TIPPING TOWARD CIVILITY: DEVELOPING COLLABORATIVE LAW IN THE U.S. AND CANADA

By: Rebecca Glass
Cooley Godward LLP 101 California Street, 5th Floor
San Francisco, CA 94111-5800
Voice: 415-693-2000 Fax: 415-693-2222
Email: rglass@cooley.com ¨ www.cooley.com

"Never cut what can be untied." – Chinese proverb

I. Introduction

Collaborative law is an inspirational new model for "untying" conflict and resolving disputes. Though lawyers are increasingly using collaborative law in employment, commercial and other areas,1[1] the movement's origins and most proven successes, from both the practitioner and client perspective, are in family law. In that context, collaborative law is relatively inexpensive,2[2] promotes creative, "win-win" resolutions, facilitates civilized, productive meetings between divorcing spouses, and offers greater peace of mind to its participants. It hardly

---

1[1] PAULINE H. TESLER, COLLABORATIVE LAW 224 (Section of Family Law, American Bar Association 2001) (hereinafter "Tesler book").

2[2] In the U.S., the cost for an average collaborative divorce ranges from $2,000 - $5,000. *See* Rochelle Williams, "Collaborating Instead of Cursing," Marin Independent Journal, March 24, 1999. A Canadian practitioner estimates that the cost of completing a collaborative law case is about a half to two-thirds the cost of preparing a traditional case right up until the point of trial. "A Brief History of Collaborative Family Law," Quinte Collaborative Law Association, February 26, 2003, available at http://www.quintecollaborative law.org/QCLA_History.html, last viewed 4/19/03 (hereinafter "Quinte").

seems necessary to catalogue the evils of its main alternative, divorce litigation.3[3] For now, it should suffice to quote California Court of Appeals Justice Donald M. King: “Family law court is where they shoot the survivors.”4[4]

Just thirteen years old,5[5] collaborative law is rapidly catching on in North America. For some of us, however, the movement and its accompanying social good cannot penetrate the American legal system quickly enough. This paper was born from and thus reflects its author’s impatience at the lag between steady-but-early growth and all-out transformation. It will first describe collaborative law, contrasting it with both litigation and mediation; then it will trace the movement’s development in the United States and in Canada. Finally, it will draw upon recent sociological scholarship to help explain this development and postulate what needs to be done to achieve mainstream status for collaborative law.

A. Not Just a Catchy Name: Defining Collaborative Law6[6]

A “cousin” of mediation, collaborative law negotiation takes place outside of the courtroom. Its central tenet is that both parties’ lawyers stipulate at the beginning that both will withdraw from representation if either party threatens or

---

3[3] I will compare collaborative law and litigation in greater depth in Section IB.

4[4] Tesler book, at 3.

5[5] Nora Bushfield, “History and Development of Collaborative Law,” *available at* http://www.iahl.org/articles/04_History_and_Development.htm last viewed 4/19/03.

6[6] A quick proviso: due to space limitations, this section will be very cursory; readers are encouraged to seek out Pauline Tesler’s book for a more thorough description.

elects to go to court.7[7] If a party's lawyer learns that her client is negotiating in bad faith (for example, by misrepresenting relevant information), the attorney must withdraw from or terminate the case immediately.8[8] In addition, the parties, who must self-select the process,9[9] commit to avoid litigation and instead "[rely] on an atmosphere of honesty, cooperation, integrity and professionalism."10[10] All disclosure is voluntary, full, and honest,11[11] and all experts or nonlegal professionals work as consultants for the entire group. Should the collaborative process terminate, the consultants are disqualified as witnesses and their work product is inadmissible.12[12] All of these factors serve to promote good-faith problem solving, and to discourage the parties from "lightly electing to litigate."13[13] Moreover, because both parties have chosen to participate in this process, suspicion and paranoia about the other side's intent decline dramatically.14[14]

7[7] Tesler book, at xx.

8[8] *Id*. at 145.

9[9] *See* Pauline H. Tesler, lecture at Boalt Hall negotiations class (April 4, 2003) (hereinafter "Tesler lecture").

10[10] Tesler book, at 143, Form 4: "Principles and Guidelines for the Practice of Collaborative Law."

11[11] *Id*.

12[12] *Id*. at 144-45.

13[13] Pauline H. Tesler, "Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It," 13 Am. J. Fam. L. 215, 220 (1999).

14[14] *Id*. One fitting metaphor for the team-orientation encouraged in collaborative law is mountain climbing. At different points in the climb, the entire party is roped together for

There are three phases to a typical collaborative representation. In the first, the Opening Moves stage, the lawyer lays a foundation for successful representation by communicating a great deal of information to the client about the process.15[15] The lawyer holds out consistent, clear expectations that the clients can and should resolve the dispute in a civilized manner.16[16] These expectations include an explicit understanding that the lawyer will only represent the client's "highest intentioned self" (one able to take the long view), and not the client's emotional, "shadow" self (one flooded with intense feelings, which can destabilize and compromise the client's abilities to cope and plan).17[17] Also at this first stage, the lawyer makes the first contact with the other party or other lawyer; conducts a pre-meeting with her client to set the agenda for the first group meeting; and has a pre-meeting with the other counsel.18[18] The pre-meetings serve the general purpose of getting on the same page philosophically and setting a detailed agenda for the first group meeting (specifically what must

---

everyone's safety. Elbowing and shoving, trying to get every little advantage, and failing to pay attention to the agreed rules jeopardizes the whole expedition. *See* Jill Kramer, "Civilized Divorce," Pacific Sun 1, March 4, 1998. Working collaboratively is not only best for the group as a whole, but for each individual's enlightened self-interest. For other metaphors, *see* Tesler book, at 208.

15[15] Tesler book, at 55. *See also* Tesler book, at 137, Form 3: Collaborative Law Retainer Agreement for the kind of formal documentation occurring at this stage.

16[16] *Id*. at 57.

17[17] *Id*. at 30-32 (the terminology is Jungian). This distinction deviates greatly from a lawyer's role in litigation.

18[18] *Id*. at 58-60.

be addressed and what must be postponed).19[19] The final element of the Opening Moves stage is the first four-way meeting between the couple and their attorneys, which serves primarily to affirm the formal ground rules and informal understandings of the process.20[20]

The Mid-Game, or second, stage is characterized by carefully structured four-way meetings, and by pre- and post-meeting sessions between (1) a single attorney and her client, and (2) the two attorneys.21[21] The negotiating sessions in collaborative law are revolutionary because they enable six-way communication (see diagram of new paradigm, below), with maximum transparency, accountability, and creativity.22[22] As Pauline Tesler explained, the clients can actually speak to each other relatively freely, “without their lawyers clamping muzzles on them” . . . and attorneys can speak to the other lawyer’s clients. This maximizes the group’s potential for creative problem solving, and makes visible if any one party creates an obstacle to resolution.23[23] As noted earlier, the group may hire experts in fiscal, child

---

19[19] *Id*. at 60.

20[20] *Id*. at 62.

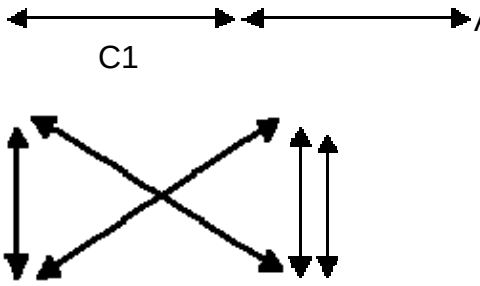
21[21] *Id*. at 65.

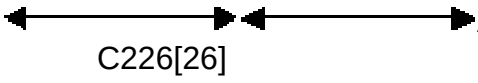
22[22] Tesler lecture.

23[23] *Id*.

custody, or mental health to consult at this stage.24[24] Most cases take between two and ten four-way meetings before resolution.25[25]

Dominant Paradigm New Paradigm:





C226[26]

24[24] One formal service, Collaborative Divorce, provides a prepackaged team of interdisciplinary experts. *See* Marcia Passos Duffy, "Collaborative Law Makes Messy Divorce Thing of the Past," The American News Service article no. 1516, 7/27/00. In other cases, the group recruits experts individually.

25[25] *Id*. at 66.

26[26] Diagrams from Tesler book, at 79.

In the End Game, the final stage of the process, the attorneys handle the technical tasks of preparing the court papers.27[27] Just as important, the End Game includes a final four-way meeting to help the clients reflect upon their successes, generosity and acts of grace; build into agreements tools for handling future disputes; and possibly provide a ceremonial marker, such as a champagne toast.28[28]

B. Collaborative law and litigation

If the process described above sounds nothing like litigation, that is because it shouldn't. Some of the most common complaints that family law litigants have about the courts are "overworked, insensitive judges," "time-consuming, costly paperwork requirements," "lack of privacy and control over proceedings and outcome," and "restriction of clients' ability to tell their stories because they are not relevant to legal issues."29[29] Family law lawyers bemoan their too-frequent role in litigation, of taking miserable and stressed-out clients and of "[overlitigating] their cases, exacerbating intrafamilial stress when [they] could be calming it."30[30] Tesler asserts that family litigators do this not

---

27[27] *Id*. at 69.

28[28] *Id*. at 70-71.

29[29] Pauline H. Tesler, "Collaborative Law: A New Paradigm for Divorce Lawyers," 5 Psychology, Public Policy, and Law 967 (note 13, 970).

30[30] Tesler, "Collaborative Law: What It Is," at 216.

because they are bad people, but because they misconstrue a lawyer's duty of zealous representation to mean a directive to act as a hired gun, rather than an engaged moral agent working towards the client's previously-identified "highest intentions."31[31] She explains, "if your client had been able to solve it you wouldn't be there, so being your client's alter ego won't solve it."32[32]

Collaborative law is also different from even a successful settlement negotiation that takes place in the context of litigation. The primary difference is that in the latter case, the parties only manage to settle because they first doggedly prepare for trial and "wave a big sword." By the time they settle (often on the courthouse steps), the process is extremely adversarial.33[33] Accordingly, the parties have not only spent significant money to prepare for trial, but they have polarized their positions and undercut their chances for a civil, ongoing relationship. Litigation still has a place for clients who can or will not reach agreement,34[34] but for the vast majority of couples, court is simply not the ideal venue for resolving the intricate, personal, emotional issues surrounding the dissolution of marriage.

C. Collaborative law and mediation

31[31] Tesler book, at 160.

32[32] Tesler lecture.

33[33] Jill Kramer, "Civilized Divorce," Pacific Sun 1, March 4, 1998.

34[34] Tesler book, at 25.

Clearly, collaborative law has far more in common with mediation than it does litigation, but there are some important distinctions between the two ADR techniques. As one commentator said, the goals are the same, but the roles are different.35[35] Like mediation, collaborative law is private, relatively civilized, invokes the help of a trained dispute resolution professional, and lends itself to customized resolutions and greater compliance.36[36] The first significant difference, however, is that in mediations there can be a lack of built-in advice and advocacy during the negotiations;37[37] in collaborative law, the lawyers work alongside their clients at the center of the negotiation, rather than on the sidelines.38[38] Second, in mediation, it may be more difficult for a single neutral (who does not want to appear biased) to handle imbalances in emotional state, power, or sophistication between the parties; if the mediator cannot remedy the problem, an unfair agreement may result.39[39] In collaborative law there is no neutral, and it is standard for counsel to work with her client to level the playing field.40[40] Indeed, when a client acts unreasonably, it is part of the collaborative lawyer's job to work with the client privately to bring her around to a more rational

---

35[35] Andrew Schepard, "Collaborative Law – Divorce," 227 N.Y. L. J. 89 (May 9, 2002).

36[36] *Id*. at 8-9.

37[37] Tesler, "Collaborative Law: A New Paradigm," at 973.

38[38] Tesler book, at 9.

39[39] Tesler, "Collaborative Law: A New Paradigm," at 973.

40[40] Tesler book, at 97.

and enlightened position. In no other model is that part of the lawyer's role.41[41] Third, in mediation, the lawyers' roles in ensuring informed consent can come into tension with the mediator's emphasis on compromise. The lawyers in mediation have no direct responsibility for bringing the parties to settlement, and because their role is to probe for weaknesses and omissions in the agreement, they can destabilize the process; this is particularly the case when the mediator fails to incorporate the lawyers effectively.42[42] Because of the structure and orientation of collaborative law, the attorneys fail to achieve the client's goal if they do not actively help to promote a settlement, and creativity is enhanced.43[43] Finally, to the extent that even a successful mediation takes place close to the time of trial, there is a greater risk of damage to ongoing relationships than in the collaborative process, which comes before any resort to litigation. Mediation has been an extremely positive development in the resolution of family law disputes, but it is not a panacea. Collaborative law is not a panacea either, but it offers some strengths where mediation is lacking. The necessary question is: given collaborative law's vast potential, what are the keys to its development?

II. Development of the Practice

41[41] Amy E. Bourne, "Some Lawyers Use What Sounds Like Psychotherapy, Others Simply Avoid Litigation and Embrace Mediation and Cooperation," S.F. Daily J. Aug. 3, 1999.

42[42] Tesler, "Collaborative Law: A New Paradigm" at 973.

43[43] Tesler book, at 97.