

COLLABORATIVE PRACTICE Toronto

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The hallmark of the collaborative law process is that if negotiations fail and either client chooses to go to court, both clients must find new lawyers. Tesler believes the possible loss of their lawyer should not be a stumbling block to a client considering the collaborative approach. If negotiations in collaborative law reach an impasse, both lawyers and clients share the risk of failure. Because the process does not give clients the option of going to a judge for a resolution, there is more incentive for everyone to stay at the table and work harder to solve the problem. Clients ultimately get *more*, not *less*, from their lawyers in a collaborative process.

In the traditional legal process conflict is the norm. Clients often end up deeply angry and unhappy. Tesler invokes a new ethical mandate for family law lawyers, who are the only ones who know the truth about family courts: "If we don't tell that truth to our clients, nobody does". Collaborative lawyers must take responsibility to help clients navigate this major life passage while encouraging socially responsible behaviour. In the collaborative process, self-determination not conflict is the norm - along with the expectation of a "good divorce".

Lawyers trained in the adversarial process, warns Tesler, may flourish in and sometimes foster conflict. Traditionally, we see our role to be one of solving our client's legal problems, rather than one of recognizing and preserving our client's relational and inner values once their marriage breaks down. Our clients need us to assume a larger role. They want to be able to hold on to what was positive from their past life and create a future life with a sense of integrity that is not destroyed by the divorce process. The collaborative approach has the potential to achieve this long-term goal of enlightened self-interest.

We also need to re-think our definition of success. "The success or failure of the process is not necessarily measured by whether an agreement is reached, but by the quality and integrity of the process itself", Tesler urges. Quality and integrity of process can be counted on to produce the best possible opportunity and circumstances to achieve a win-win resolution of all issues.

Family relationships become shattered in divorce. Tesler acknowledges that there are times when clients are consumed with anger, fear, remorse and depression and are a "shadow" of their high functioning collaborative selves. The collaborative lawyer must guard against falling back into the behaviours of adversarial practice. The client and lawyer need to recognize the client's "shadow" self and agree not to make decisions in that frame of mind. Because clients lives are changing enormously, she cautions, the consensual collaborative law process can only move forward at the pace of the slowest person at the table. She reminds us that it is the clients, not the lawyers, who will solve their problems, at their own pace and in their own time.

Tesler stressed the importance of clients and lawyers spending adequate time and effort preparing for the collaborative process at the very beginning, so as to work effectively together.

CHIP ROSE

Rose stressed the paradigm shift in collaborative law. It requires the clients to be empowered from the very beginning of the process to help themselves to change behaviour, make decisions, and create an agreement. The role of the collaborative lawyer is to facilitate the client's task, by creating a safe environment in which to gather all necessary information, and then consider options available to the clients, along with the consequences. The more a client knows, the more likely they are to come to an agreement and the more flexible they are likely to be in working out the terms of that agreement. In this process, the clients themselves find solutions to their problems. The goal is to maximize the outcome – an outcome that is acceptable to both clients and one for which they will both be responsible.

Rose explains the difference between litigation and collaborative law this way: litigation is like bowling: the goal is to smash the most to win; collaborative law is more like curling: you lead from behind and remove the impediments. Clients must be assured that in collaborative law, unlike litigation, nothing will happen unless they agree to it. But, he warned, any one of the four people around the collaborative table can sabotage this process. While it is not the role of the lawyers to control the process, they must manage it and ensure a safe environment to assist the clients to reach their goal. Do not get bogged down in "micro" issues, he urges, instead move the clients back up to the "macro" level, where you have the best chance of getting them to focus on their interests. In the most highly functioning collaborative law meeting, Rose suggests, an outsider cannot be certain which lawyer is representing which client, because all are so committed to the process and will respond appropriately to protect the safety of both clients.

Rose analyzed what happens when an impasse is reached in the collaborative process; when instead of reaching a consensus, the clients are saying "no" to each other. In a

safe environment, both clients soon realize that no solution will be forced upon them as it would in a court or arbitration situation. But no solution will be reached, either, if it does not work for both of them. So everyone is forced to stop and assess the situation: look at what is going on, listen once again carefully to each other, identify choices and evaluate the consequences of each option. Rose's strategy for handling an impasse is always to return to basic principles: Assess. Clarify. Make no assumptions. Get more information. Remember the basic values that have been acknowledged and don't be surprised if they conflict. Keep the environment respectful and safe. No one knows in advance how the matter will resolve. The process is key. The clients will change, and their values will change, over time. Showing willingness to move empowers far more than negotiating from an entitlement perspective. Rose believes that if the lawyers properly manage this process, the clients will find their own solutions and the impasse will be overcome.

Problem solving is not easy, but it is a skill we all can learn from the collaborative process. Chip Rose was a master at presenting how it is done!

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