



OVERVIEW REPORT MAY 2017

PROFESSIONALISM AND ETHICS IN FAMILY LAW

the other 90%

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01

BACKGROUND

The following report summarizes the findings of a research project that was undertaken with the support of the OBA Foundation Chief Justice of Ontario Fellowship in Legal Ethics and Professionalism Studies, and a Research Fellowship with The Winkler Institute for Dispute Resolution. The project looked at ethics and professionalism in family law alternative dispute resolution (“ADR”), specifically collaborative law¹, negotiation², and mediation³. As innovation in the provision of legal services continues to develop, it requires consideration of what constitutes ethical professional behaviour within those service models. What is meant by the term “ethical” in family law ADR? How will new professionals know what norms to apply? And how will the public

know how to measure a professional’s behaviour? While this project asked some of these questions, it also sought to begin a broader conversation that is still ongoing about understanding legal ethics in an innovative ADR process. The goal of the project was to look at all three components that serve as guidance for family law lawyers when dealing with ethical challenges in family law ADR: codes of conduct and professional standards⁴, academic research, and ethics in practice. The project included empirical research involving roundtable discussions with three groups of professionals (lawyer-mediators, settlement-focused negotiators, and collaborative lawyers), with a view to determining what is considered to be unethical behaviour in family law ADR. The results of the empirical research are presented below.⁵

¹ Collaborative law refers to a type of unbundled legal service where both parties sign a Participation Agreement that sets out the “rules” of negotiation, including: requirement of full disclosure; requirement to fix mistakes (factual and mathematical); and, the Participation Agreement includes a disqualification provision that disqualifies counsel from acting if either party commences a contested court proceeding. Collaborative law often includes the involvement of jointly retained “neutrals” who act as part of the “team”, such as a family professional (MSW, psychiatrist or clinical psychologist), or financial professional (CBV, CFP, CMA, CA, or FDS). In some jurisdictions, the collaborative team also includes a child specialist. Some “team” models also follow the “two-coach” model where both parties have their own coach instead of a neutral facilitator. For a complete list of approved neutral professional affiliations in Ontario see the OCLF website: <http://www.oclf.ca/OCLF-Membership-Standards.htm>

² Negotiation refers to negotiation in the context of an application being commenced, and where no court proceeding has begun.

³ Mediation refers to all types of mediation, including both facilitative and evaluative, and with and without counsel present. All of the mediator participants were lawyer-mediators, and the discussions were limited to mediator behaviour, not behaviour by counsel in mediation.

⁴ Ontario has several voluntary organizations which seek to regulate family law ADR processes, including but not limited to: for mediation, Family Mediation Canada (federal), Ontario Association of Family Mediation (provincial), the ADR Institute of Ontario, and Family Dispute Resolution Institute of Ontario (FDRIO). For collaborative law, the International Academy of Collaborative Professionals (IACP), Ontario Collaborative Law Federation (OCLF), and local practice groups.

⁵ The full results are available at: Deanne Sowter, “Professionalism & Ethics in Family Law: The Other 90%” (2016) 6.1 *Journal of Arbitration and Mediation* 167; and, Deanne Sowter, “Good Lawyer, Bad Lawyer: Advocacy in Family Law ADR” (forthcoming).

02

INTRODUCTION

There have been a series of reports and recommendations looking at the Canadian family justice system that call for reform.⁶ Many of the observations include the recommendation that ADR processes are a way to better facilitate the conflicts experienced by separating families.⁷ While reform looks to ADR, and many lawyers work in the shadow of litigation, or separate from it entirely as in collaborative family law, little in the way of resources have been spent on understanding what constitutes ethical behaviour in these new innovative processes.⁸

The jurisprudence and academic literature focus on the sharp practice and legal bullying that occurs in litigation.⁹ However, only 1% of divorce cases will reach the trial stage¹⁰, and 80% of divorces are uncontested¹¹ – meaning that the parties have settled outside of the courtroom. These statistics do not include those families who separate but never divorce because they were either living common law or chose to separate without divorcing.¹² Research shows that 11.5% of Canadians aged 15 and older have separated or divorced in their lifetime, and that 41% of marriages in Canada will end by the 30th year of marriage.¹³ Nearly half of all Canadians over 18 will experience a family or civil matter within any three-year period.¹⁴ Separation and divorce affects a staggering portion of the population and has a direct impact on children and therefore Canada's future. Yet, despite these statistics and the emotional and financial impact of a legal dispute¹⁵, lawyers working with families outside of litigation are often operating with little guidance with respect to expected behaviours and sometimes without procedural or substantive rules.

This project was undertaken in order to begin to fill the gap in our understanding of what it means for a professional to behave ethically in family law ADR. The study revealed that ADR has been around long enough for behavioural norms to begin to emerge, some of which are consistent across all processes, and others of which are unique to each process. More research is required; however, it seems clear that professional codes ought to be revised to incorporate the realities of practicing as a non-adversarial family lawyer.¹⁶ What follows is an overview of the results of the research project.

⁶ See e.g. Action Committee on Access to Justice in Civil and Family Matters, *Final Report of the Family Justice Working Group: "Meaningful Change for Family Justice: Beyond Wise Words"* (April 2013) [Cromwell Report]; Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil and Family Justice: A Roadmap for Change" (Ottawa, 2013) [Roadmap]; Law Commission of Ontario, "Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity" (Toronto, February 2013) [LCO]; Canadian Forum on Civil Justice, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report" (Toronto, 2016) [CFCJ].

⁷ Cromwell Report, *ibid* at 2.

⁸ Julie Macfarlane, *The New Lawyer* (Vancouver: UBC Press, 2008) at 191; Cromwell Report, *ibid* at 30-31; see also: John Paul Boyd, "The Need for a Code of Conduct for Family Law Disputes" *Slaw* (29 April 2016) <http://www.slw.ca/2016/04/29/the-need-for-a-code-of-conduct-for-family-law-disputes/comment-page-1/#comment-947704>; Robert P. Burns, "Some Ethical Issues Surrounding Mediation" (2001-2002) 70 *Fordham L. Rev.* 691; Robert A. Baruch Bush, "A Study of Ethical Dilemmas and Policy Implications" (1994) 1 *J. Disp. Resol.* 1; Michael Coyle, "Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?" (1998) 36.4 *Osgoode Hall L J* 625; Hilary Linton, "Practical, Ethical Guidelines for Comprehensive Family Mediation" (2003) available online: http://www.riverdalemediation.com/pdfs/articles/Ethical_Guidelines_for_Family_Mediation.pdf; Julie Macfarlane, "The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases" (Family, Children and Youth Section, Department of Justice, Canada, 2005); Julie Macfarlane, "Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model" (2002) 40.1 *Osgoode Hall L J* 49; Lawrence Maxwell Jr., "Ethical Considerations in Collaborative Practice" Available online: http://www.americanbar.org/content/dam/aba/unacategorized/dispute_resolution/just-resolutions/Lawrence_Maxwell.authcheckdam.pdf; Martha Simmons, "Increasing Innovation in Legal Process: The Contribution of Collaborative Law" (2015) *Osgoode Hall Law School Dissertation*; Martha Simmons, *Mediation: A Comprehensive Guide to Effective Client Advocacy* (Toronto: Emond, 2016); George Tsakalis, "Negotiation Ethics: Proposals for Reform to the Law Society of Upper Canada's Rules of Professional Conduct" (2015) 5:4 *UWO J Leg Stud* 3; Judy Van Rhijn, "Family Dispute Resolution Body Hopes to Set Standards", *Law Times*, (11 April 2016) at 13.

⁹ See e.g. Esther Lenkinski, Barbara Orser and Alana Schwartz, "Legal Bullying: Abusive Litigation within Family Law Proceedings" (2003) 22 *CFLQ* 337; Lorne H Wolfson and Adam N Black, "Incivility and Sharp Practice in Family Law" (2012) 31 *CFLQ* 275.

¹⁰ Mary Bess Kelly, "Divorce Cases in Civil Court, 2010/11" *Juristat*, Statistics Canada catalogue no. 85-002-X (March 2012) at 5 and 13 (Based on six reporting provinces and territories; excludes Ontario because Ontario includes trials for uncontested divorces which renders the figures incomparable).

¹¹ *Ibid*, at 5 (There were 113,000 divorces in the seven reporting provinces and territories in 2010/11, which is 35% of all family law cases); see also, Mary Allen, "Family law cases in the civil courts, 2012/13" *Juristat*, Statistics Canada catalogue no. 85-002-X (April 2014) at 3 (There were 318,000 active family law cases in the eight reporting provinces and territories.)

¹² Statistics Canada, *2011 Census of Canada: Topic-based tabulations – Census Family Status, Age Groups and Sex for the Population in Private Households of Canada, Provinces, Territories, Census Metropolitan Areas and Census Agglomerations*, 98-312-XCB2011026 (The 2011 Census showed that there were 12,587,900 married spouses and 3,135,810 common-law partners).

¹³ The Vanier Institute of the Family, "By the Numbers: Separation and Divorce in Canada" (December 2013).

¹⁴ CFCJ, *supra* note 6 at 2.

¹⁵ CFCJ, *ibid* at 11-12, 16 (Canadians spend approximately \$6,100 on legal problems, which is almost as much as Canadian households spent on average on food in 2012, and almost three times as much as they spent on out-of-pocket health care expenses (\$2,285); 51% of the respondents surveyed claimed to suffer stress or had emotional difficulty as a direct consequence of having a legal problem; the cost to the state as a result of social assistance, loss of employment, mental and physical health issues, caused by experiencing a legal problem is approximately \$800 million per year).

¹⁶ See also, Cromwell Report, *supra* note 6 at 31 ("Recommendation #5: That Law Society regulation of family lawyers explicitly address and support the non-traditional knowledge, skills, abilities, traits and attitudes required by lawyers to optimally manage family law files.").



03

METHOD

The study is based on six roundtable discussions that took place between February and April 2016; two discussions focused exclusively on each process: mediation, negotiation, and collaborative law.¹⁷ The discussions were each ninety minutes in length. Each roundtable discussion started with the same question, “What is unethical behaviour” in that particular process.¹⁸ The participants were also asked about pressures to settle, and specific issues related to the disclosure of information. The roundtable discussion questions are attached at Appendix “A”.¹⁹

¹⁷ There were twenty-eight participants in total, an average of five participants in each discussion. All of the research subjects were guaranteed confidentiality and anonymity in accordance with York University’s Office of Research Ethics protocol. Of the twenty-eight participants, 68% were female and 32% were male. All of the participants were from the Greater Toronto Area. The participants had been practicing law for between nine and thirty-five years. Of the twenty-eight participants, 86% had completed their collaborative law training (between the years 2000 and 2015); and, 68% had completed their mediation training (between the years 1992 and 2014). The participants were asked whether they offered the following process options: litigation, negotiation, mediation, and collaborative law. Only 50% of the participants offered litigation; 89% offered all three ADR options. The participants were all selected through the researcher’s personal contacts.

¹⁸ The participants were told to frame their discussion within the postmodern view of ethics, meaning that “ethics” and “professionalism” are distinct. For a more detailed discussion of postmodernism, see: Alice Woolley, “The Problem of Disagreement in Legal Ethics Theory” (2013) 26-1 *Canadian Journal of Law and Jurisprudence* 181; Trevor Farrow, “Sustainable Professionalism” (2008) 46.1 *Osgoode Hall LJ* 51; Alice Woolley, *Understanding Lawyers’ Ethics in Canada* (Markham: LexisNexis Canada, 2011) at 35; and, Alice Woolley et al, *Lawyers’ Ethics and Professional Regulation* (Markham: LexisNexis Canada, 2012) at 14-15

¹⁹ A gap in this research, which will be remedied in a follow-up study, is that all of the participants were from the Greater Toronto Area and thus may be practicing in a community of practice that influences what is and what is not acceptable ethical behaviour.

04

unethical **BEHAVIOUR**

The following is an overview of the themes that emerged throughout the roundtable discussions. For each process, the participants conceptualized the boundaries of acceptable behaviour in order to articulate what may or may not be ethical within that process.

<i>Universal Issues</i>	4.1
<i>Unethical Behaviour In Negotiation</i>	4.2
<i>Unethical Behaviour In Mediation</i>	4.3
<i>Uncollaborative Behaviour In Collaborative Law</i>	4.4
<i>Trust And Relationships</i>	4.5

UNETHICAL *behaviour*

NEGOTIATION

The participants generally concluded that family law ADR requires a “higher” or distinct ethical standard. They suggested that ADR ought to be conducted in a fair and respectful manner, without causing clients to feel duress, or as though they are being treated unfairly or are being intimidated. As a result, they concluded that any behaviour that causes parties to feel that way, breaching a basic ethical standard or approach to the negotiation, would be unethical as a result. Some of the participants also clarified that respectful behaviour does not mean a lawyer cannot be aggressive when necessary, but that an awareness is required to ensure that the aggressive behaviour does not become unethical. The challenge is that an ethical atmosphere can only be created when both lawyers subscribe to the same maxim.

COLLABORATIVE LAW

Collaborative lawyers subscribe to a shared value approach which is solidified by entering into the Participation Agreement (“PA”).²⁰ The participants discussed two types of behaviour: “unethical” behaviour; and, “uncollaborative” behaviour. Unethical behaviour was generally thought to involve a sinister or dishonest element, such as: using the process to delay; not negotiating in good faith; using collaborative law as a strategy; and, non-disclosure. The types of unethical behaviour described are also enumerated in the Ontario Collaborative Law Federation

(“OCLF”) PA as reasons that require mandatory withdrawal by the lawyer.²¹ Zealous advocacy was also described as being unethical but it is not covered in the PA and it is enshrined in the Rules of Professional Conduct (the “Rules”).²² In contrast, “uncollaborative” behaviour was described as behaviour that is: (1) out of sync with an interest-based process; (2) out of sync with the collaborative process; or, (3) behaviour that is outside of the set protocols that breaches trust with the team, such as not having a team member’s back. The participants also discussed uncollaborative behaviour that is so extreme that it becomes unethical.

MEDIATION

The mediators defined the process as, whatever has been communicated to the parties when they entered into the mediation. I.e. Through the mediation agreement; and / or, through the mediator’s subjective understanding of the process and their role as a mediator. As a result, behaviour that falls outside of the mediation agreement or promised process would be unethical.

²⁰ OCLF Participation Agreement is available at: <http://www.oclf.ca/OCLF-Precedents.htm> [OCLF PA].

²¹ The OCLF PA includes the following as reasons for mandatory withdrawal by the lawyer: the client withheld or misrepresented material information; the client refuses to honour an agreement; the client delays without reason; or, if a client is acting contrary to the principles of the collaborative practice (i.e. uncollaborative behaviour).

²² Law Society of Upper Canada, Rules of Professional Conduct, Toronto: LSUC, 2014 at 5.1-2 (Advocacy) [LSUC Rules].

4.1 UNIVERSAL *issues*

The following five issues were discussed in all of the roundtable discussions, regardless of process. The issues are: (1) domestic violence and power imbalances; (2) the role of personal bias and self-reflection; (3) reality checking; (4) disclosure of information, lying, correcting mistakes, and misrepresentation; and, (5) unethical behaviour caused by the pressure to settle.

1. DOMESTIC VIOLENCE AND POWER IMBALANCES

The collaborative lawyers and negotiators did not raise the issue of domestic violence and power imbalances directly, though it was raised in some examples they discussed, and it is a serious concern throughout all family law practice.²³ Both mediator groups raised concerns about creating a safe process. The mediators generally agreed that it would be unethical to conduct a mediation in an environment where the mediator knew or suspected significant power imbalances to the extent that it would not allow people to freely negotiate their best deal.

2. THE ROLE OF PERSONAL BIAS AND SELF-REFLECTION

In all of the discussions there was a general sense of responsibility for what a professional brings to the process, a responsibility to be mindful of their impact. Self-reflection was discussed by several of the participants as being integral to behaving ethically, in order to ensure the professional's ego or personal bias is not being comingled with the issues, creating harm rather than facilitating a solution.²⁴ If personal bias was influencing a

professional's work it may be unethical. Acting on a personal bias was agreed to be unethical, particularly by the mediators because it means a loss of neutrality.

3. REALITY CHECKING

The participants generally agreed that behaving ethically requires a professional to maintain their objectivity and not become overly aligned with their client.²⁵ Not being overly aligned was particularly important for the mediators, to do otherwise would mean the mediator had lost their neutrality which was viewed as unethical. For negotiators and collaborative lawyers, being overly aligned was described as losing sight of the other side's perspective or taking on their client's case as if it were their own, which may lead to unethical behaviour.²⁶ As part of that responsibility, the participants described an obligation to reality check with clients. Allowing a process to continue without reality checking was consistently considered to be unethical regardless of the process. Reality checking was described as including a cost-benefit analysis of the options, but not to the point of instilling a fear of litigation.

²³ In late 2016, the OCLF commenced a project to develop protocols for handling files in the collaborative process that involve domestic violence.

²⁴ Self-reflection is built into the collaborative law process through the "debrief" amongst professionals.

²⁵ See also LSUC Rules, *supra* note 22 at 3.2-2 (Honesty and Candour).

²⁶ See also Law Society of British Columbia, *Report of the Family Law Task Force: Best Practice Guidelines for Lawyers Practising Family Law*, British Columbia: Law Society of British Columbia, July 15, 2011 at 4. It reads as follows: 2. Lawyers should strive to remain objective at all times, and not to over-identify with their clients or be unduly influenced by the emotions of the moment.

4. DISCLOSURE OF INFORMATION, LYING, CORRECTING MISTAKES, AND MISREPRESENTATION

The discussions regarding the disclosure of information fell into two categories: (1) emotional; and, (2) financial. It was agreed to be unethical not to disclose material financial information, regardless of the process.²⁷ In collaborative law, the PA requires the exchange of information, whether requested or not. Lawyers must withdraw from representing their clients if they refuse to disclose “material”²⁸ information, correct mistakes, or if they are acting contrary to the collaborative process.²⁹ As a result, it was agreed that sanctioning that type of behaviour by not withdrawing is unethical. Traditional negotiation does not have the same requirements. The collaborative law participants agreed that material information includes emotional information. In contrast, the negotiators did not agree on whether withholding material emotional information is unethical. Unlike the disclosure of information, the Rules cover lying³⁰ and mistakes³¹. The negotiators did not agree on whether it was unethical not to correct mistakes. For the mediators, the issues were slightly different, but they agreed that it is unethical to withhold relevant information. The challenging ethical issue across all of the process discussions was determining what information is “material” or “relevant”. The mediators also agreed that it is unethical to lie, except for the purpose of safe termination. The issue of disclosure of information was the most debated topic across all of the roundtable discussions.

5. PRESSURE TO SETTLE

Throughout all of the discussions there was a general consensus that it is unethical for a lawyer or mediator to pressure a client to settle by creating an atmosphere of duress; however, the negotiators did not always agree on whether it was ethical to pressure the other side to settle. The negotiators agreed that it is unethical to threaten to withdraw as counsel if the client does not accept a reasonable offer, unless the lawyer-client relationship had become untenable to the point that the lawyer could no longer do their job.³² Misrepresenting the realities of litigation was also generally agreed to be an unethical way to pressure parties to settle. The collaborative lawyers discussed complications created by the PA, in that a client may be afraid to leave the process and start over again, even if it is in their best interest to litigate. Regardless of the process, it was generally agreed that the professional needs to maintain client expectations, and a professional cannot rely on their own reputation or position of power to pressure the parties. To maintain an ethical process, it was generally agreed that the professional must give the client the room to make informed decisions, without feeling that their lawyer or mediator is pressuring them.



²⁷ The consensus on this issue is likely because a court can set aside a domestic contract or a provision in it if a party failed to disclose significant assets or debts or liabilities that existed when the contract was made; see also LSUC Rules, *supra* note 22, at 5.1-2 (Advocacy).

²⁸ International Academy of Collaborative Practitioners, Proposed IACP Minimum Ethical Standards for Collaborative Practitioners, draft 3, under consideration – not yet adopted, January 2017 at 3.1 (Disclosure of Information) and 1.0 („Material Information’ means information that is reasonably required by a client or professional to make an informed decision with respect to the resolution of the matter).

²⁹ OCLF PA, *supra* note 20.

³⁰ LSUC Rules, *supra* note 22 at 3.2-7.1 (Dishonesty, Fraud, etc. by Client or Others).

³¹ LSUC Rules, *ibid* at 7.2-2 (Responsibility to Lawyers and Others).

4.2 UNETHICAL BEHAVIOUR *in negotiation*

There were three issues that were discussed by the negotiation participants which were not raised as issues in the other process roundtable discussions: (1) chronic delay; (2) escalating the conflict and ramping up costs; and, (3) improper threats.

1. CHRONIC DELAY

The issue of chronic delay was raised in two ways: where a client has given instructions not to communicate with opposing counsel in order to maintain the status quo because it is in their favour, either: (1) with respect to time with the children; or, (2) financially. Some participants thought that if the issue related to children, it was unethical to follow the instructions. Others, however, thought that it was a service to delay the process, regardless of the reason. Many participants thought it was good advocacy to follow instructions to maintain the status quo if it was in their client's financial best interest to do so. Some participants said that if they trusted opposing counsel they would find a way to warn them if the instructions they had were to delay.³³

2. ESCALATING THE CONFLICT AND RAMPING UP COSTS

Most participants expressed concerns that suggested it is unethical to escalate the conflict by exchanging "nasty letters". Whereas others said that it is a service to contest everything and make the process as expensive as possible if that is what the client instructed, and that might include sending "nasty letters". There were several types of letters that were given as examples of unethical behaviour: nasty letters written by the client and

signed by the lawyer³⁴; letters aimed at attacking opposing counsel³⁵; letters aimed at provoking the client instead of with an objective of settlement. Other examples of escalating the conflict included bargaining tactics such as leveraging an emotional response by forcing the sale of a beloved cottage, or using the children as bargaining chips. For many of the examples discussed, several of the participants suggested they would follow client instructions, albeit under protest. Others said emotional responses were out of their purview and therefore they had no problem following this type of instructions.

3. IMPROPER THREATS

Improper threats fell into two categories: (1) threatening criminal proceedings³⁶; and, (2) threatening litigation. Threatening litigation was thought to be good advocacy if it is for the purpose of provoking a party to come to the negotiation table, provide disclosure, or adhere to a timeline. Examples were also discussed where the threat was made for the purpose of provoking capitulation when the other side does not have the financial resources or stomach for litigation, or where a more senior lawyer is bullying a junior lawyer. In those instances, some participants suggested the behaviour is unethical, whereas others disagreed.

³² LSUC Rules, *ibid* at 3.7 (Withdrawal from Representation).

³³ LSUC Rules, *ibid* at 2.1-1 (Integrity).

³⁴ LSUC Rules, *ibid* at 3.2-7.1 (Dishonesty, Fraud, etc. by Client or Others).

³⁵ LSUC Rules, *ibid* at 7.2-1 (Courtesy and Good Faith)

³⁶ LSUC Rules, *ibid* at 3.2-5 (Threatening Criminal Proceedings).

4.3 UNETHICAL BEHAVIOUR *in mediation*

There were two issues that were unique to mediation: (1) not maintaining neutrality; and, (2) whether the mediator is responsible for a fair outcome.

1. NEUTRALITY AND OPTICS

The participants agreed that neutrality is central to maintaining ethical behaviour as a mediator. If either party were to view the mediator's behaviour as biased or showing favouritism, the perceived loss of their neutrality could indicate unethical mediator behaviour. The challenge for mediators is that the perceived behaviour may have been passive or unintentional. The participants spoke of the need to be particularly careful when one party requires more reality checking than the other, which could be perceived as bias. Several participants also spoke of optics, of the care they take in their body language to ensure that the perception they give is that of an impartial neutral. Finally, the participants generally agreed that consent is required for the mediator to make suggestions as to the outcome.³⁷

2. A FAIR OUTCOME

Whether the mediator needs to consider the fairness of the outcome was a concern for a few of the participants. The perception of fairness varied between what the parties would subjectively consider to be fair, as compared to the objective legal model in consideration of the facts of the case. Many participants said they would not mediate an agreement that was objectively unfair (too far outside the legal model), especially if the clients were unrepresented. Others said it would only be ethical to mediate an unfair agreement if they had reality checked with both parties extensively.



³⁷ The issue of types of mediation is outside the scope of this research. The participants practiced a mix of mediation types: facilitative, evaluative and transformative. Several of the facilitative mediators claimed that imposing the mediator's view on the outcome was unethical if it was done without consent. Evaluative mediation however involves the mediator making recommendations as to the outcome. For more information on types of mediation see: Mavis Maclean and John Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Portland, Oregon: Hart Publishing, 2016); and, Martha Simmons, *Mediation: A Comprehensive Guide to Effective Client Advocacy* (Toronto: Emond, 2016).

4.4 UNCOLLABORATIVE BEHAVIOUR *in collaborative law*

As discussed above, unethical behaviour in collaborative law is generally prohibited by the PA. Collaborative lawyers act as settlement advocates as opposed to zealous advocates, which changes the nature of their behaviour and what may be expected throughout the process.



THE PARTICIPANTS DESCRIBED SETTLEMENT ADVOCACY AS:

- varies in strength depending on the client needs (facilitative to more traditional – without being adversarial);
- interest-based – considers more than the legal model (i.e. client interests);
- encompasses consideration of third-party interests (i.e. the family unit);
- requirement to reality check; and,
- empowers the client to make informed decisions.

EXAMPLES OF A BEING A “GOOD” SETTLEMENT ADVOCATE INCLUDED:

- letting go of personal judgement;
- modeling good behaviour;
- listening to the client’s goals and interests;
- teaching the client to communicate effectively with their spouse; and,
- acknowledging that their counterpart counsel is working just as hard with their own client.

With respect to “uncollaborative” behaviour, the issues discussed fell into the following two categories: (1) behaviour that is out of sync with an interest-based process; and (2) behaviour that is out of sync with the collaborative process.

1. BEHAVIOUR THAT IS OUT OF SYNC WITH AN INTEREST-BASED PROCESS

The core of negotiation in collaborative law is interest-based negotiation.³⁸ Behaviour that does not subscribe to the settlement advocacy model was described as uncollaborative. Other behaviours that were described as uncollaborative and contrary to an interest-based process included: using an adversarial tone or traditional adversarial language; setting a tone that would be similar to what would typically be used on a traditional litigation file; and, cherry-picking between negotiation methods (interest based versus rights based).

2. BEHAVIOUR THAT IS OUT OF SYNC WITH THE COLLABORATIVE PROCESS

Behavioural norms in the collaborative process are often unique to the local practice group³⁹, or individual team members involved, and they form the basis of some expected behaviours. The behaviours discussed as uncollaborative included: using the term “client” instead of their names; giving a draft agreement or progress notes to the client to review first prior to the rest of the team; forwarding un-sanitized emails between team members to the clients; and, litigation consults⁴⁰. Uncollaborative behaviour that is contrary to the process was also described as “moving the negotiation table backwards”, which occurs when one lawyer has worked with their client to “give” on something, and their counterpart counsel moves the negotiation table backwards instead of forwards, or there is no movement at all.



³⁸ Roger Fisher and William Ury, *Getting to Yes* (Toronto: Penguin Group, 2011)

³⁹ Practice groups are unique to collaborative law. They are formal groups of multidisciplinary professionals who gather frequently throughout the year to network, design protocols, discuss issues, provide guidance, train new members, and provide a source of referrals.

⁴⁰ Litigation consults are a form of reality checking. They are used similar to a second opinion but involve the client consulting a litigation lawyer. They may be problematic when one client has obtained a litigation consult and the other client has not.

4.5 TRUST *and relationships*

The theme of trust came up frequently in all of negotiation and collaborative law roundtable discussions. Whether the participant trusted their counterpart counsel had a direct impact on how they viewed behaviour and whether it was unethical or uncollaborative in some instances, and it often influenced how they suggested they would handle an ethical dilemma. Both negotiator groups often qualified behaviours or distinguished their response if the opposing counsel was a trusted colleague, suggesting that if they trust opposing counsel there may be a higher threshold as to what constitutes ethical behaviour.

1. JOINT SETTLEMENT RECOMMENDATIONS

Both negotiator groups raised concerns about joint settlement recommendations, which can occur if both lawyers trust each other and can see a settlement where the clients cannot. Counsel may be tempted to work together to craft the negotiation so that the parties agree to a settlement that the lawyers have predetermined. It was generally agreed that this type of behaviour is unethical because the lawyers are essentially duping the clients, acting paternalistically, and it is unfair to the clients. However, the participants generally agreed that joint settlement recommendations are not unethical if they are conducted in a manner that allows the clients to make the decisions.⁴¹

2. COLLABORATIVE LAW

Trust was described as being integral to the collaborative process. The participants talked of close friendships that develop as a result of working together frequently, which benefits the process. They also raised concerns about the importance of a full debrief after a file is finished in order to avoid carrying any personal difficulties over to the next file. Both of the groups also described conflicts of interest that have emerged where one of the neutrals has either acted for or been represented by one of the lawyers, and the relationship is not disclosed prior to the clients jointly retaining the neutral. There is currently no protocol in Toronto for dealing with these conflicts.



⁴¹ Example of unethical joint settlement recommendation: If the wife will not settle unless she has the final word, and the lawyers cooperate to structure the offer process in a way that gives her that final say. So, if the wife's lawyer says to the husband's lawyer, "Would you consider giving me an offer of \$120k, so that I can give you an offer of \$100k." Whereas, an ethical recommendation would be as follows: Husband's lawyer says to wife's lawyer, "I believe your client needs to have the final say. I can tell you my client will accept \$100k, but I appreciate that it needs to come from your camp, so why don't you go and write it up and I'll present it to my client."

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CONCLUSION

The research presented in this report is the first empirical study of Canadian professional behaviour in family law ADR. The results are just the tip of the iceberg and further research is required to fully understand the landscape of family law ADR, and what behaviours are and should be expected. Access to justice reforms and process innovation often focus on family law.⁴² Lawyers are working in new environments, processes that are still evolving, and as a result expected behaviour is unclear beyond what is encompassed in the Rules⁴³. In collaborative law, the process is based on a shared value approach to negotiation that is secured by a PA, which sets the ethical bar high, but the participants described a tension between those values and what is enshrined in the Rules. Mediation and negotiation do not have the same defined value system, and lawyer-mediator behaviour is not covered by the Rules at all. The negotiators often struggled to reach a consensus which seemed due in part to the lack of guidance under the Rules for the issues discussed, and in part due to the lack of an enforcement mechanism available for unethical behaviour. A larger community of practice was sometimes cited by the negotiators as a reason to protect one's professional reputation by behaving ethically.

Lawyers are central to the experience that couples face when going through what is considered to be one of the most stressful events a person can experience in a lifetime. Professional behaviour directly impacts the process, personal safety if domestic violence is involved, and the outcome. This research begins to define what behaviours by the professional practicing family law ADR are ethical and what behaviours are not. The results presented in this report may serve as a basis for further research to establish a distinct ethical standard for family law ADR in order to better serve and protect the families who need to access the family justice system.

⁴² See for example, Cromwell Report, *supra* note 6; Roadmap, *supra* note 6; LCO, *supra* note 6 at 28-29; Legal Innovation Zone, Ryerson University, "Legal Innovation Zone's Family Reform Community Collaboration Report" (Toronto, February 2016).

⁴³ The original codification of legal ethics was by the Canadian Bar Association in 1920. By the 1970's family mediation began to develop, and by 1986 the Divorce Act was amended to require lawyers to advise their clients about reconciliation, mediation and settlement. The Rules require that a lawyer advise their client of their ADR options but they have not been drafted to encompass the skills and expertise required by family law lawyers practicing ADR. In addition, the Rules do not apply to lawyers who are acting as mediators.

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recommendations **AND NEXT STEPS**

RECOMMENDATION 1

Further research is required and is currently being undertaken, including: comparative research with participants practicing in other areas of Ontario; comparative research with other provinces; comparative research focusing on the multidisciplinary aspects of collaborative law and mediation; and, further research on ethical issues as they relate to domestic violence in all three ADR processes. In addition, further statistical research is required on how family lawyers are currently practicing across Canada.

RECOMMENDATION 2

Update the Rules. The Cromwell Report recommended that the “Law Society regulation of family lawyers explicitly address and support the non-traditional knowledge, skills, abilities, traits and attitudes required by lawyers to optimally manage family law files.”⁴⁴ To that end, the issues discussed by the participants in this study may be used to inform guidelines and shared values that may inform revision to the Rules, particularly with respect to advocacy.

RECOMMENDATION 3

Training on unethical behaviour. One of the first steps in altering behaviour is to be able to identify when someone is behaving unethically. Once Recommendation #1 is complete, steps can begin to improve lawyer and mediator training by working with the various regional organizations to establish trainings on identification of unethical behaviour, ideally in collaboration with the Law Societies and other interested stakeholders such as law schools.

⁴⁴ Cromwell Report, *supra* note 6 at 6.

APPENDIX “A”

roundtable discussion questions

NEGOTIATORS

1. What is “unethical behaviour” in family law negotiations?
2. As in love and war, is all fair in negotiating?
3. What do you do if you know your client wants to:
 - a. Leverage their spouse’s emotional response.
 - b. Bluff or exaggerate (is there a difference between bluffing, exaggerating and outright lying?)
 - c. Misrepresent material information.
4. What type pressure is acceptable for a lawyer to place on his or her client to settle?

MEDIATORS

1. What is “unethical behaviour” in mediation? (by the mediator)
2. Are mediators responsible for fair outcomes? How do you know how far you can / should push to achieve a fair outcome?
3. How do you determine what information to share with the other side?
4. What do you do when you know one side is misrepresenting facts or law to the other side or to you? (unethical client behaviour)
5. What role do you play in designing, transmitting, and formalizing offers, and solutions?
6. Does the pressure to reach a settlement inform your decision making?

COLLABORATIVE LAWYERS

1. How do you define “uncollaborative” behaviour? What is “unethical behaviour” on a collaborative file?
2. What does it mean to be an advocate for your client in the collaborative process? Does “zealous advocacy” have a place in Collaborative Family Law?
3. What do you do if:
 - a. you know that your client is withholding or misrepresenting information that is material to the collaborative process? How do you define “material”?
 - b. If the client’s real motivations for making a decision differ from what they “put into the room”.
 - c. If the client wants to bluff or exaggerate his or her position in an effort to “get a better deal”.
4. Have you ever felt that you or another collaborative professional pressured a client to stay in the process when perhaps it was not in their best interest? How do you ensure that the client is making his or her own decision?
5. Have you ever faced a situation where your personal relationship(s) with the other collaborative professionals have had a detrimental impact on the process? (I.e. power imbalance, close friendships/relationships among team members, business relationships among team members.)