ISSUE 144 | JANUARY/FEBRUARY 2010 > The View from the Fen | Committee Focus – Domestic Abuse | Cohabitation and its Impact on Spousal Maintenance | Training News | Having Our Collaborative Say, the Kentucky Way | Accessing the Pensions Credit | Tackling Domestic Abuse – a Change for the Better? | Collaborative Foundation Course – a His and Hers Perspective from the Bar | Research Regarding Collaborative Practice – a Comparison of Findings from the IACP and Resolution |
Having Our Collaborative Say, the Kentucky Way

BONNIE M BROWN
Attorney at Law

Collaborative divorce is recognized internationally as a type of alternate dispute resolution in which the parties contract to avoid court, try to settle in good faith, and must change counsel if either resort to court. Recent research in the UK and USA confirms that, no matter where a collaborative case is successfully concluded, the parties and attorneys generally report a more satisfactory experience than with traditional adversarial litigation. As the public increasingly requests this type of alternative dispute resolution, attorneys had best be prepared to meet this demand with competent, skilful collaborative legal services.

Every case may not be suited for collaborative resolution. When exercising our judgment to recommend it or not, some of us “recovering litigators” must guard against being unduly influenced by our old comfort zones. We have all heard (and, ourselves, said): “Let’s ‘just’ do this cooperatively. It’s easier and practically the same thing.” Well, it is easier – for attorneys who have done litigation for years. However, it may not be best for the clients. It is certainly not practically the same thing.

Co-operative practice is qualitatively different from collaborative practice, not “just the same thing without having to lose your atty.” Co-operative is not “collaborative light,” but is a type of negotiation – within the context of the adversarial system. Some may be confused because of surface similarities, such as:

- Sharing experts/resources
- Exchanging releases/informal discovery
- Respectful approach

Co-operative practice has less brutality than hard ball litigation, and fewer of its disadvantages, but, at the same time, may not produce as speedy a settlement. Co-operative practice has none of the benefits (or constraints) of a strictly collaborative case, in which all cards are on the table – face up – from the outset.

Specifically, the differences are summarized and explained below, with reference to Kentucky Bar Association Ethics Opinion, KBA-E425, (hereafter “Opinion”) which can be accessed at www.kybar.org/documents/ethics_opinions/kba_e-425.pdf

Collaborative v co-operative
The following table sets out the main differences, other than mandatory withdrawal, if there is no settlement:

<table>
<thead>
<tr>
<th>Goals</th>
<th>Big C (collaborative participation agreement signed)</th>
<th>Little C (co-operative)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Clients goals are best interest of family</td>
<td>Clients goals may be best interests of client only</td>
</tr>
<tr>
<td>Disclosure</td>
<td>Attorney may require client to disclose or terminate case</td>
<td>Attorney requires client to co-operate if opposing counsel asks the “right question”</td>
</tr>
<tr>
<td>Errors</td>
<td>Attorney must tell other (not opposing) party if he/she made a mistake</td>
<td>Attorney may take advantage of opposing party’s mistake or omission</td>
</tr>
<tr>
<td>Strategising</td>
<td>Clients determine position/case posture for the family</td>
<td>Attorneys may still jockey for position/case posture for client only</td>
</tr>
</tbody>
</table>
Client’s goals

In qualifiedly approving the practice of collaborative law in Kentucky, the Opinion recognises that the client determines the objectives of representation, which can be family peace, children’s well-being, and economic stability of all family members. When the client instructs his or her attorney to pursue these goals, the collaborative method of resolving the marital dispute is consistent with the lawyer’s obligations. In co-operative practice, the client’s goal may still be his or her separate interests only. Of course, most litigants contend that they are pursuing the best interests of the family or at least the best interests of the children; when it comes down to the actual structure of a resolution that may not be the case. That is when the mental health professionals or coaches can be of great value and keep the client focused on healing instead of revenge.

Nevertheless, it is often these directives to pursue family peace and health that drive the paradigm shift and supply the fundamental difference between collaborative and co-operative cases. “The carrot” of well-being for all rather than the “stick” of an expensive change of counsel is the real foundation for the significant benefits of a collaborative case.

Disclosure

As the Opinion explains, though the formal discovery process is eliminated, the contract requires full and timely disclosure of all material information and actions in good faith. If an attorney knows his client is not disclosing, that attorney may withdraw and often must withdraw. While not addressed in the Opinion, nothing would inherently prohibit exchange of releases as well. In Co-operative cases, it is still the responsibility of the person without the information to “ask the right question.” Again, the difference is fundamental. Placing the burden on the party with the information to disclose rather than waiting to be asked reflects the driving force of the collaborative resolution for family peace and economic stability.

For example, a business may have prepaid estimated taxes and/or an expectancy in a new project that would not be clearly expressed on the company books or in a business valuation relying thereon. If the attorney for the party not involved in the business (hypothetically, the wife) does not specifically ask about ongoing contract negotiations and/or potential tax refunds for the business, the attorney for the business owner (hypothetically, the husband) must affirmatively disclose in the collaborative case. Such affirmative disclosure would not be required in a co-operative case, and might even constitute malpractice. Why is it in the husband’s best interests to affirmatively disclose? Remember, the goal is family peace and economic stability. The wife could eventually find out after the case is over. There are a thousand ways to get even – 999 of them involving the children. The “savings” from the discovery gamesmanship can be wiped out by the attorney’s fees expended in opposing motions to alter parenting schedules and by children’s permanent memories of ruined holidays.

Errors

Similarly, in a collaborative case, one must advise and not take advantage of the other party’s mistake. The above reasoning applies. Moreover, knowing that two attorneys and/or a financial neutral will be checking the math, ensuring inclusion of all assets and debts, and confirming the legal consequences of certain language or omissions of certain language, facilitates both the perception and reality of a team effort with both parties’ working toward the common goal of the amicable, just, and healthy resolution.

Strategising

In the collaborative case, both attorneys are most likely to work together to identify financial and tax structures which generate economies that inure to the benefit of the whole family. It is also more likely that the entire family will be looking at parenting schedules and decision-making models that are best for the children without worrying about whether that "means" the children may become more bonded to the other parent or about losing touch with the children. Such results are still possible with co-operative cases, but less likely and certainly not mandated. If a co-operative settlement results in one party’s enhanced economic stability and the other party’s economic vulnerability, that can be an acceptable and sometimes preferred outcome for the advantaged client. The same result would constitute a failure under a collaborative resolution.

Thus, the features of collaborative and cooperative cases are fundamentally distinct and, to a great extent, opposite. Co-operative is “litigation light”, and not “collaborative light”. When collaborative divorce is truly not appropriate for a certain case, a co-operative case may be the best alternative. However, when the client’s goals are compatible with ethical use of a collaborative case, it is incumbent on us to offer this option to the client.

Informed consent

The client’s informed consent in selecting collaborative divorce as the means to resolve their family’s issues is the
key to ethically practicing a collaborative case within the rules designed for the adversarial system, as explained in the Opinion. The client must understand that a collaborative divorce is very different from what is normally expected, imposing upon the lawyer a heightened obligation to communicate the special implications of the process. It is a form of limited representation recognized under Kentucky Rules, and the client must understand those limits. It is also important to make an individualized assessment of whether a collaborative case is in each specific client’s best interest. It is best for the collaborative agreement to expressly state that the parties’ objective is family peace, that no information may be withheld and that counsel will withdraw if the client insists, that formal discovery is expressly waived, and that the right to seek an advantage from an error of the opposing party is likewise expressly waived.

Conclusion
The rapid and global growth of collaborative practice clearly indicates its beneficial properties. Some of us whose licenses were granted in the seventh or eighth decades of the prior century may be representing the now-adult children in their own divorces over whom we litigated in the earlier years of our practice. It is a blessing that we can offer them a healthier alternative than we were able to offer their parents.

---

**Job Shop**

The Resolution Job Shop on the members’ section of our website is growing fast with new vacancies added every week. For full details visit www.resolution.org.uk

**Experienced Associate/Partner**

We have an excellent opportunity for an ambitious individual to join our highly regarded family team based in our Gatwick office. Many of our solicitors are London trained and the quality of work will be very similar to many leading London firms.

The successful candidate will work with high net worth individuals, with complex assets and international aspects to their divorce. There will be some private children work and pre and post nuptial settlements. You will be expected to network and business develop on a regular basis.

You will be a family specialist and have gained experience of working with high profile and high net worth clients. You will have strong team development and interpersonal skills, be comfortable with business development and marketing in order to further develop business for the team and for your own caseload. Ideally you will have obtained good experience in one of London’s leading practices or an equivalent regional practice. In return we can offer you the opportunity to work in an established and well respected team, with excellent career opportunities.

**Location:** Gatwick, West Sussex  
**Company:** Thomas Eggar LLP  
**Address:** Belmont House Station Way Crawley West Sussex RH10 1JA DX: 303300 Chichester  
Telephone: 01243 786111 Fax: 01243 775640 Email: Dee.Atyeo@thomaseggar.com  
Website: www.thomaseggar.com  
**How to apply:** Please apply via email (attaching your CV and details of your current package) to Dee Atyeo at Dee.Atyeo@thomaseggar.com  
**Application deadline:** 31 January 2010  
**Ref:** 039