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Promoting professionalism through better communication

(Excerpts taken from presentation given by Richard S. Victor, chair of Professionalism and Collegiality Committee, American Academy of Matrimonial Lawyers, at the AAML national meeting in Panama City, Panama, March 2015.)

Richard S. Victor



Our recent economic downturn combined with certain court decisions and legislation around the country has resulted in the elimination of several areas of practice for lawyers, which has yielded unintended results. The first and most prevalent is a proliferation of attorneys who have taken on cases in areas of law in which that they have never previously practiced. Unfortunately, this development has led to unintended results.

Many family law attorneys now find themselves dealing with attorneys who may be unfamiliar with substantive family law, local court practices and procedures. Another result of this has caused attorneys who operate with a specific “mind set” which they may have employed in their prior specialty, to continue to use “that way of practicing” to “get things done” when they practice family law. Lawyers who have been accustomed to confrontation and “Bulldog” techniques may find that the practice of family law is a unique area, which requires more skill in having patience, techniques in negotiations, and the art of dealing with highly emotional clients. Their abrasive actions serve no positive purpose in family law matters.

Another unintended result is the different treatment lawyer’s give to each other when cases are either “high conflict” or “hotly” contested. Lawyers sometimes get caught up in the emotions of their clients or the reality that their fee is somehow contingent on the amount of time they can bill out. Examples of what I refer is when an attorney calls me and quotes their client to me as if whatever their client tells them is gospel and accuses my client of the bad behavior and wants me to get him/her to stop. I try never to quote a client (especially in child custody cases) to another lawyer, unless I have direct knowledge of the allegation being made. I know there are three sides to every story and we are each getting one of them. Somewhere in the middle is usually the real story, but lawyers have to work together to try to find that “truth” in order to help their clients and the family.

Another example came from a case where I came up with a unique way to structure a settlement, using both tax benefits and deferred compensation to resolve a difficult financial matter. I set up a meeting with the other attorney and explained the entire idea and he understood it and thought it was a great concept, but said that it was too early in the case to resolve the financial issues, as he had not billed out his retainer yet, He said we would need to do some discovery, depositions and wait a few months before we could enter into the agreement that I presented that afternoon, but that I was assured that was how the case would be settled once he had billed out his retainer.

In some cases, disrespect for brother/sister counsel has been an unfortunate result. Filing motions and serving the other attorney's office at 4:45 p.m. before a long holiday weekend, knowing the other attorney will either have to work through a holiday weekend to respond or not be in town to file a response has happened more in the last five years than in the first thirty-five years of my practice, based on conversations I have had with many family law practitioners. Also, signing a Motion, saying a lawyer made contact with an adverse attorney to try to resolve a motion, when they never did attempt to do so, has been complained about more now than ever before. Litigating, with the excuse of winning at any cost, becomes the goal; it may also lead to the downfall for our profession.

To take from my respected law school Professor Harold Norris and reword...We AAML Fellows are the foot soldiers of our profession. We must set an example others should emulate. Unfortunately, that is not always the case. In fact, while I was preparing for this lecture and out of the state of Michigan on my way to Panama, a former AAML Fellow (and recipient of the Michigan Lifetime Achievement Award in Family Law) knowing I would not be in the state, filed a motion on one of my high end cases, refusing to adjourn the case, despite the fact that the matter had previously been scheduled and adjourned and a pretrial was scheduled for when I was to return to Michigan. My partner and team filed our response and the judge knew, as well as the other attorney, that I was out of town, as a transcript from the prior hearing clearly indicated that I would be out of town, setting this matter for when I returned was attached to our response. But, this was a newly elected judge and the other lawyer had a reputation for being a bully in many circles and was going to try to use his intimidation tactics without me being present. The result: our judge's research attorney (as reported to me in Panama) called everyone into her chambers and advised the attorneys that the judge took ill and the matter would be called when I returned to Michigan.

Clearly, judges have the power to control the unprofessional lawyers among us, or the good lawyers, doing unprofessional things. Without the help of the bench, we, the ethical and professional bar, are powerless to do this alone!

In 2001, the Oakland County Bar Association had a special Domestic Relations Task Force, which I was asked to be part of in order to develop an "Attorney Code of Conduct," which I co-authored. This code applies to not only family law attorneys, but also to attorneys who practice in every field of law. In view of the times we are living through, I believe it bears repeating.

Attorney code of conduct

- (1) Never knowingly deceive another lawyer or the court and do not file frivolous motions or other proceedings.
- (2) Honor promises and commitments made to another lawyer.
- (3) Make all reasonable efforts to schedule matters with opposing counsel by agreement. Communicate with opposing counsel in an effort to avoid litigation and to resolve existing litigation.
- (4) Only seek sanctions against opposing counsel where required for the protection of the client. Do not make unfounded accusations of unethical conduct about opposing counsel or intentionally embarrass another lawyer.
- (5) Agree to reasonable extensions of time in litigation if the extensions will not materially adversely affect the client or unduly delay court process.
- (6) Exchange all exhibits before the day of any court hearing if it is reasonably possible to do so. Where it is not possible, the exchange should take place as early as possible on the day of the hearing

- (7) Respond promptly to communications, either written or by telephone, from opposing counsel.
- (8) Do not use unmeritorious, deceptive or unreasonable delaying tactics and always attempt to be punctual for any scheduled motion or hearing. If it appears that being on time for a scheduled matter will not be possible, make every reasonable effort, as early as possible, to notify opposing counsel and the court.
- (9) Do not send motions or other papers at a time or in a manner, which will unfairly limit the other party's opportunity to respond or will unfairly prejudice their ability to represent their client's position.
- (10) Advise the client of this code of conduct and the expectation that every attorney is required to follow it.

It may be time for courts around the country to post this Attorney Code of Conduct and when they hear of attorneys who violate this code, judges should do whatever they can to enforce the concept and practice of this code, if not in word, than at least in spirit, when faced with its violation.

Family law is unique. Therefore, the practice of family law should be unique. Attorneys who choose to practice in the area of family law must learn to deal with a wide range of emotions experienced by their clients. They must work to benefit a family and not add to its destruction. When children are involved, the family law attorney must help clients recognize that even though they may be divorcing and may no longer be marriage partners, they will still be parent partners. They will be the parents to the same children and the grandparents of the same grandchildren. They are and will be connected to each other for the rest of their lives. How they handle the divorce and separation process, the respect or disrespect that they show to each other, will most probably govern their interpersonal relationship for years to come. A conscientious family law attorney has a duty to help a client through this process and to minimize its destruction in order to calm the emotional behavior of the client. This task must be balanced with the attorney's ethical obligations associated with advocating and working for a client pursuant to their Rules of Professional

Responsibility.

Always remember, if a lawyer decides to handle a business, personal injury, contract, real estate or property case, what they do is very important and has the ability to affect and impact their client and their clients' business and financial affairs. But if an attorney decides to handle a family law case, especially when children are involved, what they do not only affects their client and their clients' finances, but also has the capacity to affect and impact generations.

How we behave as attorneys on behalf of our clients helps "set the tone" for our clients who rely on their attorney to guide them through difficult times.

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