. He did not inform the client that his costs had been paid but tried to obtain from him a further 50 pounds by deducting that sum from the settlement. He tried to justify this by delivering an account which included disbursements of 18 pounds. The Committee found that of that sum 13 pounds was not justified and that the solicitor had delivered a memorandum of costs which he knew or ought to have known he could not justify and had thereby been guilty of unbecoming conduct.
- (2) The Disciplinary Committee have stated in one case that in finding that a solicitor had been guilty of unbecoming conduct in charging grossly excessive fees, they must not be taken as expressing the view that in every case where a solicitor agreed to a fee with a client which was substantially larger than the fee which would have been allowed on taxation, he would thereby be guilty of unbecoming conduct.
- (3) In another case the Disciplinary Committee stated that the amount a solicitor decides to charge his client must be his responsibility even if the bill is prepared by a costs draftsman.⁹¹

The first case obviously involves fraudulent conduct apart from the amount of the fee. The second case is interesting in that it adopts the standard "*grossly excessive fees.*" Is this just an example of the "taking unfair advantage" test, or is it a test itself of what amounts to "taking unfair advantage"? Of course where a fee has been reduced, even substan-

89. Counsel of the Law Society, *Guide to the Professional Conduct of Solicitors* (1974) at 35.

90. *Ibid.*

91. *Ibid.*, at 36.

tially, on taxation, it is not in itself, without examination of the circumstances, necessarily also a disciplinary matter. This means that in England, the disciplinary and taxation standards are not the same, indeed one could imply that they are quite separate. Should they be? The third note seems to confirm the well known principle that a lawyer, like a Cabinet Minister, is responsible for his office. But what does this hint at in terms of *mens rea*, to borrow a Criminal law phrase? Perhaps, even if there was no subjective intention on the part of the lawyer to overcharge, one may still be held responsible.

The important point to take from the English situation is that there is an overcharging provision which at least on a few occasions has been enforced. The standard appears to be "taking unfair advantage" and is different from our taxation test of "unfair or unreasonable." But how is it different? "Clearly below" the taxation standard? "Worse" than the taxation standard? "Grossly out of line?" The English standard in my view does not appear to give enough guidance for the enforcement of the principle that charging excessive fees may be unprofessional conduct.

2. U.S.A.

In the 1970 *Code of Professional Responsibility* we find the following:

EC 2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

EC 2-17 The determination of a proper fee requires consideration of the interests of both client and lawyer. *A lawyer should not charge more than a reasonable fee*, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC 2-18 The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

* * * *

DR 2-106 Fees for Legal Services.

- (A) A lawyer shall not enter into an agreement for, charge, or collect an *illegal or clearly excessive fee*.
- (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
 - (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.⁹²

The ethical consideration, which we should aspire to, is that a lawyer should never charge more than a reasonable fee. The minimum, mandatory disciplinary rule, however, is that a lawyer should not charge an illegal or clearly excessive fee. If we set aside the "illegality" as referring to clear mandatory tariffs or situations where a contingency fee is not allowed and so forth, is there a difference between a reasonable standard and a clearly excessive standard? The *Code* appears to suggest that a lawyer can be disciplined for charging a clearly excessive fee which may be thought of as something different than a mere "unreasonable" fee. But when we look at what the *Code* means by this, we see that the clearly excessive standard is based on the reasonable standard and is not different from it. The clearly excessive standard is a burden of proof standard with the reasonable standard remaining as the actual prohibited conduct standard, the *actus reus*, as it were. Thus, the prohibited conduct is charging an unreasonable fee, but this must be shown (burden of proof) in that "a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee". An unreasonable fee that meets the standard of proof becomes therefore a clearly unreasonable (excessive) fee. It may well be that to meet the burden of proof a fee must be so clearly out of the reasonable range that we could speak of excessive as something different than unreasonableness, but this is not what the *Code* supports. Excessive means "in excess of a reasonable fee." Admittedly the *Code* is drafted badly, because it would make a lot more sense if part (A) read "clearly unreasonable fee." Part (B) makes it obvious that it should read that way. The reason for the drafting however, can be ascertained when we look at American court decisions.⁹³ Notice that in the American *Code*, as in the English *Guide*,⁹⁴ a lawyer cannot contract out of the standard. The *Code* says the lawyer "shall not enter into an agreement for . . . a clearly unreasonable fee." Note, finally, that there is, with some minor variations, substantial similarity between the Canadian factors test of unreasonableness used in taxation matters and the *Code* factors test.

It seems that the fundamental point of the American *Code* that we need to consider, is that the standard for discipline is indeed based on the taxation standard and that the differences between taxation and discipline is simply a matter of clear proof. This would mean that without any other circumstances being present aside from the amount of the fee, a lawyer might still be subject to discipline for charging a fee that is clearly unrea-

92. *Supra*, n. 80, (emphasis added).

93. *Infra*.

94. *Supra*, n. 89.

sonable. In reality, this would likely be translated into at least those cases where substantial reductions upon taxation have been made and upon disciplinary review those reductions have been upheld.

Unlike Canada, where scant scholarly attention has been paid to the subject of legal ethics,⁹⁵ in the U.S. there has been in the last decade a storm of controversy and a blizzard of writing and development in the field. In 1977 an A.B.A. Commission on Evaluation of Professional Standards was appointed. After voluminous hearings and submissions, the Commission decided to propose a whole new *Code* rather than to modify the 1970 document. When a *Discussion Draft*⁹⁶ came out in 1980 the controversy escalated into a full-scale war. Basically the *Discussion Draft* moved away from the adversarial ethics model in several areas of lawyer conduct. So much pressure from supporters of the adversarial ethic was brought to bear, however, that the *Proposed Draft* (1981)⁹⁷ "watered down" considerably those proposals that would have modified the adversarial base of legal ethics. The criticism continued, however, and the *Final Draft* (1982)⁹⁸ was modified still more. Since then, there have been several more final drafts and the whole package as of this writing has still not been approved.

In the area of overcharging, the *Discussion Draft* (1980) eliminated the "clearly excessive" terminology and adopted simply the "unreasonable" terminology. Although there has been some controversy, the *Final Draft* follows the *Discussion Draft*. Thus the A.B.A. *Final Draft Model Rules of Professional Conduct* (1982) now read:

RULE 1.5 Fees

- (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (8) whether the fee is fixed or contingent. A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

Notice then that the new rule simply makes the charging of a reasonable fee mandatory and adopts the old "factors" test for its determination. The older standard of proof — "clearly excessive" — is eliminated. Thus,

95. For example, the only Canadian textbook available is the pre-*Code* work of Orkin, *Legal Ethics*, (1957).

96. A.B.A. Commission on Evaluation of Professional Standards, *Model Rules of Professional Conduct, Discussion Draft*, 1980.

97. A.B.A. Commission on Evaluation of Professional Standards, *Model Rules of Professional Conduct, Proposed Final Draft*, (1981).

98. *Supra*, n. 81.

the new rules seem to put the taxation and disciplinary standards completely together. Is this a good idea? The implication would be that in every case where a court or an arbitration tribunal has reduced the fee as being unreasonable, the lawyer "technically at least" has breached his ethical duty and is subject to discipline if that reduction is upheld in disciplinary hearings. In my view, the reality of the discretionary uncertainty involved with the taxation standard, makes such a complete fusion undesirable. The old "clearly excessive" idea seems preferable in that it adopts a standard of proof requiring the disciplinary authority to show that the fee is more than "probably" unreasonable, and is in fact "clearly" unreasonable. Perhaps the new standard is just the same as the old standard, with "clearly excessive" eliminated precisely because it led to confusion. The "clearly excessive" standard may be interpreted as something different than the reasonable standard, instead of as a burden of proof addition to the "reasonable" standard. If the position is taken that there already exists at disciplinary hearings a high burden of proof in any case, similar to that in a criminal hearing, then there might not be any need for terms like "clearly excessive" or "clearly unreasonable." But what is the burden of proof in disciplinary cases? There is considerable confusion as courts vary between characterizing the discipline of lawyers as purely protective of the public with a civil burden of proof, and characterizing it as akin to punishment of the lawyer, with a Criminal burden of proof beyond a reasonable doubt.⁹⁹ The situation in Canada is no clearer.¹⁰⁰ Thus, the idea of attaching a specific burden of proof to a specific prohibition still makes sense.

3. Canada

The Canadian Bar Association *Code of Professional Conduct* (1974), states:

RULE

The lawyer should not

- (a) stipulate for, charge or accept any fee which is not fully-disclosed, fair and reasonable;

* * * *

Commentary

1. A fair and reasonable fee will depend upon and reflect such factors as
 - (a) the time and effort required and spent;
 - (b) the difficulty and importance of the matter;
 - (c) whether special skill or service has been required and provided;
 - (d) the customary charges of other lawyers of equal standing in the locality in like matters and circumstances;
 - (e) the amount involved or the value of the subject matter;

99. For a discussion of Burden of Proof see Nordby, *supra* n. 12 at 391-392.

100. See, *Hall v. Ball* (1923), 54 O.L.R. 147, (Law Society gets benefit of the doubt); and *Re Ivens* (1979), 10 B.C.L.R. P-15 (C.A.), (Committee making decisions on proof beyond reasonable doubt standard).

- (f) the results obtained;
- (g) tariffs or scales authorized by local law;
- (h) such special circumstances as loss of other employment, uncertainty of reward, and urgency.

A fee will not be fair and reasonable if it is one which cannot be justified in the light of all pertinent circumstances, including the factors mentioned, or is so disproportionate to the services rendered as to introduce the element of fraud or dishonesty.¹⁰¹

Here we see a close connection between the taxation standard and the disciplinary standard. But some difficulties are also apparent. Does it matter that the *Code* says "the lawyer should not," rather than "the lawyer shall not"? Does "stipulate for" and "accept" amount to the same thing as "agree to," thus making it impossible to contract out of the reasonable fee standard? Notice too, that we seem to have two methods of applying the "fair and reasonable" standard that the *Code* adopts as the *actus reus*. One method is the now familiar "factors test." But then another test is tacked on at the end about whether the fee "is so disproportionate to the services rendered as to introduce the element of fraud or dishonesty." These tests are expressed in the alternative, as the use of "or" between them clearly indicates. The *Code* does not say that for disciplinary purposes the fee must be unreasonable and so disproportionate to the services rendered as to introduce the element of fraud or dishonesty. I do not think it ought to say that either, but the fact that it includes this second test for fair and reasonable only makes the *Code* more confusing. The use of the alternative "so disproportionate" standard may allow one to argue that only that standard in the *Code* should be used for purposes of discipline rather than the reasonable standard based on a "factors" test.

The *Code* clearly supports any move by the Law Society to discipline lawyers for overcharging. It offers the standard of "fully disclosed, fair and reasonable," and gives both a "factors test" or a "fraud-dishonesty" test. The "factors test" obviously is related to the method of finding reasonableness in taxation matters. However, the problem with the *Code* in my view is precisely that both methods of determining "fair and reasonable" mentioned in it are problematic for discipline. The "element of fraud or dishonesty" test covers too few cases where discipline might be proper. The "factors test" alone covers too many cases, that potentially could be thrown into disciplinary hearings. We should consider whether we need the "fraud-dishonesty" test at all, and whether a "burden of proof" test to deal with the vagueness of the "reasonable" standard should be introduced into the *Code*.

IV. American Judicial Decision on Fees

A. The Old Standard: Exorbitant and/or Unconscionable

The 1970 A.B.A. *Code*¹⁰² "clearly excessive" standard (based on a clear breach of the "reasonable" standard) must be viewed in the context of the disciplinary situation preceding it. When so viewed, the *Code* provision is revolutionary, because the old disciplinary standard, as exemplified by many

101. *Supra*, n. 9 at 39.

102. *Supra*, n. 80.

reported decisions through the decades,¹⁰³ was sharply distinct from the reasonable standard. There are lots of cases which deal with discipline for excessive fees, but the standard applied might best be summarized as the "exorbitant and/or unconscionable" standard. Sometimes "and" is used, sometimes "or." Absent fairness questions about the manner of dealing with a client, the issue of the amount of the fee was generally not considered a disciplinary matter, unless the fee was exorbitant and/or unconscionable in the circumstances of the case.¹⁰⁴ It should be noted that in the United States, the discipline of lawyers is still under the ultimate jurisdiction of the judicial branch of government.¹⁰⁵ Various disciplinary agencies are delegated with authority to investigate and determine cases, but these agencies function under court supervision and review.

A leading case on the pre-Code situation is that of *Herrscher v. State Bar of California*¹⁰⁶ where the California Supreme Court summarized the precedents up to that point:

... There can be no doubt that a gross overcharge can, under some circumstances, constitute an offense warranting discipline. In *Goldstone v. State* 214 Cal. 490, 498, 6 P. (2d) 513, 516, this court stated the rule as follows: "Although we are of the opinion that usually the fees charged for professional services may with propriety be left to the discretion and judgment of the attorney performing the services, we are of the opinion that if a fee is charged so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called, such a case warrants disciplinary action by this court . . ."

We think the proper rule in such cases is that the mere fact that a fee is charged in excess of the reasonable value of the services rendered will not of itself warrant discipline of the attorney involved. Ordinarily, the propriety of the fee charged should be left to the civil courts in a proper action. *People ex rel. Colorado Bar Ass'n v. Robinson*, 32 Colo. 241, 75 P. 922; *Grievance Committee v. Ennis*, 84 Conn. 594, 80 A. 767; *People ex rel. Chicago Bar Ass'n v. Pio*, 308 Ill. 128, 139 N.E. 45. As was said by the Washington court in *Re Wiltsie*, 109 Wash. 261, 186 P. 848: "The board also found, as one of the grounds for his disbarment, that the charges made for these services were excessive. We do not feel like depriving a practitioner of his right to continue his profession on a question as debatable as the propriety of the amount of a fee. Such a question is so much a matter of individual opinion that it should not be the basis for disbarment, except in the most aggravated and extreme case. So far as the record discloses, the fees were voluntarily paid, and, were it the only charge here that such fees were excessive, the extreme penalty would not be merited."

In the few cases where discipline has been enforced against an attorney for charging excessive fees, there has usually been present some element of fraud or overreaching on the attorney's part, or failure on the attorney's part to disclose the true facts, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds under the guise of retaining them as fees. *State v. Barto*, 202 Wis. 329, 232 N.W. 553; *State Board of Law Examiners v. Sheldon*, 43 Wyo. 522, 7 P. (2d) 226; annotation 80 A. L.R. 706.

Generally speaking, neither the Board of Governors nor this court can, or should, attempt to evaluate an attorney's services in a quasi-criminal proceeding such as this, where there has been no failure to disclose to the client the true facts or no overreaching or fraud on the part of the attorney. It is our opinion that the disciplinary machinery of the bar should not

103. For a digest of American cases, see, Agthe, "Annotation: Attorney's Charging Excessive Fees as Grounds for Disciplinary Action," 11 A.L.R. 4th 133.

104. See, Romell, "The Reasonable Fee and Professional Discipline," (1965), 14 Clev-Mar. L.R. 94.

105. *Supra*, n. 12.

106. 49 P. (2d) 832 (1935) (Cal. S. Ct.)

be put into operation merely on the complaint of a client that a fee charged is excessive, unless the other elements above mentioned are present.¹⁰⁷

The *Herrscher* case, then, denies that the "reasonable" standard, or even the "excessive" standard, can be the basis for discipline. Only that which "shocks the conscience" will do. Thus the new *Code* provisions based on the reasonable standard are indeed revolutionary.

In many of the cases where a lawyer was disciplined under the old standard of extortionate and/or unconscionable, the disparity between the work done and fees charged could be interpreted as equivalent to outright theft from the client. For example, in the Washington case of *In Re Stafford* (1950)¹⁰⁸ the lawyer representing an estate found a beneficiary who was entitled to money under a life insurance policy. The beneficiary was entitled to the money by operation of law, yet the attorney took 50 percent of the assets due to her according to a fee agreement extracted from the beneficiary by the misrepresentation that assets needed to be discovered and negotiated for. There was also some forgery involved in the case by the lawyer. The court noted the "exorbitant or unconscionable" standard and suspended the lawyer for a mere three months!

Similarly, a lawyer was suspended in the Alaska case of *U.S. v. Stringer* (1954)¹⁰⁹ when he obtained a promise to pay \$2,500 from a client in a criminal case, knowing from the district attorney that the case would be dismissed. He took advantage of the fear and lack of knowledge of the client. The court noted that "the fee was grossly excessive in that it bore no proper relation to the amount of work done by the defendant, the benefits obtained by the client, or the client's ability to pay."¹¹⁰

A good example of the inadequacy of the old standard except in the most obvious cases is the Washington case of *In Re Greer* (1963)¹¹¹, where a lawyer charged a 25% contingency fee to liquidate a client lien on an estate. The matter was uncomplicated, yet the lawyer's fee amounted to approximately \$5,000. The court admitted the fee was excessive but determined that it was not unconscionable. Only for a different point of keeping part of a fee on a matter never pursued was the lawyer reprimanded. The court stated:

"While a determination that a fee is reasonable or unreasonable is appropriate only to a civil court, where the fee retained or demanded can be considered to be unconscionable, it is a matter for a disciplinary proceeding. The word "unconscionable," as is the case with terms like reasonable, unreasonable, fair, moderate, inordinate, excessive, exorbitant, etc., is not susceptible of exact definition.

... We think that supplying amplifying phrases such as "shocking to the conscience," "monstrously harsh," "exceedingly calloused," and other expletives, adds little or nothing to the definitive qualities sought to be established by the law. They depend largely for their meaning upon who is speaking and who is listening. When the courts use the expression

107. *Ibid.*, at 833-834.

108. 216 P. (2d) 746 (1950) (Wash.).

109. 124 F. Supp. 705 (1954) (Alaska).

110. *Ibid.*, at 713.

111. 380 P. 2d 482 (1963) (Wash.).

"unconscionable" in classifying a fee, we think they mean an amount under the circumstances which neither lawyer nor client can sensibly argue to be otherwise. A legitimate dispute could well arise between an attorney and his client concerning whether or not an attorney's fee, either claimed or kept, is unreasonable or excessive or even exorbitant, thus requiring the intervention of the civil court and the hearing of expert witnesses on both sides to reach a fair decision. It may be that the client is ignorant of the research involved in the problems presented, of the long and tedious hours of investigation represented by the lawyer's work. It may be that the lawyer places too high a value upon his services, that he too well remembers the long and arduous hours spent in acquiring a legal education and passing the bar examination, or that he assesses too high a charge with too little an experience. However, these are all factors which are subject to review by the courts in an action in contract.

Where, however, ethical considerations take us from one end of the spectrum marked "reasonable" through categories designated successively as unreasonable, excessive, immoderate, inordinate, exorbitant, and unconscionable, we move in a direct line from the civil arena into a disciplinary forum. Differences of opinion can legitimately arise as to whether or not a fee is reasonable or unreasonable, or even excessive or exorbitant; but we find that sensible differences of opinion do not arise where the fee is palpably unconscionable.

Can an attorney conscientiously assert that his years of study, his learning, his standing at the bar, justify his payment for professional services where no services were performed? Or can it sensibly be argued that money for costs should be kept where no costs were incurred? Mere statement of the proposition is in itself an answer.¹¹²

This case might be seen as going so far as to remove even "exorbitant" and leaving only "unconscionable" as a standard. On top of that, the implication is that unconscionable should be defined as "an amount under the circumstances which neither lawyer nor client can sensibly agree to be otherwise." Yet when giving examples of this, the court focuses on the worst cases, like taking payment but rendering no service, cases where other principles of legal ethics could cover the conduct anyway and thereby rendering any discipline for overcharging *per se* basically a myth. This is emphasized by the "chain" image given in the case: reasonable — unreasonable — excessive — immoderate — inordinate — exorbitant — unconscionable. Placing "unconscionable" down a long chain of fees, makes the gap between a "reasonable" standard and an "unconscionable" standard for discipline wide indeed. Far too wide.

Most other cases, however, include "exorbitant" and not just "unconscionable," though in some, the standard is expressed as "exorbitant" or "extortionate."¹¹³

After the A.B.A. *Code* (1970)¹¹⁴ was adopted with various minor modifications from state to state, the disciplinary standard for overcharging changed dramatically. It should be noted that in at least one case, however, a court continued to enforce a kind of old standard despite the *Code*. In the New Jersey case of *In Re Loring* (1973)¹¹⁵ where the Disciplinary Committee had determined that the fee was "greatly excessive" the court said that even though the *Code* said "clearly excessive," discipline is called for

112. *Ibid.*, at 486.

113. *Florida Bar v. Winn*, 208 So. 2d 809 (1968); *Florida Bar v. Quick*, 279 So. 2d 4 (1973), (before *Code* adopted in state).

114. *Supra*, n. 80.

115. 62 N.J. 336, 301 A. 2d 721 (1973) (N.J.).

only if the fee is "so excessive as to evidence an intent to overreach the client." This sounds like the old standard. Some states were slower to adopt the new *Code*. As late as 1974 in *Bushman v. State Bar of California*¹¹⁶ the court still cited *Herrscher*¹¹⁷ in finding the fees were "excessive, overreaching, exorbitant, and unconscionable" where the lawyer tried to collect \$2,800 for a few hours work in a routine matter. The lawyer was suspended for a year.

While only a few pre-*Code* cases have been noted here, enough has been said to show that the old standard separated the disciplinary standard from the civil (taxation) standard far too sharply. Such a separation made discipline for overcharging largely a myth and thus the public interest was not protected. That discretionary judgement is involved in the "reasonable" standard can be acknowledged, but going to the opposite extreme of recognizing only the most flagrant cases of "theft by any other name" is just not acceptable. There are many factors which prevent a client from suing on a fee or, in Canada, going to taxation. The factors of added expense, time, the professional status of the lawyer, and just the frustration of disputing, leads people to "exit" from a dispute over a fee or indeed prevents people in some cases from complaining at all. Yet the fee may well be excessive and the lawyer is thus in the position of overcharging the next client as well. On top of that, a client may not be in any position to complain because he or she did not even have a suspicion that overcharging might have occurred.

B. The New Standard: Clearly Excessive

There are many cases applying the *Code* standard of "clearly excessive" which utilize a factors test for reasonableness and the burden of proof (as I call it) of a "definite and firm conviction that the fee is in excess of a reasonable fee."¹¹⁸ A good example of the use of the *Code's* "clearly excessive" test is the Wisconsin case of *In Re Marine* (1978)¹¹⁹ where a lawyer was found to have acted improperly in taking a \$5,000 fee in a property settlement/divorce case. The lawyer did not keep time records but claimed to have spent 55-70 hours on the case. The difference between \$5,000 and a "reasonable" fee of \$3,240 or so (as suggested by the court) would probably not amount to discipline under the old standard. But here, it did. It should be noted that additional improprieties were also present, but on the fee issue alone the court found unprofessional conduct.

In some newer cases, the lawyer might have been subjected to discipline under the old standard anyway, but the court makes it clear that the new *Code* standard will be enforced. For example, in the Illinois case of *In Re Kutner* (1979)¹²⁰ a lawyer was censured for charging an excessive fee. The

116. 522 P.2d 312. (1974) (Cal.)

117. *Supra*, n. 106.

118. See, e.g.: *Westchester County Bar Association v. St. John* 350 N.Y.S. 2d 737 (1974) (New York); *Florida Bar v. Moriber* 314 So. 2d 145 (1975) (Florida); Case comment on *Moriber* 4 Flid. St. U.L.Rev. 126 (1976); *Luke County Bar Association v. Ostrander* 41 Ohio S.D. 293; 322 N.E. 2d 653 (1975) (Ohio); *Florida Bar v. White* 368 So. 2d 1294 (1979).

119. 264 N.W. 2d 285 (1978).

120. 399 N.E. 2d 963 (1979) (Ill.).

client prepaid a \$5,000 retainer for a Criminal case involving battery charges laid by an alcoholic sister-in-law of the client who on the day for the court case dropped the charges. The lawyer did not even show up for the court hearing but sent another lawyer instead. When the client tried to recover \$4,000 of the prepaid fee the lawyer refused. The lawyer also refused to go to fee arbitration and claimed that since the client had agreed to the fee, no question of reasonableness arose and no disciplinary measures could be brought against him. The court reviewed the situation preceding the *Code*, mentioning cases like *Greer*¹²¹ and *Bushman*,¹²² but made it clear that the new "clearly excessive" standard applied. Looking at the factors, the court said that the case was not novel, did not involve complex legal issues, was not unusual in time or labor, and did not preclude other employment.¹²³ Thus the initial fee agreement was excessive even if the charges had not been dropped and of course once the charge was withdrawn, the lawyer should have returned portions of the fee. The court also noted that even if the old standard of "unconscionable" had applied, the lawyer would be guilty here for receiving \$5,000 for five hours of work. The fact that the client had agreed to the fee did not matter. It is a firm principle that a lawyer cannot contract out of a disciplinary standard for overcharging.

It should be noted that there is a dissent in the *Kutner* case, with the dissenting judge of the opinion that absent coercion, overreaching or deception, freedom of contract for fees should apply, however high the fees may be in terms of work actually done. The dissent treats law like a business rather than a profession, in my view. The analogy to the unconstitutionality of minimum fee schedules does not translate into a policy of allowing as high prices by contract as a free market situation will bear. Professional services involve several factors unlike ideal market conditions. Lack of knowledge on the part of clients as to the work involved in a legal service, lack of knowledge as to the prevailing rates or methods of calculation, the unequal bargaining power of client versus professional, and most importantly the need for trust-fiduciary relationships between lawyer and client rather than arms-length adversarial relationships, make the open market analogy less than apt.

The "clearly excessive" test was applied when a lawyer was over the amount allowed by tariff in *Florida Bar v. Samako* (1981)¹²⁴ and *Re Mercer* (1980)¹²⁵; over the amount of an original fee agreement; *Kerpelman* (1981)¹²⁶; and when not paying back portions of a prepaid fee in *Johnson* (1980)¹²⁷ and *Florida Bar v. Berger* (1981)¹²⁸.

121. *Supra*, n. 111.

122. *Supra*, n. 116.

123. *Supra*, n. 120 at 966.

124. 407 So. 2d 906 (1981).

125. 126 Ariz. 274; 614 P. 2d 816 (1980).

126. 438 A. 2d 501 (1981) (Mich.).

127. 612 P. 2d 1097 (1980) (Colo.).

128. 394 So. 2d 415 (1981).

The "clearly excessive" standard covers many more cases than the old standard of "extortionate and/or unconscionable." Under the old standard the circumstances would usually be such that one could infer a subjective intention of the lawyer to steal from a client. Under the new standard, there may well be situations where a lawyer is guilty despite subjective lack of intention to overcharge. Charging fees which are clearly in excess of the reasonable standard should be a matter of discipline, however, with the subjective mental elements left to the question of penalty. If no subjective intention is present and no pattern of past warnings are present in terms of previous fee reductions in arbitration or taxation, the lawyer may be given a reprimand or a censure, or under a new provision in Manitoba¹²⁹ — a formal caution, but the principle of proper conduct should still be upheld.

V. Discipline for Excessive Fees: Conclusions

Currently we can discipline lawyers for charging excessive fees. The Canadian authorities, Code provisions, and American cases surveyed all support that proposition. In obvious cases where the disparity between the fees and the work done could be considered "unconscionable" or "grossly excessive," I believe that ample authority would support discipline. In less obvious cases, where the lawyer has nevertheless clearly breached the *Code* standard of "reasonableness" on the factors test, support for discipline may be found in our adoption of the Canadian Bar Association *Code* and the American precedents affirming essentially the same standard in the American Bar Association *Code*. A possible court challenge in the latter situation could materialize, but a strong case can be made for the enforcement of the *Code*. Thus, nothing really prevents the Law Society from proceeding in the laying of charges in cases breaching the *Code*. In circumstances where a lawyer has had a pattern of reductions of fees on taxation or arbitration, the laying of a charge might be particularly appropriate.

There is room for reform, however. I would suggest that the disciplinary standard in the C.B.A. *Code* be amended to include descriptions like "clearly" or "substantially" in connection with the "unreasonable" standard, so that the margin of uncertainty in the determination of a reasonable fee is explicitly acknowledged. In the commentary the following provision might be included first:— "a fee which is clearly in excess of a fair and reasonable fee amounts to unprofessional conduct."

Further, the part of the commentary stating "or is so disproportionate . . . dishonesty" should be eliminated from the *Code*, and replaced with:— "Prior agreement as to the amount or manner of calculation of fees is encouraged, but any such agreement must still be fair and reasonable. This includes retainer fees that are not for services rendered but to secure the services of a lawyer and to induce him to act."

Finally, the reasonable standard by definition is an objective one. Subjective states of mind should be considered after liability has been established. If the discipline of lawyers is geared toward the protection of the public,

129. Law Society of Manitoba Rules, s.19(15).

rather than toward the punishment of lawyers, the use of "objective" standards is justified. The question of whether the lawyer acted intentionally or recklessly should be an issue raised in regard to the appropriate penalty.

