

# Focus FAMILY LAW



## The risks of reconciliation

Balancing emotion and practical considerations in a divorce



**Kenneth Fishman**


*Act* codifies a lawyer's obligation to properly advise a client of their options with respect to reconciliation in a divorce case from the outset.

The duty to inform a client of their options with respect to reconciliation may be satisfied by simply reviewing with the client the parts of the *Divorce Act* that deal with facilitating reconciliation, and educating the client about their options with respect to marriage counseling and other therapeutic options which might help the parties reconcile.

One of the main concerns for a lawyer that will often arise as a result of a client's wish to reconcile will be the valuation date for the purposes of determining a client's net family property and the issue of equalization. From the lawyer's perspective, the valuation date is arguably the most critical date for their client, especially when analyzing the financial repercussions of their client's separation. The *Family Law Act* defines the valuation date as "the date the spouses separate and there is no reasonable prospect that they will resume cohabitation." In *Taylor v. Taylor* [1999] O.J. No. 5310, Justice Alan Whitten further **Valuation, Page 12**

**U**nlike most other areas of law, family law is a vocation which requires a keen understanding and compassion for the minefield which is human emotion. Family law lawyers need to be able to balance the practical and legal realities of separation with the visceral emotional feelings which their clients often display on a daily basis. Chief among the emotions felt by clients is the occasional feeling that they may wish to reconcile with their spouse. Sometimes clients feel that they want to salvage their relationship and often times, clients will communicate their willingness to reconcile at any cost, be it financial or otherwise.


At the outset of any case involving a divorce, all lawyers have a duty to discuss with a client the issue of reconciliation. Section 9 (1) of the *Divorce*



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## Focus FAMILY LAW

# Limited retainer means managing client expectations

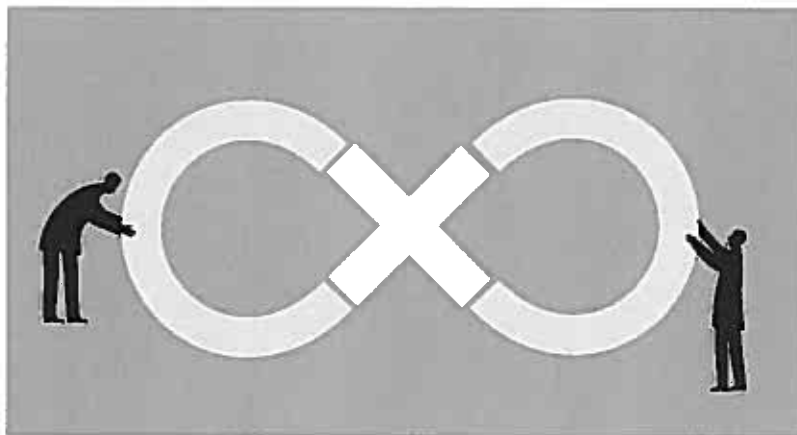


Dan Pinnington

Helping clients reduce the costs of resolving family disputes has become a practical issue for a lot of family law lawyers. As a result, many of them are offering to do work on a limited-scope retainer or "unbundled" basis. This means doing part but not all of the work on a legal matter, including document review, the preparation of a pleading, providing advice on one issue, or representation at a single hearing.

Unbundled legal services come with potential risks for both the client and the lawyer. In choosing to partially represent him or herself, the client assumes much greater responsibility for decision-making on legal issues and how to navigate an unfamiliar legal system. The lawyer, in turn, loses access to information and a view of the bigger picture, as well as control of the matter.

Lawyers need to keep in mind that limited-scope representation does not mean less competent or lower quality legal services. For Ontario lawyers, the "Competence" commentary to Rule 2.01 specifies that a lawyer considering whether to provide legal services under a limited-scope retainer must carefully assess in each case whether it is possible under the circumstances to render those services in a competent manner. And further, new Rule 2.02(6.1) provides that: "Before



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providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client."

Thus, under the rules, a lawyer and client can limit the scope of representation; however, the limitation must be reasonable under the circumstances. Limitations will not be considered reasonable if the time allotted is not sufficient to yield advice upon which the client can rely. Lawyers providing unbundled legal services owe the same duties of competence, diligence, loyalty and confidentiality to limited-scope clients that they owe to full-service clients.

Lawyers also need to recognize that unbundled legal services are not appropriate for all lawyers, all

clients, or all legal problems. Further to a new commentary under Rule 2.02(6), limited-scope representation will generally not be appropriate if a client's ability to make adequately considered decisions in connection with the matter or representation is impaired due to mental disability or for other reasons. That commentary states: "a lawyer who is asked to provide legal services under a limited scope retainer to a client under a disability should carefully consider and assess in each case how, under the circumstances, it is possible to render those services in a competent manner." Lawyers should take care when they are providing unbundled services to clients who are under a disability, or might be.

Another danger area is providing further assistance to a client after a limited-scope retainer is

terminated. In many cases, a matter handled on a limited-scope retainer basis will have started before the lawyer became involved, and will continue on after the work the lawyer agreed to do is completed. If the client comes back for further assistance, the lawyer should make sure a new full or limited-scope retainer is in place.

At the retainer stage, the lawyer should also assess whether the potential client's expectations are realistic, and whether he or she readily adjusts those expectations in response to new information. If the answer to either of these questions is "no," accepting a limited retainer from this particular client may be risky.

Case law from the U.S. demonstrates there will be post-matter disputes over the extent of lawyers' representation on limited-scope retainers. Dissatisfied cli-

ents may challenge purported limitations by refusing to pay fees, filing malpractice suits or bringing ethics complaints. Malpractice allegations raised in those cases include lack of authorization to undertake certain aspects of the representation; unreasonable fees, given the scope of representation; that the litigation result or settlement should have been more favourable; or that the lawyer did not handle an aspect of the matter properly.

Good communication with the client can go a long way toward minimizing the risk of these kinds of allegations. Note, too, that a written retainer is required for unbundled services (see Rule 2.02(6.2) of the *Rules of Professional Conduct*), and it should be carefully drafted in unambiguous language to describe the scope of the work the lawyer is being hired to do. In particular, where the client is declining aspects of service, or undertaking to handle them independently, the details of these arrangements should be reviewed verbally with the client and spelled out in writing. The rules require that clients give informed consent to a lawyer's delivery of unbundled legal services.

By communicating clearly and honestly about costs, expected outcomes and unexpected contingencies, and taking the time to listen actively and ask questions, you can manage both the client's expectations and your own claims risk when you are working on a limited retainer.

Dan Pinnington is vice president, claims prevention and stakeholder relations at LAWPRO.

## Valuation: Some relationships are just not salvageable

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expanded on this: "Valuation day is therefore when separation and a lack of desire to live in a conjugal relationship coincide. The latter intent appears in the authorities to be equated with a

lack of intent to reconcile. In plain parlance, it would be at the point when a party gives up on the relationship."

When trying to determine what the valuation date is, counsel must gauge their client's inten-

tions. Indeed, whether their client has in fact given up on the relationship will be critical in any analysis. If the client constantly gravitates between the intention to separate and the intention to reconcile, questions will immediately arise as to whether a valuation date can in fact be pinned down and established. Counsel must always ensure that clients who wish to reconcile fully understand that a different valuation date can lead to different values attached to assets and debts and they need to understand the financial consequences that flow from such fluctuations.

Aside from the financial concerns surrounding reconciliation, family law lawyers have the important task of counseling cli-

ents who have separated because of abusive relationships and are considering reconciliation. In situations such as those, lawyers must carefully advise their clients of the risks involved with reconciliation, including the danger of continued abuse, be it physical, emotional or financial. As much as we want to believe that our jobs are simply to advocate on behalf of our client, often times we have to act as counselors and advisors. The truth is that some relationships are not salvageable specifically because of abuse, and in those situations, lawyers need to carefully act as impartial third-party advisors to the clients and warn them about the safety risks resulting from reconciliation.

Relationships are sometimes

hard to build and maintain and the human psyche is such that it is difficult for people to simply give up on relationships which they have tried to nurture and cultivate, often for many years. Reconciliation is a natural emotion, but lawyers have a responsibility to ensure that our clients fully understand the legal effects of reconciliation and the possible financial pitfalls that may occur as a result.

Kenneth Fishman practices all aspects of family law as a member of the family law group at Basman Smith.

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