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## Ensuring Competent Representation: Know What You Don't Know

By: Alice Woolley

*You've got to know when to hold 'em  
Know when to fold 'em  
Know when to walk away  
And know when to run  
You never count your money  
When you're sittin' at the table  
There'll be time enough for countin'  
When the dealin's done*

*The Gambler* (Don Schlitz; performed by Kenny Rogers)

Being a competent lawyer means knowing your own limits. Lawyers representing clients in cases for which they do not have the necessary knowledge and skills risk liability in negligence, being found to have provided ineffective assistance of counsel (in a criminal case) and violating the obligations of the codes governing their conduct. Those codes define the competent lawyer as “recognizing limitations in one’s ability to handle a matter of some aspect of it and taking steps accordingly to ensure the client is appropriately served” (FLS Model Code, Rule 3.1-1(h)). They further state that a lawyer ought not to take on a matter for which she is not competent and must recognize “a task for which the lawyer lacks competence” (Rule 3.1-2, Commentaries 5 and 6).

How difficult can this be? Quite, according to some recent media reports. While the facts as reported are not sufficient to support the conclusion that the lawyers involved acted improperly, they do at least raise the question: given the apparent disconnect between their expertise and their clients’ circumstances, why were these lawyers acting? And what lessons might we be able to draw to allow lawyers to appreciate when folding ‘em is wiser than holding ‘em?

The first case is the representation of Jian Ghomeshi by two lawyers from the Dentons firm. As noted here – [Why did Ghomeshi hire Dentons?](#) – the lawyers who filed Ghomeshi’s (now withdrawn) civil claim against the CBC were a partner specializing in “commercial litigation and insolvency” and a senior associate “with experience in real estate, employment, defamation and fashion.” The dubious merits of that claim have been widely discussed (see, e.g., here: [Levitt on Ghomeshi](#)). More concerning, however, is the admission in the Claim that Ghomeshi engaged in “sado-masochism”, an admission Ghomeshi also made in his statement on Facebook (which counsel may or may not have reviewed before it was posted – [Ghomeshi FB post](#)). It is hard to

see how either the Claim or Facebook post advanced Ghomeshi's legal interests and it is quite easy to see how each may ultimately injure those interests given that "when it comes to BDSM – or at least its more intense versions – the law doesn't actually care about consent." (See: [Cossman on Consent](#)).

The second case arises from a lawsuit brought – ironically enough – against Ghomeshi's new counsel, Marie Heinen, and another criminal defence lawyer, Steve Skurka. Skurka and Heinen have been sued by their former client Nathan Jacobsen in part because of their representation of him in a US criminal trial. A December 5, 2014 article in the *Globe and Mail* noted that Jacobsen's original guilty plea in the US was struck out, and that his American counsel argued that Jacobsen has received "ineffective assistance of counsel". It also reported that in testimony in the US proceeding, Skurka stated "We were hammered by the fact, Ms. Heinen and I, by the fact that there were different discovery rules than we had in Canada." ([Globe and Mail, December 5 2014](#))

Heinen and Skurka are not the first Canadian lawyers to be criticized for their handling of a US criminal case. Eddie Greenspan's representation of Conrad Black several years ago was criticized not only by Black, but also by journalists, although the journalists were not necessarily prepared to see Greenspan's representation as the cause of Black's problems: "This wasn't Eddie Greenspan's finest hour. But it is stingingly absurd to suggest that Conrad Black was done in by his lawyers. He was done in by the facts." (E.g., [Wells on Black and Greenspan](#)). It should also be acknowledged that Greenspan worked with US counsel on Black's representation – in fact, he made the retainer of such a lawyer a condition of his representation ([Greenspan on Black](#))

In each of these cases the lawyer's (or lawyers') area of expertise (insolvency and commercial litigation/Canadian criminal law and procedure) deviates from the issues raised by the representation (sex and employment/US criminal law and procedure). The quality of their representation has been challenged. So why were the lawyers acting? Why didn't they refuse the brief?

My guess is that it was not because of ignorance of their legal and ethical duties. Rather, it was because they did not see any issues with the representation.

One explanation for that (mis)perception may be that the feeling of not being competent is not abnormal for a lawyer. Most lawyers in the early stages of their career – and some lawyers (and academics!) at later stages of their careers – will feel like they don't know enough, or have sufficient skill, to be handling the work they have been given to do. But they persevere, because the work has been given to them and it's their job to figure out how to do it as best they can. They trust the senior lawyer to identify any mistakes, or their own hard work and effort to ensure that such mistakes are avoided. As a consequence, however, lawyers may become somewhat inured to that feeling of incompetence, and less likely to see it as a basis for ethical decision-making.

Another may be that human beings simply tend to think we are better at things than we are. In one study 94% of university professors rated themselves as above average teachers ([here](#)); in another study 88% of drivers reported themselves as above average ([here](#)). Evidence does suggest competent people have better self-assessment in their area of competence than do incompetent people (the Dunning-Kruger effect, summarized [here](#)), which might suggest that lawyers ought to know the boundaries of their competence. But on the other hand, it may suggest the opposite: that it is at the boundaries of our competence, when we are becoming incompetent, that we become the least able to assess our own abilities. As David Dunning noted

in the article linked above, “Logic itself almost demands this lack of self-insight: For poor performers to recognize their ineptitude would require them to possess the very expertise they lack.” It may be at the point where our expertise runs out that we do not know that it has.

A further contributing factor is the fact that while lawyers clearly do specialize we do not treat ourselves as specialists from a regulatory perspective. We admit all lawyers to legal practice as generalists and we don’t identify them as specialists absent the satisfaction of certain criteria (and even that only occurs in some jurisdictions). This may create a perception amongst members of the bar that they have general competence, that their competence is not limited to their area of specialization. As a result lawyers may be more willing to practice outside of their specialty than are, say, doctors; one can’t really imagine a dermatologist being willing to practice occasionally as a neurosurgeon, or a neurosurgeon deciding to dabble in skin cancer detection.

If this is the case, then how might a lawyer avoid overreaching into areas where she lacks the necessary competence? One way is to view oneself as a specialist and to know what that specialty is. The specialty may not be an area of law – lawyers practicing in smaller communities and litigators often deal with a variety of legal questions. But it may be that all one’s clients are individuals; the cases are small; they don’t involve issues of crime or sex; they all occur within Canada.

And if a case is outside of her area of specialty, then the lawyer ought to presume that she is not competent to deal with it, and also be aware that she is far more likely to mistakenly believe that she is competent than to mistakenly believe that she is not. That, most significantly, the lawyer may not even know the risks to her client that her lack of knowledge and experience in the area presents, because she doesn’t know enough about the governing law and procedures to know the dangers. A lawyer who, e.g., never practices in areas touching on criminal law simply will not appreciate that an admission of certain sexual practices may indicate guilt regardless of consent. This does not mean that the lawyer cannot be involved in such a case, but it does suggest that the lawyer ought not to act as sole and senior counsel on it. Rather, the lawyer should be involved in a junior or supporting role in the case or, if acting as senior counsel, should ensure that there is supportive expertise provided by someone with the knowledge and competence the lawyer acts.

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