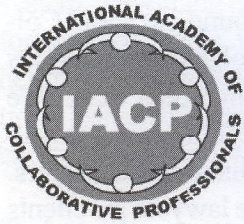


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IT TAKES A SYSTEM.....TO CHANGE A SYSTEM

An Interview With Peggy Thompson, Ph.D
Co-Creator of the Collaborative Divorce Team Model

by Pauline H. Tesler, JD, San Francisco, California

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THREADS FROM THE COLLABORATIVE LISTSERV

Edited by Carl Michael Rossi, Chicago, Illinois

Stepping Off the Edge

[Ed. note: Thanks to the effort of its founder, Carl Michael Rossi, the Collaborative Practice Listserv, at collablaw@yahoogroups.com now boasts 169 members from all over the United States and Canada and 1,573 postings as of this writing on all topics concerning collaborative practitioners. Its members can expect to receive a response on any topic from the leaders of the collaborative practice movement within hours of posting their inquiry. Here follows a typical "thread" of postings, which will be the first of many threads we will bring to you in future issues of the Review. Carl's introductory remarks and segues between threads are in blue (bold), below.]

If you are familiar with the Tarot, there is a card called The Fool. It is a depiction of the notion of fundamental trust: knowing that, as I step forward into a new experience, whatever I need will be there to support me. This is in contrast to the fear that tells me that if I do anything different, I'll plummet to my doom. Those who have taken a training or more in Collaborative Law frequently have two reactions...often at the same time! These reactions are rooted in the Step of the Fool. Let's call one reaction the Missionary - the one who desires to spread Collaborative Law to all one's clients. Let's call the other the Cautionary - the one who makes sure that s/he is never too far from the rock solid base from which s/he came. On the CollabLaw listserv, we've had discussions on both. This discussion, or "thread", occurred in June of 2002 and embraced both the Missionary position and the Cautionary tale.

Michael Hiller starts us off with a good presentation of the conflict: "I love this stuff, I want to get all my clients to agree to it BUT....."

The question is: what sort of client management tools can you recommend when a client first comes in? In Texas, we have extremes; a client comes in for Collaborative Family Law and the slightest thing can send the other client to a high-powered, litigation-only attorney. I do litigation too, but my goal is to do more Collaborative Law. The point is...a divorce with dignity. What suggestions do you have to prepare a client for Collaborative Law, while knowing that the other client, or mine, may want litigation before we even get to the 1st 4-way? It seems to me that we have to prepare for both, while trying to steer the client(s) toward Collaborative Law.... *Michael Hiller, JD, Houston, TX*

Pauline shares her wisdom on the notion Michael raises that we should "steer" clients to Collaborative Law.

My take on this is that we ought not "steer" any clients—and especially clients like these—to Collaborative Law. If ever a contrarian approach were called for, this kind of situation would be it. Working with the other attorney at the front end, and working with your practice group, about how all of you will handle folks like this is important groundwork. I think the lawyers need to send the message out to all potential Collaborative Law clients that this model is not for everyone and not everyone should select it—that it requires a commitment to the process and to a desirable outcome for both parties and for the restructured family, a commitment that not all clients can genuinely

make—and that it simply does not work well where that commitment is lacking. There has to be a real commitment to such elements as a respectful interest-based negotiating process, an ongoing working relationship after the divorce, a desire for the best co-parenting relationship possible after the divorce, an outcome that both parties can live with reasonably comfortably, and not just the biggest piece of the pie for oneself.

If your client is signed on to all that and the other party is not, the message is basically the same: this process only works well when both parties share these commitments, and it may be a bad choice for the client if that is lacking. If you and the other attorney both send this message, the dynamics often alter: the other party may have thought there was some leverage to be had by threatening not to play, but the leverage disappears when the response from both counsel is, “you’re right! If you are thinking you’d probably rather be in court, you ought not to select collaborative law and I would not encourage you to do so because it requires valuing something beyond your own immediate self interest at least as much as you value getting the biggest slice of the goodies for yourself. That may not be you—lots of people can’t honestly make that commitment and if you can’t you should not select this option.”

Most people, being told that, fairly quickly decide that they really do want to make the collaborative commitments after all. If you keep discouraging them and they keep coming back, and you tell them that if they sign on to Collaborative Law you are going to hold them to those commitments, then they have given you an important tool for managing bad behavior downstream if it arises: they were advised not to go this route unless they could seriously commit, and they did, and now you are holding them to those commitments just as you said you would. Anyhow, that’s how I’d approach it. *Pauline Tesler, San Francisco, California*

Robert Harvie starts some related discussion with his experience of someone coming at it the other way. That is, keeping the big guns close at hand “just in case”

Our group has encountered some suspected difficulty with people ostensibly agreeing to collaborative law at the outset, and then apparently, during the process, retaining other counsel to commence litigation steps as an immediate backup when they don’t appear to be obtaining the results they want in the collaborative law process. In other words, as soon as a spouse requests compromise in the process, within a day of that meeting, she finds herself served with an application which apparently was prepared and waiting already before the collaboration broke down. If anyone has suggestions on how to deal with this, we would appreciate the advice. Our thoughts were to propose that if counsel is aware of such activity as a collaborative lawyer, or is participating in taking litigation steps during the process, that they be suspended from the group. Any other ideas? *Robert Harvie, JD, Lethbridge, Alberta, Canada.*

I share my own thoughts about the challenges of collaborating in a perceived “litigious” environment.

I read two issues into what you’ve written here, Robert. One about the clients and one about the lawyers.both flow from the same question - How is the Collaborative Law model viewed and used? Two people are in conflict. That conflict can be resolved by one being right or winning and the other being wrong or losing. That is the “final resort” avenue: litigation. People in conflict whose focus is litigation simply do not see any other way to end conflict. Compromise is “losing”. Some Win/Lose’ers have thus chosen to co-opt mediation into the litigation process. In other words, I have seen CE classes on “How to use mediation to your client’s advantage” and the like. The Collaborative model steps totally away from the Win/Lose premise. It begins with and *requires* the belief and trust that each party *can* get what s/he needs if the two work

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together. Both the parties and the attorneys must have that belief and trust or, it seems to me, it just won't work. So here is where the difference comes in as I see it. The parties are surrounded by well-intentioned people encouraging them to "win" and reminding them of the ways in which they believe they have been harmed (already "lost"). That what they need is less important than what they want; and that what they want is for the other party to lose/be hurt. Any client will likely feel some challenge and doubt about stepping off the unknown cliff of collaboration [the movie title *Sleeping with the Enemy* comes to mind.] It is the attorneys' role, as I see it, both individually and as necessary in conjunction with coaches and counselors, to support the clients in the process of collaboration that they have chosen, to help them see how compromise allows them to "win" what they need. The clients should be well prepared for this by the attorney and whoever else may be on the team before the collaboration agreement is signed. If and when they express or even act on their doubts during the process (e.g., hiring trial counsel without the collaborative lawyer's involvement) they should be asked if they are still committed to this model. We need not pretend that the clients will never have doubts. We do need to support them through those doubts if that is possible. However, if after all the support they no longer trust it, the process is simply over... On the other hand, a collaborative lawyer who is involved with the acquisition of trial counsel "just in case" has not accepted the model's premise: That this conflict will *not* go to trial. That there is *no* need for a third party to declare a win/lose. That these two parties have enough trust remaining from their relationship to work together to get their needs met. Seems to me that such an attorney is simply attempting to co-opt "collaboration" as a means to win.

Any client will likely feel some challenge and doubt about stepping off the unknown cliff of collaboration [the movie title *Sleeping with the Enemy* comes to mind.]

This is not collaboration at all. Robert, I would be scared and sad to find that one of the attorneys in our collaborative group had done such a thing. And it may be that s/he will have to be excluded. I would also want to explore with the colleague what his/her beliefs are about this approach. Maybe this should be addressed outright before allowing an attorney in the group to begin with. As Collaborative Law is not intended to be "right" for every client, it is also not "right" for every attorney. Taking the "training" does not

necessarily a Collaborative Lawyer make. Thanks for raising this question. I may not be "right" in what I have said, but your question helped me clarify what I believe. *Carl Michael Rossi, Chicago, Illinois*

Carroll Straus responds to the notion of "expelling" attorneys from the group for keeping the guns at the ready.

I never would have thought the "back up" team could possibly have been part of a collaborative group. This is dishonest and, of course, antithetical to the core principles of Collaborative Law. Expelling them, however, will not stop them from doing this—I think it should be discussed with them and with the group. If people are talking Collaborative Law but not walking Collaborative Law, the damage they do needs to be addressed honestly and directly. *All* of it—the destroyed trust etc. But the only way I can see to prevent this is to vet the Collaborative Law clients very carefully. The key to Collaborative Law is the commitments, and in this case clearly someone was

not committed. Higher, or non-partly refundable, fees might (odd as it sounds) be a key to investment and commitment.... Maybe non-refundable if this type of dishonesty happens! *E. Carroll Straus, JD, Mission Viejo, California*

Carroll also comments on the potential influence of friends and therapists encouraging conflict rather than resolution.

Carl states that "The parties are surrounded by well-intentioned people encouraging...." I think this is a questionable premise. "Let's You and HIM Fight" was one of Eric Berns' Games People Play. If the result of a behavior is harm, I posit that the true underlying intent is *not* "well" or "good"—we just all like to pretend it is. The "urgers" here have their own agendas. It takes strength for the clients to be able to self-validate in the face of this, though—and we may need to be prepared to teach them this. I had a client ask "What do I say when people tell me to 'get the best lawyer you can and protect yourself'?" I told him to say "I did. Thank you for your concern." That one still may fall apart (they declined to go Collaborative Law and it is a mediation; if they had retained two Collaborative Law lawyers they'd be far better off, as I told them *ab initio*.) Alas the client's personal therapist is the "let's you and him fight" player... but we shall see. *E. Carroll Straus, JD, Mission Viejo, California*

To which Susan replies:

Regarding therapists who seem to support an adversarial process, this is another way in which having a multidisciplinary group really helps. Having coaches directly involved is, of course, great. However, it is important to note that not all therapists are well trained

in family therapy, not to mention divorce transitions. Further, therapists who work with individuals do not need to drag the impact on their clients of others' "well-intentioned" advice] ... into their work. Their job is to work solely within the perspective of the client. A multi-disciplinary group means that you also have a pool of therapists who can work with clients outside of the coaching model without messing up a collaborative case. *Susan Gamache, Psychologist, Marriage & Family Therapist Vancouver, BC, Canada*

Pauline Tesler shares with us the approach her group has built into their participation agreement

I had a client ask "What do I say when people tell me to 'get the best lawyer you can and protect yourself'?" I told him to say "I did. Thank you for your

Our participation agreements include a provision that permits the court downstream to award attorneys' fees against a party who has misused the collaborative process. I would think that preparing litigation papers while pretending to collaborate would be bad faith per se. So, work with your local practice group to ensure that you are all in agreement about such behavior, get your documents to provide clear undertakings in that regard. I'd suggest to a client on the receiving end of such behavior to seek a hefty fee award for the period during which the offending party was marching

simultaneously in two opposite directions. I also would work with my local family law judge in advance about the meaning of that part of the participation agreement to maximize the possibility of support from the judiciary, such as we have in San Francisco with Judge Hitchens. *Pauline Tesler, San Francisco, California*

Stu Webb appreciates the practicality of Pauline's proposal

Pauline, It's great to get some good constructive suggestions into the mix. *Stu Webb, Minneapolis, Minnesota*

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Linda Miller offers another approach from her group.

In our Participation Agreement, we have a required notice and waiting period if either party decides to file any action in court. There are exceptions for emergency situations. *Linda Miller JD, Columbus, Ohio*

Richard Greenblatt and Jennifer Jackson voice their concerns.

Pauline writes that "Our participation agreements include a provision that permits the court downstream to award attorneys' fees against a party who has misused the collaborative process." Pauline, would you share this *in terrorem* clause with us? I am curious to know how it works. Are judges using this clause as a basis for attorney fee awards? Are potential clients concerned about the impact of such a clause? Although it strikes me as something akin to antenuptial agreements (of course I love you, just sign this document which says you get nothing if I fall out of love with you), which are not exactly a ringing endorsement of the institution of marriage, such a clause might actually raise the parties' commitment to the process and their consciousness of the impact of their failing to adhere to that commitment. Are any other groups using such a clause? *Richard Greenblatt JD, Newburgh, New York*

As Pauline is aware, this clause can also cause some problems - such as being subpoenaed to appear to testify in your former client's case!!!! We in San Francisco are working on souping up the "confidentiality clause" to prohibit this, but then, how do you prove someone has misused the process? Very tricky. *Jennifer Jackson, San Francisco, CA*

And thus this particular thread ended. Is the question "answered"? Probably not, and the struggle to feel safe stepping into Collaborative Practice continues. How do YOU make that move from litigation to collaboration? Are you stepping out completely? Are you staying close to what you're familiar with? Either way, you are not alone. There is another much longer thread that discusses the basic question of: is it possible to "sort of" collaborate; keeping the litigation option open. Look for that one in a future issue of the Review.

Carl Michael Rossi is both an attorney and a therapist. As an attorney he practiced in New York for ten years primarily doing criminal trials. As his practice branched into "civil" trials, he was struck by how "un-civil" they in fact were. For three years he has offered seminars and workshops to teach listening skills to both lawyers and non-lawyers. He has presented at the annual conference of the International Alliance of Holistic Lawyers (www.iah.org) and been a featured speaker and moderator at www.RenaissanceLawyer.com. A former partner of Rossettie, Rossettie & Martino, of Corning, NY, he is now a certified group co-facilitator with the ManKind Project. Oh yes, and a certified in-line skate instructor. Like himself, www.lhdragon.net, is a work in progress.

My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby -- not even money; certainly not my soul. *Mohandas K. Gandhi (from his autobiography)*