Unite to Divide?

By Frank Garfield
Los Angeles Daily Journal
June 11, 2003

The essence of collaborative law is that the lawyers represent their clients for settlement purposes only. They promise in writing that they will not go to Court. The parties and their attorneys cooperate in conducting discovery and collaborate in addressing the issues. The theory is that when both parties and both attorneys commit themselves to settlement from the outset, a settlement is more likely to materialize.

While collaborative law is a legitimate form of alternative dispute resolution, it is inferior to mediation in several important respects. Compared to mediation, collaborative law is more adversarial, more expensive, and more likely to complicate the resolution of the case.

No matter how cooperative the attorneys try to be, they are also competitive. No matter how collaborative, they are also adversarial. This is true both as a logical and a practical matter. After all, if the attorneys are not in the least adversarial or competitive, why does each party need an attorney?

The collaborative lawyer's answer might be that each party is entitled to have his or her own attorney analyze the facts and explain the law. However, that necessarily implies that each attorney's analysis and explanation will be different: What husband's attorney tells him will not coincide with what wife's attorney tells her.

It is axiomatic that husband's lawyer will in 999 out of 1,000 cases advise the husband that he is entitled to a more favorable result than wife's lawyer will advise her, and vice versa. In contrast, a mediator gives it to the parties straight. The fact that collaborative law is cooperative in theory does not change the fact that it is competitive in practice.

Collaborative lawyers cannot have it both ways: If they are telling the parties the same thing, the parties do not need to hear it from two lawyers. It is only if they are telling the parties different things that the parties may need to hear it from two lawyers.

A collaborative lawyer might rejoin that only 10% of the process is adversarial and competitive; the other 90% is truly collaborative and cooperative. If so, once again, there's no need for two attorneys instead of one neutral. This is the essential dilemma of collaborative law: The more vigorously collaborative lawyers make the case that the process is cooperative, the less justification for separate counsel.

It is also possible that collaborative law may be *too* cooperative. Lawyers sometimes believe that clients are glad when the lawyers know each other and have a collegial professional relationship; sometimes even a personal relationship. From the lawyer's point of view, lawyers who know and like each other will be able to do a better job for their clients than lawyers who are strangers. Clients often don't see it that way. They are likely to be suspicious that the relationship between the attorneys will affect the outcome of the case. Even though they both can't be right, each party tends to believe that his or her attorney will be less vigorous than the other party's attorney as a result of the relationship.

Collaborative law raises this issue in at least three ways. First, collaborative lawyers will almost always know each other. Second, they will be members of a club of collaborative lawyers. Third, they will be concerned with ensuring the success of collaborative law as opposed to focusing exclusively on the parties' best interests.

Collaborative lawyers will care about the lawyer on the other side, the group of collaborative lawyers to which he or she belongs, and scoring another victory for the process. As the client cares about none of those things, there is at the very least a tension (if not a conflict) between collaborative lawyer and client in every case.

The economics are also skewed. Multiple professionals equals more work equals higher fees. Consider a meeting that lasts for three hours. With two lawyers involved, the cost of the meeting alone could be as much as $2,500 plus whatever each lawyer charges for reviewing the file and preparing. A collaborative process involving two lawyers instead of one mediator is at least twice as expensive. Compared to mediation, collaborative law is an inefficient process.

Drafting documents is similarly cumbersome. Each attorney will have his or her own set of concerns, and the documents will go back and forth until all of those concerns have been satisfactorily addressed. This problem will be compounded by each party's understandable mistrust of the other party's attorney. The inefficiency and distrust is minimized if the documents emanate from a neutral source.

Mediation is consumer-driven: The public demands a method of dispute resolution that does not involve paying two lawyers. Even if collaborative lawyers are instructed to negotiate a settlement, there are still two of them. Taking a process that costs ten times as much as it should and cutting that cost in half does not respond to the needs of most parties. Mediation may not involve lawyers at all, although the parties often desire to obtain a consultation at some point.

Collaborative law is an invention of lawyers: The gimmick is the lawyers' commitment not to go to Court. This is not problem for the lawyers. The vast majority of family law cases eventually settle whether they are litigated conventionally or collaboratively. The burden of the lawyers' commitment falls on the parties. Having exhausted themselves financially and emotionally in a failed process, they may have to start all over again with lawyers who know nothing about their case or even represent themselves in Court.

Whether the context is litigation, mediation, or collaborative law, lawyers have their own agendas. The more involved the lawyers are in the process, the more important their agendas become. Their concerns multiply; their comfort levels must also be met before they will permit the parties to strike a deal. Most parties do not want or need this level of involvement; more pertinently, they are unwilling to pay for it. What they want, to put it colloquially, is to know whether the deal they have made is within normal limits. In the vast majority of cases, any experienced family lawyer can review a draft judgment and answer that question in an hour or two at the most.

It is widely accepted privately (albeit never acknowledged publicly) by the family law bar that an experienced family lawyer can review the parties' assets and debts, income and expenses, interview one of the parties for an hour or two, and *with no discovery whatsoever* predict how the case will eventually be

resolved, at least within a range. In the main, the information the parties need to resolve their case is provided by accountants, appraisers, and actuaries who are assigned discrete tasks (value a business, appraise a house, determine the parties' interests in a pension plan, etc.). The information that parties need from attorneys may also be the subject of discrete tasks (identify issues, explain the law, review documents, etc.).

Even if the parties want separate lawyers, they don't need full-service representation. Typically, the parties will want to know how an attorney believes the law applies to the facts of their case.

If they want a best case and worst case analysis (as well as an independent lawyer's opinion of the most probable result), they can each buy an hour or two of time from a consulting attorney. Unbundled legal services are far cheaper than full-service representation.

One of the benefits many parties believe they are getting from full-service representation is a lawyer who is responsible for the outcome. Nothing could be further from the truth. The tremendous expenditure of time and money that goes into discovery is justified in the name of discharging professional obligations. However, attorneys are skilled at creating a written record that foils most attempts to hold them responsible for a settlement that their clients may come to regret. Collaborative lawyers are no more accountable than any other lawyers for the substantive resolution of the issues.

Collaborative lawyering works for the same reason that conventional lawyering works. The parties come to realize that they can negotiate a settlement that is at least as good as the result they can realistically expect from going to trial. Or they calm down and decide to get on with their lives. Or they run out of money. The reason that mediation works better than either is that it is so much cheaper.

Collaborative law is the wolf of adversarial lawyering in sheep's clothing. It is warm and fuzzy, but not very different from what settlement-oriented lawyers have been doing for years. The reason collaborative law works well for lawyers is that it keeps them involved in every step of the process from the beginning to the end. This is the same reason it does not work well for most parties.

There is certainly a place for collaborative law in the world of alternative dispute resolution. It is another option. There will be some parties who desire separate legal representation even if they would prefer to avoid going the litigation route. But no one should suppose that collaborative law is the wave of the future. Most parties wish to use expensive professionals sparingly, which is why mediation and unbundled legal services are the wave of the future, not collaborative law.

Franklin R. Garfield is a family lawyer and mediator in Los Angeles.