

# COLLABORATIVE PRACTICE Toronto

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## Previously Featured Article

### **COLLABORATIVE FAMILY LAW – What makes it different also makes it work**

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Collaborative Family Law is a structured process whereby spouses negotiate their family law issues. The core of that process is a series of safe, respectful, supported four-way meetings. Each client has their own specially-trained lawyer at their side. Those lawyers work together (what a shocking concept) to ensure respect for communication protocols, keep the activity focussed on productive discourse, information exchange, and option analysis, all the while providing legal advice and support to their clients. The goal is the discovery of the best possible solution for the parties as they define it followed by the completion and execution of a written separation agreement.

Anu Osborne wrote in the January 21, 2005 Lawyers Weekly about the attitude shift collaborative lawyers must make. This article is more about the structural differences between collaborative negotiations and other models that contribute to its success.

#### **Interest-based Bargaining Model**

The collaborative process happens via interest-based negotiation. This is distinct from positional bargaining that often accompanies litigation. Positional bargaining can succeed too, but is usually less efficient (any focus on settlement solutions is often deferred until “litigation fatigue” sets in) and can result in relatively crude solutions. Interest-based negotiation is at its heart a very simple three-step process. Gather all available information without judgment or emotion, generate all options without judgment or emotion, and then analyze those options towards selecting one that best satisfies and meets the most interests. Lawyers in a traditional positional model, communicating bluntly through letters, will generally start at Step 3 by advocating options – often skipping the information gathering and option-brainstorming part entirely. This tends to waste so much of the creative power of intelligent lawyers. It can also leave clients feeling unheard, or that their real concerns were unexplored. That can harm client “buy in” which can lead to compliance trouble down the road.

### **The Withdrawal Contract (and why it is so important)**

The entire process, by written contract, happens outside of court. Each spouse AND each lawyer agree that counsel must withdraw from representation should the matter go to court.

This key distinguishing point makes the motivation and goal of all the participants singular and congruent: settlement and nothing but settlement. Counsel become self-interested in settlement. Lawyers should face, head-on, that rightly or wrongly the general public sees lawyers as “benefiting” from acrimonious litigation. Lawyers who do family law work bristle at this notion, as we know too well the toll family law litigation has on counsel. It is however an accurate statement of public perception.

In CFL, if the negotiation fails, the lawyer faces the music just like those on “The Apprentice” – they will be called to the boardroom, will face The Donald, and they will be fired!

This guarantee lets the client really viscerally feel that “my lawyer is really in this with me”. This guarantee assuages that deep client fear that their lawyer might be one of “those” lawyers that lead them down into the “divorce from hell” for their own personal gain.

### **CFL is Demanding, Not Right for All**

While the promise of CFL is alluring to separating couples, it must be noted that it is hard work. It is for those who can take ownership and responsibility for their life and relationship (including its failure) and who want to have more control over not just the terms of their separation, but the process by which those terms are reached.

CFL expects each spouse to sit in a room and talk to perhaps the last person in the world they want to talk to. The departing spouse isn’t usually anxious to pack their bags for the inevitable guilt trip that awaits them in that room. The rejected spouse isn’t anxious to be confronted with he or she who has just crushed their dreams and ruined their life.

Why sit in that room then? Behold the paradox – the other spouse who wields so much power to hurt and shame simultaneously holds the keys to unlock each door that stands between the first spouse and final resolution of the matter. Each spouse has a fistful of keys that the other spouse wants, such as a spousal support waiver, the other half of title to the house, a Jewish Ghet, or maybe just a tiny recognition from the other spouse of their intense love for their kids. Discussion of the terms whereby those keys trade hands can be done directly if done in a safe environment with care and skill.

### Differences with Mediation

CFL is not a co-mediation. There is no neutral in the room. There are two collaborative lawyers who together as a team control the process, keep the communication respectful, make sure each outstanding issue gets explored and addressed fully, and who jointly record their progress. Simultaneously, each lawyer also sits in the room as partisan counsel to their own client, fully available to answer questions, develop options, guide and advise. This meets a concern of some mediation clients, who, despite the skill of the mediator, feel awfully alone and unsupported in the mediation process. They also fear having to take the product of the mediation back to their own lawyer and possibly hear how bad a job they did or “why did you agree to that?!”

### But does it work?

While no process guarantees success, the experience locally, provincially, nationally and internationally has been overwhelmingly positive.

I think the success flows from the fact that CFL self-selects the best-intentioned clients who are ready to take adult responsibility for all of the good and bad of their relationship and who want greater participation and control of their family law resolution process. .

The CFL process contains much promise. It can be faster: limited only by availability of the participants and a joint decision about what pace is appropriate. It can be better: I have seen separated spouses yell, and cry, and grow, and laugh. I have seen broken communication pathways rebuilt, and I have been hugged by my colleague’s client at a signature meeting. CFL isn’t therapy, but it can be therapeutic. Similarly, it isn’t cheap, but can be much cheaper than litigation. Done right, the negotiations are efficient, respectful and dignified. And dignity is something worth paying attention to by those helping clients deal with the end of their family.

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