

BRINGING THE LAW INTO THE COLLABORATIVE PROCESS

Prepared September 21, 2004 for the IACP Forum, Boston.

Whether we like it or not, the law carries great weight in collaborative work. While legal advice can narrow thinking, lead to position taking, and even derail the process, it can also redress power imbalances, stimulate clients to value and prioritize their interests and provide societal norms of fairness. Collaborative lawyers have an obligation to ensure their clients fully understand all available choices, including the legal model - which is also a requirement for the binding agreements most clients want.

So the question is not whether to introduce the law, but rather when and how.

The following are suggestions for bringing the law into the collaborative process effectively.

Information or advice?

- \$ Both!
- \$ In early stages, give legal information regarding the historical perspective of the law (how the law developed and why), legal principles, issues to be resolved, explaining areas of judicial discretion and uncertainty, with outcomes (if any) discussed in a broad range of possibilities.
- \$ Present the law as providing default resolution criteria for parties who are unable to resolve matters themselves.
- \$ Explain the limitations of the legal model, including the lack of ability to customize outcomes or provide a clear mechanism for future change.
- \$ Explain the law may provide a benchmark for fairness.
- \$ Don't defer questions about the law, but answer them generally rather than providing specific outcomes.
- \$ If one party seeks a result well outside the ambit of the law, and contrary to the stated interests of the other, the legal model may be used as a reality check and to provide an objective standard of fairness.
- \$ At the stage of considering the client's BATNA, it may be necessary to provide more specific legal

advice to the client individually (along with the costs and process for pursuing the legal option).

Gathering financial information

- \$ Be wary of the use of court financial forms which require position-taking about such matters as the date of separation, values of assets or debts, ownership interest and disposition of property, etc.
- \$ The extent of financial information to be collected and the method for recording and presenting financial information should be decided by the group in advance.
- \$ Court financial forms may be intimidating for some clients, and not user-friendly for others who would prefer to use home budgets or excel spreadsheets.
- \$ Discuss assets and debts as a group to determine areas of agreement, need for valuation, and the goals and hopes for homes, cottages, retirement vehicles, the management of debt and the like.
- \$ Court financial statements and net family property statements may be used in the collaborative process on agreement and with appropriate clarification that they are being used to organize and collect information, not to determine results. Consider blanking out totals in the net family property statement as information is being collected and documented. Consider using the budget portion of the financial statement only to establish current or proposed expenses.
- \$ If computer generated support calculations are to be prepared, do so only with the prior agreement of all participants and consensus as to the range of calculations to be prepared and the assumptions to be made.

Work with the other lawyer

- \$ The lawyers should discuss in advance the parameters of legal advice and information they have conveyed to their respective clients.
- \$ The lawyers should share in advance which issues they anticipate will be challenging and develop the most useful approach to work with each set of clients.

- \$ The lawyers should prepare in advance how and when to present the legal model, and choreograph how to present legal principles and draw out interests and concerns.
- \$ The lawyers should discuss in advance their opinions as to the legal issues to determine whether or not there is consensus. When the lawyers agree as to the legal model, they can present a range of possible outcomes and the criteria that would affect outcome. When the lawyers do not agree as to the legal model, they may highlight the uncertainty of outcomes available under the law as well as the ability to achieve certainty in collaborative negotiation.
- \$ As often as possible, provide legal advice and information in the settlement meetings to ensure both clients receive the same legal information and advice. It will usually be necessary to follow up with the client individually to ensure a full understanding of the information received and to assess options.
- \$ Use every effort to avoid surprising the other lawyer and client.
- \$ Never debate or argue the law - discuss and dialogue instead.
- \$ Unless agreed to in advance, do not write letters to be copied to clients setting out legal opinions.

Be self aware

- \$ Be aware that we deliver legal information and advice all the time in many ways.
- \$ Be aware of what our clients actually hear by using active listening and confirming their understanding.
- \$ Watch our language. Words like "give up" and "sacrifice" which can trigger strong emotions and are value laden.
- \$ Be aware of our own relationship with the law. Do we really believe the law is one equal option of many? Or are we sending a message that we place greater importance on legal entitlements than the clients' expressed interests and the options they have developed?

My thanks to Sharon Cohen who assisted in developing some of these ideas.