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**Procedural justice in ADR**

Family law: the lawyer–client relationship, procedural justice and the dispute resolution process

Jill Howieson**Background**

Family lawyers are charged with exacerbating family law disputes and making them adversarial and embittered. Indeed, the various reports that have informed the recent family law reforms consistently cite anecdotal evidence that suggests that ‘the animosity that adversarial legal proceedings create between separated parents’ is created in the main by the ‘adversarial behaviour of lawyers working in the system’.¹ Yet, nowhere in these reports, or anywhere else, is there empirical research evidence that confirms the veracity of these claims; rather there is strong qualitative evidence to suggest that family lawyers are constructive and conciliatory in their approach to resolving family law disputes. The qualitative evidence suggests that as well as negotiating a resolution to their clients’ disputes, family lawyers provide support and reassurance to their clients, help reduce the tension and stress involved in family disputes by providing an effective channel of communication for them with their former partners or even third parties, and guide, support and educate their clients through the divorce transition process. Further, and most importantly, the evidence suggests that family lawyers emphasise settlement.²

So where do these claims of the adversarial lawyer originate (aside from the fact that our legal system is adversarial in nature and rights based)?³ And doesn’t the client have some influence over how his or her family law dispute is resolved? What happens when the client walks into the lawyer’s office? Does the client bow down to the adversarial lawyer’s contentious and argumentative, highly competitive and

must win at all costs mentality? Does the client choose litigation as a matter of course and fight for his or her legal rights in the Family Court? Or does the client want to pursue an interest-based facilitative type of dispute resolution process such as mediation, or FDR as it is now known?⁴

It is hard to see that the charge of exacerbating conflicts and making the dispute aggressively adversarial should fall solely on the shoulders of the lawyers. What happens if an angry client, not yet accepting of the separation or divorce, with a highly competitive and dominating style of conflict resolution meets a constructive and conciliatory lawyer? Does the conciliatory lawyer adjust his or her lawyering style to fit the needs of the client, or does the conciliatory lawyer take the angry client down a problem-solving route of dispute resolution to no avail? These questions and more need to be answered.

Family law dispute resolution involves an interaction. Family lawyers don’t work in isolation from their clients, however there is no research that untangles the complexities of the lawyer–client relationship and demonstrates how the dispute resolution orientations and strategies of the lawyer might interact with those of the client, and how this interaction might in turn influence the course of the resolution of the dispute.

Lawyers and clients***Conciliatory or adversarial lawyers***

The literature is unclear on what exactly an ‘adversarial’ lawyer looks like, and similarly it is unclear on what

characterises a ‘conciliatory and constructive’ lawyer.⁵ There is no single construct that adequately characterises the two different approaches to family law dispute resolution. Nor are the two approaches truly dichotomous. A survey of Canadian family lawyers in Vancouver, clearly identifies that family lawyers work along a conciliatory–adversarial continuum and that there are varying degrees between family lawyers advocating a conciliatory approach to the practice of family law which focuses on the clients’ needs and interests, and others who take a more adversarial approach and focus on the duty to their clients’ ‘rights’.⁶ Understanding how family lawyers work and what approach they take to the dispute resolution task, is the first step in appreciating how the interaction with the family law client influences the dispute resolution choices that are made and the course that the family law dispute resolution process takes.

Interpersonal conflict resolution styles of the client

The next step toward this understanding of the lawyer–client relationship is to attain a picture of the family law client. It is well documented in the literature that people have different ways of responding to social or interpersonal conflict and five specific styles of handling conflict: avoiding, obliging, dominating, compromising and integrating, have been identified.⁷ A client’s predisposition to a particular style might reasonably affect how the client will try to resolve his or her family law dispute. Further, and possibly more importantly, the client’s interpersonal conflict resolution style will almost

certainly influence how the client perceives the lawyer who is helping him or her to resolve the dispute.

Emotional response to the divorce

How the client is emotionally responding to the separation/divorce might also reasonably influence how the client might choose to deal with his or her family law matter and how he or she responds to his or her lawyer. Studies have shown that the clients' adjustment to the divorce process, in terms of their affect and initiator status, relates to the clients' conflict resolution behaviours.⁸ It is therefore reasonable to assume that the clients' emotional response to the divorce will also affect their choice of dispute resolution process, their behaviour within that process and their perceptions of their lawyers.

Procedural justice

The interactions between lawyer and client are complex in nature and any thorough investigation of the relationships should be made through a robust theoretical model. A framework that would serve these types of investigations and would provide a lens for a study of this nature is the theoretical construct of *procedural justice*. Procedural justice is an apt frame because, regardless of the rhetoric surrounding family law dispute resolution, the purpose of any legal dispute resolution process is that it must be seen to be fair and just and it is clear from the research that one powerful indicator of whether a client feels that fairness and justice has prevailed, is the perception of procedural justice.

Procedural justice research shows that 'people's reactions to conflict resolution decisions are powerfully shaped by their views about the procedure that generated those outcomes.'⁹ Further, the research shows that parties are more likely to be satisfied with the outcome of a dispute resolution procedure and be more likely to view the overall experience as just, if it was generated by a fair procedure. Arguably then, if the client perceives that the lawyer has arrived at decisions regarding how to resolve his or her matter fairly, then the client will be more likely to accept and

follow the lawyer's advice. Conversely, if the client perceives that there was a level of procedural unfairness in the advice of the lawyer, then he or she might turn to another procedure as a means of ensuring fairness, for instance, the Family Court. Therefore, exploring how a client's procedural justice perceptions might influence the nature of the dispute resolution decisions that the client makes and how those perceptions might influence the route that the client takes through family law dispute resolution process is of major importance, and an essential requirement of any study into the lawyer-client interaction.

Required study

The parameters of a comprehensive study into family lawyers and their clients are multifaceted. There needs to be first, an investigation into the profiles of family lawyers in terms of their adversarial or conciliatory orientation. Second, there needs to be an investigation into the profiles of family law clients in terms of their interpersonal conflict resolution styles and their emotional reactions to the divorce process. Next, an exploration is required of what happens when lawyers with particular conflict resolution orientations come together with clients with individual conflict resolution styles and emotional responses to the divorce process targeting the following factors: what type of dispute resolution decisions are made; what procedural justice perceptions are produced; how do those perceptions influence the course of the family dispute resolution; and what outcomes are produced?

Research of this nature, grounded in procedural justice theory, has commenced in Western Australia, and it is hoped that the results of the study will illuminate, in part, the complexities of the lawyer-client relationship and show how that relationship influences the course of family law dispute resolution. ●

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This article is based on her PhD research project.

Endnotes

1. Family Law Council, *A New Approach to the Family Law System: Implementation of Reforms*, Discussion Paper (10 November 2004); Standing Committee on Family and Community Affairs, Parliament of the Commonwealth of Australia, *Every Picture Tells a Story: Report on the inquiry into child custody arrangements in the event of family separation* (December 2003) 60.

2. Rosemary Hunter, 'Adversarial mythologies: policy assumptions and research evidence in family law' (2003) 30 *Journal of Law and Society* 156 at 159, 160.

3. Our judicial system is based on the notion that disputes can be resolved best by relying on individual legal rights and disputes are played out in an adversarial system where each side presents the strongest case with little or no regard for the opposition. In the end, one side wins and one side loses. Carla Hotel and Joan Brockman, 'The conciliatory-adversarial continuum in family law practice' (1994) 12 *Canadian Journal of Family Law* 11 at 17.

4. Family dispute resolution (FDR) 'is a process (other than a judicial process) in which a family dispute resolution practitioner helps the parties who are affected by the separation or divorce to resolve some or all of their disputes with each other. The family dispute resolution practitioner is independent of all of the parties involved in the process': *Family Law Act 1975* (Cth) s 10F.

5. Despite the Family Law Council's, *Best Practice Guidelines for Lawyers doing Family Law Work* (March 2004), the meaning of conciliatory and constructive is not clear.

6. Hotel and Brockman, above note 3, p 18.

7. M Afzalur Rahim, 'A measure of styles of handling interpersonal conflict' (1983) 26(2) *The Academy of Management Journal* 368.

8. Andrew Bickerdike, *Conflict resolution in divorce mediation: The impact of the divorce adjustment process and negotiation behaviour on mediation outcome* (D Phil Thesis, La Trobe University, 1998), 2.

9. Tom R Tyler, *Procedural Justice* (2005), xiii.