

CHILD PROTECTION CONFERENCE

PAPER 1.3

Practical Tips for Parents' Counsel New to Child Protection Practice

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PRACTICAL TIPS FOR PARENTS' COUNSEL NEW TO CHILD PROTECTION PRACTICE

I.	Introduction.....	1
II.	Conflicts.....	2
III.	Accepting the Contract.....	2
IV.	The Retainer Letter.....	2
V.	Client Management and the Retainer.....	3
VI.	Communication with Experts, Consultants, and Others	3
VII.	Expect More to the Story.....	4
VIII.	Contact with clients.....	4
IX.	When Your Client Doesn't Stay in Touch	4
X.	A Bring Forward System	5
XI.	Communication with Social Worker (director)	6
XII.	Communication with other Counsel.....	6
XIII.	Service on Parents' Counsel.....	6
XIV.	Ask for Disclosure even if no Rule 2 Case Conference.....	7
XV.	Regular File Review	7
XVI.	Learn from Multiple Sources.....	8

I. Introduction

This paper is meant to outline some practical practice tips for lawyers new to the area of child protection law. Learning a new area of law is daunting—and in child protection it carries the added complexity of working with clients who may be overwhelmed by the removal, or pending removal, of their child(ren); the pressure to quickly understand a family's history that may include previous Ministry involvement; the potential of dramatic family changes or breakdown; and the necessity to inquire about and weigh various factors such as mental health, addiction, family violence, criminal matters, and housing crisis.

In fact, there are so many potential issues that may arise that one could barely address them in any depth in one paper. This paper just deals with the tips I have found I discuss regularly with lawyers new to child protection.

II. Conflicts

The most important step in working with a new client is completing a conflict check prior to speaking to them. Make sure you ask for the names of all other parents—including the parents (who are ex-partners) of other children even when those children are not the subject of your current matter. Whether you are in a large city or small town or community, there is always a possibility of parties being in legal conflict.

Some parents will also ask that you represent both of them as they do not see themselves as opposing parties, or because they “share the same point of view”. This is also a matter of personal practice. Whether you decide to do so should not be taken lightly. If the parents find themselves in conflict with one another (that is, the director views and, consequently, treats each parent differently, or each parent has a different opinion about how to protect their individual positions) you will have to withdraw as counsel for both. For families, dealing with the Ministry is always a pressure point.

Also, it is worth noting that Legal Services Society of British Columbia (“LSS”) will not give a tariff lawyer two separate contracts to work for two separate parents on the same file. All work is to be billed under one contract for one parent, so there is no financial impetus to represent both parents under one contract. LSS does not assume that both parents should share the same counsel.

Where a client is insistent they share counsel with the other parent, it can be helpful to let the client know that it can be to their advantage to have two lawyers with the same, or at least similar, legal arguments to bolster their position with the court. In the event parents are insistent that they share counsel, if you are uncomfortable with the arrangement, it is perfectly acceptable to refuse the contract.

III. Accepting the Contract

As parents’ counsel, the majority of clients are likely to come from LSS contracts.

Some lawyers prefer to speak directly to a client before accepting the contract. Doing so gives the lawyer a chance to get to know the client, the client’s perspective about why they have Ministry involvement, and decide whether they would be a good fit with the client’s personality.

Other lawyers will accept the contract immediately after confirming they are not in conflict. It is just a matter of preference.

Sometimes the potential client asks to interview you before telling LSS they would like the contract to be issued to you. If you agree to be interviewed by the client, you should expect the client to make up their mind quickly, after one appointment. If a client tries to seek on-going advice while they speak to multiples lawyers, this puts you at risk as a lawyer and opens you to liability; the client may say they relied on your advice even though you had not received an LSS contract and the client had not signed a retainer letter.

Keep in mind that in child protection, a client’s position is often aided by swift legal representation—advice and advocacy, particularly at an earlier stage, can be effective in preventing more intrusive involvement by the Ministry.

IV. The Retainer Letter

Whether you choose to represent one or both parents, one of the most important things you can do is sign a retainer letter with your client(s). Whether you choose to represent one or both parents,

you should have a retainer letter that reflects your professional relationship: a retainer letter for one client; and a joint retainer to represent both parents, if you are choosing to do so.

Refer to the Law Society of BC (“Law Society”) *Code of Professional Conduct* for a review of the issues around conflict, and refer to LSS’s website for a basic retainer agreement.¹

The retainer letter is a must-have tool as parents’ counsel. It will be the device you can turn to if a formal complaint is received by the Law Society or LSS.

V. Client Management and the Retainer

It is essential, to your practice and to protect you, to outline your professional relationship in your retainer letter, including expectations around communication. Informing the client of your policy about communication (how to efficiently and effectively communicate with you, how soon the client can expect a response, whether client can expect someone else to handle your file from time to time if you are away/unavailable), as well as their responsibility to share their current and updated contact information (both mailing address and phone number), will help both you and the client be accountable for communications. One of the most common complaints by clients about their lawyers, to both the Law Society and LSS, is their lawyer not returning phone calls or emails.

The retainer letter should also outline the reasons you are permitted to close their file. A good retainer letter should leave very few stones unturned.

As mentioned earlier, if a client is disgruntled about with you for withdrawing as counsel, particularly if LSS does not approve another lawyer, the retainer letter may defend you in a complaint, if the reason for ending the retainer is clearly defined in the retainer.

VI. Communication with Experts, Consultants, and Others

At the outset of a file, or as early as you foreseeably think it will be helpful, prepare and ask the client sign a Release of Information (“Release”) to speak to professionals your client comes into contact with. Those professionals may include doctors, medical specialists, counsellors, and other community organizations your client accesses for services. This can assist you in advocating for your client.

It can be particularly important when your client’s position differs from the director’s. For example: the director says your client is not engaging consistently, or at all, with their drug and alcohol counsellor, however your client tells you something very different.

So it is important for your understanding, and so that you may confidently confirm with the director, your client’s level of engagement in services. If it is faster, you may want to ask your client to ask their professional to provide a signed and dated letter to you by fax to corroborate the client’s position (that, is the type of service the client is participating in, the number of appointments attended, the appointment dates). Or, if you have the Release, submit to the service provider with a cover letter, outlining the requested details.

Once in receipt of the professional’s letter, review it carefully. Ensure it contains enough (but only an appropriate amount of personal) detail, ask for alterations if needed, review it with your client and confirm they want you to share it with the director/director’s counsel.

1 <http://lss.bc.ca/assets/lawyers/practiceResources/lssFamilyServicesRetainerAgreement.pdf>

The Release can be of assistance where your client is in touch with other community supports, but their ability or level of communication with you as counsel is a challenge.

VII. Expect More to the Story

As parents' counsel, one of the most important skills to develop is being a quick study about the client's life and legal case in order to advise them constructively. If you have only the client's side of the story, you can speak generally to the court process, and their rights and obligations as parents, and give them your opinion, while cautioning them that your opinion may change if you receive different information from the director. Similarly, if the matter is court related, do not rely only on the court documents when advising the client. To give your client thorough and apt advice, it is necessary to obtain information from the client, the director and/or director's counsel—and for this reason, communication is key.

VIII. Contact with clients

Many lawyers new to this area are uncertain about how much contact they can expect to have with their client, and when to have it. Basically, how much hand-holding do you do as parents' counsel?

The answer varies. This will depend on the client and your practice style as a lawyer. Some clients will be more successful with your increased attention—they are more accountable and enthused about sharing their progress. Other clients are reticent, even resentful about your attempts to inquire and follow-up about their lives.

What is important is that as counsel you are responsive to clients as their needs arise. Again, communication expectations should be outlined in your retainer letter. If the client has an unreasonable expectation about having phone calls returned the same day, every time they leave a message for you, you can direct them to your retainer letter and remind them that you will do your best, but you cannot always immediately reply. For some clients, this gentle reminder is enough, for others it will not suffice. Either way, you have addressed it in your retainer letter, and if the expectation is written and reasonable, at the very least it may protect you in the event of a formal complaint from the client.

You should always confirm important instructions in writing. In the event that the client returns days, weeks, months or years later to lament that they did not know what they were agreeing to, you can turn to your letter. Certainly, for consents to Continuing Custody Orders, or cases where there is high conflict, an opinion letter helps you be crystal clear about the client's history, legal options and wishes. If your retainer letter includes that the client has an obligation to keep you updated about their mailing address, use the last known address they gave to you for your mail, and if the letter is returned to you, keep it for your records to show you fulfilled your obligation.

IX. When Your Client Doesn't Stay in Touch

This is a common concern among parents' counsel. There can be many reasons why a client does not stay in touch with their lawyer: no minutes on their pay-as-you-go phone (which is the only kind of phone they can have without a credit rating), limited free wi-fi they can only access at certain public locations for free phone apps, sporadic access to emails through public places like libraries, or other community agencies they access, stolen phones, poor cell service, or no phone or internet access at all.

Sometimes the client is simply not healthy enough, emotionally or physically, to make communication with you a priority. Our clients have stressful lives, which often include poverty, lack of support, their own childhood experience with the Ministry, and other factors that likely contribute to why the Ministry is involved.

While it is vital you have instructions from your client, when your client does not stay in touch, it can be understandably frustrating. It is recommended you try to use a multi-pronged approach to client communication—phone, mail, and email.

Some lawyers will choose to communicate by text with their clients. Great care should be taken when doing so. You should take screen shots of your text communications, with the client's phone number and overlapping lines of text in each screen shot to clearly show the conversation stream, and email those screenshots to yourself to print and add to the file (just as you would record all written communication with your client). Many lawyers will limit their use, if any, of text communication with clients. Due to the difficulty inherent in verifying the identity of your client by text, one should be wary of providing advice or accepting instructions by text.

Also consider whether you can leave general messages at shelters, or approved family members, or other community agencies or services your client accesses.

Lack of contact with a client can be exasperating as a lawyer—after all, sometimes you are the only one showing up to court, hopeful the client will attend, seeking one or more adjournments, and are left feeling out of the loop. Of course, you can use those court appearances to glean information from the director about your client (before or during the court appearance), including confirming their current contact information or leads about their whereabouts, so it can still be of assistance.

When this happens, if your patience is worn thin, remind yourself that ultimately the person most impacted by the client's lack of engagement with counsel is the client. It is also a good idea to include in your retainer letter that you have the right to withdraw as counsel if the client is not in touch with you for a certain period of time, or if you cannot obtain instructions (being sensitive as to how long orders remain in place).

X. A Bring Forward System

Another common issue parents' counsel face is missing a court date because the client did not tell them of a court appearance. The easiest way to ensure this won't happen to you is to have a reliable and consistent bring forward ("BF") system. Outlook, or a paper calendar, is sufficient.

Diarize when your clients' orders expire; it means it's easier to remember to contact the director or director's counsel shortly before the expiration of the order to inquire whether the director will seek an extension. Always enter in your BF system the date for Presentation and Protection hearings.

Relying only on your client to contact you about court dates increases the chance you will have little or no notice from the director, director's counsel, or your client.

You are most likely to miss a court date when your client has a new application brought to court—the client may assume you knew about the application, though the director may not have sent it to you (perhaps they had previously as a 'courtesy').

XI. Communication with Social Worker (director)

An essential principal not always obvious to lawyers new to this area of practice is that parents counsel are not allowed to communicate directly with social workers (the director) because the director is an opposing party who has counsel of their own (i.e. director's counsel).²

It is only if director's counsel gives consent to parent's counsel to communicate with their client that it is permitted. Another way to think of it is this: you represent a client in a family law matter, and the opposing party has a lawyer; you know you are not permitted to contact that opposing party and only communication with counsel is appropriate. The same holds true in child protection.

Director's counsel will instruct their clients about whether they should have direct contact with parents' counsel. If you contact a social worker, and they tell you to contact their counsel, you should immediately cease communication with the social worker, and contact director's counsel instead. Whether parents' counsel has permission to contact the director can vary by region, by office, or even on a case-by-case basis.

If you have the kind of working relationship with a social worker whereby are you allowed to communicate directly with them, do not pressure the social worker to make decisions of a legal nature; those discussions should be had with, or in the presence of, director's counsel. If you breach the tacit trust of director's counsel, they may no longer permit the social workers they represent to communicate freely with you, which can be more cumbersome for you.

XII. Communication with other Counsel

When communicating with other counsel in child protection, just as in any area of law, be clear, concise, professional in tone, and set out deadlines that are reasonably justified in the circumstances.

As a best practice, some lawyers choose to forward all written communications (either via email or letter) to the client. This is particularly helpful when the client is anxious, and to ensure the client knows about the information the director has about their file. Seeing your communications helps the client see and understand you are advocating for them. Without seeing or knowing you are writing to director's counsel on your behalf, they can feel left out from a process that often appears to them to be only a court driven process.

The client has the right to all communications you have with director's counsel, and in fact, if the matter proceeds to trial, will form part of the case before the court.

If you forward emails from the director to your client, make sure you tell your client not to reply directly to the director or director's counsel—it is your job as counsel to communicate formally with the Ministry lawyer on their behalf.

XIII. Service on Parents' Counsel

It's important to know the *Provincial Court (CFCSA) Rules* (the "Rules") say the director is required to serve:

- an individual by leaving a copy with him or her (either by registered mail or fax to the last address for service).

2 S. 7.2-6, *Code of Professional Conduct for British Columbia*

- if the individual is a party with a lawyer of record, by leaving a copy (including by fax) at that lawyer's address for service.

This means the Rules state that the director is not obligated to serve counsel of record with applications; however, the director is permitted to serve the client through counsel.³ Service only upon counsel is more likely to occur when the director cannot locate your client or your client is evasive.

If I do not have instructions regarding the director's service on me instead of personal service on the client, I will often advise the court about the difficulty I would have locating my client to obtain instructions, and that under my LSS contract, I have never been approved to pay for skip tracing my own client. I will also let the court know the director often has more information than I do about how to find my client (e.g., knowledge of and contact with extended family members or friends who may know about the client's whereabouts).

In addition, the director has the ability to provide an affidavit pursuant to Rule 6(10) to seek permission from the court for another method of service to be used (an "affidavit for substitutional service") in order to serve my client.

XIV. Ask for Disclosure even if no Rule 2 Case Conference

Though there is no obligation on the part of the director to disclose their file with parents' counsel, if you have specific requests for information, make the request, and do so in writing (via email or letter), including an explanation of why you are making the request and how it may assist your client.

For example, if the director specifically references police report(s) as the basis for their concerns, you can ask the director to disclose those to you. If those documents would help you and your client better understand the director's perspective, it is worthwhile to ask. You may have to try to be very persuasive if the director is unwilling. It cannot be overstated as to how important it can be to your client's self-awareness to know what the director knows about them.

As parents' counsel, the director's transparency can make a significant difference in your client's position and instructions.

XV. Regular File Review

When you have a high volume of child protection files, as parents counsel, it can be helpful to have a monthly review of all your files. Regular file review can help remind you to check-in with clients, particularly those who are in-between court appearances. When dealing with a court-related file, orders are often 6-weeks, 3-, or 6-months in duration.

Staying in touch with a client between court appearances helps you keep abreast of any new developments. For example: your client's access has been cut-off even though they have a section 55 access order; if you follow-up immediately, instead of weeks or months later, you have a better chance of mitigating and addressing the concerns.

3 *Provincial Court (CFCSA) Rules*, R. 6(4)(a)(iii)

XVI. Learn from Multiple Sources

This practice area is rife with urgency, unsatisfied parties, and difficult situations that make advice and advocacy challenging.

My recommendations for practicing child protection law (and by the way, these do not apply only if you are junior counsel, or new to child protection):

- Familiarize yourself with the CFCSA (especially when reading the court documents, but really, at all times).
- Read the Rules (you need to know the court rules to protect your client; understand all the parties obligations and rights; know the kinds of orders the court can make; and ensure you are conducting yourself to the highest of standards).
- Research case law.
- Use as a reference the Law Society’s Practice Checklist Manual: *Child, Family, Community Service Act Procedure*.
- Read Grand Chief Ed John’s *Indigenous Resilience, Connectedness and Reunification— From Root Causes to Root Solutions: Report on Indigenous Child Welfare in British Columbia*, November 21, 2016. This is at least a starting point for knowledge about child protection and indigenous communities in BC.
- Find several experienced counsel, preferably those you have observed and respect, to seek their advice about specific legal and ethical issues. Make sure you ask as soon as a question arises. Better to feel uncertain in private than look sheepish in court.
- Always ask the difficult questions: of your client, the director, director’s counsel, and your client’s supports. There is nothing to be gained by making assumptions or being even a little bit uninformed about every person’s position.
- Read the *Code of Professional Conduct for British Columbia*. Trust your gut, and when you are uncertain of the right course of action, be quick to phone a Law Society Practice Advisor to make sure you are fulfilling your professional obligations.

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