Litigation to Collaboration: The Paradigm Shift

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When we took the collaborative training, many of us left thinking: "This is nothing new – I already practice law this way." Don't we, whenever possible, sit down with counsel and the parties and try to resolve the issues without litigation? On the surface, that's what collaborative law looks like, with the only differences being 1) everyone signs an agreement that the professionals must withdraw if the matter goes to litigation and 2) the professionals trained in the collaborative process generally are a self-selected group of people who are easy to work with.

As you start doing collaborative cases, however, and listening to collaborative practitioners share their experience with the process, you will come to understand that, as much as collaborative divorce and negotiated divorce seem to have in common, there are fundamental differences, some obvious and some more subtle, between the two approaches.

Collaborative law is fairly new and appears to have its roots in the legal profession's acceptance of mediation over the last few decades. Mediation had its critics, many of whom have now embraced the process, and are themselves mediators. The legal profession is recognizing the value of collaborative processes. In 2002, the American Bar Association established a "Lawyer as Problem Solver Award." The ABA website describes this award as follows:

> Lawyer as Problem Solver Award recognizes individuals and organizations that use their problem-solving skills to forge creative solutions. An award is given to an individual member of the legal profession and/or institution who has exhibited extraordinary skill in either promoting the concept of the lawyer as problem-solver or resolving individual, institutional, community, state, national, or international problems.
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> Recipients will be acknowledged for their use or promotion of collaboration, negotiation, mediation, counseling, decision-making, and problem-solving skills to help parties resolve a problem in a creative and novel way. The lawyer as problem solver, in both orientation and skills, demonstrates:
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> > the ability to analyze situations or to consider expert analysis from a multi disciplinary perspective, taking into account the broad array of client or party interests and the multitude of factors and circumstances that impact the "problem" presented;
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> > the ability to translate positions into interests;
> >
> > the ability to generate and assess--and to help the client or parties involved generate and assess – both conventional and novel options to address the problem; and
> >
> > the ability to build consensus around an option which best addresses the goals and interests of a client or the involved participants.

The first two recipients were Stu Webb and Pauline Tesler, two of the founders of the collaborative law movement.

Definition of "Collaborative":

Oxford University Press defines collaborative as:
1) work jointly on an activity or project.
2. cooperate traitorously with an enemy.
Origin, Latin *collaborare*, meaning "work together."

If you believe collaborative practice is more properly defined by the secondary definition, you're probably not ready to work as a collaborative professional. But, if you think working together can be accomplished without treachery, you're in the right place.

What Shifts?

The over-arching framework of how the collaborative process approaches cases has shifted from litigation to conciliation and settlement. The mere commitment to settlement necessitates different behaviors on the part of the participants. It requires us to act differently: more thoughtfully, more respectfully, and with more care and consideration of the needs of both parties, not just one. Pauline H. Tesler, in her book, Collaborative Law (2008), says this about the paradigm shift:

> The paradigm shift refers to the alteration in consciousness whereby lawyers retool themselves from the adversarial to collaborative lawyers. The paradigm first requires the lawyer to become aware of unconscious adversarial habits of speech as well as automatic adversarial thought-forms, reactions, and behaviors. The second step of the paradigm shift is to adopt the beginner' mind, learning new ways of thinking, speaking, and behaving as a collaborative lawyer. [pp. 79-80]

Tesler writes that there are 4 stages that lawyers go through to become truly collaborative:

Stage 1: Shifting the lawyer's thinking from gladiator to peacemaker and learning to apply perspectives from other professions

Stage 2: Shifting the lawyer-client relationship to include helping the client improve his or her behavior toward the other party, and to take responsibility for achieving a better divorce.

Stage 3: Shifting the way we think about and communicate with the other party and team members, and using good-faith, interest-based negotiation

Stage 4: Shifting negotiations to learn how to manage the process by following a clear structure (pre-meetings, agendas, minute-taking, etc.) and how to implement conflict-resolution strategies.

The shift:

Away from:	**Towards**:
"lawyer in control"	Lawyer-client partnership, in which the lawyer does not own the conflict
Based on "the law"	Interdisciplinary approach
Lawyer speaks for the client	Lawyers listen and encourage clients to understand and articulate what they need and want; clients learn about their role in the process
Making demands	Making requests and suggestions
Adversarial outward focus	Lawyers must understand and examine their own adversarial behaviors
"Adversary"	"Colleague" or "team member"
"Problems/disputes"	"Goals/objectives"
Negativity and blame	Regard and respect
Suspicion, secrecy, obstruction	Trust, communication and cooperation
Threats (we're going to Court!)	Commitment to settlement
Litigate and then settle	Start with settlement

Highlighting conflicts	Finding shared goals and values
Good settlement meets *my* needs	Good settlement meets *everyone's* needs