

INTRODUCTION

When family lawyers and lawyer-mediators are working towards settlement, ethical quandaries present themselves on a daily basis. What process should a client use? What information should be disclosed to the other side? What types of conversations should a lawyer have with their client? Imbedded in each decision the professional makes are ethical elements. Innovation in alternative dispute resolution (“ADR”) processes have created new environments for lawyers to navigate and to adapt to in their individual understanding of practicing well. As a result, many family lawyers are working in the shadows of litigation, or separate from it entirely as in the field of collaborative family law. ADR processes are often unregulated and fall outside of the scope of procedural rules. Many of the papers and cases that are written about professionalism and ethics in family law consider the sharp practice and legal bullying that occurs in litigation, the sort of behaviour that gives family law a bad name.¹ The concerns that arise in litigation environments do not necessarily apply to a settlement-focused ADR practice.

The goal of the research presented in this paper is to look at the following three sources that serve as guidance for family law lawyers and mediators when dealing with ethical challenges in ADR: existing academic research, mandatory codes of conduct and voluntary professional standards, and ethics in practice. Family law has been at the forefront of innovation, contributing to the rise of interest-based negotiation and the introduction of collaborative law. ADR has now been around long enough to establish behavioural norms. This paper seeks to contribute to the discussion about ethics and professionalism in innovative processes, and in particular what it means to behave ethically in family law ADR, specifically, negotiation, mediation, and collaborative law.

1. See e.g. Esther Lenkinski, Barbara Orser and Alana Schwartz, “Legal Bullying: Abusive Litigation within Family Law Proceedings” (2003) 22 C.F.L.Q. 337; Lorne H. Wolfson and Adam N. Black, “Incivility and Sharp Practice in Family Law” (2012) 31 C.F.L.Q. 275.

For the purposes of this study, family law negotiation and mediation both refer to the process that occurs within the greater context of a court proceeding, or without one having been commenced. The study looks at mediation from the perspective of lawyers acting as mediators. Collaborative law is a distinct process using interest-based negotiation.² The parties and their respective lawyers have signed a participation agreement which contains a provision acknowledging that the lawyers must not act for their clients in a related contested proceeding, in court or at an arbitration, including a review or variation. If either party were to commence a contested proceeding, the collaborative process must cease and both lawyers would be disqualified from acting for their respective clients. Collaborative law operates with a team of professionals. The model in the Greater Toronto Area is generally two lawyers, and two “neutrals” – a family professional and a financial professional.³

The first part of this paper briefly looks at the existing academic literature to determine what research has already been done on ethics and professionalism in family law ADR, with a specific view towards ethical behaviour and ethical dilemmas. Part two summarizes the benefits and difficulties of relying on codes to guide ethical behaviour, particularly in ADR. Part three summarizes the methodology of this research project, involving roundtable discussions with negotiators, collaborative lawyers and lawyer-mediators. Part four looks at the results of this research project: first, concerning how the participants made decisions when faced with an ethical dilemma; and, second, the results from the roundtable discussions. The results from the discussions are organized into three subsections: first, the features that are unique to each process; second, a discussion of the universal themes; and third, a closer look at the impact of trust between counsel. The study shows that behavioural norms are beginning to emerge, some of which are universal, and others that are dictated by the process. Ultimately, the study shows that due to the subjectivity involved in ethical decision-making, and the impact that family law has on society, family law ADR requires a distinct ethical standard that acknowledges the unique features of each ADR process to guide ethical behaviour.

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2. See generally 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) [Macfarlane, CFL]; and, Martha Simmons, *Increasing innovation in legal process: the contribution of Collaborative Law* (dissertation, Osgoode Hall Law School, 2015) [Simmons, Dissertation].
 3. A “family professional” refers to a social worker, a psychiatrist or a clinical psychologist. A “financial professional” refers to an accountant, a certified business valuator or a financial planner.

PART I: LITERATURE REVIEW

In order to frame any discussion on ethical behaviour, it must begin with the conceptual framework of what is meant by the expression “ethics”. The postmodern view of legal ethics views *ethics* and *professionalism* as distinct concepts, and recognizes that ethical decision-making is based on the lawyer’s own moral compass.⁴ Postmodernism recognizes that practicing law ethically requires more than an emphasis on zealous advocacy;⁵ the lawyer takes into account competing interests, including their own moral compass, client interests, concerns of the profession, and social responsibility.⁶ As a result, postmodernists reject the idea of categorical normative approaches to resolving ethical dilemmas. Farrow has argued that there is a conceptual distinction between “what is *professional*, under codes of conduct, and what is *ethical*, as ultimately guided by personal moral deliberation.”⁷ In family law ADR, there is a fundamental disconnect between acting professionally under the *Rules of Professional Conduct* (the “Rules”), including the responsibility to be a zealous advocate, and behaving ethically.⁸ As a result of a regulatory gap, there are distinct ethical behaviours emerging in family law ADR. Critics of postmodernism argue that there is a slippery slope from the postmodernist view to having no ethics at all.⁹ Instead of having no ethics, the ADR culture and communities of practice are establishing norms to guide some ethical behaviour. The challenge is that one cannot expect opposing counsel to share one’s ethics.¹⁰

Roger Fisher has defined ethical dilemmas in negotiation as a “conflict of interest between the lawyer’s obligation to the client (presum-

4. Alice Woolley, “The Problem of Disagreement in Legal Ethics Theory” (2013) 26:1 Canadian Journal of Law and Jurisprudence 181 [Woolley, Disagreement]. See also Trevor Farrow, “Sustainable Professionalism” (2008) 46:1 Osgoode Hall L.J. 51 [Farrow]; Alice Woolley, *Understanding Lawyers’ Ethics in Canada* (Markham: LexisNexis Canada, 2011) at 35 [Woolley, Understanding]; Alice Woolley *et al.*, *Lawyers’ Ethics and Professional Regulation* (Markham: LexisNexis Canada, 2012) at 14-15 [Woolley, Lawyers’ Ethics].
5. Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: LSUC, 2014 at 5.1-1 (Advocacy – Commentary (1)) [LSUC Rules].
6. Woolley, Understanding, *supra* note 4 at 34.
7. Farrow, *supra* note 4 at 63 [our emphasis].
8. Deanne Sowter, “Good Lawyer, Bad Lawyer: Advocacy in Family Law ADR” (forthcoming) [Sowter].
9. Woolley, Understanding, *supra* note 4 at 34.
10. See also Richard G. Shell, “Bargaining with the Devil Without Losing Your Soul: Ethics in Negotiation” in Carrie Menkel-Meadow and Michael Wheeler, eds., *What’s Fair: Ethics for Negotiators* (San Francisco: Jossey-Bass, 2004) 57 at 65 [Shell].