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A Family Lawyer's Role is (Not) to Minimize Conflict

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Do family law lawyers have an obligation to minimize conflict? It seems obvious that given the stakes involved in family law matters, especially where there is family violence or children, that a lawyer's role ought to include minimizing conflict; however, that idea is not as straightforward as it sounds. A family lawyer does have an obligation to advise her client on the impact of actions that inflate conflict; but a lawyer's role properly understood, does not include an objective of minimizing conflict. This may seem like splitting hairs, but it is an important distinction.

Minimizing Conflict

The BC *Family Law Act*, SBC 2011, c 25 (BC FLA), Rules of Court, and guidance from the BC Law Society all aim to ensure family law proceedings minimize conflict. The BC FLA requires a court to "ensure that a proceeding under this Act is conducted in a manner that strives to minimize conflict, and if appropriate, promote cooperation, by the parties" (s 199(1)(b)(i)). An object of the BC *Supreme Court Family Rules*, BC Reg 169/2009 is to "help parties resolve the legal issues … in a way that will minimize conflict and promote cooperation between the parties" (R 1-3(1)(a)(ii)).

As an aside, the more time I spend with the BC FLA, the more I admire it. It really is a remarkable piece of legislation in the way it tries to guide families towards a less conflictual resolution to their dispute. The Act encourages parties to make their own decisions, and it aims for them to do so in a way that is less conflictual, responsive to family violence, and mindful of children's interests. That said, Susan Boyd and Ruben Lindy found that BC courts are still relying on "problematic assumptions about family violence", indicating that judicial and legal education is still falling short of effectively training the legal profession about family violence (see here at 45).

In 2013, the British Columbia Law Society introduced *Common-sense Guidelines for Family Law Lawyers* (LSBC Guidelines). The first suggestion is that lawyers should be "constructive, respectful and seek to minimize conflict and should encourage clients to do likewise." The guidelines are only voluntary – presumably because many of them can only be suggestions, like minimizing conflict.

It is not uncommon for judges hearing family law matters to school lawyers about the need to minimize conflict. For example, in *Jackson v Jackson*, 2008 CanLII 3222 (ON SC), in the context of a high conflict dispute, Justice Murray held that a good lawyer will "attempt to minimize conflict while achieving appropriate results for their clients informed by the applicable

legal principles including, the best interests of the children" (at para 11). More recently, in *Alsawwah v Afifi,* 2020 ONSC 2883, Justice Kurz held that a lawyer's "role as advocate should often be as rational counsel not flame-throwing propagandist. Where the client wants to raise the emotional stakes with invective and personal attack, that lawyer must often counsel restraint" (at para 107).

The idea that family law should aim to minimize conflict is properly reflected in policy objectives. For example, one of the guiding principles of the Cromwell Report is to "minimize conflict." The Report is authored by the Action Committee on Access to Justice in Civil and Family Matters. They made recommendations for comprehensive family law reform including increasing the use of consensual dispute resolution processes, and for family law to be made "simpler and offer more guidance by way of rules and presumptions" (Recommendations #2, #7, #8, #9, #25, #27, #29 and #31).

Consensual dispute resolution processes are generally less adversarial and so lawyers can try to minimize conflict by encouraging parties to find a resolution that will meet both parties' interests. Ideally, trying to find a settlement is a less conflictual path than one designed to test legal arguments, weigh facts, and determine an objective resolution provided by the law. In addition, less conflictual disputes are resolved faster and last longer, thereby reducing ongoing conflict.

Moreover, rules and presumptions can be helpful in reducing conflict by making the law more predictable. When it is easier to determine what a court would do, it makes it easier for parties to resolve their own dispute, thus reducing conflict. Predictability makes outcomes more consistent, which also increases the appearance of fairness (Cromwell Report at 59). For example, the *Federal Child Support Guidelines*, SOR/97-175 were introduced in 1997 in part to "reduce conflict and tension between spouses by making the calculation of child support orders more objective". (s 1(b)) Similarly, the *Spousal Support Advisory Guidelines*, and the introduction of presumptions into decisions about the relocation of a child's place of residence (Bill C-78, *An Act to Amend the Divorce Act, The Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another* Act) both work to reduce discretion in the law and with it conflict over what the law provides. In addition, the objective of minimizing conflict can also be seen in evidence law relevant to family disputes (see *Stefureak v Chambers,* 2004 CanLII 34521 (ON SC); D. A. Rollie Thompson, "Are There Any Rules of Evidence in Family Law?" (2003) 21 CFLQ 245 at 250) and in family law reforms in Manitoba (see Bill 9, *The Family Law Modernization Act,* and reports here and here). The family law justice system is increasingly designed to reduce discretion and encourage settlement, thereby minimizing conflict.

Minimizing conflict is an obvious good where there is family violence or children. We know that exposure to conflict is harmful for all children regardless of age. We know that exacerbating the conflict heightens the risk where there is family violence. These are two crucial reasons to reduce opportunities for conflict within the law, and for reforms to push disputes towards less conflictual dispute resolution processes. Minimizing conflict can be a good and healthy policy objective informing the law, but it is not a lawyer's objective.

To be clear, I am not in any way endorsing lawyers (and we know they exist) who are intentionally and even dangerously inflammatory. If we were to review all of the facts of those cases, I would venture to guess that most often those lawyers were acting in violation of their professional obligations. When we say we want lawyers to be better, to be part of the solution instead of the problem, we are often responding to bad lawyering. But just as I am saying that the solicitor-client relationship does not require a lawyer to fight with such ferocity that she violates her professional obligations, the relationship also does not permit her to sacrifice her client's interests.

The Limits on a Lawyer's Conduct

A lawyer's role is to pursue her client's interests within the bounds of legality. She cannot pursue something unlawful, motivated by malice (*Model Code,* R 5.1-2(a)), or that is dishonest (R 5.1-2(b)). A lawyer cannot commence a useless legal proceeding (R 3.2-4) or one designed to abuse or misuse the legal system. (See i.e.: *Family Law Rules,* O Reg 114/99 at R 1(8.2); *Rules of Civil Procedure,* RRO 1990, Reg 194 at R 2.1.01 and R 2.1.02; *Courts of Justice Act,* RSO 1990, c C 43 at s 140; *Family Law Act*, SA 2003, c F-4.5 at s 91(1); *Kavanagh v Kavanagh,* 2016 ABQB 107 at paras 63-64.) Even though the profession's push towards civility was decelerated by *Groia*, a lawyer is still required to treat her colleagues and their clients with respect. She must be civil with everyone, and approach the law in good faith (R 3.2-1, R 5.1-5 and R 7.2-1). A lawyer cannot provide access to the justice system for a client whose motivation is to work around the law, or intentionally cause harm. These rules capture and prohibit a considerable amount of objectionable conduct, including communications that are both useless and inflammatory. A lawyer may be found guilty of professional misconduct for particularly egregious behaviour, but more often costs awards punish conduct that crosses the line.

A client's legal entitlements informs what a lawyer can and cannot do. As Brad Wendel framed it, a lawyer can only do for the client, what that client may lawfully do (Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton, NJ: Princeton University Press, 2010) at 59). Family law provides competing entitlements and defences that are pursued in an adversarial system. The justice system itself is conflictual. Lawyers are required to pursue those lawful entitlements, and balance that framework by working within the system to negotiate and promote settlement. The *Model Code* requires a lawyer to encourage settlement (R 3.2-4). If the parties are divorcing, that obligation goes further under Bill C-78 (which will amend the *Divorce Act* in March 2021). A lawyer must encourage her client to try to resolve the dispute through negotiation, mediation or collaborative practice, if it is "appropriate" to do so (s 7.7(2)(a)).

The law encourages parents to engage with each other less conflictually, for the benefit of their child (see e.g. Bill C-78 at ss 7.2, 7.3 and 16, and BC FLA at ss 4, 37, 38 and 199(1)(2)(b)). A parenting schedule may be created in a way that is aimed at reducing conflict (see *Churchill v Kennedy*, 2009 NSSC 309). If a parent persists in being conflictual, a court may order a parenting schedule that will reduce conflict – even if it means reducing the child's time with that parent (see *Bancic v Mirceta,* 2019 ONSC 39). A court may even decline to order costs to minimize conflict between parents (see *Aubin v Aubin,* 2010 BCSC 1425). So, if the matter will be decided by a third party – a judge, arbitrator, or parenting coordinator (PC) – a good lawyer will advise her client on how that decision-maker will view and weigh conflictual behaviour.

That third party's role *is* to make decisions that will also reduce the conflict between the parties, especially where there is family violence or children. So a competent family law lawyer will research the law and advise accordingly, but that still does not mean it is her *role* to minimize conflict.

When a dispute is resolved out-of-court, objectionable conduct can easily fly under the radar. When legal interpretations are not challenged by an adversary and decided by an objective third party, a lawyer has a heightened responsibility to get the law right. Yet, that responsibility does not apply to lawyering tactics in the same way. By tactics, I mean lawyering skills such as those employed in negotiations (e.g. escalating demands, good-guy bad-guy routines, and extreme offers). These are the tactics that the law does not always provide effective responses to – they cannot always be balanced the same way that competing interpretations of the law can be. They are primarily governed by professional judgement, but that discretion cannot be exercised pursuant to an objective of minimizing conflict.

How Might A Lawyer Minimize Conflict?

I began thinking about this question when Bill C-78 signaled a significant change to family law lawyering, and I wrote about it here. I also asked my ethics students a version of this question: whether other law societies ought to adopt a policy similar to the LSBC Guidelines. I've thought about the question ever since. If the objective of minimizing conflict did inform a lawyer's role, how might she achieve it?

First and foremost, suggesting that a victim of family violence ought to be the one to try to minimize the conflict with her former abuser is futile at best, and damaging at worst. An abuser may see attempts to minimize conflict as an opportunity to employ more aggressive control tactics. Sometimes the language around this idea of minimizing conflict includes a caveat, "if appropriate" which presumably means where there is no family violence. (See: Linda C Neilson and Susan B Boyd, Interpreting the New *Divorce Act*, Rules of Statutory Interpretation & Senate Observations (8 March 2020) at 6-7; and Senate Standing Senate Committee on Legal and Constitutional Affairs, "Observations to the thirty-fourth report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-78)" at 2-3.) This requires a lawyer to know whether or not there is family violence. We know that not all family law lawyers screen for family violence (see empirical research here and here), nor are they trained in family violence, although they should obviously do both. (See Luke's Place Report, "What you Don't Know *Can* Hurt You" and my previous ABlawg post here.) But competence concerns aside, the objective of minimizing conflict cannot be applied to survivors of family violence without risking re-victimizing them at a critical moment, a moment when they ought to be supported in their healing process and in their pursuit of legal entitlements, including protection by law.

Second, a rule could not only apply to family law lawyers. The silos of our justice system do a terrible job of talking to each other. (See: Jennifer Koshan, Janet Mosher and Wanda Wiegers, "The Costs of Justice in Domestic Violence Cases: Mapping Canadian Law and Policy" in Trevor Farrow and Les Jacobs, eds., *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver, BC: UBC Press.) Family law parties may be engaged in multiple systems at once. For example, the same parties may also be embroiled in civil litigation. Their lawyers

could not be working to different standards without risking parties leveraging the more aggressive system against the family law matter, where a lawyer's hands would be tied.

Even if we were to adopt such a rule, how would a lawyer actually minimize conflict? Does an objective of minimizing conflict mean that a lawyer must refuse to follow instructions if she thinks following them will increase the conflict? If so, how can that be objectively determined? How might a lawyer know what her client's former spouse might find conflictual? There are some obvious things, for example, behaviour that amounts to abuse of process or litigation abuse (which cannot be pursued anyway), but there are less obvious things too. Things that only have power over the weaker party because of the intimate history between the parties, e.g. any number of negotiation tactics, such as ultimatums, and refusing to negotiate except on terms, or tactics that have power because of a history of coercive control.

Ultimately if a lawyer were to say "I don't think you should do X, because it will really piss off your former partner" the client is entitled to say, "I don't care. I want you to proceed anyway." I'm being a bit flip and cavalier, but only to make a point. If a client wants his lawyer to proceed in doing something that will increase the conflict, the lawyer must follow her client's lawful instructions unless there is a complete loss of confidence between the two (R 3.7-2). A lawyer's duty is to her client and the administration of justice, and that cannot be reduced based on a perception of what might increase conflict. To be clear, I do think a lot of conflictual tactical conduct is already prohibited by the law governing lawyers. But the exercise of professional judgement cannot be governed by an objective of minimizing conflict. These decisions must involve discussions between a lawyer and her client, so the client can make a fully informed decision about how to proceed. A lawyer cannot refuse to follow instructions on the grounds that she thinks it is a bad idea or conflictual – especially in an adversarial system that is conflictual by design. A lawyer is not her client's conscience, she is his advocate, his representative.

This does not mean a lawyer cannot advise her client on the wisdom of an obviously conflictual tactic or behaviour, and even advise against such conduct. Indeed, she should be honest with her client, and even be firm, if necessary, about what she thinks (R 3.2-2[2-3]). A good lawyer may reality check with her client, to ensure he fully understands the consequences of his decisions – this may even be required in some non-adversarial dispute resolution processes, such as collaborative practice. (See my previous paper on the topic here.) A lawyer can also provide moral advice the same way that anyone can. But what she cannot do is wrap moral advice up in a bow of legality – meaning, she cannot provide moral advice under the guise of legal advice. Moreover, she needs to be confident that her client can tell the difference between the two (Wendel at 138-143).

Ultimately, we cannot change the fact that a lawyer is acting in a representative capacity. She provides legal advice that enables her client to make his own decisions. It is not her job to decide what is in her client's best interests – at least not to the point of overriding his lawful instructions. The client gets to decide how he wants to live, that is a benefit of living in a democracy. We have enacted laws that reflect as much. When family law clients cannot come to an agreement on their own, they are empowered to resolve their disagreement about the right way to structure their post-separation family through the law. Judges, arbitrators and PCs will make decisions, where necessary, in a way that minimizes the conflict between them.

Where the law is not working effectively to reduce conflict, especially where the majority of the work occurs out-of-court, the solution cannot be to look to the lawyers to change their role. The law is the only objective way to reduce conflict between parties beyond therapeutic remedies. The law seems to be very slowly working towards this objective, but there is a lot more we can do, such as including more rules and presumptions in family law, and doing a better job of training lawyers on where the limits of the law are. Ultimately however, a lawyer may (and in most cases probably should) advise her client to minimize conflict, but her role is to pursue his lawful interests, even when it will not reduce the conflict between the parties.

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