

## Collaborative Law: A Skeptic's View

*Susan B. Apel, Esq.*

During my practice of family law, I admit to dreaming of a world where my clients, perhaps with a nudge or two from me, would take responsibility for themselves and their children and clean up the mess that divorce often brings. I believed that the legal process was often paternalistic and disempowering, although not always,<sup>1</sup> and that private ordering was usually preferable to judicial fiat. And I hated dealing with attorneys on the other side who might have fit Pauline Tesler's definition of "barricudas."<sup>2</sup> Why, then, am I skeptical of the practice of collaborative law?

First, it is helpful to look at collaborative law with an eye toward sorting out what is new and what is not. Interest-based, or problem-solving approaches to negotiation, as well as their associated techniques – such as brainstorming – are not new. They have existed for some time and may be best known as presented in the book, *Getting to Yes*.<sup>3</sup> In the past several decades, negotiation texts and courses have incorporated these alternatives to adversarial, position-based negotiation.<sup>4</sup> What Tesler calls "the four-way" – that is, two lawyers and two clients meeting together to resolve their issues – may be less common, but is not new either. Lawyers have been known to bring their clients to negotiation sessions not only as interested observers, but also as participants.<sup>5</sup>

What *is* new about collaborative law is the agreement to eliminate litigation as a possible means of resolving disputes. While Tesler advocates that collaborative lawyers be creative in their own processes and need not follow any particular technique in slavish fashion, she states that the "one irreducible minimum condition" of collaborative law is that lawyers must disqualify themselves if litigation, or even the threat of it, occurs.<sup>6</sup> This elimination of litigation

from the very beginning of representation – signed onto by both lawyers and their clients – is the sine qua non of collaborative law. It is precisely this aspect of collaborative law that requires further scrutiny and ultimately its rejection as a viable process for dispute resolution.

It is my intent to look at this issue from each of the points of view of the parties involved, but before I get to that, one initial observation. A problem-solving approach that is characterized by creativity and flexibility while requiring the absolute elimination of one form of dispute resolution (litigation) seems inconsistent. It is not that litigation has to be the favored approach, or that it is the perfect tool in resolving disputes. Even if it has but marginal value in some cases, the good problem-solver should not reject any rational means of achieving an end, particularly at the very beginning of representation. At the beginning of a case, particularly a divorce, one may not know enough to be able to make a judgment that litigation is an undeniably poor choice. Put another way, problem-solving approaches should recognize that until there is ample and demonstrated reason to forego an option, that option should remain open.

Let us look at collaborative law from the client's point of view. The client is signing on to limited representation, which is certainly permissible under the Model Rules (Rule 1.2). Collaborative lawyers argue that clients are free to make this choice, and that it is paternalistic for lawyers to second-guess the client's judgment. It is true that clients are free to make their own choices; in fact, Rule 1.2 requires it. But lawyers have a role in the counseling process as well. That is why Rule 1.2(c) states that "[a] lawyer may limit the objectives of the representation if the client consents *after consultation*."<sup>7</sup> This means that the lawyer must be more than the proverbial potted plant. A client counts on his or her attorney to use professional experience to help evaluate existing options. Lawyers need to anticipate and provide for worst case scenarios. Therefore, even if a client believes that a case can and will be settled, a lawyer

must advise a client that sometimes litigation becomes necessary. Choosing an option – collaborative law – that rules out the litigation option is risky.

What does choosing collaborative law mean for the client? It may mean the possibility of settlement. It may also mean that should settlement become impossible, or should the other party threaten to litigate (more on this later), the parties will be forced to find other counsel to represent them in litigation. This can present a profound hardship to the client, who may not understand the difficulty of securing counsel at this stage in a divorce. One issue involves availability of other counsel. Will non-collaborative lawyers be lining up to litigate divorces where settlement has already proved to be impossible? Other problems include the costs and psychological strain of securing new counsel. Though the original collaborative lawyer can assist, surely the process of finding another lawyer will not be easy and seamless. As in all cases where a client changes attorneys, there will be financial costs involved. Bear in mind that having spent money on the collaborative process already, a client's funds for litigation may be greatly diminished. In family court, the majority of litigants are proceeding pro se. Thus, it is not certain that collaborative law clients will be able to secure counsel to see them through the court process; they may be forced to go it alone. Moreover, there are emotional costs to the client. Divorce is difficult enough. Imagine the state of emotional affairs following several negotiation attempts in which the parties have been active participants. Those attempts have failed. Litigation, the thing the parties hoped most to avoid, looms. And now, in the midst of what most probably feels like a crisis, the client must go shopping for another lawyer. Tesler herself admits that, even if disqualified counsel assists in the transition to a new lawyer, "the financial and emotional costs of starting over with new representation will usually be significant."<sup>8</sup> But she offers no solution.

Collaborative lawyers are fond of pointing out at this juncture that the worst hardly ever happens, that most collaborative negotiations succeed – a fact that, incidentally, is true of all cases, divorce and otherwise, in non-collaborative processes.<sup>9</sup> They argue that in fact it is the non-litigation clause that acts as the “teeth” needed to ensure that negotiation succeeds.<sup>10</sup> Clients, who want to avoid litigation badly enough that they have foresworn it, and who know that to break that promise will result not just in the very thing they fear, but in additional financial and emotional costs, are guided by such “teeth.” Tesler states, “For both financial and emotional reasons, once clients have become invested in working with collaborative counsel in a dispute, they typically become reluctant to end the relationship.”<sup>11</sup> I am not certain that these are the circumstances under which clients ought to settle. It feels coercive, extorting – self-induced perhaps, but nonetheless so. Continuing a process that is working is a good thing; pushing through an impasse just for the sake of continuing the process is not.

The worst part of collaborative law, however, is revealed when one considers it from the point of view of the participating lawyer. Collaborative law is the deliberate and self-administered introduction of role confusion. Is the lawyer an advocate for the client, for the foursome, for the process of collaborative law itself? To ask the question is to make it obvious that the lawyer becomes something different from, and less than, the client’s advocate. This is not because zealous representation cannot encompass interest-based negotiation. The real problem is that the lawyer’s allegiance is no longer clear. Tesler says that one of the things that is unique about collaborative law is that “risks and costs of failure are distributed to the lawyers as well as the clients,”<sup>12</sup> and that “if the process breaks down, the lawyers are out of a job.”<sup>13</sup> Tesler seems to think that this is a good thing. It is not. Lawyers are not supposed to be acting in their own best interests, even partially, but in the interests of their clients. Giving them a stake

in the process in this way causes their loyalties to run in too many different directions, with no clear accounting for conflicts or how to address them, assuming that conflicts do not already exist due to the very nature of the process.

Model Rule 1.7(b) requires that lawyers consider conflicts of interest *before* agreeing to represent a client, and states, in pertinent part:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client *or to a third person, or by the lawyer's own interests.*<sup>14</sup>

The rule goes on to say that representation under the above circumstances is possible if the lawyer reasonably believes the representation will not be adversely affected, and the client consents after consultation. However, the Comment to Rule 1.7 provides that client consent alone is insufficient, and that such consent cannot even be asked for by the lawyer if “a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances.”<sup>15</sup> Given that reasonable “disinterested” lawyers may disagree regarding whether or not clients should engage in collaborative law arrangements, the prudent lawyer should see participation in such arrangements as risky, both to the client and to their own ethical practice.

Robert Collins, professor of alternative dispute resolution, voices this role confusion as follows. He believes that collaborative law is “NOT creative, fair negotiations between attorneys who have foregone the threat of court, done in the presence of their clients, but really IS co-mediation with two non-neutral mediators.”<sup>16</sup> Thus, the lawyer is not a partisan, as in traditional negotiation, and is not a neutral, as a mediator is required to be. S/he is something else, a role that is ill-defined and difficult to determine. As but one example, he states that the job of an

attorney in a traditional negotiation is “I tell my client I will do everything I can to protect their interests, and do so.” When acting as a mediator, “I have no client to protect, or alternatively, try my best to protect both, after warning them I’m not counsel for either.” As a collaborative lawyer, “I tell my client I’ll do everything I can to protect their interests, *and then don’t do so in the 4-way, in the interests of the Greater Good?*”<sup>17</sup> Here the “Greater Good” may be simply the recognition that a settlement is virtually required. (Again, the function of those “teeth.”) Collins posits another issue: “If [in the course of the collaborative four-way ] I think of a brilliant solution that favors the OTHER client, I . . . *do what with it?*”<sup>18</sup> The path of ethical action, while not always clear for lawyers, is dangerously muddied by the practice of collaborative law.

One other ethical issue deserves comment. As previously stated, limiting the scope of representation is entirely ethical under Model Rule 1.2. Model Rule 1.16 governs attorney behavior in withdrawing from representation. It provides that a lawyer may withdraw from representing a client if “withdrawal can be accomplished without material adverse effect on the interests of the client.” The new 2002 ABA Model Rules (not yet adopted in Vermont) state in a comment that “[o]rdinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded.”<sup>19</sup> Rule 1.16 is also mindful of the need to request permission to withdraw from the court when one has already entered one’s appearance. It seems reasonably clear that collaborative lawyers can avoid this Rule by: (1) making sure to limit the scope of their representation in absolute and unambiguous terms; and (2) by foregoing the filing of any papers whatsoever with the court unless and until a settlement occurs. The foregoing of filing of papers may place a client at a disadvantage, or may not significantly affect the case. In instances where the latter is true, I do not want to overstate the significance of the letter of Rule 1.16 for the practice of collaborative law.

And yet, Rule 1.16 exists to serve a purpose. The spirit of the rule recognizes the importance of the lawyer-client relationship, and to some extent, the dependence of the client on the continuity of that relationship. That relationship is not required to continue in perpetuity. It feels wrong, however, for the relationship to terminate at the precise point when litigation becomes necessary. Lawyers themselves have admitted distaste for the courtroom, and clients fear it, all with good reason. It is precisely at this point that the client needs the lawyer more than ever, for professional, financial, and emotional reasons. Certainly the client can obtain other counsel, at financial and psychological cost. But is this really in the client's best interest? And is the lawyer showing commitment to the client and the task at hand by entering into a contract that ensures his or her unavailability at a crucial point in the representation of the client?

Much of Tesler's work speaks not just to client interests, but what she believes to be a better, less stressful alternative for lawyers. "Not least of the benefits of collaborative practice is that it seems to evoke in those lawyers who embrace it a rekindled joy in the practice of law."<sup>20</sup> One reviewer of Tesler's book notes that "[m]uch of what Tesler preaches is that collaborative law offers a more satisfying life for the lawyer. There is nothing wrong with wanting a satisfying life, but lawyers must be very sure not to attain it at the expense of their clients."<sup>21</sup> If personal distaste for the courtroom is the reason that lawyers come to collaborative law, they may be choosing their personal comfort over their clients' interests.

A brief word about the remainder of the foursome – the other attorney and client. According to the rules of collaborative law, the process must cease not only if litigation ensues, but also if the mere *threat* of litigation occurs. Clients choosing this alternative must therefore be advised that they are placing the process in the control of someone else, and in particular, someone whose interests may not be congruent with their own. That seems misguided. An

individual who becomes dissatisfied with the tone or content of the negotiation can call a halt to the entire process simply by threatening to go to court. Whatever has been invested in the process up to that point is lost, and the attorneys are disqualified from proceeding any further in the representation of the clients. This means that while the agreement purports to remove litigation as an alternative, it does not. Its possibility remains a powerful threat that can be strategically used by one party to foul the process.

What, then, is the answer to the question of how disputes might be reasonably resolved? I think the answer lies in the rejection of the binary thinking of Tesler and others who see the choices as between what she dismissively calls “gladiators” and those who would engage in collaborative law. In a sanctimonious tone, Tesler would have us believe that collaborative lawyers are “engaged moral agents” as opposed to the others who are “disengaged (albeit hungry) barricadas.”<sup>22</sup> Clearly, one cannot reduce all lawyers, and all practice of law, to those two, and only those two, categories. It is possible to be an “engaged moral agent” and practice outside the confines of collaborative law. Indeed, many of us have been doing so for decades.

What collaborative law does bring to the table is our need to develop even better counseling and negotiation skills. No responsible lawyer believes that litigation is the only answer. But even without collaborative law, lawyers can and will continue to negotiate and find non-litigation based solutions to client problems. They do not need to abandon litigation, or the very possibility of it, to do that in creative and client-based ways.

*Susan B. Apel, Esq., is Professor of Law and Director of the General Practice Program at Vermont Law School. She teaches two family law courses at VLS and a course in legal issues*

and reproductive technology at Dartmouth Medical School. She practiced family law for twelve years.

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<sup>1</sup> In the interest of full disclosure, my background prior to academia was as a legal services lawyer, in which I represented many poor people against spouses, government bureaucracies, and other relatively powerful entities. Courtrooms were sometimes places where my clients felt further victimized; sometimes they felt that *only* in court were their voices heard and justice done. When it came to speaking for them, I was proud to be, even though Tesler uses the term in a pejorative sense, their “gladiator.” See PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 169 (2001).

<sup>2</sup> *Id.*

<sup>3</sup> ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981).

<sup>4</sup> STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS* (2d ed. 2003); DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* (1989); CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (4<sup>th</sup> ed. 2001).

<sup>5</sup> KRIEGER & NEUMANN, *supra* note 4, at 277.

<sup>6</sup> TESLER, *supra* note 1, at 6.

<sup>7</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (italics added).

<sup>8</sup> TESLER, *supra* note 1, at 14.

<sup>9</sup> ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATION: SKILLS FOR EFFECTIVE REPRESENTATION* 341 (1990).

<sup>10</sup> TESLER, *supra* note 1, at xx.

<sup>11</sup> Pauline H. Tesler, *Collaborative Law Neutrals Produce Better Resolutions*, 21 *ALTERNATIVES TO HIGH COST LITIG.* 1, 14 (2003).

<sup>12</sup> TESLER, *supra* note 1, at 4.

<sup>13</sup> Tesler, *supra* note 11, at 13.

<sup>14</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7(b) (italics added).

<sup>15</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt.

<sup>16</sup> Unpublished correspondence from Robert Collins (on file with the author).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> MODEL RULES OF PROF’L CONDUCT R. 1.16 cmt. (2002).

<sup>20</sup> TESLER, *supra* note 1, at 5

<sup>21</sup> M. E. O’Connell, *Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution in Divorce without Litigation*, 40 *FAM.CT. REV.* 403, 404 (2002).

<sup>22</sup> TESLER, *supra* note 1, at 169.