EMERGING ISSUES RELATED TO ETHICS
AND THE PRACTICE OF FAMILY LAW
(a.k.a. WHY ARE THEY PICKING ON US?)

By Gwen V. Goebel, B.A., LLB.

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I. INTRODUCTION:

As family lawyers, we have many reasons to be proud of the work that we do for our clients, society and the public administration of justice. We are problem solvers – assisting families in crisis to find solutions so that they can move forward.

Virtually every member of Canadian society will be touched directly or indirectly by family breakdown at some point in their lives. A recent Statistics Canada survey reported that 38% of married couples will separate or divorce before their 30th anniversary. As stated by Chief Justice McLachlin “of all the matters the law deals with, none touches Canadian men, women and children more directly or more profoundly than family law”. 1 It goes beyond class, race, gender, age or sexual orientation. Our opportunity to represent the legal profession to the public is unique, we are on the “front lines”.

As noble as that may sound, our day to day practices are busy and stressful. We are often dealing with emotionally distraught clients who are flailing about in anger or fear trying to find a life line to hang on to. These clients feel lost in the legal process, are dissatisfied with the pace or results, and are not only feeling victimized by their ex-partner, but also by their partner’s lawyer and the justice system as a whole. They are also suspicious consumers seeking to keep their legal fees as low as possible yet demanding that “no stone be left unturned” and holding their own lawyers to a high standard of care.

Depending on the personality of the lawyer, it may be tempting to step into the role of a “rescuer”, to align oneself with the client emotionally, to react our way through a file always one

step behind, or to unconsciously avoid a needy and emotionally draining client altogether until the situation is totally in crisis.

All of these dynamics create the “perfect storm” for misunderstandings, unhappy clients with unmet expectations and, on occasion, uncivil, unprofessional or unethical behaviour on the part of the family lawyer.

II. ARE FAMILY LAWYERS MISBEHAVING?

A. STATISTICS FROM THE LAW SOCIETY OF SASKATCHEWAN:

There are a disproportionately high number of complaints made by clients against family lawyers. According to the records of the Law Society of Saskatchewan, in 2009:

- 594 total complaints were received;
- 117 of the total complaints were in the family law area (20%);
- 2 of those matters were referred to the Ethics Committee;
- 5 of those matters (involving 4 members) were referred to the Professional Standards Committee; and
- 9 of those matters (involving 7 members) were referred to Discipline.

Just because a complaint is made, does not mean the lawyer has actually run afoul of the Law Society. It does however mean that the lawyer’s client, or somebody else, was not satisfied with the lawyer’s conduct.

Even if the complaint is not referred to discipline, it will involve stress to the lawyer, a loss of billable time responding to the Law Society and possibly an emotional or professional scar. It is stressful and upsetting to receive a letter or phone call from Complaints Counsel. It is time-consuming to review the file and provide a response, even if it is a relatively minor complaint. In addition, there is the potential for serious consequences if the complaint has merit.

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2 Statistics provided by Melanie Hodges Neufeld, current Complaints Counsel, Law Society of Saskatchewan
B. ANECDOTES FROM THE LAW SOCIETY OF SASKATCHEWAN: ³

Family law complaints are frequently made by one party against the opposing party’s lawyer. Some parties appear to have difficulty separating lawyer from client, and complain that the opposing lawyer prepared a false affidavit, or lied in court, or attacked them unnecessarily. These are almost always determined to be “unfounded”.

In addition clients may complain about their own lawyer if they do not get the result that they expected. Clients frequently allege that the lawyer did not explain what they were agreeing to, that their lawyer did not represent them properly, and that their lawyer was “on their spouse’s side”.

The most common complaints against family lawyers (that could result in consequences if proven) include the following:

1. Failure to respond or keep a client informed – lawyers are required to reply reasonably promptly to a communication from another lawyer or self-represented party;

2. Delay or dilatory practice;

3. Lack of civility and sharp practice – lawyers have a duty to avoid questionable conduct and improper communications;

4. Breach of trust conditions and undertakings;

5. Withdrawal causing prejudice to the client;

6. Improper billing and unreasonable fees (usually referred to the taxation process);

7. Improper conduct such as lying or stealing.⁴

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³ February, 2008 Minutes of the CBA Family Law North Section Meeting: speaker Reché McKeague, former Assistant Complaints Counsel, Law Society of Saskatchewan, “The Stories I Could Tell – Complaints to the Law Society from Family Law Clients”

⁴ Ibid
According to the former Assistant Complaints Officer, many complaints involved unrealistic expectations about results at trial, legal bills, chances of success of particular arguments, etc. In addition, clients commonly reported frustration that their lawyers were “ignoring them”. In her view, “sharp practice” complaints occurred when lawyers became emotionally tied up with the client’s cause, resulting in a loss of perspective and judgment – when they began “fighting instead of advocating”.

The current Complaints Officer has noted an increase in complaints by unrepresented litigants against opposing counsel and recommends that lawyers dealing with self-represented parties clearly and repeatedly communicate that the rights and interests of the self-represented person are not being protected by the lawyer. This can be a difficult balance where the lawyer may feel forced into the role of advising the opposing party on the rules of practice or the conduct of the litigation, in an effort to move the matter forward. In addition, it may be tempting to “respond in kind” to unprofessional criticisms and personal attacks by self-represented parties. Care must be taken to remain objective at all times.

In summary, family lawyers are clearly a target for professional complaints, whether they deserve to be or not.

III. WHAT IS THE PUBLIC PERCEPTION OF FAMILY LAWYERS?

We have all heard the stories, the endless jokes and the 400 year old phrase from Shakespeare’s “Henry IV” - “The first thing we do, let’s kill all the lawyers.”⁵ We have heard the statistics which tell us that when asked to rate the trustworthiness of professionals, lawyers are placed in the same range as car salesmen, politicians, and psychics⁶.

A very interesting and fairly recent comprehensive “consumer” study was commissioned by the American Bar Association and is entitled “Public Perception of Lawyers: Consumer Research

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⁵ Lawrence Savell, “Why Are They Picking on Us?” ABA Journal, November 1992
⁶ Reader’s Digest “Trust Poll” 2009 conducted by independent research firm Harris/Decima to survey a representative sample of 1200 Canadian adults published June, 2009
Findings”. The researchers discovered that consumers generally viewed lawyers as “greedy, manipulative and corrupt”. They described them as people who misrepresent their qualifications, overpromise, are not upfront about their fees, take too long to resolve matters and do not return their phone calls. On a consumer basis, they were equated with contractors.

The study also observed a perceived systemic bias based upon lawyers’ connections with government, the judiciary, big business and law enforcement. One participant referred to the legal system as a “stacked deck.” The consumers communicated a kind of helplessness – supported by the perception that the governing bodies were more like “lawyer’s clubs” than protectors of the public interest.

With respect to family law, the researchers stated that family lawyers were singled out specifically for “exacerbating the conflict”. They write “some consumers feel that some lawyers do more harm than good. This is particularly true of people going through a divorce. They say that divorce lawyers can exacerbate an already difficult situation”.

The researchers found that among services available to consumers, legal services were perceived to be among the most difficult services to buy given the uncertainties and potential risks resulting in tension in the lawyer-client relationship and an avoidance of hiring lawyers altogether.

IV. SO WHAT?

You might say there is no crisis. You might say nothing has changed in years. You might even say that the public perception is a result of bad movies, aggressive American advertisements, and John Grisham’s portrayal of lawyers in his best selling novels. After all, these are unjustified stereotypes and nothing more . . . as long as you keep your own clients happy, you have nothing to worry about.

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7 Leo J. Shapiro & Associates, “Public Perception of Lawyers: Consumer Research Findings”, copyright 2002 American Bar Association,
8 Ibid at page 4;
9 Ibid at page 9;
10 Ibid at page 11;
11 Ibid at page 16
In my view, this response is no longer good enough. We cannot ignore that there is a movement in the public, the judiciary, the law makers, and those bodies which govern lawyers, to address a perceived crisis. This movement will directly impact how we practice family law and even whether we will be able to continue to attract new, bright lawyers to enter into the world of family practice. The pressure is upon us in a way that has not been present in the past.

Let me provide you with some examples of what I am referring to.

First, more and more litigants are avoiding lawyers altogether and are choosing to represent themselves. This is causing stress on the justice system as it attempts to balance access to justice with the rules of evidence and a desire that matters proceed in an orderly and timely fashion. This results in the judiciary looking to family lawyers at best for answers, or at worst, to blame.

It also results in more delayed proceedings, frustrated lawyers and unhappy clients who are reluctant to pay for fees when their ex-partner appears to be getting a “free ride” from the court. We are also being advised that there is an increase in complaints being made by self-represented parties against opposing counsel – again leading to lawyer stress and a loss of billable time.

Second, law makers are reacting to stories of unfairness and injustice in the family justice system and pressure by lobby groups with agendas for change. Where it is perceived that the problem is out of control, extreme measures may be taken which may not in fact serve the interests of justice or our clients and their children. Such measures may also directly impact the way in which we practice family law or make it too onerous for us to continue to work with difficult clients. In other words, if lawyers continue to fail to take this issue seriously, law makers may enact legislation that force lawyers to account or that drastically change the law in an effort to “even the playing field”.12

12 Pressure from groups like “Fathers 4 Justice” and others have led to the tabling of private member’s Bill C-422 of the Honourable Member of Parliament Maurice Vellacott. This Bill seeks to amend the Divorce Act by creating a legislative presumption of equal parenting in all custody matters, prospectively and retroactively. While the consensus among the majority of family law practitioners and the National Executive of the CBA Family Law Section is that such amendments are unnecessary, improperly take the focus off of children’s interests in favour of parental “rights”, and will only serve to create an abundance of highly conflicted litigation on its own, we have to recognize that the amendments are primarily motivated by what is perceived to be an injustice in the system.
Third, family lawyers are currently being targeted for more regulation, more rules of conduct and more public and professional scrutiny (more on that below).

Fourth, other professionals are looking for ways to entice potential family law clients away from lawyers to resolve their disputes. Accountants and “Divorce Specialists” often promote themselves by criticising what family lawyers have to offer. Not only are we at risk of losing our client base, but they are being lost at the cost of our professional reputations.

Finally, if there is a heightened sense of concern in the media, the bar, and the bench, it will result in more unfounded complaints being made. Family lawyers will be targeted for scrutiny that could further render the practice unappealing to young, bright, innovative lawyers who are critical to a healthy, evolving family justice system.

V. WHAT ARE THOSE RUMBLINGS ABOUT A SEPARATE CODE OF CONDUCT FOR FAMILY LAWYERS?

As stated above, discussions are advancing with respect to whether it is necessary or prudent to move towards a separate and additional Code of Conduct for Family Law Practice.

In an article written for Lawyer’s Weekly entitled “A New Code of Conduct for Family Lawyers?”17, author Cori McGuire writes that “societies expectations are changing”:

“A new ethic should begin in family law, since the clients are much more likely that others to have intimate personal knowledge of the weaknesses of the opposing party, which can be used viciously in advocacy, justifiable through the partisan ethic. Even if society is not yet prepared to shield adults, there is a general consensus that innocent children should be protected. We now know from abundant research that highly contested, bitter divorces hurt children, and thus society. The new code would not prevent arduous litigation, but increase the integrity of litigation by requiring some considerations of other family members.”13

The author recommends a new model code which would carry law society enforceability and which would become “institutionalized as the measuring stick of the reasonable standard by which the conduct of all lawyers can be compared.”

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Arising in part from the sentiment described in that article, and in part from pressure invoked by some benchers of the Law Society of British Columbia, in the last 3 years there have been discussions among Canadian lawyers regarding a separate Code of Conduct for Family Lawyers. The discussions have considered whether such a code is necessary. While the consensus at this time is that such a code is not warranted, and practically may only serve to increase the number of unfounded complaints made against lawyers, it may nevertheless be imminent, and if so, we need to be involved directly in its creation and implementation.

At this point, the only Canadian jurisdiction to take any formal steps towards such regulation is British Columbia. In January, 2008 the Law Society approached the CBA Family Law Section regarding the development of a Family Lawyer’s Code of Conduct or Best Practices Guidelines. A task force was struck to consider the issues at play. Concerns included questioning as to whether there was adequate reason to single out one area of practice for special treatment and whether the Law Society (the governing body of the profession) should be drafting “best practices” which may, as a result, become “minimum practices” and a target for complaints and discipline. In addition the task force questioned the value of regulating the conduct of only one of the participants in the family justice system – lawyers – to the exclusion of everyone else.\textsuperscript{14}

After much discussion, the group decided that it was worthwhile to use this process as an attempt to advance two common goals:

1. promoting professionalism in family practice; and
2. lowering the emotional temperature of family cases.

In so doing the Task Force decided to explore two realistic options:

1. creating a set of Family Law Principles that would apply to all participants in the family justice system (parties, persons representing themselves, lawyers, judges, and the government); and

\textsuperscript{14} Information provided by David Dundee (BC National Representative to the CBA National Family Law Executive and member of the CBABC Taskforce on the Statement of Family Law Principles). Formal materials and reports are not yet approved for publication and have been summarized here with the consent of Mr. Dundee.
2. creating a permanent bench/bar committee on family law matters.

The Task Force reports to have received significant support for this approach and is currently working on a final draft of the “Family Law Principles”.\footnote{I was unable to obtain approval to circulate a draft of the Principles that the BC Task Force have prepared to date but was referred to the Canadian Judicial Councils “Statement of Principles on Unrepresented Litigants and Accused Persons” which they are using as a template for a statement which sets expectations of behaviour for various participants in the family justice system.} In addition, formal steps are being taken, with the support of the Law Society, to set up a meeting to formulate the bench/bar committee.

**VI. WHAT CAN WE DO?**

When it comes to how we relate to one another, family lawyers must be diligent and professional, encourage lawyers who are getting off track and, stay involved in family bar activities, discussion groups, CLE, etc. that keep us familiar with one another on a personal level and focused as a group of problem solvers, not lone gun slingers.

When it comes to how we relate to our clients, we must work hard to remain objective (even if that means seeking second opinions from colleagues when the file is becoming heated). We must educate our clients thoroughly and repeatedly on substantive law, resolution processes available, practical and realistic settlement options, what to expect in court, and what to expect to pay us. Give them an opportunity to make fresh and informed decisions at each stage of the process taking into account the risks, the costs and the anticipated outcomes. Follow up with written confirmation of the discussions and instructions.

When it comes to the system, we have to individually and collectively consider and press for positive systemic changes that work for us and our clients. Chief Justice McLachlin writes:

"It is not enough that we in the justice system be reactive. To do our jobs properly, we must also be pro-active. Our task is to solve people’s problems, yes. But we can only really solve those problems in a thorough way if we take pro-active steps to ensure that family law and procedure are modified to keep pace with changes in society. Pro-active means progressive, innovative thinking and action that strives to meet the actual problems in the lives of the men, women and children the law serves."
It is important that the family bar not allow intrusive regulations or regressive legislative changes “to happen to us” and complain when they do. These changes will directly impact us, our clients and the practice of family law in the future (including the willingness of new lawyers to choose it as a career). It is critical that we, as the direct stakeholders, engage ourselves in the process of change.

The CBABC Task Force is a perfect example of a proactive approach being used to improve the entire system and to create accountabilities for all participants, when what was initially being advanced could have resulted in making family lawyers a larger target for scrutiny, complaints and discipline.

Where the family justice system is being unfairly criticized, we need to defend it by properly educating the public and our clients. Where the system is being legitimately criticized, we need to consider real problem solving strategies to address the problems being raised. For example, in previous presentations I suggested a number of ways that family lawyers could seek to improve the process and result for clients involved in high conflict parenting disputes (often very unhappy clients who are more than happy to raise complaints against opposing lawyers and their own lawyers). My suggestions included:

1. promoting mandatory mediation and “one on one” education or counselling for parents;
2. promoting the use of parenting coordinators in high conflict parenting cases;
3. promoting legal representation for children;
4. promote mandatory education programs for children;
5. promoting a judicial case management process for highly conflicted matters.\(^{16}\)

These are just a few ideas that could possibly alleviate pressure off of our clients, the children of clients, the court system and ourselves and result in a better and more effective process for

\(^{16}\) Gwen V. Goebel, BA, LLB, “Clients Involved in High Conflict Parenting Disputes: The Roles and Responsibilities of the Lawyers Who Represent Them” written and presented at the Saskatchewan CBA Midwinter Meeting, February, 2009
families stuck in a high conflict spiral. If we can target where the real problem lies in a proactive way, it will result in happier clients, a more efficient family justice system and a far less stressful way to make a good living.

Finally, when it comes to ourselves, we must evolve. I recommend considering the approach described by Dr. McFarlane as the “new lawyer”. 17 In particular, she describes the new lawyer’s role as follows:

“This role is moving away from the provision of narrow technical advice and strategies that center on litigation and fighting (the “warrior lawyer”) towards a more holistic, practical and efficient approach to conflict resolution. The result is a new model of lawyering practice that builds on the skills and knowledge of traditional legal practice but is different in critical ways. The new lawyer is not completely unrelated or dissimilar to the warrior lawyer but an evolved, contemporary version.”18

Dr. MacFarlane describes the “new lawyer” as dedicated to achieving her clients goals – what changes is that the primary skill becomes effectiveness and ability to achieve the best possible negotiated outcome. She remains prepared to litigate if necessary. “There is no contradiction between a commitment to explore every possibility of facilitating an agreement with the other side and a strong primary loyalty to one’s own client.”19

This approach is about being smarter, not weaker:

“Both the emerging and the traditional models of lawyering place legal intelligence at their center as the primary and unique skill of the lawyer...However, the new lawyer realizes that she needs to utilize these skills in different ways and in new and different processes, designed to facilitate earlier settlement. ... The warrior lawyer is more familiar with processes that rehearse and replay rights-based arguments, look for holes in the other side’s case, and give up as little information as possible. The new lawyer bases her practice on the undisputed fact that almost every contentious matter she handles will settle without a full trial ... She assumes that negotiation, often directly involving her clients, is feasible in all but the most exceptional cases and that, in this capacity, she is an important role model and coach for her client. The new lawyer understands that not every conflict is really about rights and entitlements and that these are conventional disguises for anger, hurt feelings, and

17 Dr. Julie Macfarlane, The New Lawyer: How Settlement is Transforming the Practice of Law, University of British Columbia Press.

18 Ibid at page 33-3.

19 Ibid at page 33-6
struggles over scarce resources. The new lawyer recognizes that part of her role is to assist her clients to identify what they really need while constantly assessing the likely risks and rewards as well as what they believe they “deserve” in some abstract sense."  

Dr. McFarlane describes “conflict resolution advocacy” as less about aggressive posturing and game playing and more about working with the client and opposing counsel to diagnose the needs and priorities of the clients and staying open to the creation of new pathways to meet these needs and priorities. It does not mean abandoning rights-based advocacy or trial work in appropriate cases.

VII. CONCLUSION:

If we evolve into the realistic problem solvers that our clients need us to be, if we view ourselves as part of a family law team, and if we put our heads together and lobby for systemic changes that really work, I am convinced that a positive change in public perception and a drop in the frequency of complaints, will follow. I may be naïve, but I believe it remains possible for family lawyers to be publically recognized as the problem solving “heroes” that we really are.

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20 Ibid at page 33-4

21 Ibid at page 33-8