CONFLICT – WHAT'S LANGUAGE GOT TO DO WITH IT?

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Language encourages or inhibits conflict. It's as simple as that. Simple to say, but harder perhaps to truly comprehend.

The purpose of this article is to remind, comment and encourage. The reminder is that the terminology we use impacts the course of events. The comment consists of practical suggestions, many of them from practitioners. The encouragement is to not lose sight of the fact that we have responsibility for our choice of words, and to not use words mindlessly.

The primary goal of this paper is to prompt the reader to think about the role of language in conflict, and to provide suggestions for minimizing conflict, particularly in family files.

The author's modest hope is that the reader will glean a few practical tips to incorporate into his or her practice, and in that way beneficially impact the practice of family law if only for each individual. In the grand scheme of things, it would be satisfying but not surprising if numerous small changes were to have a ripple effect and be imitated by fellow members of the bar.

The Impact of Terminology on the Course of Events

You find yourself in the middle of a nasty custody dispute. You've tried to settle but don't seem to be getting anywhere. The letters back and forth have an edge. You used to get along with the other lawyer but communication is now difficult. Your client is not happy. Your stomach churns at the mere thought of the file.

It can even happen on a collaborative file. You've explored interests to the best of your ability. You've explored options. You're at a roadblock.

How did you get here? Maybe language helped you get here and maybe it hurt your settlement prospects.

So how do we avoid conflict? There are decisions each lawyer makes which mitigate or exacerbate conflict. Many of those decisions involve the choice of terminology.

Here are my top suggestions for reducing conflict through choice of words:

Introduce softer words and concepts The words "custody" and "access" are hot-button terms. Avoid using them, particularly early on. Terms such as "parenting schedule", "parenting decisions" and "parenting time" are less threatening concepts, particularly for the non-residential parent. Instead of starting out with the standard list of "issues to be resolved", speak about your role in assisting in "re-structuring the family" and that "we need to talk about what your family will look like, as it goes through this transition".

Avoid descriptors from the former regime If you are proceeding under or using FLA terms, resist using the old descriptors. Avoid speaking about one parent having "primary parenting time". The words "primary residence" has been around for a while, and has started to take on some of the same hot-button connotations as the term "custody". The critical thing about parenting time is that the order may say a number of things about various responsibilities, but what is divided is just "parenting time". This means that neither parent's time is of a different or better quality than the other parent's time with the child. We need to put final death to the word "visit" as it applies to a parent, as it minimizes that parent's role. We should encourage the language that causes parents to be seen as equal parents who might just have different specific responsibilities or unequal time on their schedules with the child.

Apply labels last, if at all What is important is what the family will look like as it goes forward in two homes. Try to sort that out before applying labels, if apply them you must. Compare "The parties shall have joint custody of the children. The children shall reside with the Applicant, who shall have primary care and control of them. The Respondent shall have access on alternating weekends…" with "The children shall ordinarily reside with the mother. The father shall have parenting time on alternating weekends. The parties shall share each continue to exercise the responsibility of guardians." The latter contains no labels, but describes the same parenting arrangement.

Start with softer words It's not enough simply to introduce the softer terms during your first interview. What does your advertising or web site say? What does your client intake form say? It does less good to introduce softer words during your first interview if on the intake form the list of "issues" starts with "custody" and "access". Instead of referring on a file opening checklist which the client completes to "Issues to be resolved" try "What needs to be sorted out". Re-phrase "Custody" read "Parenting". You'll have lots of time to describe things in legal terms later.

Reframe, reframe, reframe Learn and practice the art of reframing. If a client vents that "That so-called father of theirs says he wants to see my kids but only when it suits him…" resist the temptation to concur. Try instead "O.K. So consistency is important to you. Why don't we leave our minds open about dad's parenting time, but stress that it's

got to be consistent?" If you are asked "How much access do I have to give him?" don't launch into "Well, the standard regime is every other…" Instead focus on what involvement would be best for the children.

Dig, dig, dig What is it the client really wants and why? A classic example is the client who is adamant she won't ever agree to joint custody. After digging into what is important to her, it becomes apparent that she equates joint custody with a 50/50 parenting arrangement. You dig further and discover that she knows of a couple who agreed to a 50/50 arrangement and the kids are now a disaster. Excavate further and you uncover that those parents were meth heads, and the children were deeply troubled well before the separation.

Avoid win/lose language The children win and the children lose depending on their parents' actions. The parents should not think of themselves winning or losing the case. A child should not have reason to state that "Dad lost". Use the polite word "successful" in addressing costs.

Do not denigrate the "ex" or a new partner A client once reported that his wife had reported to him that her lawyer had referred to my client's love interest as "the bimbo". Use language and demeanor that suggests that both parties are reasonably intelligent human beings who can be reasoned with and should be respected.

Refer to your friend as "opposite counsel" rather than "opposing counsel" Recognize that this small change can make a significant difference. The word "opposing" connotes opposition to everything. The word "opposite" simply connotes that the lawyer is your counterpart.

Demonstrate respect for the other side This goes beyond not denigrating. It means referring to the client and lawyer on the other side with respect. Saying that "I received a letter from Mr. Jones" sounds better than saying "I received a letter from Jones".

Never say "With all due respect" This is one of the most disrespectful phrases that can be said. If you really respected your friend you would not minimize their opinion but instead debate vigorously.

Soften labels in your affidavits Why not refer to "Mr. Smith" or "Sam" instead of repeatedly referring to "The Respondent"? The former certainly make it easier for the Judge to keep track of the players, add a human element, and therefore lower the conflict coefficient. Judges and lawyers should use neutral and respectful language when speaking about children, thus removing the adversarial context, wherever possible. Parents or significant caregivers should be described by name, or by their roles or relationships with the children (mother, father, birth father, stepparent, grandfather), rather than their adversarial positions in litigation or pleadings status under the Rules of Court or Statute (Claimant, Respondent, Defendant, Plaintiff). Children should be referred to by name.

Buck the adversarial nature of litigation Courts by necessity are adversarial in the common law tradition. Concepts like win/lose, right/wrong are built into the system. Any language that perceives difference as an opportunity for growth, an opportunity to learn about another, and facilitates such growth, and the consequent understanding and acceptance of another is going to contribute to peace in society.

Avoid use of street language, whether in Court or not Descriptions such as "She is a drunk, a hooker and she uses crack" are out of order. We have bigger vocabularies and can use more formal language that gets the point across in a more productive manner.

Avoid sweeping generalizations These are never accurate (incongruity intended). Avoid sweeping generalizations such as "He never picks the kids up on time."

Model the behaviour you preach The Court and counsel should interact in a way that provides a pattern for the clients as to how to behave as opposed to how not to behave.

Judges, respect both genders During legal education sessions, one occasionally hears hoots of derision aimed at the male segment of the population. Judges and lawyers alike should guard against gender bias. The following is an extensive quote from a lawyer:

> I must confess to having developed sensitivity to what appears to be a slightly obvious gender bias with some members of our Courts against men. I have had occasion to see Judges making assumptions about men's motivation in seeking more time with children as financially motivated, where there was no suggestion even by the mother that such was the case. I have seen Judges denigrate men for not having higher paying jobs, even though they were earning significantly more than the mother, without any appreciable difference in their education or job skill levels.
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> As an example, I recently was involved in a matter where the father obtained a bilateral custody [assessment] in his favor, [recommending he have] primary care. The mother sought a second opinion. We cooperated, and that report came out in favor of the mother. After reviewing the alternatives, the father agreed to the mother having primary care, however, there was a disagreement regarding costs. Rather than run a trial on the whole issue, the father agreed to resolution of the custody issue, and simply went to a hearing on the costs issue. The decision of the Justice includes this comment:
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> Nothing in family law practice suggests that a father such as this is a better and more deserving custodial parent, nor are there any facts in this case to support such a conclusion. Common sense might suggest that given the age of the child and the circumstances of these parents, the mother may well have some inherent advantages over the father when a contest such as this arises. Despite that view the mother was forced to defend, what might otherwise be perceived as common sense, through a series of court applications. There was little merit to the father's

applications and they were not directed at any issue save and except his apparent consuming need to ensure a 50/50 split of the child's time.

With all respect, these comments ignore the reality of a favorable bilateral custody assessment in first instance by the father, and made it, in the writer's opinion, patently obvious that this Justice felt that this father, seeking a strong part in his child's life, was taking a position "of little merit".

While as a group, men have been the author of their own misfortune in many respects, I feel very strongly that if we wish to create a system which shows respect for persons of each gender, we need to be sensitive not to use language which is indicative of any stereotypes, against men or women. In the absence of a factual basis, we should not assume men are motivated out of greed. Where gender is not relevant, we should use the neutral - *i.e*. why refer to a father or a mother, when we can say "parent"?

I think we, as family lawyers, are guilty of watching the emperor parading nakedly down the street, yet, we say nothing. We all know that there is a real perception of bias, yet we take no steps to address it affirmatively. Particularly in custody matters, which cut at the core of who we are as parents to our children, I think it is important that men receive acknowledgement as real contributors to their children's lives, as having something valuable and vital to give to their children beyond a portion of their paycheck. That isn't to suggest men should have custody more often. In fact, I think in most cases children are primarily connected to their mother. However, the language of the process could go a long way to assuring that fathers who have a great part of their heart taken away with the loss of primary care of their children are shown some greater sensitivity to that loss, and respect for what it takes to deal with it.

At a LESA seminar a couple years ago, a certain [Judge] was present while a highly respected local psychologist explained why fathers are important to their children. More than a few lawyers I was sitting with were shocked and appalled by a question by [that Judge] to the effect of "so how much 'magic time' with the father do we have to allow?" The question, the demeanor and the attitude making it completely evident what [the Judge] thought of the importance of fathers to their children.

If the court wants to have respect of all litigants, and more importantly, wants to avoid continued bitterness and animosity between parents once resolution occurs, I think it could go a long way to taking some modest steps to articulate respect and understanding for all parents, not just the female ones.

Judges, don't preach Judges, it's fine to encourage parties to settle, but don't preach or chastise them or their lawyers. Leave stern admonishment, insult and finger-wagging to Judge Judy. Give folks credit. If they could settle they would. That being said, it may

be that words of encouragement, or a reminder of the unpredictable nature of trial and costs awards may be enough of a nudge to get everyone back to the negotiating table.

Judges, be respectful If, despite their best efforts, the parties can't settle, and end up in trial before you, show respect. The lawyers have enough to think about without worrying about you barking or being impatient with them. The unsuccessful party is already down enough. They don't deserve to be kicked again by your perhaps well-intentioned but hurtful remarks.

Lawyer/lawyer conflict. What does it look and feel like? How can one avoid it and make one's practice and life better? *i.e.* How can one avoid becoming part of the problem?

Nobody has any difficulty knowing what lawyer/lawyer conflict looks like. Several recognized it as a by-product of the adversarial system. As stated by a colleague:

> "When the only tool you have is a hammer, every problem looks like a nail" When the only tool you have is a forced application before a third party decision maker, every problem becomes battle to win/protect/defend/outmaneuver. If the goal is a peaceful and productive society, we need to give our lawyers far more tools and avoid the pitfalls that come when lawyers too quickly decide the only method of resolution will be a court application. To avoid becoming part of the problem means finding a world view that says that all clients have a part of them that seeks good and is capable of decent behaviour, and that there is a place where they can live in peace. The lawyer's job is to find that place and guide the client to it. This is a very far cry from the gladiator role.

In a paper prepared for the Legal Education Society of Alberta in 1999, Doug Moe Q.C. quotes as follows from lawyer-cum-psychotherapist Benjamin Sells in his book, *The Soul of the Law: Understanding Lawyers and the Law* as follows:

> The words "adversity" and "litigation" themselves declare natural affinity. "Adversity" comes from roots meaning "opposing, hostile" while "litigate" means "to carry on strife". What is significant about these old meanings is that they provide the first clues that the adversarial system, in the form of litigation, is not really meant to resolve conflict. Rather, the psychology of litigation suggests that *litigation is dedicated to carrying on strife, not resolving it.*
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> This point is essential for understanding the hidden forces driving litigation. The litigious mind is devoted to strife because strife gives life to litigation. Litigation lives only so long as strife is maintained. Resolution of conflict means death to litigation. In a Darwinian struggle to survive, litigation must keep strife alive to preserve and perpetuate itself. It's a matter of litigation protecting its own self-interest.

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

A very interesting read is Deborah Tannen's *The Argument Culture – Stopping America's War of Words* (Ballentine, 1999). In it she speaks of the West's conviction that opposition leads to truth. In our argument culture, criticism, attack, or opposition are the pre-dominant if not the only ways of responding to people or ideas. This leads to the knee-jerk nature of approaching almost any issue, problem, or public person in an adversarial way.

With this approach, we are usually not trying to understand what the other person is saying. Instead we are readying our response; listening for weaknesses in logic to leap on, points we can distort to make the other person look bad and oneself look good.

Litigation is based on the same adversarial system. As Benjamin Sells would say, "litigation itself can create new problems and enflame new grounds of conflict."

The following suggestions can help keep these new grounds of conflict to a minimum.

Resist the temptation to endorse your client's view of the "ex" Your client views the ex as evil incarnate. The challenge is to show empathy but not to endorse the client's view. The client yearns to have you say "You're right, your ex is a complete [fill in the blank]". It's unprofessional, and will likely be reported by the client to the ex as "My lawyer says you're a [fill in the blank with the same or a worse epitaph]."

Avoid speaking your client's truth as if it is your truth Think of it like drafting an affidavit - state clearly that your client has advised that X, rather than stating that X happened. Many letters sound like the lawyer was right there in the room when the disputed events happen. Skip the recitations of facts if possible and go directly to suggestions to calm the waters or to take the next step in the file to move the file forward. A children's lawyer described receiving a copy of a letter, addressed to the lawyer for the other parent which started out with "Unfortunately, your client is a bald-faced liar." As Ripley would say, "Believe it or not".

Use the phone more Many lawyers write long and vitriolic letters back and forth in an effort to convince the other side of the correctness of their position. It is easier to be difficult in a letter, to fail to answer legitimate issues raised, and to de-personify the other lawyer. A phone call with some voice-to-voice contact (or, even better, the in-person meeting without clients) makes it harder to just continually escalate.

Be effective For phone calls or letters, make a list of issues to be addressed, and state your suggestions on each one. The other lawyer can respond in kind to the list, sparing the off-topic debates. Nothing frustrates the process or the other lawyer more than a

rambling letter that makes accusations but no proactive plans, or does not get to the point. It also then seems to invite a similar letter in response.

Assign responsibility appropriately It's not that "Jones is taking us to court next week". Say rather "Mr. Jones has been instructed by his client to set a court application next week".

Cactus or peach? – choose your avatar There's nothing wrong with being soft on the outside but tough as nails on the inside. We all know of lawyers who are always extremely pleasant to deal with, yet work very effectively for their clients.

Resist the temptation to criticize another lawyer You will have clients will criticize the ex's lawyer, and expect you to do the same. Even if you believe the other lawyer doesn't appear to have a clue, how you share that belief will impact on the level of conflict. Instead of "Jones obviously doesn't know a thing about s.7s" try "Mr. Jones and I appear to have different views of s.7s. I'll have to discuss that with him." Use the same approach in your discussion with Mr. Jones.

Avoid the temptation to be drawn into a verbal joust Early in my career I worked on files where it was clear that the letters between lawyers were little more than an escalating wordsmithing competition, with each successive letter trying to outdo the previous. The whole exercise was unseemly, and did nothing to advance the client's case.

Hold on to that smart retort Think twice before responding to a dig from the other lawyer, whether in person or in a letter. If it's in person, bite your tongue while thinking up a response that will move the file forward constructively. To comments like "If you knew anything about family law you'd know that ..." or "I thought at your vintage you'd know that ..." you might simply respond "We seem to have different perspectives on this. Why don't we park this item for the moment and perhaps exchange some case law." Or better yet "I may be mistaken, but I thought the A. B. and C. cases support my view. Why don't we exchange some cases and then continue this discussion."

Be aware of the Greek chorus Stay attuned to the fact that there is frequently a support group (formal or not), each member of which has an opinion on what your client should or should not do. Key words are "My friends tell me that …" Don't gloss over such statements. It's important to find out who these voices are, and to ensure it is your advice the client is seeking and that it is followed.

Family Law Act first, divorce later There is nothing preventing parties from sorting out their parenting arrangement under the Family Law Act, and then proceeding under the Divorce Act simply to obtain the Divorce Judgment. That allows them to avoid the contentious "custody and access" labels and deal instead with "parenting time".

Resist the temptation to live up to flattery A new client starts off by saying: "My good friend tells me that if there's a lawyer who can get me sole custody, it's you." All of a sudden, there's the urge to prove that you can live up to the expectation.

Blame the Judge or someone else with strong shoulders "I realize your perception is that your ex is entirely responsible for the conflict/lack of communication/[you name it], but in my experience, those darned Judges seem to think that there's always fault on both sides." Or "I hear you say it'd be best for your children if their father were to never see them again, but the experts say that children should continue to have a relationship with both parents, warts and all."

Stress the present and future roles of the parties. Ask what the parents can contribute to the growth/development/education of the children now and in the future. The past cannot be undone, but we can learn how to do better and be better parents. Use language that reinforces this prospective view. For example, "mother" rather than "your ex-wife". Personalize the children by always referring to them by their commonly used name such as "Ted" rather than "Edward" or "your child".

Remember that your clients' problems are theirs, not yours Lawyers are advocates, not parties. Sometimes we care too much. A lawyer submitted the following:

> At a recent IACP meeting in San Diego, I sat next to a somewhat junior lawyer from Ventura, California who asked me how long I had been practicing, and I was shocked to hear the words "21 years" come out of my mouth. He seemed quite amazed and asked how I manage to keep my sanity, considering that during his 5 or 6 years, he was having his emotions taxed beyond their limits. Only somewhat flippantly, I said, "the trick is not to care".
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> I must confess to having a past riddled with ego and emotionally driven combat with fellow counsel – on one occasion, sending a letter to my colleague, referring to him as a "beef-witted foot licker". I wore my heart on my sleeve, I sat in my office and cried when I lost my first custody trial. I was peppered with phone calls from clients at all hours of the evening, doing nothing to dissuade them, as I was their partner in battle. I confess, as someone who has always enjoyed athletics, I felt a constant adrenalin rush in my battles with counsel over the interests of my clients – much like a combatant in a hockey fight.
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> Then, something interesting happened. I got divorced. I sat on the other side of the desk and saw what it felt like. And I realized that, as a client, I didn't want every penny I was entitled to. I didn't want to beat my wife up. I just wanted peace. When my lawyer, who was also my friend, was very angry and bitter over my wife's conduct giving rise to the divorce, I didn't find it comforting or of assistance. I found it somewhat frightening actually – like I had a pitbull by the collar and might just lose control of it.

At that point, I realized that in my practice, I don't need to fight. My client needs objectivity and "compassionate dispassion". In other words, I care for my clients. I seek to guide them towards resolution, which might or might not include litigation, but their problems are not my problems. I didn't create the problem, and it isn't my responsibility to fix the problem. My role is to just give my best effort – while at my desk, or in court or at a negotiating table – to help them find resolution in a timely, reasonable fashion. It doesn't always work out. I needed to accept when it didn't. If I did my best, it wasn't my fault.

So many lawyers lament their pre-lawyer jobs, where they punched the clock at 5:00 p.m., and didn't carry home with them the baggage of their clients' problems. I was one of them. The point is there is nothing inherent in family law that requires us to do that. I work my very hard when I'm in my office. I listen and understand and empathize with my client's dilemmas – however, I no longer make them mine. I have a life. I have children. My client's problems are not allowed to interfere with that.

I have to confess a perverse sort of joy in what could have been a significant verbal altercation some years ago with another lawyer where we were discussing access issues after a discovery. I outlined where my client was coming from, and she outlined her position, and it became quite apparent there was some distance between us. After we hit an impasse, the other lawyer began to wind up into an argument, her emotional connection to her client becoming very apparent. I simply said, "I don't argue with lawyers – that's what Courts are for" I politely advised that I would discuss the issue with my client, but if we couldn't find a meeting point, we could leave it to a Judge. She seemed somewhat exasperated with my refusal to champion and justify my client's views, but the reality is that 10 minutes later, I was driving home…in a remarkably good mood thinking about what my evening had in store – not about a point of disagreement between myself and my colleague.

The point, I think, that family law practitioners could benefit from is that our clients' problems are not ours. We do not need to adopt their angst, anger and anxiety – like some kind of emotional chameleons. We can do a good job and then leave the job at the office. Since changing my attitude, I have found that I actually quite like most of my colleagues, no longer pine for an appointment to the bench, and actually look forward to coming to work on most days.

Remind yourself of your role One lawyer wrote that when he perceived a conflict developing he tries to politely remind the other counsel that they will better serve their clients if we remember their roles, and that the dispute is between the clients, not the lawyers. When this file is completed the lawyers will then move on to the next, and may be dealing with each other again. Clients tend to come and go but lawyers tend to deal each other over and over again. Remind yourself of this when you feel your blood pressure rising. It also helps to spend a little time getting to know the other lawyer as a person so that they are not simply a name and a number.

Try a little empathy Put yourself into the other lawyer's shoes, or even the other party's shoes. Taking time to understand the other party's position helps diffuse conflict, is professional and ultimately makes for better argument in court if that becomes necessary.

Seek advice If a problem arises with another lawyer's conduct, and if no amount of effort has created a solution as between the two lawyers, it may be beneficial to seek guidance from a colleague, and if necessary, seek guidance from the Law Society.

Recognize the strengths of both parents Both the bench and counsel should recognize the strengths of both parents. That said, if one party's conduct is plainly against the best interests of the child, that conduct should be rebuked.

Give the file the time it deserves A colleague writes that his personal experience in conducting Dispute Resolution Officer ("DRO") sessions is that it is so often the lawyers, not the clients, who are the problem. The lawyers may be unprepared, or too busy, or they have not spoken at length to their client, or they have not thought much about why the clients are at odds. We are all busy, but we are here to serve our clients and get resolution. Do not be part of the problem; be part of the solution.

Do not get personal Arguing on behalf of a client is fine, but do not say that the lawyer is dumb or stupid just because you disagree. One lawyer told a colleague she would not trust him, and therefore she would not talk by phone, and that all communication had to be in writing. The colleague suggested to her that both were being ineffective for their clients, and that both withdraw from the file and let new lawyers take over. The other lawyer responded that the colleague was the one who was the problem, and that he alone should withdraw. When the lawyers' personalities or egos get involved, the clients are not well-served.

Never accuse the other lawyer of misconduct unless you are reporting it to the Law Society It happens in Court and in Affidavits. For instance, a lawyer drafts an Affidavit which includes the statement, without foundation, the belief that the other lawyer has encouraged the other party to breach a court order. This is a sure-fire way to escalate conflict. If you sincerely believe the other lawyer has acted in an unethical manner, put it in writing to the Law Society.

Do whatever possible not to allow the dispute to become personal Do not refer to or attempt to put privileged communication into evidence. It happens all too often that letters or the contents of lawyer-lawyer conversations make their way into Affidavits. Do not use the all-too-common tactic "when losing the case, attack opposing counsel." Do not encourage clients to report opposite counsel to the Law Society. Such reports will be given short shrift. Do not tell clients personal things about opposing counsel in an effort to make themselves look better, such as "Well, he is going through a nasty divorce right now so he isn't paying attention to his files." Such actions are inappropriate and will inevitably tend to make the dispute personal between the lawyers.

Don't take shots in an affidavit It is likely that everyone has seen, or written something akin to the following in a child support application: "The Respondent and I separated on January 1, 2007 after I learned of his 6-year affair with my mother …".

Don't turn Chambers into a game of "Spot the Jerk" No matter how hard your friend (who obviously hasn't attended this seminar) tries to poke sharp sticks at you or your client in Chambers, resist the temptation to retaliate similarly.

Name the game and move on If your unlearned friend insists on playing "Spot the Jerk", remind the Judge of the nature of the application, that your friend has spent much time tarnishing your client with irrelevant brush strokes, and that your will not respond to those irrelevant allegations, unless the court requests. Move on to argue the merits.

Take the high road Whether it's declining to get into a verbal joust or declining to sling mud in court, take the high road, no matter how uncrowded it appears. Believe it or not, good behavior is infectious.

Have a face-to-face meeting What helps a lot, when dealing with difficult or high conflict counsel, is to have face-to-face meetings. Letters can make you sound tough. It's much harder to be that way in person, especially over lunch or a drink.

Insist on a large retainer up front Especially where a client insists on "fighting for" custody of the children, your insistence on a large retainer up front will at least bring home the magnitude of the cost. If you do not have a sufficient retainer, you quickly assume the role of creditor to your client. The more indebted your client is to you for unpaid legal fees the more difficult it is to extricate yourself from the file.

Remember that there are at least 2 sides to every story In fact, there as many as 6 – your client's perception, that of the other party, both lawyers' understandings, the truth, and the Judge's findings. This is not to suggest that clients always lie. What they do is explain reality from their own perspective. Don't be surprised if the perspective of the other party is diametrically opposed to that of your client. Note also that "the truth" and "the Judge's findings" are likely not to coincide either. Try and get everyone to "see the grey" as opposed to the black and white of their positions.

Work towards the future, don't fight over the past Much time and money is spent pointing fingers and arguing over the past. History got us to where we are today. It cannot be changed, but the future certainly can be impacted by today's decisions. Encourage forward-looking discussions, not rear-view finger pointing.

Remind your client of the value of apology Find an appropriate time to plant the seed in your client's mind regarding the value of an unsolicited apology. It may bear fruit, as it did in a long-running case where, in his opening comments in mediation, one party looked the other in the eye and apologized for being such a jerk at times. Shortly afterwards, the other party also apologized. The file settled. This was the parties' third attempt at mediation. The 5 days of trial looming in the near future no doubt impacted on

their reasonability factor. Undoubtedly, the mutual, unsolicited, genuine apologies also did.

Remind your client of what constitutes a true apology The words "Where mistakes have been made, the responsibility rests with me" do not constitute an apology. At a minimum, an apology must include an admission of error, an acceptance of responsibility, and an expression of apology. It must also be sincere. The above quotation neither admits error, nor accepts responsibility. The ubiquitous remark "If anyone has been offended by my words/actions/[you name it], I apologize" likewise does not constitute an apology. The use of the conditional passive voice deflects responsibility from the speaker to the victim. Far from being a sign of weakness, it takes courage to apologize.

Model true apology With some lawyers you have a good enough relationship that they can pick up the phone and be direct about something you said or did they found hurtful or inappropriate. Some times you won't need that overture. Other times you may have feelings of loathing towards the other individual. In any case, it takes courage to admit the error, accept responsibility, explain how you felt, apologize and move on.

Do not accept your client's every instruction If your client instructs you to proceed in a way which offends your sense of propriety, you may decline to do so, provided you explain your rationale and invite the client to retain other counsel. For example, you've brought a non-emergency application on 5 days' notice. Your client insists that since you've more than doubled the requisite 2-days' notice, you are to oppose any request for an adjournment. You know that opposing the request in court will be futile, and will promote reciprocal discourteous behavior by your friend. Do you really want to get that ball rolling and discredit your reputation in the process? In a similar vein, do not allow your client's instructions to override your professionalism by drafting inappropriate Affidavits.

Listen to your "spidey" senses and don't take on every client If you get an initial sense that the client is going to be unreasonable, decline the retainer. There's lots of work out there. It's wonderfully refreshing to decline a client. Pay attention also to your "danger ahead list" and refuse to take files where certain lawyers are on the other side. There are other lawyers as able as you out there who, for whatever reason, can handle that other lawyer better. You are not indispensable nor do you have to be.

Protect yourself With some lawyers or opposing parties on some files, you may want to order the transcript of every Court appearance so if they misrepresent anything, you have the record. In these cases, or where your own client suffers a personality disorder, keep all communications in writing as much as possible, and do nothing in private Chambers. Keep everything out front and on the record.

Part ways with a troublesome client It's also refreshing to dump a troublesome client. There are certainly more delicate ways to phrase the concept, but the effect is that you release yourself from the stress of working for a client on a different wavelength. There

are lawyers who purge their workload of one client a month. If, in the process, you explain that, for example, you feel the client's expectations are too high, the client may eventually get the message and set more realistic goals.

Remind clients that they can pay for the education of either their children or yours This is an effective way to bring home the cost of litigating custody.

It doesn't always have to be "quid pro quo" You know the lawyers who won't give you anything without getting something in return. You ask for some disclosure to which you are clearly entitled and they ask what they are going to get in return. It doesn't hurt to occasionally give "quid pro nihil" – something for nothing.

Use the analogy of the favor jar Tell clients that if they keep doing the right thing, they will likely eventually receive the right thing in return. For example, if they accede to requests for changes to the parenting schedule that's like putting favors into the jar. Eventually they'll be in the position of wanting a favor. Their own historic pattern of response should engender a similar one. The same principle applies to lawyers. It takes an incredibly hard-hearted person to receive favors and not reciprocate.

Seek to have a lawyer appointed for the children According to Wanda Fish, Vice-President of Client Services, Legal Aid will appoint a lawyer as long as a Judge appoints or recommends the appointment. It helps if the Judge writes a letter supporting the appointment. Legal Aid looks at the financial circumstances of both parents but may ignore them on a litigious file. If no Court Order or if both parents do not consent, Legal Aid will not even accept an application for counsel for a child. The Order should state that "A lawyer shall be appointed for the child" rather than "Legal Aid shall provide a lawyer for the child." The Children's Legal and Educational Resource Centre ("CLERC") in Calgary will also provide legal representation for children, as well as counseling, in appropriate circumstances. Again, either a Court Order or the consent of both parents is a prerequisite. CLERC has no financial limitation. They also offer children the opportunity to participate in Speaking For Themselves, where there have been allegations of proven or alleged domestic violence and high conflict separation or divorce. The children are provided a therapist through the YWCA, as well as a lawyer through CLERC. At the YWCA there are other services available for parents. Parents must consent to the child's participation. If they do not, CLERC will seek the appropriate Court Order.

Recognize the role of the children's lawyer The lawyer will encourage settlement, keep the children out of the conflict, insist on civility and engage services in a productive way. A side benefit is that the parents and their counsel usually want to be seen in a good light by counsel for the child and tend to behave in the presence of that third lawyer. Even if this good behavior is not genuine or enduring, it at least provides a better atmosphere for discussion.

Recognize personality disorders Take for example high conflict litigants who blame the spouse for all their woes and see everything as the result of someone else's behaviour.

As in the case of any personality disorder, therapy is likely the only answer. It is extremely important that lawyers learn to recognize high conflict personalities – on both sides of the file – and to promote a collaborative approach towards settlement. Litigation involving parties or lawyers with personality disorders is a recipe for disaster. *High Conflict People in Legal Disputes* (Janis Publications Inc.) by Bill Eddy is an excellent resource.

Force the issue First of all, recognize that despite your reluctance to do so, there are times when you must press forward. It can be very frustrating when you perceive the other side to be taking an unreasonable position. It may be necessary to hunker down, do the hard work, and proceed to court for assistance in achieving results. If you wait overly long, your client may perceive you to be weak. Besides, the reality of facing an imminent court application may bring the other side to the table.

Know when it is time to get off the file When you avoid phone calls, start to vibrate or write letters that are outside of your personality, the only professional thing to do is get off the file. If you cannot maintain perspective, you need to be professional and remove yourself. You are not serving your client by remaining on.

Work towards developing a forum for addressing lawyer-lawyer conflict Part of the difficulty on high-conflict files is finding an effective way to address the situation with the opposite lawyer. If tensions have arisen between you for whatever reason, that person may be resentful or even downright hostile if you dare to suggest that the lawyers are part of the problem. The response may well be that you are half-right – namely that you are the problem. It is up to the Bar collectively to come up with a protocol for dealing with this aspect of practice. One possibility might be to encourage the Law Society to mediate. Another may be to create a Fellowship – similar to a Better Business Bureau for lawyers. Membership would be voluntary, and would include an accord to be open to discussing in a neutral setting one lawyer's perception that lawyer-lawyer conflict was impacting on the conduct of a file.

Move the file For every lawyer who has a reputation as being difficult to deal with there are several who have a reputation for being able to deal with that lawyer. It is not uncommon to hear a lawyer say "I know everyone has difficulty with X but I have never had that problem".

Try to maintain a relationship with other lawyers It is rare to develop lawyer-lawyer conflict with someone you have chatted with at a LESA course, family law conference or social function. One colleague wrote that on any difficult file he tries to talk to the other lawyer about unrelated matters. If a file has been difficult he picks up the phone after it is all done to talk it out. He has only had one time where the other lawyer would not return the call after a difficult file.

Practice "Moe Law" The author heartily recommends reading and assimilating *Moe Law: Creating Resolution out of Conflict and Chaos*, written by Doug Moe, Q.C. The paper urges the reader to commit to working on a collaborative basis and to refuse to be

sucked into the litigation mindset. Like Deborah Tannen, Doug suggests that instead of having a knee-jerk reaction to reject everything the other side suggests, seek to understand and honour and legitimize their concerns.

Think outside the box A family lawyer with more than 20 years experience in resolving disputes and de-escalating conflict offers the following suggestions:

> Clients should be encouraged by counsel to think of appearances before the courts as goals where judges have ranges of options, instead of being set up for win/lose thinking by their lawyers using the language of "applications" and Notices of Motion which use dueling positions for specific relief. Counsel can educate clients to think in terms of brainstorming many options towards mutual agreements, when thinking about settlement or even the possible outcomes a court could come up with – to be encouraged to view dispute resolution through the court setting as a teamwork model rather than a contest of wills – to reframe the role of the judge into a coach helping towards an outcome to benefit the children, but seeking information and input from those with significant relationships with the children. This approach would assist in getting more balance in Affidavits, and more constructive suggestions for resolution, instead of straight he/said she/said competition.
>
> The language of conflict resolution in the courts (and out) should be interest based, collaborative, and future focused instead of positional, adversarial and fact-finding based upon historical events. In a family law setting, the "official version of the truth" can rarely be discerned during the emotionally charged context of litigation by a third party remote from the parties' interests. Only by addressing the parties' interests, and gaining agreement to buy-in to the outcome, can you ensure genuine resolution of the conflict.
>
> Expert referrals should be transformative – i.e. counseling to change behaviour– instead of assessment based. Resources are usually limited and the best results are those obtained through focused change processes rather than expensive and time-consuming family snapshots. Parenting plans, recommendations, direct reports to the court – Practice Note 7 interventions – direct court to expert communications, bypassing client manipulation of the experts – are all very effective methods of de-escalating high conflict cases.
>
> Lawyers should use the kind of language and behaviour with each other that is contemplated by the Code of Professional Conduct, our mothers and fathers, and our kindergarten teachers. If we do that, and try to answer communications in a timely way, say sorry when we should, and deal with each other with integrity we should not be in conflict with each other – we should be dealing respectfully with the client issues without personality issues between lawyers interfering. We should also take all of the mandatory training that our clients must attend (Parent After Separation course) and the Focus on Communication in Separation course – and take mediation, interest based negotiation and collaborative law training in

order to gain the skills to de-escalate tensions, both intra-counsel and inter-client, in these kinds of cases.

Flexibility, refusal to engage in conflict, maintaining humility and a sense of humour will help one avoid becoming part of the lawyer/lawyer conflict problem. A clear separation of the lawyer and client roles, and capacity to not personalize client matters to opposing counsel is key to practice in this area. That and personal maturity, experience and a network of colleagues to call upon when frustrated, are also helpful.

Correspondence should be couched in neutral and non-inflammatory language; do not use "my client – your client" words. Use names. This takes the lawyer out of the equation and keeps the correspondence related to the clients, and not the lawyers' egos; stay always settlement focused – speak in optimistic terms of ranges of outcomes, possible options, "walk the talk" of collaboration, where opposing counsel lacks skill in neutral approaches, ensure responding communications are sufficiently detailed that their clients may instruct over their heads.

Put positive comments about the other client in the communications. Defuse a short fuse lawyer by ignoring inflammatory or personal comments. Answer antagonistic voice mails only in writing - in neutral, short, and constructive ways. Do not leave a voice mail when you are angry. Always offer a way for the counsel who has behaved badly to begin to behave well by extending the olive branch of conciliation.

Model the behaviour that you desire from the other lawyer. Play mental games with yourself *i.e*. assume they are just having a bad day; try to remember what it was like to be a junior,or overworked, or whatever else appears to be wrong – and then after cooling off, call the counsel and ask if these personal matters cannot be worked out between you, where the conflict is affecting client interests.

If you just cannot seem to get a handle on the conflict, call the Practice Manager and ask for an intervention.

Do not bring the counsel issues to your client. This will fuel the fire between clients and inflame tensions. Explain the role of advocates to your client. Maintain professionalism. One person cannot create a conflict; it takes two. Take the high road. Call your mother; ask her how you should handle the problem. She will usually know best.

The adversarial process is a totally destructive world for its participants because it is the tail wagging the dog - participants are expected to accommodate the Rules of Court language. It requires a re-think and removal of reference to the litigation processes/pleadings descriptors in favour of processes which put the high conflict family into a framework of "teamwork communication model" and which models

> desired language and behaviours for the family and mandates attendance at parent education seminars, skill based communication courses and change based counseling. Where counsel are identified as fueling the litigation, I recommend that they be required to attend the same seminars and communications courses along with their clients before being allowed to bring any further applications before the courts – an educated Bar will be of assistance to reduce high conflict cases, in my view.

Collaborate, but if you must litigate … Here are some words of advice from an experienced litigator:

> My suggestion is to accept the reality that these parents, right now, cannot agree on anything, and to construct orders that take away almost any ambiguity on parenting time distribution. Construct orders that contemplate parents being late for meetings. Construct Orders that respond to birthdays, Father's Day, Mother's Day, School Holidays. Where parents have a history of disagreement, leaving a vaguely worded order that parents "share Christmas holidays" is just asking for more conflict.
>
> Oh, by the way, the use of "parenting" orders I think is a great idea, and the less we hear the word "custody" and "access" being used, the more we show respect for both "parents".

Strenuously seek costs Don't just be grateful for a good result. Don't be seen to be so taken aback by your success that you are not prepared to argue costs. Make a vigorous argument in favor of costs. The court will order costs where appropriate. An award of costs should serve as a reminder to both sides (and to whomever else is in court at the time) that there are monetary consequences to being unsuccessful in court.

Make it easy for the Judge to order costs Be prepared to argue costs. Have copies of *Metz v. Weisgerber* 2004 ABCA 151, [2004] A.J. No. 510 at the ready, as well as a draft Bill of Costs. The case dismisses virtually all of the traditional rationales for not awarding Costs in family matters. A draft Bill of Costs will give the Judge an idea of the range of costs you are seeking, which you can remind the Judge would not represent even X% of the client' legal fees. In *Metz v. Weisgerber*, the Alberta Court of Appeal described strong public policy reasons in favour of awarding costs in custody cases in accordance with the usual Rules, including the encouragement of settlement, predictability, the danger of discouraging meritorious litigants and encouraging unmeritorious ones, the disproportionate and negative impact on the parent with few financial resources, the fact that costs are not ordinarily a full indemnity, and that an award of costs best comports with constitutional rights.

One lawyer's approach This paper shall conclude with the words of Linda Long, Q.C. as she describes the approach which works for her.

> My professional approach is empathy based, and my two most successful strategies draw from simple philosophies of "welcoming" and "story" (this is well supported in the literature - Narrative Mediation - Monk and Winslade - and aboriginal dispute resolution methods of "longhouse" and "talking circle" - Dr. Shaun Hains, Ph.D, Cliff PomPana - Red Road Healing Society).
>
> Belief number one: People coming out of one form of family fear change and will cling to the known and fight experiencing "loss" unless welcomed - guided - into their new family structure - the last thing they need is an alienating, intrusive professional environment bound by a set of ancient Rules inconsistent with their evolving family dynamics.
>
> Belief number two: Everyone has a story that brought them to make the long walk down the hall to my door. They need to feel heard.
>
> I then use my mediation process skills to find out what the person's goals are for their visit - their story will have provided an information foundation - the goal discussion allows me to begin to focus the client on the kinds of processes and education programs available through the justice system, and to begin the education of the potential client into achieving realistic expectations about outcomes available in their context - ranges of options - realistic possibilities - costs - timelines - kinds of processes - and to provide education about key concepts of "justice" versus "legal" systems - this is where education about negotiation, mediation, collaboration and litigation, conciliation, counseling takes place - on a comparative basis, both for outcomes and for cost.
>
> Only after this part of the meeting do I then make a decision about accepting a case - and accept instructions about going forward. I also do not work with clients who will not immediately take my advice to register for the Parenting after Separation course - before I actively start working up the case.
>
> I advise clients from the first interview that I do not practice in a manner focused on polarizing their case or creating further adversarial relations - my emphasis is on settlement if possible - and litigation only if necessary.