

Family**Case a wakeup call in dealing with difficult clients**By **Nathalie Boutet**

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(February 9, 2022, 1:25 PM EST) -- The facts of *Capone v. Fotak* 2021 ONSC 7992 provide an opportunity to review our role as legal advisers, how to deal with impaired instructions and alternatives to court.

Zoran Fotak, a financier who has accumulated arrears of support of approximately \$2.5 million and who has made minimal support payments since the separation from his wife, a former stay-at-home mom who has been diagnosed with Sjogren's syndrome, an auto-immune disease. The couple have two children including a disabled son who suffers from a progressive degenerative disease ("Retinitis Pigmentosa") which is causing him to go blind, who also suffers from mental health issues and who has required ongoing physical, emotional, financial and medical support.

The parties were married in 1998 and separated in 2008. Following separation, the wife remained in Toronto with the children while Fotak remained living in New York. The case, burdened by international jurisdictional complexities, is still before the courts, after at least 10 interim court orders have been made.

Do we need to take difficult cases?

Commentary 4 of Rule 4.1-1 of the *Rules of Professional Conduct* clarifies that:

... [g]enerally, a lawyer should not decline representation merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused ...

However, we are also guided by Rule 3.2-4 which states that a lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

The addition of the lawyers' duties to encourage clients to attempt to resolve through a family dispute resolution process (negotiation, mediation, collaborative negotiation), in the recent amendments of the *Divorce Act*, address the same issue.

Impaired instructions

But clients don't always accept our recommendations, and they often provide instructions when their judgment is impaired.

Being impaired happens after the overconsumption of drugs or alcohol, but also when being consumed by strong negative emotions. The dictionary definition of impaired is being in an imperfect or weakened state or condition.

People who separate have often endured periods of time in unhappy, acrimonious and sometimes even violent relationships. These already emotionally overloaded people will be thrown into a separation process that is rooted in conflict during which they will experience strong emotions.

People's ability to think and to reason is negatively affected when they are experiencing strong

emotions. When humans feel threatened or experience strong emotions, their body reacts instinctively and is more primarily concerned with being strong and fast (to save our lives from danger) than thinking rationally.

Under fear or anger, the amygdala instantiates the release of cortisol in the brain and blood, which inhibits prefrontal cortex activity. The prefrontal brain region has been implicated in planning complex cognitive behaviours, personality expression, decision making and moderating correct social behaviour.

Separating spouses may be making decisions and providing instructions based on fear, shame, anger, resentment, etc. The impacts can have long-term, devastating effects for both spouses and their children.

Our profession has greatly evolved since I started practising, such that we more readily identify when a client is providing instructions from an impaired state, and we recognize the benefits of recommending additional support for clients. It is now common practice in collaborative negotiations to work as teams, where one of the professionals provides emotional support to the clients during the legal process. In other settings, it is common to refer clients for therapy or personal development training.

Benefits of family dispute resolution process

Changes to the *Divorce Act* that enshrine duties to consider non-court settings, and the simultaneous inclusion of family violence as an important factor to consider, indicate a societal readiness to send difficult family law cases to collaborative law, mediation or traditional negotiation first, before starting a court case. The experience of the spouses involved can be drastically different in these non-court settings.

Even if many cases end before the trial stage, the type of negotiation that leads to an agreement in these instances may leave clients feeling dissatisfied and can be unduly expensive. Aptly said by professor McFarlane [Julia Macfarlane, *The New Lawyer: How Settlement is transforming the Practice of Law*. UBC Press: 2008]:

[In court] lawyers prepare for litigation and negotiation in virtually the same manner.

Clients are not offered specialized negotiation techniques and strategies that could heighten their chances of good settlement and expand the range of available outcomes. Instead, negotiation proceeds along a fairly predictable and unimaginative path of an exchange of inflated offers and counter-offers, until the distance is broken down to a point of agreement.

It leaves clients facing an unexpected collapse in their expectations when they make offers to settle that are not as favourable to them as the initial claims and demands made by their counsel at the outset of the [court] proceedings ...

Clients are often told by their lawyers at the very beginning of the case, that they have a good case based on the legal principles disclosed. What is missing from clients' understanding is the reality of several financial and non-financial costs associated with litigation.

The enactment of the duty of lawyers to encourage their clients to resolve their matters through negotiation, mediation and collaborative law in the *Divorce Act* is a brave and welcome development that has the potential to make a significant difference for our clients and their families.

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