

MOE LAW: CREATING RESOLUTION OUT OF CONFLICT AND CHAOS

REPRESENTING THE MATRIMONIAL CLIENT'S '*BEST INTERESTS*,'
BY MOVING TOWARDS A HOLISTIC AND
MORE COLLABORATIVE PRACTICE OF LAW

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TABLE OF CONTENTS

1.	Introduction.....	2
2.	Why should we move to a more collaborative practice of law?.....	2
	It's what we said we would do when we became lawyers.....	2
	It's the law.....	3
	The practice of law is changing.....	4
	Clients are getting smarter.....	5
	Code of Conduct.....	6
3.	How do I do collaboration and work holistically?.....	6
	Some how to's include:.....	7
4.	Clients' Goals, Objectives, Needs and Interests.....	8
5.	The litigation mindset.....	8
6.	Whose Life Is It Anyway? Or, The Lawyer Can Make or Break the Case.....	10
7.	Following the Map.....	11
8.	Things to do.....	11
9.	Family Law Litigation is Just Like Any Other Litigation NOT!.....	13
10.	Case Assessment v. Initial Interview.....	14
11.	Miscellaneous Things to Tell Your Client.....	15
12.	Other Things to Think About.....	18
13.	Conclusion.....	20

Appendices:

- A Roadmap
- B Types of Family Law Cases
- C Human Brain, Animal Brain, Reptile Brain
- D Control Theory

1. Introduction

In April 1997 I wrote a paper entitled “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. That paper was published in the Legal Education Society of Alberta’s Banff Family Law Refresher materials, and, if things have gone well, it has been re-published with the permission of the Legal Education Society as part of these Mid-Winter materials.

If you haven’t read it, read it. If you’ve read it, it’s worth reading again.

This paper starts where that one ends.

In the conclusion of that paper I said:

Sometimes although they act like it our clients are not children and we are not their parents. Our job is not to give them what they initially say they want, but to help them discover what they need and then to guide them appropriately along the path so that they can best satisfy those needs.

As lawyers, we often do not take the time to help clients discover what they really need. We too quickly listen to their stated objectives and desires, accept our “instructions” and proceed to follow the path we learned at law school to represent our clients’ best interests through the litigation process.”

If we are to really serve our clients’ best interests, litigation may or may not be the best remedy. It is just one of many. We must act as ‘wise counsel’ and set out a range of options and approaches, the risks and opportunities of each option and the likely short-term and long-term consequences. And in outlining those risks, opportunities and consequences we must expand our horizons beyond just the legal perspective and look holistically at the entire situation.

Aleksandr Solzhenitsyn once said something to the effect 100% law is not good, but neither is 100% no law.

In illustrating why we should do this, it is helpful to start at the beginning.

2. Why should we move to a more collaborative practice of law?

It’s what we said we would do when we became lawyers.

The current oath reads as follows:

1. THAT I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors according to law;
2. THAT I will diligently, faithfully, and to the best of my ability execute according to law the office of Barrister and Solicitor. I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my

ability. I will not seek to destroy anyone's property. I will not promote suits upon frivolous pretences. I will not pervert the law to favour or prejudice anyone, but in all things will conduct myself truly and with integrity. I will uphold and maintain the Sovereign's interest and that of my fellow citizens according to the law in force in Alberta.

Are we using the best of our ability if we do not expand our horizons beyond just the legal perspective and look holistically at the entire situation? Potentially sending our clients along a path that they would not choose if they knew there were other paths? Are we destroying our own client's property when we waste their resources trying to achieve uncertain and unrealistic goals through the litigation process?

Are we perverting the law to favour or prejudice anyone when, for example, we use the Rules to grind the other side down and wear them out so they quit?

Are we acting with integrity when we accept a client's instructions without being certain that the client is fully aware of and educated about their risks and opportunities, both legal and not legal?

Are we being faithful and bearing true allegiance to the Crown when we don't follow what appears to be a desire to move towards a more collaborative practice of family law?

It's the law

The Federal Government, at least, is attempting to promote a more collaborative practice of family law and to look at family law issues in a more holistic way in recognition that family law matters are not always best served by the litigation process.

As to the evidence of this one only has to have reference to section 9 of the *Divorce Act* that requires us to promote "reconciliation, negotiation and mediation, where appropriate."

Mandatory Parenting Education.

The move to a "no-fault" divorce system.

The creation and implementation of Federal Child Support Guidelines, one of the objectives of which is "to reduce conflict and tension between spouses."

The government has more than just the Department of Justice dealing with the issues of marriage and family breakdown. I am on a committee, and I am sure there are others, that is not a Department of Justice committee. The committee (a Health Canada initiative) was set up "To Develop an Inter-Sectoral Strategy Supporting Families Involved in Separation and Divorce."

Some of the guiding principles that the committee is working with include that "children and families involved in separation and divorce need useful, reliable information and culturally-appropriate support that will help smooth the transition period, *reduce conflict and stress*, and help both parents and children adapt to changing circumstances," and "families are unique and

they respond to separation and divorce differently; thus, *a variety of responses* and support mechanisms are required (e.g., mediation, arbitration, counseling, education, information, etc.).”

One of the questions the committee is looking at is “How can the strategy encourage positive methods of dispute resolution in settling divorce arrangements out of court?”

The committee does, however, recognize that “we must maintain the Court as an alternative or [else] risk forcing people into services which cannot meet their needs and may in fact place individuals/entire families at risk.”

Another example is the work that is being done in relation to child custody and access. *For the Sake of the Children*, the report of the special joint committee on child custody and access provides “the challenge...for governments is to design a system that can accommodate different types of divorce, without penalizing couples in one category through options meant for another type of divorce.” (page 73)

The practice of law is changing

There are more and more self-represented clients. In the United States a company called “NOLO PRESS” is big business. It provides all sorts of guides and publications to assist people in helping themselves access justice.

Information is available on the internet that can assist clients.

As there are more and more unrepresented people, there is increased motivation to provide services to assist those people. In Maricopa County (Phoenix), Arizona, there are kiosks at the Court House where people can plug the facts of their situation into a computer, pay a \$5.00 fee and the computer prints out a draft Order which the parties can then choose to go have signed. As there are more services, publications and forms, and internet resources and other resources made available to self-represented clients, there will be more and more people who become self-represented.

We are not always going to be able to re-sell what is out there and available to people anyway.

What we sell isn’t time. It is knowledge and skill. In his book, *Managing the Professional Service Firm*,¹ David H. Maister says that our knowledge and skill is our asset and then he asks the question, “How is your asset?”

He says the problem with knowledge and skill is that if we not learning anything new, our asset is deteriorating. He says we need to ask ourselves the question, “In what way are you a better lawyer than you were a year ago?”

In his book, he talks about growing your asset by designing a personal strategic plan. He indicates you have to find ways to continue to develop the knowledge and skills that your clients value. He indicates that while most people acquire their skills and knowledge by “random” experience, to learn well you have to set out to learn some specific *something* (at p. 148).

¹Maister, David H. (1993) *Managing the Professional Service Firm*, New York, NY: Simon & Schuster publisher.

He says at p. 149 - 150:

“Professionals are more valuable to clients if they not only solve their clients’ problems and “tell” them what they should do, but help the client understand more. This includes helping the client look at the issue in a fresh, more revealing way, and helping the client see what the options are and what are their relative advantages and disadvantages. This activity sounds simple, but I have learned that it truly is a skill, and like all skills, it takes practice. By observation, I can report that some professionals are terrific at this, and others (probably the majority, including myself) could do with some improvement. What can not be in doubt is that effectiveness in this area is something that clients value highly, and hence builds one’s asset and one’s career prospects.”

“Other skills fall into this category of counseling ability.”

This isn’t new, this is old. “Give a man a fish and you feed him for a day; teach him how to fish and you feed him for a lifetime.” In helping our clients we need to give more, sometimes, than just legal advice. We need to help them deal with the issues in both the legal and non-legal ways so that not only are their legal issues resolved, but they are left with some insight and skills into how to resolve or prevent further conflicts without resort to the legal system.

That is, we can’t just give the clients the answer, we have to “teach” the client what they need to know in order to fully understand why the path we recommend and the solution we are recommending is the right one.

What we have to sell is our ability to analyze all of the facts and considerations, legal and non-legal, in each individual and unique case and to bring to bear all of our experience, both legal and not legal.

Clients are getting smarter

Even more important from the point of view of moving towards a more collaborative practice of law is that as a result of the greater dissemination of information, the increasing awareness, knowledge and sophistication of clients, we now find that clients are searching for lawyers who practice in a more collaborative manner. Recently, I met with a client who, when I asked how she had come to our office, indicated she and her husband had researched who, in Calgary, were the divorce lawyers, who among them had a reputation for working collaboratively, and who among those would be expected to get along with one another, focus on the clients’ issues and needs and not get caught up in a power struggle or battle of egos between the lawyers.

That research sent them to my good friend, Lonny Balbi, and myself, and then they drew straws to see who would hire Lonny and who would hire me.

Code of Conduct

The Alberta Code of Professional Conduct provides in Chapter 9, *The Lawyer As Advisor*, that “A lawyer has a duty to provide informed, independent and competent advice and to obtain and implement the client’s proper instructions.”

Rule 16 under that Statement of Principle provides as follows:

“A lawyer must recommend that a client accept a compromise or settlement of a dispute if it is reasonable and in the client’s best interests.”

Also of particular note is the commentary following those Rules:

“G.4 **General - Non-legal advice:** On occasion, a lawyer’s advice may be more useful to the client if not limited to strictly legal considerations.”

and

“**Rule #16:** As noted in Chapter 10, *The Lawyer as Advocate*, it is to the general benefit of society and the administration of justice that lawyers discourage unmeritorious suits and seek the early resolution of disputes. The result is to keep legal costs to a minimum and ease the demands on the judicial system while encouraging cooperation among opposing parties and counsel. In fulfilling this ethical duty, a lawyer is obliged to use all reasonable efforts to pursue settlement or compromise.

Determining whether settlement or compromise is a realistic alternative requires objective evaluation and the application of a lawyer’s professional judgment and experience to the circumstances of the case. The client must then be advised of the advantages and drawbacks of settlement versus litigation. Due to the uncertainty, delay and expense inherent in the litigation process, it is often in the client’s interests that a matter be settled. On the other hand, because a lawyer’s role is that of advocate rather than adjudicator, going to trial is justified if the client so instructs and the matter is meritorious (cf. Rule #1 and accompanying commentary of Chapter 10, *The Lawyer as Advocate*). A lawyer should not press settlement for personal reasons such as an overloaded calendar, lack of preparation, reluctance to face judge or opposing counsel in a courtroom setting, or possible financial benefit due to the terms of a fee agreement.

3. How do I do collaboration and work holistically?

The goal of this paper is to give some insight in that regard, however, to do a proper job of it would, I believe, constitute writing a book. It’s a book I’d like to write, but unfortunately, don’t have time to.

This paper, as you might expect, given the pressures of practice, is thrown together at the last minute and is perhaps not as organized and well presented or complete as I would have hoped. If your mind works like mine and if you read it all and read my parenting paper, your brain will fill in the blanks, create the necessary connections in order to have and understand the rest of what I have not put in here. If you read it and think about it.

For collaboration to be successful, there has to be a foundation of trust and honesty. Keys to successful collaboration include understanding the other party's goals and objectives, readily exchanging information and seeking the best solutions to meet the needs of both parties.

Some how to's include:

Start with a plan or a "roadmap" for looking at each file. Give the roadmap to the client. This helps them bring their chaotic thinking into order so that they know what is next and what is next.

Recognize the clients may be operating out of their Animal Brain (Appendix "C"). Help them recognize it and tailor advice accordingly.

Commit to working on a collaborative basis and refuse to be sucked into the litigation mindset. In some jurisdictions in the United States, parties enter into an agreement whereby they commit to resolving their issues in a collaborative manner and if either party changes their mind or feels the need to go to Court, that party's lawyer must withdraw from the case.

Work from a mindset of instead of thinking how to win or take advantage, think how do I help these people create a resolution that is fair to both sides and works from a child-centered perspective.

Find out what the other side needs and find a way for your client to give it to them, while getting what your client needs, too.

Instead of thinking tough, think smart.

Instead of thinking "here's the way I always do it," think "how can we create or design a solution that works for both parties?"

Instead of thinking how complex the matter is, think how it can be made simpler.

Instead of having a knee-jerk reaction to reject everything the other side suggests, seek to understand and honour and legitimize their concerns.

Hear the other side first. Find a way to say "Yes, I agree with everything you have said, you are correct, however, there is this other piece of information that may change your perspective...."

Agree and then change the issue or the target. Recognize it is never just about the money.

Use all of your talents, abilities and skills, not just your legal skills. Give your clients the benefit of all your experience.

Remain calm, fair, even in the storm of conflict and adversity.

In a nutshell, become part of the solution, not part of the problem. In the end, it's what many clients really want.

4. **Clients' Goals, Objectives, Needs and Interests**

Matrimonial clients present at an initial interview with varying degrees of sophistication, knowledge and understanding about the legal system and even about their own problems and issues. While often the legal issues are exactly the same from family to family, each family is different. It is like snowflakes. They look the same from far away, but up close the differences can be amazing.

It is those unique differences that we as lawyers need to be attuned to.

When a client states their goals and objectives, we need to be careful to explore them to determine whether or not they are reasonable, rational, fair, reasonably achievable, economic, and not competing with other goals or priorities. We need to be sure the client understands all the paths, approaches and options available. We can not assume the client understands the risks and opportunities of each option or approach.

This must be done before we determine the client's instructions and the path that we take. See Appendix "A" attached to this paper for a copy of my "Roadmap."

5. **The litigation mindset**

We were trained to think litigation, and the whole litigation mindset is a part of our culture. The clients think litigation.

As lawyers we often look at everything through the perspective of our training. What is the right legal procedure, what are the right tactics, what is the right strategy? How can we arrange the evidence so that the Judge sees things our way? How can we prove to the Court that 'they' are wrong and we are right? How can we win?

Benjamin Sells in his book, *The Soul of the Law: Understanding Lawyers and the Law*² talks about "the law" and "litigation" almost as if they are both breathing and living beings with their own basic needs of survival and power.

Please note Benjamin Sells is a lawyer who left the practice of law to become a psychotherapist. In chapter 4, "The Litigious Mind," Sells says:

"One of the most powerful images in the Law is *adversity*."

"...the modern mind nonetheless believes justice is forged in the crucible of adversity."

²Sells, Benjamin (1994) *The Soul of the Law: Understanding Lawyers and the Law*, Rockport, MA: Element Books, Inc.

“Given this background, what to make of the modern lawyer’s preoccupation with winning at all costs? the usual “cause” given for this attitude is that competition and economic pressures have driven lawyers to be hyper-aggressive and consumed with winning. But there is more to it than that. When a modern litigator sends a knowingly burdensome discovery request with the intention of “wearing down” the other side in a “litigation war,” he or she is mimicking conduct from a time when might literally made right. When the legal profession places winning over altruistic ideals, it is returning to its barbaric roots.”

“The words “adversity” and “litigation” themselves declare a natural affinity. “Adversity” comes from roots meaning “opposing, hostile,” while “litigate” means “to carry on strife.” What is significant about these old meanings is that they provide the first clues that the adversarial system, in the form of litigation, is not really meant to resolve conflict. Rather, the psychology of litigation suggests that *litigation is dedicated to carrying on strife, not resolving it.*”

“This point is essential for understanding the hidden forces driving litigation. The litigious mind is devoted to strife because strife gives life to litigation. Litigation lives only so long as strife is maintained. Resolution of conflict means death to litigation. In a Darwinian struggle to survive, litigation must keep strife alive to preserve and perpetuate itself. It’s a matter of litigation protecting its own self-interest.”

“Every litigator knows that litigation can take on a life of its own, get out of hand, make things worse, create new problems and enflame new grounds of conflict. And all of this regardless of how closely the litigation is monitored or how open to compromise the parties seem to be. Like a story determined by its ending, litigation must be recognized as a psychological force in its own right.”

“In practical terms, this means that litigation must find ways, systemic if possible, to establish itself. One way litigation does this is through setting up a complex system of rules and procedures designed, in practice if not intent, to perpetuate litigation. Litigators are especially prone to being swept up in these processes and procedures because the legal mind is trained to think in terms of procedure.”

“The most important thing the litigious mind wants to know is what the rules will *allow* and how they can be used against the other side: how can they be stretched for advantage, not what are they intended to accomplish.”

“Law firm billing structures...reward controversy and discourage settlement.”

“As long as the litigious mind dominates legal practice, lawyers will unconsciously enact the psychological desires of litigation. Practice will perpetuate conflict.”

“The steadfast and collective rejection of mediation by the litigators raises questions about the ability of an adversarial, litigation-based system to comprehend and appreciate the possibility of alternative approaches to resolving conflict.”

“...have we created an environment of hostility that by its very nature cannot entertain a real desire for peace?”

“And what about the knee-jerk reaction that if the other side wants it then we must be against it?”

“Or the essentially barbaric idea that justice emerges only through adversity?”

“Or, God forbid, litigation’s First Commandment that litigators must “zealously represent” their clients? Is that what we want? A profession of zealots?”

6. **Whose Life Is It Anyway? Or, The Lawyer Can Make or Break the Case**

At this point, reference should be had to my previous paper, “Minimizing Conflict in Parenting Disputes,” where I quote at length from *Transference and Contertransference Issues in Professional Relationships*³.

In short, clients can come in and lay their troubles on our desk and we take them up and carry them on our shoulders instead of leaving them where they belong, which is on the client’s shoulders. It’s the client’s problem, not ours. The client needs to take responsibility for the decisions that need to be made. They live with the result, we don’t. Once again, our job is to give wise counsel, but not to choose the path for the client.

It is very ego enhancing for the lawyer to have a client pass the mantle of responsibility to the lawyer but if the lawyer is to truly serve the client, they must refuse to accept it.

Other non-legal issues can affect our ability to represent the client’s best interests. For example, if our relationship with a lawyer for the opposite party is such that it will hamper our ability to achieve resolution, then we should either decline the representation or at least make our clients aware of the difficulty and once again let the client choose.

³Feinberg, Rhoda and Greene, James Tom, *Transference and Contertransference Issues in Professional Relationships* (1995) 29 Family Law Quarterly, p. 111 - 120, published by the Section of Family Law, American Bar Association

7. Following the Map

The map is a tool to use with your clients in order to help them see what comes first, what comes next, what comes next, and what comes after that. That is, goals and objectives have to come before strategy. If we don't know what city we are going to, we don't know what bus to get on. We go around in circles getting nowhere. See Appendix "A."

8. Things to do

Family law is not a war, but often we make it so because we don't know what else to do. What we learned in law school and what we learned in our training is how to win in Court. We weren't taught, at least not in my law school, about negotiation, mediation, or other non-litigious methods of resolving disputes. Or even why we should consider these as options. We were not taught about the nature of conflict. Even more important, we were not taught anything about human nature. Maybe we learn as we go. Maybe not.

We need to:

(a) Think.

Not approach every case in the same manner, but think about what the appropriate resolution would be for this particular client's family. Not about how to win, but how to create resolution in the way that works best for one's client. Think about what we are learning file by file, day by day about human nature and about the nature of conflict.

Take advantage of our experience and become better each day.

(b) Educate ourselves.

Go beyond our own mind and thinking about these issues. Read. Make up for our lack of training. Talk and share with others one's ideas and thoughts about human nature and conflict resolution in the hopes that they will share with us what they have learned from their experience and education. Build our asset.

(c) Recognize and realize the **power** that we have in our relationships with our clients and how we can "decide" for them.

(d) Realize that deciding for our clients is wrong. It is not our job. Our goals and values and the way we look at the world may be dramatically different than our clients' goals and values. There may be other factors operating in a client's mind that have nothing to do with legal rights or obligations.

To illustrate, I recently had a case where the parties had been divorced for a number of years. It was clear that any limitation period under the *Matrimonial Property Act* had expired. There was an existing matrimonial property action that was beyond the five year drop dead rule. It was clear to my client, at least, but disputed by their ex-spouse that there had been a 'deal' years ago and there was nothing further to talk about in relation to matrimonial property.

Part of that deal resulted in the opposing spouse having a mortgage against my client's property and when my client went to sell and deal with the discharge of the mortgage, the opposing client wanted, at that point, to equalize the other matrimonial property.

Despite my opinion to my client that even if there wasn't a 'deal' my client would be successful defending any claim, my client paid \$25,000.00 to settle the issue.

My client's rationale was that the ex-spouse was talking to the parties' adult children and painting my client in a bad light. The payment allowed him to say to the children that he had not treated their mother unfairly.

My client is satisfied with the result as it achieved his goals of 1) looking good to his kids; 2) not spending money on lawyers, and 3) being done so that he could focus on other things.

Those goals and objectives had nothing to do with what I told him the Court would do.

Practical common sense holistic solutions are often more useful to our clients than anything that has to do with whether or not an argument will or will not be successful in the Court of Queen's Bench or in the Court of Appeal.

(e)

Listen to our clients

Maister (supra) says in his book at p. 61:

"Listening well to clients means more than informal, opportunistic information gathering...."

"...it requires an ongoing systematic attempt to track client preferences, desires, and requirements. The questions "What do our clients want, and how are their needs changing?" must be continuously addressed through a structured program of information gathering, analysis, and action built into the daily operations of the firm."

"Stated simply, professional service firms don't listen to their clients enough."

(f)

Educate our clients.

Explain all the options to the clients, including the difference between advocating position through the Courts and working collaboratively with the other side to design the solution.

If one enters onto the litigation path, then they need to know what happens next, what happens after that, what the likely response of the other side is going to be,

what the budget for the whole process is going to be, what the level of certainty is in relying on the Courts to resolve matters, the time it can take, and how the time and money can expand beyond any reasonable expectation than anybody now has.

- (g) Recognize that one person can resolve or prevent the conflict. If one person refuses to fight and operates in a principled fair-minded fashion and operates in a truly collaborative manner, that can create a climate that allows the other side to quit operating out of fear or anxiety or mistrust and begin to trust that the first party is truly looking to create a resolution that works fairly for both sides.⁴

To get cooperation, one has to first give cooperation.

To expect the other side to trust, one has to be obviously trustworthy - forthcoming and open about goals, objectives, plans, disclosure, etc. Before we can hope to be understood by the other side, we have to first seek to understand them.

Recognize how we may have contributed to the problem, or how our client may have contributed to the problem. Do we want war or do we want peace?

9. Family Law Litigation is Just Like Any Other Litigation NOT!

The primary difference is that the parties have a history of intimate involvement, including a personal knowledge of relevant material facts. They are not strangers. Where there are children involved, minor or adult, there are ongoing relationships that create different considerations in each case. Also other connections, family and friends, impact on the situation. There are often considerations in relation to resolution that works for the parties that has nothing to do with the law.

Other reasons family law is different include:

1. Other disputes can be resolved without a lawsuit. Because of the necessity of obtaining a divorce, a lawsuit is mandatory.
2. The *Divorce Act's* section 9 requirements to promote reconciliation and to promote negotiation and mediation, where appropriate.
3. Mandatory parenting education.
4. Separate Family Law Chambers.
5. Separate Practice Notes.

⁴Edelman, Joel and Crain, Mary Beth (1993) *The Tao of Negotiation*, New York, NY: Harper Collins Publishers Inc.

6. In many cases, there is a lack of resources to fund litigation, but they can't walk away from it either.

Lawyers who claim otherwise are either:

- (a) speaking about the rare highly-conflicted cases where there are significant issues and resources and the only answer is to win in Court. These cases are rare.
- (b) fail to consider the broad spectrum of the types of cases that can present themselves in a family law situation (see Appendix "B").
- (c) fail to understand there is very little "true" conflict. Most disputes can be resolved by an honest exchange of information and perspectives on that information, and an honest exchange of objectives and goals.

In mediation, it is instructive to see that often two parties are talking about the same thing and want the same result but just aren't able to communicate that effectively to each other. Our job is to assist them in being able to communicate effectively.

7. **Children!!**

8. The appropriate resolution is always a moving target. Financial information changes, relationships change, children grow, people lose employment, gain employment, etc., etc. There is a constant evolution of relevant and material facts.

10. **Case Assessment v. Initial Interview**

There is a difference between a "sales call" or initial interview and doing a 'case assessment.'

Clients don't need sales calls. They need appropriate education, advice, options, direction and wise counsel.

A "case assessment" involves exploring a client's background, goals and objectives, explaining their rights and obligations in relation to the law, why sometimes it is not smart to pursue their rights, how the system works and how sometimes it doesn't work very well. It involves spending time educating the client about the litigation process and the option of dealing with matters outside the litigation process. A case assessment takes time. For an average case involving children without complicated assets or a high level of conflict, it takes me at least an hour and a half to two hours or more.

Clients are more willing to pay for a 'case assessment.' It is the most valuable and important time that a matrimonial client can spend with their lawyer as it sets the tone and direction for everything that follows. If a lawyer chooses, they can decide what path the client will take. That is not the lawyer's job. The lawyer's job is to outline options and recommendations and allow the client to choose. The client lives with the result, the lawyer does not.

11. Miscellaneous Things to Tell Your Client

1. (a) For some other ideas, review my earlier paper, "Minimizing Conflict in Parenting Disputes" and the lists set out there; and
 - (b) The paper that should be published in these materials by Joel Miller on promoting shared parenting. (Joel Miller is a divorce lawyer in Toronto who maintains what I consider to be the best Canadian Family Law website at www.familylawcentre.com).

2. Tell clients it is not useful to schedule a "kitchen table" meeting with their spouse until both spouses have had the opportunity of having a case assessment. How many times have parties reached their own "deal" only to obtain independent legal advice after the fact? Not only does the deal blow up because it was inappropriate or unwise for some reason, but now the parties are mad because someone is perceived as trying to take advantage or now going back on their word.

3. If the opposite party has not yet had it communicated to them that the relationship is over, brainstorm with your client the best way to bring that fact to the other party's attention and the merits, risks and opportunities of each option. For example, in some cases the best choice is to inform them by serving them with an ex parte Restraining Order. Usually, that's the worst option, even if there are proper grounds for such an application. Parties need to give serious consideration to accepting responsibility for communicating that fact to their partner.

Consider and discuss the likely reaction of your client's partner and give your client some strategies for assertively and effectively communicating and dealing with their partner's response.

Many clients don't need this, but if offered, it can become an important part of what they really need.

The way in which the fact of the marriage breakdown is communicated can set things off in a number of directions. I tell my clients at the beginning of the process when they don't know what the exact answer is yet they should let their constant communication with their spouse be to the following effect:

"I don't know right now what the exact answer or resolution is, but my goal is to work cooperatively with you to come up with a solution that is fair to *you* and to me, and most of all, works for our children."

Then, when the opposite party presses for a more detailed answer, just assertively repeat what one has already said, but do not get into details until such time as the other party has had a case assessment.

4. Explain the dangers and repercussions of making threats or promises. Most people feel the need to live up to their promises (and most people do). Brainstorm what the likely consequences and reactions are likely to be.

5. Have them retract the threat or promise and give their spouse the reason they are doing so.

e.g.: “You know when I said..., I take it back. I don’t mean it any more and I didn’t really mean it then. I was upset, not using my human brain and I did not have the information I needed to really decide. I think I do now and my goal now is <see above>.”

6. Explain how their goals and objectives can be competing and that they have to choose priority goals. The classic example is a client who wants to be “protected” legally but at the same time wants to pursue and promote reconciliation.

To be ‘protected’ and secure in the financial arrangements may require taking steps that are not conducive to reconciliation or ongoing relationships. Just as negotiating prenuptial agreements or marriage agreements highlight weaknesses in those relationships, attempting to negotiate a financial resolution that protects one’s self usually exasperates conflict or highlights relationship issues and eliminates or severely hampers the opportunity for reconciliation.

Once again, that client has to return to the threshold decision, are they in or are they out?

See also Bruce Fisher’s book, “Rebuilding, When Your Relationship Ends,” Appendix B, “The Healing Separation” An Alternative to Divorce.

Question whether there is any hope for reconciliation if the parties do not trust each other enough to go on without “protection.”

The classic competing goals are:

- (a) I want this over now and I want it all my way;
- (b) I want you to properly solve all my complex legal problems before my holiday in three weeks;
- (c) You charged me too much and you didn’t do anything (just imagine the bill if we did something);
- (d) I want it done fast and good;
- (e) I want it done fast and cheap;
- (f) I want it done good and cheap;
- (g) I want to force my spouse to but I don’t want to go to Court;
- (h) I want to make my spouse do but I don’t want to upset them;

- (i) I want to sue that @%#!* and make them bleed, but after that I want a shared parenting arrangement;
- (j) I want it over, but I'm not compromising;
- (k) I want instant response to my needs when I contact your office, but I don't want to pay you to be on call for me.

7. Explain to clients how and why allowing people to keep their dignity, save face, is very important in their discussions and negotiations with their spouse. One of people's basic needs is to be valued and understood. This need can be so great that people will kill themselves rather than suffer the pain of not being loved or understood.

Imagine how much easier it is to achieve resolution with a spouse who feels, if not loved, at least valued. Or with a spouse who feels, if not in agreement, at least understood.

Imagine how hard it is to achieve resolution while one is downgrading their spouse to anyone within range or while that spouse feels that not only are they losing their marriage and all that entails, but they are losing their very dignity and sense of self worth.

8. Give your client the option or the choice of treating their spouse with dignity and respect, whether or not their spouse deserves it. The Golden Rule is an old one, but a good one.

Have the client think before each communication or action, "How does this help me achieve my rational goals?" Or "How does this promote resolution?" Or "How might this exasperate or increase the level of conflict without any corresponding return of money, better relationships, or possible resolution?"

Not educating one's clients in this manner should, in my mind, be considered negligence.

9. Educate the client about emotional responses, fight or flight, basic concepts about how our brain works to fool us into thinking our choices and actions are rational (see Appendix "C"). Recognize and explain to clients that often an aggressive approach is a sign of one's insecurity or fear about their position or lack of ability or knowledge in order to make an appropriate judgment call or reasonable decision.

10. Clients need to understand that the really good lawyers don't need to prove it to anyone. They quietly give wise counsel to their clients, even if it means they don't make as much money, showcase their litigation talents, or risk appearing weak.

Elihu Root, former American Secretary of State, once said, "About half the practice of a **decent** lawyer consists in telling would-be clients they are damned fools and should stop."

11. Sometimes the most sane rational client is the one who agrees to lose or accommodate the other side in order to stop the bleeding. Crazy people don't usually quit.

12. Other Things to Think About

1. If we shift our perspective from one of being an adversary to one of being someone who works with the other side in a collaborative manner to design appropriate resolution, we do some things differently.
2. For example, rather than saying, "If I don't have input into the drafting of the Settlement Agreement there will be a problem. Don't send it over signed, let me review the draft first," versus saying, "If the contract, executed by your client, forwarded to me works, in all respects, for my client, I will recommend the execution of it, but you understand that your client may have wasted their energy in executing it if it does not meet my client's needs." (See Appendix "D" re: Control Theory)
3. The value in just being done is huge. Benefits include: cost, certainty, reduced conflict, enhanced co-parenting relationship, etc.
4. How often does litigation get out of hand and create a result that neither party wants? Some real life examples:

- (a) Mom and Dad, both professionals, are arguing about parenting. The matter goes to trial and the Judge orders that Dad have substantially less time with the children than even Mom was suggesting was appropriate. It doesn't work for Dad, it doesn't work for the kids, Mom's not happy about it either, as she has reduced free time, but she insists on it because it punishes Dad.

The result is that she won too big, so Dad goes to the Court of Appeal. The Court of Appeal says it's within the Judge's discretion, too bad.

How badly are these kids and these parties losing out because they were unable to design a resolution from a child-centered perspective as opposed to their individual selfish perspectives?

- (b) Once again a parenting dispute. Dad spends in excess of \$100,000.00 (all his resources) for what appears to be a justified attempt to change primary residence. His reasons include Mom's new spouse has strong religious beliefs he feels will have a negative impact on his children. He loses at trial.

Within a year and half Mom is sending the children to Dad to get them out of the situation that she is now willing to recognize.

- (c) No kids, just money, and not much of it, but the records are a complete mess. No one trusts anyone and one side wants a 0-100% distribution in their own favour because it's the other person's "fault."

The parties go to trial and because everything is such a mess, the trial takes longer and longer, extra trial dates are booked weeks and months apart in order to try and get some understanding of the numbers. The costs on both sides now exceed the potential benefit that either party can realize. They both would have been smarter to walk away and quit. The lawyers may not get paid.

- (d) Pushing too far. A party pushing for \$1,000.00 child support. Appropriate child support in the range of \$700.00 - \$800.00, payor requests a break so he can maintain his smoking addiction and his excessive housing costs (equivalent to payee's). Court orders \$770.00 and also ignores the payor's addiction (confirmed by psychiatric evidence).

The addiction is stronger than the Court Order, stronger than the need to maintain the home or the job. The payor skips, Mom and the child have seen no support.

- (e) Gazzumping and nibbling. Create a deal or understanding and then when it comes time to paper it, say, "Oh I forgot to ask for this and this." Get that little bit and then do it again, and again, and again. Inherently and by definition, this is an unfair negotiation tactic.
- (f) Wife obtains ex parte Exclusive Home Possession Order. The parties recently married and living in a brand new home. As it turns out, Wife has vacant, fully furnished home, up for sale, into which she could move, and which is not disclosed to the Court on the ex parte Application.

Why? Her lawyer failed to do a complete case assessment prior to bringing the ex parte Application. Took instructions and ran with them.

5. Is it our job or goal to try to do something unfair? To take advantage? It's our job to zealously pursue our clients' best interests, ethically and within the limits of the law. Is it ethical to allow a client to do themselves more harm by litigating when a fair resolution may be reached without litigation?
6. The classic case. Earlier in my career a client to whom I recommended a certain range of settlement on all the issues did not feel that his wife was conceding enough. He fired me and hired a 'tougher' lawyer, went through a long litigation process and ended up in almost exactly the same or worse spot on each of the issues.

How do I know? The client phoned me after it was over, bought me breakfast and explained it to me. In exchange for ending up at about the same spot, he delayed the resolution by almost a year, spent substantial on legal fees, totally destroyed the ongoing parenting relationship with his ex-wife and destroyed his own parenting relationship with his children.

If he had believed me or had any idea it could turn out the way it did, he would never have taken that path.

But the real point to the story is that at the end of that he was pissed off and felt cheated by the lawyer who took him through those months of litigation and “allowed” him to do it. This was a professional person who presented as a sophisticated and knowledgeable. He thought he had to do it. When he left to go to the other lawyer he said, “I need to get bloody on this.”

At the time, I wasn’t sufficiently experienced or knowledgeable in order to educate him or negotiate with him in the way that I hope I am now able to. I failed him as well, because I was unable to convince him of the merits of the path I was recommending.

The hardest negotiations are with one’s own client. The two primary tools in practicing family law are a sledgehammer and triple-ply Kleenex. Use the sledgehammer on your own client.

13. Conclusion

The right place to end is at the same place we started:

“Our job is not to give [our clients] what they initially say they want but to help them discover what they need then to guide them appropriately along the path so they can *best* satisfy those needs.”

APPENDIX "A"

"Roadmap" or What's Next?

1. **In or Out?**

Decide, in or out of the relationship. If in, go away and commit 100% to making the relationship work. Independent, neutral and non-religious marriage counseling. If out by own choice or other's, acknowledge and move to the next issues. Deal with one's emotional and relationship issues and healing separate from the legal issues.¹

2. **Parenting**

If the parties can resolve this then the rest is all business.

3. **Business**

- (a) Information or data gathering
 - Financial information, assets, liabilities, income and income-producing ability
- (b) **Goals, Objectives and Wish List** (both sides) This is probably the most important part of getting done.
- (c) Obtain legal advice
 - Are the goals realistic or achievable or smart? Or fair?
- (d) Determine strategy and approach
 - Collaboration, competition, compromise, avoidance, accommodation

4. **Process**

Kitchen Table	Mediation 'CFL'	Lawyers	4x	Med/Arb	Arbitration	Court
0 \$						Too much \$
Parties in control						No control

Moving from left to right across the spectrum of choices increases the cost and creates less control for the clients.

5. **Step-by-Step Until Done**

Don't skip steps along the "roadmap." Determining one's goals and objectives and understanding the other party's goals and objectives is 80% of the job. Often times matters deteriorate because one or both parties have not determined their own goals or whether those goals are achievable, realistic, fair or smart. Or they fail to determine what the other party's real goals are and as a result operate out of fear and anxiety.

6. **End of Day Realities**

Recognize:

- There will be a divorce if one party wants it. No American television BS about one party

¹Fisher, Bruce (1992) *Rebuilding: When Your Relationship Ends* (second edition), San Luis Obispo, CA: Impact Publishers

stopping or not “allowing” a divorce, or not “signing.”

- The parenting of the children will be shared in some fashion. It’s a question of working out the details.
- Spousal support may or may not be appropriate, but if it is, it’s a question of working out how much and for how long
- There will be child support in some fashion, and once again it’s a question of working out the details.
- The property will be split, a question of identifying, understanding and distributing it. Details.

Parties often have goals and objectives that are unconscious, unrecognized and not achievable through the legal process. The ones that usually shows up are a need to be ‘vindicated’ or ‘proven right’ or to punish the other spouse. Bringing those goals to light and identifying them as being irrational or unachievable or uneconomic or counter-productive or as competing with other goals of greater priority is often the most important step in achieving resolution. If they can be identified and understood as being irrational and not achievable they can be discarded.

APPENDIX "B"

TYPES OF FAMILY LAW CASES

Family Law cases can probably be divided into the following categories:

			Complexity of financial issues					
			NONE A	LOW B	LOW/ MEDIUM C	MEDIUM D	MEDIUM /HIGH E	HIGH F
Level of conflict, need for assistance by lawyers, and need for Court intervention	NONE	1						
	LOW	2						
	LOW/MED	3						
	MEDIUM	4						
	MED/HIGH	5						
	HIGH	6						

But it is important to note that any particular Family Law case does not stay in the same "box" throughout the whole course of the case. With appropriate counsel, a case with a high level of conflict can quickly become a case with a low or medium level of conflict. Complexity of financial issues is relative to the sophistication and level of acumen of the parties and their respective lawyers.

For example, what might be a highly complex case financially from the point of view of one lawyer might, in another lawyer's practice, fit as a low or medium level of financial complexity.

Cases with a really high level of financial complexity often do not see the Court as services of specialized private arbitrators are used.

APPENDIX "C"

Human Brain, Animal Brain, Reptile Brain

Our brain is composed of three main separate physical structures:

1. Human Brain (Neo Cortex)
- reason and logic
2. Animal Brain (Limbic)
- emotion and instinct
- fight or flight
3. Reptile Brain (Brain Stem)
- autonomous nervous system
- breathing, digestion, etc.

The point being that if one is operating out of the Animal Brain, they are, by definition, not acting rationally or logically. But because people are rational beings and because we always need to see ourselves in the best light and because these parts of the brain are connected, we convince ourselves, and often others, that our Animal Brain-created behaviours are really based in reason and logic:

"He/she deserves it."

"It's not my fault I'm in jail."

"I had to."

As family law lawyers, we need to recognize this. We can't negotiate with our own clients, other lawyers or other lawyers' clients while they are operating out of their animal brain. The strategy then becomes to get them to operate out of their Human Brain, or to be careful not to make important decisions when upset.

How? First awareness and recognition. Clearly, separating the legal and business issues from the emotional and relationship issues and educating the client about the difference often accomplishes it. Sometimes the passage of time, just like wine, sometimes people are just not ready.

Educate the client that the instinctive choice, in a family law situation is very often the exact wrong thing to do.

Someone pushes you - instinctively you push back. The fight is on. The smarter answer is to 'pull' and create an environment that allows the fight or flight reflex to relax and lets the Human Brain take over.

The biggest part of our job is to lend our clients our Human Brain at a time when they can't access theirs.

APPENDIX "D"

Control Theory⁵

William Glasser says we have five basic needs that drive us and explains that everything we do, think and feel comes from inside us and is not a response to things and people around us. Our behaviour is our best attempt to control the world to make conform as close as we can to pictures in our heads of what we would like it to be.

To help our clients, we need to help them take control and change the pictures in their heads, or at least to help them discover the other pictures that are there. That is, we need to start with the client's goals.

The five basic needs that Glasser identifies are as follows:

1. **The need to survive and reproduce;**
2. **The need to belong - to love, share and cooperate**

This need can override the need to survive. People commit suicide out of loneliness;

3. **The need for power**

This one drives all of us. Particularly lawyers who tend to be driven and competitive.

Glasser says (at p. 11) that:

“...our drive for power is often in direct conflict with our need to belong. People marry for love and belonging; but once married, driven by the need for power, they struggle to take control of the relationship. As they assert themselves to bend their mates, however, they find it harder and harder to behave in loving ways. Insufficient love, I believe, is not what destroys close relationships; what tears them apart is the power struggle that seems inevitable. It crowds out love when husbands and wives fail to negotiate and find power compromises that are acceptable to both. Many a divorced person will state quite honestly, “I still love him [or her], but I can't live with him - it is too much of a struggle.”

Can we put our own need for power aside in order to save our clients from the destructive consequences of their need for power?

Glasser says at p. 147:

“Most serious conflicts evolve from an attempt to control others

⁵ Glasser, William (1984) *Control Theory*, New York, NY: Harper & Row, Publishers, Inc.

who will not accept our control, as what we want does not satisfy them.”

Our job, then, is to come up with a single behaviour that will satisfy both of their pictures.

Power is the ability to determine what happens. We as lawyers can not determine what happens in a Courtroom. We can merely attempt to influence it. When I took the mediation training, I made a comment as to what I thought would be the obvious answer to a certain legal question in Court and Larry Fong turned to me and said, “Will you give your client a guarantee?”

I can give my client a ‘guarantee’ in relation to a mutually agreed-upon resolution.

4. **The need for freedom;**

Recognize how one party’s need for power conflicts with the other’s need for freedom and how your need, as counsel, for power conflicts with my need, as counsel for freedom.

5. **The need for fun.**