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THE ETHICS OF CREDITOR PROOFING

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I. INTRODUCTION

The subject of ethics is daunting, as in many ways I am particularly unsuited to write about this topic. My formal education in Philosophy stopped after Philosophy 101. I never really understood Kant, and Hume bored me to tears. When I need some philosophical advice, I normally turn to a very useful book I have found on this subject, entitled *Plato and a Platypus Walk into a Bar: Understanding Philosophy through Jokes*.[1]

[1] Thomas Cathcart & David Klein, *Plato and a Platypus Walk into a Bar: Understanding Philosophy through Jokes* (Harry N. Abrams, Inc., New York, 2006). *Empiricism:* Three women are in a locker room dressing for exercise class when a naked man runs through wearing nothing but a bag over his head. The first woman looks at his privates and says, "Well, it's not my husband." The second woman says, "No, it isn't." The third says, "He's not even a member of this club!" *Metaphysics:* A rabbi, a court jester and an alligator walk into a bar. The bartender looks at them and says "What is this, a *joke*?"

Fortunately, professional ethics, and particularly legal ethics, have a practical side that can be learned through personal experience. Over the course of a professional career each lawyer learns to wrestle with the ethical issues that are thrown up by his or her particular area of practice. After thirty years in the trenches, I think it is time that I shared some of the lessons I have learned, and the techniques that I have acquired, to address the ethical issues that arise in an insolvency practice. These come to the fore when advising clients on the topic of creditor proofing. Such clients are often scared and desperate. They are facing poverty or unemployment, the loss of their home, or a stark deterioration of their standard of living. The last thing that interests them is an abstraction such as ethics. Indeed, it is unfortunately not unusual for such clients to have a preconception that the insolvency lawyer is adept at hiding assets and devising legal stratagems to foil creditors. Some hold the expectation that you, the lawyer, are not bound by ethical constraints other than the obligation to act in the client's best interests. Hence the lawyer is often the only one in the room who is concerned about ethics. There may be considerable pressure to push deep into the murky gray areas where it is hard to keep sight of the line between right and wrong.

What are these pressures on the lawyer? They are real, and sometimes require courage to overcome. They include:

• client expectations: The client wants advice and action, and will be unhappy not to receive it.

• financial pressure: A frustrated client who does not accept your ethical limits will not want to pay, and may leave the firm or complain.

• pressure from colleagues, higher-ups and referral sources: If your choice of ethical limits is not respected by others, you may be accused of not servicing their clients or their referrals.

Where do these issues arise? Here are some scenarios:

1. A new client sets up an appointment to discuss creditor proofing. She starts the meeting off by announcing that the bank is suing her on her guarantee, and she wants to protect her assets in case she loses the lawsuit. What can you tell her?

2. A client tells you that he is burdened down with credit card debt, and does not know how long he can stay afloat. He would like you to transfer his half of the matrimonial home to his wife.

3. A client is setting up a new high-tech business. To safeguard against a future business failure, he proposes to set up a family trust in an offshore jurisdiction. He wants to use a jurisdiction whose laws are the most unfavourable to creditors,

and in which it will be extremely expensive for a creditor to launch an attack against the trust. He asks you to advise him on this, and to effect the transaction.

4. You are retained to creditor-proof your client against a forthcoming tax audit. How far can you go?

5. You know the personal exemption for furniture and household furnishings, under the Manitoba Executions Act, is $4,500. Do you advise your client of this information before asking what his or her household furniture is worth?

I should note that the ethical issues to be discussed in this paper normally arise only when the client is seeking advice while already in financial difficulty. When creditor-proofing is done at a time when no creditors are on the horizon, as a form of proper business planning, the ethical issues discussed in this paper do not normally arise.

II. STATUTORY & REGULATORY ENVIRONMENT

Legal ethics are based on the law. One can only determine the limits of ethical conduct by evaluating what legal constraints are imposed by the legislative and regulatory framework that governs the topic. In respect of creditor proofing, we must address the risks of criminal liability, civil liability, and professional misconduct. It is important to note that these are different standards in most instances. Conduct that is not criminal may nonetheless give rise to civil liability; and merely because a given transaction withstands a challenge in the civil courts does not mean that the lawyer's conduct is ethical in effecting or advising on the transaction.

a. Criminal Law: **CRIMINAL CODE,** RSC 1985, c C-46

> **Parties to offence** 21. (1) Every one is a party to an offence who
> (a) actually commits it;
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
> (c) abets any person in committing it.
>
> **Common intention** (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

Person counselling offence 22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

Idem (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

Definition of "counsel" (3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

Fraud 380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed five thousand dollars.

Disposal of property to defraud creditors 392. Every one who,

(a) with intent to defraud his creditors,

(i) makes or causes to be made any gift, conveyance, assignment, sale, transfer or delivery of his property, or

(ii) removes, conceals or disposes of any of his property, or

(b) with intent that any one should defraud his creditors, receives any property by means of or in relation to which an offence has been committed under paragraph (a),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

b. Civil Liability:

(i) THE FRAUDULENT CONVEYANCES ACT, C.C.S.M. c. F160

Definitions 1. In this Act,
"conveyance" includes transfer, assignment, delivery over, payment, gift, grant, alienation, bargain, charge, encumbrance, limitation of use or uses of, in, to or out of real property or personal property, by writing or otherwise; ...

When conveyances declared void as against creditors 2. Every conveyance of real property or personal property and every bond, suit, judgment, and execution at any time had or made, or at any time hereafter to be had or made, with *intent* to *defeat, hinder, delay or defraud* creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures is void as against such persons and their assigns. ...

Saving as to conveyances made bona fide and for good consideration 4. Section 2 does not extend to any estate or interest in real property or personal property conveyed upon *good consideration* and *bona fide* to any person not having, at the time of the conveyance to him, *notice or knowledge of that intent*.

How far valuable consideration and intent to pass interest to avail 5. Section 2 applies to every conveyance executed with the intent in that section set forth, notwithstanding that it may be executed upon a valuable consideration and with the intention, as between the parties thereto, of actually transferring to, and for the benefit of, the transferee the interest expressed to be thereby transferred, unless it is protected, under section 4, by reason of bona fides and want of notice or knowledge on the part of the purchaser.

(ii) THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, as amended

Transfer at undervalue 96. (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer *or any other person who is privy* to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the [five year period before bankruptcy],

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the [one year period before bankruptcy], or

(ii) the transfer occurred during the [five year period before bankruptcy] and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

...

Meaning of "person who is privy" (3) In this section, a "person who is privy" means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

c. Professional Conduct: Law Society of Manitoba, Code of Professional Conduct

Integrity 1.01 (1) A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Competence 2.01 (2) A lawyer must perform all legal services undertaken on the client's behalf to the standard of a competent lawyer.

Commentary: Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practices.

...
In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

Dishonesty, Fraud by Client 2.02 (8) When acting for a client, or in acting on instructions, a lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

Commentary A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

Before accepting a retainer or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.

A bona fide test case is not necessarily precluded by this subrule ...

Permitted Disclosure 2.03 (5) A lawyer may divulge confidential information, but only to the extent necessary: ...

(c) in order to secure legal or ethical advice about the lawyer's proposed conduct; ...

d. Common law torts:

- **Conspiracy**[2]
- **Fraud**
- **Inducing breach of contract**[3]

III. LAWYER AS "LAW BOOK" vs LAWYER AS MORALIST

There are two conflicting views of a lawyer's ethical duty in advising clients in murky ethical territory. The 'law book' approach sees the lawyer's role as the provider of legal information that is sought by the client. In this view, the lawyer acts as a repository of knowledge, and is entitled, indeed duty-bound if asked, to

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[2] The test for tortious conspiracy requires: (i) an agreement between two or more persons to perform specific acts to injure the Plaintiff; (ii) the Defendants acted in furtherance of that agreement; (iii) the predominant purpose of the agreement was to injure Plaintiff, or the Defendant's conduct is unlawful, directed towards Plaintiff alone, or with others, and the Defendant should have known that injury to the Plaintiff was likely; and (iv) the Plaintiff was injured as a result of the conspiracy: *Canada Cement LaFarge Ltd. v. B. C. Lightweight Aggregate Ltd.,* [1983] 1 S.C.R. 452 (S.C.C.)

[3] The test for inducing breach of contract requires: (i) an enforceable contract; 2) knowledge of the Plaintiff's contract by the Defendant; 3) an intentional act by the Defendant to cause a breach of contract; 4) wrongful interference by the Defendant; and 5) resulting damage to a party to the contract: Fleming, the Law of Torts, 9th ed. (1998) at p. 761-2, applied in *Drouillard v. Cogeco Cable Inc.* (2007), 86 O.R. (3d) 431 (C.A.)

provide any information to which the client would have access if he or she knew what to read and where to look. In some sense this is a value-free approach: the lawyer does not seek to impose his or her ethics upon the client when delivering information. It is only when the lawyer is asked to effect a transaction that ethics become important. Thus the lawyer is free to discuss the legal consequences of any intended action with the client, and may assist the client in good faith to determine the meaning, applicability or scope of the law. As noted by Kelly Doyle in his text, *Asset Protection*,[4] simply advising a client in asset protection methods and the likelihood of their success is unlikely to result in professional liability. In this view, the key is to recognize the difference between being a mere legal advisor and becoming a principal actor in a transaction.[5] The only ethical constraint upon the lawyer's advice is not to encourage dishonesty, fraud, crime or illegal conduct by the client, and not to instruct the client on how to violate the law and avoid the consequences.

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[4] Kelly R. Doyle, *Asset Protection (*Butterworths, 2005), at pp. 21-23.

[5] Consider the approach of the American Bar Associations's *Code of Professional Respondibility and Code of Judicial Conduct*, EC 7-7: Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist his client indeveloping evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in these situations he should resolve reasonable doubts in favor of his client.

Another perspective, to which I subscribe, is that of moral engagement: the lawyer is entitled to raise moral issues with the client. Indeed, where a course of action is legal but morally questionable, lawyers should address these moral implications. By this standard, the lawyer is not required to remain indifferent about the client's choices – he or she should attempt to guide the client toward conduct that is both legal and ethical.[6] The lawyer should, within the limits of sound advice, encourage such conduct and discourage transactions that violate these standards. This allows the lawyer to be up front and authentic about his or her perspective on things. Lawyers are entitled to have a point of view. It is my experience that many clients are gratified to know that their lawyer is concerned about ethics; they understand that in their distress they cannot maintain a healthy balance between right and wrong, and they indeed wish to act within ethical constraints. Self-interest is not the sole motivator for many people. That being said, the conduct rules require that moral advice be identified as such, and should not take precedence over the client's interests.

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[6] See the discussion of this point in G.E. Dal Pont, *Lawyers' Professional Responsibility,* 4th ed. (Lawbook Co., Austrlia, 2010) at §19.80; and Alice Wooley, *Understanding Lawyers' Ethics in Canada* (Lexis Nexis, 2011) at 59-61.

IV. THE MORAL GRAY ZONE

The line between proper and improper conduct is not a bright line – it is a moral gray zone. On one side of that zone lies conduct that is transparently irreproachable. On the other side lies criminal conduct. Somewhere in between lie the borders between criminal and non-criminal conduct; tortious and non-tortious conduct; and ethical/unethical conduct. Some lawyers do not wish to enter this zone, ever. These lawyers would be uncomfortable practicing insolvency law, as the realities of practice require that this zone be entered from time to time. Clients are prepared to pay, and wish to seek informed advice, to determine where in that zone their proposed conduct lies.

This gray zone is a moral zone, not an intellectual one. Legal knowledge alone does not dispel the mist. This can be distinguished from another kind of gray zone of which lawyers speak, namely the gray area of legal uncertainty. Peter Mayle, in his book *Acquired Tastes*,[7] accurately captures this latter characterization. He refers to it as a secret weapon that has enabled generations of lawyers to retain the appearance of wisdom without the effort of original thought, into which the lawyer dives like a rabbit down a burrow if anyone threatens him with a loaded question. The lawyer contemplates the client's case, suggests that it is

[7] Peter Mayle, *Acquired Tastes* (Bantam Books, New York, 1992), at pp. 30 - 31.

superficially strong, but there are some aspects, some mitigating factors, some imponderables, a few possible extenuations, such that it is not so cut and dried as it appears: this particular instance is a gray area. Mayle decides that the law is almost entirely composed of gray areas of this sort, and lawyers are deeply valued for saying absolutely nothing in a highly professional manner.

The moral gray zone is a corrupting area. Entering that zone means contemplating conduct that is 'close' to wrongful conduct. There is an obvious moral hazard in becoming expert at positioning conduct that is close to unethical or illegal, but does not actually cross the line into illegality or unethicality. A good tennis player, say Roger Federer, wins by hitting the ball as close as possible to the lines. But since he hits them so close, there is a chance that some of them will go out. If, as a lawyer, I choose to journey very close to the line, there is a greater chance that in some cases I will cross the line. In those cases, I have committed a criminal, tortious or unethical act. I cannot run this risk. Roger merely loses the point; I stand to lose much more.

To my mind, the best analogy is that of a florist. That is, someone who spends all day smelling roses soon loses his or her sense of smell entirely. The closer one comes to defining the precise border between proper and improper conduct, the less one is able to hold on to one's moral compass. There is a whiff of

sleaze that adheres to those who visit this zone frequently. We all know that the basic test of a questionable transaction is the "smell test" – does it smell right? As such, of what use is a lawyer who has lost the sense of smell?

How can this danger be minimized? There are various techniques and attitudes that help:

- Become familiar with the case law, and the statutory law, that informs this area. This has the effect of shrinking the zone of uncertainty;
- Develop a sense of what conduct, and which judgment calls, are considered acceptable in the local community;
- Do not enter this zone alone: consult senior practitioners, mentors, partners and associates, the Law Society, and others who can both offer advice and confirm that you are asking the right questions. This is referred to as the ethical 'safety net'.[8] Identify which of your colleagues share your ethical values, and seek out their advice. There are also useful texts that can be consulted on some of these problems;[9]

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[8] This term was coined, I believe, by Dan Dowdall of Toronto, whose 1994 paper (written with Alex Ilchenko), *Judgment-Proofing: Where are the Lines*, in *Insolvency: Recurring Themes* (Toronto: Institute of Continuing Legal Education, 1994) remains an excellent resource.

[9] See Gavin Mackenzie, *Lawyers and Ethics* (Carswell, 2004, supplemented); Alice Wooley, *Understanding Lawyers' Ethics in Canada* (Lexis Nexis, 2011); G.E. Dal Pont, *Lawyers' Professional Responsibility*, 4th Ed. (Lawbook Co., Australia, 2010); Kelly R. Doyle, *Asset Protection* (Butterworths, 2008); A. Burke Doran, Q.B., *Ethical Duties of the Lawyer*

- Ensure that the law firm environment in which you work is hospitable to ethical concerns, and that the firm is prepared to sacrifice profit, where necessary, in favour of ethical conduct;
- Involve junior lawyers, articling students and support staff in ethical discussions. The non-expert's point of view – someone who does not smell roses all day – can be a very useful safeguard. These discussions also serve as a marvellous mentoring opportunity, and they reassure and remind young lawyers of the nobility of our profession. Also consult with family members and close friends, who can perform the key function of reminding you who you are, and what your values are;
- Keep a written record of the steps you take to discern the line, including notes of informal discussions. The signpost of an ethical lawyer is not simply what the lawyer says and does, but also what efforts the lawyer makes to determine whether he or she is acting ethically.

Representing a Client Who is on the Verge of Insolvency or is Insolvent, Law Society of Upper Canada, Special Lectures 1988 on Creditor and Debtor Law; Mark Orkin, *Legal Ethics*, 2nd Ed. (Canada Law Book, 2011); L. Fox & S. Martyn, *Red Flags: A Lawyer's Handbook on Legal Ethics*, 2nd Ed. (American Law Institute, 2010)

V. AVOIDING THE MORAL GRAY ZONE

In this section of the paper I propose to review some of the practical tools that I use to maintain an ethical standard in my creditor-proofing consultations. I am sure that many of these techniques are common, and I am sure that there are others.

1. Encourage the client to stay on the 'right' side of the legal and ethical line.

Some clients arrive at a consultation, or are referred to the insolvency lawyer, with an unfortunate expectation that it is our role to hide their assets, or to defeat their creditors. They have an expectation that we lawyers are experts at being unethical. They want us to perform the fraudulent conveyance for them, or some other magic trick that will safeguard their assets from creditors while insolvency looms. They openly acknowledge that they are insolvent, and that their goal is to prevent the creditors from realizing on their claims. They are dismayed to learn that in this situation there is very little we can do for them.

In my experience, these clients are misguided, but not unethical. They simply believe, from their personal and anecdotal experience, that this is what lawyers do.

When these clients are informed of our ethical limits, most of them are somewhat relieved. They have pursued these options because they think that this is what people normally do in this situation. Many of them are familiar with people who have gone bankrupt after hiding away all their assets. If 'everyone' does this sort of thing, they wish to do it too.

My practice is to inform them of practical reasons, in addition to the ethical ones, for staying within the law. For example, I take them through the scenario of what might well happen if, for example, they flip their half interest in the matrimonial home to their spouse. Do they really want to inflict years of litigation upon their loved ones when the creditors sue to set aside the transaction? Do they want to incur the legal fees it will cost to defend the transaction? I tell them that there are indeed people who get away with fraud and fraudulent conveyances. These people, I tell them, have two attributes that are necessary to succeed in this object: they have no ethical conscience, and they are good liars. I ask my client to look within themselves and tell me if they are good enough liars to pull this off. Very few of them claim to be willing or able to lie effectively. I ask them how they will feel about themselves, and how their conscience will react, if they do choose to lie. Will they sleep well?[10] In other words, bad people can

[10] *Ethics:* A man wrote to the income tax department saying "I have been unable to sleep properly, knowing that I cheated on my income tax. I have understated my taxable income for many years. I enclose a money order for $100. If I still can't sleep, I will send another

effect fraud against their creditors, but good people cannot usually pull it off. They will usually agree that they are good people. Hence I can appeal to their inner values to help them realize that they should act ethically. Likewise, I tell them that if they are losing all their savings and assets, they will be left with two things that will become crucial to them: their family, and their personal sense of self-worth. It would be unwise to compromise their sense of self when that is one of the only things they have left. They should hold on dearly to who they are.

I discuss the Criminal Code provisions dealing with fraudulent conveyances. I openly admit to them that Canada's past record of prosecutions in this area is virtually non-existent. I tell them, however, that at some point there will be a test case, and I would not want them to be the subject of that case.

The purpose of this discussion is three-fold. First, I sincerely want my clients to act ethically. Secondly however, if they choose to act unethically I will lose them as clients, as I cannot continue to act for them in an improper transaction. I do not like to lose clients. If they can be persuaded to act ethically, I can remain their lawyer. Whereas if they walk out in a huff, I do not get paid (like them, it also helps me to have practical reasons for acting ethically

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$100."

myself). Finally, if they agree to accept ethical advice, I can minimize the time I spend in the moral gray zone.

2. Tape recorder in the pocket/Judge in the corner

I have discovered that it is important to act somewhat formally in creditor-proofing consultations. My normal manner is both informal and largely free of legal jargon. But when advising on creditor-proofing, the use of formality acts as a professional and moral safeguard. It is all to easy to slip into expediency, to hint that a certain transaction would be smart to do, to lay out and encourage a game plan under the guise of simply explaining the law, or to gently guide the client into manufacturing a different intention that the one that has already been articulated. To prevent the possibility of such slips, I play a mental game with myself. I imagine that the client has a tape recorder in his or her breast pocket. The tape is running during our consultation. That is the tape that will be played at my discipline hearing, or at trial when the client turns on me. The image of that tape helps keep me ethically alert. The formal language ensures that there will be no misunderstandings or casual hints.

Other lawyers use the image of a phantom judge in the corner of the room. Whatever works.

3. Reputational issues

Reputation is, along with expertise, the most important asset that a lawyer has. It also serves a specific function in the insolvency field, when one acts for creditors who suspect that their debtor has committed a fraudulent conveyance or an improper asset flip.

The fact is that the paperwork for a fraudulent transaction typically looks identical to that of a proper transaction. Usually the only way to discern whether an impropriety has been committed, is to take the transaction apart, to look at underlying values and inventory counts and to investigate the witnesses and contemporaneous events and documents. This can be a costly process. So how do we help the client decide whether to incur the cost of a more detailed investigation? The first step, after looking at the paperwork, is to identify the professionals who were engaged on the file. If I can identify the lawyer as someone who does shenanigans or who sets up structures that have a degree of artificiality to them, then that is a significant clue. That alone may warrant expending further funds to investigate.

In my practice, I am determined not to be one of those lawyers whose involvement in a transaction hints at possible impropriety. I want to be known as a clue in the opposite direction, i.e. my name on a transaction should represent a strong clue that the transaction is proper. This will reduce the likelihood of litigation against my clients. It makes my advice more valuable to them. There are certainly those who would differ with me, as there are many ways to profit in this business. But those who practice questionable creditor-proofing transactions become known to their peers, and their transactions may as a result be investigated with a great deal more scrutiny. I think that delivering a name that attests to a high ethical standard, is something that is of value. This also diminishes any moral taint to a creditor-proofing practice. How is this done?

- Draft documents that are reliable on their face. For example, never back-date documents. Ensure that preambles are accurate. No-one should ever be given a reason to question or wonder about your bona fides.
- Incorporate preambles (I call them "Background") that set out exactly what the facts are, so that no-one has to puzzle over what was really happening in the transaction;
- If the transaction is justified by virtue of a particular legal theory, set this out in detail. If the transaction is later challenged, it will stand or fall on the

law, rather than on impugned facts or credibility issues. There will be no need to question the lawyer's integrity.

- Presume that every piece of paper in the file will be open to scrutiny if the transaction is challenged. This includes any documented discussion of ethical issues. The fraud exception to solicitor-client privilege may apply;[11] or practical courtroom tactics may require that privilege be waived in order to avoid adverse inferences. It will assist the client, and your reputation, if the documentation shows that you expressly addressed, and resolved, the ethical concerns in advising on the particular transaction.
- Be alert to the client's expression of his or her intent in consulting you or in contemplating a particular transaction. If he or she demonstrates an

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[11] The Court may deny solicitor-client privilege where fraud is alleged, though a mere allegation is insufficient: *Kostiuk, Re* (1999), 13 C.B.R. (4th) 81 (B.C.S.C., Shaw J.); *Pax Management Ltd. v. C.I.B.C.* (1987), 14 B.C.L.R. (2d) 257 (C.A.): where the Plaintiffs specifically plead fraudulent misrepresentation and the surrounding circumstances show that such claim is honestly advanced and has sufficient credence to justify exercising the court's discretion to disallow the privilege. *Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd.*, [2003] O.J. No. 3796 (Master Dash): prima facie fraudulent conveyance. Must make out a prima facie case of fraud in fact: *Canbook Distribution Corp. v. Borins* (1999), 7 C.B.R. (4th) 121 (Ont. G.D., Ground J.) (where the facts are equally consistent with a legitimate transaction, err on the side of protecting privilege). Solicitor-client privilege was denied where the Plaintiff showed prima facie that the Defendant stripped the company of money for personal purposes through a leveraged buyout to the creditors' detriment: *Dylex Ltd., Re* (2002), 33 C.B.R. (4th) 232 (Ont. S.C.J., Spence J.); *Koenigs, Re* (2002), 36 C.B.R. (4th) 255 (Ont. S.C.J., Ground J.). Solicitor-client privilege is lost if there is a prima facie case that the documents were created for the purpose of advising and assisting the client in preparing for contemplated fraudulent conduct or in the course of such conduct, subjective test, mere suspicion is insufficient: *Royscott Spa Leasing Ltd. v. Lovett* (Eng. C.A., Nov. 16 1994)

intention to defeat creditors, do not ignore it. An ethical Rubicon has arrived. Deal with it.

VI. MANAGING THE CONSULTATION

It can take several years to develop a proper manner for dealing with clients in ethical quagmires. The objective is both to keep the client, and to keep the client satisfied, while maintaining a proper ethical stance. This can be very challenging. Ethics may not mean a lot to a clients who is facing the loss of his family home or all his savings. It is essential to try to tie ethics into practicality for these clients. Generally, it is possible, through practical or pragmatic justifications, to discourage people from doing an illegal or unethical act. The practical side of the ethical choice is essential, else the lawyer's advice will be seen as irrelevant. Who really cares about ethics when they are about to lose their home or their business, and their family is about to be out on the street? Here are some tools:

- If the client asks for advice beyond the lawyer's accepted ethical limits, simply indicate that you are not allowed to give advice on that question. Clients generally understand and accept this.[12]

- Enlist the client's help in evaluating the ethics of a particular course of action. Clients are flattered at being treated as ethical people whose moral judgment is valued. They will be more inclined to act ethically.

- Formalize the ethical component of the consultation. Often, I announce to the client that we will first brainstorm, without any regard to ethics or criminality, for the optimal solutions to the problem. Then we will apply legal ethics to see if any of these solutions can be adopted. This technique can only be utilized when I am reasonably confident that the client will not interpret the brainstorming session as an implicit invitation to engage in the solutions that work but are unethical.

- If the client's clear intention is to defeat creditors, the advice that can be given is starkly limited. The client may, however, be satisfied to receive information or advice that helps the predicament in other ways. For example,

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[12] Admittedly, I may be out of touch on this point. Possibly clients only understand and accept this if, like me, the lawyer has been practicing 30 years, has gray hair, verges on rotundity and has written a book (and is devilishly handsome).

I routinely ask such clients if they are named in anyone's will, such as that of a parent or spouse. If so, I advise them to suggest that the will be changed to establish a discretionary trust, or some other simple structure, to ensure that any bequest not accrue to the client's creditors. I discuss the same problem that may arise if, say, their parent dies without having a will. I ask the same question about designated beneficiaries under insurance policies and RRSP's. If the client's spouse is in attendance, and wants to change his or her will in this manner, I sometimes explain to them my "hit by a brick" philosophy of practicing law,[13] and perhaps have them write up a temporary holograph will, right there in my office, that will suffice until a more formal will is prepared by their family lawyer. In my experience, this advice is often sufficient to mitigate the client's initial dismay when I tell them that "I can't answer your question, it's contrary to legal ethics."

[13] "Hit by a brick" philosophy: One never knows what the future may hold. If the client's wife plans to change her will to protect the husband from his creditors, she will probably get around to it in a few weeks. But who knows, in the meantime she might be hit and killed by a falling brick or some other random event. The money that she wants to preserve for the family's welfare will instead go to his creditors. To be safe, she might want to spend five minutes right now drafting up a holograph will that will protect him even if she is hit by a brick before a new formal will is completed.

VII. CONCLUSION

I hope that this paper is of some practical value. I believe that clients require practical reasons to act ethically in challenging circumstances, and that these practical justifications can be found. Likewise, I believe that there are good, practical reasons for the lawyer to act ethically and to attempt to have the client also do so. It is all well and good to appeal to one's better nature, but nothing beats enlightened self-interest as a motivating force for good.

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