

**TAB 6**

## **Tips For Debriefing In CFL Practice**

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## **Fact Situation**

After 17 years of marriage, Bonnie and Patrick separated 8 weeks ago. After over a year of marriage counselling, Patrick announced he felt there was no hope for the marriage and he moved out of the house to his parents' home. Bonnie met with a lawyer and found out about CFL and after showing Patrick the CFL brochure, he too agreed that this was the best process for them. Bonnie and Patrick have issues of property (including disposition of the matrimonial home), and support to work out.

Before the first meeting, Bonnie's lawyer lets Patrick's lawyer know that Bonnie is pretty emotional. She cautions that she's worried that it may be too soon for Bonnie to be negotiating an agreement. However, she also says that Bonnie is really anxious to finalize issues and get this "over with". Patrick, too, wants the process to be expeditious. Until the house is sold, he cannot afford to move from his parent's home and he finds it very stressful to live with his parents. Both Bonnie and Patrick are worried about costs.

The first four way meeting takes place. Bonnie and Patrick have a relationship which is full of conflict. Bonnie cries throughout most of the meeting and when she is not crying she is protesting that she does not want the separation and she cannot believe she is sitting in a room with two lawyers talking about a separation agreement. For his part, Patrick remarks several times that Bonnie has to get a grip on herself, people separate all the time and she should "get on with her life". Both Bonnie and Patrick express the wish that they want this over as soon as possible. As Patrick and Bonnie express their hopes and goals for the process, it becomes readily apparent that they both have dramatically different ideas about outcome.

## TIPS FOR DEBRIEFING IN CFL PRACTICE

By C. Ann Nelson, Barrister & Solicitor

A common refrain amongst CFL lawyers is:

“I had no idea how challenging this work would be.”

Our clients are eager to embark on a process that keeps them out of court; allows them significant control over their own decision making; and, has the potential to protect their future relationship. Yet, our CFL clients, just as was the case with our “traditional” clients, bring a whole spectrum of emotional challenges to the table: they are angry; they are anxious about their children; they are worried about the future; they are frightened about being lonely; they are jealous; they are distrustful; etc. etc. They usually bring a pattern of dysfunctional communication with one another. Yet, at the same time they are committed to the CFL process and the assumption of the primary responsibility for negotiating their own agreements. One of the key methods CFL lawyers use to manage these dynamics is that of the debrief; both lawyer to lawyer debriefs and lawyer to client debriefs.

In this paper, I offer some hints, suggestions and tips on debriefing. They may or may not work for you and your clients.

### Lawyer to Lawyer Debrief

One of the wonderful aspects of CFL practise is that you are never really alone. Chances are if you are lying awake at night worrying about how to help a couple manage their process more effectively; so is your colleague! It is this teamwork aspect of the CFL process that is so often key to overcoming impasse and managing the process effectively. We lawyers are used to being lone wolves and so “teamwork” does not come easily. The pre and post debrief sessions that characterize CFL practice are very different from typical lawyer interactions in traditional cases. These debrief sessions focus on the process and not the substantive aspects of the negotiations. It is important to recognise that these debriefing sessions are more than mere *conversations*. They are an essential part of the CFL process. Some tips to ensure these sessions accomplish as much as possible, follow:

1. It is important that the opportunity to debrief between lawyers occur promptly after each meeting. Some of these sessions may be quite brief, particularly in cases where the clients are demonstrating effective problem solving skills, or where you have worked effectively with the other lawyer before on collaborative cases. It is usually wise to touch base with your colleague immediately before each meeting in order to ensure you are each familiar with any priority issues from both clients' perspectives.
2. Identify areas of difficulties that either lawyer noted in the last CFL meeting. Be careful about pointing the finger at the behaviour of the other lawyer's client as the reason for the problem. Rather, identify the specific behaviour in as neutral way as possible; i.e.

“When we started to discuss spousal support, I noticed John seemed quite distressed. Did you notice this as well?..... Can you help me understand what may have been causing this?”

Once a problem has been identified, discuss how the two of you can solve it:

“What ideas do you have to make John feel comfortable so that he is able to discuss options regarding spousal support?”

3. Plan in advance how you will both address a specific issue at a meeting. Some examples:
  - a) In a situation where your clients appear to be nearing impasse notwithstanding every effort by both lawyers, consider the “silent” strategy. At the next meeting, when the difficult issue arises and both clients remain firm in their individual expectations of outcome, have the lawyers remind the clients that they made a commitment when they started the process to reach resolution on their issues. Remind them, as well, of the various options that are on the table and suggest there may well be additional options or combinations of options to solve the issue. Advise them that neither of you have any further ideas to assist them at this point and then BE QUIET! This strategy is unlikely to work unless both lawyers are prepared for it. Unless it is scripted, one (or

both) lawyers are sure to jump in to break an uncomfortable silence. The “silent” strategy led to the resolution of one of my most challenging cases.

- b) In a situation where one of the clients is clearly struggling with a strong emotion, such as anger, but seems reluctant to express it openly, consider setting up a situation where she may have an opportunity to vent and receive some acknowledgement regarding her feelings from her husband. This will have to be scripted by both lawyers together and then separately between each lawyer and his/her client. The wife’s lawyer might privately debrief with her client about what she observed at the last meeting. For example: “You seemed quite distressed during our last meeting. Can you tell me about that?” Encourage the client to express her feelings constructively at the next four way meeting (using “I” sentences etc.) . In the meantime, the other lawyer will be preparing her client to hear his spouse and acknowledge her anger. This may require some role playing with the lawyer’s own client to help the client acknowledge his spouse’s emotion without escalating the situation by engaging in a substantive discussion about what ever is making his spouse angry. “I can understand why you are distressed about moving from the home; I know how important it is for you.” and “I really appreciate how difficult this must be for you”.
- 4. Discuss with your collaborative colleague outside resources to jointly recommend to your clients. If relationship issues between the spouses is interfering in the efficiency of the process, consider referring them both to divorce coaches. Lawyers do not have the mental health skills necessary to help clients address significant relationship issues. Divorce coaches can assist the clients to improve their understanding of the relationship dynamic and improve communication skills. They will then be able to use the four way meetings with the lawyers more efficiently (and cost effectively).
  - 5. Sometimes you will be in situations where you view the problem as the other lawyer. This makes for a challenging debrief. You need to be honest; and also be prepared that *you* may be contributing to the problem. You might identify

the issue as a problem with the process:

“I am concerned that our clients seem to have difficulty expressing their needs. There seems to be a fair bit of positional bargaining going on.”

If the other lawyer acknowledges the problem, you can then discuss solutions without directly advising the other lawyer that you are of the view that he or she is the one who has been exacerbating the problem. If the other lawyer does not acknowledge the problem, consider expressing your observations of the negotiation dynamic in as a neutral way as possible.

“When you were questioning my client about his income, he looked quite uncomfortable, his face got red, and he was visibly angry. Why do think he reacted that way?”

6. If you are having serious teamwork issues in your relationship with your colleague, consider asking for an opportunity to debrief with a third CFL lawyer/mentor. This can be a very effective method to deal with a situation where lawyer behaviour is part of the problem.
7. Be prepared to ask for help from your colleague. This can be an effective strategy to address teamwork problems. Your colleague may be less threatened if you ask for his advice about a problem in the process. Lawyers love to give advice! For example, you might say:

“I am worried about how we should explain the legal model to our clients in a way that makes it clear that we respect each other’s views of the law but disagree about what the legal model would provide in this situation? Do you have any good ideas about this?”

Or

“I wish my client was not behaving so negatively towards you. Do you have any ideas about how we might improve this situation?”

8. Typically, the lawyers take turns preparing and circulating progress notes after each four way meeting. In highly emotional cases, it is wise to send the first

draft of the minutes to the other lawyer so that the notes do not inadvertently cause issues. Language can be a powerful tool. In one of my cases there was an issue between the parties about the value of a particular asset. When I prepared the notes, I indicated that the issue of valuation of this asset was “in dispute”. The other lawyer suggested instead of “in dispute”, I describe the valuation issue as “under discussion”. This simple change of wording conveyed the same meaning but in a much less positional way.

### Lawyer to Client Debrief

There are some CFL practice groups which discourage pre and post meeting debriefs between lawyers and clients. In my view, such a practise must surely reduce the effectiveness of the four way meetings. Lawyer/client debriefs are key to a successful CFL process. Our clients are frequently novices at negotiation strategy. They are also struggling with strong emotions and left to their own devices may resort to very negative behaviour (threats, bullying, stone-walling, etc.). Finally, they already have experience negotiating with their spouse: they’ve been doing it for years. The problem is, it is unlikely they have been negotiating in an effective manner (after all, they are separating). It is my view that we CFL lawyers must teach our clients to negotiate. We do this in the context of the lawyer/client debrief.

1. The most fundamental concepts we must convey to our CFL clients are two fold.
  - a) They cannot reach an agreement simply by wanting it really, really badly.
  - b) They cannot reach agreement by themselves; they need their spouse now more than ever, because without their spouse’s agreement, there is *no* agreement.
2. Once a client understands that in order to achieve an agreement she needs her spouse, she is then able to understand why it is in her own interest to negotiate having regard to her spouse’s needs and interests. This “enlightened self-interest” is one that the lawyer can return to time after time to refocus the client. It is the groundwork for interest based negotiations.

3. CFL negotiations are frequently challenging for our clients. They become frustrated with what they view as their spouse's unreasonable expectations; they are frustrated about delay; they are frustrated with costs. Sometimes, they want to give up, despairing that negotiations will ever lead to resolution. It is important that you ensure your client is always aware of his alternative to a negotiated solution. He needs to know about the cost and delay in the litigation process. He needs to understand the range of solutions that are possible in the litigation process and how these may differ from the options under discussion in the negotiation process. This discussion can be very helpful for a client in refocusing his energies towards solutions.
4. In CFL we encourage our clients to negotiate from an interest based perspective rather than from a positional perspective. It is rare that this method of negotiation will feel comfortable for the client. You will need to explain that an interest based perspective will likely maximize the opportunities for identifying mutually acceptable options. You may need to help your client generate options for discussion. You will likely need to assist your client to identify the interests that underlie many of their "positions". Prior to a four way meeting which is scheduled to include the generation of options on the agenda, you might practise generating options with your client. In this way, you will assist her to feel more comfortable with the prospect of putting forward an option during brainstorming which may not be acceptable to her. You will explain that simply by listing an option, neither party is proposing it or accepting it.
5. When discussing strategies with your client, ask: "How will your spouse likely react to that idea? Why is that? Is there a way that you might make it more palatable for him?" Work with your client to educate her about opportunities which may exist as a result of the separation i.e. the prospect of splitting income for tax purposes; the possibility of RRSP and other capital rollovers.
6. Clients sometimes worry that they will be unable to remember all they want to say at the next four way meeting. They may become flustered in the presence of their spouse. Reassure them that you will not forget what they have identified as important and you will prompt them at the meeting.
7. I try to refrain from "advising" my CFL client what to decide regarding the



substantive issues. I ensure they understand how the law applies to their situation. I ensure they have considered all of the options and the short and long term implications. I help them “reality” test options. But when they ask what I advise them to decide, I respond that all I can do is make sure they have all the necessary information to make their own decisions. On the other hand, I frequently advise my client and make recommendations about process issues and negotiation strategy.

8. It is important to normalize the client’s strong emotions. I reassure clients that these emotions are a normal part of separation and most people experience the loss in similar ways. However, I also caution them that these strong emotions can make it challenging for them to make good decisions. I might say something like:

“I can certainly understand why you are feeling so angry with David; and I also know that when I am angry, I do not always make good decisions....”

This conversation may also lead to a discussion about the prospect of hiring a divorce coach.

9. An effective suggestion is to encourage a client to offer an apology when it is appropriate to do so. In one of my cases, my client was behaving particularly badly towards his spouse. He acknowledged this in private caucus with me. We discussed the effect of his behaviour on his spouse. While he minimized it, he did recognize that she was considering terminating the CFL process. My client was clear that he wanted to resolve the issues in the CFL process and not through litigation. Thus, his enlightened self-interest (staying in the process) meant that he needed to take steps to keep his wife in the process. When the four way meeting resumed, he delivered an eloquent apology (which he had practised with me) and explained why he very much wanted to remain in the CFL process. The positive effect of this apology on the client’s spouse and on the negotiations was dramatic. I learned later from the other lawyer that this was the first time in the couple’s marriage that the husband had apologized for anything!

10. Use the client debrief to assist your client to modify his behaviour one area at a time. Although there are frequently many changes in behaviour you would like to suggest to your client after each four way meeting, my advice is to focus only on one issue at a time; once that issue is addressed successfully by the client add another idea for the following meeting. Some examples of specific suggestions you may make to your client:

- ▶ “I noticed that you frequently spoke to Carol in the third person as “she”; why is that?....” and then after your client understands that it is in his self-interest that Carol feels comfortable participating in the discussions with him, make suggestions as to how the client might change this behaviour.
- ▶ If your client repeatedly uses the word “fair” (“I only want what’s “fair”) suggest that she consider a different approach. Explain that “fair” is so subjective, that it is rare both spouses agree on what is “fair” and that as a negotiation standard it is far too elusive. Suggest that the client use words like “acceptable” or “palatable” instead.
- ▶ If your client repeatedly says in a four way meeting that he wants what he is “entitled” to or what he has a “right” to, spend some time finding out what he really means. Does he mean that he feels the legal model makes sense in the situation and that is the model he would like to follow? If so, encourage him to phrase the issue in that manner. Suggest that he rephrase the comment as follows: “One of the options I would like us to consider is the legal model regarding the issue”.

## Conclusion

In my view, lawyer to lawyer debriefs and client to client debriefs are key to successful CFL practice. You will likely find that you need a toolbox of strategies for your cases. The combination of four personalities ( two lawyers, two clients) bring different challenges to each CFL case. Every case you have results in the acquisition of new skills that you can adapt for future use. I hope that some of the ideas in this paper can be added to your toolbox.