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March 24, 2015

Family Justice 3.5: Fostering a Settlement-Oriented Legal Culture

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This is the note on rethinking our approach to family justice that I never thought I'd find myself writing, and as a result I need to begin with an explanation and an apology. In this short post, I describe what I see as lawyers' duties to promote settlement, to respect informed compromise and to refrain from litigating family law disputes without good and sufficient reason. First, however, I'll explain the circumstances that have provoked me to write.

I'm involved in a number of the present efforts to reform family justice. In one particular group, I have received a certain amount of kickback when I suggest that lawyers should play a larger role at the front end of family law disputes, in order to steer as many of those disputes away from court as possible. (Well, perhaps not kickback so much as dismay.) I would invariably respond that the early involvement of lawyers would result in the parties receiving an explanation of the law and the range of likely outcomes, thereby minimizing unreasonable positions and moving the parties toward settlement, as I have described elsewhere. Although this struck me as self-evident, it is not.

I recently had the pleasure of a lengthy road trip with a colleague that gave us lots of time to talk about access to justice, the nature of the reforms required and the barriers to those reforms. I was taken aback to learn that many of the members of her local bar preferred to take adversarial positions in family law disputes, were generally disinclined to pursue out of court resolution and often took a hard line when giving independent legal advice on mediated settlements that encouraged litigation. She suggested that there were two reasons why the family law bar took this approach, firstly because litigation is where the money is (which is true), and secondly because lawyers have a duty to zealously advocate for their client's interests (which is sort of true). Another lawyer, a leader within his province's bar, independently made this latter point later the same day. Upon reflection, I suspect that there are other factors that explain this sort of antagonistic approach, including tradition – "this is the way we've always done it" – and a sort of old school lawyerly machismo that views willingness to negotiate as a sign of weakness.

Needless to say, these perspectives on the attitudes of the local bar surprised me, and as a result I must apologize for my misapprehensions and whatever scant degree of priggish self-righteousness may perchance have escaped my lips. I should also thank Rob Harvie, QC for his thoughtful comments on an earlier draft of this note.

Let me now explain, and perhaps persuade, why lawyers have a duty to promote settlement and encourage their clients toward reasonable positions, and why Dante wasn't too far off when he placed barratry in the eighth circle of hell.

Clients in Family Law Disputes

The clients of family law lawyers are uniquely vulnerable. They are not investment bankers dispassionately considering an IPO, nor are they career criminals facing another eight months for yet another B&E. They are people who often have had no prior involvement with the justice system, who are recovering from the breakdown of a important romantic relationship, who find themselves at odds over the very things that matter most in their lives, and who have little to no knowledge of the law that applies to their dispute or the courts that will process it. By and large, they are wracked by fear and anxiety about how their dispute will turn out, what will become of their children, how they'll make ends meet and what their futures hold.

Although most clients' fear and anxiety will dissipate over time, the emergence of a family law dispute is a time of profound uncertainty and unease. Legal advice given in such circumstances must be delivered with the deft and delicate touch that only experience provides. The right advice, in my view, can help the client reframe his or her experience of the dispute, rein in unreasonable expectations and improve the long-term chances of settlement. The wrong advice can needlessly damn a family to the conflict and enmity litigation engenders, and risks a permanently dysfunctional co-parenting relationship.

The advice provided by a skilled family law lawyer takes into account not just the text of the applicable legislation, but the case law interpreting that legislation, the applicable common law principles and the specific circumstances of the family as described by the client. Such advice is rarely if ever exact, in the sense of if-**X**-then-**Y**; in family law matters the best that can usually be offered is the lawyer's opinion as to the range of potential values **Y** might hold. Although the ultimate value of **Y** is unknown, the lawyer's advice should give the client an understanding of the basic law, some expectation of what lies ahead and a sense of the limitations of probability. It has been my experience that clients invariably appreciate this sort of advice at initial consultations, regardless of whether I'd given them good news or whether I'd agreed to take their case; even those clients for whom I was unable to find a silver lining left my office with a weight off their shoulders and a palpable sense of relief. All of those clients left my office better informed about the law and range of likely outcomes.

The conduct of a file after this initial consultation requires ongoing legal advice as to the client's options, the range of outcomes and opportunities for negotiation, adjusted to account for improvements in the information available as a result of disclosure and discovery, and the evolving circumstances of the parties and their children. The client's emotional state has a significant impact on the advice given about options for settlement; I have consistently found that the further my clients moved toward accepting both the end of their relationship and the parameters imposed by operation of law, the more opportunities for compromise and settlement arise. Contrary to the general rush to conclusion urged by studies such as the report of the national Action Committee's family justice working group, files that would be impossible to settle at the beginning of the case often prove remarkably tractable once the passage of time has worn away the sharp edges of the parties' emotions. Of course, trial always remains available in the event negotiations fail.

This, mind you, is just one way of doing things. An alternative approach might be to uncritically validate the client's fears and anxieties and take the resulting instructions without assessing: the potential fallout from carrying them out; whether they are in the client's interests or not; their odds of success; and, their probable long-term repercussions on the client's relationships with the opposing party, the children and the children's extended family.

Of course, these two approaches are merely points on a continuum; I do not mean to suggest that family law lawyers either do one or the other. Some lawyers place greater emphasis on negotiation and mediation; others are more inclined to start with litigation and work toward settlement as an end game. Some are more forceful in addressing unreasonable positions; others are less willing to challenge a client's wishes and instructions. However, the difference between these approaches is not just a matter of personal style, there are professional obligations at play as well, and it is here that my concerns lie.

Lawyers' Duties to their Clients

My colleagues are correct that lawyers have a duty to advocate for their client's interests. That and integrity are probably the defining professional characteristics of being a lawyer. However, where I and my colleagues' impression of the views of their local bar differ concerns the extent to which this duty is compatible with a settlement-oriented approach.

First, lawyers' duty is not to provide *zealous* advocacy, that is a concept found in, and likely unintentionally borrowed from, the Model Rules of Professional Conduct of the American Bar Association, not those of the Canadian Bar Association. Our duty as advocates is much more restrained, an attitude that is especially appropriate for those practicing family law. Rule 2.1-3(e) of the Code of Professional Conduct for British Columbia, for example, says:

> A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence that is authorized by law.

Rule 4.01(1) of the Alberta Code of Conduct says:

> When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law …

The rule in Chapter IX of the Canadian Bar Association's Code of Conduct says:

> When acting as an advocate, the lawyer … must represent the client resolutely, honourably and within the limits of the law.

The job of an advocate, then, is to "endeavour" to "obtain" for the client the benefit of remedies "within the limits of the law," and to do so in a "resolute" manner. This really doesn't have quite the ring of "zealous" advocacy, does it?

The annotations to these rules are roughly similar between the codes. The Alberta commentary says, among other things, that:

> In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the

> lawyer thinks will advance the client's case … in a way that the promotes the parties' right to a fair hearing in which justice can be done.

This too speaks of a restrained yet resolute advocacy. Lawyers must advance the issues and arguments necessary to "advance" their clients' cases, not those necessary to "grind the opposing party into a crushing defeat." Moreover, lawyers have a duty to present their cases in a manner that promotes the *parties'* – plural! – right to a fair hearing.

Lawyers' obligation as advocates to resolutely pursue the benefits authorized by law for their clients is set off, or supplemented, as I see it, by an obligation to pursue settlement. Rule 2.1-3(c) of the British Columbia code says:

> Whenever the dispute will admit of fair settlement the client should be advised to avoid or to end the litigation.

Rule 2.02(7) of the Alberta code is a bit more forceful (emphasis added):

> A lawyer **must** advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.

For an otherwise milquetoast code, those are some strong words. They are mirrored by the rule in Chapter II of the CBA code, which provides that "the lawyer must be both honest and candid when advising clients." The sixth comment on the CBA rule says:

> The lawyer should advise and encourage the client to compromise or settle a dispute whenever possible on a reasonable basis and should discourage the client from commencing or continuing useless legal proceedings.

These rules impose on lawyers a duty to "encourage" settlement "whenever possible," providing always that the settlement be "fair" and "reasonable."

Without a doubt, lawyers have an obligation to honourably and resolutely work toward such relief for their clients as is available under the law. This obligation, I suggest, is in no way incompatible with lawyers' equal and ongoing obligation to pursue reasonable settlement and avoid litigation. It seems to me that the obligations are in fact complementary and that, at least in family law, the pursuit of reasonable settlement *is* resolute advocacy.

Lawyers' Duties to Clients in Family Law Disputes

The litigation of family law disputes is rarely a happy and convivial affair. When a dispute heads to court, spouses who once trusted each other implicitly and gladly sacrificed their personal interests for the greater good of the whole suddenly and jarringly find themselves embroiled in an adversarial contest, and paying handsomely for the pleasure out of the equity in their home or their children's patrimony. The negative consequences of litigation on families are legion, and are not limited to lawyers' fees alone.

- The intense personal rivalry engendered by litigation can entrench negative views and unreasonable positions.

- The adoption of particularly negative views and unreasonable positions is highly predictive of repeated applications before trial, a trial that will be lengthier than usual and repeated applications after trial.
- The negative views of parties can persist for years even after the litigation has concluded, poisoning the possibility of cooperation and constructive dialogue.
- Parental conflict can have severe short- and long-term consequences on children, and the consequences of protracted conflict on children are far more severe than the consequences of brief periods of conflict.
- Superior court filing fees can cause hardship for those with low incomes, as can the costs of court reporters for examinations for discovery and the reproduction of documents for disclosure.
- The time required for pre-trial and trial processes can require lengthy periods of unpaid time off work or away from the tasks involved in self-employment.
- The stress and uncertainty resulting from drawn out litigation can have adverse impacts on litigants' mental and physical health.
- Conflict and prolonged litigation can result in the loss of important relationships between litigants and their friends and extended family and between parents and their children.

Surely, the avoidance of litigation, and the concomitant hazards it brings, is in the interests of most parties to a family law dispute and in the interests of their children as well. Encouraging our clients to consider alternatives to litigation *is* resolute advocacy and is in no way contradictory to our obligation to achieve a result within the limits of the law.

This is not to say that litigation is not necessary. It most certainly is. Litigation is required whenever orders are needed for the protection of persons or property, to prevent a child from being abducted or relocated in advance of trial, or to resolve a truly intractable dispute between truly intractable parties, including the mentally disordered. The commencement of proceedings can also be used to exploit the disclosure and discovery provisions of the rules of court, to chivvy an uncooperative individual into negotiations and to signal the commitment of a party to a particular position. That being said, litigation should generally be eschewed whenever possible, in my view, if its myriad harmful effects on the family are to be avoided.

Thankfully, there are alternatives to court for the resolution of family law disputes, many of which are quite popular within the bar. Lawyer-to-lawyer negotiations are often successful where counsel are prepared to take a pragmatic, solution-oriented approach to the points of difference between their clients and have the maturity to acknowledge the weaknesses of their clients' positions. Mediation, with the right mediator with the right skill set, can resolve even the most unyielding differences – I've even successfully mediated mobility disputes, if you can believe it – particularly if the consequence of failure is trial. I am particularly fond of the holistic approach offered by collaborative processes that address the family's emotional needs along with their legal issues, although I acknowledge that the cost of involving the required professionals can be prohibitive at times.

What duties, then, do family law lawyers owe to their clients? In my humble and likely mistaken opinion, they are these.

1. Lawyers owe to their clients the duty of scrupulous honesty and candour described in the CBA code. This entails obligations to: refrain from gilding the lily and exaggerating chances of success; bluntly identify areas of weakness and irrationality in the client's

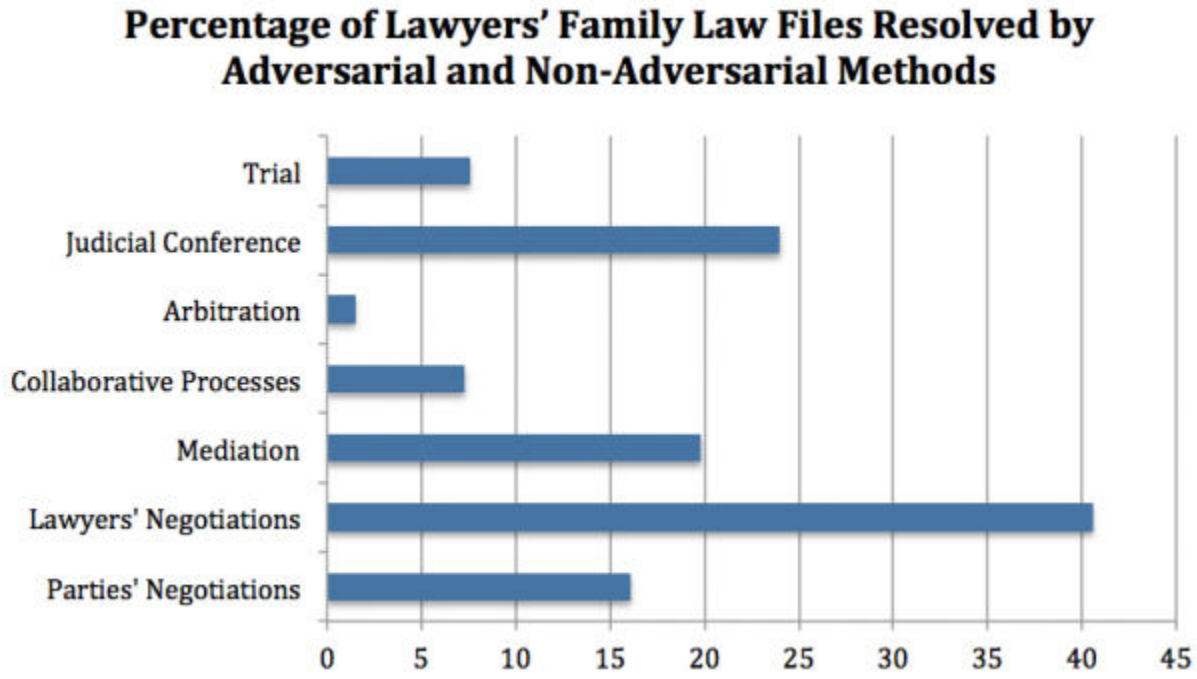
position; and, explain not only the range of *possible* results but the range of *probable* results.

2. Along with this, it seems to me that lawyers owe to their clients and the court a duty to refrain from headlong pursuit of the best *possible* outcome for the client in favour of the best *probable* outcome. This implies corollary obligations to: provide clients with a coherent cost/benefit analysis of the available options; make bona fide efforts to moderate clients' expectations; and, consider the overall fairness of a proposed result in light of the present and future circumstances of the family as a whole.
3. Lawyers have a duty to critically assess instructions given by the client. An instruction to jump should not be met with a query about the preferred height, but a considered analysis of the advantages and disadvantages of jumping to different altitudes, and of jumping at all, and the alternatives to jumping that might achieve the same result.
4. I suggest that lawyers have a further duty to refrain from acting on unreasonable instructions. This ought to be a question of simple self-preservation for those wishing to avoid assessments of their accounts and protect their reputation among the bench and bar, but it also avoids unnecessarily escalating the conflict between the parties and the possibility of the client being faced with an adverse award of costs.
5. Lawyers have a duty to consider and propose to the client options for settlement on an ongoing basis, throughout the course of the client's file, as the parties' emotional states shift and the family's circumstances evolve. Different strategies for settlement will present themselves at different times and it is important to recognize when the time for evaluative mediation is ripe, when a four-way meeting will be most productive or when informal lawyer-to-lawyer discussions are all that is required.
6. Lawyers also have a duty to respect informed compromise. All settlements require trade offs to one degree or another, and where a client freely exercises his or her discretion to effect a compromise, informed by legal advice and knowledge of the law, and in the absence of pressure or undue influence, the lawyer should respect the client's choice. This does not mean that lawyers shouldn't explain the range of likely outcomes – this is of course a key obligation when giving advice on a settlement – but lawyers should give some deference to the client's decision and to refrain from encouraging litigation by unreasonable promises of vastly improved outcomes. It is not irrational to accept an outcome that is less that ideal.
7. However, lawyers must not sell their clients short in the pursuit of settlement. As the various codes stipulate, the compromise we are directed to seek must be *reasonable*, and I suggest that "reasonable" might easily be defined by reference to the range of likely outcomes, taking into account the chances of a different result at trial and the cost to the client of getting to trial. A $20,000 aggregate shortfall on spousal support, for example, ought not justify a $50,000 trial even though the shortfall on its own might pass the lawyer's impression of gross unfairness.

Now, I am well aware that litigation is where the money is. Nothing satisfies monthly billing expectations quite like a one-week trial; certainly none of the files I have resolved through negotiation, mediation or collaborative processes have ever paid as handsomely as the files that went to trial. However, the economics of a practice focusing on the pursuit of reasonable settlements are not as grim as I think most people expect, and in my experience a settlement-oriented practice yields pleasant collateral benefits from a quality of life perspective. Those adopting a settlement-oriented approach to their family law cases will need to maintain more active files to make ends meet (or satisfy the partners) than those persistently engaged in more adversarial approaches, however lawyers with such an approach deal with *ex parte* and short-

leave applications less often, have equally fulfilling practices, are much more likely to go home before six o'clock, engage in fewer rancorous exchanges with opposing counsel, have smaller accounts receivable and are less likely to develop ulcers.

Curiously, in the end we do tend to resolve our files out of court, or in court with the assistance of a judge in a non-adversarial context. A national survey conducted by the Canadian Research Institute for Law and the Family in partnership with two prominent academics found that the bulk of lawyers' family law files are resolved by lawyer-to-lawyer negotiations and that trial placed ahead of only arbitration and collaborative processes in the resolution of disputes:



The opinions of my colleagues suggest that these findings do not translate into how we handle initial consultations and independent legal advice on settlements, and this is where I think change is urgently required. The ultimate resolution of a file is one thing, but we have a positive duty to be settlement-minded right from the start.

The initial advice we give to our clients should be the sort of advice that identifies and discourages unreasonable expectations and dampens the flames of conflict. We should approach agreements with an attitude of respect for voluntary compromise, and accept that clients are motivated to settle by a host of intangible values in addition to their legal interests. We should discourage unnecessary litigation to the extent possible, even if it comes at the cost of a heavier personal file load. We should emphasize the need for global fairness to the family over unfair but optimal results for the individual, and address this consideration openly and frankly with our clients. We *can* be strong advocates for our clients while diligently pursuing our duty to encourage settlement as our codes of conduct require.

This post originally appeared on Slaw.