The Emerging Field of Collaborative Practice

By Karen J. Levitt

In 1990, Stuart Webb of Minnesota, after countless bitter hours in court with families in conflict, felt there had to be a better way to settle family law cases than the adversarial system, which was stressful for lawyers and litigants alike. The emotional and financial toll on parties, counsel and children, and the strain on judicial resources suggested to Webb that the system was not working and that there had to be an alternative. Webb came up with the concept known as "collaborative law," in which the parties and counsel sign what is called a "participation agreement." The attorneys and their clients agree not to go to court except for the purpose of filing any final agreement reached by the parties.[1] If negotiations fail, the parties can, of course, go to court, but they have to hire new counsel, and the collaborative process terminates. Although this is the most controversial aspect of collaborative law, it is at the same time the most powerful as it removes the threat of court from being used as leverage and coloring all aspects of negotiation.

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The phrase "collaborative law" has been joined by the phrase "collaborative practice" to recognize all the many allied professionals who have joined the collaborative movement. Although collaborative law began in the family law arena and is readily adaptable to family law, it is now making inroads in other areas of the law, such as probate, employment, business and corporate law. Allied professionals, such as mental health professionals, financial professionals, business and real estate appraisers and others can also be part of the collaborative process.

Collaborative law is a process in which, pursuant to the participation agreement signed by the parties and counsel, the parties and counsel try to resolve their differences outside of court through a series of meetings. These meetings are in the nature of settlement discussions, and are therefore confidential. The number of meetings depends upon the parties and counsel, the complexity of the issues, whether allied professionals are going to be used and a variety of other factors. Should the collaborative process fail or terminate for any reason, both collaborative counsel must refer the case to litigation counsel, as the collaborative counsel pursuant to the participation agreement contracted that they would not litigate for the parties.

The Massachusetts Rules of Professional Conduct permit attorneys to limit their representation as attorneys do in collaborative law. See Rule 1.2 (Scope of Representation).[2]

How does collaborative practice compare with litigation or other forms of dispute resolution such as mediation? In the chart following, some of the differences and similarities are apparent. It is important to screen clients to determine whether collaborative law and practice are appropriate for them and their cases, although practice has shown that even cases that do not readily appear conducive to collaborative law can often be resolved collaboratively. Clients come to attorneys with a myriad of problems and concerns. Depending on the case, litigation, collaborative law, mediation, or sometimes a combination of processes, may be appropriate. All should be discussed with the client, along with sufficient information about each to allow the client to make an educated decision about which will work best for him or her.

Parties who choose collaborative law often do so because they are not comfortable with litigation, but also because they are not comfortable with mediation where they frequently do not have attorneys, or if they do have attorneys, the attorneys do not participate in the mediation sessions. Clients may be seeking to fill exactly the void that collaborative law and practice address — i.e. an alternative dispute resolution mechanism where they do not have to go to court but they have representation and where they feel their needs and interests are being asserted and protected. Collaborative law may also be attractive to parties because: (a) it affords confidentiality; (b) it may help the parties sustain a more positive relationship in cases where a continuing relationship is

Collaborative Law vs. other forms of dispute resolution

	Mediation	***Conciliation***	***Collaborative Law***	***Litigation***	***Others: Case Evaluation, Arbitration***
Party Control	Parties control process and outcome, can be with or without attorneys	Verbal opinion on outcome or resolution; advisory, often both sides have counsel	Parties control process and outcome; can only be done with attorneys	Parties have little control of process or outcome; can be done with or without attorneys	Can be with or without attorneys; can be binding or non-binding; arbitrator or case evaluator control process and advise regarding outcome or decide outcome
Voluntary or Mandatory	Usually voluntary	Voluntary or mandatory	Voluntary	Mandatory	Voluntary or mandatory
Formal vs. Informal	Informal — private meetings	Informal — joint meetings with parties and counsel	Informal — joint meetings	Formal	Some formality, may involve presentations /witnesses
Court Involvement	Can be court-based or outside court	Court-based	Outside court	Court-based	Can be court-based or outside court

either desired or is necessary, such as after divorce where there are children; (c) it can be less expensive and quicker than litigation, because attorneys can model conflict resolution skills for clients; and (d) because like mediation, it gives the parties more control over process and outcome.

Collaborative law is not appropriate, however, in every case. The attorney must also be able to be clear with a client as to when collaborative law might not be appropriate even if the client has chosen the process as his or her preferred method of dispute resolution. Clients for whom collaborative law and practice might be inappropriate are those who see the process as a way to gain advantage, those who have pre-conditions to the process, and those who have unrealistic expectations that cannot be effectively managed in the process but require judicial intervention. Other considerations, such as domestic violence, may also affect whether collaborative law and practice should be used in a case even when the client identifies that method of resolving his or her case as the preferred method.

Meetings are the crux of collaborative law and practice. They are usually four-way meetings between parties and counsel, but may be larger if there are multiple parties and counsel or if allied professionals attend a meeting. It is at these meetings that lawyers and clients have to make what is commonly known as the "paradigm shift" in the culture of lawyering and the client's perception of lawyering. The focus shifts from the litigation "best deal" model, to an understanding that the "best deal" may not be the best "solution" for either party. The focus becomes conflict resolution, not litigation. The parties and attorneys can be creative in crafting a resolution that suits particular circumstances. The focus is on interest-based negotiation, not on position-based bargaining. Long term, this serves the clients better than the traditional "win-lose" scenario, which, especially in family law, is often a "lose-lose" scenario.

Prior to each of these meetings, counsel will meet, either in person or by telephone, to discuss the case and the meetings. Counsel also meet or talk with their respective clients before each meeting. Discussions and meetings between counsel, and between counsel and their clients, may also occur after each meeting as necessary. Generally there is a written agenda for each meeting. The agenda for the meetings is created with input from both counsel and both parties, such that each meeting has some structure. Creating an agenda can keep the process on track and moving forward despite the slowest person in the process. Minutes of the meetings are kept, and circulated between parties and counsel after each meeting to ensure that the summary of what occurred at the meeting is accurate and to clear up any misunderstandings.

In family law cases the asset restraining order, which is included in the participation agreement, is discussed because the parties are agreeing to abide by it even though it may not be enforceable except as a contract if there is no court proceeding pending in the Probate and Family Court. The requirement for full financial disclosure is also discussed and emphasized. The participation agreement includes a reference to full financial disclosure so that the parties know from the outset what is required.

As in any case, there needs to be discussion regarding the application of the law to the case. However, because the parties and counsel have agreed not to go to court, court is not used as a threat. Rather, it can be used to address unrealistic expectations, to help the parties better understand an issue, or for other such reasons.

At the meetings, parties and counsel discuss

the issues, discovery, exchange of information, the use of experts or other third party professionals and work towards resolution. However, how discovery is handled may differ greatly from how it is handled in the litigation model.

In the litigation model, information is usually exchanged in an adversarial manner, with the use of discovery tools, such as interrogatories, production of documents, record keeper subpoenas and depositions. Each party usually hires his or her own expert, and discovery can be a lengthy and drawn out process, not to mention costly. Parties are not always cooperative in responding to discovery, even to their own attorneys.

In the collaborative law process, discovery is done by agreement. The parties identify the discovery they need to exchange and determine the time frame for the exchange to take place. The parties can discuss the reason that certain information and documents need to be produced, which results in the parties being more likely to cooperate and may result in the parties avoiding unnecessary discovery. The parties also identify who will take responsibility for obtaining the discovery in question so there is no duplication of effort. If releases are necessary to obtain information not in either party's possession, the parties cooperate in executing the releases, and discovery is often quicker and more complete when done by agreement. The parties are also often more cooperative, particularly when you can identify the exact documents needed, the time frame for producing the documents, and assign each party the task of obtaining those documents.

In determining what discovery is needed, the collaborative law case is like any other case, whether in litigation or otherwise. The attorney must still be a zealous advocate for their client, subject to rigorous standards of practice. However, the focus of discovery may be what is necessary for each party to produce, not what is required regardless of need.

The parties will often jointly retain experts in the collaborative process. When using experts, it is important to first consider: (a) what kind of expert is needed; (b) whether a joint expert is the best approach; (c) the role of the expert and the scope of his or her employment; (d) what qualifications does the expert need; (e) how are you going to choose the expert; (f) whether any non-disclosure agreements are necessary (e.g., because a business might be involved); and (g) what kind of contact may the expert have with the parties and counsel during the collaborative law process. Experts may be invited to attend a meeting to explain their reports or conclusions. The allocation of the cost of the expert and how the expert is going to be paid need to be discussed, and whether the joint expert will ever be used by either party as their individual expert in litigation or for some other purpose in the future needs to be clearly set forth in any expert engagement letter. Another issue that should be defined in the expert engagement letter is whether his or her report or the materials the expert relied upon to make the report may be used in litigation should the collaborative process break down. These concerns could also arise in other contexts, such as whether a financial expert could be used by one of the parties in the future for business or personal financial planning. Note that the issue of what documents or other discovery may be used in litigation if the discovery process breaks down is not just limited to experts, but all other discovery as well. This should be made clear from the outset of the collaborative law process, or as discovery is produced.

If agreement is reached in the collaborative process, it is reduced to writing and signed by all parties and counsel. Generally, any such agreement will be filed with the court, and the participation agreement allows the collaborative attorneys to file appearances in court for the purpose of having an agreement approved.

Collaborative law is not easy for either clients or attorneys. It can be much more difficult to sit at a table with counsel and the parties face to face, and work toward resolution than take a side in court and ultimately let a judge decide the issues if agreement cannot be reached.

In addition, there are issues in collaborative practice that may require an attorney to "un-learn" or "re-learn" traditional methods of resolving conflict. Collaborative practice may require:

- the reviewing and rethinking of ethical rules, negotiation and communication skills;
- understanding the tension between the role of the zealous advocate while creating transparency and "safe space" for resolution;
- the protection of client interests where parties are relying on good faith and good intent in circumstances without benefit of court order; and
- consideration of the variety of pitfalls and problems that may plague collaborative practitioners just as they do mediators or other alternative dispute providers.

Nothing is perfect. However collaborative law is a form of dispute resolution that needs to be better understood and utilized in light of its ultimate benefit to the parties, counsel and the judicial system as a whole. While not the only answer, and collaborative practice may not work or be appropriate in certain types of cases or with certain types of clients, it is one more tool in the arsenal of problem solving techniques that needs to be taken seriously. It is an opportunity to expand professional skills and rethink the role of attorneys in the lives of our clients.

Lawyers were not meant to just be the warriors in court. They were also meant to be counselors at law who helped their clients resolve their problems and move on in their lives. If collaborative practice can do that for some, then we need to train law students, lawyers and other allied professionals and educate clients about collaborative practice as an option. In the ever-evolving field of ADR, collaborative law practice is here to stay.

End Notes

1. *See* "Divorce Without the Bloodshed: The 'Collaborative Law' Revolution Is Making Life Better for Clients and Their Lawyers," Lawyers Weekly USA, April 3, 2000.
2. Rule 1.2 states in part: "A lawyer may limit the objectives of the representation if the client consents after consultation." Note 4 to the rule states that not just the objectives but the scope of services may be limited and be for a defined purpose. *See also* "Ethical Considerations for the Collaborative Attorney in Massachusetts (with special emphasis on confidentiality considerations)" by Paula H. Noe, Esq., (*Cutting Edge Collaborative Law Practice*, MCLE, Inc., 2004).