

# Independent Legal Advice or “ILA” in a Separation Agreement – Is There a Difference?

January, 2017

Dear Friends and Colleagues,

Firstly, Happy New Year! Today’s topic is: “Independent Legal Advice,” commonly referred to as “ILA.” Following are four scenarios which in my view illustrate the common assumptions and mis-assumptions of what ILA means and the huge importance that it has.

I’ll use the words “Independent Legal Advice” to mean that each party retains his/her own lawyer to advise them in the negotiation of a Separation Agreement or Marriage Contract (“Pre-nup”). I’ll use the shortened “ILA” to mean that a party wants “quick and cheap” advice from a lawyer and the lawyer’s signature on the “Certificate of Independent Legal Advice” attached to the Agreement. Is there a difference? The following 4 scenarios\* I hope will provide the answer.

Scenario 1: A woman I met in a social setting shared with me that she had got virtually nothing in terms of property at the end of her marriage, just some time-limited spousal and child support. She said that her husband, who had lots of property and money both on the marriage and on separation, had sent her for ILA (I’m using the short form deliberately!) to a “no-name” lawyer for review of the marriage contract that had been prepared by his lawyer. She said that her lawyer had advised her not to sign the contract. She subsequently returned to her lawyer and told her that she wanted to sign the contract. So the lawyer signed her up. Years later, cut to the present, she faulted her lawyer for “simply” carrying out her instructions and implied that the poor settlement was the lawyer’s fault.

Scenario 2: On his first call to me, a client asked if I do ILA on a Cohabitation Agreement. I had a strong sense that his question really meant, do I do “quick and cheap” ILA? I told the client that’s not what I do, that in fact providing proper independent legal advice was no different and one and the same thing as being retained as his lawyer in his matter. The client however, to the end, maintained that ILA – i.e. quick and cheap – was what he wanted and expected. As it turned out, there had been several complicated property transactions in the matter prior to his retaining me that came to my knowledge after I had agreed to do the work. In the result, to ensure that I did the due diligence necessary to protect the client’s interests, I spent the necessary time to do the work and swallowed a good part of my fees for this client.

Scenario 3: I was the mediator in a family law matter. My policy when acting as a mediator is to provide the parties with as much legal information as possible, stopping short of providing legal advice. This is so that the parties can engage in fulsome negotiations in the mediation without the necessity of retaining their lawyers, sometimes until near the end of the mediation. The parties, as the mediation continued and as I pointed out to them, came to understand why it would be necessary for each to have his/her own independent lawyer to advise on certain points in the Agreement. While much could be accomplished in the mediation, including collecting the

---

\* Facts changed somewhat to protect confidentiality

financial disclosure of both parties, preparing the draft Financial Statements and negotiating the terms of an agreement in principle with the assistance of this disclosure, at no time did the parties indicate an expectation that, when they would go to their own lawyers for independent legal advice, it would be “quick and cheap.” I explained to them the necessity of their lawyers spending the necessary time in the interests of having an Agreement that they each felt fair, would stand the test of time, and would not be set aside subsequently for lack of proper independent legal advice and lack of full financial disclosure. I explained that, in family law matters, the Courts take a protective interest in the parties. The case law shows that Judges don’t hesitate to set aside an Agreement made without the proper independent legal advice or full financial disclosure. They understood that, with the proper independent legal advice, they would be able to achieve the closure they both wanted so as to be able to move on to the next part of their lives.

Scenario 4: I provided a telephone consultation to a fellow legal professional in a different specialty than mine, who wanted cheap and quick ILA for a cohabitation agreement. This despite that she was a lawyer, an expert in her specialty and that she had amassed a significant portfolio of assets in her long career. During the call she was arguing against the necessity of full financial disclosure, and clearly wanted no more than quick and cheap ILA. On a follow-up call several weeks later she told me that the parties had broken up. I was not surprised given her views on this!

To conclude: It is of utmost importance that those embarking on family law negotiations, whether to a Separation Agreement, Marriage Contract or Cohabitation Contract, understand the fundamental importance of each party having independent legal advice, meaning advice which is not quick and cheap (“ILA”), but rather allows the lawyers the necessary time to do their due diligence so as to ensure that the final Agreement the parties make will stand the test of time and allow the parties to move on with their lives without having to look over their shoulders. I refer you as well Dear Readers to my article: "*Financial Disclosure: Why is it Necessary in Separation Agreements?*" (see my web site at [www.annefreed.com](http://www.annefreed.com)) on the importance of exchanging full financial disclosure in family negotiations.

Proper and full independent legal advice to each party, based on proper and full financial disclosure exchanged between the parties, are the necessary components to have a binding Agreement that will stand the test of time and allow the parties to move on in peace to the rest of their lives.

---

\* This article was authored by Anne Freed. Anne is a 35 year collaborative family law lawyer and mediator. Anne can be contacted at [anne@annefreed.com](mailto:anne@annefreed.com) or 416-368-0700.

© Anne E. Freed, January, 2017  
[www.annefreed.com](http://www.annefreed.com)