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Collaborative Law is a method of resolving disputes that was pioneered in the late 1980s by Minneapolis family lawyer Stuart G. Webb. Since that time, collaborative law has grown and is now being practiced by attorneys throughout the United States as well as Canada, Australia, the United Kingdom, New Zealand, Europe and Asia. The International Academy of Collaborative Professionals (IACP) estimates that there are now more than 10,000 professionals trained in collaborative practice in the United States. There are more than 200 collaborative practice groups worldwide. The IACP has grown from 200 members in 2001 to more than 2,400 members in 2006.

Though there has been exponential growth in the collaborative divorce movement in the last five years, many people, including Arizona attorneys, still have not heard of the term or do not fully understand the process. That understanding was aided in 2006, when two books were published on the subject of collaborative divorce.¹ Both are written for consumers, and both are very effective at explaining the collaborative process to lay people.

There are collaborative lawyers in many different practice areas, but the emphasis of collaborative practice so far is in the family law arena. This article focuses on collaborative divorce practice.

This article informs lawyers about the collaborative divorce process and how it is being practiced in Tucson.

An Arizona Practice

In Tucson, the Collaborative Law Group of Southern Arizona (CLGSA) was formed in January 2001, when approximately 11 Pima County attorneys received an initial training in collaborative divorce process in Phoenix. In 2005, the CLGSA opened its membership to non-attorney professionals, including mental health and financial professionals. The CLGSA now has 25 members from three disciplines, and the members offer Collaborative Divorce services, a “team” approach to divorce. The practice of collaborative divorce continues to grow in Pima County as more

“Collaborative Law” has been around for decades. But it is a practice that is prone to misunderstanding and oversimplification.

Last August, the American Bar Association issued a formal ethics opinion on collaborative law practice. As the opinion states, “The structure creates a problem-solving atmosphere with a focus on interest-based negotiation and client empowerment.” The opinion found that any conflicts that may occur for a client can be waived. Thus, collaborative law is not inconsistent with the Model Rules, the ABA found. We thought this might be a good opportunity to better inform readers about this area of practice.

couples hear about this method of obtaining a divorce.

In a collaborative divorce case, both parties and their attorneys contractually agree not to use traditional litigation methods or go to court to resolve the divorce case disputes. Both clients sign a fee agreement with the lawyers and a contract with each other promising to fully disclose all relevant information on demand.

The parties and their lawyers also promise not to use traditional methods used in litigation, such as hearings or trials, demand letters, settlement proposal letters, depositions, interrogatories, requests for production and the like. Instead, all negotiations are done in four-way conferences with both lawyers and both parties present.² The written agreement contains the requirement that neither attorney nor party may use another party’s mistake of facts or a misunderstanding to their advantage.³

The agreement also contains a provision that in the event either party wishes to withdraw from the process and use traditional litigation, then both collaborative attorneys must withdraw. Furthermore, any other collaborative professionals who were engaged in the process are similarly disqualified from further work on the case and cannot be called as witnesses.



Collaborative

BY NATALIE WRIGHT

D I V O R C E Practice

A Revolution in Family Law

Disqualification and Withdrawal

This disqualification provision is sometimes a source of misunderstanding and confusion with some non-collaborative attorneys. However, the disqualification provision is the hallmark of collaborative law and is essential to the process.

In traditionally litigated cases, there is always either the implicit or explicit threat of going to court: “Agree with all of my client’s [unreasonable] demands or we’ll see you in court.” This threat, whether made explicitly or implicitly, is potent because it is a rare party who wants to go to court. Most people want to avoid the expense, emotional cost and uncertainty of giving their case over to lawyers and judges. Thus, even if the attorneys in traditional litigation are “playing nice”—having four-way conferences and working amicably to settle the case—there is always the threat of going to court. In a collaborative case, the threat of “going to court” is completely removed.

Furthermore, the withdrawal provision contains a significant built-in incentive for both the attorneys and the parties to stay the collaborative course, even when the going gets tough. For the attorneys, the withdrawal provision means, among other things,

that they are out of a job if the collaboration fails. For the clients, it means that they must start over with new lawyers. This provides potent financial, time and emotional incentives to stay in the process rather than throw out what has been accomplished and start over.

Collaborative Divorce and the Ethical Rules

Some attorneys have concerns about this disqualification and withdrawal provision of collaborative cases. The American Bar Association, in August 2007, weighed in on this topic and issued a formal ethics opinion that states, “Collaborative law practice and the provisions of the four-way agreement present a permissible limited scope representation under Model Rule 1.2. ... We reject the suggestion that collaborative law practice sets up a non-waivable conflict under Rule 1.7(a)(2).”⁵ The ABA opinion follows several state opinions that have all opined in accord with the recent ABA opinion.⁵ The ABA opinion makes it clear that all of the lawyers’ ethical rules and standards of conduct still apply, including competence, communication, diligence and confidentiality.⁶

Collaborative Divorce Practice

The Team Model

One of the most exciting and revolutionary aspects of collaborative practice is the team approach now being used in Tucson and throughout the State of Arizona.

The Team Model uses mental health professionals as coaches, one for each party, as well as a child specialist, if applicable. In addition, the team may include a financial specialist. The team provides the parties the specialized help that they need. All professional members of the team commit to the same "Principles and Guidelines" contract. And all professionals involved are similarly disqualified from providing any services to either party outside of the context of the collaboration.

In a collaborative divorce, generally each party has a divorce "coach." The coach is a mental health professional who assists the party in working through the emotional issues of the divorce. That professional also coaches the party on effective communication skills.

The coaches do not provide therapy in this process. Coaching is a crucial part of the collaborative process for many clients. In the past, we lawyers have sent our client to mediators, whether private or at Conciliation Court, to negotiate on their own. How can a party effectively negotiate for themselves when they are emotionally unable to assert their own needs or recognize the ways in which their speech and communication are ineffective? An experienced and well-trained coach can work wonders with a party's ability to be effective in negotiations.

The clients also may engage a financial specialist, most often a C.P.A., C.F.P. or certified divorce planner (C.D.P.). The financial specialist is a true neutral, neither representing nor advocating for either party. The specialist looks out for the best financial interest of both parties and their children. He or she may be asked to do a business valuation, to advise on tax issues, and/or to provide projections of different scenarios and how each party's financial status would be affected both short-term and long-term.

The financial specialist is there from the beginning to help craft win-win financial settlements and financial agreements that take into consideration the needs of both parties. Though most experienced divorce attorneys know their fair share about taxes and financial matters, most are not CPAs or CDPs. In collabora-

tive divorce, the couple has the benefit of receiving specialized help with their financial plan. And because the financial specialist is prohibited from providing future services to either client outside the context of the collaboration, the clients can be assured that the financial specialist is truly looking out for each client's best interests, with no personal agendas or promise of future financial gain.

The Collaborative Process

In a typical case, the collaborative process starts with a consultation with a collaborative lawyer. The spouse is provided information about different divorce process options, including mediation, litigation and collaboration. If the spouse chooses collaborative process, he or she shares information about the process with their spouse, most commonly through a brochure and/or Web site. The other spouse then engages the collaborative lawyer of his or her choice, and both attorneys are retained.

From that point, the process involves each spouse meeting individually with their own lawyer and then meeting with both parties and their lawyers to negotiate all aspects of their case.

Typically at the first meeting, the parties, with the assistance of their lawyers, decide what other team members to bring on board. In most cases, at a minimum, each party has an attorney and a divorce coach. The client gives written permission for the coach and attorney to speak with each other so each professional can apprise the other of their mutual client's specific needs. The coach and the attorney are allies on the same team for their mutual client.

The clients also may agree, with the input of their lawyers, that a child specialist is needed. In some cases, there is a disagreement between the parents as to what the custody arrangement should be. Other times, there is no dispute about custody arrangements, but one or both parents have concerns about how their children are handling the divorce or have some specific issues they want to address. The child specialist then joins the team to meet with the parents and the children and to give input on the children's issues. The child specialist is the voice of the children in the process and is an integral part of the team. The input from the child specialist is used by the parents and their professional team to craft their final custody and parenting agreements.

Child specialists are not custody evaluators. The specialist does not make "recommendations" as to who should have custody. She or he does provide input from the child's perspective and educates on developmental issues relevant to the case.

Ultimately, as in all aspects of the collaborative divorce, the parents decide. The parties do not have the opportunity to push off decisions on someone else.

Collaborative Divorce, Mediation and Traditional Practice

Here, then, we see the significant similarity between collaborative divorce and mediation.

Both processes use interest-based negotiation rather than positional bargaining. Both

LEARN MORE

Attorneys interested in collaborative practice are invited to an **Open House** hosted by the Collaborative Law Group of Southern Arizona on **February 7, 2008**, from 4:00-5:30 p.m. at the Ward 6 City Council Office, 3202 E. 1st Street, Tucson. Refreshments will be served. Attorneys interested in collaborative practice are recommended to attend an introductory training.

For more information, refer to www.collaborativepractice.com, where you can find dates/places of trainings and collaborative practice groups in your area. The site also includes a sample "Principles and Guidelines for the Practice of Collaborative Law." Pima County attorneys can also go to the CLGSA's Web site: www.DivorceWisely.com

are client-driven. Both processes also offer the possibility of amicable and peaceful resolution of conflict and the minimization of parental conflict.

In contrast, however, collaborative divorce provides the parties with more professional support as they go through the process. Each party has their own attorney with them every step of the way. Collaborative divorce is an excellent alternative to litigation for clients who are, for whatever reasons, unable to negotiate for themselves in a mediation process and/or who require more extensive attorney involvement for discovery and valuation of assets.

All this being said, divorce is never easy. In virtually all cases, there are competing interests. Collaboration is not necessarily easy; from an attorney's perspective, collaboration may be more difficult than litigation. In a litigated case, if the attorneys fail to get the parties to an agreement, they can always take the case to the judge and the judge will then craft an order that resolves the issues. In a collaborative divorce, the ultimate responsibility for the settlement falls on the attorneys and the rest of the collaborative team. There is no court to resort to.

Why—or Why Not—Collaborate

The collaborative divorce process provides support for the entire family and is respectful of each person's needs. The people choosing this process often state that they "don't want to fight" and "want to remain friends" after the divorce. Especially for parties with children, they want to divorce in a way that can preserve their relationship and enable them to co-parent after the divorce effectively.

It is truly revolutionary for lawyers to collaborate with opposing counsel and opposing parties. And while attorneys often work with other professionals such as financial planners and mental health professionals for the benefit of their client, the Team approach to divorce is revolutionary.

In my own practice, I have observed that when I explain the different divorce process options available, very few people would choose litigation as their preferred method. If they are in litigation, it is most often because their spouse began the litigated case or was not willing to attempt alternative dispute resolution.

Anecdotally, I can say the people choosing collaboration and mediation are generally well educated, professional and upper middle class. I can also say that when I explain these process options, more couples will end up choosing mediation than collaboration. The reasons that I've been given for this choice may surprise you.

In my mediation practice, I recommend to the parties that they seek independent advice of counsel. I make this recommendation throughout the process as it is my belief that parties benefit most from getting legal advice early on, rather than waiting to get their first legal advice after they have reached a full agreement. However, in more than 90 percent of the cases I've mediated, either one or both parties refuse to see an attorney at all.

Remember, these are well-educated professionals. Why do they refuse to see an attorney?

When I inquire about their hesitation to seek legal advice, almost universally the comment clients make is that they fear attorneys will "make them fight." The public perception of divorce lawyers

is that even if the couple is working amicably toward a solution, that if either of them goes to a lawyer, the lawyers will drum up a fight.

Some clients perceive that attorneys do this solely to make money off of the client. Other clients don't necessarily think that it is solely money-driven, but they perceive lawyers as people who like to argue and fear that the lawyers "won't be able to help themselves." Thus, when offered collaboration as a divorce process option, the client may respond very positively to the concept, but find it hard to believe that lawyers can work cooperatively. This lawyer avoidance by the public is something that should be taken seriously by our profession.

Conclusion

The public is demanding that we change how we do business. From the unbundling of services to limited scope representation to offering mediation and collaborative services, as lawyers we now have options for divorcing clients and can tailor the divorce process to the needs of the individual.

The face of divorce lawyering is rapidly changing. Just as ethics opinions require "informed consent" regarding the collaborative agreement, perhaps lawyers have an ethical duty to ensure that all clients seeking a divorce are informed of all process options, not just litigation. We are at a stage in the evolution of divorce law practice in which lawyers need to be prepared to switch gears among several different process modalities or refer the client to other practitioners when the client requests or the case demands a modality that the lawyer is not prepared to offer. We are, after all, practicing *family* law. Perhaps we need to shift our focus more to the "family" part of our business.

endnotes

1. STUART G. WEBB & RONALD OUSKY, *THE COLLABORATIVE WAY TO DIVORCE: THE REVOLUTIONARY METHOD THAT RESULTS IN LESS STRESS, LOWER COSTS, AND HAPPIER KIDS—WITHOUT GOING TO COURT* (2006); PAULINE TESLER, M.A., J.D., & PEGGY THOMPSON, PH.D., *COLLABORATIVE DIVORCE: THE REVOLUTIONARY NEW WAY TO RESTRUCTURE YOUR FAMILY, RESOLVE LEGAL ISSUES, AND MOVE ON WITH YOUR LIFE* (2006).
2. For more detailed analysis of collaborative family law, see generally Sherri Goren Slovin, *The Basics of Collaborative Family Law: A Divorce Paradigm Shift*, 18 AMER. J. FAM. L. 74 (Summer 2004), available at www.mediate.com/pfriendly.cfm?id=1684.
3. A sample "Principles and Guidelines for the Practice of Collaborative Law" can be seen at www.collaborativepractice.com/t2.asp?T=documents.
4. ABA Formal Op. No. 07-447, at 3, (Aug. 9, 2007).
5. Colorado is the only state to conclude that a non-consentable conflict arises in collaborative practice. The following states have concluded otherwise: See e.g., Ky. Bar Ass'n Op. E-425 (June 2005); N.J. Advisory Comm'n on Prof. Ethics Op. 1 (Apr. 19, 2002); Penn. Bar Ass'n Comm'n on Legal Ethics & Professional Responsibility Informal Op. 2004-24 (May 11, 2004). Some states have special rules for collaborative law practice. See, e.g., CAL. FAM. L. § 2013 (West 2007); N.C. GEN. STAT. § 50-70 to 50-79 (2006); TEX. FAM. CODE ANN. §§ 6.603 & 153.0072 (Vernon 2005). Arizona has not spoken to the issue of whether this state would follow the ABA opinion or the Colorado opinion. No State Bar member has requested a formal opinion on the question of whether collaborative divorce comports with the Arizona rules.
6. ABA Formal Op. No. 07-447, *supra* note 5, at 3.