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Book Review

“Collaborative Law: A Small Group of Thoughtful, Committed People, but Growing Larger Every Day”

Reviewed by David Hoffman

Collaborative Practice: Deepening the Dialogue

By Nancy Cameron

The Continuing Legal Education Society of British Columbia, 2004, 348 pages, \$95.00

Collaborative Law: A New Model for Dispute Resolution

By Sheila Gutterman, ed.

Bradford Publishing Co., 2004, 350 pages, \$89.00

One of the signs of the growth of the collaborative law (“CL”) movement is the outpouring of articles and books on the subject. Two of the newest—Sheila Gutterman’s *Collaborative Law: A New Model for Dispute Resolution* and Nancy Cameron’s *Collaborative Practice: Deepening the Dialogue*—make important contributions to the field by helping to establish norms for CL practice. They deserve a place, not on the bookshelf, but instead on the desk of everyone involved in CL.

For those who have not been following this relatively new but important development in the field of dispute resolution, CL was the invention of a Minneapolis family law attorney, Stuart Webb, who in 1990 decided that he would no longer take cases to court. Instead, he founded a group of lawyers—the Collaborative Law Institute—who agreed to take certain cases solely for purposes of settlement.

The CL process involves a written commitment by the lawyers and their clients to collaborative, good faith negotiation and to refer the case to other counsel if they fail. Information is exchanged in a cooperative manner, and if experts are needed, they are usually hired jointly. Everyone’s incentives are aligned toward resolution.

In 15 years, the use of CL has grown rapidly. CL groups exist in a majority of states in the U.S. and most of the Canadian provinces. Texas and North Carolina have enacted CL statutes. CL courses are taught in several law schools. Webb and California CL pioneer Pauline Tesler recently received the American Bar Association's first "Lawyer as Problem Solver" award, sponsored by the ABA Section of Dispute Resolution, for their development of the CL model. CL trainings abound, and thousands of couples have used CL to get divorced without resorting to litigation. CL practitioners are now seeking to spread the use of CL to non-family cases as well.

The first book-length treatment of CL was written by Tesler in 2001 and published by the ABA Section of Family Law. "Collaborative Law: Achieving Effective Resolution in Divorce without Litigation" remains the definitive text in the field. However, Gutterman's and Cameron's books add important perspectives.

Sheila Gutterman's book brings to mind one of my favorite quotes, attributed to Margaret Mead: "Never doubt that a small group of thoughtful, committed people can change the world. Indeed it is the only thing that ever has." In Colorado, such a group has come together to form Colorado Collaborative Law Professionals, and Gutterman—a Denver-based mediator, attorney and CL practitioner—has enlisted quite a few of them to write essays for this highly useful CL manual.

The 22 contributing authors include Gutterman and 15 other Colorado practitioners, plus Stuart Webb, Pauline Tesler, and four other individuals who practice outside of Colorado. Much of the book, and many of the appendices, relate specifically to Colorado practice and family law procedure.

However, there is an important audience outside of Colorado that will find this book helpful. Lawyers, therapists and financial professionals who wish to form CL groups in their city, state or province will find an abundance of ideas and forms for launching CL (even sample bylaws for a CL group).

At the heart of Gutterman's book are essays laying out the essential elements of CL—from the philosophical (e.g., the 'paradigm shift' from adversarial to collaborative thinking) to the practical (e.g., how to conduct successful four-way meetings)—and the elements of interdisciplinary collaboration, which can involve divorce coaches, child specialists mediators and financial specialists.

The essays in Gutterman's book extend beyond the legal aspects of CL practice: "Addressing emotional trauma at the beginning, collaborative divorce

enables the couple to move through financial and legal decisions with less pain and greater clarity of thought” (quoting Peggy Thompson).

One element of the book may frustrate readers: as Gutterman points out in her Introduction, “some of this book is repetitious” in part because “it is useful to review general concepts through the eyes of different practitioners.” If Gutterman’s book goes to a second edition (as one hopes it will), it would benefit from eliminating the overlapping sections.

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If Gutterman’s book is a solid text for CL 101, Cameron’s book should be required reading for CL 201 or even 301. Cameron—also a family law attorney and mediator like Gutterman—has written an elegant, thoughtful and thought-provoking exploration of the issues that CL professionals find challenging even after they have begun handling CL cases.

Cameron’s book is unabashedly feminist in its orientation, and points out the connections between the dramatic increase in the number of women in the legal profession and the profession’s greater interest in what sociologist Carol Gilligan would call an ‘ethic of care’ versus an emphasis on ‘rights.’ (For the seminal discussion of this distinction, see Gilligan’s book *In a Different Voice: Psychological Theory and Women’s Development* (1982).) Cameron cites a study showing that, when addressing moral problems, “Women lawyers had a general care orientation (64 percent) and that male lawyers generally operated from a rights orientation (77 percent).” CL seeks to combine these two orientations and this differs from adversarial practice, with its almost exclusive emphasis on legal rights and obligations.

Her book is also unabashedly intellectual, weaving in, where appropriate, poetry, sociological studies, and insights from various schools of psychology. Her compilation of the most recent data on divorce was particularly germane. These studies show that it is not divorce so much as parental conflict that adversely affects children, and therefore any legal methodology that de-escalates conflict is likely to have a positive impact on children’s adjustment.

Although Cameron’s well-organized text covers the basics of CL (and includes useful checklists for the various stages of a CL case), it also digs deeper into the ethical and practical issues—particularly those that relate to the payment of counsel—than most discussions of CL. She welcomes the hard questions that CL’s critics pose about whether the disqualification provision of CL agreements is consistent with the canons of legal ethics. (CL attorneys disqualify themselves from further representation if their client decides to go to court.) But she also asks

why there is so little discussion regarding the everyday ethical problems faced by non-CL lawyers in a system that rewards the escalation of conflict.

Cameron's and Gutterman's books have much in common. Both provide a solid grounding in the use of interdisciplinary teams. Susan Gamache, a psychotherapist and experienced collaborative practitioner, contributed excellent chapters to both books on the role of divorce coach and the role of child specialist in CL cases. Both books also contain chapters on the role of financial specialists. Both authors present the variety of practice in the CL world—ranging from using non-lawyer professionals as part of a team practice in every case to using such professionals only when a specific need for them arises.

Cameron and Gutterman also deserve credit for discussing the important role of mediation—both as an alternative to CL and also as part of the CL process, if the parties and counsel reach an impasse. It is all too common, unfortunately, for collaborative lawyers to criticize divorce mediation as a flawed process (because the parties sometimes negotiate without direct and immediate access to legal advice) and for mediators to criticize CL as a process that expands the involvement (and expense) of having multiple professionals involved in people's lives, rather than empowering clients and supporting self-determination – the goal of mediation. The reality is that collaborative law and divorce mediation are both vitally important methods of dispute resolution, and they sometimes work well together in the same case.

Readers of both books will find particularly helpful the computer disks that are included with the books, because the forms, checklists, and other tools can be opened as word-processing documents and adapted for the needs of other jurisdictions and practice groups.

Both books deal with ethical issues, but neither fully grapples with an issue that has caused considerable concern among CL's critics—namely, whether the disqualification provision that is central to CL creates undue pressure toward settlement when the parties have limited financial resources. One could, of course, turn that question around and ask whether the high cost of the adversarial system—pretrial depositions and interrogatories, motion hearings, and the trial itself—creates such undue pressure in all cases. But there is a special reason for concern when people of limited means sign a CL agreement because they may lack the funds to hire new counsel if CL negotiations fail. Thus, in addition to the criteria that Cameron and Gutterman list regarding the suitability of potential clients for CL (such as psychological issues and the parties' ability to negotiate effectively), I would add another: whether they can afford to hire another pair of lawyers.

Notwithstanding the challenges of CL practice, which begin but do not end with overcoming the adversarial training and orientation that lawyers typically bring to their work, Cameron's and Gutterman's books exude an enthusiasm for CL that is infectious. More importantly, because of the authors' experience and their practical orientation to the subject, these books provide practitioners with both basic and advanced CL tools for their dispute resolution toolbox.

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