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Collaborative Practice: Non-Adversarial Issue Resolution

A Fable (Sort of)

Once upon a time, two people were fighting over a lemon (or a marriage that was a lemon–take your pick). Each of them wanted sole custody of the lemon.

They went to their neighbor, a wise old judge, for advice on resolving the dispute.

"Well," said the judge, "if you asked me to decide the matter for you, I'd cut the lemon in half and then you'd each get exactly the same thing."

"But I want more than just half a lemon!" both people exclaimed in unison.

"Hmmm," said the judge. "You know, before I became a judge, I was a collaborative practice lawyer. I want each of you to tell me why you want this lemon. Perhaps we can find a better way to resolve this."

"Well, I want the lemon zest to bake cookies," said the first person.

"I want the juice to make lemonade," said the second.

"I think I can help you," said the smiling judge, handing a lemon zester to the first person and a juicer to the second.

And each person got almost everything they wanted (especially the wise old judge, who stopped worrying that these people would show up in his courtroom in a couple of months with a rotten lemon he'd have to cut in half).

What Is It?

Collaborative practice, or CP, is a voluntary dispute resolution method, which, like mediation, is based on finding issue resolution not in court, but outside the traditional adversarial venue. Like litigation, it relies on two specially trained advocates trying to obtain the best possible result for their clients. Unlike litigation, counsel are retained essentially for one purpose: settlement. If resolution of all issues eludes the parties in a collaborative case, neither lawyer may represent his or her client against the other party in any future adversarial proceeding. A party desiring to take an issue to court must then retain litigation counsel for that purpose. The collaborative case begins with a signed agreement not to go to court, executed by both parties and both lawyers.

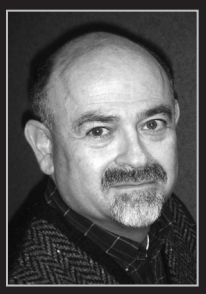
Why Collaborative Process?

There is a certain New Age mystique that sometimes attaches to the process. Practitioners, now in excess of 100 statewide, have been accused of closing collaborative four-way meetings with a chorus of "Kumbaya." The comments, while inaccurate, betray a suspicion that no real client representation can come from a setting that is impliedly so "warm and fuzzy." But nothing could be further from the truth.

Collaborative Practice Is a Coldly Calculated, Pragmatic Dispute Resolution Mechanism

To do it well requires as much skill as any task a lawyer does. The goal is simple: achieve the best possible settlement for this particular client on these particular facts, without regard to the constraints of the judicial process imposed by statute and case law. The clients themselves decide the terms of their decree; the clients are the sole judges of how well the process succeeds—or fails.

CP was created by Stu Webb, an Edina lawyer, in a perfect illustration of necessity engendering invention. After nearly 20 years in family law, he was fed up with the usual "dog and pony show" and had actually registered for college classes leading to a different vocation. In discussions with close colleagues, he determined to give family law another chance, but only if it was approached a certain way.



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Stu required:

- No court appearances whatsoever to resolve issues
- A disqualification of the attorneys if court proved necessary
- A reframing of the case context—a problem to be solved, rather than a battle to be fought
- Complete, informal, voluntary discovery
- Respect and civility from—and for—all parties and attorneys

It was paradoxical: simultaneously complex and simple. First, the hard part: by removing a judge or other third-party fact-finder and agreeing to place themselves in each other's hands, the parties have to call on abilities and values probably not exhibited in the run-up to the divorce. Parties discover that, initially, the prospect of making peace seems more daunting than making war. The process utilizes many of the same effective dynamics involved in a good mediation:

- respectful listening (even in the absence of agreement)
- the use of "I statements" to express feelings
- an avoidance of characterizing or "imputing motive" to one's spouse
- not revisiting ancient relationship history for cathartic purposes

Most conspicuously, the technique of positional or competitive bargaining is dropped in favor of fact-based, interest-based negotiations. Drawing lines in the sand is given up in favor of explaining *why* a party is seeking certain provisions. It occurrs that, often, parties are using the wrong labels for concepts and goals they wish to achieve.

So How Does It Work?

A client interviewing a collaborative lawyer will, of course, receive a thorough overview of process options: do-it-yourself, mediation, collaboration, litigation, "other." A collaborative practitioner meeting a prospective client for the first time approaches the interview a little differently than in a traditional case. The collaborative interview will involve active listening to the client's situation and concerns. The lawyer tries to obtain a feel for the relationship dynamics and the client's goals for the representation, rather than collecting "facts" that help pigeonhole the "case" as primarily a "maintenance," "child custody," "asset division," or other matter. Experienced family law counsel, regardless of process, often will do this anyway, but eventually the discussion turns to "facts" and categorization. It is an essential response to a system that relies on in-the-box pigeonholing, on superimposing a digital organization on an analog experience, if you will. If the client is interested in collaborative process, the lawyer typically will furnish information to assist the client in enrolling the spouse.

Unlike divorce itself, a collaborative process requires two parties (and lawyers) committed to the concept. When properly done, a collaborative divorce usually will be resolved in less time than a litigated case and cost significantly less money. The overall level of conflict is lower, which means any children usually are less affected by the proceedings.

Another of the attractive aspects of CP for a couple actively participating in it is that it is safe. Safety is defined not only in terms of the confidentiality that applies to other alternate dispute resolution (ADR) processes (such as mediation). It also derives from the fact that a client really cannot say "the wrong thing" and "screw up" the divorce. Collaborative counsel point out that nothing in the client's situation will change until and unless both parties agree on what that change will be. They distinguish this from a temporary hearing where residence and finances can be significantly altered by a third-party decision.

The collaborative process itself, against this background, is straightforward. Clients are given an orientation by their collaborative counsel that often can be two hours or more. Since the process proceeds in accordance with carefully developed protocols for attorneys, mental health professionals, financial professionals, and mediators, practice has become standardized in terms of the explanations clients will hear. At the orientation, the lawyers will familiarize the clients with the ground rules and the "participation agreement," which is a statement of principle as much as a commitment not to go to court. At the first four-way meeting of both spouses and their legal counsel, a participation agreement will be reviewed by the parties and counsel (often, it is read aloud) and signed. A joint petition is executed, invoking the protection of the restraining

order recited in the standard summons (and incorporated into the participation agreement).

Once the participation agreement is signed, counsel begin the important work of identifying the common and individual goals held by this couple. Once the goals have been identified, counsel and clients will identify all significant facts—significant to *all four* of them. Lawyers will note the presence or absence of legally significant information and fill in any blanks with their clients' help. Clients will demonstrate their personal priorities as they list the facts necessary for their decision making. Once all information—including information normally uncovered in formal discovery processes—is on the table, the couple begin the "blue sky" exercise of generating options for dealing with these facts and achieving their goals. And, for every option they consider utilizing, there is a full discussion of the natural and probable consequences which will flow from that choice. The couple thus can weigh the likely consequences before deciding on a course of action.

Only after their options are fully identified, do the couple—with their attorneys' assistance—bargain for the goals they wish to achieve. How do I get the lemonade without taking the peel, or vice versa?

The actual work of issue resolution is done in a series of four-way meetings, although an interdisciplinary process can involve additional professionals in the discussions simultaneously. The guiding principle is that, to achieve either common or individual goals, the parties must treat each other respectfully. They really have no alternative if they are to stay in the process. Once they forego the court system and agree to adopt only resolutions with which they both agree, how else are they to influence their spouses? Lawyers are continuously amazed by the discoveries made by their clients, and themselves, in these meetings. "I never knew you felt like that!" is a phrase often heard.

For example, recently, after an exhaustive examination of family finances disclosed that a wife in a long-term marriage probably would not need spousal maintenance in view of her employment and property settlement, I was relieved to hear her declare that, after much thought, she was willing to agree to a *Karon* waiver. I was then immediately stunned to hear my client declare that he would not seek the waiver "just in case" his wife needed help in the future. This husband had initially declared that he would agree to divide marital assets on a two-to-one ratio (in his favor) because his earnings historically had been double those of his wife and he felt that was "fair." Further discussion, within and without the four-way meetings, caused him to alter that idea as being not in his best interests.

The structure of the meetings is well-established—identification of the goals (shared as well as individual), an elicitation of the facts, a generation of options for dealing with the facts, and, finally, an interest-based negotiation based on those goals. These goals are the glue that will keep clients on task as they move through the process. Whenever discussions take a nonproductive turn, counsel will question how that moves them toward their goals, gently but effectively reminding them where their self-identified interests lie.

It is important to note that the meetings do not consist of the lawyers saying, "Well, you can do this, or you could do that." Responsibility is placed squarely with the clients to generate the options and select from among them. For each option raised, the natural consequences of that option are pointed out. The clients should do most of the talking and most of the work in all meetings after the first one. Of course, if the clients really become stuck, a lawyer may ask, "Would you consider/be open to...?" Or, clients may be asked what it would mean to them to (keep the lake cabin in the family...coach their son's little league team...finish their bachelors degree, and so forth). Options may reveal themselves as the party talks about the topic in an open-ended way. This is a familiar scenario to experienced mediators and psychologists, but it may feel quite foreign, initially, to lawyers who are used to controlling the conversation and the case.

A difficulty initially encountered by fledgling collaborative practitioners is the idea of regarding the statutes and years of practice as "advisory," rather than "controlling." Instead of using the child support guidelines as the starting point for support calculations, for example, couples are encouraged to establish household budgets and then measure their need for additional financial assistance by reference to those figures. Whether transfer payments are denominated child or spousal support may depend on the income tax consequences, a consideration not unique to CP.

CP trainers refer to the phenomenon of a "paradigm shift," referring to the mental process of regarding an issue or topic in the dissolution as an opportunity for problem solving rather than a chance to throw "zingers" at the other side. Newcomers are often struck by the implications of not being able to say, "A judge will never agree with that position," or "That's our final offer; if it's not good enough, we'll see you in court." If your client is looking to the spouse to help craft an acceptable answer, threats and intimidation are not helpful. Moreover, given that the discussion is between client and spouse, rather than counsel, incredibly helpful suggestions can come from a party's appreciation of the family history and priorities.

Sharing Responsibilities

One reason CP lawyers appreciate the process is because they no longer are responsible for the outcome. Let me say it again: *The lawyers are no longer responsible for the specific outcomes. The clients decide what those outcomes should and will be.*

Collaborative counsel will, of course, challenge their clients and present reality checks. Faced with a client who says, "I don't care about support. I just want my children to be able to see their father," the lawyer may ask the client how that client will be able to pay bills, requiring the client to think about the natural consequences of choosing an option.

In an adversarial setting, the lawyer may make statements about what level of child or spousal support the client may expect, or how property will be divided. That amounts to a marketing claim by the lawyer, whose success or failure in the case will be judged by the ability to deliver. The final terms of a decree reached through collaborative process are those accepted by the parties for their own reasons. Due diligence demands that counsel note for the client any deviations from the results in similar cases, but clients will have made their decisions based upon full information and a broad range of options. It also should be noted that a decree obtained in a collaborative case may be indistinguishable from one obtained in a litigated matter. And, there is always the unexpected: clients have been known to reconcile during these cases.

Spontaneous acts of generosity are the norm rather than the exception in CP, and often provide an unexpected foundation for good co-parenting in the future.

Although the concept of "zealous advocacy" has been removed from the Minnesota Rules of Professional Conduct, collaborative counsel are called to adhere to an ideal of representing the client, first and foremost. However, a much used and much misunderstood strategy to achieve the client's goals is understanding the client's spouse's goals and helping to meet them where possible. Collaborative counsel often define the best representation of that client as requiring this, knowing that in all likelihood the effort will be reciprocated.

I'm Not Ready to Make Nice (or Am I?)

One of the strengths of this process is the active use of allied professions to assist the parties in making the necessary decisions. Mental health professionals can be employed as divorce coaches, helping parties to communicate effectively with each other in meetings. They also are adept at picking up on less obvious mental health issues that can delay or undermine effective participation. Notwithstanding their professional licensure, these psychologists are *not*—repeat, not—acting as therapists for their clients, many of whom already have established a relationship with a therapist. Coaches facilitate communication and, courtesy of fully informed medical authorizations, keep counsel apprised of problematic areas in the marriage relationship.

Another significant role played by mental health professionals is that of child development specialist, a psychologist who can meet the children and explore what is and is not working well for them as their family transitions to two households. The child development specialist can become a voice for the children without putting them in the middle, informing and enhancing any parenting plan. This specialist presents information directly to the parents, or to the parents and their coaches, and can be invaluable where parental perceptions of the children's situations are at odds.

Financial professionals can be a lifesaver in a CP case, particularly as they function as neutrals and have no vested interest beyond providing information, overview, and—the magic word—*options* to the parties. Many a case that, prior to referral to the financial professional, bore an uncanny resemblance to a dog furiously chasing its tail, assumes a civilized and linear order in the minds of the parties and counsel afterward.

CP currently is practiced in two forms—the interdisciplinary team, where all these professionals are involved from the inception of the case, or the *a la carte* team, where these outside professionals are called upon as needed.

"Good grief!" (I thought I heard someone exclaim.) "What's *that* combined hourly rate?!"

Several hundred dollars, is the answer. However, when weighed against the reality that rarely will an entire team be on the clock simultaneously, the specter of untrained legal counsel attempting to act as client psychologists (typically at a higher hourly rate), the idea of the non-neutral legal counsel presenting various spreadsheet scenarios that stop short of making financial projections for the future, the cost may turn out to be a bargain, since it typically is incurred for a much shorter period of time than the attorneys would need to attempt the same tasks with far less competence.

Something Funny Happened in There...

When the process works as designed, which is most of the time, couples often allow their best selves—the people they truly are—to show through. Even the sharpest critic must allow that it is difficult or impossible to be creative (in a constructive way) when you have just been accused of never helping with parenting, overspending, under-earning,

emotional abuse, and general worthlessness (to say nothing of lying to the court) in your spouse's publicly accessible affidavit.

But when parties to a dissolution can look their spouses in the eye and tell them in a respectful way that they need different things in a relationship than the admittedly good things their spouse has contributed, they may discover that they actually are being heard, perhaps for the first time ever. They may be shocked to learn that being nasty is not a prerequisite to ending a relationship. Surprisingly, they may discover that they like themselves much more because they did *not* sink to the level of their neighbors, relatives, or co-workers by giving free rein to their fears and anxieties in the usual ways those feelings are expressed. Spontaneous acts of generosity are the norm rather than the exception in CP, and often provide an unexpected foundation for good co-parenting in the future.

I Want You to Annihilate My Spouse...Several Times, If Possible

NOW HEAR THIS! NOW HEAR THIS! CP is not appropriate for all clients, any more than any other dissolution process is appropriate for all clients.

Those who deeply subscribe to the notion that their divorce is an opportunity finally to resolve their family-of-origin issues by acting horrendously toward their spouse (or having their lawyer do it) will probably not succeed at CP. Chemically dependent persons are not good bets (although some have succeeded), nor are domestic abusers (although there have been exceptions there as well). The my-way-or-the-highway crowd utterly lacking in insight (including personality disordered individuals) will not even get off the ground.

Individuals who are truly self-interested and used to making decisions (such as management executives) can be excellent candidates, however. If that seems counter-intuitive, consider the appeal that writing their own terms has to such individuals, compared with having orders imposed upon them. Recently, Roy Disney and his wife made news when it was learned that their upcoming divorce will be handled collaboratively.

Lawyers unfamiliar with the paradigm shift protest that "*I am* collaborative," by which they mean that they settle most of their cases and are courteous and respectful. But given a 95 percent-plus settlement rate, such a claim hardly sounds like an accomplishment. Collaborative practitioners distinguish their efforts on the basis of the *quality* of the settlement, rather than the fact it was achieved. The traditional settlement may well occur under anxiety-producing circumstances, late in the game, rather than a cordial environment where food is served and smiles are commonplace.

An objection heard from traditional lawyers is that collaborative counsel "abandon the client" if CP is unavailing. A less dramatic statement would be to say that everyone concerned agrees up front that the collaborative lawyers cannot represent their client against the other party in any future litigation. Everyone knows this at the start; they also receive a fair grounding in what litigation involves. Clients know this is the likely alternative if they are unable to agree. Moreover, collaborative counsel make very clear to the potential clients what they will need to be able to do, personally, to succeed in CP. The clients have every opportunity to "speak now or forever hold (their) peace."

Indeed, for it to be otherwise would be to undermine the process. How dedicated to settlement can clients be when they have "one foot out the door and the motor running?" If they knew they could always go to court, how hard would they try? Can one really make peace without checking one's guns at the door? Compare this with the "abandonment" of a client who neglects to pay the lawyer's bill and receives a notice of withdrawal in the mail.

Lawyers and clients establish the ground rules for their relationships all the time, and those rules can vary. The provision disqualifying counsel if the process breaks down really is no different. The fact that clients sign a retainer agreement only after this aspect has been fully explained means that they are not "blindsided" by the withdrawal of counsel any more than they would be by the withdrawal of litigation counsel whose retainer agreement states that payment of the fees is a condition of representation.

There are anecdotes, thankfully few, in which a collaborative process failed miserably, only to discover that the attorney who claimed to be a collaborative lawyer had never been trained as such and was not a member of the Collaborative Law Institute (*www.collaborativelaw.org*), where annual training is a condition of membership. Although there are a number of attorneys in the community who handled their first collaborative case before undergoing formal training, their involvement followed extended conversations with an experienced practitioner about the essential shift in mind-set. The more experienced lawyer usually provided training materials for the inexperienced counsel's use.

There also are cases that fell out of collaborative process because a party was a poor candidate, which was not recognized initially. Fortunately, the Collaborative Law Institute, in concert with the collaborative organizations of other states and the International Academy of Collaborative Professionals, works constantly to refine the skills and protocols of its members and its processes, reducing the chances that an inappropriate process will be selected.

What the (Bleep) Do We Know?

CP is not a contest of force. It is an exercise in mutuality, a study in cooperative problem solving. For the right clients looking for a better way, collaborative practice often can be the best answer at the worst of times, a bridge to the rest of their lives. It is a valuable option for family law attorneys and parties on many levels, and one with which they should become familiar.