**DRAFT Principles of Effective Dispute Resolution**published on FamilyCounsel.ca with input from the family law community

These Principles take into account what research has shown to aide in the effective resolution of disputes. While our Code of Conduct sets some limits, lawyers can and should strive for an even higher ethical standard. Lawyers are dispute resolution professionals providing a business-like service, our role isn’t to unnecessarily increase conflict or to be paid to be rude to others. In addition to making the process less stressful for everyone involved, increasing communication and respectful-behaviour between lawyers helps to resolve disputes more efficiently, thereby reducing the cost and long-term stress to our clients.

These Principles are entirely voluntary, however lawyers are encouraged to append these Principles to their website biographies, and Retainer Agreements, explicitly stating that their representation of each client is subject to that client’s instructions complying with these Principles. If a client persists in instructing a lawyer to engage in behaviour which contradicts these Principles, then where their Retainer Agreement incorporates these Principles, the lawyer should withdraw from representing that client. Any withdrawal must minimize prejudice to the client as required by our Code of Conduct. It’s expected that lawyers who have recently adopted these Principles will have pre-existing files where they are unable to withdraw when their client’s instructions contradict these principles, however they should still encourage behaviour which follows these Principles.

1. ***Subject to emergencies.*** All of these principles are subject to emergencies and circumstances where *ex parte* (without notice) applications are appropriate. Emergencies are where there is a risk of harm to children or other persons, dissipation of property, risk of loss of jurisdiction, or an impending deadline at risk of not being met. However, even in those situations, lawyers are encouraged to follow these Principles when appropriate.
2. ***Dispute resolution professionals.*** Lawyers are dispute resolution professionals, not “pit bulls”. Lawyers should not seek to create conflict or take severely disproportionate actions against opposing spouses where doing so does not facilitate resolution of the dispute. Business-like interactions help to decrease legal costs. Lawyers should always be polite. Lawyers should not take steps with the sole purpose of pressuring any person to abandon clearly-legitimate rights. However, this principle does not prevent lawyers from applying to the court where doing so will likely facilitate resolution of the dispute, or is required to protect a client’s interests.
3. ***Refusing to harm children.*** Lawyers should decline client instructions which will likely cause more harm than good to children, including undue psychological harm. In some circumstances, lawyers should also decline instructions which are clearly not in the best interests of a child, although they should be careful not to impose their own particular values on the client (for example, declining to seek shared parenting because they do not believe in shared parenting). It is generally beneficial for children to have a strong and healthy relationship with both parents, although that may require safety precautions in some circumstances. When pursued in a business-like manner, court and other dispute resolution methods are not in and of themselves harmful, where doing so will likely facilitate resolution of the dispute.
4. ***Attack the dispute, not each other.*** Lawyers should focus on addressing the dispute, avoid tactics solely or primarily designed to dissuade persons from pursuing legitimate rights, avoid being condescending or critical of other lawyers, and avoid imposing undue burdens upon other lawyers. This Principle does not prevent a lawyer from arguing that another lawyer’s step in the litigation was improper, however such behaviour should be referred to their client’s conduct, not the lawyer’s.
5. ***Avoid gaslighting and sandbagging.*** Lawyers should avoid placing excessive “spin” on weak arguments, arguing for outcomes with no reasonable chance of success, or unduly inflating their client’s position where it may risk misleading a judge or gain an improper advantage, including extreme positions designed to obtain favour in the event that a judge decides an amount in the center of each position. Lawyers should also try to communicate the thrust of their arguments in advance, especially those that the other lawyer is unlikely to have thought of and may be determinative of the issues, so that their counterpart has a reasonable chance to investigate prior to submissions being made to a court. However, this Principle does not require counsel to advance less than their client’s best-case scenario, especially where their counterpart is advancing theirs, or where their client fully understands the risk and still wishes to pursue an unlikely but realistically possible outcome.
6. ***Live communication between lawyers.*** Where time permits, lawyers should speak over the phone, videoconference, or in person before any court applications are to be heard, even when the chances of resolution are slim. Even when information still needs to be gathered or the client’s instructions need to be sought before providing an answer, lawyers should still generally be prepared to share their client’s priorities, values, and concerns, and be prepared to discuss their preliminary thoughts about potential paths forward. Settlement discussions are generally privileged, lawyers should confirm in writing when they have reached an agreement.
7. ***Phone appointment availability.*** Where time permits, lawyers should be willing to speak to their counterpart over the phone. This Principle does not require them to abandon other commitments or respond immediately, they may be unavailable for weeks depending on their schedule, however lawyers should at least be available by appointment. Lawyers may refuse phone calls and insist on written communication where counterparts are self-represented, have misrepresented statements made by the lawyer, or have engaged in abusive conduct over the phone or in meetings with the lawyer.
8. ***Four-way meetings.*** Where time and resources permit, lawyers should always recommend four-way meetings to their clients, and should also recommend four-way meetings prior to any court hearings. Four-way meetings may be designed to address any family violence concerns, for example through videoconferencing, or keeping clients in separate rooms and lawyers meeting, where appropriate. This principle does not prevent settlement discussions from being postponed until proper financial disclosure has been provided or emergencies addressed. Lawyers are not required to recommend meetings where one is being requested for a likely-abusive purpose, such as to simply badger.
9. ***Avoid monopolizing time.*** Lawyers should avoid taking up substantially all of the available time in front of a judge to the detriment of their counterpart, and should avoid monopolizing speaking time during settlement meetings and phone calls. For resolutions to endure, it’s important that each side be heard, and that settlement discussions do not devolve into lengthy diatribes about the past, which are generally not conducive to settlement.
10. ***Financial disclosure is essential.*** Lawyers should strongly recommend that their clients exchange complete financial disclosure, including relevant information needed by their counterpart to assess their client’s position and investigate potential impropriety. Lawyers should not draft separation agreements or domestic contracts which omit their client’s assets or income. Lawyers should not impede disclosure, for example by frequently interrupting Questioning. However, except where circumstances have changed, lawyers should also generally avoid updating disclosure more than once per year, and should avoid requests for documentation not required to resolve the dispute or investigate legal rights.
11. ***ADR.*** Lawyers should recommend alternative dispute resolution to clients. Even where resources are limited, they should be aware of publicly-funded mediation and psychologist services, and the option of self-representing or a limited scope retainer in ADR. Impasses and large gulfs in positions are often best addressed through mediation or JDR. Binding JDR, arbitration, or med-arb are especially appropriate where a matter would otherwise proceed to a Court of Queen’s Bench trial, or where court is unaffordable. Lawyers should avoid assuming that ADR won’t work because their clients appear to be entrenched.
12. ***Parenting Coordination.*** When lawyers represent clients engaged in high conflict parenting disputes other than substantial changes to parenting time or relocation, lawyers should recommend that the clients enter into Parenting Coordination, in order to develop healthier co-parenting and decrease the cost of litigation. The Parenting Coordination process should be designed to address concerns of family violence or negotiation imbalance.
13. ***Withdrawal upon Renegotiation.*** Lawyers should withdraw from representing clients who wish to renegotiate a settlement which the lawyer negotiated. In addition to often being an unethical form of negotiation, the lawyer has become a witness and should not act in a dual role as witness and counsel. This Principle does not prevent steps to clarify terms, seek variation where there has been a material change in circumstances, propose a trade-off or concession to see if the opposing party might prefer that over the agreed terms, address unforeseen issues, or seek redress where a party has been misled or mandatory information has been omitted.
14. ***Joint fact-finding.*** Lawyers should encourage clients to engage in joint fact-finding, such as jointly retaining mutually-agreeable experts. Doing so generally resolves disputes faster and at less cost. This Principle does not prevent anyone from insisting on appropriate conditions such as either party being able to complete and rely upon a report even if the other party no longer wishes to continue with the joint retainer, insisting on proper documentation being made available to the expert, insisting on alternative scenarios based on different sets of factual or legal assumptions, or insisting on a higher standard of investigation.
15. ***Respect for each other’s time and obligations.*** Lawyers should avoid imposing short deadlines. Lawyers need time to properly review information, consult their client, balance their other obligations, and lawyers deserve to have work-life balance. Short deadlines should not be used to jump the cue, and lawyers should not have to work nights and weekends because another lawyer is imposing a short deadline.
16. While emergencies may necessitate short deadlines, they should not be short solely because the client is anxious.
17. Except where there is an upcoming court or ADR appearance, onerous step, or deadline, offers to settle disputes should generally be open for at least **one month**, and deadlines for other steps should be no less than **two weeks**.
18. Lawyers are reminded that the commentary to Rule 7.2-1 of our Code of Conduct states that lawyers should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client.
19. This ethical obligation overrides client instructions. Clients should be advised that timelines and other procedural matters which do not significantly affect the overall result or significantly add to their cost will generally be chosen by their lawyer, and are subject to ethical considerations.
20. Lawyers should respond to requests for extensions/adjournments as soon as practicable, and should not simply hold the date/deadline open to press their counterpart into comply when they know that an extension/adjournment is appropriate.
21. ***Communication boundaries.*** Lawyers should not contact their counterparts about files by text message, calls to personal cell phones, or through social media, unless invited to do so. Be mindful not to clutter each other’s inboxes. Sending correspondence by email instead of by letter does not mean that counterparts are expected to respond sooner.
22. ***Flagging urgent correspondence.*** Correspondence which addresses deadlines or events which are to occur within a week should be marked “urgent” or “high importance”, whether they be by letter, email, or fax, especially when serving legal forms or for time-sensitive matters.
23. ***CC’ing assistants/paralegals.*** Lawyers and their legal support staff should try to CC their counterpart’s assistants/paralegals, where known, especially when serving legal documents and for urgent matters.
24. ***Clients appropriate to skill and experience.*** Lawyers should not represent clients whose complex matters far exceed the lawyer’s skill and experience, unless that client’s resources prevent them from retaining more experienced counsel. Lawyers should not let their inexperience be an impediment to resolution. Instead, lawyers should aim to take incrementally more challenging files, and should be cognizant of when it may be more appropriate for a more senior lawyer to assist the client. Somewhat larger leaps might be appropriate where lawyers have proper guidance, such as where a more senior lawyer with appropriate skill and experience at the same firm is also involved or regularly consulted.