

Introduction

By David A. Hoffman¹

Collaborative Law (“CL”) is one of the most important developments in the American legal system in the last twenty-five years – an ironic statement when one considers that the whole point of Collaborative Law is to foster out-of-court settlements. CL has now become a world-wide phenomenon, and the author of this wonderful book, Pauline Tesler – one of the pioneers of the CL movement and one of its most sought-after trainers – is responsible for much of this growth.

Pauline and the founder of the CL movement, Minnesota lawyer Stuart Webb, were recognized in 2002 for their achievement in the growth of CL when they received the American Bar Association’s first “Lawyer as Problem Solver” Award, an annual prize from the ABA’s Section of Dispute Resolution. The ABA’s decision to publish this book is itself a noteworthy recognition of the importance of CL.

Another important sign of the arrival of CL as a major component of the American legal system is the creation in 2007 of a Drafting Committee on CL by the National Conference of Commissioners on Uniform State Laws (NCCUSL), the organization responsible for drafting such uniform laws as the Uniform Commercial Code and Uniform Arbitration Act. The NCCUSL Committee has already begun drafting a model statute authorizing the use of CL.

Pauline was the co-founder and first president of the International Academy of Collaborative Professionals (“IACP”), the leading organization in the CL field. From its beginnings as a kitchen-table cabal in the late 1990s, IACP has grown to an international organization with more than 3,000 members. Today, IACP estimates that more than 10,000 lawyers and other professionals throughout the world have received CL training.

The Foundations of the Collaborative Law Movement

Many streams have converged to form the CL movement. First, the practice of negotiation has been transformed in the last twenty-five years by the growing use of interest-based, rather than positional, bargaining. This approach to negotiation was described in the path-breaking book *Getting to Yes: Negotiating Agreement Without Giving In*, by Roger Fisher, Bill Ury and Bruce Patton.² First published in 1981 and now translated into 25 languages, *Getting to Yes* introduced the ideas of (a) separating the people from the problem, (b) using principled benchmarks for arriving at agreement on contested issues, (c)

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² See R. Fisher, W. Ury & B. Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1991) (2d ed.).

assessing each party's BATNA (best alternative to a negotiated agreement) when considering settlement options, and (d) communicating about the parties' underlying interests to enable mutually advantageous exchanges. Prior to the publication of *Getting to Yes*, negotiation theory and practice focused primarily on competitive techniques for gaining advantage; Fisher, Patton, and Ury opened the door for a more collaborative approach.

Second, as litigation has become more costly, complex, and time-consuming, a broad range of private dispute resolution methods has developed. One of the important sources of change in this area was the 1979 article "Bargaining in the Shadow of the Law: The Case of Divorce," by Robert Mnookin and Lewis Kornhauser.³ The article described, and legitimized, a system of negotiation in which courts play an essential role (even though very few cases are resolved there) by providing guideposts and benchmarks that enable the parties to make informed choices about settlement terms. Mediation and other forms of alternative dispute resolution ("ADR") – such as arbitration, case evaluation, and CL – have greatly expanded the range of options for the private resolution of conflict. In the United States, ADR is now taught in virtually every law school, and ADR programs exist as adjuncts to virtually every state and federal court system.

Third, the American Bar Association's publication of the book *Unbundling Legal Services*, by Forrest Mosten, in 2000, validated a new approach to lawyering based on the recognition that some clients might not want, or might not be able to afford, the full range of services that lawyers offer.⁴ Clients who use 'unbundled' legal services want to be actively involved in handling their case and seek only a limited number of the following legal services: advice, research, drafting, negotiation, review/editing of contracts or agreements, and court appearances. Another important manifestation of unbundling has appeared in the area of family law, in which a number of lawyers – many of them devoted to the full-time practice of CL – have begun limiting their practices to advice and negotiation and refer their clients to other counsel if a court appearance is needed.

Collaborative Law Today

CL, which is a prime example of unbundling, has grown dramatically since 1990, when Stuart Webb first began representing clients solely for the purpose of negotiation. Although it originated as a form of family law practice, CL is now used in non-family cases as well.

During the CL process, the parties and counsel sign a participation agreement in which all agree that, if litigation is needed, (a) the lawyers will

³ See R.H. Mnookin & L. Kornhauser, "Bargaining In the Shadow of the Law: The Case of Divorce," 88 *Yale L.J.* 950 (1979).

⁴ See F. S. Mosten, *Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte* (American Bar Association 2000). Mosten first outlined the concept of unbundling in a 1993 keynote address to lawyers in Australia.

withdraw and new counsel will be hired, and (b) current counsel will be disqualified from further involvement in the case. The purpose of the withdrawal/disqualification provision is to align everyone's economic incentives toward settlement. These and other important features of the process are discussed fully and with brilliant practical insight in this book. However, it is worth mentioning at least one of those features here: for proponents of CL, a major part of the value of the process comes from the enhanced trust that can be created in negotiations. Because the parties do not have to fear that they will one day face the other party's lawyer in adversarial proceedings in court, they are able to achieve deeper levels of communication and resolution.

Another important contribution of CL is the development of an interdisciplinary approach to negotiation. It is common in CL cases – particularly in divorce and other family matters – for the lawyers and clients to work with a child specialist, a financial specialist, and/or “coaches,” whose job is to assist the parties with their communications and the psychological/emotional aspects of the negotiation. In some forms of CL practice, such as Collaborative Divorce, interdisciplinary teams are used in every case.⁵ It is a rare family case that does not have financial and psychological issues, and a team-based approach can provide a richer, more three-dimensional solution to the clients' problems.⁶ When legal historians look back at the development of CL, and where it has taken us, this more holistic perspective on legal practice may turn out to be one of its most important legacies.

The achievement of this important book – the first text in the CL field and still the touchstone for anyone seeking to practice CL – has been to combine the focus on achieving deeper levels of peace and resolution with an abundance of practical advice on how to get there. The section on “metaphor” – the root meaning of which is “to bring about change” – is by itself worth the price of admission.

The entire CL movement owes an enormous debt of gratitude to Pauline Tesler, a pioneering practitioner, trainer, and author, for helping to forge the tools that enable us to craft creative settlement solutions, and thus bring peace and hope into the lives of our clients.

⁵ For an excellent discussion of Collaborative Divorce and the use of interdisciplinary teams, see Pauline Tesler's second book, P. Tesler & P. Thompson, *Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on with Your Life* (New York: Harper Collins Inc., 2006).

⁶ For a discussion of the legal, ethical, and practical issues associated with forming a multidisciplinary practice, see D. Hoffman & R. Wolman, "[Multidisciplinary Practice: Three-Dimensional Client Service](#)" Massachusetts Psychological Association Quarterly, Summer 2004 (available at www.BostonLawCollaborative.com).