

Collaborative Family Law: Restoring Sanity to the Divorce Process

By David A. Hoffman

At a recent gathering of lawyers, two former law school classmates were overheard reminiscing. One of them commented about the fact that each of them had married a psychotherapist. "How interesting," he said, "we each married someone in the helping professions, while we've chosen one of the harming professions."

If it is true that lawyers often do more harm than good (albeit unintentionally, for the most part), it is nowhere more true than in the field of divorce law, which, as it is practiced in the United States, often causes more stress than it cures.

Consider the average couple on the verge of divorce. Often only one of the spouses wants to end the marriage; the other may know that there are problems but wants to keep trying. In such marriages, one spouse likely feels betrayed, vulnerable, worthless, angry, and possibly depressed; the other spouse may feel guilty about ending the marriage and yet angry about the relentless blame and clinging behavior of his or her spouse.

Then introduce this couple – going through one of the most difficult, emotionally charged episodes of their lives – to their respective divorce lawyers. These two gladiators are trained to search out and exploit the peccadilloes of the opposing party. Every legally relevant fault of the other spouse – and in our system of family law jurisprudence, they are virtually all "relevant" in the sense of being admissible at trial – will be described in unforgettably harsh language by opposing counsel either in a public courtroom or publicly available papers filed in court.

Although only a few divorce cases go all the way to trial (some estimates are as low as 5%), a substantial number go all the way to a pretrial conference, in which the parties submit memos accusing each other of high crimes and misdemeanors. This process usually destroys whatever modicum of good feeling the divorcing couple might have been able to salvage from the wreckage of their marriage – a tragically counterproductive outcome, especially for couples with young children. And even for those fortunate couples – perhaps half of them – whose cases get resolved with only modest courtroom skirmishing, the legal

structure for obtaining a divorce produces decidedly counter-therapeutic effects for both clients and, to an extent family lawyers have long known but seldom discussed, divorce attorneys as well.

As a result, many lawyers in the United States, including many general practitioners, refuse to practice family law. It is too painful, some lawyers say. It is too "messy," say others who feel uncomfortable inquiring about the most personal details of their clients' lives. "The clients are impossible," say others whose clients need but often are not getting mental health treatment.

Eleven years ago, a small group of lawyers in Minnesota decided there must be a better way to practice family law. They created a model called Collaborative Law (CL), in which lawyers agree to do everything possible to resolve their cases without going to court, or filing court papers, until an agreement is reached. If they fail to reach a settlement, the lawyers are obligated – by virtue of a CL contract signed in advance by the lawyers and their respective clients – to withdraw from the case and refer the clients to trial counsel.

CL agreements focus everyone's attention on problem-solving instead of unproductive argument and posturing. The economic interests of the lawyers and clients are aligned because failure to reach a settlement will impose additional expense on the clients and, for the lawyers, bring their work on the case to an end.

Improved Communications in Collaborative Negotiation

There is more, however, to CL than simply promoting settlement – CL involves a dramatic paradigm shift for the participants in the process. CL negotiations typically occur in four-way meetings with ground rules that encourage respectful listening, non-inflammatory language, and interest-based (rather than positional) bargaining. In those meetings, the participants agree to take a reasoned stand on every issue, negotiate in good faith, and exchange all necessary financial and child-related information.

By structuring the negotiations in this way, CL attorneys seek to avoid the acrimony that creeps into even relatively amicable divorce proceedings where parties do not meet face to face but instead communicate primarily through their lawyers. Inevitably, a certain degree of distortion results from messages as they pass through the filter of an advocate. When divorcing couples and their counsel conduct most of their discussions in person – collaboratively – disagreements and misunderstandings can be addressed immediately instead of festering.

Usually a series of four-way meetings is necessary in a CL case to resolve the panoply of issues that arise in the context of divorce: custody, parenting schedules, division of assets and liabilities, health insurance, educational expenses, taxes, alimony and child support. If experts are needed on an issue – e.g., a house appraisal, the value of a pension, or the wisdom of various parenting arrangements

– the CL attorneys will usually recommend hiring a neutral expert, with the costs shared by the parties.

One of the important advantages of CL for both client and practitioner is that it promotes a team-based approach to the divorce process. Mental health professionals and financial advisors – whose advice is often needed but usually provided from the sidelines, if at all – can become part of the lawyer-client team, attend “four-way” meetings, and help participants address issues from a more holistic perspective.

In Massachusetts, and in several dozen areas throughout the United States, CL groups have formed for the purpose of training lawyers to use CL. The curriculum consists of communication skills, client-management skills, role plays, and discussion of legal, ethical, psychological, and practice-management issues. Members of the Collaborative Law Council in Massachusetts are listed on the organization’s web site: www.collaborativelawcouncil.org; CL groups around the country are listed at www.collabgroup.com.

Disadvantages of Collaborative Law

Of course, not every lawyer is ready to embrace CL; many prefer the rigors of the courtroom. Likewise, not every case is suitable for CL. Divorce clients are not good candidates for CL if they are:

- Still in denial about the divorce;
- So angry at the other spouse that a four-way meeting would be unproductive;
- Unable to adhere to guidelines for collaborative communications (e.g., constantly interrupting or engaging in name-calling);
- Afraid of the other spouse because of his/her abusive or domineering behavior; or
- Unwilling to share all necessary information.

Even for appropriate clients, CL poses certain risks. First, CL can result in more expense if the CL process breaks down and both clients have to retain new lawyers. Second, without court involvement, either party to the divorce can delay the process by dragging out the negotiations, either intentionally or unintentionally. Third, court involvement offers greater protection from a spouse who intends to hide financial assets or secretly move them to a separate account; although CL attorneys typically require the clients to sign an agreement freezing the marital assets during the negotiations, violation of a court order usually results in harsher penalties and thus provides more of a deterrent to financial misconduct.

Ethical Issues

The practice of CL also presents certain ethical questions. Some might wonder, for example, whether a lawyer can fulfill his/her obligation to represent a client "zealously," as required by the canons of legal ethics, if s/he has irrevocably agreed not to litigate on the client's behalf. However, a lawyer and a client may determine what zealous advocacy means by spelling out in advance the ground rules for the lawyer's representation of the client. (See commentary to Mass. Rule of Professional Conduct 1.2: "the terms upon which representation is undertaken may exclude specific objectives or means.") This is, of course, what British "solicitors," as distinct from "barristers," have been doing for centuries.

Collaborative lawyers are just as zealous and devoted to their clients' interests as any other lawyers. The difference is that CL attorneys, and their clients, have decided on a set of objectives that are different from those in a non-CL case (where the goal is usually to obtain the greatest possible advantage, even if it is at the expense of the other party). In CL, attorneys focus on a broader set of goals – such as enhancing the long-term relationship of the parties with each other and with their children and treating each other respectfully during the divorce process.

The crucial ethical obligation for a CL attorney is to fully inform the client and provide him or her with an objective opinion of the advantages, and disadvantages, of CL. Even for those lawyers who believe strongly in the CL process, the canons of ethics require candid advice to the client concerning the risks associated with this form of practice.

Comparison with Divorce Mediation

In recent years, divorce mediation has become the preferred option for couples seeking an amicable divorce. Mediation and CL are closely related phenomena, with a high degree of overlap among the practitioners who continue to practice law while also serving, either frequently or occasionally, as divorce mediators.

Mediators guide the negotiation process, help the divorcing couple to identify issues and options, and draft a marital settlement agreement (or, if the mediator is not a lawyer, a memorandum of understanding, which one of the parties' lawyers turns into a formal agreement). What a mediator cannot do, however, is advise either of the parties: mediators are prohibited by their ethical codes from providing legal advice.

Accordingly, the parties in a mediation – which is ordinarily attended by the divorcing couple without their attorneys – often need coaching from their respective lawyers between mediation sessions. In some cases, this can be cumbersome and slow the negotiation process. When one spouse has greater experience in dealing with financial, real estate or tax issues than the other, mediating without counsel often compounds feelings of vulnerability in the less

knowledgable spouse.

Although mediators try to level the playing field by assuring a fair process and full sharing of information by the parties, most avoid directing the parties to a particular substantive outcome. For all of these reasons, CL may be preferable to mediation in certain situations – especially where one or both of the parties want to have their counsel at their side when such issues as asset division, alimony, health insurance, estate planning, or child support are discussed. Mediation can also be used in conjunction with CL, by involving counsel in some or all of the mediation sessions. Or these two processes can be used, if necessary, consecutively – e.g., if mediation does not result in settlement, the parties could hire CL attorneys and thus give themselves another chance to resolve their dispute amicably.

Conclusion

Reducing the cost and bitterness associated with divorce is a priority not only for most divorcing couples but also for attorneys. The growing interest in CL has arisen primarily because a significant number of disgruntled family lawyers are seeking a way to avoid producing, in case after case, equally disgruntled clients.

Both statistics and anecdotal evidence show that the vast majority of CL cases succeed in producing an out-of-court settlement. This is also true, however, for cases that use neither CL nor mediation. But the critical advantages of CL (and mediation, in appropriate cases) are (a) the reduced psychological and financial costs for the parties and their children, and (b) the opportunity to use creative problem-solving, instead of adversarial negotiation and reluctant compromise, to craft solutions that more fully meet the parties' fundamental interests.

Although CL may not be appropriate in every divorce, it widens the range of options for a divorcing couple seeking to end their marriage sanely and with a degree of civility. It also holds out the hope for lawyers sickened by the unnecessary but all too frequent viciousness of family law practice that law can one day be restored to its place as a helping profession.

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