

Decision should alert family lawyers to rethink their settlement negotiation style

By Judith L. Huddart



The standard of care applied to a family law lawyer's advice in recommending settlement recently came under scrutiny by the Ontario Court of Appeal. In *Ristimaki v. Cooper* [2006] O.1. No. 1559 a family law client successfully appealed dismissal of a negligence claim against her former lawyer. The court found lawyers should be held to the same standard of care as, other professionals when they make "judgment calls" for clients. This decision could be a wake-up call for family law lawyers.

Settlement is now the norm in the majority of family law cases. Experienced family law lawyers

advise most clients to settle cases outside court and to settle as soon as possible. If a case does go to court, judges often repeat this advice. In theory, as judges decide fewer cases, responsibility for resolution should shift to the parties themselves. In practice, responsibility for settlement has shifted to the parties' lawyers. While it makes sense in litigation for lawyers to assume a role of control, given the current trend in the law on solicitor's negligence, lawyers should consider carefully before assuming this same role in settlement discussions.

Negotiations in family law present unique challenges. Clients are usually not functioning at their best. Their judgment may be temporarily clouded by grief or a desire for revenge. It can be tempting for lawyers to assume responsibility for decision-making for emotional clients. Beware - according to *Ristimaki v. Cooper*, if a lawyer managing the negotiation process makes a recommendation for settlement which their client accepts, the lawyer may be held liable for

this advice if the recommended outcome is less favourable than anticipated.

Consequently, the more a family law lawyer shares control and decision-making with their client in settlement negotiations, the more the client should share responsibility for the outcome of their case. It may be challenging for a lawyer to share control of a family law case with an emotional client, and just as challenging for that client to make important decisions while their lives are in turmoil. But involving a client in a more meaningful way in their case can be mutually beneficial. When clients have necessary information and input into negotiations they are better equipped to make decisions and accept the consequences of those decisions. When lawyers share information and involve clients in negotiations they are less likely to be second-guessed later if things do not work out as well as clients had hoped, or to be sued by their clients for negligence as a result of their conduct.

Lawyers have been slow to recognize the need to actively

involve their clients in settlement negotiations and slow to recognize the benefits of sharing responsibility for outcome with their clients. The collaborative approach in family law may be the first lawyer initiative to specifically build client responsibility for the outcome into the process. Collaborative lawyers have learned to apply their legal knowledge and negotiation skills as problem solvers. Collaborative training provides lawyers with necessary skills to involve and educate their family law clients not only about their legal rights, but also their interests. Instead of lawyers taking responsibility for generating a settlement proposal the lawyers facilitate informed settlement discussions, encourage clients to generate options and then to choose the option that best meets their needs.

The collaborative process attracts clients not only because their lawyers agree to keep matters outside court, but also because they have a meaningful role to play with their lawyers in negotiations. Clients agree upfront in a collaborative case to share responsibility for resolution. Unlike *Ristimaki v. Cooper*, where negotiations followed the traditional lawyer to lawyer approach, negotiations in a collaborative case take place primarily at four-way meetings with clients present, represented by their lawyers, and directly involved in the discussions.

Minutes of the progress and issues covered at each meeting are circulated to everyone for review and approval. If additional expertise is needed to resolve child or financial issues the parties agree to jointly retain these experts, who report back to the clients as well as their lawyers.

Family law lawyers may need to re-think their negotiation styles to reduce potential liability for negligence arising from settlement recommendations to clients. Consider the following:

- take training to offer family law clients a collaborative process option
- if a collaborative option is not possible, make sure clients are well informed on an on-going basis about settlement discussions; report back to clients regularly and document these reports; ask clients for input and for written instructions before making any settlement proposal.

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