

From Barristers and Solicitors to The New Collaborative Lawyer

BY KIMBERLY P. FAUSS

Lawyers must reinvent themselves from time to time. Roots of our practice today grow from Medieval professionals known as barristers and practitioners known as solicitors. The New Lawyer is a designation for a new century, assuming traditional litigation competency, but adding on an array of settlement skills.¹ The rights-based model of traditional conflict resolution through courtroom litigation contrasts with and internet-based model found in other processes such as mediation and collaboration. With Collaboration and other alternatives to court, the practice of law is being redefined to encompass new and expanding knowledge and skills of negotiation to meet the needs of more sophisticated and self-aware clients. The distinct components of Collaborative Process are set forth in a report by Homer Lar Rue, the chairman of the ABA Section of Dispute Resolution:

The key defining element of Collaborative Law is a written agreement that no party will seek a resolution of any disputed issues in court during the collaborative process, and that if any party does so, the Collaborative Law attorneys for the parties will withdraw from any adversarial proceeding regarding the subject matter of the dispute. This Collaborative Law Participation Agreement usually also contains provisions calling for good faith negotiation, the sharing of relevant information, the use of joint experts, client participation in the negotiations, respectful communications, and the confidentiality of the negotiation process.²

Chairman La Rue notes in his report that thousands of cases have been resolved by this process over the past 20 years in more than 12 countries. A New Lawyer is emerging who is confident and competent in "conflict resolution advocacy."³ The mainstreaming of the Collaborative Process challenges all lawyers to incorporate client participation in the settlement of their own disputes as well as interest-based negotiating skills to achieve durable solutions.

Where We Have Come From

A split legal profession arose in the late Middle Ages, a time when information and ideas began exploding. The formal education of lawyers, the

self-designated *professio advocatorum*, and ethical codes of conduct can be traced back to mid-thirteenth century Europe.⁴ The early division of legal labor fell to judges, advocates and proctors in ecclesiastical and civil courts and to village notaries who prepared legal documents. These occupations began to organize guilds by the 14th Century and membership eventually became compulsory by statute. Procedures from Roman law and ecclesiastical courts were the foundation of advocacy and were justified by moral and religious conviction. This division of legal labor also reflected the social conceit of the aristocracy who trained for *professions* and eschewed the more common need to earn a living. Professionals made the "solemn promise" (inherent in the word "*profession's*" meaning) equivalent to a religious commitment to a higher good. "When they swore the admissions oath, medieval advocates and proctors accepted both a legal and a moral obligation."⁵ Judges were designated by Aquinas as "God's ministers" and formal legal decisions were preserved in writing as authoritative even during this early period.

Legal Separation Necessary

Intellectual and commercial opportunities increased in the following centuries for the common man. Legal specialization was necessary to serve the increasingly specialized needs of clients. By the fifteenth century, the legal profession was split into barristers who took on advocacy roles in the civil courts and solicitors who advised clients on matters such as wills, conveyances and contracts. The professional training for barristers and solicitors remains different even today in the British model with the other significant distinction being direct access to clients: barristers appear before the courts on cases in which they may never even meet the client, while solicitors work directly with clients.

The pendulum swings back away from specialization when we have historic periods of consolidation, and so a



more general practice of law became the norm for how law was practiced in this country as it grew. Our fused legal profession in the United States also arose from equalitarian and practical considerations. We did not have the social divide which scorned work, nor did new territories have the luxury of this dual system on the frontier. The small town general practitioner did it all. But, history again repeated the dynamic growth of the Renaissance in the second half of the 20th Century. Information and globalization forced specialization again to meet the discrete and exacting needs of clients. Lawyers became *de facto* barristers or solicitors —those who litigate and those who advise and memorialize transactions. Litigators are created in the procedural courses in law school which hone their barrister skills, while transactional lawyers focused on the solicitor's skills of trusts and estates, real estate and UCC.

Primacy of Legal Rights

When conflict arises, however, an embedded belief in the primacy of legal rights as foundational to justice causes lawyers to look to the courts for adjudication of these rights. Legal education transmits this preference for statute, precedent and procedure as the fundamental approach of a lawyer. This assumption of controlling rights results in positional bargaining to measure settlement options against, and to preserve at all costs, those rights as interpreted by the lawyer and ultimately a court. Rights claims can grow into superior moral claims in the minds of lawyers and clients because they arise from the law. The traditional approach to conflict is submission to an independent tribunal to enforce legal rights—not to convince the other side or find other

solutions. Negotiations are within the procedural continuum of litigation, but settlement offers are measured against asserted judicial outcomes. In disputes (which are essentially breakdowns in communication and divisions of resources), lofty principles are not always relevant. But in traditional legislation, the lawyer is relied upon to frame the dispute for the client: "An emphasis on rights is also key to the unique technical expertise that lawyers offer their clients."⁶ If clients do not rely on this rights-based system, what skill is the lawyer offering? Unless the lawyer acquires skills in other techniques of dispute resolution, he is locked into this traditional framework of fitting the dispute into the law.

In the 21st Century client's access to information, sophistication and self-determination is challenging the legal profession to once again reinvent itself. Rather than just swing back with the pendulum to the general practitioner, lawyers are being asked to expand their skills beyond litigation and transactions to become more conscious *negotiators* in both venues. The New Collaborative Lawyer represents his client in settlement negotiations only - and withdraws from the case if it ultimately goes to court. In some ways, this representation looks like the practice of a solicitor. There is direct client contact; there is discussion of personal goals and objectives; decisions are made by the clients with the support of a team of advisors; and there is a resulting written agreement. Yet the expertise and experience of a barrister are important as well. Knowing the legal framework of the possible court resolution and the various ways similar cases have settled is a great advantage to clients when evaluating their best alternatives. Collaborative Practice training begins an adaptation process so that lawyers can combine their professional education and practice wisdom from traditional disputes with new procedures, techniques and a deeper understanding of what motivates conflict.

The Collaborative Practice of Family Law

The inclusion of family law as a litigation practice arose from the historic restrictions on divorce requiring proof of fault by evidence and court intervention.⁷ At the time no-fault laws were passed in the 1970's, divorce specialists were litigators. Family law practice continued with lawyers who had come to view divorce as rights-based disputes and perpetuate the

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notion of moral positions arising from these rights. Litigation, in general, starts with the assumption that laws and legal rights are determinative a preset resolution of conflict. These factors have shaped the thinking of many lawyers who have become entrenched in the view that the statutes on divorce and the case law from litigation define the appropriate standards for divorce settlement. This is advocacy within the shadow of the law.

Collaborative practice has taken root in family law for several different reasons. Separation and divorce are singular events which usually involve a one-time engagement between lawyer and client, and the possibility of withdrawal does not jeopardize a long term lawyer-client relationship in the future. Also, the legal and financial issues of divorce practice are nestled among emotional and family systems dynamics which may be better addressed by a lawyer associated with the Collaborative team of mental health and financial professionals, often to a greater extent than in business conflicts. Furthermore, litigation may deplete valuable family resources in reaching resolution, and the long-term emotional consequences on the divorcing couple and children are high in that traditional forum.

This affinity of Collaborative practice and mediation to the family law client, however, has affected more traditional dispute resolution processes available to clients since the early 1990's. Some lawyers have taken Collaborative and mediation training to add the processes as an adjunct to an active litigation practice. Some lawyers have moved further away from court solutions offering only Collaborative and mediation services. Practice groups in over 300 communities worldwide have formed for lawyers and other professionals on the Collaborative team to continue learning together. With the promulgation of the Uniform Collaborative Law Act this past year and its submission to the ABA for endorsement, Collaborative practice has reached the tipping point.

The role of the law is different for barristers and solicitors. The client abdicates involvement as the barrister

takes his case to the higher court relying on precedent and procedure; the client sits at the table with his solicitor to structure the deal so that competitors may agree how to share limited resources—or create new ones together. Collaborative lawyers outside of the court system become like transactional lawyers, recognizing that the laws and legal rights are the backdrop to reaching a deal. The law may not be important to clients except in the infrastructure of the agreement. There are clearly some divorce cases which come down to protection of rights. There is also room in conflict resolution to be creative and move past the law to solutions a court does not have the power to order.

The Focus on Settlement

While concerns about how Collaboration is practiced and how credentials are monitored have been expressed,⁸ the casual rebuff that Collaborative divorce lawyers are "wimps" or "bad litigators" is not worthy of professional debate. There may be inexperienced or incompetent lawyers in any community, but the test of a Collaborative lawyer is not his warrior attitude, but rather the professional skills he uses in the service of his client as with any lawyer. Even though Rule 1 of the Virginia Professional Rules of Conduct (VRPC) requires competency and specifically describes the lawyer as negotiator, few law schools teach negotiating skills as a subject in the general curriculum.⁹ The preeminent negotiation centers, such as the Harvard Negotiation Project, The Strauss Institute at Pepperdine University, and The Center for Advanced Study of Law and Dispute Resolution Processes at George Mason University, are continually developing the theories, techniques and interpersonal communication skills needed for expertise in the practice of negotiation. Since Roger Fisher and William Ury's *Getting to Yes* in 1981, the art of negotiation has been studied, discussed and taught. When impasse arises in global conflict, the response of the 21st Century is to negotiate—not with the threat of war—but with understanding differing needs and

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and mutual interests.

Conflict is a continuum running from the rights-based, win-lose distributive allocation of resources accumulated in the past to the interest-based, win-win integrative agreement on shared resources for the future. Where we engage the conflict on the continuum makes a difference. The conflict resolution advocate helps the client make the choice based on many factors including the degree to which the clients can participate. Divorce lawyers typically enter a longstanding conflict at the moment in time when a marriage is ending, and in the traditional rights-based model, seek to distribute the fruits of the marriage according to a formula. This formula is essentially a premarital agreement which was written by the State in laws and cases rather than by the parties. Litigation is the means to clarify the terms in this particular divorce. The inquiry by the lawyer is about past behaviors which may increase or decrease his client's share of the assets fixed in time at this point. The lawyer fits the client's history into a stock format to meet the requirements of laws or cases which will achieve a favorable result. There may be little time spent on family goals or non-financial objectives or underlying motivations. The case is framed for a result a court can order, and only the information needed to prove the case is gathered and presented. The lawyer is so adept at this approach that he can represent an innocent spouse in one case and an adulterous spouse in a different case at the same time with equal moral conviction.

But, the relationship between spouses may well continue past the divorce, especially with children involved. Consequently, this point of dissolution on the continuum may also be considered a *beginning*—an opportunity to make a new deal. From a transactional vantage point, the clients can view this moment as an opportunity to focus on the future by writing a new agreement on how they will use their resources to create two new households and interact cooperatively in the future. Even without children, there may be personal values and goals to act with respect towards the other spouse which are better served through negotiation.

Instead of focusing on disappointed expectations which can promote retributive intentions, skillful negotia-



tors can acknowledge those needs and emotions while keeping the conversation on shared goals and customized solutions. Fault or other disparities can still be addressed in the settlement process, but the clients can craft a remedy appropriate for their circumstances and values. One approach looks to the past and applies to a removed decision-maker for conclusion. The other looks to the future and engages client choice to share resources after considering any information relevant to them. The added benefit of collaboration is clients can strive to minimize conflict in the future by anticipating and planning during the settlement process.

Where We Are Going

The question is not whether Collaborative lawyers are wimps because they choose to negotiate in their client advocacy; the better question is whether the Collaborative lawyer is trained as an effective negotiator. Just moving litigation skills into the Collaborative process is not enough. The New Collaborative Lawyer builds on knowledge of the litigation process with new and continuing training in the skills used to maximize integrative solutions. A recent comment on the Collaborative listserv noted that "CL [Collaborative law] requires a set of personal and team practice tools and skills for the CL team members that none of the professionals involved is likely to have learned in their traditional professional training, and many may be at odds with their most highly valued practice tools."¹⁰ The lawyer who strives to be the *negotiator*—envisioned by Rule 1 of the VRPC is the procedural framework of litigation. The Collaborative lawyer is informed

by the precedent and evidence, but he moves beyond to problem-solving in drafting "a solution which meets some of the needs and interests of all the parties. . . ."¹¹

The New Lawyer is a conflict resolution advocate who is aware of the standards of litigation, mediation and Collaboration and can assist a client in evaluating the risks and benefits of each in his or her particular situation. As a lawyer assesses a client for Collaboration, he must evaluate the client's ability to participate in negotiations, to assume responsibility for information-gathering, to follow through with commitments made. It also means providing clear information on all client choices and obtaining informed consent to whichever process the client chooses. Litigation is no longer the only choice for clients and has not been for some time. If family lawyers choose not to train in and practice collaboratively, they must still assist clients in considering negotiation options beyond litigation-bound, positional bargaining.

Ultimately, we are still a profession that is dedicated to serving the client's needs even if we are not the right choice of lawyer for a particular client. In *The Future of the Firm*, the authors admonish professionals:

The professions are a noble calling, providing the opportunity to serve and contribute to others and make a difference in the world beyond one life. Despite this, the passion and morale in the profession - a leading indicator of the health and vitality of any calling - has been in decline for decades. . . . No one enters the profession in order to bill the most hours. This theory - which is at the very core of the thinking of most professionals - is slowly eating away at the very sustenance of our calling. It is time to supplant it; and we suggest this is not so you can make more money, but so that you can make more of a difference in the lives of those important to you.¹²

As we reflect on the core of our personal identity, the reason for our efforts to make the solemn promise of professionalism should not be forgotten. Whether litigator or negotiator or new lawyer, our skills are for the service of our clients and should not be denigrated by each other, but rather enhanced and extended throughout our practice careers.

Notes

1) *The New Lawyer* is a designation taken from a recent book of that name by law professor Julie MacFarlane which provocatively describes "How Settlement is Transforming the Practice of Law." MacFarlane, J. (2008). *The New Lawyer: How Settlement Is*

Notes Cont.

Transforming the Practice of Law. Van Couver: UBC Press.

2) Report to ABA Sections of Homer La Rue, Chair, ABA Section of Dispute Resolution, "Uniform Collaborative Law Act" (9/27/09) at p. 2. The full text of this report is recommended for its analysis of the UCLA and responses to objections raised by the ABA Litigation Section. See: http://meetings.abanet.org/webupload/commupload/DR035000/site-sofinterest_files/DRSectionMemoreUCLAtoSectionsandDe_.pdf

3) MacFarlane supra at 109.

4) Brundage, J. (2008). *The Medieval Origins of the Legal Profession*. Chicago: Univ. of Chicago Press. (See Chapter 9 at p. 371.)

5) Ibid at p. 491.

6) MacFarlane supra at 49.

7) Coontz, S. (2005). *Marriage: A History*. New York: Viking.

8) Report to ABA, supra, at p. 25-31.

9) See Comment [2a] of Rule 1: Virginia Rules of Prof'l Conduct (2006).

10) Comment of Kevin Karlson JD PhD posted on Yahoo CollabLaw listserv (11/6/09).

11) Comment [2a]: VRPC supra.

12) Dunn, P. and R. Baker (2003). *The Future of the Firm*: Hoboken: John Wiley & Sons.

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