

COLLABORATIVE LAW

A PRACTITIONER'S PERSPECTIVE

BY DAVID A. HOFFMAN

A SIGN OF THE SUCCESS OF COLLABORATIVE LAW (CL)—one of the most important and, in my view, worthwhile developments in law practice in recent years¹—is the sophistication of the critiques it has attracted. In this issue of *Dispute Resolution Magazine*, John Lande warns of the “perils” of CL, while also lauding its promise.² Earlier this year Julie Macfarlane published a thoughtful and elaborately researched study of CL based on interviews with clients and lawyers in 16 CL divorce cases.³ Another critique, by attorney Gary Young, who teaches professional liability law at the University of Wisconsin, focuses on the malpractice risks that he sees in CL.⁴

For those of us who engage in CL practice on a daily basis and find it to be enormously valuable for clients seeking nonadversarial resolution of conflict, some of these critiques hit a raw nerve. Although CL is well-established in some areas of the country (for example, Texas and North Carolina, where CL statutes have been enacted, and California, where CL groups abound), it is still on the cutting edge of law practice in much of the United States, and many lawyers and judges remain skeptical about CL.

I recently appeared before a judge to present a divorce agreement in a CL case, and he said, “I don’t believe in collaborative law.” I was tempted to reply with the story about the Maine farmer who was asked if he believed in infant baptism. “Believe in it?” the farmer said with astonishment. “Hell, I’ve seen it done.”



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Responding to criticism of CL

Some CL practitioners are concerned that their efforts to promote an important, and now widely-used, alternative to litigation are being unfairly undermined by criticism based on either a thin slice of data or no data at all. Many of these practitioners wonder whether the more theoretical critiques of CL exemplify the story told about economists – namely, that they cannot see something working in practice without wondering if it also works in theory.

My suggestion to fellow CL practitioners is to cull through the criticism for those insights that will improve the practice of CL—and I believe there are many. As Ben Franklin once said, “Critics are our friends, [because] they tell us our faults.” Indeed, the CL movement should count itself fortunate that several of its critics are committed to alternative methods of dispute resolution and are eager to suggest solutions to the problems they have identified.

At the same time, we need to thoughtfully engage CL’s critics on those points where their criticism is misguided. For example, in a recent issue of the ABA’s *GP/Solo Law Trends & News*, two lawyers—both of them relatively new to the practice of family law and neither of them engaged in CL practice—opine that CL is a “welcome addition to family law” but only in “the rare event when both parties are equal negotiators and have equal access to information.”⁵ Of course, one of the reasons people hire lawyers—both CL and non-CL attorneys—is to compensate for their inequality as negotiators. Moreover, it is an elementary principle of CL practice that the parties freely share relevant information; conscientious CL attorneys will not sign a CL process agreement without ascertaining, in advance, the willingness of the other party and his or her lawyer to honor that principle.

THE CL PROCESS

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Points of critique

The most thoughtful critiques of CL, in my view, make the following points.

1. Pressure to choose CL. Both Macfarlane and Lande express concern that some CL attorneys believe in CL so strongly that they will persuade clients to use CL even though the client might be better served by some other process. Both authors question whether clients are sufficiently informed of the risks. The Massachusetts Collaborative Law Council (MCLC) has developed a suggested form of CL Process Agreement (CLPA) that lists some of the risks,⁶ and an article distributed at MCLC trainings lists the disadvantages, as well as the advantages, of CL.⁷ But not all CL literature presents a balanced perspective, and it should.

The dilemma for CL advocates is that we are simultaneously:

- seeking to persuade the powers-that-be that CL is the greatest thing since sliced bread, or at least since mediation
- marketing CL to attorneys and other professionals who may be looking to join a CL practice group, and
- communicating with potential clients, who need to make well-informed decisions about what process to use.

If CL marketing has overshadowed informed consent on some CL Web sites and other communications, it is time to shift our focus.

The International Academy of Collaborative Professionals (IACP) Ethical Standards for Collaborative Professionals requires practitioners to inform clients of “the full spectrum of process options . . . in order that the client(s) may make an informed decision.”⁸ Most of the CL attorneys that I know also serve as mediators, and many still litigate. In my experience, CL practitioners do a far better job of explaining process options to clients than other lawyers because most have

direct experience in litigation and mediation, as well as CL, and many are willing to provide any of those services in an appropriate case.

2. Pressure to continue with CL. The sharpest criticism of CL is directed at the disqualification provision of the CLPA—the agreement by the parties and their counsel that other attorneys will be hired if CL fails to produce a resolution. Macfarlane found that some clients—a minority—felt trapped because, once they had invested time and money in CL, they did not want to switch to litigation. It is noteworthy, however, that none of the clients that Macfarlane studied said that they wished, in retrospect, that they had chosen litigation instead of CL. I have been handling CL cases for five years—a few of them lasting more than two years but most of them resolved in a few months—and I have never had a client who completed the CL process say that, in retrospect, litigation would have been preferable. This is consistent with empirical data gathered by attorney William Schwab in an excellent study of CL, in which high levels of satisfaction with CL were reported by clients, about 45 percent of whom said the disqualification provision kept them at the table.⁹

The disqualification provision lies at the heart of CL because it simultaneously aligns the parties’ interests in settlement and creates a safe container for settlement discussion. Lande speculates that unscrupulous parties could abuse the CL process to stall negotiations. However, my experience has been that most CL cases proceed far more quickly than litigated cases, and litigation provides far more effective tools for complicating, stalling, and wearing down an opponent.

One of the lessons of experience, however, for CL practitioners is that we should consider screening out cases where the parties lack the resources to hire a second pair of attorneys. Although I would not say that CL should never be used in such cases, CL attorneys need to warn clients with modest resources in the clearest possible terms of the risks presented by an impasse on a critical issue. Of

course, even when impasses occur in CL cases, a number of options remain. CL attorneys often use mediation, neutral experts or case evaluation to break a deadlock. Even arbitration, in rare cases, has been used to resolve a discrete issue. Moreover, if the CL process ends and a court appearance is needed, legal services attorneys and pro bono counsel through bar associations may be available.

In family cases, the question for CL practitioners and critics alike is whether, on an ex ante basis, a family is better served by CL or the alternative. Although the answer will depend on a number of factors, one of the most poignant lessons of research in family systems is that parental conflict—even more than divorce itself—takes a terrible toll on children. A parent’s decision whether to use CL, which deescalates parental conflict by bringing parents to the bargaining table with counsel, has to take into account (a) the potential cost of hiring new counsel and (b) whether that risk is outweighed by the likely benefit to the family (given CL settlement rates of more than 85 percent)¹⁰ of an amicable, negotiated resolution. Schwab found that 76 percent of the CL clients he surveyed decided to use CL because of concern about the negative effect that litigation might have on their children and their ability to co-parent successfully.¹¹

3. Pressure to settle. Macfarlane and Lande criticize CL practitioners for allegedly imposing a “harmony ideology” on some clients. However, experience with my own CL cases and frequent discussions with CL practitioners in the U.S. and Canada suggest that there is often as much forceful bargaining in CL cases as in other cases. The primary difference is that CL practitioners have (a) training in interest-based negotiation, problem-solving and collaborative communication skills, and (b) clients who have made a commitment to negotiating settlement terms without the damaging drama of courtroom accusations and counter-accusations. Thus, vigorous bargaining occurs within a safe container.

Macfarlane also expressed con-

cern about CL attorneys—again, a minority in her study—who may impose their own views about “healthy family transitions.”¹² According to Lande, clients “may feel pressured to accept agreements that the lawyers believe are in the interest of the whole family.”¹³ It has been my experience, however, that good lawyers, whether they practice CL or not, generally avoid dictating to clients what is best for their children. It is unfortunate that Macfarlane’s study did not include a control group involving non-CL attorneys for comparison. Had she done so, I think she would have found that CL-trained attorneys tend to be more responsive to their clients’ interests and perspectives about family issues than other lawyers, because CL training teaches lawyers to explore the clients’ underlying interests.

There is, to be sure, some pressure to settle because of the cost of hiring new counsel if litigation is necessary. There is nothing wrong with such pressure, however, if the parties have chosen—freely, mutually and in an informed manner—to enter such a process. Mediation involves pressure as well—the parties make an investment in educating the mediator and that investment is lost if the negotiations fail. Moreover, the parties often expect the mediator to exert some pressure on them to settle.¹⁴

The concern about settlement pressure arises in part from the fact that CL attorneys are seeking to establish or protect their reputation among CL colleagues as reasonable negotiators while, at the same time, they owe a duty of complete loyalty to the clients’ interests. In my experience, CL attorneys generally do a good job of balancing these two objectives because, in reality, both objectives point in the same direction. CL clients are looking for a negotiated settlement, and they realize that their lawyers need to negotiate reasonably to get one.

4. The sanctity of the attorney-client relationship. The most fundamental ethical concern articulated by CL’s critics goes back to the disqualification provision—the contractual duty that

the CLPA imposes on an attorney to withdraw in the event of litigation. How, these critics ask, can an attorney permit himself or herself to have contractual duties to the opposing party and that party’s lawyer? The answer is that lawyers agree to similar provisions with some frequency when they represent multiple parties. A lawyer representing defendants A, B and C in a civil suit is permitted to have a joint-defense agreement that gives A primacy—A can force the lawyer to jettison B and C if their interests diverge, and for that matter so can the plaintiff if his or her counsel can show that the defendants’ lawyer has a conflict of interest.

While it is true, as Scott Peppet says, that CL gives one party the ability, in effect, to fire the other party’s lawyer,¹⁵ that party can do so only by firing his or her own as well. The risk of losing one’s lawyer—whether because of illness, death, changes in the lawyer’s practice, dissatisfaction with the lawyer’s performance or disqualification—is, in any event, unavoidable.

Nor is this risk uncommon. For example, when a lawyer represents a client in a transaction that results in litigation, the client may decide to retain the lawyer to handle the litigation because of the lawyer’s knowledge of the situation. This saves the client the expense of educating a new lawyer. However, one of the factors in making that decision is whether the lawyer’s first-hand involvement in the transaction could make the lawyer a necessary witness, in which case the opposing party could move to have the lawyer disqualified. Such motions occur in some cases even after the trial has started. In situations of this kind, the opposing party has even more power than in CL, because he or she can move for disqualification without losing his or her own lawyer.

Even so, CL runs against the grain of a legal culture that assigns enormous value to the attorney-client relationship. The right to counsel is protected by the Constitution for criminal defendants—even if they are indigent. Civil litigants also have the right to legal representation—but only if they

can afford counsel. There are, in addition, ethical rules prohibiting lawyers from limiting clients’ choice of counsel through noncompete agreements, and evidentiary rules that protect as virtually sacred the communications between lawyer and client. But these are rights that can be waived. And just as there is nothing unethical about a knowing waiver of attorney-client privilege or an informed decision to sign a joint-defense agreement, there is nothing unethical about lawyers and well-informed clients signing a CLPA.

To be sure, it is no small step—given our society’s emphasis on the value of the attorney-client relationship—for two parties to agree that the cost of a negotiating impasse will be to relinquish their initial choice of counsel. But it is not unusual—particularly in divorce cases—for clients to switch lawyers if their case is at a standstill.

Consider the following situation: Two business partners have a falling-out. Each goes to a transactional lawyer for representation, even though the partners know that a bargaining impasse will mean they have to hire litigators. There is nothing unethical about such an arrangement. What if Partner A hires a transactional lawyer and Partner B hires a general practitioner who does both transactional work and litigation. Again, there is nothing unethical about the fact that Partner B can, by going to court, effectively “fire” Partner A’s lawyer. This is simply the result of a choice that each partner made. However, CL’s critics seem to be saying that if these two partners knowingly hire general practitioners who agree to serve only as transactional lawyers, such an agreement may be unethical.

This makes no sense because the fundamental purpose of our rules protecting the attorney-client relationship is protection of the client and client-choice. If a properly-informed client wishes to execute a CLPA, it would be paradoxical for the attorney to tell the client “Sorry, we know better.”

5. Other ethical considerations. Critics of CL have questioned whether there are unresolvable tensions

between the CL commitment to share relevant information and a lawyer's ethical duty to maintain the confidentiality of client secrets. Again, the answer is informed consent—lawyers frequently ask clients in mediations and other negotiations to consider disclosing information to promote settlement. The difference here is that the CL process requires an advance commitment, whereas negotiation theory suggests that it is safer to disaggregate a negotiation into a series of steps so as to test the other party's willingness to reciprocate information sharing. Accordingly, CL practitioners would be well-advised to consider meeting once or twice with the other parties before signing a CLPA—at least in those cases in which the lawyers are not sure that such reciprocity will be forthcoming. But the bottom line is that the rules of legal ethics permit lawyers to make an agreement to exchange information so long as the clients understand what the disclosure obligation entails.

To date, CL practitioners have obtained three advisory ethics opinions regarding CL: formal opinions from Kentucky and North Carolina,¹⁶ which generally approve the use of CL, and an informal opinion from a member of the Pennsylvania Bar Association Ethics Committee, which is more equivocal. All three advise CL practitioners to determine on a case-by-case basis whether CL is appropriate. There are, of course, ethical conundrums in every form of professional practice, and the IACP Ethical Standards for Collaborative Practitioners will assist CL attorneys in addressing such questions.

CL is reshaping the legal landscape

Just as the growing use of ADR in the 1980s and 1990s transformed the way lawyers handled litigation matters, CL is beginning to transform the way lawyers negotiate. One of the hallmarks of CL is the use of four-way meetings as the primary forum for negotiation. It is common CL practice for such meetings to be held alternately in each lawyer's office, with the visiting lawyer preparing a memo sum-

marizing the meeting. CL attorneys consult with each other and with their respective clients between meetings and jointly develop agendas for each meeting. After a case is resolved they discuss what went well and what could have gone better. Even in my non-CL cases, I have seen greater use of these promising collaborative techniques.

Although not every case is suitable for CL, I have seen CL lawyers adopt in some cases what attorney Mark Perlmutter describes as “cooperative ground rules”—instead of the conventional competitive ground rules “We shall use every means permitted by law to prevail over the other side:”

We shall exchange enough information to permit a reasonably accurate evaluation, make good faith efforts to settle, and failing that, afford each other a fair opportunity to present the merits.¹⁷

“Cooperative law” is not CL, but if lawyers and clients can make a credible commitment to cooperative rules, they can achieve some of the same benefits as CL.

Finally, I have seen the growth of CL create “reputational capital” for those CL attorneys who get training and get involved in state and local CL groups. Attorneys often view their reputations as their most valuable professional asset. CL organizations provide opportunities for training, networking and discussion of practice-related issues, and thus enable attorneys to acquire a credible reputation as collaborative negotiators, even in transactional work in which no CL agreement is needed. Such a reputation is a valuable asset when clients are looking for nonadversarial representation.

CL was first practiced in Minnesota in 1990. There are now CL groups in 33 states in the United States and most of the Canadian provinces. Fifteen years from now, there will likely be CL groups in every state in the United States, and CL will become, like mediation, a mainstream form of dispute resolution. Even Macfarlane predicts, in the conclusion of her study, that, with “careful attention

to [its] core values and continued self-scrutiny and external evaluation,” CL “will flourish.”

Endnotes

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