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## **ETHICAL DUTIES OF LAWYERS FOR PARENTS REGARDING CHILDREN OF CLIENTS: BEING A CHILD-FOCUSED FAMILY LAWYER**

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*Lawyers for parents in family cases have important ethical duties not only to their clients and the administration of justice, but also to ensure that the interests of their clients' children are appropriately taken into account. A family lawyer taking a child-focused approach also best serves the long-term interests of a parent who is the client, reconciling the apparent tension between the lawyer's traditional of role of "partisan advocate". The duties of family lawyers towards children are indirect, and arise because their parent clients themselves have legal and moral duties to their children. Lawyers give effect to their duties to children by providing information, counsel, and support to their parent clients with the aim of "helping their clients to be good parents". Duties in regard to children must always be balanced against counsel's obligations to take instructions from their clients. More explicit recognition of the unique ethical issues related to the practice of family law should result in greater professional satisfaction for lawyers, and promote better long-term outcomes for parents and their children.*

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*Les avocats qui représentent des parents dans des litiges familiaux se voient investis d'importantes obligations éthiques, non seulement envers leurs clients et l'administration de la justice, mais également en ce qui concerne leur responsabilité de veiller à ce que les intérêts des enfants de leurs clients soient pris en compte de façon appropriée. Qui plus est, un avocat en droit de la famille qui adopte une approche axée sur l'enfant sert également les intérêts à long terme du parent qui est son client, en désamorçant la tension apparente qui existe entre son rôle de « défenseur du seul client » et celui qui, selon les auteurs, devrait être adopté par les avocats exerçant dans ce domaine du droit. Les obligations des avocats en droit de la famille vis-à-vis des enfants sont indirectes, et découlent des responsabilités morales et juridiques dont les parents-clients sont tenus envers leurs enfants. En pratique, les avocats satisfont à leurs obligations envers les enfants en communiquant de l'information, en prodiguant des conseils et en offrant de l'aide aux parents-clients qui peuvent alors se concentrer sur les besoins de leurs enfants. Ainsi, les avocats « aident leurs clients à être de bons parents ». Les obligations à l'égard des enfants doivent toujours être conciliées avec l'obligation des conseillers juridiques de recevoir les instructions de leurs clients. Une reconnaissance plus explicite des enjeux déontologiques bien particuliers liés à la pratique du droit de la famille devrait se traduire par une plus grande satisfaction professionnelle pour les avocats et s'avérer plus avantageux à long terme pour les parents et leurs enfants.*

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## 1. Introduction: Helping Clients to Be Good Parents

The traditional conception of Canadian lawyers is that they focus on the legal problems of their clients, take instructions from them, and have an ethical duty to be “partisan advocates” for them without regard for the effect that the advocacy of their rights may have on others. While this may be an appropriate role for lawyers acting as defense counsel in criminal cases and as counsel in some civil contexts, it is not appropriate for family cases. Lawyers for parents in family cases have important ethical duties not only to their clients and the administration of justice, but also to ensure that the interests of the children of their clients are appropriately taken into account. A family lawyer taking a child-focused approach also best serves the long-term interests of a parent who is the client, reconciling the apparent tension between the lawyer’s traditional role and the one promoted here for family lawyers. The duties of family lawyers towards children are indirect, and arise because parents themselves have legal and moral duties to their children. Lawyers give effect to their duties to children by providing information, counsel, and support to help their adult clients focus on the needs of their children.

For family lawyers, fulfilling their responsibilities in regard to children of their clients are among the most challenging but rewarding aspects of their professional lives. The fulfillment of these responsibilities requires knowledge, skill, sensitivity and judgment. Like so many ethical responsibilities for lawyers, there is significant professional discretion on the part of family lawyers about how to fulfill their obligations to the children of their clients, and doing so requires taking account of the individual context of each case. Although complex and situational, one might summarize the duties of the family lawyer in this regard as “helping their clients to be good parents.” Duties in regard to children must always be balanced against counsel’s obligations to take instructions from their clients.<sup>1</sup>

While the duties to children of family clients are only addressed in a limited way in legislation and the *Code of Professional Conduct* for lawyers in Canada,<sup>2</sup> we believe that most family lawyers have at least some implicit awareness of their responsibilities to children, and many lawyers in fact promote the interests of the children of their clients, albeit often without

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<sup>1</sup> In this paper, we consider only those indirect obligations, which are complimentary to but different from those of lawyers who are acting for child clients in family proceedings. For a discussion of the ethical obligations of lawyers representing children, see e.g. Nicholas Bala, “Child Representation in Alberta: Role and Responsibilities of Counsel for the Child” (2006) 43 *Alta L Rev* 845.

<sup>2</sup> See especially *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 9 [*Divorce Act*]; Federation of Law Societies of Canada (FLSC), *Model Code of Professional Conduct* (Ottawa: FLSC, 2014), ch 5.1-1 [*Model Code*].

explicitly articulating this.<sup>3</sup> One of the purposes of this paper is to stimulate discussion among family justice professionals about whether there should be a clearer articulation of ethical duties of lawyers for parents in regard to the children of their clients, and ultimately to animate the development of a set of ethical guidelines specifically for family lawyers in Canada.<sup>4</sup>

In recognition of the unique nature and challenges of the practice of family law, the American Academy of Matrimonial Lawyers (“AAML”) has adopted a detailed set of guidelines, the *AAML Standards of Conduct* (*AAML Standards*),<sup>5</sup> which are intended to provide guidance to professional practice for family lawyers. The AAML is a widely-respected national professional body, but it is without a regulatory mandate, so these *AAML Standards* are necessarily aspirational rather than mandatory in nature.

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<sup>3</sup> An explicit commitment to take account of the interests of the children of adult clients is clearly articulated by lawyers who practice collaborative family law, where both parties and their lawyers commit to reaching a fair, negotiated settlement. The collaborative agreement expressly requires both lawyers and clients to consider the children’s interests. Lawyers who are acting as mediators in family disputes may also have responsibility to ensure that a mediated agreement meets the needs of the children of the parties, or at least does not expose them to risk. A consideration of the ethical and professional duties of lawyers involved in collaborative practice or acting as mediators is beyond the scope of this paper; for a discussion of these issues, see Barbara Landau, Lorne Wolfson & Niki Landau, *Family Mediation, Arbitration & Collaborative Practice Handbook*, 5th ed (Toronto: LexisNexis, 2009); Department of Justice Canada, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases*, by Julie MacFarlane (Ottawa: Family, Children and Youth Section, Department of Justice Canada, 2005); Martha Emily Simmons, *Increasing Innovation in Legal Process: The Contribution of Collaborative Law* (PhD Thesis, Osgoode Hall Law School, 2015) [unpublished]; Deanne Sowter, “Professionalism and Ethics in Family Law: The Other 90%” (2016) 6:1 J Arb & Med 167.

<sup>4</sup> While the focus of the discussion and central arguments in this paper are based on clients having children who are minors, many of the arguments apply even if the children are adults or the clients have no children. For a discussion of broader ethical duties of family lawyers, see Lorne H Wolfson & Adam N Black, “Incivility and Sharp Practice in Family Law” (2012) 31:2 Can Fam LQ 275; Esther L Lenkinski, Barbara Orser & Alana Schwartz, “Legal Bullying: Abusive Litigation within Family Law Proceedings” (2003) 22 Can Fam LQ 337.

<sup>5</sup> Stephen Sessums et al, “[Bounds of Advocacy: Goals for Family Lawyers](#)” (November 2000), *American Academy of Matrimonial Lawyers*, online: <[www.aaml.org/library/publications/19/bounds-advocacy](http://www.aaml.org/library/publications/19/bounds-advocacy)>. For an earlier version and discussion of the *AAML Standards*, see American Academy of Matrimonial Lawyers, “The Bounds of Advocacy: American Academy of Matrimonial Lawyers Standards of Conduct” (1992) 9:1 J American Academy Matrimonial Lawyers 1. See also Forrest S Mosten & Laura Traum, “The Lawyer’s Role in Preventative Legal and Conflict Wellness” (2017) 55:1 Fam Ct Rev 26; Pauline H Tesler, “Can This Relationship Be Saved? The Legal Profession and Families in Transition” (2017) 55:1 Fam Ct Rev 38.

However, a number of states, including New York<sup>6</sup> and Florida,<sup>7</sup> have used the *AAML Standards* as the basis of a legally mandated set of Guidelines for Professional Conduct of family lawyers, which include recognition of the duties of lawyers towards the children of their clients and more broadly to “the family”, as well as to their individual adult clients.

In Australia, the process of legislative reform has resulted in an increasing number of family lawyers spending “most of their time trying to refocus their clients on the children ... recognize[ing] that clients are often fuelled by emotional responses such as anger and disappointment.”<sup>8</sup> In Canada, the British Columbia Branch of the Canadian Bar Association has developed a short but very helpful set of *Guidelines for the Practice Family Law*<sup>9</sup> that briefly addresses specifically child-related issues.

We believe that explicitly addressing the unique ethical issues related to the practice of family law in general, and towards children affected by separation in particular, will result in greater professional satisfaction for family lawyers and promote better long term outcomes for parents and their children. Having clearer ethical standards for family lawyers can also reinforce for clients and the public the notion that family lawyers have a unique and critical role at a time when the family justice system and family lawyers are under increasing criticism in the media,<sup>10</sup> and can contribute to improving access to family justice.

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<sup>6</sup> See *McKinney's New York Rules Of Court—State*, vol 1 (St. Paul: West Publishing Company, 1996), §§1400.1-1400.7.

<sup>7</sup> John C Lenderman, “Ethical Considerations in Family Law” in Florida Bar, Continuing Legal Education, eds, *Florida Dissolution of Marriage*, 12th ed (Tallahassee: Florida Bar, Continuing Legal Education, 2015).

<sup>8</sup> Cate Banks, “[Lawyers and Family Dispute Resolution Practitioners: Achieving the Child-Focus Ideal in Practice](#)” (2009) 12 Family Relationships Q, online: <<https://aifs.gov.au/cfca/publications/family-relationships-quarterly-no-12#lawyer>>; Cate Banks, “Being a Family Lawyer and Being Child-Focused—A Question of Priorities?” (2007) 21 Aust J Fam L 37 [Banks].

<sup>9</sup> “[Best Practice Guidelines For Lawyers Practicing Family Law](#)” (15 July 2011), *Canadian Bar Association, British Columbia Branch*, online: <[www.cbabc.org/Publications-and-Resources/Resources/Practice-Guidelines/Best-Practice-Guidelines-for-Lawyers-Practicing-Fa](http://www.cbabc.org/Publications-and-Resources/Resources/Practice-Guidelines/Best-Practice-Guidelines-for-Lawyers-Practicing-Fa)> [“Best Practice Guidelines”]. These Best Practice Guidelines were developed by a Task Force appointed by the Law Society of British Columbia, with the support of the Family Law Section of the British Columbia Branch of the Canadian Bar Association.

<sup>10</sup> See e.g. Christie Blatchford, “[Getting to the root of Ontario's family law mess](#),” *National Post* (21 March 2017), online: <[nationalpost.com/opinion/christie-blatchford-getting-to-the-root-of-ontarios-family-law-mess](http://nationalpost.com/opinion/christie-blatchford-getting-to-the-root-of-ontarios-family-law-mess)>; Jesse Winter, “[Hamilton judge skewers legal aid system in decision](#),” *Toronto Star* (17 March 2017), online: <<https://www.thestar.com/news/gta/2017/03/17/hamilton-judge-skewers-legal-aid-system-in-decision.html>>.

In Part II of this paper, we discuss the legal basis of the duties that Canadian family lawyers have regarding the children of their clients.<sup>11</sup> In Part III, we articulate some specific responsibilities, recognizing that these are indirect duties that involve providing counsel and advice to parents, and taking instruction from them. We conclude in Part IV by proposing further steps that professional organizations as well as individual lawyers can take to continue the dialogue about the ethical duties of family lawyers in general, and more specifically related to children. We also address some of the implications of recognizing ethical obligations concerning children for law schools, continuing education of family lawyers and interdisciplinary research.

## 2. The Basis of the Family Lawyer's Duties Related to Children

### A) The Traditional Conception of the Lawyer's Role

The traditional conception of the role of the Canadian lawyer, at least for the purposes of resolution of disputes, was largely developed in the context of criminal and civil litigation. It is reflected in the *Model Code of Professional Conduct* of the Federation of Law Societies of Canada as the basis for the regulation of the conduct of lawyers,<sup>12</sup> and is articulated by legal scholars like Alice Woolley. Lawyers have a role that is “actively partisan” and are expected to advance the interests of their clients, whether “in or outside a traditional court of law.”<sup>13</sup> While a lawyer *may* choose to offer advice about the social or moral aspects of a case, the focus of the lawyer's duty is providing legal advice, and then taking direction from the client to provide representation “to obtain legal advantages ... regardless of the cost that obtaining those advantages may impose on other individuals or on the public generally.”<sup>14</sup>

This conception of the “client-centered zealous advocacy” role of a lawyer has been challenged by some, such as David Tanovich, who argues

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<sup>11</sup> See e.g. Bruce A Boyer, “Ethical Issues in the Representation of Parents in Child Welfare Cases” (1996) 64:4 *Fordham L Rev* 1621.

<sup>12</sup> There are some differences in the rules of professional conduct promulgated by the different provincial and territorial law societies, though the provisions discussed in this paper are essentially identical in all Canadian jurisdictions. For a fuller discussion of this history, interpretation and significance of the *Model Code*, as well as exploration of the differences in provincial and territorial codes, see e.g. Art Cockfield, *Introduction to Legal Ethics*, 2nd ed (Toronto: LexisNexis, 2016); Alice Woolley, *Understanding Lawyer's Ethics in Canada*, 2nd ed (Toronto: LexisNexis, 2016) [Woolley]; Mark Orkin, *Legal Ethics: A Study of Professional Conduct*, 2nd ed (Toronto: Canada Law Book, 2011) [Orkin].

<sup>13</sup> Woolley, *supra* note 12 at 29. To a similar effect see Orkin, *supra* note 12, ch 2.

<sup>14</sup> Woolley, *supra* note 12 at 29.

that lawyers should adopt a “justice-seeking ethic”<sup>15</sup> that might consider the interests of society or vulnerable individuals affected by the actions of lawyers in the justice system. However, the traditional model is still “central to Canadian legal culture” and dominates discussion and teaching of legal ethics in Canada.<sup>16</sup>

Woolley acknowledges that the legal “context” may significantly influence how lawyers undertake their “zealous advocacy”, and she specifically mentions family law as a distinct context, though she offers no discussion of its unique nature. Despite the acknowledgment that context may influence the lawyer’s role, it is clear that some Canadian family lawyers still adopt a traditional professional role, emphasizing that they are “not social workers,”<sup>17</sup> and their mission is “resolute advocacy” in the context of an adversarial family justice system.<sup>18</sup> Indeed, some clients come to family lawyers expecting a champion who will achieve vindication of their rights against a former partner who has betrayed their trust and expectations.

It is our argument, however, that an emphasis on zealous representation of individual clients that is appropriate in criminal and some civil cases is seldom appropriate in family law matters, and is actually inconsistent with the interests of most clients.

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<sup>15</sup> David M Tanovich, “Law’s Ambition and the Reconstruction of Role Morality in Canada” (2005) 28 Dal LJ 267. See also Trevor CW Farrow, “Sustainable Professionalism” (2008) 46:1 Osgoode Hall LJ 51; Allan C Hutchinson, “Calgary and Everything After: A Postmodern Re-Vision of Lawyering” (1995) 33:4 Alta L Rev 768.

<sup>16</sup> Alice Woolley, “Context, Meaning and Morality in the Life of the Lawyer” (2014) 17:1 Leg Ethics 1 at 5-7. See also Woolley, *supra* note 12 at 31.

<sup>17</sup> Bruce Winick, an American law professor and a leading exponent of therapeutic jurisprudence, observed:

[W]e have to, as lawyers, understand a little psychology and understand some principles of social work. I know when I give this talk, some [lawyer] in the back row always says, “But I am not a social worker.” And my answer is, “Yes, you are when you are dealing with these kinds of problems, and you are either going to be a good social worker or a lousy one, so get with the program and increase your effectiveness.”

Joseph E Gubbay et al, “The Changing Face of Justice: The Evolution of Problem Solving,” (2001) 29:5 Fordham Urb LJ 1790 at 1811.

<sup>18</sup> Most provincial law society rules now use the term “resolute advocacy” or “commitment to a client’s cause” instead of the traditional “zealous advocacy”. See e.g. *Model Code*, *supra* note 2 at Rule 5.1-1. In its recent decision on the issue of a lawyer’s role, the Supreme Court of Canada adopted the term “commitment to a client’s cause” to describe the traditional conception of a lawyer’s duty of loyalty to the client. See *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401.

## B) The Practice of Family Law—The Code of Conduct and Legislation

Although expectations and responsibilities specifically for family lawyers are not fully articulated in Canadian law and professional responsibility literature, there is a clear legal basis for the recognition of the unique nature of the practice of family law. The *Model Code* provides that lawyers shall encourage settlement of cases:

### 3.2-4 Encouraging Compromise or Settlement

A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.<sup>19</sup>

This duty to encourage settlement applies to all lawyers involved in dispute resolution, but the responsibility of family lawyers to encourage clients to consider settlement is significantly reinforced by the legislative provision in s. 9(2) of the *Divorce Act*, which requires lawyers to “discuss” with clients seeking to terminate their marriages “the advisability of negotiating” resolution of support and parenting issues and to inform clients of opportunities for mediation.<sup>20</sup> Settlement is especially important for cases where the clients have minor children, as parents who have separated or divorced will have a continuing relationship concerning their children, and an adversarial trial will place greater strain on their relationship. A settlement on the legal issues that arise, incorporated in a separation agreement or court order, will help set the parents on a path for the productive resolution of future issues related to parenting and child support that the parents will inevitably need to address as their children grow older.

The *Model Code* recognizes that as an “advocate”, the role of the lawyer is “openly and necessarily partisan”, but the Commentary to Rule 5.1-1 specifically qualifies that role when lawyers are involved in proceedings that involve children:

In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client.<sup>21</sup>

This duty to advise about taking “into account the best interests” of a child will be explored further in this paper, but it is significant that it implicitly

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<sup>19</sup> *Model Code*, *supra* note 2, ch 3.2-4.

<sup>20</sup> *Divorce Act*, *supra* note 2, s 9(2).

<sup>21</sup> *Model Code*, *supra* note 2, ch 5.1-1.



requires a family lawyer to understand issues related to the “health, welfare and security” of children, so that appropriate advice can be provided. The articulation of this duty substantially strengthens the general obligation on all lawyers to encourage compromise and settlement, as on-going parental conflict is harmful to children.<sup>22</sup>

In 2011, the Family Law Section of the British Columbia Branch of the Canadian Bar Association demonstrated national leadership and developed its *Best Practice Guidelines for Family Lawyers*, which includes a statement that:

Lawyers should advise their [parent] clients that their clients are in a position of trust in relation to their children, and that

- i) it is important for the client to put the children's interests before their own; and
- ii) failing to do so may have a significant impact on both the children's well-being and the client's case.<sup>23</sup>

Following the adoption of this ethical precept, legislation came into force in British Columbia in 2013 that makes clear that family dispute resolution professionals, including lawyers, have an obligation to “advise” their clients that parenting and contact arrangements reflected in agreements and court orders “must be made in the best interests of the child.”<sup>24</sup> Recently, two experienced family lawyers in that province, Morag MacLeod and Trudi Brown, concluded:

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<sup>22</sup> There is a large body of social science literature on the negative effects of parental conflict on children, and steps that parents and professionals assisting them can take to reduce the conflict. See e.g. Paul R Amato & Bruce Keith, “Parental Divorce and the Well-Being of Children: A Meta-Analysis” (1991) 110 *Psychol Bull* 26; Rachel Birnbaum & Nicholas Bala, “Toward the Differentiation of High-conflict Families: An Analysis of Social Science Research and Canadian Case Law” (2010) 48 *Fam Ct Rev* 27; Leslie Drozd, Michael Saini & Nancy Olesen, eds, *Parenting Plan Evaluations*, 2nd ed (New York: Oxford University Press, 2016); Linda B Fieldstone & Christine A Coates, eds, *Innovations in Interventions with High Conflict Families* (Madison: Association of Family and Conciliation Courts, 2008); Benjamin D Garber, “The Chameleon Child: Children as Actors in the High Conflict Divorce Drama” (2014) 11 *J Child Custody* 25; Janet Johnston, Vivienne Roseby & Kathryn Kuehne, *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce*, 2nd ed (New York: Springer, 2009); Department of Justice Canada, *The Early Identification and Streaming of Cases of High Conflict Separation and Divorce: A Review*, by Ron Stewart (Ottawa: Family, Children, and Youth Section, Department of Justice Canada, 2001).

<sup>23</sup> “Best Practice Guidelines”, *supra* note 9.

<sup>24</sup> *Family Law Act*, SBC 2011, c 25.

As counsel for a parent, the lawyer owes a duty not only to the client, but also to the children of that client. The children are the beneficiaries of the duties owed to them by their parents and those owed to them by their parents' counsel.<sup>25</sup>

In our view, this statement is foundational for the practice of family law, not just in British Columbia, but throughout Canada, and indeed in other countries where post-separation parenting laws are based on the best interests of the child.

### **C) The Unique Nature of Family Law and the Role of the Family Lawyer**

Parents have legal and moral duties to their children and, on a conscious level, almost invariably want to promote the interests and welfare of their children, and minimize the harm that they may experience as a result of separation.<sup>26</sup> However, in the midst of the emotional turmoil of separation, parents are often not fully aware of the effects that their conduct and the separation is having on their children. Parents going through separation, transitioning from a cohabiting parenting partnership to becoming separated co-parents, almost always want and need advice about how to respond to their children's needs, and their lawyers may be well-placed to provide some of this advice.<sup>27</sup> Although there are cases where lawyers for vulnerable parents must advocate for restrictions or suspension of contact with former partners, especially when there are concerns about violence or abuse, in most cases lawyers for parents should work towards a non-adversarial resolution that promotes significant ongoing involvement by

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<sup>25</sup> Morag MacLeod & Trudi Brown, "Ethics in Parenting Cases: What Are We Doing Wrong" (Address delivered at Family Law 2016: A Focus on Children and Parenting Issues, Vancouver, 3 March 2016), [unpublished].

<sup>26</sup> While parents have fiduciary legal and moral obligations to their children, breach of these duties (in particular by denying the other parent access to the child) does not always give rise to a civil suit for damages against a parent. See *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81.

<sup>27</sup> American Academy of Matrimonial Lawyers, "The Bounds of Advocacy: American Academy of Matrimonial Lawyers Standards of Conduct" (1992) 9 J Am Academy Matrimonial Lawyers 1 at 27:

The lawyer must represent the client zealously, but not at the expense of children. The parents' fiduciary obligations for the well-being of a child provide a basis for the attorney's consideration of the child's best interests consistent with traditional adversary and client loyalty principles. It is accepted doctrine that the attorney for a trustee or other fiduciary has an ethical obligation to the beneficiaries to whom the fiduciary's obligations run. To the extent that statutory or decisional law imposes a duty on the parent to act in the child's best interests, the attorney for the parent might be considered to have an obligation to the child that would, in some instances, justify subordinating the express wishes of the parent.

both parents in the lives of their children.<sup>28</sup> Even if contact with one parent is suspended due to concerns about abuse or violence, there is a prospect of the relationship being resumed at some future time.

Family law disputes occur in an often emotional and embittered atmosphere, with one or both parties feeling a sense of fear, anger, betrayal, loss of trust, grief or humiliation. Unlike most other disputes, in which the fact that the parties may harbour substantial animosity after legal proceedings are concluded has no practical significance or legal effect, parents involved in family disputes will interact for years to come and need to communicate and co-operate if their children are to thrive. Further, a failure to communicate effectively may result in future proceedings to vary an existing agreement or order, or to seek court enforcement.

Family lawyers have a unique responsibility in working with clients as they navigate one of the most stressful, complex, and challenging periods in their lives. Clients will share the most intimate details of their lives with their family lawyers, and many rely on their lawyers for guidance as they reshape their lives. There may, for example, need to be special sensitivity in working with a spouse who feels understandable anger and mistrust if the other partner has been sexually unfaithful.<sup>29</sup>

If the clients have minor children, the children will inevitably be affected by their parents' separation, and the children will usually suffer if there is lack of co-operation and poor communication between parents, let alone high parental conflict. An adversarial family dispute increases the risk of emotional harm to the children from parental separation. When the legal process is over, the ability of the parents to work together constructively and to allow their children to have a secure and loving relationship with both parents is very important for the children's well-being and resilience.<sup>30</sup> Actions and advice by counsel that support this result are constructive, while actions or advice of counsel that undermine the relationship of the parents with each other are likely to harm the children. Further, unlike most other areas of dispute resolution that are focused on the past, cases about

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<sup>28</sup> See e.g. Peter G Jaffe et al, "Custody Disputes Involving Allegations of Domestic Violence: The Need for Differentiated Approaches to Parenting Plans" (2008) 46 *Fam Ct Rev* 500.

<sup>29</sup> See e.g. Robert E Emery, *The Truth About Children and Divorce* (New York: Viking Press, 2004) [Emery], who writes about the emotional differences between the "leaver" partner and the partner who is "left".

<sup>30</sup> See e.g. Amy JL Baker, "The Long-Term Effects of Parental Alienation on Adult Children: A Qualitative Research Study" (2005) 33 *Am J Fam Therapy* 289; Joan B Kelly & Robert E Emery, "Children's Adjustment Following Divorce: Risk and Resiliency Perspectives" (2003) 52 *Fam Relations* 352; Robert E Emery, "Interparental Conflict and the Children of Discord and Divorce" (1982) 92 *Psychol Bull* 310.

parenting are prospective. Effective lawyering can help to change parental conduct that can in turn effect future negotiations or judicial decisions, and the future health of the family members.

Rather than being “resolute advocates” for the objectives that their clients may initially want to achieve, a counseling, problem-solving approach to the role of lawyer is usually a better model for family lawyers to adopt to help their clients resolving difficult issues and conflicts, and for advancing the long-term interests of their clients, as the welfare of their children is a prime concern for family clients.<sup>31</sup>

Family lawyers must recognize the effect that their words and actions have on their clients’ attitudes about each other and their children. The lawyer’s conduct of the case may have life-long implications for their clients’ children. Family clients will usually come to a lawyer with negative experiences and assumptions about the other party; these negative perceptions can easily increase if they are encouraged by counsel. Good family lawyers recognize that “Rarely, if ever, is it in the interests of a child for their parents to be in conflict over them,” and that amount of conflict can reduced if “every lawyer, from the beginning, manage[s] their client’s goals, needs and expectations appropriately.”<sup>32</sup> While it is important for family lawyers to understand their clients’ perceptions and feelings, and in appropriate cases to assess the risk that a former partner may pose, lawyers should avoid fanning the flames of that anger.

For all but the wealthiest families, separation into two households will result in a decline in the standard of living for all members of the family. Family lawyers dealing with financial issues must appreciate the economic aspects of family life to adequately advise their clients—including things like tax implications of settlements, financial planning and the hidden costs of maintaining two households. This knowledge is often fundamental to advising clients to make good choices.

Similarly, providing appropriate guidance about family issues also requires knowledge of healthy parenting strategies and child development, as well as at least a functional understanding of mental and emotional disorders of both adults and children. A family lawyer should be familiar with the dynamics of domestic violence and alcohol and chemical dependence issues, in addition to being aware of the appropriate interventions for cases

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<sup>31</sup> Deborah J Weimer, “Ethical Judgment and Interdisciplinary Collaboration in Custody and Child Welfare Cases” (2001) 68 *Tenn L Rev* 881.

<sup>32</sup> Doug Moe, “Minimizing Conflict in Parenting Disputes: The Role of the Lawyer in Dealing with the Matrimonial Client So That the Client Deals ‘Appropriately?’ with Issues of Parenting” (Paper delivered at The Legal Education Society of Alberta 30th Annual Banff Refresher Course, Banff, 12-16 April 1997) [unpublished].

that raise these issues. Ideally, family lawyers will have had some formal education related to these issues, but most lawyers are only likely to fully develop their knowledge about these matters as they begin to practice, hopefully obtaining appropriate mentoring and continuing education, as well as through self-directed study.<sup>33</sup>

A lawyer with good awareness of family restructuring research can provide appropriate feedback for clients as they navigate changes, make parenting choices, and carry out their responsibility effectively. There will also be cases where the lawyer's knowledge alone is not sufficient, and direct consultation by counsel with a mental health professional is necessary. Lawyers also need an awareness of when a referral to other professionals is appropriate for the client in family cases.

It is not sufficient for family lawyers to focus exclusively on their clients' "legal problems", as the clients are actually facing profound social problems that have significant, intertwined legal aspects and implications.<sup>34</sup> Unless a client specifically demonstrates that it is not necessary, family lawyers should always address the emotional, monetary, and parenting repercussions of restructuring family relationships with clients. However, family lawyers also need to be aware of the limitations of their individual knowledge and expertise, and recognize the need for client autonomy.<sup>35</sup> The extent to which family clients need or want information or discussion about matters that go beyond the strictly legal, including dialogue about emotional, economic and child-related issues related to separation and divorce, will of course

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<sup>33</sup> One of the best sources of this type of information for lawyers is the *Family Court Review*, the journal of the Association of Family and Conciliation Courts (AFCC). The AFCC also hosts interdisciplinary conferences.

<sup>34</sup> See e.g. Katherine R Kruse, "Beyond Cardboard Clients in Legal Ethics" (2010) 23 *Geo J Leg Ethics* 103. She writes about the need for lawyers to avoid "legal objectification of their clients [and] the narrow construction of client objectives in terms of legal interests and client values" (at 154), and the need to engage in "client value clarification ... to curb impulsive client decision-making that may be distorted by anger, fear or insecurity and ensure that legal representation furthers the clients deeper and more fundamental values" (at 150).

<sup>35</sup> See Law Society of British Columbia, *Code of Professional Conduct* (Vancouver: Law Society of British Columbia, 2013), ch 3.1-2, which permits, but does not require lawyers to provide advice about non-legal issues:

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.

vary enormously based on the client, the nature of the case, and the lawyer's comfort and experience.

At one end of the spectrum may be clients, especially those without minor children, who have effectively negotiated their own basic agreement before seeking legal advice. They may be simply coming to a lawyer "to have the paper-work done", and are clearly not looking to their lawyer for non-legal advice. Even in these cases, lawyers must ensure that their clients appreciate the long term financial consequences of the end of their spousal relationship. Lawyers may provide observations and advice about the potentially forgotten or unknown impacts of their arrangements.

At the other end of the spectrum will be clients who expect their lawyers to play a significant role that includes an element of being a "divorce coach", providing a broad range of advice and support about an interrelated set of issues that include parenting, career, finances, tax planning and even timing of new relationships. In these cases, it is important for lawyers to appreciate the limits of their knowledge and role. Making appropriate referrals and collaborating with non-legal professionals will be significant aspects of the lawyer's job.

Most cases will likely be somewhere between the extremes, with clients not fully aware of their needs and expectations, and requiring a shifting degree of non-legal advice and support.<sup>36</sup> In some cases, such as ones involving domestic violence, it may be necessary for a lawyer to provide immediate and directive advice about the risks to the client and their children of certain courses of action. In these high-risk cases, the lawyer may be an initial, primary source of professional advice and information, and will need to help the client start a process that may involve shelters, police and other agencies. To properly advise their clients, lawyers must be aware of the services and supports in their communities.

Lawyers are accustomed to identifying issues that a client has missed, and advising them accordingly, even in cases where the client has not been aware of the need for advice. Suggesting that the client did not ask for guidance in a particular area may be insufficient for the lawyer to discharge their duty to the client, if the lawyer can reasonably be expected to be aware of a likely impact on the client. Just as clients may come to their family lawyers with a proposed financial resolution that neglects to consider a tax implication, they may arrive at a parenting plan that fails to consider a key

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<sup>36</sup> Forrest S Mosten, "Emerging Roles of the Family Lawyer: A Challenge for the Courts" (1995) 33:2 *Fam & Conciliation Cts Rev* 213; Lynn D Wardle, "Counselors and Gatekeepers: The Professional Responsibilities of Family Lawyers in Divorce Cases" (2010) 79:2 *UMKC L Rev* 417.

developmental need of a child, such as ignoring the impact of high ongoing conflict with the other parent on their child.

## D) The Lawyer Advising Clients to be Child-Focused

In helping parents to understand and promote the interests of their children, lawyers are also promoting the long-term interests of their adult clients.<sup>37</sup> If a case is ultimately resolved by a judge, the court is likely to favour the plans and position of a parent whose actions, communication with the other parent, and statements in court display a child focus. Family lawyers should ensure that parents have adequate information and understanding of the effects of separation on their children, and appreciation of challenges that parents face in effectively communicating with their children about the separation and beyond. Lawyers should take steps to ensure that children's views and perspectives are ascertained in a sensitive fashion, and shared with parents and decision-makers.

Lawyers with an appreciation of the effects of separation on parents and their children can have a critical role in warning parents of the harm that they may be causing their children by conduct that is emotionally abusive, alienating, neglectful or insensitive to their children. Lawyers should, for example, advise parents not to have their children act as “messengers” or “spies.”<sup>38</sup> It is often appropriate to suggest that parents take their time about introducing new partners to their children, as children usually find this upsetting, especially if it is soon after separation, and for lawyers to warn clients of the challenges that the step-parent role involves.<sup>39</sup>

Optimally, awareness by lawyers can assist in identifying clients who will benefit from parental education or mental health intervention, as well as recognizing cases where expeditious court involvement is needed. Arthur Leonoff, a psychologist with a long history of working with separating

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<sup>37</sup> American courts have held that children cannot sue their parents' lawyers in divorce proceedings. See Louis Parley, *The Ethical Family Lawyer: A Practical Guide to Avoiding Professional Dilemmas* (Washington: American Bar Association, 1995) at 156.

<sup>38</sup> Barbara Jo Fidler, Nicholas Bala & Michael A Saini, *Children Resisting Post-Separation Contact: A Differential Approach for Legal and Mental Professionals* (New York: Oxford University Press, 2013).

<sup>39</sup> Constance Ahrons, *We're Still Family: What Grown Children Have to Say About Their Parents' Divorce* (New York: Harper Collins, 2004); Michael Ungar, “[When Parents Date Someone New: What's Best for the Kids? Serial Romantic Relationships Can Affect Children's Mental Health](https://www.psychologytoday.com/blog/nurturing-resilience/201508/when-parents-date-someone-new-whats-best-the-kids),” *Psychology Today* (1 August 1 2015), online: <<https://www.psychologytoday.com/blog/nurturing-resilience/201508/when-parents-date-someone-new-whats-best-the-kids>>; Terry Gaspard, “[5 Rules for Introducing a New Partner to Your Kids](http://www.divorcemag.com/blog/5-rules-for-introducing-new-partner-to-kids),” *Divorce Magazine* (18 September 2015), online: <[www.divorcemag.com/blog/5-rules-for-introducing-new-partner-to-kids](http://www.divorcemag.com/blog/5-rules-for-introducing-new-partner-to-kids)>.

families, offers sound advice about the role and responsibilities of family lawyers, especially those representing parents who may, often unconsciously, be undermining their child's relationship with the other parent:

[The] ethical position of the family law lawyer is essential ... The worst scenario is where the lawyer joins the preferred parent in lockstep in repudiating the targeted parent and blaming them for their fate. In turn, a lawyer who fans the flames of litigation in adversarial support of a targeted parent seeking justice is also ill suited to addressing the problem ... Extreme clients always push their lawyers to adopt the same extremes. In my experience, skilled lawyers resist this enormous pressure by keeping a space for their own reflection and processing linked to core principles and understanding of what is transpiring.<sup>40</sup>

If a client is engaging in behaviour that is not beneficial to their children, such as inducing their children to reject the other parent, the client may need to be repeatedly informed by their lawyer about how a court is likely to view this conduct. For example, parents who engage in alienating behaviour, such as undermining their children's attitudes towards the other parent, should understand that the court will likely look critically at the children's stated preferences, and the judge will make efforts to minimize the impact on a child of any perceived alienating behaviour. Advising the client about their strategy and its likelihood of success will be familiar to lawyers—but it must be based on knowledge of the social science research and precedent to help parents be aware of the implications for their children and judicial decisions of poor choices about parenting. Lawyers with more familiarity with these issues can go further to help the client understand how a manipulative or alienating strategy will not only fail to work for the client, as the court is likely to react negatively, but that it is harmful to their children.<sup>41</sup>

### 3. The Nature of a Family Lawyer's Duties

While it is important to discuss some specific examples of the duties that family lawyers have to be child-focused, it is also necessary to appreciate that the role of the family lawyer is always nuanced and case specific. It will often require a balancing of duties to clients, their children, and the administration of justice.<sup>42</sup>

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<sup>40</sup> Arthur Leonoff, "The Problem of Alienation" (Address delivered at Carleton County Law Association Family Law Conference, Montebello, 9 April 2016) [unpublished].

<sup>41</sup> Nicholas Bala & Patricia Hebert, "Children Resisting Contract: What's a Lawyer to Do?" (2016) 36 Can Fam LQ 1 [Bala & Hebert].

<sup>42</sup> For more on the role of a family lawyer, see Brian Burke, "Client Services" (Address delivered at the Law Society of Upper Canada 11th Annual Family Law Summit, Toronto, 7 March 2017) [unpublished].



Further, while the discussion that follows is premised on the lawyer who is providing traditional “full representation”, it is also highly relevant for lawyers who may be providing services on a limited scope retainer. If, for example, an individual contacts a lawyer for help in preparing the individual to argue a motion on their own, it is important for the lawyer to also ask if a reasonable, child-focused settlement offer has been made and, if not, provide advice about its importance in terms of potential cost awards.

### **A) Initial Interviews and Retainer**

At the stage of the initial interviews and signing of a retainer agreement, if a case may affect the future well-being of a child, a family lawyer should explain to the client the ongoing ethical obligation under the *Code* to provide advice about how the child may be affected and how the parent can promote the best interests of the child. Of course, clients will sometimes tell their lawyers that they have already fully considered their children’s interests and have no need of further discussion of the issue.

In most family cases, however, parents have concerns about their children and want what is best for their children, and will appreciate discussion with their lawyers about how to advance the interests of their children. An Australian family lawyer explained the importance of framing relationships with clients at the start in terms that focus on children:

The first thing that I do is always ask if there are children involved, [as] the first question ... [in the] initial interview [and] always after that I say how are the children? Are there any issues in relation to the children ... I just care that my client’s children are okay and I care that my clients are okay, so the first thing as a priority I ask them how are the children? Are you seeing the children? ... Are there any issues in relation to the children? And then after I have dealt with that, in every interview, ... I deal with all the children first, and then I deal with the property thing second.<sup>43</sup>

A focus on children will usually result in efforts to resolve a case without an adversarial trial and in a way that promotes a child’s relationship with both parents. However, there will be cases, especially where there are issues of abuse, domestic violence, substance abuse or parental mental illness, where a focus on the child will require a lawyer to take a strong advocate role and use the court system to protect a parent-client and child, and that may require supervision or even suspension of the child’s contact with the other parent.

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<sup>43</sup> Banks, *supra* note 8 at para 33.

## B) Information on Communicating With Children

Parents who are experiencing separation often have difficulty in discussing their situation with their children in a balanced, age-appropriate fashion, due to their own discomfort and uncertainty, as well as a lack of experience and knowledge.<sup>44</sup> Further, even if a parent speaking to a child is sensitive, child-focused, and age appropriate, their children may not be fully candid about their fears, hopes and preferences, and there will need to be many conversations with the children about the issues that have arisen and about the evolving situation.<sup>45</sup> Children, almost without exception, feel pressures during family breakdown, and have many reasons to attempt to please or pacify each parent. As a result, children may overtly or less-consciously send different messages to each parent based on what they think that parent wants to hear. A parent may also, intentionally or not, encourage the child to express certain views, and in some cases parental statements may start to influence children's memories of events.<sup>46</sup>

There are now educational programs in many places in Canada, often funded by the government, that offer parents information on the effects of separation on children, and addressing communication with their children about the issues arising from separation. While in some provinces, attendance at such a program is mandatory after proceedings are commenced, lawyers should be making early referrals to these programs even before litigation is started.<sup>47</sup> Lawyers should also direct parents to print and internet-based resources for information about the effects of separation and parental conflict on children, as well as how to communicate with their children about the process of separation.<sup>48</sup> While children will have understandable

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<sup>44</sup> In an American study, children were told about their parent's pending divorce by the mother 44% of the time, by both parents 17% of the time, and by no one 23% of the time. Among those who were told, 45% were provided with only one or two short statements such as: "your dad is leaving" or "your mother wants a divorce." Only 5% of children were fully informed about the separation and allowed to ask questions. See Joan B Kelly & Mary Kay Kisthardt, "Helping Parents Tell Their Children About Separation and Divorce: Social Science Frameworks and the Lawyer's Counseling Responsibility" (2009) 22:2 J Am Academy Matrimonial Lawyers 315.

<sup>45</sup> For a helpful article about how lawyers can provide counsel to parents about how to talk to their children about their separation and divorce, see *ibid.*

<sup>46</sup> Margaret Bruck & Laura Melnyk, "Individual Differences in Children's Suggestibility: A Review and Synthesis" (2005) 18:8 Applied Cognitive Psychol 947; Louise Sas, *Developmental Capabilities and the Courtroom Environment: The Impact on Testimonial Competency* (Ottawa: Department of Justice, 2004) at ch 5.

<sup>47</sup> See for example the mandatory Parenting After Separation eCourse available in Alberta. "[Resolution Services Learning Centre: Parenting After Separation \(PAS\)](http://pas.albertacourts.ab.ca)", online: <pas.albertacourts.ab.ca>.

<sup>48</sup> See for example, Department of Justice Canada, "Making Plans, A guide to parenting arrangements after separation or divorce: How to put children first", Catalogue No

concerns and questions about the change in family relationships and their lives as a result of parental separation, they will often feel too afraid or guilty to directly raise these concerns with their parents.

Parental communication with children needs to be age appropriate, and sensitive to the confusion and possibility of divided loyalties that children may feel. In most cases, lawyers should be advising parents that it is in their child's best interests to support the child's relationship with the other parent.<sup>49</sup> Further, parents should be informed that, as required by s. 16(10) of the *Divorce Act* and similar provincial statutes, in making parenting orders, the courts will take account of the extent to which a parent is supportive of their child's relationship with the other parent.

Counsel also need to advise parents that children may give different messages to each parent regarding their perspectives, wishes or desires, especially if it is a high conflict separation. This is understandable as most children, especially young children, are influenced by what they believe their parents want to hear. It is a normal response of children to want to please the parent whom they are being cared for when questioned, particularly in times of stress. Further, parents who may be actively listening for negative statements about the other parent and positive statements

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J2-374/2013E-PDF (Ottawa: Department of Justice Canada, 2013); Department of Justice Canada, "Parenting Plan Checklist", Catalogue No J4-25/2015E-PDF (Ottawa: Department of Justice Canada, 2015); "[Children in Between® Online: A Nationally Recognized Parenting Class From The Center for Divorce Education](#)", *The Center for Divorce Education*, online: <[www.divorce-education.com](http://www.divorce-education.com)>. Parents should also be informed about material that is intended for children, such as Department of Justice Canada, "What happens next? Information for kids about separation and divorce", Catalogue No J2-215/2007E-PDF (Ottawa: Department of Justice Canada, 2007). The Canadian Bar Association has developed a useful website that identifies and describes a wide range of materials available for parents and their lawyers: The Canadian Bar Association Family Law Section, "[Successfully Parenting Apart: A Resource Directory](#)" (Toronto: Canadian Bar Association, April 2017), online: <[www.cba.org/CBAMediaLibrary/cba\\_na/PDFs/Sections/SuccessfullyParentingFinalEng-Accessible.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Sections/SuccessfullyParentingFinalEng-Accessible.pdf)>. There a number of good free websites that lawyers can refer their clients to for information, or have printed off for clients and given out at initial meetings. See e.g. "[Pamphlet Information: Parents Are Forever](#)", *Association of Family and Conciliation Courts*, online: <[www.afccnet.org/resource-center/resources-for-families/pamphlet-information/categoryid/1/productid/8](http://www.afccnet.org/resource-center/resources-for-families/pamphlet-information/categoryid/1/productid/8)>; "[Children's Responses to Separation and Parental Conflict](#)" (2010), *Early Childhood Australia*, online: <[www.earlychildhoodaustralia.org.au/our-publications/every-child-magazine/every-child-index/every-child-vol-16-2-2010/childrens-responses-separation-parental-conflict-free-article/](http://www.earlychildhoodaustralia.org.au/our-publications/every-child-magazine/every-child-index/every-child-vol-16-2-2010/childrens-responses-separation-parental-conflict-free-article/)>; John Hoffman, "[An age-by-age guide for talking to kids about divorce](#)", *Today's Parent* (15 January 2016), online: <[www.todaysparent.com/family/relationships/kids-and-divorce-an-age-by-age-guide/](http://www.todaysparent.com/family/relationships/kids-and-divorce-an-age-by-age-guide/)>; "[Client Manuals: Client Handbooks](#)", *American Bar Association*, online: <[www.americanbar.org/groups/family\\_law/publications/client\\_manuals.html](http://www.americanbar.org/groups/family_law/publications/client_manuals.html)>.

<sup>49</sup> Bala & Hebert, *supra* note 41.

about themselves may place an undue emphasis on a child's statements that suggest a preference for them. In advising the parent client, a lawyer should understand the dynamics of high conflict separations and the impact of separation on children. It is important for each parent to be aware that the children may be giving different messages to the other parent, and that as children get older, they may try to actively manipulate their parents to get material rewards or behavioural rules that they prefer.<sup>50</sup>

### **C) Referrals**

Many parents need insight and support to be able to understand and address the needs of their children in the wake of family breakdown. While family lawyers need to understand the social and emotional context of their client's cases, and provide advice and support, lawyers are not therapists and should make appropriate referrals to mental health professionals, counselors, social agencies and doctors. This requires lawyers to be both familiar with local professionals and agencies, and have an understanding of the needs of their clients and their children.<sup>51</sup>

Often parents themselves will benefit from appropriate referrals, including for addressing issues like substance abuse or domestic violence. Children will also often benefit from having therapeutic intervention or counseling. Parents should, however, be advised by their lawyers that it is normally preferable for both parents to be involved in the decision to obtain help for their children, so that both parents can support the interventions and to prevent the perception, or reality, that the therapist has become allied with one parent. Parents should also be warned that judges are generally concerned if one parent makes a unilateral decision to obtain counseling or treatment for a child.

### **D) Advising Clients on Maintaining a Child-Focus**

While most parents believe that they are taking positions based on an assessment of best interests of their children, it is not uncommon for separated parents to conflate their child's interests with their own desires. As a result, as a case develops, family lawyers should provide on-going advice to attempt to educate and refocus their clients on their children. As a child-focused Australian lawyer said:

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<sup>50</sup> *Ibid.*

<sup>51</sup> For a discussion of some of the importance and challenges of collaboration between lawyers and therapists, see e.g. Julie MacFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) at 236 [MacFarlane]; Julie MacFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, 2nd ed (Vancouver: UBC Press, 2017).

[T]he best interest principle is just a very general statement ... it's not so much the best interest principle which I think needs elaboration, it's how clients are educated on it, because all too often they would sit across a table from you and vehemently state that what they are doing is in the best interest, but when you poke and you prod and you push and you dig ... it's quite obvious that there's a lot of personal interest involved, and the trick then becomes exposing that to the client in a diplomatic and sensitive way ... I think maybe how we, as practitioners, explain it to clients could be worked on ... I ... counsel them about the likely impact on the child from this behaviour and ... I would be referring them to proven research that I might be aware of about how this conduct usually plays out in the child's mind and in the child's future development.<sup>52</sup>

It can of course be challenging for a family lawyer to be both candid and communicate effectively with clients who may be emotionally traumatized by the process of separation, and lawyers need to develop a relationship of trust and be sensitive to their clients.<sup>53</sup> Another Australian lawyer explained the need to develop strategies to effectively understand and advise clients:

If a client wasn't acting in the best interest of the child I would spend a lot of time looking at what is the fear that's motivating the client ... Is it coming from a love background or a fear background? Many instances following divorce, it's motivated be a fear: a loss, an anger, you know, sadness, madness is motivating some alternate agenda. So it's really identifying those agendas to actually look at them changing that belief system. Often children are used as pawns, unintentionally but often intentionally, and it's attempting to refocus back from fear to you're ok and looking at the issues ahead. So it's a refocusing back, at all times, to the long-term picture.<sup>54</sup>

Family lawyers can have a special role in helping separated parents to communicate with one another in a respectful child-focused way. The lawyer can, in part, do this through role modeling in communication with the other party, if they are self-represented, or with the other party's lawyer if they are represented. Sometimes clients are surprised or even angry at the civility of lawyers towards one another, and it is important for lawyers to explain to their family clients why respectful communication is valuable for their children.<sup>55</sup> Conversely it is very unhelpful to family litigants if their counsel are rude towards one another.

In a recent Ontario discipline hearing involving a lawyer who had himself experienced a very high conflict separation and had then decided to

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<sup>52</sup> Banks, *supra* note 8 at para 43.

<sup>53</sup> For a discussion of the challenges and benefits of lawyers sharing their social and moral perspectives with their clients, see Robert K Vischer, "Legal Advice as Moral Perspective" (2006) 19:1 *Geo J Leg Ethics* 225.

<sup>54</sup> Banks, *supra* note 8 at para 42.

<sup>55</sup> MacFarlane, *supra* note 51 at 209.

shift his practice from commercial to family litigation, the Tribunal found that the lawyer had engaged in unprofessional conduct and demonstrated a lack of civility towards opposing counsel. The Chair emphasized the dangers of poor role modeling by lawyers of family clients:

Family law involves personal and intimate matters and the most vulnerable members of our society—children. The issues can lead clients and lawyers to feel passionately, particularly when we have our own histories. However, clients will not be well served if lawyers cannot work together on effective and proportionate dispute resolution and solutions to the issues. We must separate clients' views from those of lawyers and recognize that, as lawyers, we only fully have one side of the story. What is more, clients will not be well served by personal incivility in contentious matters. After all, if lawyers are not civil to each other on a personal level, how can we expect spouses involved in a family breakup, the most stressful time of their lives, to do so? What are we modelling? The legal profession will fall in the public eye if lawyers act in an unprofessional and uncivil manner.<sup>56</sup>

While recognizing their role as advocates and the potential problems when parents communicate with one another, especially in high conflict cases, even if providing full representation, family lawyers also need to allow their clients to communicate directly with one another about issues related to on-going co-parenting and their children.<sup>57</sup> In some high conflict cases, this may require that communication between parents is, at least for a time, exclusively in written form, whether by text, email or through a communication log. In these high conflict cases, clients need clear direction from their lawyers that any judge considering their case will be influenced by the level of respect and child-focus in their communications, or conversely their hostility and lack of child-focus. Separated parents may need to be

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<sup>56</sup> *Law Society of Upper Canada v Ludmer*, 2017 ONLSTH 28, [2017] LSDD No 37, Chair Wright.

<sup>57</sup> Marsha Kline Pruett & Tamara D Jackson, "The Lawyer's Role During The Divorce Process: Perceptions Of Parents, Their Young Children, And Their Attorneys" (1999) 33:2 Fam LQ 283 at 298. In their study of parental experiences with separation and the family justice process, Pruett and Jackson report:

The role of the attorneys was perceived [by parents] as contributing to parental rivalry and conflict by creating and encouraging less communication between parents. Parents were told not to communicate directly, but rather, to speak through attorneys in order to reduce manipulations by the other party. Parents expressed, "It is hard to co-parent when you are not speaking to each other," and are "going through attorneys only." Even parents who felt their spouses were generally acceptable people iterated that he or she became a "monster" during the legal conflict. Their relationships became more normalized when the parents felt they took more of the process into their own hands and out of the lawyers'.

educated and reminded about the fact that their children's well-being and emotional futures will be affected by the level of conflict between them.<sup>58</sup>

### **E) Non-adversarial Dispute Resolution and Child-Focus**

Section 9(2) of the *Divorce Act* requires lawyers to discuss with clients obtaining a divorce “the advisability of negotiating” a resolution of issues related to parenting and support and the available mediation services.<sup>59</sup> Separated parents of minor children will have an ongoing and evolving relationship, and even after a parenting plan is made by a court or agreement, they will have to resolve many issues related to their children, both large and small. It is generally in the interests of their children to have a resolution that avoids an adversarial trial, which will likely push them apart and further strain their relationship and communication.

Non-adversarial processes can also be better-suited to resolving underlying issues between parents that prevent them from optimizing their transition into their new parenting arrangement. A communication strategy, for example, can include ways to make decisions in a manner that is inclusive and respectful of both parents' roles, allowing them to more quickly and efficiently make better decisions, while avoiding conflict for children which is detrimental to their wellbeing. Use of a consensual dispute resolution, whether collaborative family law, mediation or negotiation, is likely to improve communication. While a court-imposed resolution will establish a parenting plan or regime at one point in time, it will not likely address the underlying lack of good communication skills or problem-solving strategies for the future. Consensual dispute resolution both develops and models ongoing strategies to allow parents to make future decisions, whereas court-based processes do not always set the parents on the path to future independent consensus-building about their children.

Lawyers can have a critical role in advising their clients and keeping them child-focused during negotiations or mediation, providing a “reality check” about the effect of any proposals on their children and the other parent, as well as the likelihood of their positions being accepted by the courts. Lawyers should encourage parents to avoid having children become

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<sup>58</sup> *Ibid* at 285-86.

<sup>59</sup> *Divorce Act*, *supra* note 2. The importance of consensual dispute resolution for family cases was also emphasized by the Committee Chaired by Justice Thomas Cromwell on reform of the civil and family dispute resolution in Canada. See Action Committee on Access to Justice in Civil and Family Matters, “Meaningful Change for Family Justice: Beyond Wise Words” (Ottawa: Canadian Forum on Civil Justice, April 2013) [“Meaningful Change for Family Justice”]; Action Committee on Access to Justice in Civil and Family Matters, “Access to Civil & Family Justice: A Roadmap for Change” (Ottawa: Canadian Forum on Civil Justice, October 2013).

“bargaining chips”, whose interests are traded off for economic or other interests of their parents. Lawyers should also resist seeking remedies such as supervised access or shared custody when they are clearly not appropriate. Interest-based processes allow the parents to consider their own interests and their children’s in a more transparent way.

Clients need to be reminded that “divorce is not a zero sum game;”<sup>60</sup> they may both be better off with a fair, nuanced settlement that takes account of their circumstances than a regime imposed by a court. This may be most apparent in regard to economic issues, where there may be tax advantages that can only be achieved through negotiation and a joint filing.<sup>61</sup> Although sometimes less obvious to separated parents, the plans that they jointly make are more likely to meet their circumstances and needs than ones made for them by a judge; separated parents and their children are usually better off if they agree to a substantial sharing of responsibilities and time with the children than if one parent has sole care and responsibility.

Parents who may feel favoured by their children’s expressed preferences should be encouraged to “take control” through a consensual settlement that recognizes and supports the role of the other parent, rather than leaving it to a court to order and determine the terms of their children’s relationship with the other parent, which is likely to occur if a case proceeds to trial absent findings of abuse or incapacity. Parents who may feel that their children are being alienated by the other parent and hope that a judge will vindicate their rights should be informed that there is more likely to be compliance with an agreed resolution by favoured parents and their children than if there is an expensive, and often futile, effort to secure court enforcement of a parenting order.

Despite the value of consensual dispute resolution, counsel in family cases face real challenges in finding the right balance between settlement and use of the court process. Settlement is generally in the best interests of children. There are legitimate concerns that in some cases a lawyer may increase the adversarial nature of the process and the costs of resolution for parents (while increasing income for the lawyer), and indirectly harming the children.

There is, however, also a converse problem, more subtle but nevertheless real, of lawyers (and other professionals like mediators and case management judges) applying inappropriate pressure to settle, especially on vulnerable

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<sup>60</sup> See Robert H Mnookin, *Bargaining With the Devil: When to Negotiate and When to Fight* (New York: Simon & Schuster, 2010) at 217.

<sup>61</sup> See Andrew Freedman, *Tax Principles of Family Law*, 24th ed (Toronto: Duff & Phelps, 2017).



family litigants. This may expose parents and children to risk, or provide for an unfair financial settlement, endangering the economic and social well-being of the children. Lawyers may allow their own discomfort with litigation or their desire to “close a file” without the stress of a trial to affect the advice that they give their clients about the suitability of their cases for settlement.<sup>62</sup>

## F) Ascertaining the Views of the Children

Whether cases are resolved by mediation, negotiation or litigation, it is important that parents, professionals and decision-makers are aware of the perspectives and preferences of the children whose lives will be profoundly affected by any parenting plan. Children benefit when they know that their views have been considered, even if the plan that is ultimately made for their care is not based on their wishes; children appreciate the difference between “a voice and a choice.” Indeed, while most children want to have their views considered, very few want to be placed in the position of having to choose between their parents, as most want to have strong relationships with both parents, and do not want to be seen as rejecting either parent.<sup>63</sup>

One of the responsibilities of a family lawyer is to advise clients that their children’s views should be considered, whether the parenting plan is made by the parents or a judge. Article 12 of the *United Nations Convention on the Rights of the Child*<sup>64</sup> provides that a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, and that those views will be given due weight in accordance with the age and maturity of the child. Parents must be advised that this is the law in Canada.<sup>65</sup>

Further, clients should be advised that the child’s views should be ascertained in a sensitive and age-appropriate fashion. Parents should be informed that if an agreement is not reached and a judge will be asked to make the decision, the court will want to know why a child expressed a

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<sup>62</sup> See e.g. Barbara Fines, “Ethical Issues in Collaborative Lawyering” (2008) 21 J Am Academy Matrimonial Lawyers 141; MacFarlane, *supra* note 51 at 216-219; Austin Sarat & William LF Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (New York: Oxford University Press, 1995), ch 3.

<sup>63</sup> See e.g. Rachel Birnbaum, Nicholas Bala & John-Paul Boyd, “The Canadian Experience with Views of the Child Reports: A Valuable Addition to the Toolbox?” (2016) 30:2 Intl JL Pol’y & Fam 158; Rachel Birnbaum, “Views of the Child Reports: Hearing Directly from Children Involved in Post-Separation Disputes” (2017) 5:3 Soc Inclusion 148.

<sup>64</sup> 20 November 1989, 3 UNTS 1577 (entered into force 2 September 1990). The principle that a child’s views and preferences are a factor in determining a child’s best interests is recognized in legislation in most Canadian provinces as well as in case law.

<sup>65</sup> *G(BJ) v G(DL)*, 2010 YKSC 44, 193 ACWS (3d) 1227, Martinson J.

preference, not just what views they expressed. While almost all parents accept that their child's views should be taken into account, many parents do not appreciate that, especially in the context of separation, their children may not have been fully candid with them.

There are several child-focused methods that can be used to ascertain the views of a child, including through an interview and report by a mental health professional as part of a full assessment, appointment of counsel to represent a child, a "views of the child report" prepared by a mental health professional or lawyer, or an interview with a judge, arbitrator or mediator.<sup>66</sup> In some cases, especially ones that are not resolved in a reasonably short period of time, it may be appropriate to use more than one method and at different stages in the litigation process to engage the child as the case evolves.<sup>67</sup>

There are of course high conflict cases where the child will *not* want to express any views or share experiences with parents or professionals because of desire to maintain good relationships with both parents, despite their apparent antipathy to one another, and the child's decision to "remain silent" must be respected.<sup>68</sup>

In cases where a child may be expressing very strong views against one parent, it is important to consider whether there is alienation as a result of pressure or suggestion from the favoured parent, or if the child has valid reasons for rejecting a parent due to parental misconduct, domestic violence, abuse or neglect. In some cases of alienation, a favoured parent may be unaware of the effect of their negative comments and attitudes about the other parent on the child, and unconsciously undermining the child's relationship with the other parent. Acting in a child's interests requires determining the

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<sup>66</sup> Rachel Birnbaum & Nicholas Bala, "Views Of The Child Reports: The Ontario Pilot Project" (2017) 31:3 Intl JL Pol'y & Fam 344.

<sup>67</sup> Nicholas Bala & Patricia Hebert, "[Views, Perspectives and Experiences of Children in Family Cases](#)" (2014) Queen's University Legal Research Paper No 082, online: <<https://ssrn.com/abstract=2887623>>.

<sup>68</sup> See e.g. *Neger v Dalfen*, 2016 ONCJ 751, 276 ACWS (3d) 879 where in a very high conflict case, for more than two years, an 11 year old girl repeatedly refused to talk to child protection investigators or representatives of the Office of the Children's Lawyer about her experiences or preferences. The trial judge decided to make a decision without interviewing her, fearing that an attempt to do this would only place her under greater pressure. For a discussion of some of the critical factors in deciding how to engage children in the resolution of family disputes, see Lorri A Yasenik & Jon M Graham, "The Continuum of Including Children in ADR Processes: A Child-Centered Continuum Model" (2016) 54:2 Fam Ct Rev 186.

source of the child's problem with one parent, and encouraging both parents to address that problem cooperatively. Awareness of the research and the prevalence of the problem of children resisting contact with a parent can, in many cases, assist family counsel to redirect parents to see a child's apparent rejection of one parent as a family functioning problem to be appropriately addressed by allowing the child to have a healthy relationship with both parents,<sup>69</sup> rather than as a dagger to be used in litigation.

### **G) The Lawyer as Advocate: Mediation, Negotiation & Litigation**

The central argument of this paper is that lawyers for parents must take account of the interests of children when advising and representing parents, but this must always be seen in the context of the lawyer having a primary duty to advise and advocate for his or her client. While it is usually preferable for parents, children and the justice process to have a consensual dispute resolution, it is not uncommon in family cases for one or both parties to be slow to meaningfully engage in discussions about resolution of monetary and parenting concerns, whether due to emotional issues and stress arising from separation, a reluctance to address new realities,<sup>70</sup> or a desire to gain a tactical advantage from delay. At least the threat of litigation, if not its commencement, may be needed to encourage meaningful engagement in consensual dispute resolution. While most family cases can and will be resolved without a judicially imposed decision, in some cases the need for protection from threatened abduction, abuse, or violence may require immediate commencement of proceedings. More commonly, a family lawyer's first contact with the other side should be premised on seeking a consensual negotiated resolution, perhaps involving a collaborative approach.

In some cases, one, or both, parties may be unreasonable and a judicially imposed resolution may be needed. Some of these cases may involve individuals who are taking an unrealistic position, perhaps due to personality disorder or mental illness, or involve disputes over issues of abuse or violence. There are also some cases, relatively small in number, that cannot be settled, even if both parties are child-focused, such as ones involving parents who need to relocate and want to take their children, disrupting the relationship with the left-behind parent.<sup>71</sup>

<sup>69</sup> Bala & Hebert, *supra* note 41.

<sup>70</sup> See e.g. Emery, *supra* note 29.

<sup>71</sup> In *Van Rassel v Van Rassel* (2008), 172 ACWS (3d) 178 at para 9, 61 RFL (6th) 364 (Ont Sup Ct), Mossip J, in dealing with the issue of costs in a relocation (also called, mobility) case, observed:

There is no other area of family law litigation in which the idea of a winner and a loser is less applicable than that of a mobility case. It is also true that even with

Even if family litigation is threatened or commenced, it is important to avoid inflammatory language in communications and pleadings. Clients, however, also need to be reminded that “taking the high road” may ultimately affect how a court views their case. If there is a contested hearing, lawyers undertaking cross-examination should keep in mind that the parties are both likely to have a continuing relationship with the child, and each other, but there is likely to be a need to challenge the reliability and completeness, and in some cases the veracity, of the other party. As one Ontario family lawyer observed about her trials on relocation:

I try very hard to keep the rhetoric down and to keep the language as smooth and non-confrontational as possible, but litigation is litigation and if you're at a trial, you have certain burdens of proof and certain things that you have to prove, and it's a fight ... and when you have two people who are investing that much of their emotional and financial resources into fighting with one another, I can't help but assume that some of that is filtering back to the children even if the parents are trying hard. And that's assuming that both parents are actually trying not to involve the children; let's face it, that is actually a rarity, too much of that battle mentality filters down to the children and that's not good for them.<sup>72</sup>

As this lawyer acknowledges, while family trials are sometimes necessary, they almost inevitably harm the children.

## **H) Dealing with Aggressive Lawyers and Self-Represented Litigants**

While family lawyers have an ongoing duty to encourage parents to maintain a focus on the welfare of their children, there are many factors that affect what having a child-focus approach means and how this is to be done.

In most cases, maintaining a child focus will require a lawyer to encourage a client to support the child's relationship with the other parent, even if the client has deep feelings of anger, betrayal, or mistrust towards the other parent as a result of marital infidelity or other spousal conduct. In other cases, however, a child-focus may require restricting or terminating the child's contact with an abusive or violent parent.

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the very best parents, it is the area where “win-win” solutions can rarely if ever be fashioned. Parents involved in a mobility dispute have to resort to the courts, because even with the best of intentions, and with both parties doing their best to put their children's interests before their own, they cannot find a solution to the desire of one parent to move with the child, and the other parent vehemently resisting that move.

<sup>72</sup> Ghislaine Lanteigne, “Relocation in England and in Ontario, Canada: The Work and Views of Lawyers” (Address delivered at the International Society of Family Law 16th World Congress, Amsterdam, 28 July 2017) [unpublished] [Lanteigne].

An important factor for a child-focused family lawyer will be the attitude and approach of counsel for the other parent. In some cases, the parents both choose a collaborative family lawyer, prepared to work with mental health professionals so that the parents' and children's emotional needs are being addressed and a holistic plan can be developed to address the parents' separation. In other cases, however, a child-focused lawyer for one parent may find that counsel for the other parent is a "zealous advocate", or the other parent is an aggressive self-represented litigant.

If one counsel has a strongly adversarial approach to a case, this necessarily affects the approach of the other counsel, even if that counsel is child-focused. If a self-represented parent is taking unreasonable positions, not focusing on the interests of the children and rejecting reasonable settlement offers, this impacts the approach of counsel who must deal with that litigant and protect the interests of his or her client, as well as those of the children. When facing an unreasonable action by the other party, counsel should point out that the position is unreasonable; it may be appropriate to take action and respond "tit for tat" in the context of court proceedings to encourage more reasonable future behaviour.<sup>73</sup> However, when faced with an adversarial and unreasonable lawyer or self-represented litigant, it is also important for counsel to warn a client against "responding in kind" to inappropriate parenting behaviour, both to promote the interests of the child and to emphasize to the client that, should the issues be resolved by a judge, the court will be influenced by the relative child-focus and reasonableness of each parent. The approach should be: "When they go low, we go high". It requires maturity and tolerance of frustration for a parent and their counsel to avoid an angry response to an unreasonable demand, but it is still the preferred course of action when children are involved. Ultimately, the child is almost certain to realize that one parent is more reasonable and child-focused, and will appreciate the sacrifices of that parent.

While it is necessary for counsel to point out to the other party when they are being unreasonable, and in some situations to note rudeness or aggressiveness, the central effort should be to remain polite and focused on the interests of the child. It is, however, also important to appreciate that retaining a child-focus does not mean simply giving in to an unreasonable parent; indeed, a child-focus may require resistance to an unreasonable parent or an adversarial lawyer, especially if there are safety issues.

If the other side displays a disregard for civility and the rules of procedure, it may even be necessary for opposing counsel to seek costs against the lawyer personally. As observed by Justice Sherr in *Sambasivam*

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<sup>73</sup> MacFarlane, *supra* note 51 at 214.

*v Pulendrarajah* in making an order for costs against a lawyer personally in a family case:

It is disappointing when the court sees counsel engage in sharp practice. It only feeds into the skewed perception that the public has of family law lawyers. It undermines the good work that family lawyers do. Family law cannot be practised this way and it is incumbent on the court to show its disapproval ...

[I]t is important to send a specific message to [counsel] ... and a general message to the public that this is not the way family law is to be conducted, and in the rare cases where counsel act this way, the court will voice its disapproval and impose costs consequences. It is essential that family law litigants and counsel have confidence that they will be treated fairly during a difficult process.<sup>74</sup>

It may also be that, aside from being unreasonable, the other parent is simply unaware or unable to parent separately in a fully effective way. Our premise is that a lawyer can and should help their own client see how their children benefit from child-focused parenting arrangements. Depending on the circumstances, it may be appropriate to advise a client who is more child attuned to help the other parent, as much as is reasonably possible, to overcome any barriers they have to good parenting. An effective parent can be, if motivated, a good coach for the other parent who may be taking on new parenting responsibilities and learning new skills. This is often done when parents live together, and should also occur after separation if the coaching is offered and received in an appropriate, co-operative fashion. The stronger parent can be invited to “be the hero” for their kids, ultimately resulting in their children having two effective parents. The parents should be encouraged to see themselves as on “the same team,” a team that promotes their children’s wellbeing with good team members who support and encourage others on the team to do their best.

### **I) Withdrawal of a Lawyer from a Family Case**

There may be cases where a lawyer will consider withdrawal from a family case because a client “refuses to act” on the lawyer’s advice and is engaging in conduct that is harming or endangering the child. The *Model Code* accepts that this is a situation where a lawyer may withdraw, provided that this can be done in a way that will not prejudice the client or delay a hearing.<sup>75</sup>

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<sup>74</sup> 2012 ONCJ 711 at paras 72, 80, [2012] OJ No 5404 (QL). See also *Ostafichuk v Iaboni*, 2013 ONCJ 174, 30 RFL (7th) 249.

<sup>75</sup> *Model Code*, *supra* note 2, ch 3.7-2. A lawyer is prohibited from withdrawing from a client’s case only in limited situations. See also *R v Cunningham*, 2010 SCC 10, [2010] 1 SCR 331.

There will be cases where a lawyer has serious concerns about the effect of a client's behaviour or litigation stance on a child. This may, for example, occur when clients with *de facto* care are unjustifiably delaying resolution of the case to build up a stronger relationship and weaken their children's ties to the other parent.<sup>76</sup> Similarly, a client may refuse to accept a settlement offer that the lawyer thinks is as good or better than what a court is likely to order. This may result in a lawyer telling the client that they want to withdraw. As observed by an Ontario family lawyer:

At a certain point, I don't believe that, as lawyers, we have to do whatever our clients instruct us. There are other demands of the practice, other clients, other things outside the practice, and at a certain point, I think it's just fine for a lawyer to say to a client, "You know, this is the best I can do for you, you're not going to do better than this, I recommend you take it, and if you don't want to take it, I'm going to help you find another lawyer." Not just "I'm done", but "this is my approach, if you don't want to follow my advice, that's my prerogative, and to the best of my abilities, without prejudicing your position in the case, I'm going to give you some referrals, I'm going to do what I can to transition the file, but I am done."<sup>77</sup>

If the client accepts from the time of retainer that their lawyer may withdraw if the client is acting contrary to their children's best interests, the threat to withdraw may well have a salutary effect on parental behaviour.

However, in many situations, the child-focused lawyer may determine that it is better for the child (and likely the client and the justice process) to remain on the case than for the client to obtain the services of a less child-focused lawyer or become self-represented. The child-focused lawyer may ultimately affect the client's conduct, even if the client initially seems unwilling to accept the lawyer's advice. In practice, a client who is refusing to accept their lawyer's advice may terminate the lawyer's retainer before counsel comes to the stage of withdrawing.

Although not common, there may be cases in which a lawyer is concerned that a client may be planning to undertake conduct that is clearly harmful to a child. Rule 3.3-3 of the *Model Code* permits a lawyer to disclose confidential information where there is "imminent risk of death or serious bodily harm," which may include the risk of serious emotional harm. For example, a lawyer who learns that a client is planning to abduct a child, in particular to a country that is a non-signatory to the *Hague Convention*, the lawyer might be justified in warning the police, child protection authorities

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<sup>76</sup> Deanne Sowter, "Professionalism and Ethics in Family Law: The Other 90%" (2016) 6:1 J Arbitration & Mediation 167 at 184 [Sowter].

<sup>77</sup> *Ibid* at 209.

or counsel for the other parent, or at least withdraw from the case.<sup>78</sup> It would normally be prudent for counsel contemplating such action to contact their Law Society or retain their own counsel for advice.

#### 4. Conclusion: Child-focused Family Lawyers

Many Canadian family lawyers already adopt a child-focused orientation in their practices. Some of these lawyers may not be fully conscious of this, which is not surprising as these issues are rarely addressed in a direct way in writing or in discussions of ethical issues for lawyers in Canada. We join with others in advocating that family lawyers and their professional organizations should be more explicitly addressing the need for family lawyers in these cases to have a child-focus, including following the lead of lawyers in British Columbia to develop professional guidelines that address the challenging issues related to the ethical practice of family law.<sup>79</sup> The dialogue about the articulation of such guidelines would have value, and these ethical standards could be shared with clients, both to allow them to better appreciate the complex role of the family lawyer and the nature of the family justice process, and also to help parents to focus on the interests of their children.

The articulation of ethical guidelines specifically for family lawyers would also help to shape educational curricula for law schools, continuing education and self-study, as well as stimulating reform of the family justice system.<sup>80</sup> Family lawyers need, for example, to have knowledge of child development. Family lawyers in turn have an opportunity to educate the bench, through principled advocacy, about family cases. There is also a need for more mentoring of family lawyers who are starting their careers by more senior members of the bar, so that those joining the profession will be better able to understand their responsibilities.<sup>81</sup>

Lawyers who provide advice and support about parenting also need to be aware of their own values and the limitations of their knowledge. They should strive to not impose their own personal parenting preferences or

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<sup>78</sup> See discussion in Jennifer L Hiatt, “The Rules of Professional Conduct: A Conflicting Guide for Counsel in Child Custody and Access Proceedings” (2012) 1:1 UWOL Legal Stud 4.

<sup>79</sup> See e.g. Sowter, *supra* note 76; John-Paul Boyd, “[The Need for a Code of Conduct for Family Law Disputes](http://www.slw.ca/2016/04/29/the-need-for-a-code-of-conduct-for-family-law-disputes/)”, *Slaw* (29 April 2016), online: <[www.slw.ca/2016/04/29/the-need-for-a-code-of-conduct-for-family-law-disputes/](http://www.slw.ca/2016/04/29/the-need-for-a-code-of-conduct-for-family-law-disputes/)>.

<sup>80</sup> See e.g. “Meaningful Change for Family Justice”, *supra* note 59 at 5; Natalie A Knowlton, “The Family Law Bar: Stewards of the System, Leaders of Change” (2017) 55:1 Fam Ct Rev 12.

<sup>81</sup> Cori McGuire, “Family law lawyers need code of conduct”, *Lawyers Weekly* (23 May 2008).



their own personal biases on their clients, but rather provide advice based on sound social science research.

Discussion of ethical standards for family lawyers also has implications for research. Little is known about how family lawyers in Canada view their role and professional responsibilities, what type of advice they give their clients about parenting or settlement, and how they actually manage their relationships with their clients and other lawyers.<sup>82</sup> More research needs to be done on how family lawyers in Canada perceive their roles and actually conduct their practices.

While we are advocating that family lawyers adopt a child-focused approach to representing parents, we appreciate that this can be a very challenging role, and even if ethical guidelines are adopted for family lawyers, significant discretion will be required in their application. There will inevitably need to be a case specific balancing of the interests and concerns.

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<sup>82</sup> There are two significant but limited recent empirical studies of the practices and perspectives of Canadian family lawyers: Sowter, *supra* note 76; Lanteigne, *supra* note 72.