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'Collaborative Law' Looks to Avoid Litigation

by David A. Hoffman and Rita S. Pollak

In a handful of jurisdictions around the United States, groups of lawyers are banding together and adopting an unusual "just say 'no'" attitude toward litigation. The "collaborative law" movement -- which first developed in Minneapolis and has now spread to San Francisco, Dallas, and Cincinnati -- involves a commitment by lawyers on both sides of a case to resolve the dispute by negotiation, and to withdraw from the case if they fail.

In Massachusetts, a collaborative law group -- the Collaborative Law Council -- is in an early stage of formation, and recently held a training for 40 lawyers.

The process of collaborative law is straightforward. Each party is represented by counsel. Both the parties and their attorneys agree, contractually or through a stipulation filed in court, to attempt to settle the matter without litigation or even the threat of litigation. They promise to take a reasoned stand on every issue, to keep discovery informal and cooperative, and to negotiate in good faith.

The key to the agreement is this: if either party seeks intervention from a court, both attorneys must withdraw from representation. (Exceptions are made for certain standstill agreements and emergency motions agreed to by the attorneys.) In addition, the parties and counsel agree that (a) all documents prepared in connection with the collaborative process, such as correspondence and settlement proposals, are inadmissible in any future proceeding, and (b) all experts and their work product are off-limits for use in the subsequent proceedings, unless both parties agree otherwise. If settlement efforts fail, the collaborative attorneys may assist in getting their successor counsel up to speed, but neither the original attorneys nor any attorneys in their firms are permitted to receive further compensation for the case.

Origins of Collaborative Law

The practice of collaborative law began about ten years ago, when a Minneapolis family lawyer, Stuart Webb, became fed up with the destructive effects of divorce litigation and decided to leave the courtroom for good. Webb founded the Collaborative Law Institute (CLI), a non-profit family law group that provides attorneys in the Twin Cities area with advice and training on collaborative law practice. The Institute now lists over 40 family law attorneys among its members, and serves as a referral service for parties who wish to settle their disputes through collaboration.

Another collaborative family law group was formed several years ago in the San Francisco Bay area, and a Cincinnati-based group, the Collaborative Law Center, has recently been trying to expand the discipline into new areas of practice. In Dallas,

a group of lawyers has just completed a collaborative law training.

Advantages of Collaborative Law

For clients, the advantages of the collaborative approach are substantial.

First and most importantly, collaborative law creates an atmosphere of cooperation rather than warfare, making it easier for parties to retain amicable relationships after the dispute is resolved. Without the risks of a possibly one-sided result in court, parties are more likely to stay focused on negotiation, and therefore tend to become less adversarial. Not surprisingly, collaborative law has taken root most readily in the area of family law, where disputants generally have the greatest incentive to remain on speaking terms. However, collaborative lawyers believe that their approach could expand into other kinds of conflicts where maintaining relationships is an important objective, such as employment law, disputes between business partners, or differences between companies that need to do business with each other in the future.

Second, collaborative law creates stronger incentives for settlement by more effectively aligning (a) the interests of the attorney and client and (b) the interests of the lawyers in the case. For the attorney, failing to settle means losing the client's business on this case, and for the clients on both sides of the controversy, it means the additional expense associated with selecting and educating new counsel. As a result, collaborative law generally leads to settlements at a lower cost than ordinary representation. One family lawyer estimates that handling a divorce using a collaborative law stipulation (i.e., both sides are bound) costs about one third the price of traditional divorce representation.

Disadvantages of Collaborative Law

Collaborative law is not without its drawbacks. Perhaps the most serious problem for the clients is the additional costs if collaborative negotiations break down and the original attorneys must withdraw. Collaborative law can also be abused: for example, parties with greater financial resources could feign an interest in the collaborative process in order to take advantage of its cooperative discovery practices, and then, because they can better afford to change counsel, resist settlement. Collaborative law agreements and stipulations require good faith, but proving an absence of good faith will often be difficult if not impossible. For that reason, it is important that lawyers considering a collaborative law approach for their clients select each case carefully.

There are potential drawbacks in collaborative law for attorneys as well. Declining to litigate means writing off what is often the most profitable form of legal practice. In large firms, complex litigation permits the leveraging of associates and paralegals, whereas the negotiation phases of a case typically involve only one lawyer

and more limited billings. In addition, if collaborative negotiations fail, attorneys may fear that the client they refer to outside litigation counsel may never return. On the other hand, even without the benefits of collaborative lawyering, the vast majority of civil cases settle, and most divorce cases are resolved without significant involvement of the courts. The use of collaborative law is likely to improve the odds of settlement while at the same time reducing the expense and acrimony of adversarial discovery. Collaborative lawyers can count on the additional good will from satisfied clients to offset any marginal loss of revenue. (For a discussion of this issue, see R. Mnookin & R. Gilson, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation,* 94 Colum. L. Rev. 509, 560 (1994).)

Some lawyers may conclude, after weighing the advantages and disadvantages, that both they and their clients are better off using mediation instead of collaborative law. In fact, the widespread use of mediation in the area of divorce practice may be one of the principal reasons why collaborative law has not grown more quickly. However, divorce mediation usually involves the parties and not counsel as participants, and thus the negotiations proceed without the direct involvement of lawyers, whose input at an early stage might add value to the process of joint problem solving. Using mediation but not collaborative law does not address one of the potentially destabilizing features of the mediation setting -- namely, lawyers on the sidelines who may, or may not, be fully supportive of settlement or lawyers who actively unravel a settlement agreement at the end of the mediation process. One solution is for the parties to sign both a collaborative law stipulation and an agreement to mediate, thus taking advantage of both techniques. Under such an arrangement, the parties and counsel could determine, with the help of the mediator, the extent to which counsel would participate in the mediation process, but all would agree that the purpose of attorney involvement would be to support the goal of a fair and reasonable settlement, as opposed to achieving an advantage for one client at the expense of the other.

Ethical Issues

The practice of collaborative law presents certain ethical questions. Some might wonder, for example, whether a lawyer can fulfill her obligation to "represent a client zealously within the bounds of the law" (Mass. R. Prof. Conduct 1.3) if she has irrevocably agreed not to litigate on the client's behalf. Collaborative lawyers contend that the lawyer and a fully informed client may determine what zealous advocacy means by spelling out the ground rules for the lawyer's representation of the client.

The commentary to Mass. Rule of Professional Conduct 1.2 states that "the terms upon which representation is undertaken may exclude specific objectives or means." Thus, as long as an attorney explains the consequences of collaborative law

to the client, and the client agrees to those terms, and the lawyer otherwise serves as a diligent and vigorous advocate for the client's interests, she may restrict representation to handling only settlement negotiations. Indeed, "solicitors" in the British system, who never go to court and refer all trial matters to "barristers," have been doing this for centuries.

In addition, some might question whether the rules governing withdrawal by counsel would bar a collaborative lawyer from pulling out of a case in which the client is then left in the lurch. Under MASS. R. PROF. CONDUCT 1.16(b)(6), attorneys must have "good cause" in order to withdraw from representation if withdrawal will have a "material adverse effect on the interests of the client." However, the collaborative process involves a prior agreement to do just that. In fact, it is the potential (but mutual) detriment to the clients which provides the incentive for settlement. The Comments to the Rule seem to contemplate analogous situations, because they permit a lawyer to withdraw if "the client refuses to abide by the terms of . . . an agreement limiting the objectives of the representation." The adverse impact to the client is blunted somewhat by the provisions that usually appear in collaborative law participation agreements, requiring withdrawing attorneys to aid in the transition to new counsel, and providing for a one-month waiting period between withdrawal and any action in court (barring an emergency). In addition, the Model Rules of Professional Conduct require counsel to assist the client in making the transition to successor counsel. (See Mass. R. Prof. Conduct 1.16(d) and comments 9 - 10.)

The crucial element in addressing these ethical issues is the need to fully inform the client and provide him or her with the benefit of the lawyer's independent judgment about the advantages, and disadvantages, of collaborative law. Even for those lawyers who believe collaborative law is a panacea, the canons of ethics require advising clients of the risks associated with this form of practice.

In Practice

Attorneys seeking to incorporate collaborative law into their practice should, as an initial step, develop two sets of documents: a form of agreement with the client and a form of agreement or stipulation for use with the other lawyer(s) in a case. In addition, a lawyer needs to decide whether to devote his or her entire practice to collaborative law, as several family law attorneys in Minnesota and California have chosen to do (i.e., handling only those cases in which the other lawyer(s) in the case agree to refrain from going to court), or instead maintaining a hybrid practice (i.e., continuing a conventional practice but serving as a collaborative lawyer in any case in which the other lawyer(s) are willing to do likewise).

Attorneys seeking to develop a collaborative law practice also need to decide whether to form an association or practice group in their city or town. Such groups

facilitate the practice of collaborative law by drafting standard forms, providing training, and developing referral lists of like-minded lawyers.

The Bottom Line

To date, collaborative law's greatest advocates have been family law practitioners who find themselves disillusioned by the waste and acrimony often associated with divorce litigation. In time, educated consumers may become the driving force that leads lawyers to adopt collaborative approaches.

For the time being, however, the growth of collaborative law has been relatively slow and limited to certain geographical pockets where a critical mass of lawyers have agreed to practice in this way. Although collaborative law is certainly not appropriate for every case, attorneys seeking to offer a full range of dispute resolution alternatives to their clients should consider discussing collaborative arrangements with their clients. In order to make this a realistic option, greater discussion and education about collaborative law among lawyers should be a priority.

Collaborative law seems to give clients what they almost always want: a better chance at resolution without the expense and delay of litigation. And if widely used, collaborative law might just make the practice of law more fulfilling as well.

Note: information about Collaborative Law is available at the following web sites:

- www.collaborativelaw.org
- www.collaborativedivorce.com
- www.collaborativelaw.com
- www.massclc.org

[David A. Hoffman is an attorney, mediator, and arbitrator at the Boston Law Collaborative, LLC, where his practice is concentrated in family law, alternative dispute resolution, and employment law. He is past-president of the New England chapter of the Society of Professionals in Dispute Resolution and co-author (with Prof. David Matz) of Massachusetts ADR (Michie, 1996). Rita S. Pollak is a family law attorney who concentrates in divorce, alternative dispute resolution and Guardian Ad Litem work. She is the past president of the Massachusetts Chapter of the Association of Family and Conciliation Courts. *The authors wish to thank Jeffrey Pyle, a summer associate at Hill & Barlow, for his research and editorial work on this article.]*

