

## **Collaborative Law in the World of Business**

By David A. Hoffman

In Boston, Cincinnati, and other venues where Collaborative Law (“CL”) has taken root and grown rapidly in the arena of divorce practice, attorneys who practice in other areas and who have received CL training are scratching their heads and wondering: what about us? Why has CL been slow to develop as a method for resolving tort cases, contract disputes, employment terminations, and partnership break-ups?

CL got its start in Minnesota in 1990, when a group of divorce lawyers and mediators formed the Collaborative Law Institute (“CLI”). The CL process involves a commitment to collaborative, good faith negotiation and a written commitment by the lawyers and their clients to work together to achieve a settlement, and to refer the case to other counsel if they fail. Everyone’s incentives are aligned toward resolution.

CLI founder Stuart Webb had previously served as a divorce mediator and found that process unsatisfactory. The main problem with mediation, according to Webb, was the power imbalance: husbands and wives, negotiating the terms of their divorce without lawyers present, were seldom an even match in terms of information or negotiating skill. Mediators usually find it difficult to level this playing field without compromising their neutrality, and they are prohibited by the principles of mediation ethics from providing legal advice.

The CL process provides a better solution, in most cases, than adding lawyers to the divorce mediation sessions. A five-way meeting – with lawyers, clients, and mediator all present – might seem like an ideal mix. However, in many cases, the presence of the mediator simply permits the lawyers to be more adversarial and positional than they would be in four-way meetings, because the lawyers can look to the mediator to take responsibility for urging moderation. Moreover, increased adversarialness can make discussion of the personal issues that arise in divorce more difficult.

In theory, the CL method should work every bit as well in non-family cases as it does in divorce, where CL has become even more popular than mediation in some locales. Yet, as reported recently in *Lawyers Weekly USA*, the business world has been slow to embrace CL (see Nora Tooher, “Collaborative Law Stuck in the Family Track,” October 27, 2003). What has been slowing the adoption of CL in non-family cases?

One of the reasons why this question has been so hard to answer is that it may be the wrong question.

Instead of asking why CL has been so slow to catch on in the world of business, a better question might be why it has caught on so quickly in the world of family law. The short answer to that question is that CL originated as a solution to a unique set of

problems that often exist in divorce cases and often do not exist in business, tort, or employment cases. (For purposes of this article, I am referring to all such cases as “non-family cases.”) The discussion below describes the nearly ideal ‘fit’ between CL and divorce cases, and the reasons why that fit is not always as ideal in non-family cases. The article concludes with a discussion of the potential for adapting CL techniques in non-family cases.

### **Divorce Cases Provide Fertile Soil for the Growth of CL**

The following are some of the factors that cause CL to be particularly useful in resolving divorce cases.

1. Common interests. Divorce cases often involve children, whose emotional and financial welfare can be safeguarded by reducing the antagonism and transaction costs associated with the break-up of the marriage. Children are seldom represented by separate counsel in divorce proceedings, and therefore parents share an interest in protecting them from a detrimental outcome. The often harsh allegations in divorce pleadings, as in other court pleadings, are public documents – available for children to read one day. Even when there are no children, the parties in a divorce share a common interest in reducing transaction costs, because there is a finite ‘marital pot’ of assets from which both parties’ attorneys’ fees will be paid. CL reduces costs by motivating the parties to stay at the bargaining table, reduces antagonism by fostering collaboration and keeping the controversy out of the public arena of the courtroom, and, where there are children involved, helps to keep the children from getting caught in the cross-fire. In non-family cases, the parties’ interests may diverge – e.g., an injured tort or discrimination plaintiff may prefer the public arena to ‘send a message’ and may prefer an adversarial process to make his or her point. And, of course, the parties in a non-family case are seldom paying their lawyers out of a common fund.

2. Limited resources. Divorce means supporting two households on the income that previously supported one. As a result, even when divorce negotiations proceed smoothly, the economic impact of divorce can be enormous, and there is often little, if any, money available for hiring lawyers. Indeed, divorcing couples are routinely forced into debt to hire professionals to help them through their divorce. CL solves this problem by eliminating the most costly aspects of traditional divorce practice – courtroom appearances for hearings and trial. Divorce lawyers also see the value in this approach because it reduces the chance that they will be left with unpaid fees as a result of the economic carnage caused by a full-blown trial. In non-family cases, resources are often less limited. Indeed, in some businesses, the cost of legal services – and even paying judgments – is a budgeted item each year, and therefore if the business is within budget for the year, the costs of litigation may not be a strongly motivating factor for using CL. And for business and tort lawyers, high-stakes litigation can be one of the most profitable areas of law practice.

3. Predictable Results. In divorce cases, where jury trials are available only in a few jurisdictions, judges often tell the parties in a pretrial conference what the likely outcome of the case will be if it is tried. Even without a pretrial conference, there are

well-established guidelines (e.g., child support guidelines) and customary practices (e.g., with regard to property division and alimony) that create a zone of likely outcomes. As a result, negotiations in family law cases generally take place within a fairly well-defined ‘ballpark.’ In non-family cases, however, there are often clear winners and losers, and the results are often all-or-nothing. The possibility, in some cases, of a huge jury verdict, multiple damages, or the recovery of attorneys’ fees adds to the incentive to litigate. Accordingly, the parties and counsel in non-family cases are often willing to invest more resources in a potential litigation victory because the stakes can be much higher.

4. Tightly Knit Bar. The family law bar is a specialty area in which practitioners tend to know each other very well. In some cases a lawyer will represent the husband, and in others the wife – antidiscrimination laws discourage lawyers from representing solely husbands or wives in their divorce practice. As a result, divorce lawyers realize that extreme positions can come back to haunt them in their next case and, as a result, some degree of moderation is a feature of many if not most divorce negotiations – the exception, perhaps, being the high-profile, high-stakes divorce cases in which the most litigious counsel participate. Even in contentious divorce cases, however, the lawyers often get along fairly well (a source of irritation, sometimes, to the clients) and usually are members of bar groups in which they frequently see each other and share opportunities for presenting workshops and seminars. In non-family cases, however, the ranks of litigators are much larger and there is typically less collegiality (except perhaps among the most experienced practitioners, who belong to elite groups such as the American College of Trial Lawyers). Collegiality fosters collaboration, and therefore it is not surprising that collaborative law has been easier to grow among family law practitioners.

5. Tax Effects. The attorneys’ fees paid by divorcing couples are paid out of after-tax dollars. The Internal Revenue Code provides only modest deductions for such fees, and even then only when they are related to the production of income and exceed 2% of the taxpayer’s adjusted gross income. Accordingly, divorcing couples have an added incentive to limit their expenditures on attorneys’ fees. For businesses, however, attorneys’ fees are generally deductible from income, and therefore there is a not-insignificant tax benefit that comes along with the expense, and for personal injury plaintiffs settlements and judgments, including the portion paid to attorneys, are not taxed.

6. Need for Ongoing Relationship. In many, if not most, divorces the parties need to have at least some type of ongoing relationship. When the parties have had children together, there will be occasions – ranging from consultation on co-parenting issues to arrangements for family gatherings – that require collaboration in order to be successful. Even when the parties do not have children, they often have property that needs to be marketed or transferred and there is an ongoing need for the parties to ensure that they are taking consistent positions on their tax returns. Collaboration provides a greater opportunity for success in the ongoing relationship. In non-family cases,

however, there is often no ongoing relationship (such as in tort cases) or a very limited ongoing relationship (such as in employment termination or breach of contract cases).

7. Few Repeat Players. In divorce cases, the parties often feel that there are major issues of principle, but those principles are primarily personal rather than political in nature. In other words, it is seldom the case that a divorcing party will invest more in attorneys' fees in a case than the likely benefit to the party simply because other husbands or wives might benefit from the precedent set by the case. In non-family cases, however, there are many repeat players (e.g., employers, manufacturers, and insurers) who have a vested interest not only in establishing precedent but also in sending the message to lawyers and the world generally that they do not compromise easily and are willing to go the distance. This has the effect of discouraging frivolous litigation against them, and therefore is considered by many businesses to be a wise investment of resources.

8. Changing Lawyers. It is not uncommon in divorce cases for the parties to change counsel – sometimes more than once – during the pendency of a case. Family law clients often get frustrated with their lawyers, in part because of frustrations with the process itself and with the intractability of their spouse on negotiated issues. Accordingly, in divorce cases, the idea of having to hire a new lawyer to litigate a matter that has resisted settlement is perhaps less daunting than doing so in a non-family case. Moreover, from the standpoint of the divorce attorney, the departure of a client is usually not a cause of grave concern because the attorney's practice is 'diversified' – i.e., not critically dependent on any one client or group of repeat clients. In non-family cases, it is more unusual for parties to switch counsel, though certainly not entirely uncommon. In addition, businesses often establish long-term relationships with their attorneys – relationships which they are not willing to relinquish simply because the other side has been stubborn. From that standpoint of the lawyer, a business client is much more likely to be a source of repeat business than a divorce client. Indeed, the business lawyer's motivation to retain the loyalty and billings from business clients provides one of the most powerful disincentives for business lawyers to use collaborative law.

9. Fee Arrangements. In divorce cases, contingent fees are generally prohibited by ethical rules. Accordingly, the divorcing parties typically pay a retainer and then monthly charges for their lawyers' services. This fee-for-service model makes litigated divorces expensive. In tort cases and some employment and business cases, however, it is not uncommon for plaintiffs to be represented by counsel on a contingent fee basis. Accordingly, in those cases, the plaintiff is not concerned about the amount of time spent on the case by his or her attorney because it has no direct impact on the amount the plaintiff receives and affects the plaintiff economically only to the extent that s/he may be responsible for certain out-of-pocket costs (such as deposition transcripts, filing fees, and process server fees).

10. Privacy and Intangible Costs. Anyone who has witnessed divorce litigation can attest to the fact that it can be an emotionally wrenching experience. The parties often feel some combination of rejection, betrayal, vulnerability, worthlessness, anger, depression, guilt, or resentment. Add to this mix a pair of gladiators (trial attorneys),

trained to search out and exploit – in a courtroom and in publicly filed pleadings – every legally relevant shortcoming of the other party. Husbands and wives fear this type of exposure because, having lived together for a number of years, they know ‘too much’ about each other. And hearing highly personal accusations hurled at them by complete strangers in a public courtroom often destroys whatever modicum of good feeling the divorcing couple might have been able to salvage from the wreckage of their marriage. In non-family cases, the controversy may have emotional elements (particularly in employment or partnership disputes), but the parties are more likely to be able to distance themselves from the fray because conflict is, after all, one of the ‘costs of doing business.’ And in most tort cases, the parties are complete strangers, with no prior relationship, who simply met by accident and will never see each other again after their dispute is resolved.

11. Complex Negotiations vs. Single-Issue Cases. Divorce presents a dizzying array of decisions: custody, visitation, asset division and debt allocation, alimony, child support, college expenses for the children, life insurance, health insurance, taxes, estate planning, and more. Divorce cases can be a trial lawyer’s nightmare because proposed findings and conclusions must be presented on each of these issues and many others. Multi-issue cases are good candidates for collaborative negotiation because they present opportunities for trade-offs that are not present in the single-issue cases that are more typical in non-family disputes. In those cases, the entire dispute may boil down to a single question: Is the patent valid or not? Did the employer engage in discrimination or not? Was the roof defective or not? To be sure there may be complex sub-issues that underlie the ultimate issue, but for purposes of settlement, a single-issue case requires compromise and, for the litigants, compromise may be anathema.

### **Resistance to CL in Non-family Cases**

The points outlined above describe incentives (and disincentives) that influence the decision of parties to use (or not use) CL. I have found that, because of these incentives, many of my clients and potential clients in divorce cases are immediately receptive to the idea of using CL, as opposed to mediation or conventional representation. In fact, the appeal of CL is so powerful in family law cases that the concept nearly sells itself: I have had clients call asking for CL simply because they saw a description of it on our web site.

My experience has been quite different, however, with non-family cases. The clients typically do not ask for CL, and, even after I describe CL, they are often skeptical. They may like the idea of avoiding court if at all possible, but they generally do not see the advantage of the disqualification provision. They fear that they will be outflanked by a wily adversary who is not as attached to, or confident in, their attorney, and thus be forced to go searching once more for an attorney after spending time and money educating the first one. Trust is usually absent in such cases, and often (as in tort cases) there is no prior relationship on which trust could be built. By contrast, in divorce cases, trust may have taken a beating, but the parties generally know each other quite well, and therefore they may rely on the other party’s predictability, in lieu of trust, as a foundation

for deciding whether to take the risk of a stalemate that will require both of them to hire new lawyers.

Many observers have noticed that CL is a lawyer-led movement, which has now expanded to embrace professionals from other disciplines. In other words, the growth and development of CL has been driven largely by the energy of committed professionals more than by the insistence of clients. In the growing community of non-family lawyers who would like to see CL grow as quickly there as it has in the field of family law, there is palpable frustration – fueled in part by (a) the disparity between the substantial efforts that have been made in Cincinnati, Boston and elsewhere to grow the use of CL in non-family cases and the relatively limited results to date, and (b) the comparatively easier way in which CL has grown in divorce cases.

In addition, non-family lawyers have been frustrated because the case for using CL in non-family disputes seems every bit as compelling as the case for using it in divorce. For example, many of the factors outlined above apply in non-family cases:

1. Common interests. Such interests can be found, even if it is only in the reduction of the transaction costs associated with resolving the dispute.
2. Limited resources. Even if the parties have deep pockets, a business's legal budget may be quite limited.
3. Tightly knit bar. In small towns and cities, business lawyers and litigators may be an even more tightly knit group than the divorce bar in big cities, and in specialty bars (such as patent, trusts and estates, and construction), the 'regulars' know each other well even in big cities.
4. Need for ongoing relationship. In many non-family disputes, the parties will continue, even after settlement, to be tied to contractual relationships. And in some cases, the performance of the settlement will occur over time.
5. Repeat players. Setting precedents can be a two-edged sword. In some non-family cases, the possibility of setting a precedent in a case with unappealing facts may cause a trial to appear more risky than a collaboratively negotiated resolution.
6. Changing lawyers. A small group of law firms and business clients is beginning to recognize the advantages associated with using lawyers who specialize in settlement. Known as "settlement counsel," they may practice in the same firm as litigation counsel, but the effect is similar to disqualification in a CL process – management of the client's case shifts to new lawyers if there is an impasse.
7. Fee arrangements. Although contingent fees and other novel billing arrangements – such as blended rates and fixed-fee engagements – may mitigate

the costs of hiring an attorney in some non-family cases (especially for plaintiffs), much if not most work in non-family cases (especially for defendants) appears to be done on an hourly basis. Accordingly, opportunities for savings abound if litigation can be prevented.

8. Privacy and intangible costs. Litigation can be just as intrusive for businesses as it is for married couples. Indeed, when a company is required to produce voluminous business records and defend numerous depositions, the imposition may be even greater, and most businesses face a greater risk of adverse publicity because their cases are more likely to be of interest to the press.

9. Complex vs. single-issue negotiations. While there may be only one or two issues in a non-family case, the solution may be quite complex and present opportunities for trade-offs and joint gains in settlement negotiations.

Given the similarity of incentives in both divorce and non-family cases, it remains somewhat surprising that non-family disputes have provided less fertile soil for the growth of collaborative law. It is not as if litigation is viewed with particular favor in the business community: as David Porter once quipped, “litigation is the basic legal right which guarantees every corporation its decade in court.”

I believe the answer to this mystery can be found not only in the economic incentives described above but also in the culture and sociology of litigation practice. Within the bar, there continues to be a reverence for trial as the lawyer’s ultimate test. Trial practice presents enormous intellectual and emotional challenges. Negotiations can also be enormously complex, but they are not conducted on a public stage. As a result, trial work is still considered one of the highest forms of work done by ‘real lawyers,’ as opposed to those ‘touchy feely’ lawyers who study alternative forms of dispute resolution, look for ‘win-win’ solutions, and find solace in “Getting to ‘Yes.’” This may be a gross caricature of today’s legal culture, but even caricatures contain an element of truth.

To be sure, the inherited culture of the bar is changing, but the emphasis on trial, as opposed to negotiation, in television shows and movies about law practice continues to distort the image – in the minds of clients, and perhaps some lawyers as well – of what ‘real lawyers’ do.

Inside law firms, a similar culture prevails. Status and influence flow from revenue production, and litigation is often a primary engine for producing revenue. CL may be viewed as a threat to the firm’s livelihood, and the idea of referring a long-term client to another firm so that the other firm can handle the most lucrative aspect of resolving the conflict (i.e., litigation) is virtually unthinkable. Will the client return after the trial? What are the long-term prospects for a firm that refers out its most lucrative opportunities? I say this with disappointment, borne of personal experience in trying – unsuccessfully – to persuade my colleagues in a 145-lawyer Boston firm of the value of CL.

## Adding CL to the Non-Family Lawyer's Toolbox

Sophisticated non-family lawyers have, in recent years, added mediation, arbitration, and case evaluation to their standard toolbox. Indeed, the tremendous success of mediation in resolving non-family cases stands as one of the primary obstacles, in my view, to greater acceptance of CL. Unlike divorce cases, where mediation is generally done without lawyers and therefore can create a dangerously un-level playing field, non-family cases are typically mediated with lawyers present. Commercial mediators report settlement rates in the 70-90% range and higher. For non-family litigators, there is a tendency to think 'if it ain't broke, don't fix it.' For them, CL may appear to be a solution looking for a problem.

However, mediation and CL often work successfully hand in hand. In some divorce cases, the parties may go first to mediation and then realize that they need to hire counsel to advise them during that process. The CL roster provides a uniquely suitable list of lawyers who support negotiated resolutions. In non-family cases, the parties may turn first to counsel, who can point to mediation, arbitration, and case evaluation as impasse-breaking techniques that make the use of CL less risky for the client if the CL negotiations falter.

CL attorneys have also been experimenting with variants of collaborative law. As noted by Prof. John Lande, in "Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering" (64 *Ohio State Law Journal* 1315 (2003)), the negotiation strategies, techniques, and norms used in CL may have enormous value even if the parties do not sign a formal CL agreement containing a provision for disqualification of CL counsel in the event that litigation is necessary. Some CL attorneys have referred to this form of practice as 'CL-lite,' but this term is misleading, because the essence of CL is the disqualification of counsel from any form of litigation.

The use of settlement counsel, described above, solves the disqualification problem if the settlement attorney is in the same firm as the litigating attorney. (For an excellent description of the settlement counsel process, see William Coyne, "The Case for Settlement Counsel," 14 *Ohio State Journal on Dispute Resolution* 367 (1999), and James McGuire, "Why Litigators Should Use Settlement Counsel," 18 *Alternatives* 1, 3 (June 2000).) In addition, attorney Mark Perlmutter has described a model of litigation in which attorneys agree in advance to 'fight fair' – i.e., to seek a court decision on the merits without taking advantage of any inadvertent procedural mistakes and without obstructing the exchange of necessary information. (See "Cooperative Versus Competitive Strategies: Rewriting the Unwritten Rules of Procedure," by Mark Perlmutter, available at [http://www.bostonlawcollaborative.com/documents/perlmutter\\_article.doc](http://www.bostonlawcollaborative.com/documents/perlmutter_article.doc)). There are also lawyers who have decided to handle cases solely on a collaborative, non-court basis (see Les Wallerstein's article on "Unilateral Collaborative Law," *Collaborative Law*



*Journal* (Boston, MA), Fall 2003). Such a role is, in some ways, analogous to that of a business's in-house counsel who refers litigation matters to outside firms.

To be sure, neither 'CL-lite,' 'cooperative' litigation, 'unilateral CL,' nor settlement counsel should be confused with CL, but they may be good alternatives to CL in a setting where either the client or the attorney's firm is not willing to use CL.

It also seems highly likely that CL will become more widely used in the business community over time, just as mediation grew from early acceptance in divorce cases to greater acceptance in the world of business. As more and more non-family lawyers receive CL training, a critical mass of attorneys will develop, and they will in turn lead clients to CL as an option to consider in appropriate cases. Such a development could be particularly effective if a critical mass were achieved in those specialty areas of the bar where practitioners know each other well. With more training, non-family lawyers will begin to see that certain of their cases – perhaps the ones that are most like divorces, such as employment terminations and business break-ups – are excellent candidates for CL.

It is probably unrealistic to expect the use of CL to grow in large firms. The economic incentives at work in a large firm do not reward the 'un-bundling' of legal services (i.e., dividing legal services into sub-components, such as research, advice, negotiation, and courtroom representation). On the contrary, the purpose of a large firm is usually to serve a full array of clients' needs. In small firms, however, where the majority of lawyers in the United States and Canada practice, CL may turn out to be an appealing option – especially where the firm does not handle litigation or tends to refer large-scale litigation to bigger firms. In those cases, it may even prove useful to identify outside litigation counsel at the outset, so that everyone knows who will be handling the case if the CL process ends in stalemate.

In my view, one of the promising areas of practice for CL-trained non-family attorneys is transactional work. CL is, by definition, practiced in the arena of conflict – i.e., cases that could be headed for the courtroom but for the commitment of attorneys in the CL process agreement not to go there. Many CL-trained attorneys, however, also handle contract negotiations and other transactions and have acquired a reputation for collaboration. Nine years ago Professors Ronald Gilson and Robert Mnookin predicted that lawyers could differentiate themselves from their competitors – and possibly even charge more for their services – if they became known for their commitment to collaboration. (See Ronald J. Gilson and Robert H. Mnookin, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation," 94 *Columbia Law Review* 509 (1994).) Gilson and Mnookin suggested that by "choosing lawyers with reputations for cooperation, clients might be able to commit to cooperative litigation strategies in circumstances where the clients themselves would not otherwise trust each other." (See <http://grace.wharton.upenn.edu/risk/wp/8.2.96.abs.html>.)

To be sure, collaborative strategies in transactional work are not the same as CL. However, growing the ranks of CL-trained attorneys in the world of deal-making will

serve to create the fertile soil necessary for the fuller use of the CL process in those non-family cases where litigation would otherwise be the default mode of dispute resolution.

### **Conclusion**

Many have described CL as an idea whose time has come. That description is accurate. In the world of business, however, that time is coming more slowly than many would have predicted. CL originally developed as a uniquely well-suited alternative to mediation in the area of divorce. In non-family cases, mediation generally works well, and attorneys can use it without risk of disqualification if the mediation reaches an impasse. Accordingly, CL is currently a less prominent feature of the business law landscape than it has become in the world of divorce. CL has nevertheless added a valuable tool for non-family lawyers – a tool that may prove to be particularly useful in smaller, non-litigation-oriented firms or in cases where, as in divorce, the end of a relationship needs to be managed with care. In addition, lawyers have already adapted from the CL model variations of practice that may fit their clients' needs more precisely than CL itself. While the term "collaborative law" should be reserved for the original model, the spirit that led Stu Webb to create CL in the first place lives on in the lawyers who are creating new tools to place side by side with CL in the non-family lawyer's toolbox.

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