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Family Law Section

ADR'S COLLABORATIVE LAW: INNOVATIVE BEST PRACTICES

As you may know collaborative law as a concept and practice alternative was the brain-child of a mid-western American attorney by the name of Stu Webb. This idea hatched some fifteen years ago and since then this process has spread all over the continent and is firmly rooted in Canada, particularly our western provinces and here in Ontario. This process model rolls out through lawyers who become individually committed to the precepts and practice of CFL (collaborative family law) and form up with local municipal or regional organizations. These local groups tie in with the larger provincial (Ontario Collaborative Law Federation) and international (International Association of Collaborative Professionals) communities dedicated to the promotion of this innovative style and structure of conflict or dispute resolution. Currently, there are functioning local practice groups in most larger Ontario communities and there is a steady stream of local membership admissions.

I have been asked to speak of the development of CFL and that would entail doing so from various perspectives. One perspective is facilitated by our esteemed presenter, The Honourable Madam Justice June Maresca who will share a point of view from the bench. That discussion may broaden into the interests and expectations of the collaborative practice bar with respect to specific aspects of the bench and bar cooperation, case management, new directions in diversion programs and a unified theory of the administration of justice. For present purposes however; I would like to focus on some simple ingredients to sound practice and better business. These business and professional features include efficiency, effectiveness and differentiation.

Our discussion may be informed by an appreciation that CFL has dramatic practice potential as a mainstream alternative responding to an escalating demand from the general public. Collaborative law is forming up as a major process option in the solidly entrenched evolution of Alternative Dispute Resolution. CFL has been said to be more of an art than a science. Art school to us is a place of the enriched heritage of family mediation and the shift back to the fundamental empowerment of the people to really retain control over their own lives.

Re-assembling decision-making resources around the client as the central person in the divorce and separation experience nurtures other time-tested ADR theories. Note the natural resonance of the client-centered approach within the solicitor-client relationship.

A key feature of CFL includes a *settlement-only* solicitor-client contract with a disqualification provision regarding litigation (that is to say adversarial proceedings) as well as good faith or cooperative bargaining with full disclosure. Lawyers, as problem solvers, provide a new role to clients as process coaches through principled or interest-based negotiation and information resources both legal dynamics but also to the point of organizing other professional interventions (notably divorce coaches, child specialists, financial advisors and evaluators). The new presenting clients as informed members of the general public reject the adversarial court connected model because of the perceived harm it may likely do to their family in restructuring their post-marital relationships. Collaborative professionals are guided by a thirty-year history of mainstream social science which points to *conflict* as opposed to *family re-structuring* as the fundamental flaw in divorce processing. So, family conflict is the problem therefore CFL (particularly in the collaborative divorce or inter-disciplinary model, which organizes a collaborative team to assist people with respect to their varied and specific requirements) takes into consideration the emotional transition of separating spouses adapting to a new parenting relationship and /or informed comprehensive financial resolution. The goal of CFL is to help people in divorce to make better or informed decisions and just like family mediation, there is a conscious effort to validate a person's emotional journey. Integrated legal services forms one part of these larger dynamics.

I am referring to the interaction of the legal divorce and emotional divorce. E. Marvis Hetherington in her book *For Better or For Worse, Divorce reconsidered (ISBN 03-93048624)* points out that three years after the divorce 25% of the divorce couples are able to work with each other but 75% of the divorce couples are not functioning (50% of this dysfunctional couples are not able to talk to each other but do not conflict, 25% of the couples are still in high conflict). The conclusion is that the majority of cases are failures of ill-adapted emotional dynamics. Accordingly, emphasis on the legal divorce is like the tail wagging the dog.

Political commentators say that you can't underestimate the common sense of the average citizen. Ontarians are attracted to the common-sense reorientation to preserving long-term relationships within the context of marriage breakdown and change. There is cohesion with parental love, children's needs and their peace and prosperity. Collaborative law formats the legal divorce but facilitates insight and processing of the emotional divorce.

Also, we have witnessed CFL's common sense attraction with Ontario family law practitioners. An interesting commentary is provided in the research of Dr. Julie MacFarlane of the Faculty of Law, University of Windsor on the various roles and values operating within the collaborative law movement and our legal profession. This material is available in the CLE program of the Law Society of Upper Canada and the Ontario Collaborative Law Federation entitled *Collaborative Family law Practice, Tab 1 (ISBN 0-88759-419-0, SKU CLE04-01106)* which was chaired by James MacDonald, Q.C and Richard W. Shields on November 12th, 2004.

Let's look at collaborative law as a business model. I am not referring to the inevitable benefits of individual or group promotions, the international (IACP) marketing campaign or the reduction of accounts receivable problems. I am focussing on the features of efficiency and effectiveness that are emblematic of these particular ADR client- centered approaches (both collaborative practice and family mediation). Efficiency and effectiveness are the core ingredients to maximizing your success in the profession of law and the business of the profession of law. These are the combinations for a solid foundation of good business, risk management and a high level of consumer satisfaction. And mark you, this is primarily an intrinsic analysis as opposed to a comparison with the adjudicatory model (i.e. litigation or cooperative negotiation with the integration prospect of court). Indeed, most CFL'ers and lawyer-mediators continue to engage a comprehension family law practice and live within the court system, albeit as principled negotiators.

Efficiency is always necessary in good business and profitable service delivery. Communication dynamics are markedly different in alternative dispute resolution. Let's look at the mediation and collaborative meta-communication models. Both ADR processes consolidate the communication matrix to direct and coordinated proportions. The purest reduction is found in mediation's classic

triangle with the lynchpin mediator maintaining a safe and participative manner of focused dialogue. Lawyers may contribute an essential role in independent legal counsel however; their active participation is essentially suspended to the later stages of the agreement. By contrast, the collaborative lawyer's role is integrative by nature. Unlike the independent legal advice in mediation as an external lineal adjunct, this lawyer is integrally involved in the formation and facilitation of advanced negotiation.

At the same time, the core structure of this process remains fundamentally client-centered. For on collaborative practice, the clients themselves conduct settlement negotiations with the lawyers "by their sides" so that client ownership of the process is combined with legal protection. The new model to accommodate these negotiations, is the four-way meeting (i.e. CFL lawyers and clients). However, there is a critical difference. The lawyers, instead of dominating the process, act as advisors to the clients ever mindful of the clients' inherent control.

The central feature of the four-party meeting is a safety within direct (and hence efficient) communications. This structure opens up a collaborative discussion and has everyone building together [*that's needed to replace the disjointed telephone chatter of the "I'll talk it over (if I understand you) with my guy and get back to you"*]. Our clients CFL professional development or training programs stress interest-based negotiation, active listening, trust and nontoxic relating- we work with people not at the phone. This is a different type of practice which involves more block times, qualitative scheduling, merging administration flows between and within law firms. However, this new solicitor- client relationship remains traditional in the sense that the dynamic is rooted in a client-centered approach with the lawyer serving as a resource. This resource informs the process. In addition, the lawyer serves to model a highly effective interest-based negotiator. This dynamic is fostered in the context of safe and secure structures organised to develop preferred options reflecting maximum and mutual gain in negotiation theory.

We have now entered the sacred ADR preserve of *win-win* negotiation- the holy grail of effectiveness. This is the perfect context for interests- based negotiation. From the first time that a prospective client enters the office of a family mediator or collaborative lawyer, there is an absolute

dedication to understanding that person's needs, values and requirements. That client will obviously be their own judge as to the level of success achieved within their own case.

Once again, I refer you to the introductory materials of the LSUC-OCLF CLE program of November 12th, 2004 (*supra*) at Tab 2 written by Co-Chair Richard W. Shield entitled *Preparing the clients to commit to the process* which includes a summary of practical objectives in initial consultations with useful references and astute commentary.

Effectiveness is facilitated by timely and reliable information flowing within the new solicitor-client relationship. Once again, a clear understanding of the client's emotional persona underscores more effective service delivery. In particular, there is a useful engagement of a client's psychological time orientation and phase within the divorce and separation experience. Time sensitivity including immediate/mid- term and long- range considerations will inevitably assist in understanding and managing the expectations of the client. Managing expectations is a hallmark of best practices within any lawyer-client relationship.

Effectiveness operates closely with the concept of differentiation within the marketplace. Entering an office which blends conventional and innovative process options with a client-centered assessment avails a full range of services. There is a critical explanation of rights, remedies, interests, process options and time for prudent deliberation and engagement. Highlighting the different role of a lawyer in the three major process options (family mediation, collaborative law or conventional/ traditional lawyer negotiation/ litigation) signals the professionalism of a modern family lawyer. Consistent with our duty in the rules of professional conduct, we discuss alternatives to litigation and facilitate informed decision making. Sound practice combines with good business when the subject lawyer is able to broaden the range of services within his/ her office.

And here's a trade secret. Potential consumers to ADR processes are self- selecting. As I mentioned, the new legal consumer is well informed and there is common ground within the restructuring family unit to save time, expense and "stay out of court". Information about specialized dispute resolution system are easily accessed on the internet. The common

denominator within this presenting community is the mutual exclusion of the *win-lose* paradigm. Family mediation and collaborative law are problem solving structures which are now reconstituted as the last best tools of joint decision-making within the family. These informed consumers are more likely to be successful to follow through with their initial consensus and build a collaborative agreement.

Obviously, the adversarial system promotes *win-lose* framing and all family law practitioners know about mutual suspicion, rampant speculation and covering all exigencies. Obviously, covering all “fronts” as it were (i.e. all or multiple theoretical options) generated by the possibility of distributive *loss*, significantly impacts on potential effectiveness. Effectiveness is secured through developing crucial core interests through to a maximized outcome in negotiated and cooperative settlement. This is advanced negotiation generated by integrative thinking.

Because of the increased role of the CFL client in empowered participation, the client is present when real and obvious work is being performed by the lawyer or staff. Firstly, this jumps the communication hurdle which is often present in lawyers’ assessments or complaints. Secondly and more to the combined points of efficiency and effectiveness, this process lends itself to systemization (client- lawyer conferences) while maintaining individualised integrity. Many of us in best practices have a progress report formatting interim resolutions with specific reference to the law model (e.g. Part I, FLA property derivations). Once again, my comment relates to the client being there first hand for much if not all of the unfolding process. Obviously, this is very different from the litigation model which generates excluded discussions and *in camera* meetings. It is little wonder that the legal consumer to the adjudicatory model is consistently dissatisfied and continually detached from pragmatic and proactive progress.

We in ADR are changing with the expectations of the general public. Simply, people prefer hands-on participation in the fundamental decisions of their lives. ADR processes may constitute stark departures from the conventional litigation-centered approach to the inevitable societal need for re-structuring families following marital break-down. As such, they constitute exciting innovations within family practice. To quote Joe Calloway in his recent book, *Becoming a Category of One; The Competitive Advantage* (ISBN 0471274046) “the incredible innovations of today become the

minimal expectations of tomorrow”. Moreover, past behaviour is often the enemy of success. Responding to the emergent needs of a highly specialised consumer portends a radical re-orientation of differentiated service delivery within the marketplace. My submission is that ADR processes represent our new technology which ramp up sound practice and good business. Best practices can both be a cherished tradition and exciting innovation. You can find out more about family mediation through the OAFM network and professional development opportunities and local practice groups in collaborative law through the Ontario Collaborative Law Federation. We have the technology as well as the sustaining natural resource of effective advocacy in the great tradition of our noble profession.

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