

A Higher Standard for Family Law Practitioners

By Christopher Musulin and Christina Groves

Few areas of the law are as emotionally charged as divorce and family law. Litigants faced with the failure of their marriages, the attending interspousal conflict, and the decision-making about children and finances, can be driven to the brink of collapse.

Unfortunately, attorneys can be easily drawn into the emotional storm and, in some cases, assume the angry persona of their clients. In fact, some clients, empowered with television or Hollywood bravado, expect their divorce attorneys to engage their adversary in a rude or caustic fashion, exhibiting over-the-top scorched-earth behavior and tactics. Attorneys who decline to engage in such aggression, even when done with the interest of the client in mind, are accused of “not fighting for” the litigant.

The Rules of Professional Conduct, which apply to all practice areas, contain strong prohibitions against such forms of inappropriate conduct. Furthermore, the RPCs have been interpreted broadly to punish a variety of bad conduct perpetrated by renegade attorneys. In the American Academy of Matrimonial Lawyers (AAML) Bounds of Advocacy aspirational standards have been created specifically to address the challenges that matrimonial and family law attorneys face.

Rules of Professional Conduct – Breaking Bad

The RPCs, to capture all machinations of bad behavior, are written in a general and, frankly, somewhat opaque fashion. They generally promote honesty, fairness, and tact in interactions with clients, opposing counsel and the court. The rules, however, are cast with broad strokes; it is not obvious from the actual text what behaviors fall within the penumbra of each provision.

Apart from the obvious factual situations such as ignoring a file or not having a fee agreement, there are a limited number of published ethics opinions in family law matters dealing with the emotionalization often involved in such matters. There are, however, ethics opinions demonstrating outrageous behavior in other practice areas that are worthy of note.

RPC 3.4 addresses dealings with the opposing party/

counsel. Section (g) of the RPC states, “A lawyer shall not present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.” It is also important to note the RPCs apply to lawyers advocating for clients as well as representing themselves. In *In re Supino*, for example, counsel received a three-month suspension for threatening criminal charges against his former spouse, the judge, court staff, and police officers in reference to his own custody litigation.¹

The misconduct in *In re Supino* was also found to violate RPC 3.2, which provides, “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.” Counsel had written letters of complaint against police officers, judges, and the court administrator, attacking them professionally and threatening criminal action. In *In re Ziegler*, counsel told his client’s wife, in front of her attorney, that he was going to “cut her up into bits and pieces, put [her into] a box and send [her] to India.”² The conduct need not be this egregious, however, to constitute a violation. Name calling, throwing counsel out of the office, and fabricating excuses to delay proceedings have also resulted in discipline.³

A particular level of decorum and professionalism is also required when dealing with the court, with RPC 3.5(c) prohibiting conduct by an attorney that is intended to interrupt or disturb the court process. The attorney in *Supino* was also found to have violated this rule by telling the judge he was “making a very big mistake” by denying his request. These statements were found to disrupt the court process, in violation of the rule, as they were bullying and intended to pressure the court to take certain action.

RPC 8.2 also focuses on dealings with the court, directing that a lawyer “shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge...” Violations of this rule can be found even where such statements are not made in the courtroom, as in *In*

re *Van Syoc*, where counsel told his adversary during a deposition that he had the judge in his pocket.⁴

In general, any conduct by a lawyer that interferes with the administration of justice violates the RPCs, as specifically spelled out in RPC 8.4(d). The comments in *Van Syoc* about the judge being in the lawyer's pocket also violated this rule. They were deemed prejudicial because they were said in the presence of a court reporter and the litigants. The threats in *Supino* violated RPC 8.4(d), having been made in an attempt to gain an advantage in the litigation. Failing to cooperate and attempting to delay proceedings have all also been deemed misconduct in violation of the rule.⁵

These types of misconduct no doubt put an even greater strain on the relationship between the litigants. The cost to counsel involved was varying levels of discipline, but the cost to the litigants was likely much more severe. A high level of conflict in a divorce often interferes with the litigants' ability to coparent, therefore, family law practitioners should be held to a more demanding code of conduct.

Raising the Bar for Family Law Matters

The AAML was established in 1962 to provide leadership and promote the highest degree of professionalism in the specific practice of family law. In 1987 the AAML published the *Bounds of Advocacy* to guide matrimonial attorneys in their unique area of practice.

Noting family practitioners must serve not only as an advocate, but also as a counselor at law, the *Bounds of Advocacy* provides clear and meaningful principles rising above the Rules of Professional Conduct, which guide attorneys in practicing in a professional and civil manner. The subtitle reveals the important purpose: "To provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law." In furtherance of this goal, the *Bounds of Advocacy* focuses on the many facets of family law practice, including advice, communication, conduct of the client, professional cooperation and even the interests of the children involved in the conflict. These principles are closely intertwined.

Effectively managing the visceral emotions of divorce and custody matters is a vital and complex task for family law practitioners that can change the course of the litigation. The *Bounds of Advocacy* offers the following guidance:

1.3 – An attorney should refuse to assist in vindictive

conduct and should strive to lower the emotional level of a family dispute by treating all other participants with respect.

- 1.4 – An attorney should be knowledgeable about different ways to resolve marital disputes, including negotiation, mediation, arbitration, and litigation.
- 5.1 – An attorney should not condone, assist, or encourage a client to transfer, hide, dissipate, or move assets to improperly defeat a spouse's claim.
- 7.1 – An attorney should strive to lower the emotional level of marital disputes by treating counsel and the parties with respect.

It is not uncommon for clients to want their matrimonial attorney to mirror their raw emotion and support their desire for revenge. In the role of counselor as well as advocate, however, matrimonial attorneys are called upon to act with respect to all involved and reduce the level of conflict. Instead, focus should be on a model of problem-solving and resolving the dispute.

Quieting the tension serves the dual purpose of generally benefitting both parties while also likely minimizing the impact of the adult conflict on the children. Family law practitioners do not owe a duty to children as clients, but advocacy and competent representation of a client cannot be at the expense of the children. As the client has a responsibility to act in the best interests of the children, the duty of a matrimonial attorney to their client, in turn, cannot ignore considerations of how children will be affected. The nature of family law practice necessitates this elevated standard of professionalism. Therefore, while the general Rules of Professional Conduct do not contain any guidance in this regard, the *Bounds of Advocacy* specifically speaks to child-related considerations:

- 5.2 – An attorney should advise the client of the potential effect of the client's conduct on a child custody dispute.
- 6.1 – An attorney representing a parent should consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children.
- 6.2 – An attorney should not permit a client to contest child custody, contact or access for either financial leverage or vindictiveness
- 6.4 – An attorney should not bring a child to court or call a child as a witness without full discussion with the client and a reasonable belief that it is in the best interests of the child.

In reality, the best interests of the children and the welfare of the parents are not mutually exclusive. The family relationship continues despite litigation in the Family Part, and the attorneys for both parties should collaborate with their clients to preserve stability for the children.

Striking the balance between being counselor and advocate in family law matters requires an attorney to respect the client's wishes, while also recognizing emotion can cloud a client's ability to make rational decisions. The unique trust developed between attorney and client when handling such personal issues makes effective communication a paramount concern. The *Bounds of Advocacy* provides essential advice on weighing these considerations:

- 2.1 – An attorney should accord clients respect.
- 2.2 – An attorney should provide sufficient information to permit the client to make informed decisions.
- 2.4 – An attorney should share decision-making responsibility with the client, but should not abdicate responsibility for the propriety of the objectives sought or the means employed to achieve those objectives.
- 2.5 – When the client's decision-making ability appears to be impaired, the attorneys should try to protect the client from the harmful effects of the impairment.
- 2.6 – An attorney should not permit a client's relatives, friends, lovers, employers, or other third persons to interfere with the representation, affect the attorney's independent professional judgment, or, except with the client's express consent, make decisions affecting the representation.

2.7 – An attorney should not allow personal, moral or religious beliefs to diminish loyalty to the client or usurp the client's right to make decisions concerning the objectives of representation.

While ultimate decision-making authority rests with client on matters affecting the merits of the case, the family law attorney is able to provide counsel not only on the law, but also moral, economic and other relevant considerations. It is not the attorney's role to impose their own personal beliefs on a client but, rather, to attempt to encourage consideration of all pertinent factors and dissuade the client from making a decision that will be detrimental.

The practice of family law is unique because of the deeply personal, emotional, and inherently complicated issues in need of resolution. The effects of the breakdown of the parties' personal relationship extends beyond the parties to children, other family members and friends. Animosity that develops during family litigation does not end with the litigation, as the parties will continue to interact long after the matter is concluded. It is therefore necessary and appropriate that family law practitioners hold themselves to a higher standard of professionalism. The AAML's *Bounds of Advocacy* offer standards we should all strive to achieve. ■

Christopher Musulin and Christina Groves are family law practitioners in Mount Holly, New Jersey.

Endnotes

1. *In the Matter of Anthony M. Supino*, DRB 04-253 (2004)
2. *In the Matter of Joel S. Ziegler*, DRB 08-344 (2009)
3. See *In the Matter of Clifford L. Van Syoc*, DRB 12-397 (2013) (calling another attorney "stupid" and a "bush league lawyer" during a deposition and directing another attorney to leave his office); see also *In the Matter of Hamdi F. Rifai*, DRB 10-221 (2010) (calling a prosecutor an "idiot" and lying about a car accident to postpone trial).
4. *In the Matter of Clifford L. Van Syoc*, DRB 12-397 (2013)
5. See *In the Matter of Hamdi F. Rifai*, DRB 10-221 (2010) (pushing a witness, calling the prosecutor an "idiot," failing to respond to a demand for information and lying about a traffic accident to postpone trial); see also *In the Matter of Joel S. Ziegler*, DRB 08-344 (2009) (letter to opposing counsel threatening a "battle royale" as well as ethics charges).