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Family

System reform will not work without buy-in from family law lawyers, part two | AJ Jakubowska

By **AJ Jakubowska**

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(December 20, 2022, 2:05 PM EST) -- Before I share my thoughts on steps family law lawyers must take to help reform our ailing family law system, I am reissuing Tom Dart's initial invitation to a dialogue (see "The high cost of family law legal services and need for change;" "The high cost of family law legal services and need for change — part two"). As I said in part one of this series (see below for link), words and articles are not enough. Family law lawyers are central stakeholders in the system delivering family law services of Ontario's public. Without our active participation in reform, no change will come.

Pooling ideas, and an active dialogue about them, are essential to that reform so I ask my colleagues, family law lawyers, to engage in our discourse, including in this esteemed publication.

What can we, must we — family law lawyers — do to give life to the theoretical concept of steering more family law cases in the direction of family dispute resolution (FDR)?

1. Changing our own mindset — For years, I have tried to drink black coffee. These days, milk splashes into my brew about half the time. That's progress in my books. Many of us, as champions of our clients, are wired, after many years of practise, to get the court involved at first instance. Many justify this by saying they prefer to have the proceeding available "just in case." We must actively work on changing this approach.

If every family law lawyer in the province steered at least half of their family law cases to FDR, that would be tremendous progress. Consider how that one change in approach would ease the burden currently faced by our courts.

2. Making language around FDR more imperative and less of a choice — In the upheaval of separation, our clients yearn for some measure of control over their lives. This includes having a choice and in that context, we often offer them alternatives — for example, mediation or court. Setting aside cases that truly require early judicial intervention or are unsuited to FDR based on power imbalance, we need to rephrase "mediation or court" to "mediation and then court or arbitration, if necessary."

Our legislation now obligates us to speak to our clients actively about family law mediation. We are expected to do more here than just tick off a box, and how we pitch FDR to our clients matters. In this context, we must have an initial dialogue with our client about the costs of litigation, along the lines suggested by Tom Dart. This should be a recurring event in the life of the file. This is particularly important for clients who resist FDR.

Create a budget. It will be an estimate but it should be realistic. Make that budget span the case, from start to trial. Include in the budget expected timelines, so that the client understands not only the financial outlay but also the emotional and psychological cost of delay in resolution.

Then create a second list, this time for FDR. Pierce through commonly held misconceptions of

court, generated and reinforced by the law pablum fed in the media. Tell your client family court is not like Judge Judy and no judge will yell at their spouse for cheating. Court is dry and expensive, and if your client thinks they will be able to actually "tell the judge their side of the story," they are mistaken. If they want to talk not only about their positions but also their interests, mediation is the place.

3. Neutralizing traditional language around winners and losers — Words matter. They sometimes trigger instant responses in our brain. They invoke feelings and reactions, and can reinforce already held ideas. When we speak of beating the other side at a motion or at trial, that creates and sometimes confirms an adversarial mindset in our client. It's taken me years to learn to drink black coffee and I still use the winner/loser language every day, often unwittingly. But that does not mean we should not try to shake these habits.

Conceptually, I see mediation as an effort at solving the dispute together. In court, the parties are sitting on different sides of the table. Our language can reinforce those models. Talk to your client about the longer-term effects of winning a motion and how polarizing that can be to parents and their children.

4. Use your FDR professionals creatively — The ability of using a mediator/arbitrator as case manager, from the very start of his or her involvement, is obvious but a mediator can assume a similar role, provided both sides agree. Just the other day, I was involved (as a mediator) in a call with counsel that essentially amounted to case managing through dialogue and consensus. We came up with a procedural plan that will maximize chances for settlement by being open to each other's ideas and concerns — counsel and mediator.

Your client's buying into the FDR process depends largely on their perception, over time, that the process is advancing their interests and needs, and that it is prompt and cost-effective. Tell them about any progress and its pace, and contrast these with how the case would be unfolding before the court. And keep using your FDR professional creatively, tapping into their experience and neutrality as participants in the process.

Some say that a new practice becomes a habit only after 45 days of active engagement; some say it takes longer than that. Take a look at your current files and resolve that for 12 months, for those and for new ones, you will consider mediation for each one, really consider it and early on. Then reassess at the one-year mark. If each one of us did that, and 80 per cent of us then continued with the practice a year later, the effect on our system would be remarkable. And I have not yet given up on drinking black coffee 100 per cent of the time.

This is part two of a two-part series. Part one: System reform will not work without buy-in from family law lawyers.

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