



# Family Law News

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## *Collaborative Family Law – So, What’s the Difference??*

**A**lternative Dispute Resolution (ADR) processes have grown over the years in response to the destructive impact of litigation on families undergoing the stress and trauma of separation. The creation of many private ordering processes such as mediation and Collaborative Family Law is evidence of a recognition that, in family law, there is a need to protect the ongoing relationships of families.

Collaborative Family Law (CFL) has grown from its inception in 1990 when Stuart Webb, a disillusioned, burned-out family law lawyer spearheaded a movement that has developed into an internationally recognized dispute resolution process, with CFL practice groups in most of the United States and Canadian provinces and growing internationally. At its heart, the CFL movement seeks to take the litigation threat out of the family law negotiation process and empower clients by having them participate directly in the decision making that affects their lives. It provides the parties with the opportunity to explore their needs and interests without the pressure or the threat of court. CFL has drawn many lawyers from around the world, to a model of practice which is antithesis of the adversarial process. The high stress levels associated with a family law practice have resulted in an unusually

high burn out rate for practitioners in this field. CFL provides them with the option of practising family law in a far more respectful manner without the “warfare” mentality, which is extremely appealing to many.

In CFL, both parties hire their own lawyers who have been trained in the collaborative process. All parties focus on negotiation from the outset in the form of open, positive, civilized four-way meetings where the clients participate equally with their lawyers toward the resolution of their disputes. If the negotiations break down and court is necessary, the clients are then required to seek and retain litigation counsel to represent them in court.

At the heart of the CFL process is the disqualification agreement which the parties enter into with their lawyers which require the lawyers to withdraw from representation if the negotiations break down and court is necessary. The disqualification agreement is essentially the enforcement mechanism to ensure that parties, both lawyers and clients, neither threaten nor actually go to court during the CFL process. The power of the threat of court is eliminated. The goal is to work outside the court system and all efforts are focused on reaching agreement in a collaborative, interest based environment. Under CFL theory, the disqualification agreement is the metaphorical container around the lawyers and clients to help focus on

negotiation. It contains the lawyers’ natural tendencies to threaten litigation as the first instance of disagreement. By negotiating within the “container”, many collaborative law clients feel protected against the pressures created by the adversarial process.<sup>1</sup>

## *The Cooperative Lawyer – An Oxymoron?*

The common response of family law lawyers when considering the CFL process is, “So, why bother, what’s the big deal? You don’t need CFL to settle files. I can do the same thing in a four-way.” The “big deal” is the training and the mindset of collaboratively trained lawyers who recognize that the culture of litigation and adversarial practice often impedes resolution that is client focused. The benefit to clients is the skill and training of collaboratively trained lawyers in being able to handle the difficult emotions and dynamics in a settlement negotiation. A process that removes the warfare potential forces lawyers to be far more creative in looking for ways to help their clients settle their disputes. For lawyers, it forces them to step outside their comfort zones and directly deal with the interpersonal relationships of people who are often bitter and angry, as clients are directly involved in the decision making that will impact on their lives and the lives of their children. Outside the CFL process, pulling out of a negotiation when things get difficult and threatening court can actually be an easy way out for lawyers. They can then move back into a system in which they have been trained and are comfortable; one which values an adversarial model of justice in which their role is to zealously advocate for one’s client in order to secure the optimal legal gains. The “big deal” is that CFL takes the litigation threat away and forces lawyers to look for

creative interests based solutions for their clients.

The function of the CFL model is to give separating spouses an alternative to the gladiator mentality of adversarial lawyers who control the process without real input from the client. Although most cases do settle before trial, the trial preparation process can often be devastating to families. Further “settlement” is often reached at the courtroom door, under significant pressure on the parties who wish, at all costs, to avoid the expense and trauma of the trial and all the uncertainties of outcome. There is no real opportunity for an exploration of needs and interests that may not necessarily be satisfied by application of strict legal principles regarding rights and entitlements.

The role of the lawyer in the CFL process should be to assist in helping people become empowered and control their own processes. The process defines itself as “client centered” due to its interdisciplinary nature. The clients not only have lawyers assisting them, but also, financial practitioners, child and family mental health professionals and coaches, all working cooperatively to support the “whole client” with their legal, financial, emotional and psychological needs.

***OCLF Annual Conference: May 15-17, 2008 Ottawa, Ontario***

Training, information sharing and professional development for collaborative lawyers is a focus of not only local practice groups, but also for the Ontario Collaborative Law Federation (OCLF) and the International Academy of Collaborative Practitioners (IACP). The IACP has nearly 3000 members from 15 countries around the world and has created standards of practice for practitioners and trainers.

The focus is on learning and sharing from other collaborative practitioners, not only lawyers but also child and mental health specialists and financial and accounting practitioners.

One such opportunity to share and network was the 2008 Ontario Collaborative Law Federation Annual Conference which was held in Ottawa on May 15-17. There were many presenters who provided valuable and interesting sessions over the two-day conference. The OCLF did an exceptional job organizing the conference and Ottawa was in full bloom with its annual Tulip Festival. The theme of the conference was “Collaborative Practice in Bloom” and there were many speakers who were able to recharge and energize those of us who attended.

Chip Rose, an experienced lawyer/mediator and very well known in the collaborative movement, provided some valuable guidance for those of us who mediate or practice collaboratively. As clients are expected to fully participate in the collaborative process, getting their needs and interests out in the open is crucial to ensure that they remain involved in helping arrive at their own solutions. This is often a difficult task for lawyers who like to tell people what to do. Rose has a simple solution – ask questions! This might seem self evident; however, asking the right questions to gather information about the clients’ needs (not only the legal ones) can be more difficult than you think. We can certainly ask questions that are legally related; we’re good at cross-examining and getting answers that we want. However, we’re not so good at asking non-legal questions that are broad and open ended, as often we don’t really know what to do with the answers. Rose indicates that at first, you should ask questions that assess; broad open ended questions to

get information about parties’ feelings, interests, and concerns, e.g. “Help me understand...?” “What do you think...?” Next are the questions that help the parties generate options, i.e. “Where do you go now?” or “What do you see your options as being?” Then ask questions about consequences, i.e. “What do you think will happen if you keep up this behaviour?” “How do you think your kids will feel if the hostility continues?” Finally, after full discussion of both legal and non-legal interests, ask: “What do you want to do?” - the most difficult question of all, as it gives the authority and responsibility to the clients to make their own decisions.

Another speaker was Sharon Strand Ellison, the author of *Taking the War Out of Our Words: The Art of Powerful Non-Defensive Communication*. This is a book which should be read by all lawyers, whether you practise collaboratively or litigate. Ellison’s premise is that we essentially use “rules of war” as the foundation of all of our human communication. When we communicate, either personally or professionally, we become defensive if we feel that we are being attacked. We shut down or use war-like defensive maneuvers to protect ourselves from perceived insult or judgment. This has the effect of further polarizing and distancing people – toward further battle, rather than toward resolution. Ellison provides a system for using language which is geared toward creating understanding rather than focusing on defensive self-protection. She believes that people can learn the skills that are necessary to help create respect and creative problem solving in diverse environments at every level – both personally and professionally. This is a book that is definitely worth reading!

Hamilton's own Rick Shields (if you didn't already know, Rick is one of CFL's gurus) also presented at the conference. Rick explored the intersection of mediation, arbitration and CFL. The appeal of CFL is the fluidity that comes with its multi-disciplinary nature. CFL can borrow from other processes such as mediation and arbitration in order to provide parties with the best from each process in the effort to resolve their disputes in a non-adversarial fashion. As the parties' needs differ in each case, a multi-disciplinary and multi-process spectrum can be used to create custom made solutions for clients. Unlike litigation, which is a "one size fits all" model, CFL has the flexibility to create processes that will meet the individual needs of families.

Although CFL isn't for everyone, it provides the opportunity for separating couples to take some control over their lives and participate actively in reaching solutions that will have significant impact on their lives and the lives of their children. To be able to avoid the posturing of lawyers and the threat of court can only benefit clients

in what is a very difficult time in their lives. Lawyers are forced to think outside the legal box and consider their clients needs and interests. They can protect their clients by providing legal advice but do so within an atmosphere of cooperation and openness. Questions are asked, options are considered and hopefully, "war" and "defensiveness" are taken out of the words, out of the room and out of the resolution process.

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<sup>1</sup> J. L Lande. "How Will Lawyering and Mediation Practices Transform Each Other?" 24 *Florida State University Law Review*. 1996-1997. pp. 839-901. ■

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