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What is beneath the hype of collaborative family law?

By Dr. Julie Macfarlane

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I have recently concluded a three-year research project funded by the Social Science and Humanities Research Council of Canada and the Department of Justice, Canada, examining the practice of collaborative family lawyering (CFL) in Canada and the United States. I wanted to get beneath the "hype" and the excitement over CFL and discover what the process was like for clients and for lawyers, as well as to critically explore the differences that CFL makes to the process and outcome of divorce disputes.

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The study followed cases in four cities – Vancouver and Medicine Hat in Canada, and San Francisco and Minneapolis in the United States – which were selected as representative of a range of different CFL practices and philosophies and a variety of client groups. Between these case studies and an initial "immersion" year spent visiting North American locations where CFL groups were starting up, more than 200 interviews were recorded.

What I found on my travels was a new "movement" for more participatory and dignified conflict resolution in divorce. Collaborative lawyers have high ideals and genuine aspirations to provide better client service and to enable separating spouses to cope better – both emotionally and practically – with the stresses and sadnesses of family transition. Of course there is a "bandwagon" effect here, with some lawyers drawn to CFL as a new marketing strategy — but these are a small minority. Most CFL practitioners are dedicated to improving conflict resolution processes because they are disillusioned – some would say disgusted – by the destructiveness of family litigation.

I found that CFL clients are for the most part satisfied, and some are enthused, about this approach to resolving family conflicts. For many of the clients I encountered, and whose cases I followed on a weekly basis, it was important to participate directly in negotiation and decision-making, however painful; they felt that better decisions were made as a result. Many clients were motivated to appear as role models to their children, that mom and dad could still be civil and respectful with each other. Many appreciated the strong emotional support they received from their lawyers, and – in the few cases that retained their services – their coaches.

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But the picture I have drawn in detail in my final report (Department of Justice, 2005: www.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/index.html) is not without its ambiguities and challenges. Some CFL clients feel that they need stronger advocacy from their lawyers, and a few complain of an apparent reluctance to provide them with legal advice or to use legal arguments as a way of moving the negotiations forward. Some find the "false harmony" imposed on the four-way meetings by the collaborative ideology unreal and frankly inadequate to deal with the real conflict that often exists between the separating spouses.

CFL lawyers probably need far more training to equip themselves to manage these interactions – the process is a fine one, but it is not the answer in and of itself. Sometimes CFL lawyers forget that while they are motivated by lofty ideals of better family transitions, and service to the "whole family", often their clients' priority is simply to get the divorce over with quickly and inexpensively and to survive as best they can. Another problem is the "overselling" of CFL, where clients are assured that the process will be "faster and cheaper" than traditional divorce – often it might be but there is no data yet to prove this. Negotiating with clients as part of the team may sometimes take longer than traditional lawyer-to-lawyer negotiation – one of the cases I followed was still ongoing after 18 months – but one would hope that the results would be better for all concerned. Lawyers also need to do more to prepare their clients for the hard work involved in negotiating directly with their spouse. While CFL may be a more supportive and dignified process than litigation, that really isn't saying much ... and divorce is always hard.

There is also some concern that inadequate attention has been paid, thus far, to thorough screening of cases. There is always a risk in informal processes that the process might be manipulated by one abusive party or that participation and speaking up may actually put one or the other party in danger. In a few of the cases I followed, the spouses were still living in the same residence, and there was a concern about interactions following and between meetings. Lawyers need to be more cognizant of these dangers and take steps accordingly to protect potentially vulnerable clients.

The CFL movement has taken these and the many other issues I raised in my final report very seriously. There has already been work done in local groups and in trainings to address some of the questions raised by my research and to enhance the level of professionalism in collaborative practice. The collaborative lawyers face continuing challenges as any innovators must do. They need to control their zealotry – and in particular the tendency among some to reject mediation as an alternative to collaborative law – and continuously ensure that the collaborative process is meeting their clients' needs, as well as their own.

It would be a serious misjudgment to write collaborative lawyers off as flakes or hippies. They are definitely onto something, and they are not going away.

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