The Core of Collaborative Practice – The "Safe Room"

I have been practicing law since 1973. Like many young lawyers of that era, after being called to the Bar, I immediately started doing a variety of cases that included family and criminal law. Many of us learned through the experiences of our cases, and I was no exception. From the outset, family law was different as it was apparent to me that parents and children were uniquely challenged and often traumatized by the adversarial system that embraced and virtually required negative finger-pointing. Lawyers and clients had little choice but to participate in that adversarial, negative culture.

In 1975, I became counsel for what was then termed the Superintendent of Child Welfare. I did that work "hands on" for approximately 25 years. I continue to be counsel for the Director (for Delta) and supervise young associates in our firm with respect to this work.

Shortly after commencing my child protection career, I also started doing child advocacy …. representing children in family law disputes. This continued for a number of years.

In those two representative positions, I often attempted to facilitate multi-party meetings, depending upon who was involved (parents, social workers, and even children sometimes) in order to try and resolve matters in a peaceful, hopeful and safe manner. I never felt that parents and children were best served through the trauma of court proceedings. That forward looking approach was usually appreciated and, while no methodology is every 100 percent successful, it did result in many peaceful, positive outcomes.

I took that approach into my daily family law practice and would advise clients at our first meeting that I felt my job was to try and help them get through this difficult time in their lives, both emotionally and financially intact. Clients exhibited an array of emotions and would often say to me, "I'd rather give it (money) to you than my spouse." I never felt comfortable hearing that language and knew that parents and children were not well served by it. It was usually substantially inconsistent with the family's best interests. Accordingly, instead of routinely using all of the tools available in litigation, I would try and arrange for four-way meetings involving counsel and clients.

Sometimes those meetings took place, and sometimes not. As well, we did not have the collaborative methodology available to us, together with the training and commitment that collaborative professionals bring to today's meetings.

One statement of a long-time litigator that I have never forgotten was directed towards me years ago when upon my suggesting that we try and settle our clients' dispute, as they could not afford it both financially and emotionally, my learned opponent stated with his usual bravado, "I don't make those judgments, I just litigate."

Settlement conferences outside of the collaborative model were and are very different. That is, perhaps, the starting point of this discussion of the "safe room" that collaborative practice affords.

It is essential for prospective clients (and counsel) to understand the difference between rooms where negotiations take place and those where collaborative practice occurs.

In traditional negotiations involving lawyers and clients, while the meetings are almost always confidential, lawyers and clients are there not only to explore settlement, but also to get to know the "enemy". Collateral benefits of these settlement conferences often include:

1. Sizing up the opposition.

2. Intimidation to perhaps stimulate settlement.

3. Showing one's own client that their lawyer is at least as tough and smart as the other lawyer.

While settlement discussions take place, they do so usually in an environment of posturing and assessment by the very same lawyers who will take their clients' cases to court in the event settlement does not occur. While the discussions may be confidential, the process is often part of the litigation "dance" and affords the fact-finding lawyers and clients information to add to their arsenals in case litigation continues.

So what makes the collaborative room different and safe? There are a number of very important factors that I will list at this time:

1. Everything said is confidential and is not admissible as evidence in court.

2. Neither lawyer can ever appear in court as either a witness or counsel for or against either spouse. While critics of this methodology like to point out that in the event settlement is not reached through the collaborative process, that clients are disadvantaged by having to obtain fresh counsel who have not been party to the collaborative process. In my view, this is one of the essential strengths of this process. I say this for the following reasons:

   (a) The risk of not reaching settlement is relatively small (approximately 10%) worldwide and, in my view, vastly outweigh any arguable detriment.

   (b) All professionals involved are dedicated to assisting the clients in reaching a fair and durable settlement and, in the event settlement is not achieved, experienced counsel are able and willing to assist clients in a smooth transition to fresh counsel.

3. Practiced well, there is no posturing or attempted intimidation by either counsel, and if either of the spouses attempt to intimidate the other in any way, his or her own counsel will deal with that behaviour, not the "other" lawyer.

4. Counsel are trained and experienced in utilizing neutral language to explore interests, rather than express positional arguments.

5. Counsel are dedicated to creating a safe place for their clients and usually have had numerous files together and multiple meetings, so that each understands the other's approach and trusts the expertise and safety which they, as counterpart counsel, bring into the room.

6. Counsel discuss upcoming meetings with each other and debrief after every meeting both between themselves and with their respective clients in order to ensure that all parties have felt safe and to receive feedback with respect to the just-completed meeting.

7. Clients are advised at the first meeting by the "other lawyer" that that lawyer will never "take them on" or do anything akin to cross-examining them in any way. In the event that occurs or appears to occur, both lawyers are dedicated to ensuring that it ceases immediately.

8. Counsel are aware that the most successful collaborations are those in which both clients feel supported by both counsel. Knowing that, it is a common goal of counsel going into each and every meeting. That methodology is not inconsistent with pursuing a client's best interest.

9. Discussion about the "law" will be open and transparent in the presence of clients with counsel often saying to each other, "what do you think about this?" rather than, "this is the law", or, "this is my client's position."

10. Clients are encouraged to explore ideas without fear of criticism or reproach. As well, they are encouraged to reflect upon what is said in meetings and, in good faith, change their minds or ask further questions about any topic in subsequent meetings.

11. Respectful communication is modeled by counsel who speak respectfully, in good faith, and with integrity. Listening is a required skill, as is speaking when it is your turn to do so.

12. Divorce coaches, specially trained mental health professionals, are frequently used to help clients communicate more efficiently and understand the emotions which they are going through. This greatly assists in creating a safe room in which to effectively discuss difficult issues. These trained and experienced mental health professionals should not be looked upon as an extra cost, rather, it has been my experience that they often reduce the number of meetings which clients have with their lawyer, thus reducing cost. As well, they are of great assistance in creating a durable, respectful agreement. Clients often comment that they have learned life lessons from the collaborative model to which they are exposed with their counsel and divorce coaches and have noted that these lessons have stood them in good stead in many aspects of their lives, long after our work with them is completed.

Lawyers who are committed to this work are continuously learning from each other, their clients, and the other professionals with whom they collaborate. In addition, they usually continue to read and attend workshops on a regular basis, all of which increases their skills and benefits their respective clients.

Statistics show that approximately 97 percent of British Columbia family law cases that start out using the court process settle prior to trial. In addition, the International Academy of Collaborative Professionals reports that its statistical analysis indicates that approximately 90 percent of cases that start collaboratively resolve collaboratively. Assuming the two foregoing statistics to be accurate, I believe that it is unwise to spend energy, health and money fighting when eventually efforts are directed towards settlement, often after a significant expenditure of money and emotion. Collaborative practice skips the "fighting" stage and the waste that accompanies that stage. It efficiently affords clients the ability to direct their energies and resources towards settlement. As long as clients are prepared to be transparent in their disclosure, collaborative practice in the hands of skilled practitioners is a powerful dispute resolution option that focuses on restructuring families in a healthy way, and gives all members as reasonable a chance as possible for peace sooner rather than later. The cornerstone of that opportunity and what differentiates collaborative practice from all other forms of dispute resolution is the safety of the room in which we collaborate together with the commitment of all of the collaborative professionals to pursue and ensure that safety.