Collaborative Practice: Solving Family Disputes Outside of Court

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What is collaborative practice? Lawyers learn early how to work together with other lawyers, judges and clients in a spectrum of cases from litigation to negotiation. While collaboration is a familiar concept, not all lawyers are trained in specific techniques used in nonlitigation settings. Since the early 1990s, teaching institutions and judicial jurisdictions have developed alternative dispute resolution approaches—such as mediation and collaborative practice—that utilize interest-based negotiation. Rather than starting by formulating positions to meet specific statutory criteria or precedents, interest-based negotiation focuses on the needs of the participants and how to use available resources to meet those needs without the threat of court.

Collaborative practice was developed in 1990 by Minnesota lawyer Stu Webb, who believed the court model is destructive for families enmeshed in domestic disputes. A model was developed to allow clients and their own lawyers to resolve conflict through settlement. Since 1999, the International Academy of Collaborative Professionals (IACP), which promulgates standards and provides resources to professionals and the public, has heralded this movement.

This collaborative practice model originally applied to divorce and family matters (known as collaborative divorce), but has since been adapted to other forms of civil dispute (known as collaborative law). Any conflict that continues beyond the dispute is appropriate for collaboration practice. The model includes communication, disclosure and interaction intended to produce enough information for the clients to solve their problems. The model includes forms and resources to assist the attorneys in working toward settlement. The model includes staging and timing for joint meetings adapted specifically to the needs of the clients, not the courts, and allows clients flexibility and opportunities to control the costs of their case. The model instills a philosophy in all of the participants of respect, transparency, confidentiality and personal responsibility for outcome.

Why and how is collaborative practice different than just cooperating with the other side in settlement discussions? As collaborative practice becomes more familiar to the bench, bar and public, many lawyers have been caught off guard with a question about their qualifications to collaborate. While cooperation is often the key to successful lawyering, a tendency to settle cases is not the same as collaborative practice. Lawyers trained in collaboration might not enter a collaborative case unless opposing counsel is also trained in collaboration. If one client chooses the collaborative process and the other does not, the case cannot proceed under the collaborative model. This limitation preserves the model and its significant difference from litigation practice.

The distinguishing feature of collaborative practice is the disqualification clause. The reason the process and techniques of collaboration can be so successful is that the lawyers cannot represent the collaborative clients in court. In the collaborative agreement signed by the clients and their

lawyers, there is full disclosure of the lawyers' limited representation for settlement purposes only. If either client chooses to end the collaboration by proceeding to traditional litigation, both lawyers are disqualified and cannot continue the representation. Fees are determined according to the terms of their separate engagement agreements.

The fact that the collaborative lawyers cannot take a collaborative case to court reduces strategy, posturing, hiding information and holding out for what a court might do under guidelines or case law. Couples work out solutions themselves, with the assistance of professionals. This is the heart of alternative dispute resolution: The parties are the best decision makers for their own lives, and they are more apt to abide by agreements they have created. Traditional settlement conferences cannot approach the freedom clients experience when litigation—and the threat of litigation—are not options.

A cooperative settlement conference within the context of a lawsuit is not collaborative practice. Cooperation alone does not produce the trust and respect achieved by the tools, techniques and commitments of collaborative practice. Since the model of collaboration requires additional training and practice, lawyers without collaborative certification should be cautious about representations to clients to avoid confusion. The training, agreements and efficiencies of collaborative practice are mandatory for lawyers holding themselves out to be collaborative professionals in order to provide clients with competent and ethical representation in this model.

How does collaborative law work? A collaborative divorce case requires two willing clients and two trained collaborative lawyers. The issues particular to the divorce are then resolved in a series of meetings with the parties and lawyers working together. These are conducted like business meetings, with agendas, and minutes are taken and distributed. The clients gather requested information—such as income, expense, asset and debt figures and the attorneys or financial planners compile it. In the initial four-way meeting, the collaborative contract, which includes ground rules and a code of conduct, is reviewed and signed. The clients identify and prioritize short-term and long-term goals and issues and topics for future meetings. Discussions to identify problems, issues, options and solutions begin and continue through additional four-way meetings. Agreement is then memorialized in writing.

Some of the hallmarks of collaborative practice are:

- There is a focus on settlement and the future.

- Court is not an option and the threat of court is prohibited by the ground rules.

- There is "transparency"—with full and complete disclosure by participants and attorney advice and experience given to a client in the presence of all participants during the meetings. All professionals assist the clients as they test their proposed solutions and ideas. The focus is on respecting relationships.

In the team model, coaches, financial specialists and child specialists may facilitate. Coaches help manage anxiety, stress and emotions involved in divorces. Coaches help clients communicate and negotiate. Child specialists are licensed mental health professionals who help children understand and cope with divorce. Financial specialists help participants understand and manage their finances.

From a lawyer's perspective, these team players are invaluable.

What's the difference between collaborative practice and mediation? Because a mediator is a neutral facilitator, neither the mediator nor lawyers who may be engaged by the mediating clients are subject to disqualification if the matter goes to court. Consequently, the greatest disincentive to litigation—disqualification of the lawyers—is not in place to remove the specter of court. Mediation is embedded in the context of litigation. The risk and cost of failure of the mediation is not equally spread to the lawyers or mediator, consequently leaving the decision to terminate mediation with either participant. There is less incentive to work through the emotional blocks and impasses to negotiation.

In mediation, only the mediator is trained in techniques of interest-based negotiation, while both collaborative lawyers are trained mediators. Many state standards for collaborative practice require thirty hours of mediation training for all professionals in the process. Collaborative practice can be considered to be nonneutral co-mediation. In collaboration, the clients each have an advocate in all meetings to provide legal information in real time, as compared to mediation, where lawyers may advise clients outside the mediation setting. Both clients hear the legal advice given by the other client's lawyer.

Occasionally, experts may be used in complex mediations. In collaboration practice, neutral experts hired jointly by the clients are routinely used to evaluate specialized issues not requiring legal knowledge. Power differentials between clients, even in cases of domestic violence, can be addressed directly by allowing divorce coaches and therapists in the group meetings. Children's wishes are considered through neutral child specialists who have interviewed and interacted with them. The team enriches the conversation in meetings and uses the clients' financial resources efficiently by paying for services needed instead of duplicating efforts and collecting reports and documents solely for trial.

When threat of litigation is removed and clients commit to communication, a shift occurs in the thinking of lawyers and clients. Collaborative practice begins with goal setting: The focus is the future as the clients turn in different directions—the meaning of the word "divorce." This psychological shift of emphasis creates a team mentality and builds mutual respect.

Collaborative professionals can use mediation for particular issues, and mediators can refer agreements to collaborative lawyers for final decrees. A client who

chooses a collaborative lawyer, but whose spouse chooses a noncollaborative lawyer, might still move forward cooperatively by agreeing to mediate before going to court. The more choices a client has, the more invested he or she can become in forging a resolution.

What are the benefits of collaborative law? For many lawyers, collaborative law provides a practice that fits better with their personal beliefs and values than with litigation. Every experienced family lawyer has been involved in a "train wreck" case where a couple's finances were needlessly depleted, their relationships with their spouse or children were destroyed or irrevocably damaged, and the rancor and animosity between the clients was amplified. These disaster cases are usually accompanied by one or both of the participants having mental health, emotional or communication problems.

Collaborative law offers lawyers and other professionals ways to help their clients resolve family and financial problems and address mental and emotional issues. With the use of a collaborative divorce team, clients communicate better. Their questions, concerns and issues are expressed and addressed. There is a forum where clients can vent frustration and anger. Agreements outside the scope of what a court could do can be developed and implemented.

Most cases settle. A number are resolved on the courthouse steps. Consequently, trying collaborative law at the outset of a case, before resorting to court, seems to be an efficient use of resources. Clients spend settlement dollars in advance rather than at the end.

Studies of collaborative cases indicate that clients who resolve their disputes through this process are more likely to abide by their agreements. The positive effects of better communication between parents and better relationships between spouses and the children cannot be measured.

What are the ethical considerations of collaborative practice? Several states have enacted statutes regarding collaborative practice. A few other states have issued advisory opinions. The IACP has promulgated voluntary ethical standards[1], which begin with a directive to collaborative practitioners to adhere to the rules of ethics of his or her respective discipline. There is always the possibility of developing a model rule to address ethical considerations of collaborative practice.[2]

Virginia collaborative lawyers rely upon the *Rules of Professional Conduct* (RPC) for ethical guidance.[3] A client who selects the collaborative process must give informed consent; there cannot be dual representation; the attorney must be competent to offer the service; and clients must comprehend and consent to a waiver of confidentiality and to the termination of representation in certain circumstances. To address these considerations, participation in the collaborative process needs to be by written agreement.

Informed Consent. Often, potential clients believe that contested litigation is their only option. Comment [1] of Rule 1:2 of the RPC instructs that in the context of defining the scope of representation "a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing…" the client's objectives. Therefore, it is permissible for the attorney and client to agree on the scope of the representation, and it is incumbent upon the attorney to advise the client about all dispute resolution options. The attorney should explain each process and discuss the possible benefits, risks, harms, delays, costs and privacy of each. Collaborative practice is a distinct dispute resolution process now available to clients throughout most of Virginia.

Comment [1] of Rule 1:4 of the RPC sets out "a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen. For example, information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process such as mediation, where the participants themselves could be more directly involved in resolving the dispute." Therefore, even a case that starts in litigation may become better suited for the collaborative process, and the attorneys should so advise the clients. In this case, the underlying litigation could either be dismissed or, by court order, put on hold so the clients may retain collaborative lawyers and try to settle all or some of the issues.

Dual Representation. Rule 1.7 of the RPC prohibits dual representation. This is not an issue in collaborative law cases, since each client is required to hire a trained collaborative lawyer. Each collaborative lawyer should have a separate written fee agreement with his or her client. The collaborative contract states that each attorney represents only his or her client, even though the collaborative lawyers will facilitate resolution of all issues using cooperative strategies instead of adversarial techniques and will not threaten or initiate contested court procedures.

Competence and Diligence. As set out in Rule 1.1 of the RPC, competent representation requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Collaborative practice is more than practicing collaboratively. Therefore, to avoid confusion, it is mandatory that attorneys holding themselves out as collaborative practitioners have the training and experience as required by the IACP. Comment [2] of Rule 1:3 of the RPC recognizes that "a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests." Moreover, a client can be represented zealously with an approach that vigorously pursues a solution that satisfies the interests of all the participants.

Confidentiality. Rule 1.6 of the RPC prohibits the disclosure by the attorney of information protected by the attorney-client relationship. Yet, one of the fundamental elements of the collaborative process is the requirement of transparency and, as long as the collaborative process continues, the collaborative lawyers assist

their respective clients in making voluntary, full, honest and open disclosure of all relevant information and documents that each party needs to make an informed decision about the issues. Neither side takes advantage of mistakes. Therefore, the collaborative contract, which the participants sign after extensive discussions with their respective lawyers and a complete review in the first four-way meeting, includes specific agreements between the participants that they shall not knowingly withhold or misrepresent information that is material to the process. Also, since most of the work in a collaborative case in done in the four-way meetings, the collaborative agreement shall instruct the attorneys to render advice to their clients with candor, honesty and in a straightforward manner. Advice should be given either in the presence of the other party and attorney or reported at the next joint session.

Additionally, the collaborative agreement requires an attorney to withdraw from the collaborative case if his or her client persists in withholding or misrepresenting information. Thus, if a conflict arises, the secrets and confidences of the client are preserved and the collaborative case must terminate.

Finally, the collaborative agreement provides that all information arising from or related to the representation shall be kept confidential. This includes information from third-party experts or other collaborative professionals. Any exceptions shall be clearly stated in the collaborative agreement.

TERMINATION AND WITHDRAWAL. Another fundamental element of the collaborative process is dedication to the settlement process and commitment by the attorneys to withdraw from representation if either party chooses to file a pleading seeking court intervention or if a client persists in withholding or misrepresenting material information. The collaborative agreement shall clearly state these conditions, which, shall terminate an attorney's involvement or terminate the process, so that clients clearly understand that they will incur the cost of retaining litigation counsel should the process terminate or an attorney withdraw.

One section of the collaborative agreement is usually between the clients and the collaborative lawyers sign the other section. These agreements provide the ground rules upon which the participants and the lawyers operate in the collaborative process. Collaborative professionals are exploring the development of state standards of practice or possibly a rule specifically for collaborative practice.

How can you become a collaborative lawyer? To begin your collaborative practice, attorneys, mental health professionals and financial professionals need twelve hours of basic training in collaborative law or interdisciplinary collaborative training. The basic training includes topics such as the theories, practices, and skills necessary to begin a collaborative practice with exposure to the collaborative models; interest-based negotiation; team-building skills; and ethical considerations. Interdisciplinary collaborative training is more comprehensive, as it includes instructions and practice working with other professionals in the team model.

The IACP sets basic requirements for a collaborative professional who wishes to satisfy the IACP standards for collaborative practice in family-related disputes.[4] These basic standards go further than the minimum training requirements and, for lawyers, include at least thirty additional hours of training in client-centered, facilitative conflict resolution, such as mediation training, and fifteen additional hours of advanced collaborative training or other interest-based or mediation training.

In Virginia, there are more than 225 trained collaborative professionals, many of whom are associated with local practice groups, the first of which formed in June 2004. Local practice groups provide invaluable networking and support to collaborative professionals. Virginia Collaborative Professionals[5] is a statewide

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organization to assist and support the development of collaborative practice through the local practice groups in each region by offering training, education and resources to attorneys, other professionals and the public. Collaborative professionals are working on their qualifications to become trainers.

Interested? The next Introductory Collaborative Divorce Interdisciplinary Team Training in Virginia will be held May 30-June 1, 2007, in Virginia Beach. Contact Rob Sadler of Hofheimer/Ferrebee at (757) 425-5200 or rsadler@hoflaw.com for more information. Also, see the IACP Web site for trainings around the country that satisfy the basic requirements. ⚖

Endnotes:

1 International Academy of Collaborative Professionals, http://www.collaborativepractice.com/

2 *See*, Fairman, Christopher M., "The Collision of Two Ideas: Legal Ethics and the World of Alternative Dispute Resolution—A Proposed Model Rule for Collaborative Law," 21 Ohio St. J. on Disp. Resol. 73, January 20, 2005.

3 *See*, Virginia CLE and Virginia Bar Association Domestic Relations Section presentation/outline "Ethical Issues Raised By The Collaborative Process," August 18, 2005, by Frank West Morrison, Esquire, and Rachael L. Rust, Esquire.

4 The International Academy of Collaborative Professionals (IACP), *IACP Minimum Standards for Practitioners* adopted July 13, 2004. http://www.collaborativepractice.com/

5 Virginia Collaborative Professionals http://www.vacollaborativepractice.com/