

Collaborative Law: Divorce Lawyer As Peacemaker

By Arnold D. Cribari

An army of peacemakers is growing throughout the United States and other countries in the field of divorce law. These peacemakers are collaborative lawyers, and I am one of them. If you are a matrimonial lawyer, a lawyer doing some divorce cases, or a spouse considering a divorce, collaborative law is an important subject that may have a huge impact on your life.¹

Definition

Collaborative law is a divorce settlement process. Each party is represented by a collaborative attorney, trained in the disciplines of divorce mediation as well as collaborative law. Rather than starting a divorce action, an initial agreement known as a Participation Agreement is signed by the parties and their attorneys providing, among other things, that the parties shall not go to Court, or threaten to do so, during the settlement process, and the attorneys shall not be the litigators or trial counsel in that case if negotiations break down. Negotiations occur at four-way settlement conferences (both spouses and their collaborative attorneys attend) conducted privately in one of the lawyer's offices. Mediation techniques, including reframing or looping described below, are used by the attorneys during the conferences. The goal is to reach a finely tailored settlement agreement that satisfies the reasonable needs and concerns of both parties and their children. Unlike mediation, each party has the support of his/her own attorney during, and in between, the settlement conferences in a collaborative case.

The Benefits

Divorce is almost always a painful process, no matter how respectfully it may be resolved.² Ethically, an attorney can never guarantee any benefit to a client in the collaborative process for the same reasons that an attorney cannot do so in litigation. Collaborative law, however, may minimize conflict, ease stress, be protective of children, reduce legal fees and preserve the marital estate for the parties.³ The attorneys may also derive substantial benefits including a reduction in their stress, and a paucity of accounts receivable.

Anatomy of a Collaborative Case

First Settlement Conference:

The first four-way conference is devoted to reading and explaining the Participation Agreement to the parties; their questions regarding this initial agreement are

answered, and assuming they wish to proceed with the collaborative process, this agreement is signed.

Another document, “Ground Rules for the Collaborative Process,” consisting of rules encouraging respectful negotiations, such as “attack the problems and concerns at hand, not each other,” is similarly read, explained and signed. Helpful hand-outs are given to the parties including “Marital Issues for Resolution.” This document is an exhaustive list of possible issues to address in a divorce case so no important issues are forgotten or overlooked during future conferences when the substantive issues are negotiated.

Discovery:

Before getting to the substantive issues at future conferences, it is common for two or three conferences in a typical collaborative case to be devoted to discovery. Instead of serving a boiler-plate, and sometimes overly burdensome, formal discovery demand like a Notice for Discovery and Inspection and/or Interrogatories, the parties and their attorneys simply ask during a conference for the financial information and documentation needed, which is usually supplied at the next meeting. Upon receipt of the documentation, questions are asked and answered explaining and elaborating upon the information therein. Financial statements known as Sworn Statements of Net Worth are essential as in litigated divorces, but in collaborative law they are often treated at the beginning as a work in progress to be done as accurately as possible. Before requiring the completion of Sworn Statements of Net Worth (often an arduous and time-consuming task) prior to negotiations as in a litigated case, in a collaborative case four-way settlement conferences proceed forthwith, before these financial statements are completed. This serves at the outset to de-escalate and diffuse any conflicts and disputes between the spouses. In order to assure proper financial disclosure, Sworn Statements of Net Worth are signed, attorney certified and exchanged before the final marital settlement agreement is executed. If the parties fail to exercise good faith in complying with financial disclosure requests, then they are reminded of their commitment to do so as stated in their Participation Agreement. If that doesn't work, then the collaborative process may be terminated and a divorce action brought in which more invasive financial discovery, including depositions, can be done. When this is explained to the recalcitrant collaborative spouse, discovery compliance is almost always forthcoming on a voluntary basis.

Neutral Experts:

When an expert opinion is needed, both attorneys recommend that a reputable neutral expert be retained to do a valuation report. This commonly includes a neutral real estate appraiser to value the marital residence or other real property, and a neutral forensic accountant to value a business, a license, a degree or other enhancement of earning capacity. A neutral accountant may also be retained to determine the net after-tax value of marital assets, determine the income tax consequences upon the present or

future sale of property, and analyze the tax consequences of child support, maintenance and dependency exemptions for the parties.

Reframing or Looping:

A mediation technique known as reframing or looping is a very useful tool for the attorneys to use in a collaborative matter when problems arise, intense feelings are expressed, or greater understanding is sought. Increased understanding attained through looping frequently leads to good settlements that meet everyone's reasonable needs. Looping or reframing is a form of active and reflective listening whereby the speaker (hereafter "S") makes a statement, often with intense emotion in a divorce-related dispute, and the listener (hereafter "L") does the following:

- a) refrains from interrupting, insulting, deliberately offending, or otherwise personally attacking S;
- b) refrains from offering any suggestions at this point for solving the dispute;
- c) simply repeats back the gist of S's statements and any emotion expressed therein, followed by a remark like "did I hear you correctly?" Such a remark shows S respect by inviting S to correct L's understanding of what S initially said;
- d) S and L reverse roles, so L is given an opportunity to speak, and S loops L's statements in a similar manner;
- e) they take turns, one making statements that the other listens to and then loops, and a dialogue develops, enabling them to build understanding and empathy between them.

When looping is done artfully, marvelous things can happen. Artful looping is reframing done naturally, skillfully, and with clarity, compassion and empathy.

Looping can best be explained by giving an example of it in an actual case. The husband shall be referred to as "Mr. Unflappable" and the wife as "Ms. Passionate," to preserve confidences in the following dramatic example. At the third collaborative four-way conference, Ms. Passionate suddenly lashed out at her husband for criticizing her decision-making with respect to their disabled child. Mr. Unflappable expressed his own strong feelings in defending himself in an uncharacteristically passionate way, and then the collaborative attorneys had an opportunity to do a reframe which proceeded as follows:

I interjected: "What I am hearing from both of you, and correct me if I am wrong, is that both of you have strong feelings about your child, you are both very concerned about your child, that you both want what is best for him, and that is a very good thing."

My collaborative colleague representing Ms. Passionate then interjected, in sum and substance: that parenting a disabled child is very hard to do, it puts a strain on the relationship of even a happily married couple, and that the parents of a disabled child are bound to have serious disputes. Then, she stated that she knows this from personal experience in dealing with her own disabled child and the breakdown of her own marriage.

What followed was two minutes of silence, and the mood in that conference room completely changed. Feelings of fear and hostility were transformed into feelings of empathy, which were palpable. Our reframe and my colleague's extraordinary courage and transparency (other highly effective qualities for collaborative law and mediation) were responsible for this transformation, which had a huge impact on the parties. I remember Stu Webb (an attorney from Minneapolis, Minnesota who invented collaborative law) commenting during basic collaborative law training on how silence can lead to creativity in dispute resolution, and can have a positive impact during collaborative settlement conferences. After the silence, the husband made a settlement proposal to the wife, which she accepted, and we had a meeting of the minds on the basic terms of a settlement on custody and visitation.

Though not all looping done in a collaborative case is as dramatic and momentous as the above example, looping satisfies a basic human need – the need to feel listened to and understood. Such active listening can engender feelings of empathy and good will which, in turn, can lead to de-escalating the conflict between the parties, dissipating any hurt feelings between them, and getting them to a point where they truly understand each other, are open to hearing options for solving their dispute or problem, and one or both of them are ready to take responsibility for it.

Options, Solutions and the Law

Once considerable looping is done and both parties feel they have been listened to and understood, the brainstorming of options and solutions can be done effectively. Collaborative lawyers have differing views of the role of the law, but my experience has been that most collaborative lawyers believe it is essential to explain the law to the divorcing couple so that they have informed consent, and the freedom either to apply the law, or to make a knowledgeable waiver regarding it.

The following is an example of a collaborative case where there were knowledgeable waivers of the law that led to a settlement beautifully tailored to the underlying needs of the parties and their child. The husband was a few years away from normal retirement age, he had received a substantial inheritance that greatly appreciated during the marriage, the wife was financially dependent on him, and their child was about to commence college in a neighboring state. After the needs and concerns of the parties were identified and addressed with artful looping, and New York law was explained to them regarding maintenance, child support, apportionment of college expenses, marital

and separate property, and separate property credits, then the following collaborative settlement was made:

a) the marital home, a marital asset with substantial equity, was sold forthwith so both parties could relocate and have sufficient funds to purchase separate residences, which they both wanted to do. The net sale proceeds were deposited in an attorney trust account for safe-keeping (or escrowed), with partial equal distributions to each party made early in the case enabling them to purchase new separate residences and relocate. Part of the escrowed net sale proceeds was reserved to satisfy income taxes realized upon the sale (capital gains taxes), and then the remaining net sale proceeds were distributed equally to the parties upon the execution of the final settlement agreement.

b) the husband (in his early 60s) retired from his high pressure job, and relocated to the neighboring state where the parties' child was about to begin college, to take advantage of the much more affordable college rates for "in state" residents.

c) the wife also relocated (in the opposite direction of the husband), and she waived maintenance;

d) in consideration for the wife's waiver of maintenance, the husband gladly agreed to pay all of their child's college expenses and reasonable support-related needs directly to the child. He also agreed to share equally with his wife the substantial appreciation of his inheritance during the marriage notwithstanding that he could have claimed the appreciation was passive and, therefore, his separate property.

e) the husband retained the original value of his inheritance as his separate property.

In essence, this settlement met the needs of the husband to retire, the wife for financial security, and the child to go to the college of his choice at affordable rates. The lawyers were paid in full, and in a timely fashion at their usual and customary hourly rates, without any accounts receivable. Each lawyer was paid legal fees in the range of \$7,500.00 to \$9,000.00.

OTHER INTERESTING FEATURES AND CONCLUSION

Rarely, if ever, do collaboratively trained attorneys insult or personally attack each other or the parties. Such behavior is counter-productive to settling the case, which is the only purpose of collaborative law. In my experience as a divorce litigator, my opposing counsel on cases over the years have threatened me with bodily harm (holding up his fist to my face during a recess outside of the Judge's presence like a playground bully); taunted and trashed-talked me outside of the Judge's earshot at the end of a long custody trial like a defensive back might try to do to a wide receiver in a professional football game (taunting, if detected by a referee, results in a fifteen yard penalty in a football game); and told me in my own client's presence in the middle of a trial (that I ultimately won) that my own client would have an attorney malpractice case against me

that would be the largest in the history of Westchester County in the State of New York where I practice law.⁴ In collaborative law, where the attorneys' sole motivation is to settle the case and the lawyers cannot be the litigators or trial counsel, there is no financial incentive to engage in such unprofessional and inflammatory tactics. Of course, I have also been threatened with contempt and incarceration on occasion by overworked and burnt-out divorce trial judges for doing my job. I have also had the experience of almost being bankrupted in a child custody case that I won early in my 28 year career in which the trial lasted for approximately four months, and I collected a total of \$10,000.00 for my services, which amounted to thousands of hours.⁵

In collaborative law, we are taught as part of our basic training to create a cordial atmosphere during settlement conferences, including attending to such details as the following:

- a) speak to the parties on a first name basis, and refer to the other spouse's attorney also preferably by his/her first name, or as "my collaborative colleague" or "my collaborative counterpart," never as opposing counsel.
- b) refreshments are served which may include cut-up assorted fruit, crudités, cookies and crackers, bottled water, coffee and tea.⁶
- c) round conference room tables are better than the typical rectangular ones and, if possible, seat the couple next to each other on the same side of the table (if rectangular).
- d) be positive, courteous and respectful at all times, no matter how intense, or even crazy, either spouse may become.
- e) focus on the needs and concerns underlying any position taken during negotiations, and seek to understand those needs and concerns through looping or otherwise, before offering any solutions.
- f) search for win-win solutions knowing that ultimately a fair division of the marital estate and income, regardless of their size, still needs to be made.

If you happen to be a divorce attorney, you may find that once you get the necessary training in mediation and collaborative law, join a local collaborative law group,⁷ and start working on some collaborative cases, they may become the most rewarding part of your matrimonial practice. Consider doing this and joining the army of peacemakers.

Endnotes

1. The authoritative treatise on collaborative law is: Collaborative Law Achieving Effective Resolution in Divorce Without Litigation, by Pauline Tesler, 2001 American Bar Association. A comprehensive and scholarly article on collaborative law appeared on

the front page of the Special Litigation Section of the New York Law Journal on February 22, 2005, by Barry Berkman, Esq., and Neil Kozek, Esq, fellow members of the New York Collaborative Law Group.

2. Once when I shared with a divorcing couple my enthusiasm for collaborative law and how much I enjoy it, my collaborative counterpart in that case, Katherine Eisold Miller, Esq. (a highly regarded collaborative attorney and divorce mediator in New Rochelle, New York) reminded me in private that it might be better for me to tone down my enthusiasm, and to think of collaborative law for this couple as being comparable to having a tooth extracted. Thank you, Katherine.

3. Empirical evidence to substantiate such benefits is hard to find, largely because collaborative law is so new. See website of New York Collaborative Law Group: www.collaborativelawny.com for further information of possible benefits.

4. When I was a young divorce attorney, I attended a roasting of local matrimonial attorneys, including me, conducted in or about 1990 by Hon W. Denis Donovan and the late Hon. Vincent Gurahian, two Judges of the New York State Supreme Court in Westchester County. Judge Gurahian asked the audience: “do you know how you divorce lawyers service your own client’s?” Then, he answered his rhetorical question: “when I was a boy, I once saw a bull service a cow, and you should have seen the condition that cow was in after that bull was through with her. That’s how you divorce lawyers are servicing your own clients.”

5. For an even more outrageous example of a custody case that got out of hand, see Courting Justice, by David Boies, Esq., where he describes a matrimonial case where he and his former New York City law partnership accepted a \$300,000.00 retainer and ended up expending over \$3,000,000.00 of their services pro bono.

6. Don’t make the mistake I made of serving Dunkin Donuts holes to a couple where one of their issues was the overweight condition of one of the spouses.

7. Well-established collaborative law groups exist throughout the United States and other countries. For more information, see the websites of the International Academy of Collaborative Professionals (website: www.collaborativepractice.com), the New York Collaborative Law Group (website: www.collaborativelawny.com), the Association of Collaborative Lawyers of Rockland and Westchester (website: www.collaborative-ny.org), and the Hudson Valley Collaborative Divorce Association (website: www.collabdivorce-ny.com).

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