Collaborative Practice

Divorce Without Litigation

FAMILY LAW ATTORNEYS who use court alternatives for dispute resolutions recognize that "a system that treats all family law litigants as adversaries is destructive to future relationships and is often devastating for children."[1] In fact, given the range of options available to clients seeking information regarding divorce, a family law attorney cannot, in good faith, present only the "litigation" model. Attorneys have an ethical obligation to inform each new client of the complete dispute resolution continuum available, objectively presenting the advantages, disadvantages, potential risks, and costs.[2] The collaborative divorce process is one more option that we as lawyers should offer to our clients where appropriate and be prepared, through training, to carry into practice.

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Overview—The Collaborative Process

Described simply, the collaborative process consists of two parties and their respective lawyers who sign a binding agreement defining the scope and sole purpose of the lawyers' representation: to help the parties engage in creative problem-solving aimed at reaching a negotiated agreement delineating the legitimate needs of both parties. The parties agree that neither will threaten nor engage in litigation. While the parties do not forfeit their right to access to the courts, if either party chooses to litigate, the attorneys must withdraw from further representation of either party.[3] Other essential elements of the binding agreement are voluntary and cooperative disclosure, commitment to shared goals, civility, and adoption of collaborative problem-solving techniques. The model creates an economic incentive to work cooperatively and a disincentive to escalate conflicts.

Collaborative practice uses an interdisciplinary "collaborative team" to act as cooperative, rather than adversarial, problem-solvers. Team members assist the participants in their area of expertise with the goal of finding mutually acceptable solutions to the multiple issues related to the separation and divorce. Members from other disciplines are most commonly mental health professionals, serving as child specialists or divorce coaches, or financial professionals, serving as financial neutrals or financial coaches. Each team member is expected to be trained in collaborative practice and to participate in a collaborative manner. Accordingly, each team member adopts the collaborative commitment and pledges not to participate in litigation, agrees to assure full and complete disclosure of relevant information, and commits to working in a civil, problem-solving manner.

Unlike the traditional litigation model in which negotiations are primarily handled by attorneys, in a collaborative divorce the negotiation is done by the parties and facilitated by the attorneys, primarily during a series of four-way meetings between the parties and counsel. There can be additional five-way meetings with the clients, counsel, and a financial or child specialist; six-way meetings with clients, counsel, a mediator, and the specialist; three-way meetings with the parents and child specialist; and one-on-one meetings with a client and the divorce coach.

Collaborative practice enables clients to obtain the information they need in a shared manner. It permits the attorneys to engage in creative and broad problem-solving. The team is designed to meet the needs of the divorcing clients while keeping the process balanced and productive. Both parties must be prepared to adopt a positive focus and contain their emotions in meetings. Each participant and member of the collaborative team must trust the integrity of the others and their commitment to the process. Despite the initial perception that, with more professionals involved, costs may be greater, the reality is often different when litigation is avoided, crises are deflected, and post-divorce outcomes improved.

Screening Procedures

It is critical to the collaborative practice to have screening procedures in place in order to determine whether the collaborative process is appropriate for a particular client. Because the collaborative process depends on the parties' agreement to full disclosure of all relevant facts, a client who is in an abusive situation, has personal knowledge of the spouse's basic dishonesty, or would have to disclose information that could be substantially detrimental in a court proceeding, would be an unlikely candidate for a collaborative law divorce. Even if no such factors are evident, before agreeing to represent a party in this process, a lawyer must assess the situation and advise the client of the risks and benefits, taking the disclosure requirements into consideration.

Informed Decision-Making

Integral to the collaborative process are the terms of the Collaborative Law Participation Agreement (CL Agreement), signed by the parties and their attorneys during the first four-way meeting and signed by any others who become part of the team. It provides that the attorneys "cannot and will not represent them in contested proceedings and that, upon withdrawing from the collaborative law process, each party must retain another attorney to represent him or her in litigation." The retainer agreements entered into by both clients and their respective attorneys must include similar language. Thus, at the onset, the parties agree to limited representation and to the withdrawal of their attorneys if the collaborative process breaks down.

The concern here is "informed consent." A lawyer who contracts with a client to limit the scope of representation and to withdraw under certain circumstances must advise the prospective client of his rights, all of the alternatives available, the consequences of each, and the potential costs. Here, the lawyer must sufficiently educate the client regarding the collaborative process to permit informed decisions about entering into and continuing with the process.

"Zealous" Representation

Collaborative law is consistent with the practice of diligence or zealous advocacy, and this approach may be the very best way to pursue the client's interests and needs in family law matters. In fact, the Virginia State Bar has revised the comment to Rule 1.3 to include the following language:

> *[L]awyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.*[4]

In a collaborative divorce, the emphasis is on interest-based bargaining, as opposed to position-based. Win-win is the best outcome, not win-big. Both parties need to understand this before opting for the process. They need to know what the law provides regarding various aspects of their situation, e.g., support, separate property, etc. They also need to know, however, that in this process, doing what the law allows courts to do may not be in the best interests of the family or of the desired negotiated agreement that is consistent with the goals of the collaborative process.

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Further, as pointed out by more than one author, overzealous tactics such as coercion and threats of litigation can actually harm a client's position by initiating a destructive and expensive cycle of retaliatory actions.[5] Clients who have participated in the collaborative process have expressed their favorable

opinion of the experience and their relief at avoiding the "battle" so many others undergo during divorce.

Confidentiality and Privilege

Confidentiality is a fundamental principle underlying the attorney-client relationship. The collaborative process does not require an attorney to ignore or breach that confidential relationship. Two issues arise in the context of the collaborative process. First, the parties are required to disclose all material information. If the client divulges information that, in the attorney's opinion, is material to the outcome of settlement but instructs the attorney not to reveal the information, the attorney is bound by the attorney-client privilege. The attorney would, however, have to remind the client that the CL Agreement demands "full, honest and open disclosure." If the client cannot be persuaded to share the information material to the outcome, the attorney must withdraw from the process. Second, the question arises as to the confidentiality of the communication in the context of the four-way collaborative conference with the parties and their attorneys. This can be accomplished by the contractual agreement for confidentiality of communications between the clients and the lawyers as set forth in the CL Agreement.

Conclusion

The value of collaborative practice is evidenced by its rapid growth and the excitement of its practitioners. Besides Michigan, the model has taken hold in 35 states and more than a dozen countries.[6] In order to appreciate fully the unique aspects of the collaborative process and skillfully execute the process in practice, training is absolutely necessary. The collaborative process is not a win-lose approach. It requires that lawyers put aside adversarial behaviors and adopt collaborative behaviors. Without training, lawyers may dismiss the collaborative law process as being no different from what they already do but without the trial at the end, and thus subvert the process—which, as noted above, could result in the client having to start over with new counsel. In summary, collaborative practice can be very beneficial, particularly when children are involved and all parties are committed to forego litigation approaches. With emphasis on collaboration, not litigation, and an appropriate mix of professionals, the needs of the child can be more fully considered, outcomes can be optimized, and clients can go forward after the divorce more knowledgeable and equipped for their new lives. ◆

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Footnotes

1. Nancy Cameron, *Collaborative Practice: Deepening the Dialogue* (The Continuing Legal Education Society of British Columbia, 2004), p 5.
2. Practitioners should inform clients about alternative dispute resolution options besides collaborative practice, including "kitchen table," early stage facilitative mediation, lawyer negotiation, late stage evaluative mediation, and litigation, so the client can make an informed decision.
3. Pauline H. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (American Bar Association, 2001), p 7.
4. Virginia Rules of Professional Conduct, Official Comment to Rule 1.3.
5. John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering,* 64 Ohio St LJ 1315, 1334 (2003).
6. The International Academy of Collaborative Professionals (IACP) has doubled its membership in the last year to 1,800 members comprising diverse collaborative practitioners, including attorneys, judges, mental health professionals, and financial experts. There is a helpful listserv at http://groups.yahoo.com/group/CollabLaw/files; registration is required.