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Collaborative Family Law

Pauline H. Tesler

INTRODUCTION:

Since its emergence in 1990¹, collaborative law has captured the enthusiasm and commitment of a rapidly growing segment of the family law bar across the U.S. and Canada.² Given its rapid expansion and the degree of support accorded it by prominent family law judges, many family law attorneys predict that by the second decade of this millennium, collaborative law may establish itself as the normative first resort for resolution of family law disputes. In the words of Hon. Donna J. Hitchens,³

“I believe that my job—the job of all judicial officers in family and juvenile law—is to serve children and families, and a community in which people cannot afford to spend their whole family estate on attorneys. So I favor any system that best serves families and children, and, from everything I’ve seen so far, the collaborative law approach is THE best, and the least litigious. The least litigious alternative is always going to be better for families.”

Because the model has as its core element an agreement that no participants, neither lawyers nor clients, will threaten or resort to court intervention during the pendency of the collaborative work, all efforts take place entirely outside the court system. For that reason, the model has proved readily adaptable across jurisdictional lines, despite sometimes significant differences in substantive and procedural laws from jurisdiction to jurisdiction. By the late 1990’s, vigorous communities of collaborative practitioners had formed and begun representing family law clients in California, New Mexico, Arizona, Florida, Georgia, Pennsylvania, New York, Connecticut, Massachusetts, New Hampshire, Ohio, Illi-

1. The precise date, January 1, 1990, can be pinpointed; on that day, Stuart Webb, a family law attorney in Minneapolis, decided that he would henceforth represent clients only pursuant to a binding agreement that neither he nor the lawyer for the other party would ever go to court for those clients. The sole purpose of the retention would be to help the parties reach an efficient, respectful, interest-based settlement. The originator of the collaborative law model, Webb soon realized he needed a cadre of similarly committed colleagues, and from that realization was born the Collaborative Law movement.

2. The International Academy of Collaborative Professionals, which includes practitioners from the fields of law, mental health, and finance, publishes a list of local, regional, and statewide practice groups in its journal, the *Collaborative Review*. The second issue of the Review, dated October 1999, listed 16 practice groups in six states and one Canadian province. The IACP website currently lists more than 120 practice groups in four countries, 26 states and 20 Canadian provinces. See www.collabgroups.com.

3. Then Presiding Judge of the Family Law Department of the San Francisco Superior Court, and now Presiding Judge of the Superior Court itself. Pauline H. Tesler, “Donna J. Hitchens: Family Law Judge for the Twenty-First Century,” *The Collaborative Review* (formerly, *Collaborative Quarterly*), October 2000, Vol. 2, issue #2, pp. 1-4, at 4.

nois, Minnesota, Wisconsin, Colorado, Utah, British Columbia, Alberta, and Ontario. Today, the model has expanded to Ireland and the United Kingdom, Austria and Australia.

Collaborative Law appears to meet significant needs both among family law clients and among the lawyers who assist them through divorce. As will be discussed more fully below, clients appear to want the advantages of a contained, settlement-oriented, creative, private, respectful process without sacrificing the benefits of having a committed legal advocate at their sides. For that reason Collaborative Law appeals to clients who may hesitate to commit to a dispute resolution process facilitated solely by a neutral mediator.⁴ And, while many family lawyers suffer considerable professional angst as a consequence of their awareness that family law courts are neither safe nor effective places for clients to resolve divorce-related disputes,⁵ the decision by a family lawyer to become a mediator instead of a litigator in order to work in a more positive conflict resolution modality with clients requires an immense and difficult step: leaving the practice of law. Because collaborative legal practice, unlike mediation, allows family law attorneys to represent clients in the role of advocate, continuing to practice law and to be bound by all ethical mandates for lawyers, the switch from conventional lawyering to collaborative law is not a leap out of one profession into another, but rather a short step through an open door into a different approach to lawyering. As collaborative practitioners, lawyers who have become disillusioned with what they can offer clients in adversarial family law practice can embrace an identity as a member of a "helping profession"

4. Joan B. Kelly has noted that the term mediation encompasses such a broad, diverse spectrum of dispute resolution modalities that it is difficult to make meaningful generalizations about "mediation". Joan B. Kelly, *A Decade of Divorce Mediation Research*, 34 *FAM. & CONCILIATION CT. REV.* 373-85 (1996). While different locales have differing predominant family law mediation models, it is quite common for family law mediation to involve only the two clients and the mediator, with counsel for the parties (if any) providing advice and sometimes litigation services outside the mediation process.

5. A vivid description of what is wrong with family law courts as family restructuring institutions is provided by judge Anne Kass, in *Clinical Advice From the Bench*, 7 *J. CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM.* 247, 251-53 (1998): "[T]oo few judges and lawyers have examined their personal beliefs, attitudes, and expectations about family matters in any depth, and that leaves them vulnerable to becoming emotionally entangled in divorce and custody cases, sometimes quite unconsciously. . . . What does reach their conscious awareness is that they are extremely uncomfortable, but they haven't the skills to reflect on their discomfort through introspection. In short, family law has the propensity to diminish objectivity and blur boundaries for judges and lawyers and thus cause emotional overload." *Id.* Worse yet, the art of "building and maintaining appropriate boundaries is missing from legal education, so we find lawyers and judges who assume the inappropriate roles of rescuer and avenger." Communication about facts is often "tied to fault and blame," and lawyers and judges communicate in "linear and triangular patterns with little understanding that doing so causes misinterpretations, suspicion, and confusion. *Id.* For an in-depth analysis of lawyers' professional malaise from a psychosocial perspective see SUSAN SWAIM DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* (American Psychological Association 2004).

while maintaining their chosen professional identity as lawyers. Collaborative lawyers often report that the process of retooling from litigator to collaborative lawyer involves integration of personal and professional values into a coherent identity that brings a professional gratification previously absent from their work as lawyers.⁶

Basic Elements of the Collaborative Law Model:

The core element that distinguishes a collaborative law representation from “friendly negotiations” and other lawyer-facilitated efforts to settle divorce-related disputes⁷ is that in collaborative law, the representation begins with the clients and lawyers signing a binding agreement (referred to as a “participation agreement” or “collaborative stipulation”) that prohibits those lawyers from ever participating in contested court proceedings on behalf of those clients. With that core element, the case is a collaborative law case, and without it, no matter how cordial or cooperative the lawyers and parties may be in their behavior, attitudes and intention to reach agreement, the case is not a collaborative law case. The term “collaborative law” is not just a synonym for “nice,” or “cooperative.” It

6. This and other similar observations about collaborative lawyers and collaborative practice are based on the author’s work over more than a decade as a practitioner and trainer of collaborative lawyers, as well as her role as co-founder and President of the International Academy of Collaborative Lawyers and co-editor of the Collaborative Review. This work has involved teaching and mentoring thousands of collaborative lawyers and hearing first-hand their reports of the transition from litigation to collaboration. Research results are not yet available to provide empirically-based conclusions with respect to the ideas and impressions set forth in this article, but academic researchers are beginning to conduct studies focused on collaborative lawyers and clients. See e.g. Julie MacFarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 1 JOURNAL OF DISPUTE RESOLUTION 179 (2004).

7. Nearly all divorces and indeed nearly all litigated proceedings of every kind end not in a judgment after trial, but rather in a negotiated pretrial settlement agreement. The familiar boast of family law litigators that “I settle over 90% of my cases” is therefore likely to be true. However, as will be discussed below, such settlements typically happen in a litigation matrix in which pacing, rules, procedures, and expectations about outcome are dictated by the practices of the local courts, and in which substantial – even irreversible – economic and emotional costs are often incurred in the lengthy preparation for trial that precedes the eventual effort to settle. Included in the data about pretrial settlements are the many agreements hammered out virtually on the eve of trial through considerable pressure from lawyers and settlement judges. Collaborative law, in contrast, takes place entirely outside the litigation matrix. No support or custody or kickout motions, no formal discovery or discovery motions, no depositions, no subpoenas, no settlement conference statements, no “fast track” or “rocket docket” timelines, impose external pacing or expectations on the process. Collaboration proceeds without reference to courts, except at the end of the process to the extent the imprimatur of the court is necessary to achieve dissolution of the marriage and incorporation of the ultimate agreement into a divorce judgment.

refers to a specifically-defined model for dispute resolution, the essential element of which is that the lawyers are disqualified contractually from ever representing those clients against one another in court proceedings.⁸

It is that unique element that gives collaborative law its considerable power to guide clients to acceptable settlements while building vigorous assistance of legal counsel into the heart of the process. Experienced collaborative practitioners who have come to this work from a background as family law litigators believe that in the face of apparent impasses in settlement negotiations, lawyers who are not contractually barred from taking the issue to court tend to decide too quickly that the issue should be taken to a third party for resolution. By temperament, lawyers tend to be impatient and result oriented.⁹ Moreover, trial practice is generally the most lucrative work for lawyers. Thus, the reasoning goes, internal and external factors coincide in favor of inducing traditional litigation-matrix lawyers to abort negotiations in the face of impasse where court is an option. In collaborative practice, however, such a decision will terminate the involvement of those lawyers in the case, and for that reason, collaborative lawyers operate within a significant external incentive to remain longer at the nego-

8. Some non-practitioners (including family law litigators who prefer to be able to hold onto the client and the case in the event settlement efforts fail) have expressed doubts about whether the core concept of a retention specifically limited to working toward settlement, in which the lawyers are barred from representing the clients in subsequent litigation, actually is particularly important for success in resolving conflicts. Whether or not research ultimately confirms the universal conviction of collaborative practitioners that this core element is central to the power of collaborative law in resolving family law disputes, it should be emphasized that this core element of collaborative law is definitional: that is, those practitioners who are committed to practicing collaborative law have selected the term “collaborative law” to define what they are doing. Quibbles by those who wish to do something other than this model about whether disqualification is or is not “necessary” are missing the point. From a consumer protection and malpractice protection point of view, it is important that clients understand clearly the nature of the dispute resolution options available to them as they select their preferred conflict resolution modality. Collaborative law is the term that has entered the marketplace to describe the model in which the lawyers cannot litigate but only can work toward settlement. Practitioners not wanting to enter into this kind of limited scope retention are free to offer their clients other dispute resolution modalities – described by other names – that do not require the binding agreement that the lawyers will not litigate if negotiations break down. No useful purpose would be served, however, and consumers could only be confused, if such practitioners were to call such other models by the same name – collaborative law – that is now in widespread use to describe only cases in which the lawyers cannot take the dispute to court. Collaborative practitioners and trainers across the U.S. and Canada are united in their advocacy for careful, accurate use of this terminology in the interests of clarity, consumer protection, and malpractice prevention. The International Academy of Collaborative Practitioners will adopt standards in 2004 that incorporate this definition of collaborative law. Commentators and researchers interested in comparing outcomes for clients whose lawyers use the collaborative law model, as compared to outcomes for clients whose settlements were reached in modalities that do not require an a priori agreement that the lawyers will not represent the clients in disputed proceedings in court, should be able to construct better research designs for comparing cases if this terminological and definitional clarity is respected than if it were to be blurred.

9. See generally DAICOFF, *supra* note 5.

tiating table working with their clients to find a way through the impasse. With the contractual disqualification from going to court, the risk of failure becomes distributed to the lawyers as well as the clients. With this element, lawyers as well as clients are highly motivated by the procedural “carrots and sticks” built into the model to remain at the negotiating table in the face of apparent impasse far longer than in any other mode of lawyer-facilitated family law dispute resolution.¹⁰ This is sometimes expressed as: collaborative practice liberates the problem solver within.

LITIGATION-MATRIX DIVORCE DISPUTE RESOLUTION: THE CONTEXT FROM WHICH COLLABORATIVE LAW EMERGED

In the United States, Canada, and the European Union, roughly half of all marriages now end in divorce.¹¹ Over the course of the last half of the twentieth century and into the twenty-first, we have seen mainstream attitudes toward divorce move from considering it a scandalous or shameful aberration in which a “guilty party” could expect harsh treatment at the hands of the courts, to accepting it as a predictable, and statistically “normal” life passage for most people, if not in their own direct experience, then almost certainly in the experience of their extended family, friends, and colleagues. Divorced parents, remarriages, blended families, shared custody in one form or another, and all the attendant potential for parental disagreement and conflict constitute the daily life experience of a large and growing percentage of children growing up in western cultures today.

But while statistically normal, the divorce passage is far from easy for most people. It is recognized to cause emotional trauma second only to the death of a spouse, and to involve a grief and recovery process that parallels the stages of recovery from death of a loved one. Divorce requires unusual emotional resources from clients at a time when they typically are experiencing high levels of stress and lowered coping ability. Moreover, clients are expected to make financial and parenting decisions of enormous import for the future well-being of themselves and their children at a time when strong emotions often impair

10. For extended discussion of how collaborative legal practice actually works, see Pauline H. Tesler, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (American Bar Association 2001) and Richard W. Shields, Judith P. Ryan, and Victoria L. Smith, *COLLABORATIVE FAMILY LAW: ANOTHER WAY TO RESOLVE FAMILY DISPUTES* (2003).

11. See, e.g., U.S. Bureau of the Census, U.S. Gov't Printing Office, *Marriage, Divorce and Remarriage in the 1990's* (Current Population Reports) 5 (1992).

clear thinking. And, at a time when children need extra attention from their parents because of the dramatic life changes accompanying divorce, typically parents are distracted by the demands of the divorce and family restructuring process in ways that impair their ability to attend to the needs of children. Study after study has documented the substantial harms inflicted upon children by high conflict divorces in which parents use the courts as a battleground for seeking redress for deep emotional pain that the courts cannot possibly remedy.¹² In the face of these changes and consequent pressures, our judicial system, the cultural institution responsible for handling issues associated with the family breakdown and restructuring attendant upon divorce, has lagged behind in making the profound changes that might be expected following upon a recognition that divorce, far from being aberrant and shameful, far from being an accident or injury involving an offender and a victim, is a predictable, "normal" life passage that will be experienced by a large percentage of people embarking upon marriage.

Courts are the institution that our culture charges with conducting the official business necessary to accomplish a divorce, and lawyers are the professionals designated by default to guide divorcing couples through the significant, extended rite of passage that divorce actually represents in a human life. But courts, even with the best-intentioned judges and clerks, are poorly adapted to meet the needs of families as they break down and restructure.¹³ Depending on how you look at it, courts may be seen as the arena for a ritualized form of gladiatorial combat, or a public resource for more or less orderly and predictable third party resolution of disputes, but even the most positive description of a

12. "Entrenched disputes often represent a response to overpowering feelings of shame and vulnerability which are evoked by the marital separation as well as by the perception that professionals are increasingly in charge of what was once the family's private life. Vulnerable parents frequently manage these feelings of shame and helplessness by projecting all incompetence and badness onto the former spouse and holding all competence and goodness for themselves. From this dynamic evolves a wish that the judge, Solomon-like, will erase the shame by publicly answering, once and for all, the question of which parent is good and competent and which parent is bad and incompetent." Vivienne Roseby, Ph.D., *Uses of Psychological Testing in a Child Focused Approach to Child Custody Evaluations*, 29 FAM. L. Q. 97, 98 (1999). "[L]itigation itself is often demeaning, as litigants attempt to exaggerate each other's flaws and reopen old wounds in order to win points for themselves. Further, the process is disempowering as it forces the parties to place their fates in the hands of their attorneys and the court. In the process, the family's resources are expended and depleted with no beneficial outcomes for the child or the parents." Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997).

13. See generally DAICOFF, *supra* note 5. Courts and judges are asked to "take on and resolve family dilemmas that other professionals and the community at large have failed to resolve—cases that attorneys have failed to negotiate and mediators have failed to settle, for families that counselors and therapists have failed to help. Inexplicably, there is an assumption that judges have some special capacity to resolve the most difficult, the most complex of all family problems. Is it any wonder that family court assignments for judges are so unpopular, so often avoided, and usually staffed by rotating assignments to prevent burnout?" JANET JOHNSTON & VIVIENNE ROSEBY, *IN THE NAME OF THE CHILD* 223 (1998).

family law court's functions would fall far short of including the kinds of comprehensive conflict resolution, financial, and psychological services that families in transition typically require.

Because courts function in an adversarial model, the necessary business of resolving divorce-related issues becomes, in the court-based paradigm, a contest between starkly opposing extremes of proposed outcome with respect to each disputed issue. The contest is orchestrated by gladiatorial attorneys whose job it is, in trial-based dispute resolution, to pare down the divorcing couple's complex emotional, financial, and material issues into readily understood black and white terms that have the appeal of simplicity in a court system that prizes efficiency and speed. For the lawyers, control over the flow of facts and argument is a vital tool in the battle to win over the decision maker. Considerable expense and effort is expended in preparing for the "main event": the trial; and while family law litigators know that settlement is the likeliest outcome for most cases they handle, it is a common saying among trial lawyers that the best way to prepare for settlement is to prepare well for trial. Information is guarded like the dwarf's treasure buried beneath the mountain; complex post-separation child-rearing dilemmas are reduced to black and white cartoons of Snow White and Hitler. Another commonplace in trial practice holds that since the judge will never award a party all the relief that he or she requests, the effective trial advocate always asks for the moon and the stars. Devastating allegations under penalty of perjury supporting requests for extreme forms of relief are filed on behalf of both parties, causing wounds that can never be repaired. This is the context in which litigation-matrix settlements are forged, often late in the process, in the shadow of trial, after irreparable damage and most of the costs of litigation have already been incurred. This is the time when litigation-matrix lawyers are expected to change roles and, after having prepared clients for a win at trial, must urge their clients to accept a far leaner settlement.¹⁴ Most clients do in fact yield to the considerable pressure to settle that mounts as the trial date approaches; only 3% to 5% of cases in most jurisdictions actually do go to trial.

But these litigation-matrix settlements merely push clients to immediate resolution of a list of justiciable legal issues, without bringing the disputing parties to a deeper understanding and acceptance of the need for resolution or the value or appropriateness of the specific outcomes agreed to, much less incorporating true closure across the broad range of conflict that may be feeding the narrower list of specific disputes that the law permits courts to resolve. Cli-

14. In California, for instance, legislative policy expressly favors settlement of family law matters, and attorneys' fee awards can be made by judges in part based on the degree to which the party and/or attorney have worked to achieve or thwart settlement.

ents typically emerge from such settlements dazed and angry, because they have read the motions and trial briefs and – unlike their lawyers – they tend to believe what they read. They expect to be awarded the moon and stars, and instead emerge from settlement negotiations with the equivalent of a lump of coal. In the words of an eminent California family law jurist, retired court of appeals Justice Donald King, “family law court is where they shoot the survivors.”¹⁵ Another experienced family law judge puts it this way: “If anyone leaves my courtroom happy, I’ve made a dreadful mistake.”

It should come as no surprise, given the costly and conflict-engendering process that family law litigants go through on the road to settlement, that family law attorneys worry about malpractice suits and frequently find themselves in fee disputes with clients. Unhappy clients are commonplace in family law practice, where disputes above the horizon about dollars and hours with children often are the weapons with which clients fight subterranean battles that are really about who is aggressor, who is victim, who is good and who is bad.¹⁶ Whatever the result, litigation matrix settlements and judgments rarely provide answers to those questions, and no outcome measured in dollars or hours is sufficient to salve the narcissistic wounds that often are driving the “above horizon” divorce litigation conflict. Moreover, the fees and costs incurred in family law litigation can devastate the savings of all but the wealthiest litigants.

Little wonder that family law is a field in which even the most successful practitioners experience high levels of stress and frustration. This is the context in which collaborative law emerged, the fertile ground in which it has taken such rapid root. Family law attorneys learning about the model have welcomed it as the solution to a deeply troubling problem in their daily professional lives:¹⁷ how

15. Address at *New Ways of Helping Children and Parents Through Divorce*, conference sponsored by Judith Wallerstein Center for the Family in Transition and University of California, Santa Cruz; Quail Lodge, Carmel Valley, California (Nov. 21, 1998).

16. See, e.g., Roseby, *supra* note 12 at 98 (“entrenched disputes often represent a response to overpowering feelings of shame and vulnerability which are evoked by the marital separation as well as by the perception that professionals are increasingly in charge of what was once the family’s private life. Vulnerable parents frequently manage these feelings of shame and helplessness by projecting all incompetence and badness onto the former spouse and holding all competence and goodness for themselves. From this dynamic evolves a wish that the judge, Solomon-like, will erase the shame by publicly answering, once and for all, the question of which parent is good and competent and which parent is bad and incompetent.”)

17. The leading trainers who emerged in the collaborative law field during the early and mid 1990’s concur that there is a lawyer-driven self-generating demand for training that has rendered it unnecessary to advertise collaborative law to the family law bar. Stu Webb, originator of the collaborative law concept, often refers to the rapid growth of this movement as driven by “attraction rather than promotion.” Private conversation with Stu Webb, 1999. This author has been approached frequently during attorney trainings by lawyers who say with emotion that they were about to give up the practice of law, but that attending the collaborative law training was a last attempt to find a way to remain in the legal profession, and that they now see a way that they can practice family law with a sense of integrity and purpose.

to provide useful, high quality, professionally appropriate legal advocacy and counsel to family law clients in a way that supports the healthy transition of a couple and a family from marriage through the normal life transition that is divorce.

Just as collaborative law seems clearly to meet a need among family law attorneys, it also appears to meet the needs of clients in a way that renders it attractive when described accurately and evenhandedly as one of a menu of dispute resolution options from which a divorcing couple can choose at the time of divorce. Family law attorneys often note that it is rare for a client to tell a divorce lawyer, "I want war! I want revenge! I want to take him to the cleaners! I want to reduce her to destitution!" While strong, primitive feelings boil and bubble close to the surface for many divorcing clients, they generally start out the divorce process by telling their lawyers, "I just want what's fair." Fair, of course, is an elastic and subjective concept that is of limited use in setting goals and strategies for divorce representation. Nonetheless, the statement, understood correctly, can be translated to mean, "I am upset and worried, but I do not want a war; I want to reach some kind of reasonable outcome, as good as I can realistically achieve for myself and my children without ending up in a costly, emotionally draining battle that nobody can really win." Many if not most family law clients at bottom aim for such an outcome, but many of them lack the emotional tools needed to get them from where they are to that kind of "good divorce."¹⁸ Some of them are lawyer-averse, fearing that to retain a family law attorney is to guarantee costly and damaging litigation that will preclude effective co-parenting of children following the divorce. These clients, if they make use of professional advisers at all during the divorce,¹⁹ may seek out professional

18. In my trainings I refer to the "highest intentioned client," i.e., that part of the client that truly wishes for a contained, respectful, reasonable settlement of divorce issues so as to preserve resources and permit a functioning post-divorce restructured family that can parent children effectively after the divorce; and the "shadow client," i.e., that part of the client that has been deeply wounded by the loss of the marriage, and suffers transient intermittent states of diminished capacity characterized by periods of primitive emotion such as fear, rage, guilt, grief, and the like. Recovery from the trauma of divorce resembles recovery from the death of a spouse in its nature, intensity, and progression. It can take several years for a wounded client to return gradually to whatever functional state he or she enjoyed prior to the divorce trauma; recovery can be seen as spending increasingly more time in the "highest intentioned" state, and decreasing time in the "shadow" state. The degree to which the "shadow client" dominates the legal divorce process and dictates the goals, strategies, and tactics correlates directly with how likely it is that there will be a "high conflict" divorce. These concepts are discussed at greater length in PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (American Bar Association, 2001).

19. Self-represented or "pro per" or "pro se" clients constitute a growing percentage of divorce filings in many jurisdictions, presenting delays and other significant challenges to an already-

mediators and perhaps even refuse to retain consulting attorneys to advise them during the mediation process. Others, worried about the potential bad behavior of the spouse, or about their own perceived weakness at the bargaining table, eschew mediation, seeking out traditional family law attorneys in order to have a strong advocate at their side during negotiations. These litigants will probably settle their issues short of trial, but have until now had no way to identify and select counsel able and willing to focus the divorce process on settlement rather than on preparing for trial.

COLLABORATIVE LAW DIFFERS GREATLY FROM CONVENTIONAL SETTLEMENT NEGOTIATIONS

On first hearing about collaborative law, traditional family law attorneys often remark that it's nothing new, "I've been doing it for years, I just don't call it that. After all, I settle more than 90% of my cases." Family law cases do overwhelmingly settle short of a full trial on the merits, but these are settlements fashioned in the shadow of the law, with the litigation matrix shaping the representation from the first attorney-client contact. Often, family law litigators settle cases these cases virtually, if not literally, on the courthouse steps, after expenditure of enormous emotional and financial resources on pendente lite motions and discovery. The settlement may be on the eve of trial, supervised by a settlement conference judge who applies evaluative pressure on parties and counsel in the interests of lightening the court's docket.

The movement of a case from first interview to settlement in this kind of litigation-matrix settlement practice is shaped from the start by the limitations and demands inherent in court rules and legal restrictions on the family court's jurisdiction and exercise of discretion. From the start, a "litigation-matrix" attorney excludes from consideration much of what the new client considers most troubling about the divorce situation, because the court lacks the power to make effective orders about wounded feelings and the nagging annoyances that angry or vengeful spouses can inflict upon one another below the threshold of a court's power or willingness to act.

The job of the lawyer in this kind of representation is to shape and pare the facts of the client's situation into a story, a theory of the case that will enable the lawyer to "win big" on the client's behalf. To do this, the lawyer will ignore or deem irrelevant many parts of the client's story, and will emphasize or exaggerate others. From the first interview, the lawyer typically uses leading, closed-ended questions to spot issues that lie within the court's jurisdiction to resolve and develop goals, strategies, and tactics for successful outcomes. Sometimes,

overburdened court system that cannot function smoothly with large numbers of cases lacking any knowledgeable professional working on either side of the divorce. *See, e.g.*, Roderic Duncan, *Pro Per Do-It-Yourself Divorce*, Cal. Lawyer, Jan. 1998, at 44.

custody and support motions are prepared in the course of the first interview, and the client – who may be highly anxious and driven by fear, grief, or other primitive emotion – may be asked to sign inflammatory declarations under penalty of perjury then or soon afterward, for maximum tactical and strategic advantage in the litigation process. “Hurry up and wait” is the normal pace in litigation: hurry to meet arbitrary court deadlines, wait for the court calendar to have space to attend to client needs. Always, the norm of third party judicial resolution is the template that shapes development of goals, sharing of information, advocacy of positions, and pacing of resolution.

Another way to put this is that the litigation-matrix for settlement involves devoting nearly 100% of the lawyers’ efforts to an event that is expected to happen less than 5% of the time, a ratio of effort to result that is matched only by the military and firefighters.²⁰ Client participation in the settlement process is generally minimal; the lawyers control all negotiations. Distributive bargaining is the norm, with little or no attention paid to the broader spectrum of interests that can matter greatly to divorcing clients and that could enrich settlement prospects and outcomes.²¹

In many ways, the real interests of divorcing parties get lost in the process of bringing a litigation-driven case to settlement. The focus, in these settlements, is on the immediate divorce-related financial and custody provisions of the divorce judgment. Limited or no attention is given to the interests and needs of the post-divorce restructured family, either in the sense of positive planning for healthy long term family restructuring and change, or in the sense of minimizing the destructive impacts of the divorce process itself on economic interests of family members and on possibilities for effective parenting of children after the divorce. In most U.S. jurisdictions, litigated court proceedings and files (including those of cases that ultimately settle) are open to the public and all vestiges of privacy are lost, at the same time that matters formerly decided pri-

20. I am indebted to Boston collaborative lawyer Doug Reynolds for this comparison, and permission to use it.

21. These include material issues that may be readily negotiable even though outside the jurisdiction of the court (for instance, potential agreements about paying college education expenses for adult children, or about support of stepchildren or infirm parents, or about alimony arrangements that courts could not order, or consideration of tax issues that lie outside court jurisdiction) as well as more elusive but highly significant relational considerations that may be overlooked by distraught clients and adversarial lawyers, though if asked the clients would value them higher than achieving the marginal financial gains that may render the relational interests unattainable (for instance, the value of being able to dance at a child’s wedding, or to meet over the cradle of a grandchild, or for children to be able to sustain warm relationships with extended family).

vately by the couple are handed placed under the control of disinterested and busy professionals.

Settlements reached in a collaborative legal representation come into being in a process that differs dramatically, in nearly every important respect, from the litigation-matrix settlement process. Collaborative lawyers work from the first interview to listen deeply to the client's entire story, because only by doing so can the collaborative professionals facilitate true interest-based negotiations. Without such attention to what really matters to the client, the raw material is lacking to help clients discover common interests and goals, and to take advantage of differing perspectives on value, risk, and timing. Moreover, good collaborative practitioners begin by educating clients about the negotiating process and the divorce recovery process, and eliciting agreements about good faith bargaining and management of conflicts and strong emotions, so that clients are empowered to participate actively and effectively in direct negotiations. All substantive discussions, information-sharing, options development, and negotiations take place in face-to-face meetings with the clients at center stage, aided by their collaborative advocates. The role of the lawyer shifts from alter ego gladiator to guide for negotiations and manager of conflict. Instead of measuring success by the size of the outcome on one's own side of the table, good collaborative lawyers detach from outcome and judge their success by the degree to which both collaborative lawyers succeed in working effectively with all participants to offer the clients the best possible circumstances in which to work in a good faith, interest-based, respectful matter, at an appropriate pace, toward a mutually beneficial and acceptable outcome.

The process invites maximum client involvement and control over outcome, while maximizing privacy and creativity. The participation agreements signed at the outset commit all participants to good faith bargaining, voluntary full disclosures, interest-based bargaining, inclusion of relational and long term interests in the identification of clients' goals and strategies. The role of the lawyer is redefined in collaborative practice, as advocate for achieving the long-term enlightened interests of the client, rather than zealous advocate for goals and strategies identified by clients possessed by transient states of diminished capacity associated with the trauma of divorce. The disqualification of all professionals from participation in litigation between these clients has the effect of keeping both lawyers and clients at the negotiating table in the face of apparent impasse much longer than is typically the case in conventional settlement negotiations, where resort to the local judge to resolve impasses is a comfortable and familiar option on the dispute resolution menu that litigation attorneys carry in their mental armory. For collaborative lawyers, deciding to see what the local judge can do with an apparent impasse is identical to a decision to cease participating in the case. Unlike litigation attorneys, collaborative lawyers share the risk of failure in collaboration with their clients. Collaborative lawyers see these features of the collaborative law model as powerful aids to creative conflict

resolution – as the means for liberating the effective problem solver trapped within litigating lawyers.

COLLABORATIVE LAW RESEMBLES BUT DIFFERS IN IMPORTANT WAYS FROM
MEDIATION²²

While collaborative law builds upon important conflict resolution skills and understandings developed in the field of mediation,²³ collaborative law differs from mediation in important ways. First and foremost, collaborative lawyers are advocates, not neutrals. They work within all professional ethics and standards of practice for lawyers and are a licensed profession. They owe a primary duty to their own clients. But, this duty is reframed not as the duty to zealously advocate for whatever fear-driven objective the client might grasp for during the course of recovering from loss of a marriage, but rather the duty to work with the client to help him or her achieve the goal nearly all clients say they want – the “good divorce”, speedy, economical, respectful, individualized, and protective of children – in a process specifically tailored to help the client be able to realize that goal. This means that collaborative lawyers undertake much more than either a conventional lawyer or a mediator considers to be part of the job description: to educate clients, help them work from positions to interests, remove them from the negotiating table when they are too upset to think clearly, counsel them when they behave in self-defeating or bad faith ways, and assist them to recalibrate back to the high intentions identified at the start of the collaborative retention. Moreover, collaborative lawyers generally agree to protocols for practice whereby they will withdraw from representing a client who hides information, stonewalls, misrepresents, or otherwise misuses the collaborative process.

Where clients in mediation may occupy an uneven playing field, collaborative law builds in advocacy and legal advice into the heart of the process. Where neutral mediators may encounter great difficulty working with clients who subvert the process (whether intentionally or otherwise) while still main-

22. *See supra* note 4, for the dangers of generalizing about mediation. Notwithstanding that fact, the distinctions pointed out here between collaboration and mediation would seem to apply to virtually all the many variants of mediation described by Joan Kelly.

23. Standards for collaborative legal practice that will be adopted in 2004 by the International Academy of Collaborative Professionals include mediation training as one of the recommended elements of a comprehensive training program for collaborative lawyers, and identify as important many skills that are central for effective mediation, such as active listening, open-ended questioning, reframing, and the like.

taining neutrality, collaborative lawyers take on as part of their agreed job description the responsibility to work with such clients until they can return to the table willing and able to engage in effective good faith negotiations.

Finally, the structure of the collaborative legal model itself seems to offer more wattage of focused dispute resolution power than is generally available in family law mediation. Family law mediation often takes place as a three-way process, including the two divorcing spouses and one neutral mediator; lawyers for the parties, if they are involved at all, participate from their own offices, not in the mediation room. Even when consulting attorneys for the parties participate directly in the mediation, they participate not as designated conflict resolution professionals working explicitly toward settlement, but rather as conventional legal counsel who provide advice and representation in an adversarial model in which the decision to terminate mediation and take the matter to court is readily available and without built-in disincentives. Only in collaborative practice is the option-generating and negotiating process conducted by two trained legal advocates committed to consensual dispute resolution and skilled in interest-based bargaining who share a commitment to help clients stay on the high road and discover common ground for solutions. Because these advocates, who have every incentive to continue working toward settlement, meet in “real time” around a table with the clients who are expert in the facts and interests associated with the case, and everyone can hear and respond to the ideas of all the other participants in the conversation, the creative “out of the box” lateral thinking power available at the negotiating table to help clients reach agreement is considerably amplified as compared to single-neutral mediation.

INTERDISCIPLINARY COLLABORATIVE PRACTICE

During the early 1990's, at the same time that lawyers were developing and extending collaborative legal practice, a parallel model called collaborative divorce emerged among a certain segment of mental health professionals experienced working in the court system on the custody battles of high conflict divorcing couples. These psychologists, social workers, and counselors mediated at the courthouse, and conducted the child custody evaluations used in trials and court-annexed settlement conferences to provide recommendations and rationales about which parent was more deserving of custody of the children. These professionals came to see that their evaluation reports, though intended to serve the best interests of children, were further polarizing the already-conflicted parents and decreasing their ability to provide effective post-divorce parenting for children.

Peggy Thompson, Ph.D., a California psychologist, worked with colleagues in the early 1990's to develop an interdisciplinary team approach that would offer divorcing couples a consistent, positive, supportive, contained system for working with mental health and financial professionals on divorce-related is-

sues. The collaborative law model, developing simultaneously and separately among family law attorneys, was the final component of an approach that now offers integrated virtual professional teams to divorcing spouses in many communities across the U.S. and Canada.²⁴ These teams include: two collaborative lawyers, two divorce coaches (who must be licensed mental health professionals experienced in divorce work), a child specialist, and a financial neutral. These professionals are trained in the psychodynamics of divorce and healthy family restructuring as well as effective communication skills, conflict resolution skills, and interdisciplinary collaboration.

Individuals in these professions working together on a particular case remain independent practitioners, bound by all ethical and professional mandates of their respective professional licenses or certifications. Typically, in communities where this option is available, interdisciplinary practitioners form practice groups through which they can build trust, develop protocols, and obtain training and mutual mentoring, as well as engage in public education and marketing about interdisciplinary collaborative divorce services. Clients interested in this interdisciplinary resource can select the individuals who will constitute their particular professional collaborative team from the members of the practice group.

Each client works with a trained divorce coach to learn highly focused communication, stress reduction, values clarification, assertiveness, and/or anger management skills aimed at helping the client move as effectively as possible through the collaborative divorce process. The child specialist provides balanced, non-judgmental, non-evaluative information about the children's needs and challenges during the divorce process, as an aid to developing high quality parenting plans. The financial neutral helps clients identify income, expenses, assets, and debts, efficiently marshalling necessary documentation for the collaborative lawyers to use in the legal negotiations, while at the same time helping the clients with immediate budgeting concerns, identifying key financial issues needing to be addressed by the lawyers, and assisting in the settlement process by analyzing tax issues and projecting long term financial consequences of various settlement options. Each professional bills separately at his/her own rate. Each professional has a separate fee agreement with the client. Usually, the result is to contain conflict and educate clients in ways that reduce legal fees, streamline negotiations, and provide long-lasting "value-added" professional services that do far more than simply push the clients into an agreement.

24. See the *Collaborative Review*, journal of the International Academy of Collaborative Professionals, for regularly updated listings of interdisciplinary practice groups and contact persons.

Where clients have the intention, but not the emotional or intellectual ability, to work effectively with their collaborative lawyers in legal negotiations, this interdisciplinary model can provide the additional resources needed for couple to realize their intention of having a “good divorce.” For such clients, paradoxically, paying to bring in the necessary range of professional resources typically results in a divorce that costs less than it would have if they had been represented solely by collaborative lawyers, without the interdisciplinary team.²⁵ Interdisciplinary collaborative practice offers divorcing couples consistent, positive, integrated professional assistance, in a client-centered model aimed exclusively at helping the couple reach respectful, efficient, lasting, mutually workable solutions to divorce-related problems that will help both parents provide effective co-parenting of the children after the divorce. Like collaborative lawyers, all interdisciplinary collaborative divorce professionals sign contractual agreements with their clients that bar them from ever participating in contested court proceedings between the parties.

Infrastructure for Collaborative Practice:

Practitioners from the three professional disciplines that are providing collaborative dispute resolution services to clients have built an umbrella organization, the International Academy of Collaborative Professionals,²⁶ that has been effective in sustaining a consistent vision of core elements and standards for collaborative practice throughout the English-speaking world. During the fourteen years since the first emergence of collaborative law, none of the schisms or conflicts that have fragmented the mediation movement have emerged, perhaps

25. In the oft-quoted words of human potential psychologist Abraham Maslow, “If the only tool that you have is a hammer, every problem you encounter will tend to resemble a nail.” Lawyers are not trained in the skills required to support or contain emotionally challenged clients, but are faced with the problems such clients present during divorce on a regular basis. Doing the best they can to manage anger, grief, fear, and other “shadow” behaviors takes more skill and experience than most family lawyers have to offer, and the result is to run up legal fees with little of value to show for the expense. Lawyers may have somewhat more to offer with respect to financial issues, but typically have little patience for educating unsophisticated clients in how to manage a checkbook, or how to understand retirement plans and investments. Nor do they usually have the ability to do sophisticated tax planning, or complex projections of long term financial consequences of –for instance–keeping the family residence versus receiving liquid assets. And their services generally are billed at a higher hourly rate than mental health or financial professionals, while providing less to the clients when the problem is emotional, relational, or financial in nature rather than a legal or negotiations challenge.

26. IACP was founded in the mid-1990’s as a 501(c)(3) tax-exempt nonprofit organization. It publishes the leading journal in the collaborative practice field, *The Collaborative Review* (co-edited by the author and Jennifer Jackson, J.D.). Its website, www.collabgroup.com, provides lists of practitioners and practice groups by geographic locale, and a variety of other information about collaborative publications, trainings, conferences, and other activities. IACP will adopt comprehensive standards for practitioners, trainers, and trainings in 2004.

because collaborative practitioners cannot work effectively with their clients without basic consensus among practitioners about protocols, procedures, and values. IACP has been a force for consensus-building that continues to embrace new developments in the collaborative community.²⁷

Law Schools and Legal Theory:

Collaborative law and collaborative interdisciplinary practice are beginning to be presented in law school courses, sometimes in seminars addressing design of dispute resolution systems, sometimes under the rubric of professional ethics, and sometimes as advanced courses for students interested in domestic relations law.²⁸ Loyola University (New Orleans) Law School professor Kathy Lorio is working with students and colleagues to create a year-long course in interdisciplinary collaborative practice for graduate students in law, business, psychology, and social work that will incorporate theoretical study and clinical practice.

Legal scholars have included collaborative legal practice within the rubric of “therapeutic jurisprudence,” a perspective that looks at the intended and unintended therapeutic and counter-therapeutic impacts of legal systems upon the people who operate and pass through them.²⁹ Law professor Susan Daicoff sees collaborative law as one of a variety of “vectors” in what she calls the “comprehensive law” movement, which resembles the “complementary medicine/patients’ rights” movement in the field of health care.³⁰ And theorists in the

27. Collaborative dispute resolution is just beginning to spread from the realm of family law into the broader field of general commercial and civil dispute resolution, and it seems likely that probate and business collaborative lawyers will be embraced within IACP. For articles addressing collaborative law in the broader legal dispute resolution community, see Pauline H. Tesler, *Collaborative Law Neutrals [sic] Produce Better Resolutions*, ALTERNATIVES (JOURNAL OF THE CPR INSTITUTE FOR DISPUTE RESOLUTION), Vol. 21, No. 1, January 2003, and Douglas C. Reynolds and Doris F. Tennant, *Collaborative Law: An Emerging Practice*, BOSTON BAR JOURNAL Vol. 45, No. 5, Nov.-Dec. 2001, pp. 1-5.

28. Individual classes and guest seminars have been presented in many law schools, including: Stanford, Harvard, University of Miami, Santa Clara University, University of California-Berkeley, University of British Columbia, University of Houston, and Florida Coastal University. Semester-long courses devoted to collaborative law and interdisciplinary collaborative practice have been included in law school curricula at Santa Clara University, the University of British Columbia, and the University of Texas Law School. Multi-day law-school sponsored continuing education program in collaborative practice have been presented at Loyola University Law School (New Orleans) and South Texas College of Law.

29. See e.g., David Wexler and Bruce Winick, *LAW IN A THERAPEUTIC KEY*(1996); Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, PSYCHOLOGY, PUBLIC POLICY AND LAW, Vol. 5, No. 4, December 1999, pp. 967-1000 [.

30. DAICOFF, *supra* note 5 at 175-185, 187-192.

field of conflict resolution are starting to see collaborative practice as having great potential for attracting a broader segment of the population to consensual dispute resolution than mediation has yet appealed to.³¹

Statutes and Ethical Considerations:

Texas was the first state to adopt a statute specifically recognizing and legitimizing collaborative legal practice: §6.603 of the Texas Family Code (2001). The statute was necessary because without it, cases were being assigned early trial dates shortly after divorce petitions were filed, under “rocket docket” local rules. The ability to proceed at a pace that comports with the emotional requirements and negotiating styles of the parties is crucial to effective collaborative legal practice. The Texas statute defines collaborative law as:

a procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution of marriage dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties’ counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement.

Further, the statute specifically exempts collaborative cases from high speed court procedures.

North Carolina adopted a similar statute in 2004, with a similar definition of collaborative law. A third statute is being drafted by legislative advocates within the State Bar of California for possible presentation to the California legislature. And, efforts have begun to consider the possibility of drafting of a uniform model collaborative law statute. In addition, judges have adopted local rules of court to support effective collaborative practice.³²

Meanwhile, in states without specific statutory recognition of collaborative law, practitioners have sought ethical opinions from bar associations and coverage opinions from malpractice insurance carriers. So far, no ethical opinion has concluded that practitioners of collaborative law are outside either professional ethical guidelines or standards for practice of law.³³ Collaborative lawyers re-

31. See e.g., BERNIE MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (San Francisco: Jossey-Bass/Wiley, 2004).

32. See Pauline H. Tesler, *Donna J. Hitchens: Family Law Judge for the Twenty-First Century*, *THE COLLABORATIVE REVIEW* (formerly, *Collaborative Quarterly*), October 2000, Vol. 2, issue #2, pp. 1-4. Judge Ross Foote, of Alexandria, Louisiana has taken major steps to bring collaborative practice to his parish and state in a form accessible to even low income clients, through rule making, speaking, training, and personal leadership.

33. The Los Angeles County Bar Association Formal Ethics Opinion # 502 (1999), relating to “unbundled” legal services, approves the provision of such services on well-reasoned grounds that would appear to apply with equal force to collaborative law, which is also a limited purpose retention, provided the limitations on representation are carefully described and consented to in writing.

port that when asked, malpractice insurers inform them that their professional errors and omissions policies cover their work as collaborative lawyers, and that no special exclusions, riders, or premiums apply.

Because of the particularly collegial nature of collaborative practice, and the rapid communications network provided to practitioners by the listserve operating within yahoogroups (collablaw@yahoogroups.com) it is unlikely that any malpractice case filed against a collaborative practitioner would escape notice. It is estimated that more than five thousand lawyers have been trained in the collaborative legal model in North America as of 2004³⁴ and are presumably providing collaborative representation to clients. No malpractice claim, to the author's knowledge, has been filed against a collaborative lawyer in the fourteen years that collaborative legal services have been provided to clients.³⁵

Research and Research Needs:

The first longitudinal study of collaborative lawyers and clients is reaching completion. Conducted by law professor Julie MacFarlane, the study (funded by the Social Science and Humanities Research Council of Canada and the Canadian Dept of Justice.) involves in-depth interviews of collaborative lawyers, clients, and – where present – coaches and financial professionals – at the beginning, middle, and end of collaborative cases in five cities where experienced collaborative practitioners are representing clients: San Francisco, Minneapolis, Vancouver, Medicine Hat (Alberta), and Regina.³⁶ The research is intended to generate results that will help improve collaborative practice by identifying discrepancies between client and attorney perceptions and expectations, derived from specific case situations.³⁷

Collaborative practitioners have begun gathering data as cases are completed, through an email listserve, collablaw@yahoogroups.com. Access to the listserve is limited to legitimate collaborative professionals. However, researchers interested in making use of the data being gathered can contact either Carl Michael Rossi, listserve owner and Chicago collaborative lawyer, or the Interna-

34. Based on anecdotal reports by trainers, as well as practice group data maintained by the International Academy of Collaborative Professionals and updated in each issue of the *Collaborative Review*.

35. See Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOLOGY, PUBLIC POLICY, AND LAW 967 (December, 1999), at 976-77, n.24, for discussion of some specific ethical and standards of practice questions that might be raised about collaborative law.

36. MacFarlane, *supra* note 6.

tional Academy of Collaborative Professionals, which is committed to assisting researchers whose research might assist practitioners to deliver better services to clients. Among the many areas in which research would be useful would be: tools for screening and identifying clients unlikely to benefit from collaborative dispute resolution services, study of frequency of post-judgment litigation in collaborative settlements as compared to mediated settlements and litigated judgments; study of outcomes for children after collaborative settlements as compared to mediated settlements and litigated judgments; evaluations of the effectiveness of various approaches for training collaborative practitioners; comparative outcomes for clients using interdisciplinary team model vs. using collaborative lawyers alone. Many of the questions that have been asked by researchers with respect to mediation could usefully be asked regarding collaborative practice.³⁸

38. For further thoughts about research needs, see: Pauline H. Tesler, *The Believing Game, The Doubting Game, and Collaborative Law*, 5 PSYCHOLOGY, PUBLIC POLICY, AND LAW 1018 (December 1999)