The Promise and Perils of COLLABORATIVE LAW

BY JOHN LANDE

Getting people to use an interest-based approach in negotiation has been a difficult problem. Experts provide helpful suggestions for changing the game, though these are usually limited to case-by-case efforts within a culture of adversarial negotiation. Collaborative law (CL) is an important innovation that establishes a general norm of interest-based negotiation and intentionally develops a new legal culture. This article describes CL's promise and potential perils, focusing particularly on the perils to complement the literature touting the promise.

The promising performance of CL

CL reverses the traditional presumption that negotiators will use adversarial negotiation. CL parties and lawyers sign a participation agreement establishing the rules for the process. Under these agreements, lawyers and parties (negotiators) focus exclusively on negotiation, disclosing all relevant information and using an interest-based approach. Negotiators work primarily in four-way meetings in which everyone is expected to participate actively.

A "disqualification agreement" clause provides that CL lawyers represent parties only in negotiation and are disqualified from representing them in litigation. (Although CL lawyers cannot litigate a CL case, CL parties can withdraw and hire other lawyers to litigate.) This disqualification provision creates strong incentives for all negotiators to stay in CL. Practitioners consider this the essential feature of CL.[1]

Although CL principles could be applied in almost any civil case, virtually all CL cases have been family law matters.[2] Many CL groups promote a multi-disciplinary approach throughout the case, using a team of professionals in allied fields, including neutral financial and child development experts as well as mental health professionals serving as "coaches" for each party.

Since the CL movement began in 1990, it has grown rapidly. There are more than 150 local CL groups, which develop local practice protocols, train practitioners, build demand for CL and form referral networks. The International Academy of Collaborative Professionals, an organization with more than 1,000 members, publishes a newsletter, manages a listserv and Web site, does public relations, holds annual conferences and sets standards.[3] Legislatures and courts have enacted rules exempting CL cases from normal case-management procedures.

CL negotiators generally use interest-based negotiation, according to a landmark study by Professor Julie Macfarlane.[4] Her three-year study involved 66 initial interviews with clients, lawyers and other professionals in the United States and Canada. The researchers then conducted in-depth case studies of 16 cases in four cities, involving 150 interviews.

Macfarlane found that CL negotiators generally did not engage in adversarial negotiation and when they did so, they usually had more information and a more constructive spirit than in traditional negotiations. She found that, in general, CL agreements contain provisions comparable to those reached through traditional negotiation, though CL parties sometimes develop more creative provisions tailored to their interests. Macfarlane found no evidence that weaker parties in CL received less favorable terms than they probably would have in traditional negotiation. In general, CL parties benefited from improved communication and were satisfied with the process and their lawyers. CL lawyers were generally quite pleased with the process, which enabled them to practice more consistently with their values and provide better service to clients.

The potential perils of CL

CL practitioners are experimenting with new roles and procedures in an innovative process. Innovators inevitably make some mistakes, but we can hope CL practitioners will learn from research and experience to reduce the following risks.

1. Setting unrealistic expectations. When considering whether to use CL, parties need realistic understandings of the nature of the process and the lawyer's role. Macfarlane found that CL lawyers generally used three different approaches: (1) a traditional legal advisor who commits to cooperation, (2) a friend and healer who focuses more on helping people heal emotionally than serving as an advocate for individual clients, and (3) a member of a team committed to preserving the integrity of the CL process.

Although CL lawyers may combine several approaches, many lawyers have a general preference for one of them. Each approach has potential benefits and risks. Lawyers using the healer and team-player roles face particular risks because they deviate from traditional expectations of lawyers and are more likely to violate professional conduct rules.

The degree of risk depends on whether the lawyers effectively communicate realistic expectations at the outset, and the clients provide real informed consent. In some cases, Macfarlane found a "mismatch" of expectations, which frustrated clients. Some CL lawyers were so committed to a "harmony ideology" that they were not sympathetic to their clients' desires for emotional expression or particular results. Clients generally

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took a pragmatic approach, concerned primarily about the cost, time and resolution of the matter.

Macfarlane found that some clients were disillusioned when the process was not as fast or inexpensive as they were led to believe. Some were disappointed when their lawyers did not provide specific legal advice, emotional support or advocacy. Indeed, in some cases clients felt that their lawyer "ganged up on them" with the other side, leaving them without support or advocacy. Some clients did not understand what information it would be necessary to disclose—for example, the existence of a romantic relationship. Moreover, some CL lawyers had inaccurate understandings of rules governing confidentiality and thus generated misleading expectations.[5]

To some extent, inadequate or misleading disclosures are predictable for a complex new process in which many practitioners have only limited experience. Over time, CL lawyers should routinely provide clients with realistic expectations, which requires CL lawyers to be aware of their own values and expectations and communicate them effectively. Practitioners should provide candid advice to prospective clients including potential disadvantages of CL and contra-indications in their cases.[6]

2. Creating excessive settlement pressure. Some pressure in negotiation is inevitable and often desirable. Parties may not make reasonable decisions—or any decision—without some pressure. Parties are often inexperienced and under stress, and their lawyers often have a better understanding of what would satisfy clients' interests. Thus it is often appropriate for lawyers to press clients to reconsider decisions or to agree to reasonable requests from other parties.

Macfarlane found that some parties feel significantly empowered in CL but others do not, sometimes due to the lawyers' approach or the structure of the process. CL lawyers participate in virtually every conversation in the negotiation process, including the four-way meetings and also the conversations with clients and the other lawyers before and after the four-ways. One CL lawyer said, "I think it's very clear, we still have a ton of control . . . in fact, more control maybe than we had, in a sense, than before. Not of the outcome, necessarily, [but] over process and over behaviour in the meeting and so on."[7]

CL lawyers also can exert major influence on substantive decisions. For example, Macfarlane found that some CL lawyers sometimes impose their own views about "healthy family transitions" on their clients. This finding suggests that some clients may feel pressured to accept agreements that the lawyer believes are in the interests of the whole family rather than focus primarily on the clients' own individual wishes and interests.

Similarly, some clients may feel pressured by lawyers whose primary goal is to avoid litigation and who thus attempt to impose a false harmony.

Pauline Tesler writes that CL lawyers should "represent the highest-functioning client, and . . . take no instructions from the 'shadow client.'"[8] CL lawyers can use this theory to ignore clients' stated desires as coming from the shadow client—that is, one who is governed by feelings such as anger, fear and grief—not the "true client."

The CL process, through the disqualification agreement, is purposely designed to put pressure on parties to stay in CL. Macfarlane found that although CL lawyers explained the disqualification agreement at the outset, some clients felt "entrapped" because they had invested so much time and money in CL that it was too hard to switch to litigation. This dynamic gives power to a party who stalls the process or outlasts the other. It also gives power to a party who suggests ending the process, if the other party does not want to litigate.

CL practitioners should respect clients' ultimate decision-making authority and thus limit their pressure on clients.

3. Violating rules of professional conduct. It is hard to assess definitively whether CL practice complies with lawyers' rules of professional conduct. CL implicates rules governing competence, diligence, zealous advocacy, limiting the scope of representation, representation of multiple clients, conflicts of interest, confidentiality, client's right to settle, withdrawal, prospective waivers of liability and joint advertising.[9] Courts and ethics committees must rely on imperfect analogies in interpreting rules premised on the model of traditional representation. Moreover, CL procedures vary, and determinations of compliance typically depend on the facts of particular cases.

The disqualification agreement, a central element in CL theory and practice, may be especially problematic. Professor Scott Peppet has doubts whether such agreements comply with ethical rules. "By requiring that both parties hire new attorneys in the event that they cannot settle their dispute, mandatory mutual withdrawal provisions effectively permit one party to fire another party's lawyer."[10] He argues that this "seems at odds with the most fundamental premises of the legal ethics codes, which strive at every turn to protect the lawyer-client relationship."[11] Moreover, CL participation agreements probably violate ethics rules if they authorize lawyers to withdraw if clients do not follow the lawyers' advice.[12]

Professor Christopher Fairman argues that CL is a distinct form of practice calling for new ethical rules.[13] However, unless authorities do adopt new rules, CL lawyers should comply with existing rules.

4. Resisting choice and innovation. Some CL practitioners are so committed to their approach that they ignore other options that may be more appropriate for their clients. Macfarlane found that some practitioners have "quasi-religious" passion for their approach, and that local groups generally develop uniform practices for their members. A uniform approach can provide benefits of strong commitment to the process and development of clear understandings. When practitioners feel limited tolerance for variation, however, they are less likely to raise questions that could

lead to improvements. Moreover, allegiance to a single ideological approach can deprive practitioners and parties of a greater choice of processes, a fundamental value of dispute system design.

Instead of limiting offerings to a single ideological approach, practitioners should develop clear explanations of a broad range of options. Practitioners should respect client process choices rather than impose their ideological preferences on clients. Macfarlane argues that "if CFL [collaborative family law] is to develop integrity as a process choice for family transitions—particularly as a process that trumpets the autonomous decision-making role of the client—it is critical to remove the taint of ideology. . .."[14]

CL's ideological nature is demonstrated by insistence on using disqualification agreements. CL groups have been unwilling to offer "cooperative law"—a similar process that does not include the disqualification agreement—even though it might serve some clients better than CL.[15] Macfarlane also found that some CL lawyers do not advise clients whether they would benefit from mediation. In everyday conversation, some practitioners refer to litigation as if it is inherently a form of evil rather than a problematic but essential form of dispute resolution.[16] These practices give priority to practitioners' ideological preferences over the interests of clients who might prefer cooperative law, mediation, or traditional litigation.

CL practitioners should provide clients with the balanced information needed to make informed decisions, and they should then respect clients' decisions. Similarly, CL practitioners—and all dispute resolution professionals—should respect practitioners with different ideologies of dispute resolution.

Achieving CL's potential

CL is an important innovation offering great promise and posing real risks. It creates a mechanism for institutionalizing interest-based negotiation as the norm, reversing the presumption of adversarial negotiation. Local CL groups provide ongoing training and peer consultation to continuously improve the quality of services.

CL leaders and practitioners can manage risks if they openly acknowledge and address problems. Practitioners can elicit truly informed consent from prospective clients and refrain from overselling CL. They can provide realistic expectations, including frank acknowledgment of potential problems and an explanation of other processes that clients might prefer. Practitioners can comply with professional conduct requirements, and they can limit pressure on clients to accept the practitioners' procedural and substantive preferences. They can respect diverse dispute resolution and CL procedures, and they can advise clients primarily based on clients' needs rather than the practitioners' ideological preferences.

As CL develops, we can hope practitioners will achieve the potential and minimize the risks of this important innovation in dispute resolution system design.

Endnotes

[1] For analysis of disqualification agreements, see John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 Ohio St. L.J. 1315 (2003).

[2] For an excellent analysis explaining why parties have not used CL in business cases, see David A. Hoffman, Collaborative Law in the World of Business, Collaborative Rev., Winter 2004, at 1. For suggestions to adapt CL for civil cases, see John Lande, Negotiation: Evading Evasion: How Protocols Can Improve Civil Case Results, 21 Alternatives to High Cost Litig. 149 (2003).

[3] *See* International Academy of Collaborative Professionals, www.collaborativepractice.com/index.cfm.

[4] Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (2005), at http://canada.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf.

[5] *See* Lande, *supra* note 1, at 1341-43.

[6] An official comment to the Model Rules of Professional Conduct states: "Ordinarily, [informed consent] will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives." Model Rules of Prof'l Conduct Rule 1.0(e) cmt. 6 (2002).

Some statements promoting CL do not promote such informed consent. For example, the International Academy of Collaborative Professionals website identifies advantages but no disadvantages of CL and its section "Is [collaborative practice] for you?" includes no cautions about contraindications. *See* www.collaborativepractice.com/index.cfm. In a recent appearance on the nationally televised Today Show, CL lawyer Neil Kopek said that there are "no real risks" in CL. *See* www.collaborativelawny.com/today_show.php.

[7] *See* Macfarlane, *supra* note 4, at 42 (omission of words in original).

[8] Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation 161 (ABA Publishing 2001).

[9] For detailed analyses, *see* Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2004-24, 2004 WL 2758094 (2004); Lande, *supra* note 1, at 1330-60.

[10] Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 Iowa L. Rev. 475, 489 (2005); *see also* Lande, *supra* note 1, at 1344-60.

[11] Peppet, *supra* note 10, at 489.

[12] *See* Lande, *supra* note 1, at 1345-49. For an example of such a provision, *see* Macfarlane, *supra* note 4, at 69 n.85.

[13] Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 Ohio St. J. on Disp. Resol. 505, 522-28 (2003).

[14] Macfarlane, *supra* note 4, at 35-36.

[15] For discussion of cooperative law and comparison with other dispute resolution processes, *see* John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 Fam. Ct. Rev. 280 (2004). There are a small number of groups offering cooperative law. *See, e.g.*, Divorce Cooperation Institute, http://cooperativedivorce.org.

[16] For an excellent critique of a tendency in the dispute resolution field to castigate the courts and litigation, *see* David A. Hoffman, *Courts and ADR: A Symbiotic Relationship*, Disp. Resol. Mag., Spring 2005, at 2.