FAMILY LAW

In the collaborative law process, an attorney does more than advocate for his client's core interests. He becomes an advocate for the process itself, which favors cooperation over traditional litigation techniques.

Advocacy Redefined

BY FREDERICK J. GLASSMAN

COLLABORATIVE LAW IS AN ALTERNATE dispute resolution method, distinct from mediation or arbitration, that today is being used by lawyers primarily in matrimonial matters but also in civil and probate disputes.

The dictionary definition of collaboration is the art of working together. Thus, by definition, collaborative law contemplates lawyers working in a resolution-oriented mode rather than being litigation-prone and promoting their often polarized positions to an outside source, whether the judicial officer or binding arbitrator.

Furthermore, by practice or inference, collaborative law denotes the art of working

together with other allied professionals, including financial specialists and licensed mental health professionals. In essence, collaborative law or as it's more commonly known, "collaborative practice," has become, in most jurisdictions, an interdisciplinary alternative approach to resolving family law disputes rather than by the traditional method of court-mandated determination.

Although different jurisdictions throughout the United States have variances in their collaborative practice protocol, the common thread for collaborative practice running through most states includes the following criteria:

> Mandate for full disclosure and exchange of all information, including financial and custody-related data;

> Commitment by the lawyers for the parties to resign or otherwise cause the collaborative law process to terminate if the case is not resolved, and to not represent the parties in litigation;

> Joint retention of consultants and/or experts, including financial professionals and child development therapists, to maintain the neutrality of all such allied professionals;

> Maintenance of confidentiality so that work product, reports and other data of the allied professionals are precluded from being introduced into evidence if the collaborative case terminates and the parties proceed to litigation; and

> A good faith commitment on behalf of the parties to be fair, reasonable and respectful with each other in the collaborative law process.

The collaborative practice is sensible because it allows the disputants to control their own destiny by avoiding having to submit themselves to a judicial officer, or binding arbitrator, and facing an unknown and uncontrollable result. Collaborative practice is a client-driven process whereby the clients participate with their lawyers in making decisions for themselves and their children. These decisions often result from creative options that quite often look beyond what could be expected through the discretion of the court. For example, it seems sensible for parents to make commitments for the college education of their children after reaching majority age.

The parties exhibit good common and practical sense by desiring a process which most likely will reduce the attorney fees by opting out of the quite often protracted litigation arena. Finally, the parties become keenly aware that it makes little sense to have "hired guns" as experts when they recognize that the element of neutrality is protected and respected by agreeing to a joint expert.

Because the parties know their attorneys have "stepped up to the plate" by committing to resigning or withdrawing if the case is not settled within the collaborative process, they feel secure and trusting of the process. There is little risk of the lawyers grandstanding or otherwise threatening litigation if the case is not resolved in his or her favor. The parties also feel safe knowing that their statements, written or oral, as well as the work product, reports and other materials of all personnel, including their lawyers and allied professionals, are confidential and, thus, precluded from being used as evidence if the collaborative case is aborted and litigation follows. Since a prerequisite for working in the collaborative model requires full disclosure of all pertinent financial and other information, the safety factor is achieved.

The collaborative practice also is a sensitive approach. Divorce is not just the breakup of a financial partnership but touches upon the emotional well being of the parties and their children. The business of the divorce and the personal relationship of the divorce run on two parallel tracks. The collaborative process allows the parties to take into consideration the awareness and responsibility of their emotional needs and the emotional needs of their children.

The use of a licensed mental health professional as a "collaborative coach" can provide a working alliance with one or both parties in order to facilitate relationship issues and prepare the parties to be fair, reasonable and respectful with each other in the collaborative process. The benefactors are not only the parties but the children, as well, who recognize that their parents selected an appropriate method of ending the marriage.

Now that the parties understand the sensible, safe and sensitive way to divorce, how does collaborative practice, in a nutshell, work? First of all, the parties voluntarily commit to a written agreement formalizing their arrangements which include the five-point criteria mentioned above, sometimes in a stipulation and order filed with the court. Their lawyers may join in signing the stipulation and appear of record. Otherwise, the parties appear in propria persona, and their attorneys adhere to the five-point criteria in a separate writing known as the "participation agreement." Any and all allied professionals engaged in the process, including the mental health professionals acting as coaches and/or as child development therapists, as well as financial professionals jointly retained by the parties, also commit in written agreements.

Secondly, under the auspices of a sensible, safe and sensitive way to dissolve their marriage, resolution is reached through a series of informal meetings (sometimes called "sessions") in which the parties and their lawyers are present. Involvement with the court system is limited to submitting to it the final agreement for approval and entry as a judgment. The parties are free

to leave the collaborative process anytime and neither party waives any legal rights by participating in the process.

Finally, on an as-needed basis, the allied professionals join in the meetings, and a collaborative team is formulated. Team members exhibit roles correlating with the common thread of maintaining the art of working together in an appropriate dispute resolution process. With all information needed to make decisions put on the table, the "brainstorming" and exchanging of ideas from the participants results in a mutual understanding of the parties.

The lawyer's role in collaborative practice calls for recognition of a redefined advocacy. The lawyer not only maintains responsibility as an advocate for the client's core interests but becomes an advocate for the collaborative process itself. It is the blending of such primary interests of both parties that creates a path for settlement. This interest-based negotiation replaces the traditional litigation negotiation from a positional and often polarized standpoint. The lawyer promotes not only the client's rights and entitlements, or obligations and responsibilities, but is considerate of the needs, concerns and interests of the client's spouse. In accomplishing this goal, the parties find creative solutions that likely will avoid future involvement with the court and modification of judgments.

In fulfilling his or her responsibilities, the lawyer becomes a true educator, informant, advisor and confidant for the client concentrating on solutions that maximize the interests of both parties and minimize the effects of marital dissolution on the children. The collaborative lawyers call this the paradigm shift from an adversarial model to a problem-solving model. Emphasizing the restructuring of relationships between spouses rather than finding fault and blame is paramount to the lawyer's role. Since the lawyer is restrained from representing the client in court proceedings, except to present the stipulated judgment reached in the collaborative model, the lawyer's role changes from promoting the most onerous one-sided position for the client to accommodating interests of all those affected by the divorce.

The heart and soul of the collaborative law process is the "disqualification clause," that is, the lawyer is required to withdraw from the case if resolution is not achieved. Mandatory withdrawal by counsel serves as an effective deterrent to the parties and their counsel from attempting to manipulate or otherwise use the collaborative law process for ulterior motives, such as stalling to achieve self-interests during an inactive period or wearing the other side down by extraordinary expenditure of professional fees and costs.

The starting point for collaborative law was Minneapolis, Minn. In the early 1990s, a family law attorney, Stuart Webb, became dissatisfied with the results of his family law practice. As a litigator, taking his clients through the traditional adversarial system caused Webb to become frustrated and dissatisfied that he was not really helping his clients or their families. By taking a stance that he would no longer go to court and would only represent clients in a negotiated process aimed at creating settlements, Webb was making an unorthodox commitment. When he combined this commitment with withdrawing if the case broke down and referring his clients to litigators, the collaborative law process was born.

In the mid-to-late 1990's the collaborative movement came to Northern California. As the movement evolved, additional allied professionals were added to form "teams" to help manage various aspects of the marital dissolution, such as the emotional issues, concerns for the minor children and the financial issues. Lawyers joined with mental health and financial professionals to form interdisciplinary groups to practice collaboratively. From a realistic standpoint, the collaborative law process became a truly collaborative practice.

Collaborative practice groups formed all over the country and currently exist in more than 35 states within the United States as well as throughout many European countries, Australia and New Zealand. The international movement organized in 1999 as the International Academy of Collaborative Professionals, commonly known as IACP. Its mission is to educate professionals and the public regarding the collaborative solutions to disputes, not necessarily limited to family law. At publication time, nearly 3,000 professionals are members of the IACP and more than 10,000 professionals have been trained in collaborative practice.

California, Texas and North Carolina have already adopted collaborative law statutes. Many other states have local county rules allowing or endorsing collaborative law as an appropriate dispute resolution process. Finally, a uniform model statute for collaborative law is currently being drafted by the National Conference of Commissioners on Uniform State Laws.

The dramatic increase in the public awareness for alternative dispute resolution methods is due primarily to the growing frustration that litigation does not always minimize the destructive impact upon the family. Family law practitioners now have a vehicle to guide them, together with their clients, through a more sensible, safe and sensitive method for achieving such positive resolution. Collaborative law sets the stage for lawyers in other fields, such as civil litigation and probate and estate, to draw upon collaborative law or collaborative practice models to fulfill the void often felt in the traditional litigation model. ■

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