

Goodbye litigator: Hello "breakdown consultant"

Meet the new family law lawyer

The introduction this past January of new spousal support guidelines has put the spotlight on family law practice. To put the impact of the guidelines in context – and to better understand the pressures of family law practice today – LAWPRO Magazine this spring convened a panel of family law practitioners from across the province. We asked them to step back and look at the larger picture: What has changed in the practice of family law? What are the issues facing those doing family law today, and how have our panelists adapted to these evolving issues? And what lies ahead for the family law practitioner?

The insights and solutions offered transcend family law practice. Lawyers in all practice areas will find this discussion thought-provoking and eye-opening.

LAWPRO: *In your view, has family law changed – and if so, has it changed for the better or worse since you started in practice?*

Mary: I don't think of it in terms of better or worse. Because change is constant, family law practice – like other areas of practice – is certainly different from what it was five, 10 or 20 years ago. Society, our clients and the environment in which we practise also have changed. All of the changes make us more accountable, which I think is a very good thing.

Our clients demand more of us – and rightfully so. They want everything better, quicker and cheaper. Therefore we cannot stay the same.

As well the world is not such a very big place anymore – thanks to technology. We can communicate 24/7. People are very mobile and everyone expects to reach everyone else at the touch of a button, by voicemail, fax or otherwise. This increases our obligations in a very significant way.

Daniel: What's better is that our practice is not the "same old, same old:." Our clients and their relationships are more complex, break-ups more difficult, and the issues are different than say 10 or 15 years ago. Today we have same-sex relationships, second marriages, children in combined families and so on. All of this makes the legal issues more challenging and more interesting.

Technology puts greater demands on us, but it also lets me interact with my clients at a much higher and more efficient level. E-mail certainly can be a scourge – but can also be a tremendous tool for saving clients money. Take for example, the preparation of financial statements: I almost never get a hand-written one anymore, they are almost always typed which leaves little or no room for error. So when these clients come in, I already have the pertinent details that I've had a chance to review in advance, and we have a very different kind of meeting. Certainly the lawyer and clerk still have to go through the paperwork – but e-mail and computers have helped reduce the "grunt" work at our end.



Heather McGee

The panelists

Kristen Bucci: An associate with Buset & Partners LLP in Thunder Bay, Kristen has practised family and general litigation law since being called to the bar in 1993. She lectures and instructs in the local Bar Ads course, and facilitates CLE programs for area lawyers. She is past president of the Thunder Bay Law Association.

Mary M.S. Fox: An experienced trial lawyer and trained mediator, Mary is a partner with the Windsor law firm of Ducharme Fox LLP, where she practises primarily family law. She is also a frequent lecturer, instructor and panelist in CLE programs on family law, professional practice and civil justice reform, as well as serving on numerous professional and community boards and committees. Mary was called to the Ontario bar in 1978.

Heather McGee: The founding partner of McGee & Fryer, Heather has practised family and estates law in the Markham area since being called to the bar in 1991. She is also certified in collaborative law practice. As well as a guest speaker and writer in legal education and practice skills, Heather has volunteered on numerous committees and special projects for CDLPA, OBA and the Law Society. Heather is the incoming president of the OBA for 2005/2006.

Daniel S. Melamed: A partner at Torkin Manes Cohen Arbus LLP, Daniel focuses on family law and estates litigation. He

is certified by the Law Society as a Specialist in Family Law. He served as faculty member on National Family Law Conferences in Victoria, Ottawa, Whistler and St. John's, was an adjunct Professor at the University of Toronto Faculty of Law, and has lectured and instructed for the Law Society, the OBA, and other organizations. Daniel was called to the Ontario Bar in 1988.

Lawrence S. Pascoe: A sole practitioner lawyer, Lawrence has practised both family and wills and estates law in the Ottawa area since establishing his practice in the late 1970s. He is a frequent writer, lecturer and instructor on a wide variety of family law-related topics, and a regular contributor of articles on family law issues for local consumer publications. His firm's Web site – www.thepascoedifference.com – is frequently cited as an example of how lawyers can use technology to improve client relations and to market themselves more effectively. He was called to the Ontario bar in 1977.

Moderator

Dan Pinnington: The director of LAWPRO's practicePRO risk management program, Dan moderated the family law panel discussion. After his call to the bar in 1993, Dan practised law, including family law, in southwestern Ontario. He joined LAWPRO in 2001.

Technology also lets me service clients more effectively around the world: I have clients in Eastern Siberia, Africa, France, England, even Australia. Where it once would take many days to turn around a document such as a separation agreement by courier, today I can send the clients a draft by e-mail, they can approve it overnight by e-mail, and the next day I can get it drawn up, send it to them by courier and two days later it is done.

What's worse? The greater expectations, some of which are unrealistic. Because of the Internet, clients think they have more legal knowledge: They'll send case law that they think applies to their situation. They ask more questions, challenge you more, are less willing to accept your judgment: While that makes practice challenging and interesting, it also means you spend a lot more time educating clients. You have to explain jurisdictional issues, why that case does not apply, or why that precedent is really a bad one to use in their situation.

One client contacted me the day after the (spousal support) guidelines came out asking why I didn't consider them when we were making a settlement. A very good question right? But a very difficult one to defend completely because you sound defensive. On the one hand, things are more difficult, but on the other people are informed and I prefer that.

Heather: Our role as lawyers has shifted to being one of "break-down consultants." We're having to improve our client relations and active listening skills. What we really want to be able to do, at an early stage, is separate the legal from the non-legal issues, and sort out where we can offer legal solutions and where we cannot, so we can better manage expectations.

Lawyers need to be realistic about what they can achieve, and should point the client in other directions for everything else, particularly services and counseling to promote emotional wellness.

It is essential that our clients are well enough to be making good decisions, and able to process the trauma of what is happening.

One of the things I do in my practice is encourage clients to put together their own "transition team," in effect a support system – friends, family, a good physician, a real estate agent, an accountant, a business or financial consultant – because issues on marriage breakdown can be diverse and overwhelming. My impression of a more traditional practice is that everything, including the non-legal issues, came to the lawyer's desk. Now, with more services in the community and awareness, you can have a notional partnership between the lawyer, the client and the client's team.

Frankly, this is not just a major improvement for the client, but also for the lawyer. When the client builds in other supports, less of the trauma is directed at the lawyer.

Many lawyers do burn out because we are constantly with people during a highly traumatic stage of life. All the grief, anger, shock, sadness is projected onto us, and we are left with this job to do. Without careful management, the lawyer can soon find herself being more responsible for the client's issues than the client is.

As family lawyers, we need to be more aware of the effect on us personally when we are working in this field, as well as help our clients understand that they are going through a process. This is a much more specialized approach: I am a good lawyer, but that's

all I am, I can help you with the legal issues, but on the non-legal issues the best I can do is point you in the right direction.

Lawrence: The over-aggressiveness of some lawyers is one issue that concerns me. Perhaps the cause is that there are more litigators doing family law because there is less personal injury and criminal work. I believe that these litigators forget that they are not representing banks, criminals and corporate clients and take pretty hard lines and positions. Unfortunately they sometimes succeed (though generally not) with these arguments, and so continue to practise in this aggressive way.

To address this problem we need to make family law more of an exact science. This has been done with the *Child Support Guidelines* and the new spousal support guidelines. More certainty will not only make our jobs easier, but will also cut down on the over-aggressiveness. It will also be fairer to all parties.

Kristen: I see change in four key areas: Others have already talked about improved technology and the fact that the issues facing the profession are different, because we're in an environment of continuous change.

As a result of these changes, the style of practice for some family law lawyers has changed. We're using alternative dispute resolution, collaborative law, mediation and other approaches. The new Family Law Rules are a testament to this new style – they emphasize case conferences as opposed to traditional adversarial litigation for example. In my view, some of these changes are positive.





Kristen Bucci

A fourth area of change is the growing emphasis on Continuing Legal Education that I trace to both changing client expectations as well as to ongoing legislative and regulatory changes, and to a lesser extent to the Law Society discussions surrounding the prospect of mandatory CLE. As a bar, I believe we are more committed to CLE and to staying on top of changes in the law and the need to better understand and meet client needs – especially in an environment in which fees are going up steadily.

LAWPRO: *One of the trends in family law practice is collaborative family law. Lawrence highlighted the over-aggressiveness of counsel on the other side and perhaps issues of civility. What's your view of the role of different practice models such as collaborative law, mediation and the like?*

Heather: Collaborative law has the potential to provide out-of-court, structured, and mainstream family law resolutions without the additional cost of arbitration. In a larger context, collaborative law is part of the development of family law as a highly skilled specialization.

And the truth is, not everyone can do it, and I say that with no disrespect to the traditional litigator or the generalist. Particularly in urban centres where there is a high concentration of family law cases, we can have a specialized bar, services for private resolutions, as well as a specialized Family Court. It's

remarkable how much higher the level of service is for clients in jurisdictions that have Family Law courts, collaborative law services and private resolution services such as arbitration and med/arb.

Daniel: Although I am not formally trained in it, I am doing a collaborative file right now and I am finding that it is a very interesting experience. Because it takes a unique kind of personality as well as determination on the part of the client, I also believe collaborative law will only reach a certain level of acceptance by both the bar and clients alike.

On the subject of mediation and arbitration – I do see more people doing mediation and arbitration, and am meeting people who are being mediated or arbitrated, because they believe that having that specialized knowledge results in a quicker, more efficient and fairer resolution of matters. But it's a trend among those who have the financial means to hire lawyers who are specialized, or can restrict themselves to those practice areas because we see their benefit.

What frightens me about this is that the courts are being left with more of the unrepresented and/or the dabblers. This is because the communities of people who are already like-minded figure out other ways to resolve things, either through negotiation or mediation/arbitration. The others don't. And then you get a

judgment that makes you ask: "Where did that come from?" You know the judge likely had to grapple with what facts need to be considered. This is a very different challenge facing family law today.

Mary: I believe a real challenge for us is that our ability to be advocates in the traditional sense of the word has eroded. Once we went to court when we chose to go to court; there was a beginning and an end. You represented your client in a traditional way that was understood. Today going to court is becoming a privilege, available for the rich or the poor.

That raises the challenge of the self-represented litigant. It is a challenge for the represented client because of the cost disproportionality. It is a challenge for us because we must take extra care in how we communicate with the self-represented. It is a challenge for the justice system because it puts an additional burden on the counter staff. It is a huge challenge for our judiciary to accommodate the self-represented who are at least notionally on the same footing as a represented client. But we all know that is never the case. I see the challenge in the self-represented litigant increasing and not decreasing in the practice of family law.

LawPRO: *What advice do you have for others when it comes to self-represented parties? How do you keep the matter moving along or help it move along more effectively?*

Mary: You have to keep everything documented. Whatever discussions you have, someone should be present so statements are not misconstrued. If there is a self-represented person on the other side, find a way to bring it to a close, quickly.

Heather: Some self-represented people are quite capable and reasonable. If you can set out expectations early, you can often get a resolution.

We have a policy to deal with unrepresented people only in writing. Also, we will set up a timetable up front for the negotiation process, failing which we then issue an application. Failing a quick resolution, we are more likely to go to court because with the court process there are imposed obligations and timelines. The whole process has to be much more structured and we have to make everything clear up front.

And we ask for an acknowledgement (we don't always get it) that the other party pays for half the cost of the larger documents to be drafted, even though we are not in any way representing them.

Daniel: I have an internal timetable and if people don't reach those benchmarks then we take the matter to litigation. At that point they are either overwhelmed by the process and hopefully retain counsel, or if they don't, we just bring it to an end as soon as possible.

I also try to negotiate the obvious things. If the other party is being unreasonable, I will just bring a motion: 80 per cent of the

time I know what the result should be, and that is generally what the result turns out to be. So I tell them that, I write them that and then we go forward. To do otherwise is simply not fair to your own client. You spend too much time and money trying to be nice and fair, and in the end you get nowhere because they are just being unreasonable.

The frustrating part, and I think we have all experienced this, is the degree to which the court must bend over backwards to ensure that this person understands what they are doing, and give them lots of opportunity to do what they need to do. This frustrates clients who have retained counsel to no end.

Kristen: My best piece of advice: Never give an unrepresented party legal advice – or what could be construed as legal advice. Although this appears to go without saying, it can be hard to do, especially if the unrepresented party is pleasant and you're close to resolution, and you realize there is only one thing that they don't understand. It's hard not to say, "OK, here's how it is," it's hard not to advise them on procedural issues or provide advice that keeps things moving forward. I almost always tell the unrepresented party to get their own lawyer because chances are they're making emotional decisions, not business decisions. We all know that emotional decisions will likely not satisfy that party in the long run.

Lawrence: Sometimes it is better having a self-represented client than some of the lawyers I have to deal with – I have had the experience where I felt that I was out-argued by the unrepresented client.

Because of some bad experiences, it is my policy that everything is in writing with the self-represented party. They have misinterpreted what I have said on the phone. In a couple of cases, they have later argued that they thought that I was representing them, when it was clear that I was not.

I find today that judges are not bending over backwards as often as they once did for the unrepresented client because the judges are also getting tired of doing their work for them.

LawPRO: *The issue of civility was raised earlier in the context of aggressive lawyers. Have you seen civility issues? Is it the newer or older members of the bar? What do you do if you're faced with an uncivil lawyer?*

Lawrence: My experience is that it is more often the younger lawyers who are more aggressive and less civil. Hopefully that is something that they will grow out of as they mature. I had a bad experience recently with an older lawyer, who was constantly quite derogatory about my client, and used some profanity in discussing my client. I wrote the lawyer a very strong letter to say that I was not going to tolerate this type of behaviour. I told him to stop bullying me and stop making disparaging remarks about my client. He then became quite civil with my client and me.

Mary: Somehow the notion of professional civility, of human decency, seems to have eroded if not utterly disappeared. I worry about some of the younger members coming out of our profession: They often have no ability to understand and appreciate what it means to be a lawyer, to behave in a professional manner towards colleagues, clients and the court.

There seems to be the notion: "If I disagree with everyone, if I am aggressive and challenge everyone and everything, that will make me a good lawyer." It is a problem that is not decreasing. This is a true challenge to our profession.

Daniel: What is happening to us is no different than what is happening in society. There is a general lack of civility. People in society are being more and more rude to one another, and that is reflected in all areas of practice. When it happens, I shut the bully down because bullying is what they are really trying to do. Say something that is effective and more embarrassing and does not add fuel to the fire and often it just goes away. That is my own experience.

Kristen: If the incivility is unwitting, it's prudent to discuss the issue with them. If it's purposeful and personal, take a deep breath and move on. Too often these parties confuse their notion of being good advocates with what in fact is unacceptable, uncivil behaviour. Here's where the need for more CLE comes into the picture.

Heather: On a positive note, although in a minority, I must say that there are a growing number of family lawyers who are genuinely trying to understand not only their clients' issues, but also the issues affecting the other side.

When I received my certification in collaborative law a couple of months ago, a light switch went on for me. The difference with collaborative law is that counsel and clients work as a team, with a commitment to find a solution that works for everyone. That kind of culture change encourages people to not only be more civil to the opposing counsel and client, but to also make the solution work for the other side. Quite often, your client doesn't even have to give anything up to make that happen. The cultural shift is that neither party is attacked and both parties have a deal they can live with.

Mary: Do we as counsel have an obligation to the bar to deal with this issue?

Daniel: Yes – and when faced with young, oppositional counsel I will take them aside, perhaps encourage them to take time to rethink their position or their approach, or to get more advice before they continue down the same road. Or I will take them out to lunch and try to mentor them.

Heather: We need to remind each other that we are colleagues, and that we share a desire to do good work, one file at a time.

Mary: We've all had situations where we have had to step up to the plate, take on motions or aspects of a file or even babysit another's children to give a colleague time off or time out.

Lawrence: Stress by osmosis is a reality for us: So each of us needs to have a conscious program of exercise, massage, vacations, whatever it takes to help keep life in balance.

LawPRO: *Let's talk about an issue that is very hot right now – the spousal support guidelines. What's their impact likely to be?*

Mary: We are seeing a variety of approaches in the extent to which counsel and the judiciary are relying on the guidelines. As counsel, we are using them as the litmus test. And what about judges in case conferences and on motions? Some expect to be educated as to why under the *Divorce Act* or the *Family Law Act*, they should apply or ignore the guidelines. Some expect to be provided with the calculations and at the same time need to be convinced that there are merits as to why the guidelines may be applied. Some are quite ready to jump on the bandwagon and say, "if it comes from a computer and it has numbers attached to it, it must be more right than if I am to exercise my own discretion in complicated circumstances."

Daniel: I use them or I produce them, I present them, I argue about them. Judges are interested in learning about them, as are my colleagues. For those of us who do most of our work at 393 University Avenue in Toronto, they are a most useful tool, because the numbers don't really change much if you use the old approach that they have been using for awhile now; it is really the termination aspects of the guidelines that provide a sharper focus for that part of the discussion.

Kristen: They're a useful tool when you're advising clients: If you're representing the payor, they can be a real eye-opener in terms of providing an objective idea of what the client may have to pay in the way of support. So you can say, "Here's the range, based on the guidelines and not just my opinion... and here are other factors that may also be taken into consideration." If you're representing the recipient, they can be a useful negotiating tool with opposing counsel.

Heather: The experience that I have had to date in arguing motions is that the justices have not delegated any of their discretion to the advisory guidelines. They are interested in what the guidelines say; but the standard of practice is not at the level where every lawyer is bringing the guidelines into the courtroom. I don't think it is a standard yet across the board. Duration has been the concept that has been churned by this



Daniel Melamed

and I hear more counsel now addressing duration, just like we did 10 or 15 years ago. But, other than that, I haven't found the spousal support guidelines to have the splash that I was expecting.

Lawrence: I think that they are fantastic. They really narrow the range of what the outcome will be, which as we all know in the past has been quite a wide range. Unfortunately, at the Law Society course on the spousal guidelines, the panel of judges indicated that they would look at them for motions and pre-trials, but were not going to use the guidelines for trials. I found those comments confusing. I think that the judges will realize how much easier it will make their job and will really start using these guidelines.

LAWPRO: *Still another subject – support staff. How has the role of support staff changed over the years?*

Mary: Like us, our staff has to be more responsive and more responsible in dealing with our clients and how we provide information, in terms of quality, cost and speed. They have to function on a much higher level. As was said earlier, they become very much an integral part of a team approach to servicing our clients and assisting them in resolving their problems. CLE has also become mandatory for staff. Technology has played a large role in making ongoing training and development accessible and affordable.

Heather: Frankly, I am not sure how you run a sophisticated practice without the proper staff. Many of the younger lawyers run off laptops from their home, and I give them credit, it can't be easy. From my point of view, when you do have good staff and good communication, it just doesn't get any better.

I've discovered that the hardest part of practising law is the human resources job – developing consistent office policies, keeping good quality staff, and accommodating their goals. Staff today are more mobile than once was the case; and that means you cannot count on having a 20-year employee anymore. This has implications for file



Lawrence Pascoe

documentation. Mrs. Brown who witnessed the will 15 years ago may not work for you next year when the will goes to probate. You may not be able to rely on the institutional memory of your staff and they may not be around when the separation agreement comes up for variation. So document, document, document!

Daniel: Yes, we demand an awful lot more, especially in family law because of the narrow area of practice. Support staff can become more like junior lawyers; their level of expertise often exceeds that of the first, second or third-year lawyer on some of the technical aspects of family law. They are also really skilled at it – filling out financial statements, doing affidavits etc.

The emotional attention that support staff should get is paramount because they are so vital to your practice. Not only do they need to get paid well, but they need to know and hear that they are doing a good job. It helps to keep people around. They also need to know their ideas are being listened to. The way you run your practice makes a big difference to your support staff.

Family law practice is so emotionally based for our clients that it's critical for support staff to be warm and caring people. They also have to be totally on top of every file, so they can let me know about any change, any issue that could affect that file; they have to be able to deal with clients with integrity and compassion. These are things that don't change, no matter what else is happening.

LawPRO: *What about what's ahead for family law practice. What or where are the challenges?*

Kristen: I think we have real access to justice issues. The cutoff to qualify for legal aid is so low that very few people actually qualify. At the same time, because of the rising costs of litigation, fewer people can afford to go to court. Fewer people can afford to hire a lawyer – and too often they're turning to paralegals. I'm often consulted on separation agreements or divorce papers that have been drafted by paralegals because that's what the client thought was all she or he could afford. There's this huge group of people who fall in the middle and have great difficulty getting access to legal counsel.

At the same time, the new Family Law Rules have not necessarily reduced the cost of litigation, especially in areas such as Thunder Bay where we have a collegial bar. In the past, we've been able to negotiate settlements quite effectively without case conferences and often more quickly than under the Rules. We have to fine tune these Rules to make them more effective.

Mary: We have to continue to become more effective problem solvers. Our skill levels, our knowledge base, and the manner in which we practise will all continue to change. Gone are the days when, as a litigator, you needed one skill. Today, being advocates in a courtroom and understanding procedure and evidence are critical skills. But we also need to be able to know when to negotiate and how, or when to arbitrate and how. We have the ability to specialize, if we choose.

Doors have opened for us. At the same time, one of the doors that is closing is our accessibility to the courts. Few clients can afford to be in a courtroom from beginning to end. The real challenge for us as lawyers is to be effective in understanding the nature of the problem of our clients. We need to be up front about what is or is not doable and not be simply processors. We have to recognize that we can be effective in many different ways. Sometimes we're delivering the service, and sometimes a part of our service is to refer the client elsewhere. For example, I don't practise collaborative law. If I thought my client would benefit from this approach, I would not hesitate to make a referral. My obligation is to advise my client in these circumstances that he or she may benefit from another service such as mediation, collaboration, arbitration, counseling, among others.

Similarly, if I don't see a role for myself in the early stages of the case, I will recommend a different course of action. The challenge, however, is that there is more and more complexity to all of this. And the question is: How do we maintain that level of information and skill to be able to direct people in the right way.

Daniel: Managing the communications aspect of our business, whether it's cellphones or e-mails or other technologies – especially in our "go-go" society – is a major challenge. There's a temptation to feel that every communication must be responded to instantly: That only leads to burnout. Don't be afraid to say that I am not going to respond for three days if you think a client's request does not require immediate response.

In terms of the practice, I think the spousal support guidelines and the *Child Support Guidelines* represent the beginning of the automation of a large swath of our clientele. For the majority of cases, they take away issues of discretion and make many decisions pretty straightforward. This is going to free us up to spend more time thinking about the more complex issues in our practices – for example to reflect on the tax implications of a very complicated property settlement.

Finally, a major challenge for us is to get more justices interested in the area of family law, in developing the expertise and providing the kind of guidance that we will need on a regular basis in the future. We have some excellent, really interested justices, but we also have some who have no specific interest in family law, which is quite complex, and that is very, very frustrating.

Lawrence: I'd like to build on what Daniel said about communications, because I think we have to better manage the whole process. Communication with the client is one aspect, our relationship with the client, working with them is another aspect, good reporting and written material, and even time management are other aspects. The process is very important to the client. As well, files are so complex that we have to be better managers.

We have to continue to move towards taking a lot of discretion out of family law which is what both guidelines have done, so there is more certainty and less cost. We have to push the legislature to be more precise on some of these issues so that figuring out support should be like figuring out your taxes. Remove the discretionary areas. Provide more definitive answers... be more precise, in both the legislature and in the courts.

Heather: A major challenge, as I see it, is the importance of recognizing family law as its own profession. Family law is now the bread and butter of most small firm practices. It is the place (outside of real estate) where most people are most likely to need a lawyer. So, as a profession, we need to invest in ourselves and make use of our volunteer organizations to learn and connect with each other.

I fear the issue of the specialized Family Court has become too political. The bar needs to address this. We have to recognize the critical role of dedicated and specialized family law justices. The public needs it.

We also need legislative reform. The Working Group in family law, comprising of the Ontario Bar Association, the County and District Law Presidents Association and The Advocate's Society, has been working with the Attorney General's Office on critical amendments to the *Family Law Act* – the first since 1986. We hope to see these reforms proceed.

When you look at the statistics on spousal relationship breakdowns, it is surprising that family law reforms are not front-page news. So I think that one of our roles, as family law lawyers, is to raise public awareness of the importance of good transitions on marriage breakdowns, and of the need for comprehensive legal and community resources.