

Unfolding of a Family Law Collaborative Case

I. Introduction

According to Norma Trusch, 2004 president of the International Academy of Collaborative Professionals:

A collaborative lawyer must make a paradigm shift from a litigation mindset. Once you have made the shift, the practice becomes gratifying. I've never had the satisfaction with the practice of law as I have had since practicing collaborative law... No more looking over my shoulder. No more stress of wondering what the other side is up to... There is an integrity to collaborative law. Litigation brings out the worst in claimants; collaborative law brings out their highest selves. After 26 years in the trenches of litigation- seeing children's lives destroyed- to now be a peacemaker and counselor at law feels so good. I'm not burned out anymore. It's inspiring to practice law again.

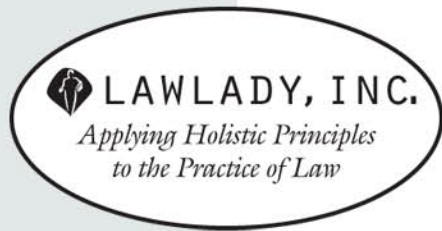
If you want to enliven your family law practice with collaborative law, you can start today. This is a model that can be learned on-the-job. For many years, collaborative lawyers across America were making up the process as they go.

One caveat, collaborative law requires sensitivity to human interactions. For some litigators, it will be difficult to stop aggressive habits. Not all lawyers are suited to collaborative law. The most successful collaborative lawyers share a sense that the litigation system fails families and that family law cases go more smoothly if the parties are able to talk and make decisions for themselves.

You can obtain guidance to learn how to practice collaboratively by joining the national collaborative law list serve found at www.collabgroup.com. This is an active listserv where you will get prompt feedback and help. Also, you can contact www.NWCollaborativeDivorce.com for assistance or help finding a mentor to assist you with your first case.

II. Obtaining Collaborative Clients

◆ **A. Who Makes a Good Collaborative Client.** Some family law clients are ideal for collaborative law. Others are not. Collaboration requires a basic level of trust between the parties. Appropriate collaborative clients lack a history of domestic abuse or severe power imbalances. You will want to question potential clients about their domestic abuse history to decide if collaboration is a good fit.



◆ **B. Finding Collaborative Clients.** A good way to develop a collaborative practice is to begin presenting collaborative to potential clients. The leaders in the collaborative movement recommend that you pitch collaborative law as one of many options available. Here is a sample pitch:

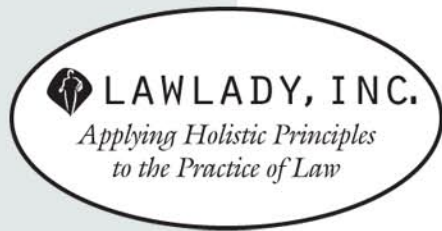
There are several divorce services I can offer. First is the traditional divorce. I'll prepare papers and serve your spouse. Next, we'll proceed to get temporary orders at a motion. Another way to handle your divorce is called Pro Se assistance. You see me for an hourly consult to learn your rights, and then you handle the paper work. A third method is mediation- either with or without lawyers. Collaborative law is a fourth option. In collaborative law cases, all parties agree that no one will go to court. If either you or your spouse chooses to withdraw from the collaborative process, both attorneys must withdraw and new lawyers are hired. Sometimes, in collaborative cases, you and your spouse will hire neutral advisors to provide needed expertise, such as a business evaluator, or child specialist. Would you like me to describe any of these methods in further detail?

Other ways to develop a collaborative law clientele is to begin meeting with collaborative-minded attorneys and professionals. This might include joining NW Collaborative Law (see NWCollaborativeDivorce.com for sign up details) or approaching your favorite opposing counsel to see if they might be interested in practicing collaboratively. Stu Webb started this national movement by sending out letters to his ten favorite family lawyers asking if they would agree to handle a future case differently. Four said yes.

Generally, the model sells itself. The public is hungry for options that avoid contentious, expensive litigation. Some of the benefits of collaboration are:

- 1) the opportunity to save money,
- 2) the removal of litigation as a threat (which reduces stress/fear),
- 3) an orientation towards a win/win result, and 4) voluntary and transparent discovery process.

One caution: When recommending collaborative law there is the tendency to "over sell" the model, and set the clients up for disappointment. Collaborative lawyers tend to be enthusiastic about the model. But divorce is generally painful, and the model doesn't always succeed. Client need to be fully apprised that there is no guarantee that the process will work, or that the divorce will be less painful. Clients must understand that both attorneys will withdraw if the parties choose to pursue litigation, or a party fails to act in good faith.



◆ **C. Recruiting the Other Side.** The next question is how should your client introduce the concept to the spouse. Some collaborators recommend a neutral third party suggest the model to the other spouse. They assume that the other spouse will be more receptive if someone other than the spouse suggests collaboration. Other collaborative professionals feel this is manipulative approach and advise their clients to introduce the collaborative model themselves. This can be done by passing along a brochure or pointing the spouse to the national website (www.collabgroup.com). Some lawyers ask their client to come in and discuss the introduction strategy in person at the client's first paid appointment.

Sometimes the other spouse already has an attorney. You might consider writing or calling the other attorney to explain collaborative law and ask them to handle the matter collaboratively. This requires the other attorney to sign an agreement to withdraw if the parties can't settle. Often times a lawyer new to the concept will agree to be friendly, but not withdraw. This is called a "cooperative case." Since you don't have the protection of an agreement to withdraw, you need to remember your litigation tools if the case does not move towards settlement within a reasonable time.

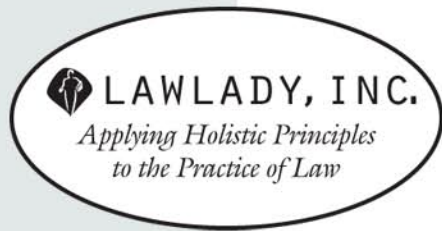
◆ **D. Fees and Fee Agreement.** If the client hires you as a collaborative attorney, you should amend your fee agreement to contain collaboration language that you will withdraw if the case goes to litigation, or if your client fails to act in good faith. This is the key principle of the model and the client needs to be informed.

Also, you may want to include language in your fee agreement that you have permission to talk with experts and opposing counsel and this will be a paid service.

With collaboration, the clients tend to share billing information more readily than they otherwise would in a traditional litigated case. Be prepared that your bills will be discussed at four-way meetings. It is typical for the parties to discuss at the first four-way meeting how both lawyer fees will be paid.

III. The Start of a Collaborative Case

◆ **A. The First Client Meeting.** There is controversy in the collaborative community about how much legal information you should give your client at the first client meeting. Some lawyers feel it is better to hold off giving too much legal advice early on. This avoids the client formulating "a position" before all the facts are known. Formulating an early opinion can cause a party to become entrenched. Other collaborative lawyers feel that the more information the client receives, the quicker the client will be prepared for the next step: the first four-way meeting.



One critical piece of information to discuss with your client is what to expect at the first four-way. You should explain expected conduct at four-way meetings (respectful behavior), and to discuss the participation agreement which they will be asked to sign. This is a good time to discuss with your client their hopes and goals for the process, and whether a divorce coach would be helpful in preparing the client for four-way meetings.

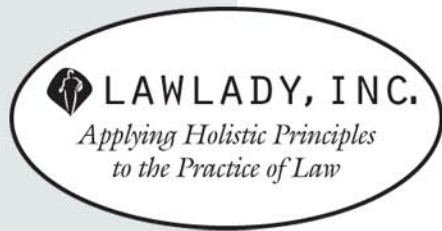
Other issues to discuss with your client are: What needs to occur for the client to feel satisfied about the process? What should the client bring to the first meeting? What documents need to be shared with the other side before the first meeting? Any concerns you should know about?

◆ **B. Getting the Case Moving.** After you have met with your client, you will now want to schedule the first four-way meeting. You will hold this meeting before conducting extensive preparatory work. You will meet before you know very much about the case or what is the best settlement for your client.

The lawyers should discuss in advance how the first meeting will proceed. Where will the meeting be held? Who provides refreshments? What are the directions and who will distribute this information? Parking? Who is going to send out a confirming letter? Will someone be preparing a written agenda in advance of the meeting? If so, who prepares? Will you set more than one meeting at the same time you schedule the first 4-way? Are any legal documents expected to be signed at first 4-way? How will you share the talking roles? Who will sit where? How do you prefer to contact one another? Vacation plans? Work styles? When will you debrief after meetings and will you have a standard check-in procedure? What language should be included in the participation agreement?

Collaborative clients have a high expectation that the two lawyers will work fluidly together. Also, you reduce both parties stress if you plan your meetings well. When people are relaxed, they make better decisions and creativity is heightened.

The purpose of the first four-way is to lay the ground rules, sign the participation agreement, schedule the next few meetings, and handle any immediate issues. Immediate issues might include temporary child support, short term parenting arrangements or payment of bills. The initial meeting is a chance for the attorneys to get to know the other party. Informal questions may be asked so that each lawyer and the parties get a better sense of the case. It is the lawyer's role to ensure that the parties do not engage in accusatory behavior. Both parties should feel "safe" and free to discuss his or her concerns. It is highly encouraged to limit four-way meetings to less than two hours. If meetings go longer than two hours, tensions tend to escalate as participants become tired.



◆ **C. Get to Know the Other Lawyer.** One of the most pleasurable aspects of practicing collaboratively is the requirement that you work as a team with the other attorney. You share the goal of facilitating the parties to a win/win resolution, and you increase the odds of success if you have a cordial relationship with the other attorney.

It might be helpful to verify with the other attorney that you share the same basic ground rules for collaborative law. What trainings have each of you had? Would it be helpful to share training material? Unlike a traditional litigation case, your success depends in part on your lawyer partner's skill at collaborative law. So it behooves you to facilitate their education.

Another important question to discuss up front: How do you plan to handle disputes or problems arising between the two attorneys? Will you both agree to use a mediator or facilitator if conflict arises between you?

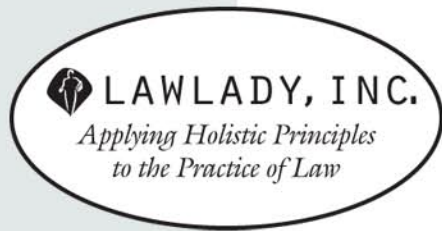
◆ **D. The Importance of the Venue.** Collaborative lawyers are very attentive to the setting and amenities for meetings. There is a consensus in the collaborative community that the setting for a collaborative meeting has an impact on outcomes. The meeting location should be comfortable, private and convenient. Refreshments should be served as a way to make the environment less threatening, and so that the participants have energy. Sitting at a round table can be more conducive to collaboration, than sitting across from one another at an imposing rectangle conference table. People receive communication through non-verbal and spatial cues. What messages are the sitting arrangements, spatial layout, and venue saying? You want to aim for a comfortable, safe, and equitable environment.

◆ **E. The First Four-way Meeting**

1. Open on a high note. Collaborative law attracts clients who wish to make their divorce a better experience. A gracious opening sets the tone. Both lawyers should greet both clients with enthusiasm. You might want to start with an inspirational quote; a moment of quiet; or by complimenting the couple for choosing collaboration.

2. Review logistics. Who will take notes? Where are the bathrooms? What time will you end?

3. Go over the ground rules. Harsh language and inflammatory comments are to be avoided. It is best to speak about your own experiences (my feelings, my opinions). Educate the clients that when brainstorming it is best to resist critiquing ideas until later.



4. Review collaborative process. Attorneys withdraw if the process fails. The goal is a win/win resolution. It may take several meetings to complete the process.

5. Review and sign collaborative agreement. Although it seems laborious and the clients may seem annoyed, it is a good practice to go through each paragraph as a group. Some collaborators go around the table and each person reads a section. The reason for this detailed reading is that the participation agreement is what holds the clients to the process when things become difficult. Later you may need to remind them of their commitment. If the clients are deliberate about entering the agreement, that commitment will be stronger than if they sign something they may not have read.

6. Go over day's agenda if there is an agenda already prepared by lawyers. Briefly set one if not. Beware of the tendency to spend one hour setting an agenda with only 30 minutes remaining to complete the agenda.

7. Consider having each party describe what they hope to achieve through this process. This is a gentle place to start a dialog, and a way to acclimate the clients to express themselves and to be heard.

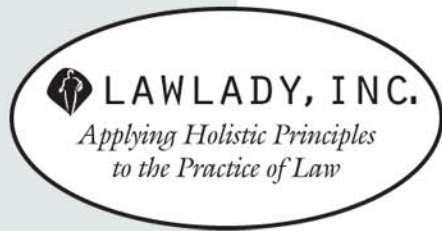
8. Discuss pressing issues. It works best if both sides first try to understand the interests of the other person, rather than starting with offers and counteroffers. If agreements are reached, it is a good idea to write down the agreement and get signatures at the meeting. Memories fade after meetings.

9. Discuss Homework. Towards the end of the meeting you will begin to discuss what needs to happen next. Typically, this includes gathering additional information or retaining an expert. The four participants will discuss what actions each will complete before the next meeting.

10. Set future meeting(s). People's lives are busy. It's easier to cancel an unneeded meeting, than to set a meeting for four people. Schedule early.

11. Case Management. One attorney, paralegal or coach may want to act as the scheduling and case management liaison. Determine who will write up meeting notes, and who will remind people of the next meeting.

12. Debrief and end on a high note. Perhaps you want to reflect on how successful the meeting has been, or to end with some inspirational words.



IV. The Middle Phase of a Collaborative Case

◆ **A. Case Management and Tracking the Case.** With more complex cases, an important task will be case management to coordinate the efforts of the two parties, two lawyers, and other collateral professionals. With smaller cases, the tracking can be handled informally. By tracking, I'm referring to making sure everyone is informed about meeting times and have directions. Case management could include coordinating the exchange of and storage of shared documents, such as financial or business records. With larger cases, you may want to designate a paralegal or one of the divorce coaches to oversee this job. The idea is to have the tracking done by someone with a lower hourly rate. **Eclipse® CLS** offers an on-line tracking/calendaring system designed for collaborative cases. They can be reached at 1-920-684-7739. They offer a free on-line tour of their service.

◆ **B. Continued Four-way Meetings.** The bulk of the collaborative work occurs at a series of four-way meetings in which both lawyers and clients attend. Any information needed to assist in making the meetings productive – such as financial data, account records, etc. – are identified and exchanged prior to the meetings. Experts or other neutral professionals can be brought to the meetings if this is useful. Clients may meet with their lawyers between four-way meetings.

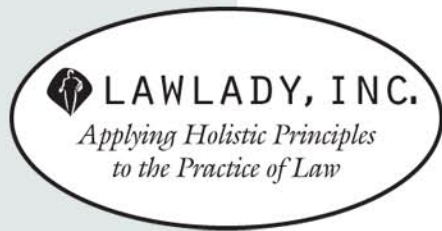
The number of four-way meetings is dependent upon the facts of the case and the needs of the parties. Pauline Tesler (mother of the movement) has observed that most family law cases seem to be resolving in 3-8 four-way meetings.

The national collaborative trainers recommend that you let the parties determine in advance the agenda for each four-way meeting. Knowing what will be discussed helps reduce client anxiety. Our job as lawyers is to make keep the tension to a minimum.

When setting the meeting agendas the lawyers should try to give the clients much control over the order issues are discussed in. The lawyers should solicit input from both clients as to what issues feel most important to discuss next.

◆ **C. Conflicts.** Conflicts are inevitable when parties are in the process of a divorce. Section 5B of this CLE material gives language techniques to help facilitate when parties are in conflict. There is an excellent appendix in the book *Collaborative Family Law: Another Way to Resolve Family Disputes* by Shields, Ryan and Smith that offers techniques to use when things go wrong. I highly recommend this book. Books on mediation and group dynamics are also a helpful resource.

As you evolve as a collaborative lawyer, you will need to master techniques such as “reframing” a negative comment into a neutrally-phrased statement with the



same meaning; "redirecting" to bring a client who is off-topic back on course; body language to change the flow of a meeting by using non-verbal body clues; "modeling" of good communication techniques between the two lawyers; "active listening" to mirror back what the client is saying to build rapport and increase understanding; open-ended questioning to elicit free-flowing information; how to use a wide-focus to observe the dynamics occurring between the participants in the room; how to reduce strong emotions by acknowledging the emotion before proceeding; how to confront gently by pointing out inconsistencies; and summarizing agreements, and common interests and concerns.

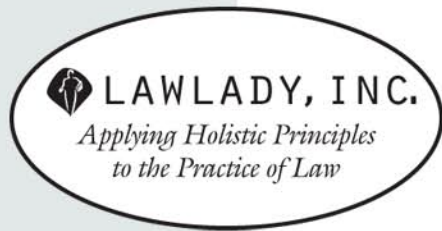
V. Use of Collateral Professionals

One benefit of the collaborative divorce process is the retention of one expert, not two. Any expert hired should be granted immunity from being called at trial, or as serving as one party's expert, should collaboration fail. This point should be in your participation agreement and the expert's fee agreement with the client. The expert should be neutral and avoid giving any appearance of preferring one side over the other.

The number of supplementary professionals depends on the case. Here are additional members of a collaborative team.

◆ **A. Child Advocate.** A child advocate gives the child(ren) a stronger voice. The child advocate's role is to meet with the child(ren), parents, and other important people such as teachers, neighbors or relatives. The advocate does not prepare a written report, but works informally with the lawyers and parties to educate the family about child development, to speak on behalf of the child, and to smooth the divorce transition for the child by being the child's confidant. The advocate can help the parent's negotiate terms of the parenting plan. The advocate might feel private meetings with each parent would be most helpful, or prefer to report findings at a five-way meetings with the lawyers and both parents.

◆ **B. Divorce Coaches for the Parties.** A divorce coach's role is to help a party mentally prepare for the rigors of four-way meetings. Each party sees his or her own coach. The coaches might teach the clients stress management techniques or communication skills that will facilitate harmonious interaction. The coaches can step in to facilitate if the client has trouble communicating with his or her lawyer. Sometimes, if emergency conflicts arise, the coaches can step in and attend a four-way meeting with the two clients and two coaches to work out emotionally volatile issues.



Coaching is controversial. Some collaborative groups require that all couples retain coaching services. Others don't. There is a national dispute over credentialing requirements. Some groups only want coaches with mental health professional degrees. Others are open to trained coaches with certification from a national coaching institution.

◆ **C. Other Experts.** The other experts retained in collaborative cases are the same experts retained in a traditional case, such as business evaluators, appraisers, accountants or realtors.

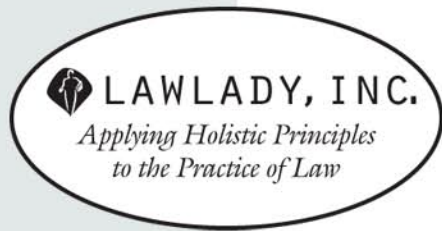
◆ **D. Gender Balance.** When selecting experts, be sensitive to gender. A party might feel uncomfortable if all the professionals in a case are of the same gender. Gender diversity can be helpful and avoid having one party feel overwhelmed by the opposite gender.

VI. Court Procedures

At present, there are no court rules or statutes in Washington addressing how to handle a collaborative case. But legislation is being drafted. There have been whispers that if collaborative law grows in King County, collaborative cases will start be assigned to one judge for review, and the case schedule stayed pending the collaborative process. For now in King County, we must comply with a mandatory case schedule. One recommendation to get around the case schedule issue is to hold off filing the petition until further along in the collaborative process after it is more apparent that a settlement will be reached.

In the interim, you might want to consider filing an Agreed Order of Collaboration. This order announces the parties' intention to proceed in a collaborative style, and affirms the requirement that the attorneys withdraw if the matter does not settle. I've attached a sample agreed order. Some commissioners have signed this type of agreed order. At least one refused to sign it. Later the parties may want to file a Joint Statement of the Collaborative Process to keep the court informed of where the parties are in the process. This might include information about the number of meetings held; the number of issues tentatively agreed upon; or an estimated date of settle. Again, there is no guarantee that the court will approve of you filing such a document, but such documents are routine in other states.

Although your decision-making process is collaborative, the final documents will be the mandatory family law forms. It is a good idea to add to the forms any subtle nuances agreed to by the parties. More comprehensive "agreements" is one of the benefits of collaboration. You also might want to include language in the Decree or Parenting Plan that this agreement was reached through collaboration and the parties will use the same process to resolve future disputes.



VII. Resources

Two books on the subject of collaborative law are:

Collaborative Law: Achieving Effective Resolution in Divorce without Litigation
by Pauline Tesler (2001, ABA Publishing).

Collaborative Family Law: Another Way to Resolve Family Disputes
by Richard Shields, Judith Ryan and Victoria Smith. (2003, Thomson Carswell).