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The Rules of Professional Conduct: A Conflicting Guide for Counsel in Child Custody and Access Proceedings

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The Rules of Professional Conduct: A Conflicting Guide for Counsel in Child Custody and Access Proceedings

Abstract

The Rules of Professional Conduct [Rules] of the Law Society of Upper Canada outline the professional and ethical obligations of all members of the legal profession in the province of Ontario. Lawyers are required to turn to these Rules when faced with ethical and professional dilemmas in their everyday practice. However, the acrimonious nature of family law often makes the application of these rules impractical. This article examines the vague and conflicting guidance the Rules provide to family law lawyers faced with ethical dilemmas in child custody and access proceedings. It is proposed that past disciplinary proceedings of other lawyers actually provide the most concrete and clear guidance for family lawyers faced with difficult ethical dilemmas. This state of affairs is problematic, as disciplinary proceedings are not meant to be a forum for teaching ethical standards. The proceedings were created as a method for reprimanding lawyers who deliberately violate the Rules. To alleviate this problem, it is proposed that the Rules should include a hierarchical ordering so that family law lawyers are not faced with conflicting advice when resolving their ethical dilemmas.

Keywords

LSUC, rules of professional conduct, ethics, family law, child custody, child access

Cover Page Footnote

B.A. with High Honours (University of Saskatchewan, 2007), J.D. (University of Ottawa, 2011). I would like to thank Professor William C. Johnson at the University of Ottawa's Faculty of Law for his assistance and encouragement during the writing, and editing of this article. This article was awarded the 2011 Rueter Scargall Bennett LLP Essay Prize in Legal Ethics by the Chief Justice of Ontario's Advisory Committee on Professionalism.

THE RULES OF PROFESSIONAL CONDUCT: A CONFLICTING GUIDE FOR COUNSEL IN CHILD CUSTODY AND ACCESS PROCEEDINGS

JENNIFER L. HIATT*

The Law Society of Upper Canada [LSUC] regulates Ontario's legal profession.¹ It is authorized by provincial legislation to license Ontario's lawyers and regulate their conduct, competence, and capacity.² Its primary purpose is to ensure a competent and ethical bar.³ The LSUC has created *Rules of Professional Conduct* [*Rules*] that outline the professional and ethical obligations of all members of the profession.⁴ Members failing to meet these obligations are subject to the LSUC complaints and discipline process.

All family law lawyers are required to use the *Rules* to resolve their professional and ethical dilemmas.⁵ However, the acrimonious nature of family law often makes the application of these rules impractical.⁶ For example, child custody and access proceedings are rarely non-confrontational. They may include allegations of child abuse by one parent against another, or the occurrence of parental child abduction.⁷ The *Rules* provide vague and conflicting advice for lawyers working within these contexts. It is often only through a lawyer's own disciplinary process or through examining the disciplinary process of another lawyer that concrete ethical guidance is provided.⁸ This situation is problematic as the disciplinary process was not created as a forum for

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¹ The Law Society of Upper Canada, *Protecting the Public*, Toronto: Law Society of Upper Canada, 2010, online: The Law Society of Upper Canada <<http://www.lsuc.on.ca/with.aspx?id=1063>>.

² *Ibid.*

³ *Ibid.*

⁴ See generally The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: Law Society of Upper Canada, 2000 [*Rules*].

⁵ *Ibid.*, r 1.03(1)(e).

⁶ See generally Jane Becker, "Ont. Lawyers learn tricks and traps of family practice", *The Lawyers Weekly* (4 October 1991) (QL).

⁷ See Peggy Buchan, "Speakers offer young lawyers advice for dealing with emergency situations in family law cases", *The Lawyers Weekly* (13 May 1994) (QL).

⁸ *Law Society of Upper Canada v Curtis*, [1993] LSDD no 216 (QL) [*Curtis*]; *Law Society of Upper Canada v Ross*, [2010] LSDD no 10 (QL) [*Ross*].

teaching ethical standards. It was created as a method for reprimanding lawyers who deliberately violate the rules of their profession. To alleviate this problem, the *Rules* should include a hierarchical ordering so family law lawyers are not faced with conflicting advice when resolving these ethical dilemmas.

CUSTODY OF AND ACCESS TO CHILDREN

The Legislation

Both federal and provincial law governs the custody of and access to the children of separated parents.⁹ The provincial *Children's Law Reform Act [CLRA]* governs custody and access claims of parents who are not married, regardless of whether they were living common law.¹⁰ The *CLRA* also governs the custody and access claims of married couples who separate, but have no immediate intention of divorcing.¹¹ In contrast, the federal *Divorce Act [DA]* governs the custody and access claims of married couples who separate and concurrently claim a divorce.¹² The governing principles under both pieces of legislation are essentially the same.¹³ Therefore, the substantive outcome of a child custody and access proceeding is affected very little by the particular legislation that governs a case.¹⁴

What is Custody? What is Access?

Custody denotes the totality of rights and duties in relation to children.¹⁵ It is defined as “the care, control, and maintenance of a child awarded by a court to a responsible adult.”¹⁶ There are three main types of custody that are awarded to parents: shared custody, split custody, and sole custody.¹⁷ Shared custody describes an arrangement where both parents have joint legal responsibility for making major decisions concerning the child’s welfare. The child spends at least 40 percent of his or her time with each parent.¹⁸ Split custody occurs when there is more than one child of the relationship and each parent has custody of at least one child.¹⁹ In sole custody, children live with one parent more than 60 percent of the time and the other parent has

⁹ Berend Hovius & Mary-Jo Maur, *Hovius on Family Law: Cases, Notes and Materials*, 7th ed (Toronto: Carswell, 2009) at 517 [*Hovius*].

¹⁰ *Ibid.* See also *Children's Law Reform Act*, RSO 1990, c 33 [*CLRA*].

¹¹ *Hovius*, *supra* note 9.

¹² *Ibid.* See also *Divorce Act*, RSC 1985, c 3 (2nd Supp) [*DA*].

¹³ *Hovius*, *supra* note 9.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Black's Law Dictionary, 3rd ed, sub verbo “custody”.

¹⁷ Canada, Department of Justice, *The Federal Child Support Guidelines: Step by Step* (Ottawa: Minister of Justice and Attorney General Canada, 2009) at 11.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

access.²⁰ Access is defined as “the right of a person to visit with a child.”²¹ It includes the important right to make inquiries and be given information regarding the health, education, and welfare of a child.²² Most parents want to be awarded custody of their children and disputes often arise when the parties cannot agree to a custody and access arrangement.²³

The Best Interests of the Child

Both the *DA* and the *CLRA* refer to the best interests of the child when resolving custody and access disputes between parents. Under section 16 of the *DA* the court is required to take into account the best interests of the child in any application for custody of or access to a child.²⁴ Section 24(1) of the *CLRA* provides similar guidance.²⁵ In addition, section 24(2) of the *CLRA* outlines a list of factors that the court is required to take into account when determining the best interests of the child:

- 24(2). The court shall consider all the child’s needs and circumstances, including,
- (a) the love, affection and emotional ties between the child and,
 - (i) each person entitled to or claiming custody of or access to the child,
 - (ii) other members of the child’s family who reside with the child, and
 - (iii) persons involved in the child’s care and upbringing
 - (b) the child’s views and preferences, if they can reasonably be ascertained;
 - (c) the length of time the child has lived in a stable home environment;
 - (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;
 - (e) the plan proposed by each person applying for custody of or access to the child for the child’s care and upbringing;
 - (f) the permanence and stability of the family unit with which it is proposed that the child will live;
 - (g) the ability of each person applying for custody of or access to the child to act as a parent; and
 - (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.²⁶

²⁰ *Ibid.*

²¹ *Hovius, supra* note 9 at 518.

²² *Ibid.*

²³ *Ibid.*

²⁴ *DA, supra* note 12, s 16.

²⁵ *CLRA, supra* note 10, s 24(1).

²⁶ *Ibid.*, s 24(2).

Each party to the dispute must show how he or she meets the best interests of the particular child. As part of this process, some parents try to undermine the other parent's ability to meet the best interests test.²⁷ It is within this context that family law lawyers often face ethical dilemmas and must practically apply the *Rules*.

ALLEGATIONS OF CHILD ABUSE

Truthful versus False Allegations

In the course of custody and access claims family law lawyers are often confronted with allegations of child abuse by one parent against another. In most cases, there is no clear forensic evidence of abuse and there are often conflicting claims brought by each party.²⁸ Many of these abuse allegations are truthful.²⁹ The abuse may have commenced when the family was intact but the child felt too intimidated by the presence of the abuser to disclose until after separation.³⁰ The child's disclosure of abuse may also have led to the separation.³¹ Alternatively, the abuse may have commenced after separation when an emotionally unstable parent began to exploit the child.³² However, there are cases where the allegations of abuse are simply untrue. The parent alleging the abuse may have had an honest, but mistaken, belief that abuse was occurring or the allegation may have been a deliberate attempt to deceive the court.³³ The Department of Justice funded a study that looked into allegations of abuse in custody and access disputes.³⁴ Of the 196 family law decisions studied, 46 cases involved substantiated abuse allegations, 89 cases involved unfounded allegations, and 61 cases included evidence of abuse but no judicial finding on a balance of probabilities.³⁵ In 45 of the 150 cases where abuse was not proven, the judge believed that it was an intentionally false allegation.³⁶

²⁷ *Wakaluk v Wakaluk* (1976), 25 RFL 292 (Sask CA) at paras 34–35 [*Wakaluk*].

²⁸ Nicholas Bala & John Schuman, "Allegations of Sexual Abuse When Parents Have Separated" SFLRP/2000-006 (11 May 1999) at para 4 (QL).

²⁹ *Ibid* at para 3.

³⁰ *Ibid* at para 7.

³¹ *Ibid*.

³² *Ibid* at para 8.

³³ *Ibid* at para 11.

³⁴ Nicholas MC Bala et al, "Allegations of Child Abuse in the context of Parental Separation: A Discussion Paper" (Ottawa: Family, Children and Youth Section Department of Justice Canada, 2001), online: Department of Justice Canada <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2001/2001_4/2001_4.html> .

³⁵ *Ibid*.

³⁶ *Ibid*.

Conflicting Ethical Duties

Family law lawyers face diverse ethical dilemmas in the context of child abuse allegations by one parent against another. In a typical situation, counsel for the parent making the allegations [“Alleging Parent”] is confronted with the following statement from their client: The father of my child has been granted custody and I have been granted access. I am supposed to transfer my child to her father in compliance with court order. I cannot let my child go with him! He is sexually abusing her! What should I do?³⁷ In this situation, there would be a court order obligating the Alleging Parent to transfer the child to the other parent [“Alleged Abuser”] on a specific date.³⁸ Counsel for the Alleging Parent would face two main ethical dilemmas when giving advice to the client. First, may I counsel my client to keep the child from the Alleged Abuser in defiance of a court order?³⁹ Second, if my client goes into hiding with the child, must I counsel my client to come out of hiding?⁴⁰ To resolve these dilemmas most family law lawyers would turn to the *Rules*.

The *Rules* provide guidance for a family law lawyer deciding whether to advise a client to defy a court order.⁴¹ Counsel for the Alleging Parent would want to consider Rule 2.02(5): “When advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment.”⁴² In addition, the lawyer would want to consider Rule 4.06(1): “A lawyer shall encourage public respect for and try to improve the administration of justice.”⁴³ Rule 4.01(1) provides similar advice: “When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.”⁴⁴ These three rules suggest a family law lawyer should not advise the client to defy a court order. By instructing such action, a family law lawyer would be encouraging illegal conduct which may bring the administration of justice into disrepute. However, the commentary to Rule 4.01(1) provides conflicting advice: “In adversary proceedings that will likely affect the health, welfare, or security of a child, a lawyer should advise the client to take into account the best interests of the child. . . .”⁴⁵ This commentary suggests that a family law lawyer should protect a child from abuse.

³⁷ *Curtis*, *supra* note 8. (The father is referred to as the Alleged Abuser in-line with the *Curtis* case; however, a mother may also be the Alleged Abuser in the situation outlined.)

³⁸ *Ibid.*

³⁹ See generally Tom Onyshko, “Lawyers can counsel clients to disobey court orders, Ont. discipline case suggests”, *The Lawyers Weekly* (15 October 1993) (QL).

⁴⁰ *Ibid.*

⁴¹ *Rules*, *supra* note 4.

⁴² *Ibid.*, r 2.02(5).

⁴³ *Ibid.*, r 4.06(1).

⁴⁴ *Ibid.*, r 4.01(1).

⁴⁵ *Ibid.*

Therefore, the *Rules* outline conflicting duties for family law lawyers.⁴⁶ It is considered important to promote respect for the administration of justice by upholding a court order. At the same time, the administration of justice may be brought into disrepute if a court order is followed and an innocent child is abused. It is unclear what action a family law lawyer should take in resolving this dilemma without further guidance from the jurisprudence or the LSUC.

The *Rules* provide conflicting guidance on whether family law lawyers have an obligation to counsel a client out of defiance of the law.⁴⁷ There are four main rules to consider. First, Rule 4.06(1) reveals that a lawyer should encourage respect for the administration of justice.⁴⁸ Second, Rule 2.02(5) states “When advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment.”⁴⁹ Third, Rule 2.02(1) advises a lawyer to be honest and candid with clients.⁵⁰ Lastly, Rule 2.03 outlines a duty of confidentiality from a lawyer to the client.⁵¹ The former two rules suggest a direct duty to uphold the administration of justice. A lawyer’s only guidance to a client violating the law should be encouraging the client’s compliance with a court order. However, the latter two rules suggest a duty to the client. A lawyer must provide honest and candid advice, in confidence, to any client seeking guidance. This includes a client currently breaking the law. The *Rules* are not clear on whether the duty to the client or the duty to the court should take priority.

The Ethical Solution

In 1990, family law practitioner Carole Curtis was faced with the ethical dilemma of counsel for the Alleging Parent.⁵² Curtis was to represent a mother on an appeal and on a motion to stay an order granting custody to the child’s father.⁵³ The mother alleged that the father was abusing their young daughter.⁵⁴ She did not want to transfer the daughter to the father as required by court order. In a letter to Lorna Rudolph, the mother’s trial lawyer, Curtis gave the following advice:

Your client should seriously consider not allowing this child to be transferred to her father on 28 April, 1990. We appreciate this is a very serious step and will put her in breach of a Court Order. We strongly urge that she not disappear with

⁴⁶ *Rules*, *supra* note 4.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, r 4.06(1).

⁴⁹ *Ibid.*, r 2.02(5).

⁵⁰ *Ibid.*, r 2.02(1).

⁵¹ *Ibid.*, r 2.03.

⁵² *Curtis*, *supra* note 8.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

the child but that rather, she keep the father advised at all times that the child is safe. However, if there is any likelihood that he will attend with the police and a certified copy of the Order, then she should not be at her home.⁵⁵

Rudolph forwarded this letter to the mother and the mother went into hiding in breach of the court order.⁵⁶ A complaint was brought against Curtis to the LSUC.⁵⁷ It was alleged that there were reasonable and probable grounds to believe that Curtis was guilty of professional misconduct.⁵⁸ The relevant misconduct alleged was twofold: (1) Curtis counseled her client to breach a court order, and (2) once the client went into hiding, Curtis failed to counsel the client to come out of hiding, despite periodic contact.⁵⁹ Although Curtis was cleared of all alleged misconduct, the case provided long-awaited guidance for family law lawyers.⁶⁰

The Disciplinary Committee provided clear advice on when a family law lawyer may counsel his or her client to defy court order. Counsel may provide this guidance if two factors are met: (1) A reasonably held belief that a child is in imminent and serious danger and (2) an immediate court application to vary the original custody or access order.⁶¹ However, the Disciplinary Committee provided one caveat:

Once that application is made and the facts have been presented before a court of competent jurisdiction however briefly, if that court refuses to act to change an outstanding order, then the obligation of the client is to ‘trust the efficacy of the legal system’ and adhere to the court order and then if so advised, to seek a full hearing for a permanent change.⁶²

In coming to this decision the Disciplinary Committee relied on Section 4(c) of the *American Professional Responsibility Code for Matrimonial Lawyers* and the Ontario Court of Appeal’s decision in *M(BP) v M (BLDE)*.⁶³ The former was notable as it provided the two factors outlined by the Disciplinary Committee.⁶⁴ The latter was

⁵⁵ *Ibid* at 2.

⁵⁶ *Ibid* at 10.

⁵⁷ *Ibid* at 1.

⁵⁸ *Ibid*.

⁵⁹ *Ibid* at 2.

⁶⁰ *Ibid* at 19.

⁶¹ *Ibid* at 13–14.

⁶² *Ibid*.

⁶³ *Ibid* at 12, citing New York State Trial Lawyers Association, *Professional Responsibility Code for Matrimonial Lawyers adopted by the Family Law Section Committee on Specialization of the American Bar Association Standing Committee on Specialization as a “Model Standard”* (New York: New York State Trial Lawyers Association, 1975), s.4; *ibid* at 13, citing *M(BP) v M(BLDE)* (1992), 42 RFL (3d) 349 (Ont CA).

⁶⁴ *Curtis*, *supra* note 8 at 12.

important as it was a Canadian case where neither the Court of Appeal nor the Trial Division criticized a mother for denying access to a father allegedly abusing his child.⁶⁵ In fact, the Trial Judge termed the mother's breach of court order a mere "technical violation of the order" and deemed it less serious than a breach of court order in other circumstances.⁶⁶ The Disciplinary Committee did not make reference to the *Rules* in their decision. However, it found a clear compromise between the duty to follow a court order and the duty to support the best interests of the child.

Clear advice was also provided to family law lawyers on whether they must advise a client to come out of hiding. The *Rules* contain no explicit guidance requiring a solicitor to counsel a client out of defiance of the law.⁶⁷ According to the Disciplinary Committee, it would have been a straightforward exercise to include such a proposition in the *Rules*.⁶⁸ Therefore, it should be inferred there is no positive obligation on a family law lawyer to counsel their client to come out of hiding and cure a contempt of court order.⁶⁹ The Disciplinary Committee went on to consider what information a family law lawyer may disclose to a client in hiding. This process involved reconciling the conflicting rules using an excerpt from *Essays in Legal Ethics* by George Warvelle:

...if the client desires to know what course the law requires under particular circumstances, it is the duty of the legal adviser to explain it. But here his duty ends. He is under no obligation to further the unjust schemes of the client, and should refuse to become a party to them.⁷⁰

Based on this excerpt and the American Bar Association *Model Rules of Professional Conduct*, the Disciplinary Committee placed a requirement on lawyers to provide a client-in-hiding with an analysis of the legal aspects of his or her questionable conduct.⁷¹ However, the lawyer was not allowed to provide any advice that may further the client's illegal act.⁷² This decision provided a clear interpretation on how family law lawyers should apply the conflicting rules in their everyday practice.

⁶⁵ *Ibid* at 13.

⁶⁶ *Ibid*.

⁶⁷ *Ibid* at 18.

⁶⁸ *Ibid*.

⁶⁹ *Ibid* at 19.

⁷⁰ George Warvelle, *Essays in Legal Ethics* (Littleton, Colorado: Rothman, 1980), as cited in *Curtis*, *supra* note 8 at 17.

⁷¹ *Curtis*, *supra* note 8 at 18.

⁷² *Ibid*.

POTENTIAL CHILD ABDUCTION

Incidence of Abduction

Parental child abductions are a concern for family law lawyers representing clients in child custody and access proceedings. The number of abductions varies annually.⁷³ In 2009, there were 237 reports of parental child abductions in Canada.⁷⁴ This was the lowest reported number of abductions in a decade.⁷⁵ One hundred and twenty-five males and 112 females were abducted.⁷⁶ Elementary school age children were significantly more likely to be abducted than children over 12 years of age.⁷⁷ The majority of children (68 percent) were abducted from their family home, while less than seven percent were abducted from childcare.⁷⁸ Some abductors also have contact with the family law lawyer.⁷⁹ Therefore, it is important to address the ethical dilemmas that may arise for lawyers within this volatile context.

The Ethical Dilemma

A family law lawyer may receive information that suggests a client plans on abducting his or her child.⁸⁰ The lawyer must decide whether there is an ethical obligation to disclose this potential abduction to the court.⁸¹ In a typical case, there would be ongoing child custody and access proceedings.⁸² As part of these proceedings, each parent would be required to compile and submit information on how he or she will meet the best interests of their child.⁸³ The parents may disclose information such as where they will reside with the child, what school the child will be enrolled in, and what type of childcare plan would be put in place. A potential abductor may fail to disclose plans to move with the child outside the jurisdiction.⁸⁴ For example, the parent may fail to disclose to the court the intention to move from Canada to Hungary.⁸⁵ The ethical dilemma arises when the lawyer receives information about this plan and must decide

⁷³Our Missing Children, *2009 Missing Children Reference Report: National Missing Children Services* (Ottawa: Minister of Public Works and Government Services, 2010), online: Royal Canadian Mounted Police <<http://www.rcmp-grc.gc.ca/pubs/omc-ned/an-ra/annrep-rappann-09-eng.htm>>.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Bill Doskoch, "Intrigue, Tears & Burnout: Family Law in the 90s", *National — Canadian Bar Association* (August-September 1993) 25 at 28.

⁸⁰ *Ross, supra* note 8 at para 2.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Wakaluk, supra* note 27 at para 35.

⁸⁴ See generally *Ross, supra* note 8 at para 2.

⁸⁵ *Ibid.*

whether he or she has an ethical obligation to disclose the information. The lawyer should turn to the *Rules* for guidance.

The *Rules* outline four main duties for a family law lawyer who receives information suggesting a client plans on abducting a child. The lawyer has two distinct duties to the client. There is a duty to advise a client on the implications of his or her plan to leave the jurisdiction. Rule 2.02(1) represents this duty: “When advising clients, a lawyer shall be honest and candid.”⁸⁶ Rule 2.03(1) presents a duty to keep the advice given and any instructions received from the client confidential.⁸⁷ Together these two rules suggest a lawyer’s primary duty is to the client and thus he or she should not disclose any abduction plan. Such a disclosure would breach the duty of confidentiality. However, the lawyer also has two duties to the court. Rule 4.01(1) represents the first duty: “When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.”⁸⁸ Rule 4.01(2)(e) illustrates an additional duty:

When acting as an advocate a lawyer shall not (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct.⁸⁹

These two rules suggest a lawyer should disclose the client’s plan to the court. Otherwise, the lawyer would be knowingly allowing the court to rely upon false or deceptive information in deciding the ongoing custody and access proceedings. The lawyer would be breaching his or her duty to treat the court with candour, fairness, courtesy, and respect. The lawyer’s duties to the client are in direct conflict with his or her duties to the court. It appears impossible for a lawyer to resolve the ethical dilemma without breaching one of the duties outlined in the *Rules*.

The Ethical Resolution

In 2010, family law lawyer Paul Ross faced a Hearing Panel on allegations that he engaged in professional misconduct.⁹⁰ Ross allegedly breached Rule 4.01(1) of the *Rules* by failing to treat the court with candour, fairness, courtesy and respect.⁹¹ These

⁸⁶ *Rules*, *supra* note 4, r 2.02(1).

⁸⁷ *Ibid*, r 2.03(1).

⁸⁸ *Ibid*, r 4.01(1).

⁸⁹ *Ibid*, r 4.01(2)(e).

⁹⁰ *Ross*, *supra* note 8 at para 12.

⁹¹ *Ibid*.

allegations were based on Ross' representation of a client in 2004.⁹² Ross had brought a custody application on behalf of a female client.⁹³ He then agreed to an adjournment of the custody application, knowing that his client may no longer be in the jurisdiction when the matter was brought back before the Court.⁹⁴ His client had plans to move with her child to Hungary before the conclusion of the custody and access proceedings.⁹⁵ Ross failed to disclose his client's intentions to the court or to the child's other parent, thereby allegedly breaching the *Rules*.⁹⁶

The Hearing Panel determined that Ross had engaged in professional misconduct by breaching Rule 4.01(1).⁹⁷ In coming to this decision the Hearing Panel considered three duties Ross was obligated to follow. First, Ross had a duty to the court outlined by Rule 4.01(1) and Rule 4.01(2).⁹⁸ Second, Ross had a duty to his client represented by Rule 2.03(1) and Rule 2.02(1).⁹⁹ Lastly, Ross had a duty to the other parent as an unrepresented litigant. This duty is illustrated in Rule 2.04(14).¹⁰⁰ The Hearing Panel acknowledged that the duty of confidentiality outlined in Rule 2.03(1) and the duty not to suppress what ought to be disclosed to the court outlined in Rule 4.01(2)(e) were in direct opposition.¹⁰¹ The Hearing Panel decided that Ross should not have breached these rules.¹⁰² He had to maintain the duty of confidentiality, as his situation did not meet the exception to this duty found in Rule 2.03(3).¹⁰³ There were also limits on Ross' duty to provide effective advocacy. One such limit is that he should not allow the court to labour under a misapprehension.¹⁰⁴ In other words, Ross had a duty to disclose his client's future change in address.¹⁰⁵ Therefore, Ross was in an impossible situation. According to the Hearing Panel, his only option was to remove himself from the record.¹⁰⁶ Ross did not take this course of action and was found to have engaged in professional misconduct.¹⁰⁷

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid* at para 112.

⁹⁸ *Ibid* at paras 75, 77.

⁹⁹ *Ibid* at paras 71, 73.

¹⁰⁰ *Ibid* at para 78.

¹⁰¹ *Ibid* at para 98.

¹⁰² *Ibid.*

¹⁰³ *Ibid* at para 96.

¹⁰⁴ *Ibid* at para 99.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* at para 100.

¹⁰⁷ *Ibid.*

PARENTAL CHILD ABDUCTION

The Ethical Problem

Family law lawyers are faced with many ethical dilemmas in the immediate aftermath of parental child abduction. In some instances, the abduction occurs when a parent has either been denied custody of the child or believes he or she will be denied custody in the future.¹⁰⁸ The parent takes the child and goes into hiding in another province or country.¹⁰⁹ While on the run, the client may contact the family law lawyer either directly or indirectly.¹¹⁰ A lawyer may receive a telephone call or an email from the client. Alternatively, the lawyer may receive letters that have passed through a number of hands and envelopes to disguise their origins.¹¹¹ The client may seek legal advice on his or her current situation.¹¹² Within this context, the family law lawyer faces two ethical dilemmas. First, the lawyer must determine whether there is an ethical obligation to counsel a client who is breaking the law, and whether this obligation would include a duty to counsel the client to return with the child.¹¹³ Second, if the child's current location is disclosed, the lawyer must determine whether there is an obligation to notify the proper authorities.¹¹⁴ Many lawyers are unclear of the ethical obligations in the context of parental child abduction and must turn to the *Rules*.

Counsel for the Abductor must decide whether there is an ethical obligation to counsel a client breaking the law. This ethical obligation is identical to the dilemma faced by Counsel for the Alleging Parent.¹¹⁵ The clients in both situations have gone into hiding with a child. The only difference between the two situations is that the Alleging Parent took the child in order to protect the child from abuse.¹¹⁶ Allegations of abuse may or may not have been made in the context of parental child abduction. Despite this difference, the same three rules should be considered.

First, Rule 4.06(1) reveals that a lawyer should encourage respect for the administration of justice.¹¹⁷ Second, Rule 2.02(5) states "When advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment."¹¹⁸ Lastly, Rule 2.02(1) advises a lawyer to be honest and candid with clients.¹¹⁹ The first

¹⁰⁸ Doskoch, *supra* note 79.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Curtis, supra* note 8 at 2.

¹¹⁶ *Ibid* at 2.

¹¹⁷ *Rules, supra* note 4, r 4.01(1).

¹¹⁸ *Ibid*, r 2.02(5).

¹¹⁹ *Ibid*, r 2.02(1).

two rules suggest the lawyer has a duty to the court. Their actions should uphold the administration of justice. The lawyer may choose not to counsel a client knowingly breaking the law. Alternatively, the lawyer may assist the client by negotiating a settlement for his or her return. However, Rule 2.02(1) suggests a duty to the client.¹²⁰ A lawyer must provide honest and candid advice to any client seeking guidance, even if this client is breaking the law. The *Rules* are unclear whether the duty to the court or the duty to the client should take priority.

Counsel for the Abductor must also turn to the *Rules* if he or she becomes aware of the child's location and is deciding whether there is an obligation to disclose this information to authorities. In this situation, there are two main rules to consider. Rule 2.03(1) outlines a lawyer's duty of confidentiality to a client:

A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.¹²¹

This rule clearly advises that Counsel for the Abductor should keep the location of the child in strict confidence and not disclose it to authorities. However, Counsel for the Abductor must also consider Rule 2.03(3).¹²² This rule provides an exception to the rule of confidentiality. The lawyer may disclose the child's location if he or she believes on reasonable grounds that there is imminent risk of death or serious bodily harm to the child.¹²³ This risk includes serious psychological harm that substantially interferes with the child's health or well-being;¹²⁴ however, the *Rules* do not define imminent risk or serious bodily harm and the lawyer would be required to look at disciplinary proceedings, jurisprudence or legislation to see whether or not the abduction of a child qualifies.¹²⁵

The Ethical Response

The *Law Society of Upper Canada v Curtis* decision provides that Counsel for the Abductor should provide legal advice to a client who has abducted his or her child.¹²⁶ The client should not be deprived of the services of a lawyer or be barred from

¹²⁰ *Ibid*, r 2.02(1).

¹²¹ *Ibid*, r 2.03(1).

¹²² *Ibid*, r 2.03(3).

¹²³ *Ibid*.

¹²⁴ *Ibid*.

¹²⁵ See generally *Rules*, *supra* note 4.

¹²⁶ *Curtis*, *supra* note 8 at 14.

representation before the courts because of this decision to break the law.¹²⁷ Counsel for the Abductor should provide the client with an analysis of the legal aspects of the client's conduct.¹²⁸ The only limitation is that the advice given by the lawyer may not aid the client in breaking the law.¹²⁹ For example, if the client asks the lawyer to sell off an asset so that the client can remain in hiding, the lawyer may be prudent and refuse.¹³⁰ From a practical standpoint, most family law lawyers see their role in the context of parental child abduction as that of negotiator. They are primarily concerned with seeking a settlement for their client's return. This role ensures the lawyer remains in compliance with the *Rules* and does not aid the client in breaking the law.

It is currently unclear whether Counsel for the Abductor has an obligation to notify the authorities if he or she becomes aware of an abducted child's location. At present there are no LSUC disciplinary decisions on this matter. Some clients take effort to hide their precise location from their lawyer.¹³¹ Alternatively, some lawyers advise clients to refrain from divulging their location in order to avoid any potential obligation for disclosure.¹³²

The *Law Society of Upper Canada v Ross* decision provides some guidance on when lawyers may apply the exception to confidentiality outlined in Rule 2.03(3).¹³³ In this disciplinary decision, the Hearing Committee determined that suspected child abduction did not meet the test of imminent risk of serious psychological harm to the child.¹³⁴ A lawyer who suspects that the client plans on abducting a child has no obligation to disclose this information to the court.¹³⁵ The Hearing Committee further revealed the exception is permissive and not mandatory.¹³⁶ Therefore, a family law lawyer is likely not obligated to disclose the location of an abducted child; however, family law lawyer Lynne Reieron argues that child protection laws may intervene in this situation.¹³⁷ The Court may choose to use Ontario's *Child and Family Services Act* to force a lawyer into disclosure.¹³⁸ The answer to this question remains debatable and will only become clear upon a future professional disciplinary proceeding or a court judgment.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ Doskoch, *supra* note 79 at 28.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ross*, *supra* note 8.

¹³⁴ *Ibid* at para 96.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ Doskoch, *supra* note 79 at 28.

¹³⁸ *Child and Family Services Act*, RSO 1990, c C-11.

MODIFYING THE *RULES*

There are two main types of codes of professional conduct: hortatory and regulatory.¹³⁹ The former “attempts to inspire members of the profession to a higher standard by articulating general principles and underlying goals of the profession.”¹⁴⁰ The latter provides “a minimum standard to which members of the profession will be held accountable through the use of rules, whether permissive or prohibitive.”¹⁴¹ A good professional code should include both hortatory and regulatory provisions.¹⁴² Furthermore, it is proposed that a hierarchical ordering of rules would make professional codes more effective for resolving complex ethical dilemmas. For example, a hierarchical ordering of the *Rules* would eliminate the irreconcilability of conflicting duties that often arise for family law lawyers trying to resolve ethical dilemmas in the context of child custody and access proceedings. This type of ordering would also limit the situations in which lawyers would be required to remove themselves from representing a client. The exact hierarchical ordering of the *Rules* is beyond the scope of this paper, but it should include a list of specific situations in which the duty to the client would take priority, as well as a list of other situations in which the duty to the court should take priority. This change to the *Rules* would help eliminate the use of disciplinary proceedings as a forum for teaching ethical standards.

In theory, the *Rules* should help family law lawyers resolve ethical dilemmas,¹⁴³ however, many family law issues are sufficiently complex that it is impractical to expect practitioners to resolve them on the basis of the current *Rules*.¹⁴⁴ The *Rules* often create conflicting duties for family law lawyers rather than a solution to their problems. The failure of the *Rules* to provide specific guidance to family lawyers when faced with ethical dilemmas is problematic.¹⁴⁵ It may leave the public unprotected.¹⁴⁶ It may also leave some family law lawyers to conclude that the *Rules* are unhelpful and should be ignored entirely.¹⁴⁷

The current *Rules* provide more guidance than earlier versions,¹⁴⁸ but they are still insufficient for resolving ethical dilemmas arising in the contexts of allegations of

¹³⁹ Margaret Ann Wilkinson, Christa Walker & Peter Mercer, “Do Codes of Ethics Actually Shape Legal Practice?” (2000) 45 McGill LJ 645 at para 10.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid* at para 13.

¹⁴³ *Ibid* at para 1.

¹⁴⁴ G Mackenzie, “The Valentine’s Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession” (1995) 33 Alta L Rev 859 at 869.

¹⁴⁵ RE Loder, “Tighter Rules of Professional Conduct: Saltwater for Thirst” (1987) 1 Ga J Leg Ethics 311 at 312.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ See The Law Society of Upper Canada, *Professional Conduct Handbook* (Toronto: Law Society of Upper Canada, 1992). See also *Rules*, *supra* note 4.

child abuse, parental child abduction, and spousal violence. At present, these ethical dilemmas are resolved through a lawyer's own disciplinary process or through examining the disciplinary process of another lawyer.¹⁴⁹ Further changes, such as the implementation of hierarchical ordering, should be made to the *Rules* in order for them to be effective in resolving the complex ethical dilemmas of family law lawyers.

¹⁴⁹ *Curtis, supra* note 8; *Ross, supra* note 8.