

The Law Society
of British Columbia



REPORT OF THE FAMILY LAW TASK FORCE

After considering the following two reports, the Benchers, at their May 2, 2008 meeting, approved the following resolution:

"That the Family Law Task Force, in collaboration with the CBA, develop guidelines for the practice of family law lawyers."

The Law Society *of British Columbia*



Report of Family Law Task Force

For: The Benchers

Date: April 18, 2008

Purpose of Report: Discussion and Decision

Prepared on behalf of: Family Law Task Force

**Policy and Legal Services Department
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EXECUTIVE SUMMARY

The Benchers of the Law Society of British Columbia, at their January 26, 2007 meeting, struck the Family Law Task Force, with the following mandate:

- (a) determine whether an amendment to the *Professional Conduct Handbook* is necessary;
- (b) determine whether a code of conduct or guidelines for family lawyers is necessary, and if so whether it should be mandatory or voluntary, and who should be responsible for developing it; and
- (c) report back to the Benchers with its conclusions.

The decision to strike the Task Force arose following consideration by the Benchers of the opinions of the Access to Justice Committee, the Ethics Committee, the Independence and Self-governance Committee, and the Family Law Working Group, respecting the recommendations in the Ministry of the Attorney General, “A Code of Practice for Family Lawyers”, Discussion Paper, March 2006, and Recommendation 36 of BC Justice Review Task Force, “A New Justice System for Families and Children”, May 2005. Recommendation 36, suggested in part:

that the Law Society of BC recognize the changing roles and duties of family law lawyers and develop a Code of Practice for Family Lawyers to give guidance in the balancing of a lawyer’s partisan role with the potential harm it may cause to other family members, especially children.

The Family Law Task Force reviewed the material in this report’s selected bibliography, as well as conducting a jurisdictional study of family law, best practice guidelines from the United States, the United Kingdom and Australia. In addition, the Task Force engaged in limited consultation with members of the some of the CBA Family Law Subsection, collaborative law lawyers, and the CBA family law Provincial Chairs.

During the course of its research and consultations the Task Force became aware of issues that flowed from its mandate, but which were not anticipated at the time its mandate was set. This is perhaps not surprising, as the process of answering difficult questions is a dynamic and heuristic one: unexpected discoveries occur, and at times an imperfect question leads to a richer answer than would otherwise be possible. This report contains information on these related matters, and the Task Force believes it will provide the Benchers with an adequate knowledge base for determining how best to proceed.

The Task Force’s mandate raises two main questions. The Task Force believes (for the reasons set out in this report) that family law is a unique area of practice, and it is important to improve professionalism in this area of law in order to better protect the public and, in particular, to reduce the harm caused to children by family law disputes.

Question 1: Is an amendment to the *Professional Conduct Handbook* necessary?

Answer: No. It is not *necessary* to amend the *Handbook*, as the Task Force believes the *Handbook* contains adequate guidelines for professionalism.

Question 2: Is a code of conduct or guidelines for family lawyers necessary, and if so, should it be mandatory or voluntary and who should develop it?

Answer: The *Handbook* is a sufficient code. However, best practice guidelines for professionalism in family law should be developed. One of the following approaches should be adopted:

1. The Law Society of British Columbia should develop best practice guidelines for professionalism in family law. If the Benchers endorse this approach they may wish to continue the Family Law Task Force, with an amended mandate, for this purpose. Alternatively, the Benchers may wish to strike a new Task Force. In either case, the Benchers should consider this within the framework of their strategic planning and priorities; or
2. Given that the CBA has expressed a tentative interest in developing best practice guidelines for family law lawyers, the Benchers should monitor the CBA's efforts and:
 - a. decide whether to offer the assistance of two Benchers, in a non-official capacity, to facilitate the CBA's efforts;
 - b. review the material the CBA creates and decide whether to endorse it, in whole or in part, as best practice guidelines for professionalism in family law (e.g. perhaps as an appendix to the *Professional Conduct Handbook*);
 - c. when the Benchers are setting priorities for 2009, assess the state of the CBA's progress and determine whether the initiative is progressing and, if it is not, determine whether the Benchers should strike a task force to create best practice guidelines for professionalism in family law.

The recommendations of the Task Force, along with a summary of its research and findings are set out in the body of this report.

PART I: BACKGROUND INFORMATION AND ANSWERS TO THE QUESTIONS RAISED IN THE TASK FORCE’S MANDATE

In May 2005, the British Columbia Justice Review Task Force’s Family Justice Reform Working Group published, *A New Justice System for Families and Children*. Their mandate was to explore ways to change the family law system to better serve children and parents who engage it. The report contained 37 recommendations, including Recommendation 36, which suggested in part:

that the Law Society of BC recognize the changing roles and duties of family law lawyers and develop a Code of Practice for Family Lawyers to give guidance in the balancing of a lawyer’s partisan role with the potential harm it may cause to other family members, especially children.

In March 2006, the Ministry of the Attorney General published a discussion paper titled, *A Code of Practice for Family Lawyers* (“Discussion Paper”). The Discussion Paper explored family law reforms that have taken place in other jurisdictions, including the United States, the UK and Australia. These reforms have included guidelines for lawyers in their role of family law advocate. The Discussion Paper concluded, at pages 17-18:

To move forward, two separate, but related initiatives might be considered:

- A role for the Law Society of British Columbia. The Law Society (perhaps with research or other assistance of the Ministry of Attorney General) may consider striking a committee to draft an Appendix to the *Professional Conduct Handbook*, for family lawyers to:
 - incorporate a code of conduct mandating the obligation set out in the *Divorce Act* to discuss with clients the advisability of negotiation and the availability of mediation facilities; and
 - provide lawyers with guidance in balancing advocacy demands with an ethic of “do no harm”, particularly to children.
- Broad consultation with the family law bar. The Ministry might explore with the bar the possibility of striking a committee or advisory group to research and develop a set of family law protocols that are consistent with and give guidance to all lawyers in:
 - building a family practice model that brings consensus building and problem solving values to the forefront; and
 - promotes a non-adversarial norm in family law matters.

The Ethics Committee, the Independence and Self-governance Committee, and the Access to Justice Committee considered aspects of these issues in 2006.

The Ethics Committee provided the Access to Justice Committee feedback on Recommendation 36, suggesting that two kinds of initiatives might help achieve the objectives. First, lawyers could be educated to understand the role they have in guiding client conduct. Second, lawyers could be better educated to understand issues in family law that might require them to take a greater than usual role in managing client conduct. The Ethics Committee felt a Code of Practice might assist with education, but did not consider whether such a Code should be part of the *Professional Conduct Handbook*. The Ethics Committee was of the view that lawyers might not understand that their duty of loyalty does not prevent them from counseling the client respecting certain actions. Lawyers have the right to influence client behaviour to attain ethical outcomes, and to withdraw when instructed to act unethically. The Ethics Committee did not think the traditional role of the lawyer should include a formal obligation to children or other parties involved in, or affected by, family litigation. The Committee was of the view that lawyers have sufficient latitude to influence client conduct to promote proper dispute resolution.

The Access to Justice Committee felt that this is an important issue, but not an access to justice issue *per se*. They were of the opinion that, to the extent the government might push for a code of practice for family law lawyers, there is an independence issue, and referred the matter to the Independence and Self-governance Committee for its views. The Access to Justice Committee posited that part of the problem is some family law lawyers over-identify with their clients and lose objectivity. The Committee was of the view that educating these lawyers to proper conduct is a worthwhile goal.

The Independence and Self-governance Committee was of the opinion that the government proposals didn't raise significant independence concerns. The best interests of children is an issue that will usually have to be considered, but the Committee cautioned that codes of conduct mandating certain considerations could handcuff lawyers in exercising judgment. The Committee felt that there is no harm in reminding lawyers to advise clients of the full range of approaches, as well as the fact that legislation like the *Divorce Act* imposes standards.

After hearing back from the Ethics Committee and the Independence and Self-governance Committee, the Access to Justice Committee referred the Discussion Paper to the Benchers for consideration at December 8, 2006 meeting. At that meeting the Benchers constituted a working group consisting of Carol Hickman, Kathryn Berge, QC, Rob Punnett, Richard Stewart, QC and Gordon Turriff, QC to determine whether the Discussion Paper raised issues that required further analysis.

The working group met on several occasions, reviewing statistics on complaints against family law lawyers and discussing the Discussion Paper.

The working group reported to the Benchers on January 26, 2007, recommending that a Task Force be struck. At that meeting the Benchers struck the Family Law Task Force, with the following mandate:

- (a) determine whether an amendment to the *Professional Conduct Handbook* is necessary;
- (b) determine whether a code of conduct or guidelines for family lawyers is necessary, and if so whether it should be mandatory or voluntary, and who should be responsible for developing it; and
- (c) report back to the Benchers with its conclusions.

For the reasons set out in this report, the Task Force answers these questions as follows:

Question 1: Is an amendment to the *Professional Conduct Handbook* necessary?

Answer: No. It is not *necessary* to amend the *Handbook*, as the Task Force believes the *Handbook* contains adequate guidelines for professionalism.

Question 2: Is a code of conduct or guidelines for family lawyers necessary, and if so, should it be mandatory or voluntary and who should develop it?

Answer: The Benchers should endorse the creation of best practice guidelines for professionalism in family law. In giving effect to this recommendation, one of the following approaches should be adopted:

1. The Law Society of British Columbia should develop best practice guidelines for professionalism in family law. If the Benchers endorse this approach they may wish to continue the Family Law Task Force, with an amended mandate, for this purpose. Alternatively, the Benchers may wish to strike a new Task Force. In either case, the Benchers should consider this within the framework of their strategic planning and priorities; or
2. Given that the CBA has expressed a tentative interest in developing best practice guidelines for family law lawyers, the Benchers should monitor the CBA's efforts and:
 - a. decide whether to offer the assistance of two Benchers, in a non-official capacity, to facilitate the CBA's efforts;
 - b. review the material the CBA creates and decide whether to endorse it, in whole or in part, as best practice guidelines for professionalism in family law (e.g. perhaps as an appendix to the *Professional Conduct Handbook*);

- c. when the Benchers are setting priorities for 2009, assess the state of the CBA's progress and determine whether the initiative is progressing and, if it is not, determine whether the Benchers should strike a task force to create best practice guidelines for professionalism in family law.

The Family Law Task Force consists of: Carol Hickman, Chair, Kathryn Berge, QC, Rob Punnett, Pat Schmit, QC, Richard Stewart, QC, Gordon Turriff, QC, and Dr. Maelor Vallance. The Task Force receives staff support by Doug Munro and Ingrid Reynolds.

PART II: METHODOLOGY AND ANALYSIS

The Task Force collected core material for its initial meeting on April 4, 2007, consisting of the first seven items in this report's selected bibliography. The Task Force recognized that in order to consider whether amendments to the *Professional Conduct Handbook* are necessary, as well as assessing the necessity of a code of practice or best practice guidelines for family law lawyers, they needed to collate the existing best practices, as referenced in the Discussion Paper, and identify what gaps, if any, exist in British Columbia. In order to do this, the Task Force created a comparative table that set out the principles contained in items five through seven in the selected bibliography, and matched those principles against examples in Canadian sources such as the *Professional Conduct Handbook*, legislation, Benchers Bulletins, etc.

The process of creating a comparative table affirmed the Task Force's suspicion that many best practices and procedures are already articulated, but they are not contained in a single resource, nor is there any articulation of the need for lawyers to advise clients of the fiduciary duty they owe to their children. The Task Force discussed the pros and cons of creating a consolidated resource that set out best practices. The Task Force is of the view that, from a regulatory perspective, it is not desirable to establish multiple codes of conduct, as doing so introduces confusion where clarity is sought. However, the Task Force believes that from an educational perspective, a consolidated resource that sets out the best practices in family law could be a useful tool for students, lawyers and clients. The purpose of such a best practices guide would be to raise the standard of family law practice so as to better protect the public.

The Task Force also contacted a representative of the Ministry of the Attorney General to determine whether the recommendations were ones the Ministry was planning to press ahead with. The Task Force felt it was important to determine whether the potential independence concerns were more than just theoretical. The Task Force was advised that the Ministry would not be creating a code of practice for family law lawyers or imposing duties on lawyers to act in the interest of parties other than their clients. The Ministry affirmed its willingness to provide research information to assist the Task Force in its deliberations, however, and provided the Task Force some statistics on marriage, divorce and family law filings in British Columbia.

As part of its process, the Task Force considered the following issues and engaged in some limited consultation.

a). *What, if anything, is unique about family law?*

Family is the core relationship that binds human beings together: it informs our understanding of self, and our relationships with others, and has a profound impact on how communities form and function. Family constitutes the private sphere of our lives, yet is interwoven in profound ways with our public lives. Because of this, family has the capacity to affect and influence virtually everything we do. Family, perhaps more than any other relationship, touches the emotional heart of who we are. As such, the

dissolution of the family unit can have profound emotional, economic, private and public ramifications. Family, more so than any other social relationship, often involves the interests of people who are particularly vulnerable: namely, the elderly and children.

The Task Force believes that family law is unique; not because the issues of economics, privacy, emotion, and vulnerability of third parties do not exist in other areas of the law, but because these issues are pervasive in family law, and often magnified. In addition, family law can also deal with family violence, including founded and unfounded allegations of spousal and child abuse. Such cases bring the family law lawyer face to face with complexities that other practitioners will rarely confront. As such, family law presents unique challenges to the goal of addressing adversarial proceedings in an objective, dispassionate manner. In fact, it provides fertile ground for a lawyer to over identify with his or her client, and become a simulacrum of the client, rather than a rational advocate for the client's cause.

In addition to the factors mentioned, the Task Force also considered the high profile nature of family law. As the Benchers are aware, the government is undertaking a detailed review of family law reform and intends to unveil a modernized *Family Relations Act* by 2010.¹ Despite concerns that have been raised about the disappearing civil trial, family law disputes are still being litigated. Approximately 78% of the people who have used the British Columbia Supreme Court Self-help and Information Centre are involved in a family law matter.² The Task Force considered statistics from the Ministry of the Attorney General indicating that there are approximately 22,000 marriages a year in BC, and approximately 12,000-13,000 new court filing each year, with a divorce rate in the province of about 38%. In addition, approximately 56% of divorcing couples have children at home. Of considerable importance from the Law Society perspective is the fact that the greatest volume of complaints the Law Society receives are in the area of family law. In addition, family law complaints involve a much higher level of complaints from the opposing party or opposing counsel than complaints in other areas of practice, and that a greater proportion of such complaints are founded than those arising from other areas of practice.³

b). *Review of approaches in the US, UK and Australia*

The Task Force read and discussed the material in the selected bibliography on approaches taken in the US, UK, and Australia. This report does not seek to summarize those documents, but the Task Force encourages those interested in their content to read them.

¹ The Task Force understands, however, that the government does not face strong family law reform lobbying efforts, and as such it is difficult to tie reform objectives to votes.

² John Malcomson & Gayla Reid, *BC Supreme Court Self-Help Information Centre Final Evaluation Report*, (August 2006), at p. 33.

³ 42.78% of founded family law complaints are made by the lawyer's client, versus 37.03% in all areas of practice (the latter statistic includes family law). 38.46% of founded family law complaints are made by the opposing party, versus 22.29% in all areas of practice. From 2001-2007, there were 417 family law complaints that led to a finding of wrongdoing out of a total of 2,053 family law complaints.

The Task Force thinks the American Academy of Matrimonial Lawyers, “Bounds of Advocacy” is a good educational document. The language is clear, and it does a good job of explaining why these issues are important. However, it is 25 pages long, and in considering whether it was suitable as a code of best practice guide, the Task Force felt a shorter document would be more functional.

The Task Force also reviewed “Resolution” from the UK, and the one page articulation of its Code is attached to this report as **Appendix 1**. The Task Force was in touch with Resolution staff to find out more about its origins and its complaint process. Part of the appeal behind the Resolution Code is that it arose at a grassroots level and worked its way up to a statement of principles that have been appended to the Law Society of England and Wales *Family Law Protocol*. The Task Force discussed the pros and cons of such best practices developing from the ground→up, or being imposed from the top→down. Ultimately, unless there is a grass roots development of best practices in family law within the province the question becomes one of choosing between top→down initiatives or the *status quo*.

Of all the jurisdictions the Task Force looked at, Australia has undergone the greatest degree of reform in the area of family law. In addition to discussing the material in the bibliography relevant to the Australian experience, the Task Force met with Assistant Professor Fiona Kelly, of UBC Faculty of Law, to get her perspective, based on her time working in Australia, on the changes that have taken place in Australia.

The Task Force is of the view that the Law Council of Australia best practices contain a number of worthwhile concepts, though the document is too large (66 pages) to be presented as a best practice guide or appendix to the *Professional Conduct Handbook*. While it is possible to compare the Australian and British Columbia experience, observations have to be qualified. Australia has operated under a unified family court for many years, and has a judiciary schooled in that system. In addition, Australia has experienced considerable family law reform over the years, going beyond the best practices articulated in the Law Council of Australia material to the development of a Child Case Program and ultimately the Less Adversarial Trial process that is in place today.

A number of factors appear to have contributed to the legislative reform in Australia, including the presence of active and aggressive fathers’ rights lobbyists, a conservative government concerned about the erosion of the nuclear family, and a perception that lawyers were causing more harm than good. The result is a less adversarial process, with a presumption of equal time for parents with the children, and mandatory counseling processes before litigants are entitled to access the trial process.

It is still too early in the Australian experience to properly weigh the good and the bad that has come of this reform. In addition, depending on the value one seeks to measure, a given result can be viewed as a success or a failure. For example, the pilot project that became the Less Adversarial Trial saw disputes being resolved much more quickly than matters that proceeded through the regular trial process. As one of the objects of the

pilot, and the Less Adversarial Trial, was to reduce the amount of time it took to resolve disputes, this result could be measured as a success. One could also argue that with the reduction in the amount of time comes a reduction in a child's exposure to an adversarial process, and by that measure the pilot was a success. However, it turned out that settlements made during the less adversarial process were less durable when compared with matters that had proceeded through the traditional, adversarial system. There are a number of potential causes for this, but one is likely that people need a certain amount of time to deal with the emotional issues that arise on the dissolution of a marriage, and an expedited trial process might not afford people sufficient time to get into the mental state they need to be in to make enduring decisions. Viewed in this light, the result could be seen as a failure (or at best a qualified success). Because of these complexities, the Task Force is hesitant to laud or condemn the Australian experience.

c). *Consultations with CBA Family Law Subsections*

The Task Force felt it was important to get a sense of the views of the family law Bar in the province regarding the need for the development of a mandatory or voluntary family law code of conduct by the Law Society of British Columbia or another body. Because the Task Force was struck for a narrow mandate, and did not have an operating budget, it decided to make presentations at the CBA Family Law subsection meetings in Victoria and New Westminster. Members of the Task Force also met with collaborative law lawyers in Victoria, and attended a meeting of the CBA provincial Chairs to discuss the work of the Task Force. The Task Force felt that supplementing its own research and views with feedback from a representative sample of the family law Bar, would make it better able to report back to the Benchers regarding its mandate.

The initial feedback the Task Force received from lawyers when they became aware of the Task Force was one of concern. It is fair to say that some lawyers practising family law felt they were being singled out as requiring a special set of rules to govern their conduct. They felt family law was a difficult area of practice and the imposition of a specialized code of conduct would not make it less so. However, other lawyers recognized that there is merit in best practices guidelines. The dominant view recognized the unique challenges that family law lawyers face, and that some practitioners engage in practices that are unprofessional and cause harm.

At the meeting with the CBA Family Law Provincial Chairs, the concept of best practice guidelines met with universal approval. The CBA representatives felt it was important that such guidelines be created by the CBA, though the value of having input from the Law Society was recognized. The dominant view was that such guidelines should be voluntary and that it would have an effect on raising the standard of practice in family law. The Task Force suggested that a concise, one page document similar to the short-form version of the Resolution Code of Conduct (see Appendix 1) was a good idea, as a long document would not be widely read. The group felt that something that could be given to clients was a good idea, and that the creation of a short best practices statement would not preclude creation of a larger best practice guidelines by the CBA or others in due course.

d). *Views of the Law Society Professional Conduct Department*

The Task Force sought feedback from Maureen Boyd, Stu Cameron, Jaia Rai and Andrea Winnograd from the Law Society's Professional Conduct Department, regarding the sufficiency of the current *Professional Conduct Handbook* provisions in dealing with family law complaints and discipline matters.

The staff felt that there was value in best practice guidelines, including an approach similar to the short form code from Resolution, because that would allow the Law Society to point to specific norms in the standard of conduct (e.g. refraining from engaging in inflammatory communications). The staff felt that a best practice guide should be developed collaboratively between the Law Society and CBA, but not by one organization without reference to the views of the other. They said there was some merit in the guide forming an Appendix to the *Professional Conduct Handbook*, noting that the concept is used in Appendix 3 (Real Property Transactions).

It was also observed that it is unlikely this will change some seasoned practitioners, and some will argue that the adversarial system permits them to be zealous advocates. The idea of education and transforming the culture over time was seen to be a good one, and the need for positive mentoring was raised. They felt there was value in being able to point to a standard that articulates conduct that will be deemed unacceptable even if the client instructs the lawyer to engage in it. Staff felt that the biggest issue is over-identification with the client, and that maintaining objectivity is essential. One example that was used is the lawyer who has so over-identified with the client that the lawyer acts without instructions because they know what the client will want.

e). *Professionalism*

Throughout its deliberations, the Task Force discussed professionalism. It is important to note that professionalism is not simply an issue for family law lawyers. The Task Force believes that its observations regarding professionalism are valid for lawyers in general. As such, while in this report professionalism is discussed in the context of family law, it should not be read as being an issue that is only relevant to that area of practice. Because of the nature of family law, however, certain unprofessional behaviour is more prevalent. What follows are some examples of how professionalism can be improved. The Task Force believes these steps will help reduce some of the harmful conduct that occurs in family law cases. An adversarial dispute resolution system should not be a sanctuary for unethical, malicious, or hostile behaviour. As a matter of professional responsibility, a lawyer is supposed to avoid such behaviour. The Task Force believes that a lawyer has the authority to counsel his or her clients not to engage in such behaviour either. A non-exhaustive set of examples for improving professionalism follows, and the Task Force believes these concepts could be included in educational material and/or form the foundation of a larger notice to the profession on professionalism:⁴

⁴ A good discussion on professionalism can be found in the articles by Richard Sugden, QC, and Richard Peck, QC listed in the bibliography.

i). Affidavits

Affidavits drafted by some family law counsel, often frame assertions in what can generously be described as coarse language, and often should be called much worse. The nature of the relationship between the parties provides an opportunity for this sort of material to be developed, but the assertions are often irrelevant to the issues at hand, and once set out in filed material have a very destructive, often permanent, effect on the ability of the parties to negotiate and upon their future relationship. The Task Force believes there is no place for such language in an affidavit, and that as a matter of professionalism a lawyer should ensure that the language in affidavits be civil. As Richard Sugden, QC noted in his article, “Civility in the Legal Profession”,⁵ a functional definition of civility “is the ability to disagree without being disagreeable.” The Task Force agrees with this statement, and believes lawyers should be judged by the degree to which they adhere to this standard.

ii). Communication

Just as language in affidavits can be unprofessional, language in written and spoken communications can be unprofessional. Examples can run the spectrum, and the Task Force does not attempt to catalogue them. Some examples are, or should be, obvious. The Task Force believes that lawyers should communicate in a civil manner with clients, opposing counsel and parties, and in court. It is particularly inexcusable for letters or emails to contain unprofessional language, and lawyers should be encouraged to pause and read what they write through a lens of professionalism. The incidence of such unprofessional conduct is higher in family law than other areas of practice. Competence is about more than getting the law right.

iii) Maintaining objectivity

A client, particularly in the throes of a family law dispute, can be ruled by emotion. That client’s lawyer should be governed by reason and objectivity. There are a number of ways to achieve this. It starts with educating the client regarding conduct, and managing client expectations. It is proper for the lawyer to disabuse the client of any notion that the lawyer’s job is to take on the persona the client brought to his or her family relationship. The lawyer’s job is not to pour fuel on a fire; rather, the lawyer as advocate should seek to extinguish the fire and salvage the best result for the client in light of the facts and the law. Achieving objectivity requires proper communication with a client. On occasion, it requires telling the client what they need to hear, not what they want to

⁵ International Society of Barristers Quarterly, Vol. 36, No. 4, at 510

hear. As a matter of professionalism, there are simple steps a lawyer can take to maintain objectivity. For example, rather than saying “we” in correspondence, the lawyer can say “my client” or refer to the client by name. Doing so reminds everyone, including the lawyer, of his or her proper role.

Objectivity is also eroded when a lawyer over-identifies with the client’s situation. A lawyer should be alert to the risks of emotional over-identification, and assess whether his or her objectivity has become clouded. When a lawyer becomes an emotional surrogate for the client, the lawyer has lost objectivity and the risk of unprofessional and/or incompetent conduct increases. In some circumstances the best option is to refer the client to a counsel who is capable of providing the client objective representation. While a lawyer can have compassion for a client’s emotional state, the lawyer and client should not have conjunctive emotional states.

The Task Force believes that counsel acting more professionally would mitigate many of the harmful aspects of the adversarial system. This requires lawyers to educate themselves about, and hold themselves to, a higher standard. It requires lawyers to insist on such conduct from other lawyers they deal with. And it requires adjudicators to demand professionalism from advocates appearing before the courts or tribunals.

f). Models for change: code of conduct, best practice guidelines, education

The Task Force considered a range of options, from creating a distinct code of conduct for family law lawyers to the development of best practice guidelines. The Task Force also discussed the desirability of amending the *Professional Conduct Handbook*, or whether educational documents and courses provided a better approach.

As noted, the Task Force does not believe family law lawyers require a separate code of conduct. Most of the best practices that are articulated in the US, UK and Australian codes and guidelines already exist in BC. The difficulty is that they are articulated in a range of sources, and some practitioners may not be conversant in them, and some who may be conversant in them might not follow them because the culture of professionalism has been in decline.

The Task Force does not believe that the *Professional Conduct Handbook* needs to be amended. We observe, however, that the Law Society of Upper Canada, in commentary to Rule 4.01(1) of the *Rules of Professional Conduct* states:

In adversary proceedings that will likely affect the health, welfare, or security of a child, a lawyer should advise the client to take into account the best interests of the child, where this can be done without prejudicing the legitimate interests of the client.

Similar language has been placed in the commentary to the draft Federation Model Code Rule 4.01(1). It might be desirable to have Ethics Opinions on the issue of professionalism in general, with some particular direction for lawyers practising family law, to alert lawyers to the standard that is expected of them and the latitude they have in guiding client conduct. If best practice guidelines are developed, it might also be desirable to append it to the *Professional Conduct Handbook*.

The Task Force is of the view that Ethics Opinions and/or footnotes to the *Professional Conduct Handbook* are only part of the solution. There is value in creating best practice guidelines for family law (some of which will have broader application). The two greatest benefits of such guidelines are: 1) it consolidates disparate concepts into a single resource, and 2) it has the potential to be a useful educational tool. The second benefit is the one the Task Force feels is most important, because we believe that improving family law advocacy to reduce the harm it causes to children requires a cultural shift in how family law disputes are approached. This requires education and time.

The Task Force believes the need for education is broad. It includes educating law students to the concepts of professionalism and ethics, and the unique challenges that arise in the area of family law. The education should continue, through PLTC and on into the realm of continuing professional development. The hope is that over time a culture develops that understands that a lawyer can act as advocate for his or her client in an adversarial model, yet conduct the case in a manner that does not exacerbate the harm that can be caused to children whose families are dissolving.

The Task Force also believes that best practice guidelines and education can reach beyond lawyers and be of benefit to clients. As a profession we must come to terms with the fact that members of the public in an information age will self-educate on an array of topics of interest to them. Creating plain language guides to best practices in family law that articulates not merely the role of lawyers, but that of clients as well, can have a tangible benefit. Knowledge reduces the opportunity for abuses of the lawyer/client relationship to occur.

Because of the limited scope of the Task Force's mandate, it did not wander too far into a discussion of educational models. The Task Force believes that the Law Society should contribute to future discussion regarding best practice guidelines as well as opportunities for improving education on professionalism and, in particular, the unique challenges that arise in family law. The Task Force does not believe, however, that this is the sole provenance of the Law Society. While the Law Society would want to articulate the standard of professionalism it, as the regulator, expects, it does not follow that the Law Society is properly equipped to create courses and educational programs.

g). *Fiduciary duty and the best interests of the child*

One of the suggestions in the Discussion Paper is that the Law Society "provide lawyers with guidance in balancing advocacy demands with an ethic of "do no harm", particularly to children". In grappling with this suggestion the Task Force explored the nature of the

lawyer/client relationship, to assess the degree to which an ethic of “do no harm” is desirable, or even feasible.

The fiduciary nature of the lawyer and client relationship, and the duty of loyalty a lawyer owes a client are well known concepts, though one could argue that they are not well understood concepts given that case law continues to develop in these areas. In an adversarial system we accept that a lawyer is to assiduously represent his or her client within the bounds of the law. The Discussion Paper cites Megarry, V.C. in *Ross v. Caunters*, [1979] 3 All ER 580, at 599:

In broad terms, a solicitor’s duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb “properly,” that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client.

On its face, this statement creates a tension with the concept of balancing advocacy with an ethic of do no harm.

The Task Force explored alternative ways of addressing this tension, in an effort to clarify a lawyer’s duties rather than expand the scope of them. One concept the Task Force explored can be stated as follows. A lawyer has a fiduciary duty to his or her client. The client owes a fiduciary duty to his or her child. The best interests of the child inform the scope of the parental duty, and the parental fiduciary duty places a parent under a positive obligation not to breach the trust owed to the child (see, *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at 65). The parent may not be aware of this obligation. The *Professional Conduct Handbook*, Chapter 3, Rule 3(k) states:

3. A lawyer shall serve each client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. Without limiting the generality of the foregoing, the quality of service provided by a lawyer may be measured by the extent to which the lawyer:

(k) discloses all relevant information to the client, and candidly advises the client about the position of a matter, whether such disclosure might reveal neglect or error by the lawyer.

The Task Force explored two concepts that flow from the case law and the *Professional Conduct Handbook*.

The first concept is that the standard of professional competence requires disclosure of all relevant information to the client. The fact that the client owes a fiduciary duty to the child has a profound impact on the client and may, depending on the client's conduct, expose the client to liability. It follows that this is relevant information for the client to know. As McLachlin, C.J.C. observes in *K.L.B.*, *supra*, the fiduciary duty creates a fault-based standard. If we accept that a reasonably competent lawyer would be required to advise an executor, a trustee, an agent, a bailee, an officer of a corporation, etc. of the risks that flow from their conduct as an incident of their special status, it follows that a lawyer should, as a matter of course, explain to the client the concept of being a parental fiduciary. An argument can be made that failing to do so could amount to falling below the standard of competence expected of a lawyer. The fiduciary obligations of a parent to a child have not been generally taught in the training of family law lawyers.

The second argument is similar to the first, but would require the lawyer *as fiduciary* to advise the client of the parental fiduciary duty. In *R. v. Neil*, [2002] 3 S.C.R. 631, Binnie J., at para. 12, cites *R. v. McCallen* (1999), 43 O.R. (3d) 56 (C.A.) at p. 67 for the proposition that:

. . . the relationship of counsel and client requires clients, typically untrained in the law and lacking the skills of advocates, to entrust the management and conduct of their cases to the counsel who act on their behalf.

The combination of lack of legal knowledge and training on the client's part, coupled with the trust placed in the lawyer, militates in favour of the lawyer bringing to the client's attention a matter as fundamental as the duty the client, as a fiduciary, owes his or her child. Binnie J. notes that "[t]he duty of loyalty is intertwined with the fiduciary nature of the lawyer client relationship" (para. 16). The duty of candour regarding matters relevant to the retainer is part of the duty of loyalty (para. 19). Because the best interest of the child will govern the determinations of the court, it is relevant to the retainer. Similarly, because the best interests of the child inform the parental fiduciary obligation, they are relevant to the retainer because the parental fiduciary duty sets boundaries on client conduct, and the client should be alert to those boundaries, and understand the relationship between the best interests of the child and the parental fiduciary duty. On these grounds, one might argue that as part of the lawyer's fiduciary duty to the client, the lawyer should advise the client of the nature and scope of the fiduciary duty a parent owes a child, and the concept of the best interests of the child.

One of the main advantages of framing the issue from the perspective of the fiduciary duty owed to the client, or from the perspective of the standard of competence, is that it preserves the sanctity of the duty of loyalty the lawyer owes the client. In educating the client to his or her obligations, and the factors the court will take into account, the lawyer can steer the client to take into account the best interests of the child. While this may lead to the same result as the lawyer taking into account the best interests of the child, it does so in a manner that better respects the sanctity of the lawyer/client relationship.

h). *Specialization*

The Discussion Paper briefly raised the issue of specialist designation, noting that specialists in some jurisdictions are required to meet set criteria and in some instances subscribe to standards of practice. The Task Force discussed specialization on a number of occasions, including a cursory review of jurisdictions with specialization programs. The Task Force did not venture far into this line of enquiry, as it felt the subject was secondary to the core questions it was tasked to consider. In the end, the Task Force has concluded that specialist designations in family law cannot be recommended based on the information available, and the scope of the Task Force's mandate, but recommend that should the Benchers decide to consider the topic of lawyer specialization at a later date they start with a consideration of family law specialists.

Concepts for Bencher Consideration

During the course of its deliberations, the Task Force discussed a number ideas and developed concepts that, under a broader mandate, it would have framed as recommendations to the Benchers. In light of the scope of its mandate, however, the Task Force raises these as concepts for consideration that the Benchers may wish to explore further.

Concept #1: The Task Force does not believe the traditional role of a lawyer should be expanded to require balancing the demands of advocacy with an ethic of do no harm. However, the Benchers might wish to refer the following concept to the Ethics Committee for an Ethics Opinion, or consideration as to whether it (or a variation of it) should form part of a best practices statement:

- Parents owe their children a fiduciary duty. This duty is grounded in trust, and the duty of loyalty. The duty is fault-based, and as such differs from the concept of taking into account the best interests of the child. However, the best interests of the child informs the parental fiduciary duty, and the best interests of the child will drive the court's decision-making process in family law matters that involve children. As such:
 - a. As a matter of professional competence, a lawyer should advise the client of the concept and role consideration of a child's best interests plays in family law, and educate the client of his or her obligations as a fiduciary to the child.

Concept #2: Lawyer specialization might help improve the practice of law in certain areas. If the Benchers decide to explore lawyer specialization at a later date, they should include family law specialization as part of that exploration.

Concept #3: Part of the standard of professionalism in family law arises as a result of the particular vulnerability of members of the public who are directly affected by the tone and conduct of family law litigation; as such, education will play an important role in improving professionalism and reducing harm in family law. If the Benchers identify this as a strategic priority, now or in the future, they might wish to:

- (a) Direct the Lawyer Education Committee to consider, as part of its ongoing work and within the scope of its mandate, what might be done to improve professionalism in the area of family law and reduce harm to children;
- (b) Direct PLTC to create content for its practice materials that addresses the unique challenges of family law, and stressing the role a lawyer has to play in reducing harmful conduct;
- (c) Encourage law schools and third party education providers to generate courses and content designed to alert law students and practitioners to the unique challenges in family law, and to encourage civility in advocating for a client in family law matters, particularly when children are involved.

CONCLUSION

British Columbia, like other jurisdictions, is reviewing its substantive and procedural family law. Historically, family law was subsumed within the framework of civil litigation. Over time, practices such as family law mediation and collaborative law have developed, partly in recognition of the fact that the traditional adversarial system can aggravate the harm caused to participants in family law disputes. At the same time, there are certain situations in which a traditional adversarial model is the best method for resolving a family law dispute. This tension suggests that if we are to reduce the harm caused to families undergoing marital dissolution, and in particular reduce the harm caused to children, we need to focus on moderating the conduct of those involved in resolving the dispute.

The Task Force believes that family law is unique, in part because of the essential role family plays in everyone's life, and as the foundation of society. Acrimonious family law disputes come at a cost to those involved in the dispute, but also carry a broader social cost. Because of this, it is appropriate for the Law Society, as regulator of the legal profession, to assess what it might do to mitigate this harm, thereby fulfilling its core mandate to protect the public interest. The natural inroad into change is to view the issue through regulation and education.

The Task Force believes a best practices guideline for professionalism in family law should be created. A best practice guideline for professionalism in family law is an important first step; future steps might include education in best practices. While family law disputes will always be emotional, it does not mean that the actors in those disputes, particularly lawyers, should be given free reign to exacerbate the harm marital dissolution can cause to those involved. In matters of professionalism, lawyers have given oaths to subscribe to a higher standard of conduct than is required of the laity. Educating lawyers

to the unique aspects of family law, and the standard of professionalism that is expected of them, is an appropriate approach for effecting positive change. The Task Force believes there is a serious issue of professionalism in family law that needs to be addressed to better protect the public, and to improve the public perception of lawyers. The Task Force believes that by endorsing the recommendations in this report, the Benchers can make tangible progress to achieving these important ends.

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11. Zoe Rathus, “Shifting the gaze; Will past violence be silenced by a further shift of the gaze to the future under the new family law system?” (2007) 21 AJFL
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Appendix 1

Resolution: Code of practice

Membership of Resolution commits family lawyers to resolving disputes in a non-confrontational way. We believe that family law disputes should be dealt with in a constructive way designed to preserve people's dignity and to encourage agreements.

Members of Resolution are required to:

- Conduct matters in a constructive and non-confrontational way
- Avoid use of inflammatory language both written and spoken
- Retain professional objectivity and respect for everyone involved
- Take into account the long term consequences of actions and communications as well as the short term implications
- Encourage clients to put the best interests of the children first
- Emphasise to clients the importance of being open and honest in all dealings
- Make clients aware of the benefits of behaving in a civilised way
- Keep financial and children issues separate
- Ensure that consideration is given to balancing the benefits of any steps against the likely costs – financial or emotional
- Inform clients of the options e.g. counselling, family therapy, round table negotiations, mediation, collaborative law and court proceedings
- Abide by the Resolution Guides to Good Practice

This Code should be read in conjunction with the Law Society's Family Law Protocol. All solicitors are subject to the Solicitors Practice Rules.

FAMILY LAW TASK FORCE

Views of Gordon Turriff, Q.C. and

Pat Schmit, Q.C.

We have read a draft of the Report of the Family Law Task Force. We do not subscribe to it.

As we see it, the Task Force exceeded its mandate. We would answer the two questions posed by the Benchers as follows:

1. no amendment to the Professional Conduct Handbook is needed; and
2. a code of conduct for family lawyers is not needed and guidelines for family lawyers are not needed.

Like our colleagues, we were not persuaded that the Professional Conduct Handbook is deficient. Doubtless some family law practitioners fall below the required standards but we do not think that any useful purpose would be served by endorsing the publication of an arguably unenforceable code or set of guidelines. In any event, we think that lawyers might be confused about what was required of them or about what might be enforceable against them if a code or guidelines were developed by lawyer advocacy groups, especially if Benchers or their representatives were involved in the process of development.

If the Task Force is wrong to have concluded that no changes to the Professional Conduct Handbook are needed, the Handbook should be revised as necessary so that the required standards are recorded clearly and comprehensively in one place.

We certainly do not suggest that the Benchers should not educate lawyers about the required standards or that they should not encourage the law schools to ensure that law students are educated about professional responsibility and ethics.