TAB 2

Preparing the Client to Commit to the Process

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CONTINUING LEGAL EDUCATION

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Introduction

In the first meeting with a prospective collaborative law client, a lawyer has certain objectives that he or she will wish to accomplish as follows:

1. Establish rapport with the client;
2. Understand the nature of the client's problem;
3. Provide an overview of the law, if requested by the client;
4. Advise the client of his or her process options.

In the course of preparing the client to commit to any process, it is important that the lawyer effectively attend to each of these aspects of the initial interview. They will be considered separately in this paper. In practice, the collaborative lawyer integrates these elements into a seamless tapestry, in which inquiries are made, information is provided, and advice is offered.

Establish Rapport

Following a separation from his or her spouse or other life partner or in anticipation of an imminent separation, a lawyer may be the first person, professional or otherwise, that a client consults. He or she may not have sought the advice or intervention of a lawyer previously other than for the purpose of purchasing a home or preparing a will. The purpose of his or her attendance on this occasion is not to discuss a transaction; he or she is experiencing a problem of a particularly serious kind. He or she may be suffering from the effects of a life-altering trauma, neither expected nor previously encountered. Psychologists inform us that a spouse typically responds to separation by moving along a behavioural arc, from denial through depression and then anger, followed by various coping mechanisms including bargaining, until he or she ultimately attains a level of acceptance, however reluctantly.

Binder, Bergman, and Price (1991) recommend that lawyers adopt a *client-centered* approach. They contrast this method with the more traditional orientation in which lawyers consider a client's problem in terms of existing legal doctrines, such as contracts and torts. Within a family law context, this perspective becomes even more differentiated among parenting, financial support, and property issues. The traditional lawyer seeks and obtains information from his or her clients, which they intend be filed into one or more of these discrete legal compartments. This traditional approach also assumes a role for the lawyer as a process and content expert who will direct the client along an appropriate course. Many lawyers who practise in this way regard their clients as incapable of making decisions for themselves because they perceive that clients are unable to comprehend the nature of their problems, they are too emotionally encumbered, and they fail to consider the long-term implications of their decisions.

The client-centered approach offers an alternative that is more likely to establish an appropriate lawyer-client rapport. It extends the focus beyond the legal aspects of the client's problem to encompass the nonlegal dimensions as well. It considers that clients are able to understand the complexities of their own problems. They do require the assistance and support of their lawyers; however, they do not need them to decide everything for them, particularly in those areas of their lives where they have greater expertise. The client-centered approach does not disregard emotions. Lawyers recognize that they are an inevitable consequence of the problems presented by their clients, particularly in family settings.

Binder et al. describe the attributes of a client-centered approach. First, the lawyer helps the client identify the problems from his or her perspective rather than from the point of view of the lawyer and other clients. Second, the lawyer actively involves a client in the process of

exploring a broad range of potential options as opposed to gravitating toward a single solution. Third, the lawyer encourages the client to make the decisions that are likely to have a substantial impact on his or her life. Fourth, the lawyer provides advice based upon his or her understanding of the client's values, what is important to him or her. Fifth, the lawyer acknowledges, understands, and responds to the client's feelings. Sixth, the lawyer repeatedly conveys his or her desire to help the client.

If it is accepted that a client-centered approach is more likely to establish the rapport between a lawyer and his or her client required for an effective professional relationship, the lawyer must conduct his or her initial interview in a manner that may represent quite a departure from the traditional approach that many practitioners follow. The lawyer begins by asking the client of his or her prior experiences consulting with a lawyer. He or she ought not to assume that that his or her new client knows what to expect in this initial consultation. Upon learning of the client's experiences and expectations, the lawyer should provide a brief outline of what he or she will attempt to accomplish over the course of their meeting and then ask of his or her client if this will be sufficient for his or her purposes.

The lawyer will then invite the client to describe what it is that has brought him or her to see the lawyer. Some refer to this as the *storytelling* phase. In a sense, it models what occurs in the first session of a mediation or collaborative law process. Ideally, the physical surroundings of the lawyer's office or meeting room are conducive to effective storytelling. Rather, than remaining behind a desk, a lawyer should sit beside the client or at a round table with the client.

The lawyer initiates storytelling with an *open-ended question*. This type of question does not suggest any particular direction in which the client should take the lawyer with his or her

story. It is empowering because it places the full responsibility for both process and content on the client. An open-ended question will provide a great amount of data as to facts and feelings and all within the context of the client's life experience.

As the client tells his or her story, the lawyer listens. He or she maintains eye contact and a body posture that communicates that he or she is interested in the story the client is telling. While notes may be taken, attempts at recording verbatim the information provided by the client is discouraged. Invariably, the lawyer will not hear a critical part of the story if he or she is focused upon writing down everything that is said. The lawyer should scrupulously avoid interrupting the client during storytelling as it may distract him or her and result in either his or her overlooking some aspect of the story or conveying a message to him or her of the relative importance of something said to that point in the story.

Upon the completion of the client's narrative account, the lawyer may perceive that there are gaps in the story told by the client. Some of the information provided may not be clear or precise. The lawyer should then ask *closed questions* to obtain further details of the story as well as clarify parts that he or she does not understand. While these questions do narrow the focus of the inquiry, they should not be framed so as to provide only a *yes/no* answer or appear to be directing the client. They should still leave the client with the responsibility of telling the story.

As a result of the selective application of open-ended and closed questions by the lawyer, the client will most likely have provided a comprehensive and detailed statement of his or her problem. At this point, it is appropriate for the lawyer to engage in a practice that therapists refer to as *active listening*. He or she *paraphrases* the information provided by the client using different words to express the essence of the message. The purpose is to communicate to the

client the lawyer's understanding of the story told and either confirm or correct his or her impressions. The lawyer does not restrict him or herself to the factual content alone but extends it to include his or her reflections on the emotional and relational aspects of the story as well. *Empathy* is the practice of a person to whom a story has been told by another of attempting to understand the events and the emotions associated with them as the storyteller experienced them. By empathizing with what the client has described, the lawyer connects feelings with facts.

Understand the Problem

In the traditional legal representation context, it is customary for the lawyer to assess the client's problem entirely from a legal perspective. Lawyers consider the appropriate legal principles and substantive law and apply their interpretation of the law to the factual information provided by the client. The lawyer may then offer a preliminary opinion of the anticipated outcome should the matter proceed to court. He or she provides a legal analysis only of the client's problem.

If the lawyer considers his or her role more broadly as helping his or her clients to achieve effective solutions to their problems, his or her understanding of the nature of those problems will extend beyond the legal dimensions. Binder et al. submit that there are at least two other broad areas of consideration. First, the lawyer needs to understand the context in which the client's problems are embedded. Second, the nonlegal dimensions of the client's dilemma may be the more dominant in his or her mind at that time. Binder et al. include among those concerns, the economic, social, psychological, moral, political, and religious consequences.

Lawyers must recognize that all solutions produce nonlegal consequences. An outcome on any of the principal generic issues in a family dispute – parenting, child support, spousal

support, and property – may well impact the relationship between the spouses as well as each of them with their children. Indeed, the nonlegal dimensions and, in particular, the relational, may be the more dominant in the mind of a client. Even a desired solution may have negative nonlegal consequences. To choose one solution that is in accordance with the law may cut off other more positive nonlegal consequences if an alternative solution were to be chosen instead. The process of weighing the impact of one choice against the other is difficult. Negative nonlegal consequences may flow from any of the available solutions and the clients may have to trade off one against the other. Furthermore, as the nonlegal consequences are often difficult to predict, attempting to choose among possible outcomes will be challenging. Finally, the legal consequences may be secondary to the nonlegal,

Understanding the nature of the client's problem will necessarily involve more than simply providing a legal analysis. It requires that the lawyer acquire a sense of the problem as this client experiences it. As with the story itself, the lawyer will paraphrase his or her understanding of the nature of the client's problem and seek affirmation that he or she has accurately captured its essence.

Provide Overview of the Law

Incorporating an appreciation of the nonlegal dimensions of the problem does not mean that the lawyer should forego his or her obligation to inform the client about the law. Rather, it encourages the lawyer to look beyond the law in the course of helping the client settle upon the best solution to his or her problem. Understanding the legal and nonlegal dimensions of the problem may serve as a segue into the next phase of the initial interview.

Some clients do arrange to meet with a lawyer specifically for the purpose of obtaining

an opinion of their legal rights. Others are content to allow the lawyer sufficient latitude to introduce this discussion at an appropriate time. Clearly, at some point in the course of their professional relationship, the lawyer will have to inform his or her client of the applicable law to enable him or her to make an informed choice from among the available alternatives. The following guidelines are offered to assist the collaborative lawyer with these questions during the course of the initial interview.

A lawyer is unable to provide a precise legal opinion until such time as he or she acquires an understanding of the perspectives of both spouses and obtains all of the important information and related documents from them. At best, this opinion would have to be qualified as premised upon what the client alone has provided. As he or she is a party to the dispute, his or her view is invariably biased. Unless the lawyer reduces his or her explanation of the law to writing, the client may well only recall the opinion without the qualifications. To say the least, it would not be an informed opinion. The lawyer should ask of him or herself whether he or she is content to have this client act or rely upon an opinion offered at this early point in the relationship.

A lawyer could simply respond that he or she is unable to provide an informed opinion until such time as full information from both the client and his or her spouse has been provided. He or she could offer an overview of the law that would apply to the matters in dispute between the parties. In anticipation of questions of this kind being asked during the initial interview, lawyers could prepare brief explanations of the relevant statutory and case law, which they could provide orally or as part of an information set to be given to the client at the conclusion of the interview or posted on his or her website. The lawyer concludes with the question, *is this sufficient for now*, and the assurance that a more complete legal opinion will follow.

Advise of Process Options

While the lawyer will not likely be able to provide anything more than general legal information in terms of the substantive outcomes the client might expect, he or she should advise of the available process options. The subject of this discussion is not *what* the client should seek but *how* he or she might obtain it. It is paramount that consideration of process occurs in the course of this first meeting. If the lawyer does not advise the client of his or her options and review their respective merits with him or her, his or her spouse may make an early decision on process that effectively rules out consideration of collaborative law and possibly others.

The obligation to inform the client of alternative dispute resolution options did not first arise with the emergence of collaborative law. Sub-rule 2.02(3) of the *Rules of Professional Conduct* provides the following:

> The lawyer shall consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

The *Divorce Act* contains a similar provision in subsection 9(2), which reads as follows:

> It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.

While neither of the foregoing provisions specifically identifies collaborative law, it has since acquired such a degree of acceptance and recognition that it would be improvident for a lawyer to neglect to describe it in the course of making other process options known to the client.

The obligation to consider ADR is mandatory in all disputes as is the requirement to inform the client if the lawyer believes it appropriate. Prudence dictates that the lawyer always

inform unless he or she is prepared to support his or her belief with credible reasons that it would be inappropriate in a given case. The duty to discuss the advisability of negotiation in the context of corollary relief claims within a divorce proceeding and to inform the spouse of mediation facilities is not subject to exception. Indeed, subsection 9(3) of the *Divorce Act* is explicit in its requirement of lawyers who act for clients in divorce proceedings.

> Every document presented to a court by a barrister, solicitor, lawyer or advocate that formally commences a divorce proceeding shall contain a statement by him or her certifying that he or she has complied with this section.

Cochran (1990) submits that the failure of a lawyer to obtain the informed consent of his or client before proceeding may constitute legal malpractice. His argument is grounded upon client autonomy. To the extent that it is reasonably possible, clients should control the decisions that affect them. Cochran analogizes the concerns of lawyers with those that confront medical practitioners. If a physician or surgeon fails to obtain the informed consent of his or her patient prior to undertaking medical treatment, he or she may be held liable. To discharge this obligation, he or she must inform the patient of the risks of and the alternatives to the contemplated procedure and only then seek his or her consent to proceed.

Applying the above reasoning to a lawyer representing a client in a dispute resolution context, he or she should inform the client of the availability of alternatives to litigation, including negotiation, mediation, and arbitration. In the event that the lawyer fails to do so and institutes court proceedings, he or she has acted without the informed consent of the client. If the client sustains a loss that is in any way attributable to the neglect of the lawyer to inform the client of these alternatives, the lawyer may be found liable. Just as the lawyer would not allow his or her client to commit to an outcome on substance without informing him or her of all

available options, he or she ought not to proceed to make process choices without the informed consent of the client.

The provision of information to the client on process choices involves more than simply reciting them by name and offering simple definitions. The lawyer must be as informed about ADR alternatives as he or she is already about adjudication. Ideally, he or she will have attended one or more continuing legal education programs on this subject. A substantial literature is also available as either a primer or as support material. Siegel (2004) provides a summary of alternative dispute resolution procedures in his paper found in the bar admission course materials of the Law Society of Upper Canada. Chornenki and Hart (2001) describe process options in their book, which is written in a format that can be easily understood by clients, while Macfarlane (2003) offers a comprehensive text more appropriate for legal practitioners and law students. For more detailed accounts of processes specific to family dispute resolution, lawyers may consider Landau, Bartoletti, and Mesbur (2000) on family mediation and Shields, Ryan, and Smith (2003) on collaborative family law. Finally, a lawyer should think about meeting with a family mediator and a collaborative family law practitioner to obtain further information.

As the lawyer advises of the nature and salient features of each of these process options, he or she should provide an opportunity for the client to ask questions. The relative advantages and disadvantages of each process are reviewed and considered. The lawyer inquires of the client's needs, fears, desires, and concerns, which constitute the underlying *interests* as described by Fisher, Ury, and Patton (1991). Clients have process interests as well as outcome interests. While the lawyer should provide a balanced presentation of the process choices, it is entirely appropriate for him or her to reveal his or her own preference and to be enthusiastic about it.

However, it is unwise to make exaggerated claims concerning projected costs or timeframes that cannot be supported by that lawyer's own practice experience or empirical data.

Collaborative law and mediation are both essentially collaborative dispute resolution processes. Unlike litigation or negotiation in the shadow of the law (Mnookin and Kornhauser (1979), in these two processes, the parties work together to arrive at a mutual gain outcome. Collaborative law and mediation share certain attributes. First, they are empowering; the clients retain decision-making authority on process and outcome. Second, they are participatory; the clients play an active role throughout the process. Third, they hold that process and outcome are of equal importance; that it is as important *how* you resolve a dispute as to *what* it is you agree upon. Fourth, they recognize that the parties will remain interdependent in their post-separation relationship. Fifth, they adopt the *interest-based* negotiation model with its focus on interests and not positions and the generation of an array of creative options (Fisher et al., 1991). Sixth, they maintain that, while the law is a standard for resolution, it does not provide the sole and exclusive criteria for settlement (Shields et al., 2003).

While collaborative law and mediation do share these commonalities, they are also different in a number of material respects. First, lawyers seldom attend mediation with their clients who will have to be able to speak for themselves at all times in the course of the process. Second, the mediator is a *neutral* and not the representative or spokesperson for either party. He or she can offer general legal information but not specific legal advice. Third, while a mediator can *reality check* with either or both parties on the proposed resolution of any issue, he or she cannot make specific recommendations nor direct them toward any particular outcome. Fourth, some mediators restrict themselves to the preparation of a memorandum of understanding

following the negotiation of a settlement and others will prepare a draft domestic contract, which they then submit to the lawyers for the parties. In no circumstances, will a mediator allow the parties to sign a final and binding agreement without independent legal advice. The parties must always return to their lawyers to conclude the process if they want the closure that a separation agreement offers.

With this discussion of the attributes of the two collaborative processes, the lawyer should punctuate each with questions to the client. *How do you feel about this element of the process? Does it satisfy your process needs? Does it raise any process concerns? Are you prepared to commit to this aspect of the process?* If the client responds affirmatively to these attributes of collaborative dispute resolution, the lawyer must make a similar inquiry concerning the points of difference between collaborative law and mediation. *How do you feel about attending a process without your lawyer there to assist you? How do you feel about the mediator as a neutral assisting you in your negotiations with your spouse? How does each of these two processes satisfy your process needs? Are you prepared to commit to one or the other of these two processes at this time?*

In the course of or following this process discussion, the client may well express some reservations about the appropriateness of collaborative problem solving and decision making with his or her spouse. Their past history in responding to conflict may suggest that some other more *rights-based* approach, such as either adjudication or arbitration, would be more effective. That collaborative dispute resolution may not be appropriate in a particular case supports the view that process screening is essential. However, the same can be said of litigation, the financial and human costs of which may outweigh any benefit to be derived. A more comprehensive

screening process is required in which all of the alternative dispute resolution processes are subject to the same rigorous analysis for appropriateness and effectiveness.

The client's reservations about collaborative dispute resolution may not be about whether or not it would be either appropriate or effective for his or her family. His or her concerns may relate to the *trust* he or she feels toward his or her spouse. In an interview with Chip Rose, a prominent collaborative dispute resolution practitioner and trainer (Jackson, 1999), *relationship trust* is differentiated from *process trust*. While relationship trust may or may not be restored, it does not preclude the parties from committing to the process and placing their trust in it. Process trust requires that each party commit to do what the process requires of them.

The client may not be able to make a process commitment following the conclusion of this initial interview. As this meeting may well be the first occasion on which he or she has received any process information, it is likely premature for him or her to make a decision of this magnitude without further reflection. The lawyer can assist the client by providing him or her with supplementary written materials and guidance as to where he or she can obtain more information as on the websites of the lawyer, his or her practice group, and the International Academy of Collaborative Professionals. If the client and his or her spouse continue to communicate constructively, the lawyer may also provide a duplicate set of materials for the spouse together with an accompanying letter explaining where he or she can obtain further information and a directory of the collaborative lawyers and mediators who practise in their community. It is appropriate and prudent for the lawyer to schedule a date and time for a further meeting at which a commitment will then be made as to the dispute resolution process most appropriate for this client and his or her family.

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