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Collaborative Law, Collaborative Divorce & Collaborative Mediation:

Building Cooperation between Professionals and Separating Spouses

By Barbara Landau



Collaborative Family Law (CFL), Collaborative Divorce and Collaborative Mediation are three relatively new choices to assist separating couples. These

choices share a common goal with mediation, namely, client empowerment. Collaborative practitioners build on the communication and process skills of mediators, as well as their commitment to an interest based approach. When the problem solving skills of lawyers are added to the mix, these choices become attractive options for clients.

Collaborative Family Law (CFL)

CFL represents a paradigm shift from the traditional role of a lawyer. Fundamentally, CFL blends interest based negotiation theory and mediation skills with the ability to problem solve. The result is that collaborative lawyers act as legal advisors, respectful role models and coaches for their clients. The clients are encouraged to take the primary role in negotiating agreements that they believe will meet their own and their children's needs. The lawyers' knowledge and creative problem solving skills are directed at reaching an integrative solution that everyone can say 'yes' to and that the parties feel committed to uphold.

Steps in the Collaborative Family Law Process

The process begins with an initial meeting between lawyer and client in

which a range of options are discussed for addressing the issues in a separation or divorce. The client learns that CFL is not adversarial nor is it litigation focused. In fact, both clients and their lawyers must sign a Collaborative Participation Agreement at the outset, agreeing not to litigate if an impasse is reached. What this means is 100% of the lawyers' and clients' effort is directed at finding a win-win solution. Should that not be possible, the lawyers must withdraw and turn the matter over to counsel from a different firm.

If both clients select CFL during a meeting with their own counsel, then a series of 4 way meetings with clients and counsel are scheduled.

Before the initial 4 way meeting, the lawyers get together to share general observations about their clients (e.g. How are they adjusting to the separation? What issues need to be addressed?), agree on logistics and agenda for the first 4 way meeting (including how it will be conducted), suggest conflict management strategies, and to develop a positive working relationship. It is crucial to the success of the collaborative process that the lawyers create the mindset of a "team effort." While each lawyer is still in the role of an advisor and advocate for his/her client, the goal is not "winning over" the other party, but "with" the other party, in a way that benefits all affected family members.

Prior to the 4 way meeting, each client meets with his/her lawyer to prepare. At this stage, it is most important to ensure the terms of the Collaborative Participation Agreement are understood, including that both lawyers are obligated to withdraw if the matter goes to court, that full and frank disclosure is required as soon as possible, and that good faith negotiations are essential. Then, the agenda for the 4 way meeting is discussed and the issues and priorities are clarified. Unlike a traditional process, the focus is not on the preparation of legal arguments, but rather on explaining the interest based approach to constructive problem solving, the importance of respectful communication, and how to utilize the tools of Active Listening and "I" Messages.

In a collaborative process lawyers encourage the clients to take the lead in actively seeking a win-win outcome.

It is important to clarify the roles of the lawyers and clients in a collaborative process. In the traditional process, lawyers usually speak on behalf of their clients. In a collaborative process lawyers

encourage the clients

to take the lead in actively seeking a win-win outcome. Lawyers need to explain to their clients that they will address questions and make supportive or validating comments to the "other side" in an effort to build a positive working environment. Clarifying expectations in advance can prevent misunderstandings and disappointment.

Trois nouvelles approches de collaboration peuvent être utilisées lors de séparation ou de divorce. Elles ont toutes pour objectif de remettre entre les mains des parties le pouvoir et le contrôle du règlement du différend. La première approche est celle de la collaboration appliquée au droit de la famille. Par cette approche, les parties et leurs avocats signent une entente de collaboration par laquelle ils s'engagent à tout faire pour trouver une solution amiable. S'ils ne règlent pas et que le différend se retrouve devant les tribunaux, les avocats s'engagent à se retirer du dossier et à laisser un autre cabinet représenter le client. La clé du succès de cette approche est le travail de collaboration des avocats et des parties. Alors que le mandat des avocats est toujours de représenter leurs clients, ils sont liés par un autre code de conduite qui encourage la résolution constructive et décourage l'hostilité, les procédures écrites agressives, les menaces de litige, les approches « c'est à prendre ou à laisser » ou « c'est notre dernière offre », ou encore l'intimidation. La seconde approche est basée sur l'implication de multiples intervenants dans le règlement d'un divorce. Cette façon d'aborder un divorce peut être utile lorsque les parties et leurs enfants ont besoin d'un support multidisciplinaire. Le troisième approche, dite de médiation en collaboration (« collaborative mediation »), est une approche par laquelle les parties consultent d'abord un médiateur et débudent le processus sans conseiller juridique. Lorsque l'implication d'un conseiller s'avère nécessaire, on peut impliquer des avocats qui adoptent une approche de collaboration. Ces trois approches sont plus intéressantes tant pour les clients que pour les avocats. Tous les types de différends qui impliquent une relation à long terme gagneraient à utiliser cet éventail d'approches de collaboration.

Each lawyer may also recommend that his/her client take advantage of supportive counselling in relation to the separation or consider the use of impartial professionals for addressing some of the family law issues (e.g. a mediator for parenting issues, an actuary to value pensions).

At the first four way meeting the Collaborative Participation Agreement is read, discussed and signed by both lawyers and clients. Before substantive issues are addressed, the participants agree on guidelines for respectful communication (both within and between sessions), and a process for resolving conflicts or addressing potential impasses. They also agree to protect the children from being caught in the middle of their disputes.

Then, the issues are clarified, prioritised and any urgent matters addressed. Agreement is reached on the documents needed for disclosure, a reasonable time frame is set, relevant impartial professionals are added to the collaborative team with everyone's approval and tasks are assigned to each participant to complete prior to the next 4 way meeting. One of the lawyers takes notes of the agreements reached and prepares a summary, including the agenda for the next 4 way meeting. For example, it may be that the parties engage a mediator to create a parenting plan or real estate agents to appraise the home, so that all relevant appraisals are ready for the appropriate meeting. Clients no longer engage partisan experts who surprise the other side with values that appear "optimistic," assets do not mysteriously disappear and insurance proceeds do not find their way to pet canaries until both parties agree that all reasonable family responsibilities have been met.

In between 4 way meetings, the lawyers review the progress being made both with their clients and with each other and additional 4 way meetings are held until an agreement satisfactory to the participants is reached.

While the role of the lawyer is still to represent his/her client, collabora-

tive lawyers are bound by special Rules of Conduct that encourage constructive problem solving and discourage hostile correspondence, angry affidavits, threats of litigation, take it or leave it offers or other intimidating or power based tactics. They are required to withdraw if their clients do not act in good faith or if litigation is pending. Therefore the lawyers, as well as the clients have a considerable investment in a successful resolution.

Collaborative Divorce

A Collaborative Divorce involves an integrated, cross-disciplinary team model for delivering professional services to divorcing clients. It is the legal equivalent of a multi-disciplinary team in the mental health field. In cases that require a range of expertise, for example, to act as communication coaches, or to assist parents with developmentally appropriate parenting plans, or to value a business, the family can benefit from the co-ordinated efforts of several professionals, all acting in an impartial capacity, to resolve their outstanding issues in a non adversarial manner.

While other professionals may be added to a CFL case, the Collaborative Divorce tends to be more of an ongoing working relationship between team members rather than an ad hoc arrangement.

A process similar to CFL is followed with respect to the role of the lawyers, but others assist as needed and as determined by the person who is acting as a "case coordinator." As with a CFL case, those professionals who are assisting the couple must agree to withdraw if the matter goes to court.

Collaborative Mediation

Collaborative Mediation is a process that begins with clients selecting mediation as their preferred method of dispute resolution. These clients frequently have not yet seen a lawyer or have had minimal contact and not yet retained counsel. They are usually

anxious about involvement with lawyers, fearing that their hopes for a non-adversarial resolution will be disappointed. They are worried about losing control of their decision making and prefer a process that encourages them to design their own terms for separation.

Collaborative Mediation offers this opportunity. As mediators we are obliged to send people for independent legal advice. Now we can include lawyers who are trained in Collaborative Law under the umbrella of a Collaborative Mediation Agreement and have the mediator, both clients, and both counsel committed to the same non adversarial process.

In some cases the mediator will assist the parties to mediate all issues (comprehensive mediation) and the lawyers will attend a preliminary five-way meeting to clarify roles and time lines and will not meet again unless a difficult issue arises, an impasse is reached, or the Memorandum of Understanding is ready for review by the lawyers. In other cases, the mediator may assist with the parenting plan and then transfer primary responsibility for financial issues to the collaborative lawyers. In any case, all will have signed a Collaborative Mediation Agreement.

Advantages of Collaborative Models

Most clients that I see retain mediators before they have lawyers. Their prime motive for seeking mediation is frequently to avoid an adversarial battle. The client's concern is almost always that if lawyers are involved, they will end up in the "divorce from hell," it will undermine their ability to

cooperate with their ex-spouse, it will cost a fortune, and the psychological stress will have a terrible impact on the family. Despite this resistance, mediators are subject to a Code of Conduct that requires that they make every effort to ensure that their mediation clients are protected by having independent legal advice. While most mediators comply with this requirement, many acknowledge that their worst nightmare is that mediation clients, who have managed, with difficulty, to set aside their anger and hurt feelings, will be drawn back into an adversarial battle by their lawyers.

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Collaborative mediation offers the best protection for the clients via referral to lawyers who have been trained in CFL. This is also the best way for mediators to be sure that the clients will complete an agreement cooperatively. CFL and Collaborative Mediation offer many of the benefits of traditional mediation, but with the additional safeguard of the

lawyers' presence for high conflict separations.

One of the guidelines of the collaborative approach requires parties to make full disclosure of all relevant information at the earliest opportunity. This has the effect of building trust between the parties, an important element in any successful settlement.

If special expertise is needed, a single agreed upon expert can be jointly retained. This saves the client money and minimizes any hostility, caused when one parent feels excluded from important decisions or that they have been presented with a "take it or leave it deal."

From the lawyer's perspective, the collaborative approach makes the

practice of family law far more appealing. Few lawyers experience pleasure knowing they have "won" a case, and in the process done significant harm to future relationships with children, grandparents and friends. Family Law is very stressful for most lawyers. Clients, who are extremely unhappy and fearful about their future often take their lawyers along on the roller coaster ride.

Collaborative lawyers and clients stand to benefit from the involvement of mediators. What mediators can gladly offer to Collaborative lawyers are clients, along with the promise to the clients that their case will not end up in court! Also, mediators have special expertise in communications skills, the interest based negotiation model and the needs of children.

Collaborative Law has a promising future. In addition to its use in the context of Family Law, it will likely be applied to other areas where there is a need to preserve ongoing relationships or the cooperation of parties is required, for example, estate matters, partnership disputes, environmental issues, victim offender cases, and neighbourhood disputes. ♠

For more information on collaborative law in Canada, visit the Web site for The Collaborative Law Network, www.collaborative-law.ca

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