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NEGOTIATION AND THE ATTORNEY IN THE COLLABORATIVE PROCESS

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As Collaborative Family Law (CFL) matures and moves beyond discussions of paradigm shifts, collaborative protocols and choreography, lawyers grapple with their role in the negotiation of the collaborative case. Too often, lawyers engaged in the collaborative process complain that beneath the veneer of collaboration, they revert to familiar, positional bargaining. What is the advocacy role of the collaborative lawyer? Why should a client choose a lawyer who will engage in collaborative advocacy? What value does the client receive in the collaborative process from the lawyer's role? Although mental health professionals and financial planners often play an important role in CFL cases, this article focuses solely on the lawyer's role in the CFL case.

What is the Lawyer's Role in the CFL Case?

One of the basic principles of CFL is the acceptance of a shared negotiation choreography and the use of collaborative "protocols." The choreography includes an initial conference that focuses on the processes available to end a marriage, a second client conference that focuses on client interests, consultation by counsel to share negotiation hot spots and agenda items, and structured four-way meetings. These meetings are used to gather and understand information and create options for a negotiated outcome. The negotiation process is marked by attention to constructive communication and effective problem-solving.

Interest-based problem solving is at the core of CFL negotiation. The concepts articulated in [Getting to Yes](#)¹ have been expanded to create the basic structure of a collaborative law case. The template focuses the participants on understanding the interests of both parties, gathering all of the information necessary to make good decisions in a straightforward manner, understanding the nuances of the information

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Negotiation and the Attorney

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gathered, generating options for settlement, evaluating the consequences of those options, and reaching a settlement based upon the articulated interests of the parties. The collaborative law negotiation template provides predictability for clients and counsel.

In practice, the dynamics of negotiation are far more complex than a template. It is in the option-generating/negotiation stage that lawyers have the most difficulty in moving from positional bargaining. In order to understand the difficulty, one must examine the lawyer's role in the entire collaborative choreography.

A. The Initial Office Conference

The lawyer's role is modeled from the inception of the case. A client often begins the initial consultation by articulating a desire to "know his rights." For example, he may question the amount of his obligation for child and spousal support and what will happen to his pension. He may state positions such as "I must have 50/50 parenting time with my children." Lawyers, by training and practice, often respond to these questions and positions solely from a "rights-based" approach. That is, the application of the law to a given set of facts. Lawyers are often most comfortable detailing specific outcomes, and exhibiting to the new client a mastery of the nuances of the law and its application.

The collaborative lawyer acknowledges the client's questions about "his rights," and indicates that the questions will be answered. First, information is shared with the client about *process options* to terminate a marriage. The client is advised that the *process* (mediation, collaborative law, traditional lawyer negotiation or litigation) he selects for the termination of his marriage requires consideration as it will have a direct bearing on the outcome. When the collaborative lawyer explains process options to the client, the lawyer encourages the client to think about his interests, understand the various process choices, and examine the consequences of each choice. In this way, the client begins to operate within the negotiation template itself, and develops an appreciation for the role of the process and its significant impact on parenting and property outcomes and post-divorce communication. The client begins to understand that he will be a major part of the process and will be directly engaged in option-generating and decision-making.

Following the process discussion, the lawyer focuses on the client's substantive questions. Information about substantive outcome ranges is shared by counsel, but HOW it is shared is critical. The client has already learned that there are a number of process choices. This allows for more flexibility in the presentation of information about rights-based outcomes. *The rights-based outcome, often called "the court model" is presented as only one very narrow set of options.* It is

one “measurement” for an agreement. The collaborative process encourages couples to create options that are more tailored to the needs and interests of their family. Simply put, the law does not provide all, or in fact, many of the answers for families. For example, in Ohio, the obligation for child support terminates at the later of reaching the age of 18 or high school graduation. For many families with teenagers, managing college costs presents real questions for which the court model provides no answers.

The initial conference sets the tone and begins to frame the lawyer’s role in the process. The client begins to understand the lawyer’s role is not “answer giver”, but rather “information provider and negotiation guide.” While lawyers often provide many of the options generated during the process, there is sufficient “room” for the clients to provide options as well.

A collaborative lawyer who does not set this tone, and ignores this protocol does so at his own peril. A client who believes she is hiring a “white knight” who will “stand up to her spouse” or who believes that her case will be negotiated by lawyer posturing involving strong, extreme positions, will be sorely disappointed in her counsel as the collaborative process unfolds.

B. Focusing on Interests

After a client has determined that the CFL model meets her goals, it is critical to continue to focus on understanding and elaborating on interests. Sometime prior to the attorney-to-attorney conference and the four-way meeting, the lawyer focuses the client on her interests and helps her understand the difference between interests and positions. The client who says “I must retain the house for the children” begins to understand that her interest is security for the children and retaining the house may be but one viable option. In order to reach agreement, there will need to be openness to the possibility of other options that might also

meet the security needs of the children. To generate options, the client will have to listen to and appreciate her spouse’s interests. She will become aware that this also means that her spouse will listen to and appreciate her interests. Questions like “what is really important to you?” and “how will you be able to measure a successful outcome for yourself” move the client from firmly held “positions.” This attorney role often does not fit within client expectations. A client must feel comfortable that the *reason* her counsel focuses on her interest is to insure that the best possible agreement for her is reached, and the *reason* her counsel focuses on her spouse’s interests is to have the basis for what might be acceptable options that will meet her interests.

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C. The Attorney / Attorney Meeting

The attorney-to-attorney meeting is an excellent opportunity to begin to preview client interests. It affords counsel the first opportunity to begin to understand the interests initially articulated by the other spouse. Because the negotiation has not yet been anchored by a mutual discussion of the client’s interests, counsel may fall back to positional bargaining. Allowing the process to unfold is critical to a successful collaborative process. This attorney conference provides an opportunity to choreograph the initial four-way meeting. It is critical to plan for a meeting that will “set the stage” for a successful process. Clients need to feel confident that the lawyers will be able to deliver the efficient, focused process that has been promised. They will be unfamiliar with the role of the lawyer in the collaborative process and will often use the first meeting to gauge the whether the process will meet their goals. The attorney-to-attorney meeting provides an opportunity to plan to insure that the meetings meet client expectations.

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D. The Negotiation

Focusing on interests at the beginning of the collaborative four-way provides a comfortable anchor for parties. The use of good communication around the discussion of interests sets the stage for the entire negotiation. While constantly looping back to interests is critical, negotiation often involves the clash of interests and requires the management of discrete tensions, including *creating and distributing value and empathy and assertiveness*.² Some negotiations, or parts of negotiations, lend themselves to creating value or “expanding the pie”. Other negotiations or parts of negotiations are narrower and present purely distributive negotiating options. If a negotiation is ONLY about the division of a limited resource, it can become purely distributive. The goal of the collaborative lawyer is to manage the distributive aspects and create value whenever possible.³ The goal is to recognize whether there is a way to “expand the pie” and when an issue is solely distributive.

In positional negotiation, there is concern that revealing interests creates vulnerability. A Wife might say, “If I share how much I want to keep the house, won’t my husband exploit that information?” The power in the collaborative negotiation is in the mutual revelation of interests which provides the context for generating creative options

Creating and Distributing Value

The collaborative lawyer’s role is to **create value** through problem solving negotiation. Creating value means reaching a deal that, when compared to other possible outcomes, either makes both parties better off or makes one party better off

without making the other party worse off.⁴ In the context of collaborative negotiation, the name of the game is expanding the “pie.” A skillful negotiator moves simply between imaginative strategies to enlarge the pie and conservative strategies to secure an ample slice no matter what size the final pie turns out to be.⁵ The way to determine whether the slice is the “right” size is to determine if it adequately meets the client’s interests.

The client expects the lawyer to negotiate the best possible deal on his behalf. In a common (albeit stereotyped) scenario, for Husband, this may mean the obligation to pay the lowest amount of

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spousal support for the fewest number of years. Conversely, for Wife, this may mean receiving the highest amount of spousal support for the most number of years. In single issue cases, for example a couple with no children, assets or liabilities, when negotiating spousal support, every dollar that Wife receives is a dollar that Husband does not have.

There may be minimal value-creating opportunities, because there is nothing to trade off. Arguably, however, even within the issue of spousal support, there are value-creating opportunities. For example: *how much support and for how long, how or if support is modifiable, what if any security should there be, what circumstances trigger its ending, taxability issues, the possibility of lump sum property in lieu of spousal support...* etc. : all of these are open for discussion. Even without other tradeoffs, creative option-generating is a possibility.

In reality, most family law negotiations lend themselves to creating value because they involve mul-

multiple issues. Spousal support is usually just one of many issues in the family law case. Thus, the negotiations have significant *value-creating potential*.

The lawyer's role is to create value by expanding the discussion to brainstorm a multiplicity of options beyond spousal support. With an expanded approach, the client may pay more or accept less spousal support than he or she originally anticipated, but may be willing to do so in exchange for other considerations. The role of the lawyer in positional negotiation is to "have his client pay the minimum amount of spousal support". The role of the collaborative lawyer is to expand the range of options to insure that the amount paid is *acceptable* in the context of the entire settlement. The positional bargainer enters the negotiation with a fixed concept of both the size of the pie and the exact size of the slice his client must have. The collaborative negotiator is aware of the parameters for measuring whether the size of the slice is acceptable to the client, but is not rooted in one particular size.

Collaborative negotiators can employ creative strategies to enlarge the pie by focusing on the sources of value in a negotiation; for example, trading on differences between the parties.⁶ Differences may include different resources, relative values, forecasts, risk preferences and time preferences.⁷

As an example of different forecasts in a spousal support scenario, Wife may express concerns about her long-term financial well being. She may be concerned that when she returns to the job market, she will not be able to save for retirement. Husband may be less concerned about his long-term retirement prospects as he is aware that his company provides excellent retirement benefits and is confident it will continue to do so. In the option-generating portion of the case, the collaborative negotiators might help Husband brainstorm issues around uneven division of retirement funds. Husband may be willing to trade retirement dollars for another issue that would meet his interests.

Other interests must also be explored. Wife may be very concerned about her immediate financial security. She may want the security of a fixed amount of spousal support each year so she can depend on it, even if Husband makes more money (*Different risk preferences*). Husband may be interested in "making

sure his kids are all right" and having an obligation that would be non-modifiable as he might make considerably more money in the future (*Different time/risk preferences*). These differences can generate value-creating trades. Husband may be willing to provide more retirement assets on Wife's side of the ledger in exchange for a shorter, fixed duration of spousal support. Wife may believe that she will remarry and therefore will never collect on the long-term spousal support. Husband may doubt Wife will remarry and believes that an agreement to pay long-term support will mean paying support for a longer term that Husband wants. Husband may be willing to pay "up front" based upon his analysis of the future and his risk analysis.

Another source of value is to examine non-competitive similarities. In some instances, parties may have similar interests that do not compete. One person's gain is not the other's loss.⁸ For example, Mother and Father may both want their children to graduate from parochial schools. Mother, who does not have financial resources, may be willing to work Bingo to make a time contribution to insure the children attend parochial schools. Father may be willing to provide a disproportionate amount of tuition payments. These options both spring from the parents' shared interest in their children's education. The parties need the opportunity to fully explore their interests in order to find interests that don't compete.

Sometimes, more than one good or service can be produced using the same basic resources, thus reducing the cost of each. For example, an option for a difficult daycare situation might be created when parents who share weekly time share a daycare provider to avoid each paying a full-time provider.

The role of effective, collaborative communication cannot be underestimated. The skilled negotiator must assert his own needs, goals, and point of view and at the same time demonstrate a level of understanding of the other side's needs, goals, and point of view. Assertion without empathy risks escalating conflict, while empathy without assertion risks jeopardizing one's legitimate concerns.⁹ The power in the collaborative process is in providing an environment to question, discuss, and brainstorm interests and options constructively.

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Negotiation and the Collaborative Attorney

*Continued from page 5**Distributive Negotiation*

Often, lawyers assume distributive negotiations, when in fact there are interest-based options available. However, some negotiations *are* purely distributive. That is, there is simply little or no pie to expand. In these negotiations there is more emphasis on each party's Best Alternative to a Negotiated Settlement (BATNA).¹⁰ That is, if a client walks away from the table, what outcome can he or she anticipate?

In the Domestic Relations context, most often the BATNA is a lawyer's assessment of "what will happen in court." In the collaborative negotiation context, it is most effective to talk in terms of ranges of outcomes. This allows a client to focus on a Zone of Possible Agreement (ZOPA) to create parameters for a settlement.

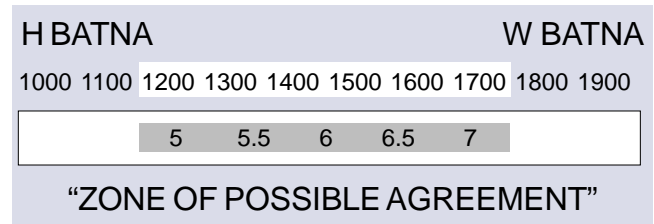
In the limited example of spousal support, Husband's attorney may assess the husband's BATNA as a payment of \$1000 per month for five years. Wife's attorney may assess Wife's BATNA as a payment of \$1900 per month for seven years. Husband might be willing to settle for \$1200 for five and a half years (his reservation value). Wife might be willing to settle for \$1700 for six and a half years (her reservation value). A Zone of Possible Agreement (ZOPA) is created.¹¹ Disclosure of information may assist in bridging the gap. Wife may know that she will complete a degree in four years and will be financially secure in five and may be willing to lower the time amount in exchange for higher initial payments. Husband may be interested in the shortest possible duration. This is where the exchange of interest and information is critical. With no exchange of information, the only real discussion is "splitting the baby" or resorting to testing each BATNA.

Collaborative lawyers must discuss BATNA without overt posturing and puffing. Without a frank discussion of BATNA, it is virtually impos-

sible to create a ZOPA. The BATNA, even if it is dramatically different, creates parameters for the discussion.

Lawyers generally work to enhance and improve a client's BATNA; for example, providing a detailed trace of separate assets to enhance a client's "share" of the marital estate. In the collaborative process, the enhancement of BATNA properly falls within information gathering. It is appropriate in the context of gathering information to provide a detailed separate asset trace. It may be appropriate, in the collaborative context, to have available case law on point as part of the discussion.

In the event impasse is reached, the lawyers can again exhibit creativity in resolving the impasse. For example, in one collaborative case, the participants found themselves at an impasse around spousal support because the lawyers had vastly different BATNA analyses. As a result, they were unable to create a Zone of Possible Agreement. The lawyers creatively broke the impasse by providing the spousal support statutes to their clients to illustrate the discretionary nature of the law. Counsel jointly met with two Magistrates to obtain their informal outcome analysis, and then met with an experienced member of the collaborative practice group for his analysis of the facts. As a result, the clients and lawyers were ultimately able to create a Zone of Possible Agreement and resolution was reached.



What is the Value of Collaborative Negotiation?

The perceived “solvability” of a conflict has a direct bearing on the outcome. The more disputants believe a conflict is solvable, the more likely they are to aim for a full resolution of their differences¹². One of the major advantages to CFL is the power created by two lawyers who understand and engage in the collaborative negotiation process. The Participation Agreement is a written commitment by the parties to focus on problem solving. This written commitment completely changes the nature and tenor of the negotiations. The negotiation is streamlined with a shared collaborative choreography. Lawyers enter the negotiation with certain shared expectations. The expectation that all relevant information will be disclosed and that the negotiation will be conducted in good faith creates a comfort level that allows for the give and take of negotiation.

The challenge of the collaborative model lies in the tension between advocacy and effective collaboration. The efficiency of the process and the space created for significant client actualization hold tremendous promise for the future of family law. It is up to all of us to safeguard and meet the promise.

Notes

¹ Getting to Yes., Roger Fisher and William Ury.

² See generally, Beyond Winning, Negotiating to Create Value in Deals and Disputes, Robert H Mnookin, Scott R. Peppet and Andrew S. Tulumello.

³ Mnookin p. 174.

⁴ Mnookin p 12.

⁵ Mnookin, p. 9.

⁶ Mnookin p. 12.

⁷ Mnookin p. 12.

⁸ Mnookin p.16.

⁹ Mnookin p. 10.

¹⁰ Getting to Yes

¹¹ Mnookin p. 20.

¹² B. Mayer Chapter 3 see “Thomas”.

Sherri Goren Slovin has practiced family law for twenty-five years, twenty-two of them as a solo-practitioner. In 1987 Sherri began a mediation practice to complement her legal practice and from 1987-2000 associated with the Cincinnati Center for Dispute Resolution, a non-profit mediation and public disputes center. In addition to family and civil mediation, Sherri began providing negotiation training as part of her work with the Center, and after attending the Program on Advanced Negotiation at the Harvard Summer Program, became interested in the application of interest-based negotiation in the family law setting. Collaborative Family Law provided a logical next step for Sherri. She has been engaged in the practice of Collaborative Family Law since 1997 and is the immediate past chair of the Collaborative Family Lawyers of Cincinnati. The Cincinnati organization has over 60 participating lawyers who have completed hundreds of collaborative cases.

Although Sherri’s practice is now primarily collaborative family law, she continues to mediate and also to provide litigation services to clients where litigation is unavoidable. Her peers have repeatedly recognized Sherri by her inclusion in Best Lawyers in America and Ohio Superlawyers. Since 2001, Sherri has provided introductory and advanced workshops on Collaborative Family Law throughout the United States. She is looking forward to providing a workshop for family lawyers in Auckland, New Zealand in February 2005. An IACP board member-elect, Sherri can be reached at sgslovin@slovinlaw.com