Collaborative Practice
– What’s Beneath the Tip of the Iceberg

By Laurie Israel

I’ve been practicing collaborative divorce in Massachusetts for over 19 years. (I was in the first training class in Boston in April 2000.) Even so, I find that most people are still unfamiliar with collaborative practice (CP). And when they are aware of it, one of their primary misconceptions is that collaborative practice means weakness. They think their attorney will not “go to bat” for them and will not get them what they think or feel they deserve in the divorce. But advocacy for one’s client remains a crucial and foundational element in a collaborative divorce case. It is just done in a different manner.

One of the hallmarks of CP is the face-to-face meetings in which the spouses and their attorneys work together to find and design reasonable and fair terms for their upcoming divorce. These are called “team” meetings. The modern CP paradigm is to have a fifth person attend all team meetings. This person is often termed a neutral process coach (NPC), because the person is a neutral third party and function as a coach of the process. In other words, the NPC is helpful in ensuring a productive climate for the team meetings. The NPC is almost always a trained and experienced mental health professional – either a therapist, counselor, MSW, or psychologist.

The NPC is there to make sure the meetings go well and productively, without emotions or words or conduct (on the part of the clients and/or the attorneys that could derail the success of the meetings. To make sure this happen, the NPC interacts with the attorneys as well as the clients, when and as needed, so that communication remain respectful and constructive.

It is true that the four-way team meetings (or five-way with a neutral process coach) have the flavor of co-mediation sessions. During the team meetings, an attorney will generally back off from vocally pressing their client’s positions. They are more focused on the client’s wishes and interests in a more open-ended manner. The team meetings are used for information gathering and brainstorming possible options. There is much discussion between the parties and attorneys at the meetings, with the attorneys providing their expertise and leadership.

The professionals at the table concertedly try to make the discussions non-confrontational. The neutral process coach has the important role of controlling emotions and maintaining civility among the participants (including the attorneys) so that the meeting remains respectful and amicable. This helps lead to the success of the process.

This type of team meeting can be tremendously helpful for our clients to solve problems in a respectful and constructive way. The real-time aspect of the team meetings is crucial to the power of the CP process. It is the diametric opposite of conventional divorces, where the truth is withheld, and parties function totally from positions that are completely voiced by their lawyers, who are usually not even in the same room.

The collaborative team meetings work best if words expressing advocacy (by the clients, but especially by the attorneys) are limited. Because negative interactions and aggressive
positioning are highly minimized in CP team meetings, the spouses tend to be more generous toward each other and settlement is often more easily reached.

**Face-to-face team meetings are only the tip of the CP iceberg**

Much of the CP work goes on in between the team meetings, in private between the client and the collaborative counsel. These private meetings include educating, listening, evaluating, and strategizing. The attorney may help the client formulate his or her wishes and ideas to create a reasonable outcome for the divorce. There will be many discussions with the client to assist them in evaluating options and determining how they fit into a cohesive and realistic plan for divorce. In addition, the attorney will educate the client on the “rules of divorce” in the jurisdiction and how the client’s plan fits in with those rules.

Here are some of the private attorney/client discussions and work that goes on between CP team sessions that provide the information, legal advice and case strategy that a client needs and deserves.

**What does “the law” have to do with it?**

Part of what we do is to help clients manage their expectations by providing sound legal information. Clients are then realistic in their desires when thinking about the terms of their divorce. We give our clients information on divorce law and how it relates to the facts of their particular marriage and divorce. It is usually done fairly early in the process, before the first team session.

Most of us practice “in the shadow of the law.” This means we respect judges’ analyses and rulings on the factual patterns presented in divorce cases and how the law relates to the facts. We read the published cases and hear about unpublished rulings from our colleagues. In Massachusetts, equitable divorce law creates an environment that provides good guidance and creates fair and practical results.

As attorneys, we seek to help our clients take a reasoned view on any issue, so that our clients feel supported and educated at the same time. We encourage our clients to avoid extreme positions, which can derail collaboration, and cause the divorce to spin into litigation. CP practitioners generally look for a “fair” result, not a greedy one-sided result. That is one of the hallmarks of the CP process. In using our sound judgment and knowledge of family values and dynamics, we also look toward the future of the newly reconstituted family, with an aim at promoting fairness that will sustain future peace. This will benefit the spouses and their children throughout their lifetimes.

The “law” is not disregarded in a collaborative process. It is there, subtly informing the collaborative negotiations and interest-based discussions that take place during the team meetings. Sometimes our clients may wish to depart from “the law” for good reason. CP can accommodate this too, as long as a client knows what marital rights he or she may be waiving.

**Work between sessions.** We confer with our clients privately between collaborative meetings. Our clients (and we as attorneys) can truthfully express all our thoughts regarding the
case that may not be appropriate to express in the group collaborative practice meetings. In the separate meetings with the client, the lawyer can provide legal information that may support (or detract from) the client’s position or interests. It’s a reality check that helps orient the client as to what is truly possible. It is important to do this work in private with the client.

**Develop strategy.** CP attorneys and clients work on strategy privately between team meetings, just as in other types of cases. Strategy is advocacy. It is done in the usual way, utilizing legal conclusions, as well as information gathered from the clients and expressed and developed at the team meetings. As in every divorce case, strategic development is crucial in a CP case, too. It doesn’t go by the wayside just because the spouses have chosen to resolve their divorce by CP.

**Be a sounding board and coach.** The CP attorney provides a sympathetic but rational “ear” for some of the disruption and fears a client may have during the divorce process. Divorce is often very upsetting for the client. The attorney provides emotional ballast for the client during the process. The attorney will also provide private coaching on how to most effectively articulate and promote the client’s needs, interests, and wishes during the real-time CP team meetings.

**Provide objective guidance.** Collaborative counsel will provide neutral, unvarnished, confidential feedback to the client regarding all matters that arise during the collaborative process. This includes advice regarding interpersonal relationships between the spouse and children (or in-laws), and on finances and other issues. As in any divorce case, having a trained professional give the client objective, professional advice during the process is very helpful.

**Analyze finances.** Careful and detailed analysis and understanding of finances is a crucial aspect of virtually all divorce cases. This does not differ in a collaborative case. Collaborative divorce counsel must be attorneys experienced in reviewing finances, business entities, tax returns, and trusts. The attorneys must have an intimate knowledge of all financial components that are part of the marital partnership. Collaborative attorneys can help the client consider the financial ramifications of a settlement, and what the finances will look like after the divorce.

**Analyze agreements/proposals.** As proposals are generated during the collaborative process, they are analyzed by the clients and the lawyers. Much of this work is done with collaborative counsel and the client “off-line,” in private. Collaborative counsel will provide an unembellished analysis and evaluation of all aspects of the proposals. Counsel will help the client formulate needed changes, and strategize how best to present them to counterpart counsel and the other spouse during the team meetings.

**Help with decision-making.** At many points in the collaborative process, the collaborative client will need to make decisions on various matters, large and small. Collaborative counsel will assist the client by assessing each matter. Counsel will provide feedback to the client in private to help the client reach what they believe to be the best possible decision. This will involve evaluating the client’s aims, wishes and desires (and those of the spouse) with the legal and practical considerations of the issue. The advice will be informed with the realities (economic and personal) faced by the divorcing client.
Help with problem-solving. One of the strengths of the collaborative process is that all parties participate in resolving the practical issues of the divorce. I call this “a marriage to the divorce.” A great deal of brainstorming goes on, some of it usable, some not. Collaborative counsel participates in this problem-solving both “on-line” at the joint team meetings, and “off-line,” privately with the client.

Other functions of collaborative counsel. Collaborative counsel helps the client gather all documents needed, including the client’s financial information, which is key in providing full financial disclosure. They also prepare court-form financial statements and other documents needed for the divorce. Collaborative counsel is also responsible for the drafting, reviewing, and revisions to the very important Separation Agreement, which is the written agreement that sets forth all the terms of the divorce. This document will serve as the roadmap for future interactions between the divorced spouses.

Conclusion

As is apparent from the above, collaborative counsel performs all the same functions in a CP case as conventional counsel provides in a non-collaborative case. The attorney’s advocacy for their CP client is present, but is generally not articulated directly at the team meetings. Because it’s more subtly done, the clients frequently experience less strife and enmity than in the typical divorce process. This creates more opportunity for success in coming to terms and can result in better and more optimal results for the clients.

The fact that advocacy is alive and well within CP and underlies the collaborative negotiations should give potential collaborative clients confidence that their needs and concerns will be protected and safeguarded by their own counsel in a collaborative practice setting.

Laurie Israel is a divorce lawyer, mediator, and collaborative lawyer located in Brookline, Massachusetts. She is the author of “The Generous Prenup: How to Support Your Marriage and Avoid the Pitfalls” (2018), available on Amazon and other online retailers.

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