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Ministère de la Justice
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RESEARCH REPORT

**THE EMERGING PHENOMENON
OF COLLABORATIVE
FAMILY LAW (CFL):
A QUALITATIVE STUDY
OF CFL CASES**

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EXECUTIVE SUMMARY

1. Introduction

The exponential growth of “collaborative family lawyering” (CFL) is one of the most significant developments in the provision of family legal services in the last 25 years. In general, “collaborative lawyering” (CL) refers to a contractual commitment between lawyer and client *not* to resort to litigation to resolve the client’s problem. The lawyer is retained to provide advice and representation regarding the non-litigious resolution of the conflict, and to focus on developing a negotiated, consensual outcome. If the client decides that legal action is ultimately necessary to resolve the dispute, the retainer stipulates that the collaborative lawyer (along with any other collaborative professionals, such as divorce coaches or financial planners) must withdraw and receive no further remuneration for work on the case. Collaborative lawyering is used in number of different areas of law and in particular in family law.

This executive summary sets out the principal findings of the Collaborative Family Lawyering Research Project, a three-year initiative funded by the Social Sciences and Humanities Research Council of Canada and the Department of Justice Canada, which examined the practice of CFL in Canada and the United States. The objective of the research was to explore the differences that CFL makes to the process and outcome of divorce disputes, and in particular to assess its impact on the clients of family legal services.

2. The Study

The study used interviews as the primary method of collecting personal, reflective and complex data about the experiences of lawyers and clients with the theory and practice of CFL. Researchers conducted 66 initial interviews with lawyers, clients and other collaborative professionals at nine sites in the United States and Canada where CFL groups are active. The following year, four locations—Vancouver and Medicine Hat in Canada, and San Francisco and Minneapolis in the United States—were selected as representative of a range of different CFL practices and philosophies, as well as a variety of client groups. At each site, clients and professionals in four recently contracted CFL cases were recruited to participate in the study. Standard form interviews with each client and collaborative professional (lawyer, therapist, financial advisor or other) were conducted throughout the case. A total of 150 interviews were conducted for the 16 case studies.

3. Collaborative Family Lawyering Groups

Each CFL group has one or more significant leaders who are often experienced litigators with wide credibility in their professional community. All CFL groups have created local rules for membership, which vary only slightly. In these ways, the CFL groups play a significant gatekeeping function. In each CFL centre, there appears to be a strong commitment to establishing a uniformity of practice—whatever the practice model is for that particular group. This trend leads to some tension between CFL groups with different approaches.

4. Principal Variations in CFL Practice

a. The Traditional Legal Advisor Who Commits to Cooperation

This model of CFL casts the role of the lawyer in fairly traditional terms when it comes to providing legal advice and looking out for the client's interests. Cooperative Advisors continue to regard legal advice as central to their professional role. This perspective leads them to believe that their primary responsibility is to their client, and not to the collaborative team or to the "whole family." In many ways, Cooperative Advisors are fitting the CFL process into and around their existing norms of client advocacy and representation, or attempting to blend the two.

b. The Lawyer as Friend and Healer

This type has moved further in reconceiving the traditional role of the lawyer. Lawyers as Friends feel a central aspect of their working expertise involves providing a supportive and healing environment, often presenting divorce as a journey of personal growth. These lawyers are often uncomfortable with the idea that they act as "advocates" for one side, and even with the implications of the word "advocacy." The Lawyer as Friend believes that it is counter-productive to emphasize legal rights advice and that focussing on legal rights is less constructive than working on the therapeutic dimensions of the divorce.

c. The Team Player

While having much in common with the Lawyer as Friend, the Team Player has one major distinguishing characteristic: promoting the integrity of the CFL process over any other considerations (such as maximizing client satisfaction, or matching or exceeding legal standards) that may factor into good outcomes. The Team Player is tenacious about staying in the process and looking for a solution to emerge. The Team Player emphasizes cooperation, communication and perhaps co-strategizing with the lawyer on the other side.

Few, if any, lawyers consistently identified exclusively with just one of these three types, suggesting—as one would expect—that practice norms in CFL are still emergent. However, at each pilot site, one of these types tended to dominate.

5. CFL Objectives, Expectations and Motivations

The study found that the primary motivator for lawyers embracing CFL was finding a way to practise law that fit better with their beliefs and values than the traditional litigation model did. Further significant motivations included the desire to provide better client service and to offer a better alternative to family mediation.

For many clients, the principal goals in the collaborative process were reduced expense and speedier results. Secondary motivations mentioned by a smaller number of clients were the importance of taking personal responsibility for role modelling, especially for children of the marriage; and, the opportunity for personal growth offered by a face-to-face collaborative process.

There are some contrasts between lawyers' and clients' goals for CFL. Clients generally take a far more pragmatic approach to CFL than do lawyers, who prefer to describe loftier goals that, for some, border on an ideological commitment. This difference is reasonable, given that clients are describing how they will deal with a life crisis, while lawyers are describing how CFL will better meet their clients' and their own needs for a fair and dignified process.

This contrast in emphasis between lawyers and clients raises two concerns. The first is that clients who choose CFL largely because of the "promises" of speedy and inexpensive dispute resolution are sometimes bitterly disappointed with their final bill and disillusioned by how long it has taken for them to reach a resolution. The CFL movement should be cautious in making such claims, especially when using them as a basis for obtaining clients' consent to participate in CFL.

Second, the apparent mismatch in expectations and objectives between some clients and their lawyers may raise the risk that CFL lawyers may assume an ideological commitment on the part of their client that is not actually there, perhaps imposing their own motivations onto clients who are simply trying to get their divorce completed quickly and inexpensively. CFL lawyers should be careful to be transparent with their clients about their values and goals, and to ensure that they do not paint an unrealistic picture of CFL in their eagerness to promote the approach.

6. The Negotiation Experience in CFL

i. Negotiations in CFL

There appears to be widespread agreement that CFL reduces the posturing and gamesmanship of traditional lawyer-to-lawyer negotiation, including highly inflated and lowball opening proposals. There is recognition that positional bargaining does still sometimes occur, especially where there is an impasse. However, where split-the-difference bargaining does occur, parties usually have more information at hand and share a more constructive spirit than one would often see in a traditional lawyer-to-lawyer negotiation.

The strong ideological commitment to cooperative negotiation within the CFL model has a significant impact on the bargaining environment, which is strengthened by the "club" culture of CFL groups and their sense of shared values. CFL groups are investing heavily to develop a reputation for cooperation. CFL lawyers also point to pragmatic considerations; where agreement between lawyers and both clients is necessary to settle, positional bargaining simply does not work.

ii. The place of emotions in CFL negotiations

A number of clients commented that their lawyers seemed to underestimate the level of emotionality that would inevitably colour the negotiation process between separating/divorcing spouses. Sometimes clients experienced this as a denial of their feelings and an attempt to impose a false "harmony" on the situation.

If CFL lawyers are to moderate discussions between angry and hurt people, they need the skills to handle the potential consequences. CFL training must prepare lawyers to deal with high conflict and highly charged interactions, both practically and conceptually.

iii. The role of legal advice in negotiations

The amount of legal advice CFL clients receive, and how specific it is to the facts of their particular case, varies widely. In this area, the three major styles of CFL practice described above clearly influence the approach the lawyer will take.

Clients themselves often do not have a clear idea of how much or how little legal advice they will receive and some are less satisfied than others with this aspect of collaborative legal services. Some clients expressed frustration at not getting clear and specific legal advice when they felt they needed it, and some expressed a desire for their lawyer to be more assertive with the other side about the limits of their entitlement. Some clients who felt their lawyer was replacing the legal advice role with a quasi-therapeutic one resisted that approach.

iv. The impact of the disqualification agreement

Data gathered by this study—where every case had a disqualification agreement (DA)—suggest that the collaborative process fosters a spirit of openness, cooperation and commitment to finding a solution that differs qualitatively from solutions achieved through conventional lawyer-to-lawyer negotiations. However, it is difficult to say that this result proves the need for a DA, which requires an absolute commitment not to litigate, rather than an agreement to commit to a particular period of negotiation outside litigation. Further research should examine how far the DA is a critical enabler of settlement-only lawyering.

7. Lawyer-Client Relationships in CFL

i. Control and responsibility

In CFL, clients are expected to take on more responsibility for solving their own problems, by planning and participating in face-to-face negotiations. Many lawyers described how this approach relieved them of the burdensome responsibility to solve their clients' problems that they often experienced in litigation.

Those clients who recognized a change in control regarded it as a positive characteristic of CFL. Others, however, pointed out that they had little control over some aspects of the collaborative process such as timing, in situations where the other side was apparently dragging its feet.

ii. Privilege

There are many different approaches to the issue of formal lawyer-client privilege in CFL. CFL retainer agreements characteristically contain provisions relating to commitments to disclose "relevant" information, and allow lawyers to terminate the agreement if they know or suspect that clients are not meeting the disclosure requirements. There is no consistent standard for relevancy and there are many different practices. The issue of privilege requires attention to ensure a more consistent standard and, above all, that clients fully understand the limits of confidentiality when they agree to CFL.

iii. Advocacy

In the most traditional formulation of "zealous advocacy," the interests of the other side are seen as a distraction from absolute client loyalty. The collaborative process, like other consensus-building processes, requires lawyers to pay attention to meeting the interests of all parties, for both pragmatic and philosophical reasons. The challenge for collaborative lawyers is to determine just how far their regard for the interests of the other side interferes with or even supplants their commitment to their own client's goals.

Most CFL lawyers are aware of these complexities and are finding ways to balance these tensions in each file. Most CFL lawyers see their relationship with their client as their primary, special responsibility. However, concerns about enabling healthy family transitions appear to lead some CFL lawyers to see their responsibility as being to the "whole family," despite the fact that counsel is not working privately with each member of the "whole family" nor taking instructions from them collectively. These lawyers risk unintentionally substituting their own judgment for that of their client.

8. A Multidisciplinary Approach

Relatively few lawyers participating in the cases studied or interviewed on field visits had used the full team approach. While lawyers frequently acknowledge the contribution a coach could make, many noted that it is difficult in practice to persuade clients that they need to retain two professionals at the start of their case.

Many lawyers acknowledge that they do not have the necessary skills to work with some couples who need special help in communicating. Some would consider not taking certain high-conflict cases unless the parties agree to retain a coach as well. However, some lawyers (a small but notable group) see themselves as qualified to discharge the therapeutic and counselling responsibilities that might otherwise fall to a mental health specialist.

There are a number of complex, unresolved issues related to the effort to merge the expertise of different professionals working on a collaborative file. Foremost among these is the possible encroachment by lawyers on the therapeutic role of coaches. Some therapists indicated that they were uncomfortable with the blurring of the boundaries between their role and that of some lawyers who assume a more therapeutic relationship with the client.

There are also emerging issues related to control and hierarchy within the team, including the question of professional fees and the designation of one person to act as the referral "hub" or "case manager." Creating a case manager role may help professionals identify and avoid some of the challenges of the team model described in the report.

9. Outcomes in CFL

The outcomes of the cases that were resolved during the course of this study match or exceed the legal standard in most respects. Nonetheless, vigilance is important to ensure that weaker parties do not fare worse in CFL than they would in a formally regulated setting.

Many outcomes reflected value-added components, including detailed and creative plans for co-parenting and access, support paid in different formats, and enhanced communication. Finally, the collaborative process allows parties to develop "trial" outcomes in a way that litigation rarely affords.

10. Costs and Timing

i. Costs and fees

There is as yet no clear evidence that CFL cases are less expensive than traditional litigation or negotiation divorce files, although common sense suggests that they often will be. Some clients are disappointed at the eventual cost of the process, especially if negotiations proceed slowly, having initially formed an unrealistic expectation of cost.

ii. Timing

Without the external time pressures imposed by the court, CFL lawyers need other means of ensuring that the CFL process proceeds at a pace that meets some minimal requirements for both parties. Clients who feel that the process is too open ended, in the face of indecision or intransigence by their spouse, may waver in their commitment to collaboration.

11. Ethical Issues in Collaborative Practice

Outside a small group of experienced practitioners, the study found little explicit acknowledgement and recognition of ethical issues among CFL lawyers. This finding raises concern, since the changed client consultation, negotiation and advocacy procedures required by CFL place counsel in many new and unfamiliar situations where they must exercise discretion to determine appropriate "ethical" behaviour, often without clear precedents or personal experiences on which to draw.

A number of such issues concern the management of collaborative files: How should they assess the suitability of particular divorce cases for CFL and screen out cases where CFL might even be harmful? How can they ensure the client gives informed consent to participating in CFL? How and when should they advise the client to withdraw from CFL, if there appears to be little chance of a resolution via negotiation? And how can they ensure appropriate professional relationships between lawyers on a file, especially where CFL networks are small and lawyers work together regularly?

12. The Relationship Between CFL and Mediation

CFL clients said their primary reason for preferring CFL to mediation was their perception that they would do better with a personal advocate who participated in the process alongside them, rather than someone who was positioned outside the process as a consulting attorney. CFL appears to be more appealing on an emotional level to parties who feel relatively unskilled or vulnerable in the negotiation process.

There is a widespread view among CFL lawyers that, while mediation is a constructive process for some clients, CFL is appropriate for a much wider range of clients and levels of conflict. One commonly expressed view is that "the mediation process is not a complete process," a reference to the lack of direct advocate participation. The strength with which CFL lawyers offer mediation as an alternative to CFL varies widely. In some cases, it is apparent that CFL clients know little or nothing about the possibility of mediation as an alternative to CFL. The apparent dismissal of mediation by some CFL lawyers wastes the opportunity for important cross-fertilization between mediation and CFL.

13. Policy Issues

While this study did not aim to answer questions for policy makers, there are a number of policy issues surrounding the development of CFL.

i. Provincial funding (via legal aid) for CFL

Pilot legal aid projects for CFL are beginning in several provinces and more are expected to follow. These initiatives throw a spotlight on two areas of CFL practice: the qualification and experience of collaborative lawyers, and the extent to which they offer their clients conventional legal advice and counsel in a privileged setting. Given the variations in CFL practice discussed in this study, legal aid administrators may need to clarify the role of legal advice, the privacy of some aspects of the lawyer-client relationship and the identity of the "client" of the legally aided lawyer.

ii. Accreditation for collaborative lawyers

At present, only a lawyer who is a member of a CFL group can be designated as a "collaborative family lawyer." Other regulators—for example, the provincial law society—may enter this arena soon. The most immediate problems noted by this study are the risk that clients may work with lawyers handling their first collaborative file, who may be less than fully competent; and the risk that clients may work with collaborative lawyers who do not know how to handle high-conflict cases. Regulators should focus on addressing these issues—for example, through case screening and mentoring systems—before tackling the larger question of accreditation. This work should be done in cooperation with leaders in the collaborative movement, who recognize that it is in the interests of the collaborative movement to develop mechanisms to ensure client satisfaction and protect the reputation of CFL.

iii. Professional codes of conduct

This study was concerned with the experiences of lawyers, clients and other collaborative professionals with CFL, and not with codes of professional conduct for lawyers or other collaborative professionals. However, this topic will become increasingly important in jurisdictions where there is concern that collaborative practice may bend the rules of professional conduct—for example, in relation to obligations of representation, competency and withdrawal.

14. Postscript

CFL offers a chance for separating spouses to negotiate durable, realistic and creative outcomes that they deem “fair.” It creates a forum for frank dialogue and dignified closure. Family lawyers who are embracing CFL see it as a dispute-resolution process that has integrity, empowers clients and helps families move through difficult transitions.

There are also many challenges. Some CFL clients experience a jarring of their expectations and goals when the going gets tough, sometimes finding that CFL is taking longer and costing more than they had anticipated. Often, clients do not want collaborative teamwork to overtake their lawyer’s personal advocacy on their behalf. Some of these clients need more clarity at the beginning of the collaborative process about what this procedural commitment might mean for them, emotionally and practically, later in their case.

These challenges suggest four key values for excellence in collaborative practice. These are commitment (carefully balancing commitment to the process, to one’s client and to one’s colleagues); transparency (being frank with one’s clients regarding core values and what might go wrong); flexibility and responsiveness (developing different styles of CFL practice and adjusting one’s own practice to client needs); and a recognition of the limitations of the CFL model and practice (realizing that not every case is suitable for CFL and not every lawyer has the necessary skills for every potential CFL case). With careful attention to these core values, along with continued self-scrutiny and external evaluation, CFL will flourish.