

COLLABORATIVE LAW: HOW GOES THE QUIET REVOLUTION?

By Pamela H. Simon

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By now most lawyers, albeit some very grudgingly, have finally accepted mediation as an effective and efficient way of settling disputes, especially in family law, rather than as an "extra layer" and "extra expense" on the warpath to the courtroom. Now, however, there's a truly revolutionary process taking hold-- one that completely rejects the adversarial system as a useful approach to resolving issues in divorce. It's called "Collaborative Law."

Although Collaborative Law ("CL") is relatively new to North Carolina, it's been around for over a decade in several other states, including California and Minnesota, and Texas even has a statute specifically recognizing and approving the process. Last year, the International Academy of Collaborative Professionals (IACP) met in Oakland, CA, to "network." Fifteen states, the District of Columbia, and two foreign countries (Canada and Switzerland) were represented by approximately 100 lawyers and other professionals (therapists and financial planners.) This networking meeting is held on an annual basis, usually in a major city.

The results reported by the participants are astonishing. Pauline Tesler, one of the pioneers of the process in California, reports that CL typically costs the clients between one tenth and one twentieth of the traditional courtroom case, and cuts the time necessary to resolve the case from approximately two years to just a few months. Many of the lawyers reported they now avoid litigation completely, and accept cases only on a CL basis. More importantly, the participants indicated that CL works to end a "bad" marriage with a "good" divorce.

Divorce is always in some respects a tragedy, disrupting and altering forever some of life's most intimate relationships. Traditional litigation encourages each side to build an arsenal against the other, distorting the inevitable disagreements and lapses of good behavior into major "indignities," quickly assuming the aura of a lurid soap opera. Lawyers, most of whom are basically good people, take on the very worst qualities of their clients, who in turn are exhibiting the worst behavior of their lives.

Although attorneys, after a day in trial where they impugn the character of not only the opposing client but all too often that of opposing counsel, are famous for leaving the courtroom together with smiles and slaps on the back, frequently joining each other for drinks and dinner, the show of camaraderie eventually becomes a fake. A lot of litigators sincerely hate each other's guts, and their enmity spills into and poisons their next case together.

A lawyer friend of mine, whom I deeply respect, recently stated in response to the current debate over CL and other ADR options, "We need to remember that we are first and foremost trial lawyers." With all deference to my friend, whom I still respect, I beg to differ. I am first and foremost a human being, and in my profession, I am first and foremost a counselor at law, not a warrior or guerilla. It is typically the CL lawyer's goal to be the same person in his or her

personal and professional lives. As litigators, we too often relish the opportunity to humiliate and degrade a witness through ruthless cross-examination, and the next thing we know, we are grilling our spouses, children and friends with the same tone and technique. No wonder so many people hate lawyers, and feel free to say so, right to our faces.

So what is CL, and how does it change that landscape? CL was founded by Stu Webb, an attorney in Minneapolis. Well into his very successful career, he took a family-law case against a lawyer whom he liked and had worked well with in the past. The case unexpectedly went sour, and by its conclusion, Stu and his friend were no longer speaking.. He decided then and there that he would never again allow such a thing to happen, and he was perceptive enough to realize that the adversarial system produces adversaries, not friends.

Stu then invented CL by writing to a group of good lawyers and asking them to join him in an experiment. The parties and their counsel would agree at the outset, and sign a contract to that effect, that they would pledge to settle their case without court intervention. They would share information fully and without the need for formal discovery. They would treat each other and both clients with dignity and respect. Rather than assuming the persona of their hurt and angry clients, they would model for them a demeanor fostering trust, civility, and an understanding of the other's needs. They would retain only jointly chosen, neutral experts. They would ensure that each attorney was paid for his or her services. Should either client back out of the deal and go to court, the attorneys would withdraw from the case, and allow a 30-day "cooling off" period during which both attorneys, at no cost to the clients, would brief the new lawyers on the fundamentals of the case. None of the evidence compiled during the collaborative process would be admissible in court, and none of the jointly retained experts would be competent to testify. In other words, each client would have a substantial investment in sticking with CL.

The CL project took off immediately. In the first year, Stu had 100 cases. He is now busier and more successful than ever. In addition to maintaining a substantial and lucrative caseload, he also spends much of his time, as does Pauline Tesler, in training lawyers both nationally and internationally in the CL process.

Naturally enough, more than one model of CL has emerged. The NC Bar Association's Family Law Counsel has formed a subcommittee to deal solely with CL, and a number of counties (including Wake, Mecklenburg, Iredell, Rowan and Catawba) have either formed CL groups or are in the process of doing so. The North Carolina CL model tends to have the following features:

(1) The process is conducted largely through "four-way" meetings, during which the clients and attorneys meet face-to-face, in a comfortable, non-threatening atmosphere, and follow an agenda for each meeting;

(2) Experts (such as psychologists, appraisers and financial planners) are added as needed and as the parties can afford;

(3) None of the participants threaten litigation as a means of obtaining an advantage;

(4) Each lawyer builds a rapport with and has an opportunity to address the opposing client directly;

(5) There will be no unnecessary delving into past events;

(6) If the parties are unable to resolve an issue, or cluster of issues, through their own negotiations, they may submit those issues to mediation and/or binding arbitration under the Family Law Arbitration Act (FLAA), and then continue with CL. Some attorneys are beginning to add binding arbitration provisions in all of their CL agreements, so that under no circumstances will a client lose his or her lawyer.

(7) If an attorney discovers that his or her client, or opposing counsel, is abusing the CL process by, for example, hiding assets, doctoring documents or pretending to commit to CL solely for the purpose of obtaining information to be used at trial, the attorney shall terminate the CL process; and

(8) The court is involved only as necessary to enter the parties' agreement as an order, or to enter ancillary orders such as QDRO's, Decrees of Separate Maintenance and decrees of absolute divorce.

At the first four-way meeting, the parties go over the CL participation agreement (I have drafted an extensive agreement that can be "haircut" and tailored to meet the particular case, and will be happy to fax or e-mail it to anyone interested) paragraph by paragraph, to ensure that each agrees fully with the goals and principles. If enough time has been allotted, the participants may then also discuss what needs to be done next (e.g., hire appraisers, consult therapists or counselors for themselves and/or their children, produce and share certain documents, or obtain a financial plan for both parties,) and a time and agenda are set for the next meeting (or ideally, series of meetings.) For each meeting, there should be an agenda and an orderly progression through the issues that need to be addressed. To be successful, the procedure must accommodate and move at the pace of the party whose acceptance of the divorce comes more slowly. The goal is to emerge from the CL process without irreparable emotional or economic damage to the parties or their children.

To initiate a successful CL program, each county should form a practice group (known as a "POD.") Choose a name (such as "The Mecklenburg County Collaborative Family-Law Group,") form a steering or executive committee, draw up by-laws and rules for admission to and retention in the group, design a brochure and ideally a website, and assess admission and annual dues to cover costs. One of the requirements for admission should be that each member either be trained in the process or pledge to obtain CL training within 12 months. Learning to be a CL lawyer is a little like learning to be a mediator – training is essential. Information about training can be obtained from a number of websites (e.g., www.collaborativelaw.com and www.collaborativedivorce.com .) It appears that at least 75 NC lawyers have now completed the training.

Courses are normally offered at out-of-state, big-city cities, which may make it impossible financially for many practitioners to attend. However, in North Carolina, CL courses have been offered by Chip Rose in Raleigh, Stu Webb himself in Salisbury, and most recently, by this writer in Winston-Salem. It was the CL committee's goal, from the start, to have at least one member of the family-law section receive enough training to present a program without having to rely on outside speakers. Our goal is to reduce the expense and inconvenience of obtaining training. As part of the Triad Collaborative Family-Law Practice Group, I facilitated a program offering 6 hours of CLE credit in Winston-Salem, am currently planning another training in the Pitt County area, and hope to bring the training to other areas as well.

The Mecklenburg County Collaborative Family-Law Practice Group is in the planning stages of putting together a two-day multi-disciplinary Collaborative Law symposium. The ad hoc planning committee is composed of two lawyers, two mental-health specialists, and two financial specialists. We hope to bring other areas of expertise, which we frequently consult in family law anyway, "on board" with the concept of CL, so that the clients, lawyers, and experts form one team rather than two armies.

To push your CL efforts, network with other counties (and states) and borrow freely from their ideas. Arrange to speak to groups of other professionals, including therapists, appraisers, accountants and financial planners, and urge them to be part of the CL project. Publicize your project through newspaper articles, public speaking and word-of-mouth.

Do not confuse CL with being "nice" or "cooperative." The linchpin of CL is the agreement to withdraw if the CL process fails. Retaining the option to litigate infects and ultimately kills the CL process. Preparing for trial and working toward a CL settlement are incompatible goals. CL is a team approach that treats divorce as a problem to be solved, not a battle to be fought.

Obviously, CL will not suit every case or every practitioner. For example, if a dependent spouse is seeking alimony, but hopes to conceal a pre-separation affair, CL is inappropriate. If you, as a lawyer, derive satisfaction from the nasty thrill of attacking the character of your client's spouse or one-upping opposing counsel through clever gamesmanship, CL is not for you. If you thrive on motions for contempt, to compel, and for sanctions, or on plotting for modification of an existing custody order, you will not enjoy CL.

However, if you are weary of posturing and dissimulation; if you feel that litigation requires you to skate on the thin ice at the edge of ethical behavior; if your character as a lawyer differs dramatically from your principles as a human being; if you look back at cases you have handled and realize that the litigants and their families will bear the scars of trial forever; and if you are still idealistic enough to believe that a lawyer's job is to help the client—then you may find that CL offers a way to become both a better lawyer and a better person. All physicians pledge to "do no harm." Perhaps we should do the same.