

TRANSPARENCY BETWEEN LAWYERS IN AN ADR PROCESS: WHAT A NOVEL IDEA! *

The adversarial model is the model on which Ontario's legal system is based and remains the model taught in Law schools to this day. In this system, notions of transparency and open communication between the lawyers in a case are radical and almost unheard of. Having had the experience recently of just such transparency and seeing its positive results, I am eager to share what I learned with you!

This was a family law case where the parties had chosen to use the collaborative process to resolve their matters in a matrimonial separation. Collaborative process is an alternative dispute resolution (ADR) process in which the two lawyers and their two clients work together as a team rather than 'adversarially' to resolve all issues. The idea of a team is sometimes easier said than done, as lawyers, having been trained through law school, bar admission, articling and often years of experience in the adversarial methodology, often have difficulty "changing hats!" Such changing hats, or taking off one's lawyer hat, is necessary in ADR processes for example when the lawyer engages as a mediator in mediation, and from time to time when a lawyer acts in a collaborative case.

An interesting fact of this case was that the parties had signed a marriage contract when they had gotten married some years before. The current lawyer for the husband, retained for the negotiation of the Separation Agreement, had also been his lawyer in the negotiation of the marriage contract!

The husband was now of the view that the marriage contract was unfair in its terms, and that he had been forced into signing it by the wife. The wife, my client, was willing to see what the law would say as to their matter as she wanted to make sure that the Separation Agreement would be fair to both of them.

An early transparency challenge arose in the first four-way collaborative meeting. I stated that I had reviewed the marriage contract and that in my opinion it had been properly done and met all the requirements of a valid and binding marriage contract. I also said that, if this were a Court process, the husband's lawyer would be subpoenaed as a witness to give evidence as to the circumstances of the making of the contract, and certainly could not be his lawyer now in the negotiation of a separation agreement! (As a sidebar, this is one of the benefits of using an ADR process such as collaborative: the husband was able to retain the same lawyer.) The husband's lawyer and I had discussed this in advance of the meeting.

This was I am sure difficult for the lawyer and her client to hear (although it was a compliment to the husband's lawyer's good work on the marriage contract!). However

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they did not object or get defensive, as what I had said was correct, was off the record, was protected by the collaborative practice agreement which stated that if the process were to terminate, the parties would have to retain new lawyers for the litigation, was not stated 'adversarially' by me but rather as a matter of fact, and was not taken adversarially, assisted by our pre-meeting communications. This was an example of transparency in discussions, which allowed a discussion about facts we needed as a background for informed and productive settlement discussions.

In another four - way meeting, we discussed the circumstances of the making of the marriage contract. The husband began to say that he had been under duress when he had signed the contract. His lawyer started to intervene to stop him from saying anything further, as is a typical tactic in the traditional legal process. I quickly intervened, reminding her that this was a collaborative process, that all was off the record and that we would not be the parties' lawyers in any event should this go to Court. The husband's lawyer acknowledged this and immediately relaxed and let her 'litigation guard' down, and I resumed my questioning, and the husband resumed talking. The discussion which ensued was very helpful to all of us having all the facts, as well as the perspectives and interests of the parties, to facilitate engaging in fruitful negotiations. In a traditional adversarial legal process this information would have been withheld as part of the husband's lawyer's strategy.

There were several other examples of transparency between the lawyers. For example, when dealing with mutual pension releases and the new law and regulations re pensions, we collaborated together in the learning process of ascertaining the several forms which were also required to ensure that the releases in the separation agreement would be upheld by the pension administrators.

The transparent and open communication between the lawyers was not however the case between the parties! The parties themselves were far more circumspect and non-transparent in the four-way meetings than the lawyers. Perhaps it was the influence of TV shows and the Media, all cloaking communications in a case in defensive and aggressive secrecy, that influenced them in this. Perhaps also it was their mistrust of each other (as often happens in the breakdown of a marriage) that led to them being reserved in the meetings. Indeed I would opine that it was the friendliness, respect, open communication and transparency between the lawyers notwithstanding this, that kept the flow of the meetings and progress going.

As for my colleague and me, I noted that, while we were transparent and open in our communications both in the four - way meetings and outside of them, each of us remained in every measure a strong advocate for our own client.

The case settled in a relatively short time, in a remarkable aura of civility and respect, and both my colleague and I agreed that we would be pleased to work with each other again. This ongoing positive relationship between lawyers was one of Stu Web's objectives when he founded collaborative process.

I believe it was the transparency and openness in the lawyer-to-lawyer communications that was material to the success of the process and its outcomes. The case settled on a win/win basis for both parties, in that both of their interests and needs were met in the terms of settlement. It is interesting to note that the law proved far better for my client than the marriage contract, and that the husband in the end settled on the implementation of the terms of the marriage contract rather than the law. However my client was also satisfied in that, as she told me, she got the closure she wanted and the confirmation that she needed that the terms of the final settlement were fair to both parties.

The next steps are to educate the public that has been raised on Perry Mason dramas and "War of the Roses" movies that, in ADR processes, transparency and open communication can lead to positive results for all.

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