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Collaborative Family Law

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In Massachusetts and several other states, groups of lawyers have begun practicing collaborative law, which involves a commitment to negotiation, as opposed to litigation, as a method of resolving family law and other disputes. The collaborative law movement -- which first developed in Minneapolis in 1990 and then spread to San Francisco, Dallas, Cincinnati, and now Massachusetts and elsewhere -- involves a commitment by lawyers on both sides of a case to a non-adversarial problem-solving approach and to withdraw from the case if they fail.[1]

In Massachusetts, a collaborative law group -- the Massachusetts Collaborative Law Council (MCLC) – formed in 2000 and, as of this writing, has approximately 100 members.[2]

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 a collaborative law 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 mutually hired experts and their work

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1 For a detailed introduction to the practice of collaborative family law, see Pauline Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* (ABA Press, 2001). For a discussion of the use of collaborative law in settings other than family law, see Doug Reynolds & Doris Tennant, "Collaborative Law: An Emerging Practice," 45 *Boston Bar Journal* 1 (November/December 2001); Robert W. Rack, Jr., "Settle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costly Litigation," *ABA Dispute Resolution Magazin*e 8 (Summer 1998).

2 Information about the MCLC can be found at www.massclc.org. For information about collaborative law in other jurisdictions, see www.collaborativelaw.org; www.collaborativedivorce.com; www.collaborativelaw.com; and www.collabgroup.com.

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.[3] 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 in the early 1990s in the San Francisco Bay area, and a Cincinnati-based group, the Collaborative Law Center, has succeeded in expanding the discipline into areas of practice beyond family law. In many other cities in the U.S. and in Canada, groups of lawyers have completed a collaborative law training and formed collaborative law groups.

The Importance of Training

In Massachusetts and in many other areas where the practice of collaborative law has developed, training is required for practitioners. Collaborative law training includes development of non-adversarial communication and problem-solving skills through discussion and role play, as well as exploration of ethical practice issues that are unique to collaborative law. Although family law practitioners may find that the format in which collaborative law is practiced – a series of four-way meetings – is familiar, they are often unfamiliar with the paradigm shift that occurs when counsel on opposite sides of the table begin treating each other as colleagues instead of opponents. For that reason, training is considered essential, for both experienced and inexperienced family law attorneys. (Indeed, experienced family law attorneys may find that their adversarial habits and approaches are so ingrained that the training is especially valuable.) Members of the MCLC are required to take a day-long basic training in collaborative law in order to join the organization.

Advantages of Collaborative Law

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3 See Stuart Webb, "Collaborative Law--A Conversation: Why Aren't Those Divorce Lawyers Going to Court?" *The Hennepin Lawyer*, July-Aug. 1996.

The advantages of the collaborative approach for clients and attorneys 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 be 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.

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 traditional 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.

Comment: For lawyers, collaborative law clearly provides a forum for more civil dialogue, something that too often is lacking between adversarial attorneys. The result is likely to be greater satisfaction in being able to obtain a fair result for the client without the stress that can be involved in traditional 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 showing 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 carefully assess each case.

Comment: A process that minimizes cost and promotes cooperation during and after divorce can only benefit clients who too often emerge from the divorce process bruised, angry and unable to communicate. Collaborative law offers clients a chance to take the high road, obtain a fair result, and save money. A client who enters the collaborative law process in good faith, however, can ultimately be forced to incur the financial and emotional costs of hiring new counsel if his/her spouse remains unyielding in the negotiation. While the requirement of seeking new counsel and the resulting cost is meant to act as a deterrent to choosing court, it

would appear that "innocent" parties are more likely to be disadvantaged if the process breaks down.

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 some firms, 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.

Even without the benefits of collaborative lawyering, however, 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.[4]

Comparison to Mediation

In recent years, divorce mediation has become the preferred option for many couples seeking an amicable divorce. Mediation and collaborative law are closely related, with a high degree of overlap among the practitioners who continue to practice law while also serving, either frequently or occasionally, as divorce mediators.

Mediators guide the negotiation process, help the divorcing couple to identify issues and options, and draft a marital settlement agreement (or a memorandum of understanding from which one of the parties' lawyers prepares a formal agreement). What a mediator cannot do, however, is advise either of the parties: mediators are prohibited by their ethical codes from providing legal advice.

Accordingly, the parties in a mediation – which is ordinarily attended by the divorcing couple without their attorneys – often need coaching from their respective lawyers between mediation sessions. In some cases, this can be cumbersome and slow the negotiation process. When one spouse has more experience than the other in dealing with financial, real estate or tax issues, mediating without counsel often compounds feelings of vulnerability in the less knowledgeable spouse.

Although mediators try to level the playing field by assuring a fair process and full sharing of information by the parties, most avoid directing the parties to a particular substantive outcome. For all of these reasons, collaborative law may be preferable to mediation in certain situations – especially where one or both of the parties want to have

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4 For a discussion of this issue, see Robert Mnookin & Ron Gilson, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation,* 94 Colum. L. Rev. 509, 560 (1994) (discussing premium that lawyers may be able to charge if they demonstrate the ability to resolve cases more economically than their competitors).

counsel at their side when such issues as asset division, alimony, health insurance, estate planning, or child support are discussed. Mediation can also be used in conjunction with collaborative law, by involving counsel in some or all of the mediation sessions or referring a particular issue to mediation. Or these two processes can be used, if necessary, consecutively – e.g., if mediation does not result in settlement, the parties could hire collaborative law attorneys and thus give themselves another chance to resolve their dispute amicably.

Comment: It is obviously important for mediators to recognize when one or both parties are unable to speak for themselves and thus negotiate a fair resolution of the issues. In those situations, the collaborative law option is preferable because the parties can still retain control of the process and avoid protracted adversarial negotiations, which was their original intent when they initially sought mediation.

Ethical Issues

The practice of collaborative law also presents certain ethical questions. Some might wonder, for example, whether a lawyer can fulfill his/her obligation to represent a client "zealously," as required by the Massachusetts Rules of Professional Conduct, if s/he has irrevocably agreed not to litigate on the client's behalf. See Rule 1.3 ("The lawyer should represent the client zealously within the bounds of the law.") However, a lawyer and a client may determine what zealous advocacy means by spelling out in advance the ground rules for the lawyer's representation of the client. (See commentary to Mass. Rule of Professional Conduct 1.2: "the terms upon which representation is undertaken may exclude specific objectives or means.") This is, of course, what British "solicitors," as distinct from "barristers," have been doing for centuries.

Moreover, collaborative lawyers are just as zealous and devoted to their clients' interests as any other lawyers. The difference is that collaborative law attorneys, and their clients, have decided on a set of objectives that differ from a non-collaborative law case (where the goal is usually to obtain the greatest possible advantage, even if it is at the expense of the other party). In collaborative law, attorneys focus on a broader set of goals – such as enhancing the long-term relationship of the parties with each other and with their children and treating each other respectfully during the divorce process.

Some attorneys 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 unrepresented. 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.[5]

Comment: If a client terminates the collaborative law process, the collaborative law attorney should assist the client in finding outside counsel, especially if some immediate action might be necessary, rather than having the client seek other counsel on his/her own.

Finally, some attorneys may be concerned about the protection of client confidences and attorney/client privilege in collaborative law, because the process is relatively "transparent." However, there is nothing about the collaborative process which requires an attorney to ignore, modify or breach the confidential relationship which that attorney has with his or her client. If your client divulges information which, in your judgment, has a material impact on the outcome of the settlement, and your client instructs you not to reveal that information, the collaborative attorney is as bound by the attorney/client privilege as an attorney working in the adversarial process. However, this is an opportunity to remind your client that the Participation Agreement demands that the parties and their counsel act with integrity and honesty. (The Participation Agreement recommended by the MCLC states that "We agree to give full, prompt, honest and open disclosure of all information pertinent to our case, whether requested or not, and to exchange Rule 401 Financial Statements in a timely manner.")

If the client cannot be persuaded to share information which is material to a fair outcome, the collaborative attorney would have to withdraw. Withholding that kind of information is an abuse of the collaborative process and might well raise ethical issues. If the attorney determines, in his or her professional judgment, that the information is not material or relevant to a fair outcome, the attorney can advise the client that the confidence will be kept and the process can continue. This is a judgment call which must be made in the context of the "rules of engagement" – i.e., the signed Participation Agreement" – of the collaborative process.

The crucial ethical obligation for a collaborative law attorney is to fully inform the client and provide him or her with an objective opinion of the advantages, and disadvantages, of collaborative law. Even for those lawyers who believe strongly in the collaborative law process, the canons of ethics require candid advice to the client concerning the risks associated with this form of practice.

Comment: The conversation with the client regarding the risks of collaborative law presumably takes place at the initial interview. There should also

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5 See Mass. R. Prof. Conduct 1.16(d) and comments 9 - 10.

be language in the Participation Agreement which indicates not only that the attorney will be disqualified from representing the client in court, but that the client acknowledges that s/he will be required to engage new counsel if court intervention is sought. In addition, since the client is signing a contract, s/he should be advised about the right to confer with separate counsel before signing the Participation Agreement (similar to when a new client signs a Client Fee Agreement) in light of the significant ramifications of such an agreement.

Communications and Collaborative Law Protocol

There is more to collaborative law than simply promoting settlement – collaborative law involves a dramatic paradigm shift for the participants in the process. collaborative law negotiations typically occur in four-way meetings with ground rules that encourage respectful listening, non-inflammatory language, and interest-based (rather than positional) bargaining. In those meetings, the participants agree to take a reasoned stand on every issue and to negotiate in good faith.

By structuring the negotiations in this way, collaborative law attorneys seek to avoid the acrimony that can occur even in relatively amicable divorce proceedings where parties do not meet face to face but instead communicate primarily through their lawyers. Inevitably, a certain degree of distortion can result from messages as they pass through the filter of an advocate. When divorcing couples and their counsel conduct most of their discussions in person – collaboratively – disagreements and misunderstandings can be addressed immediately instead of festering.

Usually a series of four-way meetings, often alternating between each attorney's office, is necessary in a collaborative law case to resolve the panoply of issues that arise in the context of divorce: custody, parenting schedules, division of assets and liabilities, health insurance, educational expenses, taxes, alimony and child support. If experts are needed on an issue – e.g., a house or business appraisal, the value of a pension, or the wisdom of various parenting arrangements – the collaborative law attorneys will usually recommend hiring a neutral expert, with the costs shared by the parties.

One of the important advantages of collaborative law for both client and practitioner is that it promotes a team-based approach to the divorce process. Mental health professionals and financial advisors – whose advice is often needed but usually provided from the sidelines, if at all – can become part of the lawyer-client team, attend "four-way" meetings, and provide additional information to help participants fully address issues.

Since the basic premise of the collaborative law process is rooted in creating trust between the participants, the attorneys start the process by establishing trust between themselves. If counsel have never worked together before, the ideal way to begin is by meeting in person, for a cup of coffee or even for lunch. The goal is not necessarily to

discuss the details of the case, or to begin exchanging ideas about settlement. Rather, the purpose is to get to know the other attorney – e.g., by talking about your respective practices, or why you were interested in taking the collaborative law training. Is this the first collaborative case for either one of you, or perhaps both? Consider talking about your families and interests outside the practice of law. Try to establish some rapport so that when you conduct the first four-way meeting, a connection has been formed between you, a connection which allows you to feel at ease during that first meeting.

One can also use this preliminary social setting to draw up the agenda for the first four-way meeting, and if appropriate, present some of the goals and interests of your client. If you have worked together on prior cases, but this is your first collaborative law case together, it is still worthwhile to have an in-person meeting. The roles you are playing as collaborative colleagues are fundamentally different from the adversarial roles you have played in the past; you cannot rely on that experience to establish the trust that is necessary for a successful collaboration. If this is not your first collaborative case together, you should still have a phone conversation about this particular case and use that time to set the agenda for the first meeting.

Either attorney can host the first four-way meeting. The attorneys should try to create a comfortable atmosphere, informal yet respectful, with an agreement to use first names during the meetings. It is important, however, to remind the clients that no matter how informal the process seems to be, neither client can contact their partner's attorney directly. Reiterate that each client is represented by counsel and explain the rules about communicating only with your own attorney. Attorneys may find it useful to discuss some of the communications ground rules that are part of the collaborative law training, such as:

- Avoid interrupting, dominating, psychoanalyzing, moralizing, and accusations.
- Use "I" statements rather that "you" statements.
- Make sure everyone has a chance to speak.
- Use active listening.
- Articulate ideas and reactions with non-inflammatory terms.
- Explore and address each party's underlying interests.
- Look for problem-solving approaches instead of positional ones.
- Be empathetic, while at the same time be forthright about your own interests and objectives.

The clients should be reminded that, although the attorneys are accustomed to speaking on behalf of their clients, everyone is entitled – indeed, expected – to participate in the discussion and the process of generating options to resolve the issues on the table.

One attorney should take comprehensive notes during each meeting, not only to record the discussion but also to make sure that assigned tasks and timetables are clearly understood by all the participants. Collaborative law attorneys typically alternate this responsibility for successive meetings. The attorney who takes the notes should consider transmitting them to the other attorney for editing before they are sent to the clients. Once the content is satisfactory to both counsel, the notes can be distributed as a jointly created document. Tasks and timetables should be highlighted.

The first four-way meeting begins with a careful review and execution of the Participation Agreement, and is used to emphasize the positive and unusual aspects of the collaborative law process. Another task at the first meeting is to gather and exchange information, and to reiterate that documents will be gathered and shared in the most efficient and timely manner possible, in contrast with discovery rules that might slow down the pace of settlement discussions. For example, if the four participants agree to exchange documents in 14 days, and designate which party will get copies of the tax returns and which party will produce the agreed-upon bank statements, some of the essential discovery will be completed more quickly than in a litigated case.

There are many ways to begin the discussion of issues. One useful way is to ask each client to articulate his/her goals, wishes, needs, wants. This is not a list of demands; it is an opportunity for each party to openly express what s/he hopes to achieve by using the collaborative process rather than the adversarial process. Stating the goals at the first meeting can create a "touchstone" for evaluating the agreements that are made as the process moves along. Do the proposed agreements move the parties toward their stated goals? Should the goals be revised as new options and information emerge?

Despite your efforts to provide a calm atmosphere, some clients are so anxious about a specific issue that addressing that concern immediately makes sense. Others are too anxious to focus on a specific issue so that having one attorney ask open-ended questions about the children, about one party's profession or some other "neutral" topic, eases everyone into the process. It is also helpful for one of the collaborative law attorneys to prepare a written agenda before the meeting and review it with the other lawyer beforehand. Another option at this initial meeting is to ask the couple where they want to begin. The parties should be encouraged by both counsel to take the initiative in the four-way conversation; the attorneys should play a supportive role, facilitating the conversation, asking questions, seeking clarification, making suggestions.

In a collaborative law negotiation, it is not unusual for one attorney to make a comment or suggestion which shows "support" or empathy for his/her client's partner or the partner's attorney. It is usually a good idea, however, to prepare your client for that possibility before the first four-way meeting, as well as for the possibility that your colleague may also show support for or understanding of your client's position. The attorneys are responsible for setting the tone not only during the meeting, but in correspondence as well.

Just before the first meeting adjourns, schedule the next meeting and, if convenient, arrange to meet at the other attorney's office. Reiterate assignments and reinforce how much was accomplished at this first meeting. Any personal word of praise and encouragement said to your own client or your client's partner and counsel, is the best way to end the meeting.

After each meeting, plan a 15- to 20-minute de-briefing session with your client. If the client is unable to stay at that moment, schedule a phone conference within 24 hours. It is very important to get immediate feedback from your own client about his or her experience. You want to know right away if your client's expectations were met or if something went awry. It is also recommended that you speak with the other collaborative law attorney within a day or two after the meeting to see if his or her client was satisfied with the process. Use the time between meetings to plan the agenda for subsequent meetings and to discuss settlement of issues which have become difficult to address fully in the four-way meeting.

As the meetings progress and tentative agreements are reached, one attorney can begin drafting the Collaborative Divorce Agreement, to be circulated for everyone's review. The other attorney should begin preparing the other documents which will be filed with the court, as well as taking responsibility for getting the certified copy of the marriage certificate and the Parent Education certificates (if there are minor children of the marriage). Current financial statements must be signed and exchanged before the final Agreement is signed. Having the parties together to sign the agreement is an important opportunity to again reinforce the good work the parties did during the process.

The final document should mention the collaborative law process wherever appropriate, such as in the title, and especially in the Dispute Resolution provision. If the attorneys accompany their clients to court for the section 1A divorce hearing, it is a good opportunity to mention to the judge that the parties settled their divorce using the collaborative law process.

Developing a Collaborative Law 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 in the case.[6]

Lawyers who decide to practice collaborative law need to decide whether to devote their entire practice to collaborative law, as several family law attorneys in Minnesota, California, Massachusetts and elsewhere have chosen to do (i.e., handling

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6 A sample Participation Agreement can be found at the MCLC website (www.massclc.org). For a sample engagement letter, see Pauline Tesler, *supra* note 1, and D. Sholar, *Collaborative Law -- A Method for the Madness,* 23 Memphis State Univ. L. Rev. 667, 683-85 (1993).

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 is willing to do likewise).

Attorneys seeking to develop a collaborative law practice also need to decide whether to form an association or group 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.

Judicial Support for Collaborative Law

A vital component of the collaborative law process is the lawyers' commitment to withdraw from a case if litigation is needed. A typical Participation Agreement states that, "in the event that a court filing is unavoidable prior to settlement, both attorneys will be disqualified from representing either client." This essential element – withdrawal and disqualification – cannot be effective, however, without judicial support, because the parties and counsel must look to the courts to enforce the disqualification provision.

In Massachusetts and other jurisdictions, this issue has seldom arisen, because the success rate with collaborative law is very high. In addition, it is a rare client who would insist on having as his or her representative in court an attorney who was seeking to withdraw. It would also be an unusual collaborative law attorney who would contest a motion to disqualify because such a step would severely and negatively impact his/her reputation as a collaborative law practitioner.

Recognizing the importance, however, of judicial support for the collaborative law process, the founder of collaborative law, Stuart Webb, contacted the courts in his jurisdiction before beginning his collaborative law practice there. In a February 1990 letter to Hon. A. M. Keith of the Minnesota Supreme Court, Webb outlined the elements of collaborative law and received from Justice Keith a letter of encouragement. In Massachusetts the MCLC has kept the courts and the office of Bar Counsel informed of collaborative law developments here and invited judges and bar counsel to MCLC meetings.

While it is true that one of the cornerstones of our litigation system is the parties' right to choose counsel, this right has a constitutional dimension only in the area of criminal law. In other areas, it is also a vitally important right, but collaborative law does not prevent the parties from going to court or hiring an attorney. It simply eliminates from consideration, if the parties do go to court, the two attorneys who signed the Participation Agreement in that case.

It is conceivable, of course, that a client could seek to keep his/her collaborative lawyer in the case because of his/her knowledge of the case and the cost of retaining new counsel. It is for this reason that the success of collaborative law depends, in part, on the

willingness of courts to enforce the withdrawal and disqualification provisions of the Participation Agreement.

Comment: The key to ensuring that lawyers will not be faced with the issue of disqualification is of course the strength of their screening process in selecting cases suitable for collaborative law. However, even with the most careful screening, cases could still become contested and the disqualification provision disputed by either the client or the attorney. To preserve the integrity of the collaborative law process if the court is presented with a challenge to an attorney's disqualification, judges should be willing to enforce the Participation Agreement in the absence of countervailing equities.

A further option is that in cases where the parties (or their counsel) have filed a 1B petition, they should consider preparing a stipulation at the outset of a case for signature by attorneys and clients, which sets forth their agreement that collaborative counsel are disqualified from appearing in any subsequent contested court proceeding. Either party acting pro se can then present the Stipulation to the Court for approval before the collaborative law process begins or in the event the other party goes to court to litigate the case.

In any event, collaborative law attorneys should endeavor to educate judges about the collaborative law process so that if an issue of disqualification were to be presented, the court would be familiar with the process in order to better address the issue.

A Sample Case

The following is a description of a typical case in which collaborative law was used.

The parties, "Dave" and "Sheila," have been married for 23 years. They have three children: Sam who has just graduated from college at age 22, Leslie who is a first year college student at a private college, and Grace who is a sophomore in high school.

Dave is a licensed clinical social worker in private practice. He does some occasional teaching at a local community college for which he gets very little pay. Sheila is vice-president of a small firm which evaluates health care delivery systems. She travels a great deal for her work. Because Dave can set his own hours, he became the primary parent in caring for the children after school. Over the years, he took them to their activities, coached little league and basketball, and took them to most of the doctor and dentist appointments, since he could arrange the appointments around his availability. Dave does not earn much money from his social work practice, and there were periods of time when he was out of work altogether due to depression. Sheila has worked long hours, sometimes on weekends, to progress in her field. She now earns a salary of $150,000, plus benefits, as well as receiving an annual bonus. In recent years the bonus has ranged from $15,000 to $35,000. Sheila has a 401(k) account, and Dave has two small IRAs; their retirement savings are not substantial.

Two years ago, while Sheila was on a business trip, she had a brief fling. Dave found out about the affair, and the parties tried some marriage counseling to repair the breach of trust. Dave went into a deep depression and his work tapered off to almost nothing. Despite his depression, Dave continued to care for "Leslie" (while she was still home) and "Grace," spending even more time supervising homework and activities, shopping, cooking, doing laundry and other housework. Although Sheila ended the affair immediately after Dave found out about it and entered into the marriage counseling wholeheartedly, Dave decided that he could no longer remain married. Sheila was very opposed to ending the marriage.

Dave consulted an attorney who does mediation and collaborative law. That attorney explained the differences between the two options, emphasizing that given Dave's still somewhat depressed state of mind, as well as the fact that he was taking anti-depressants, the protection afforded by having a collaborative lawyer present during all meetings might better serve his needs than mediation. Dave and the attorney agreed that he did not feel able to hold his own in a mediation session or negotiate effectively with Sheila, especially since she was so facile with financial matters and he was not. Dave brought Sheila the information about collaborative law given to him by his attorney, and his attorney wrote Sheila a letter asking her to consider entering the collaborative process. Sheila did select a collaborative attorney and the process began.

There were several complicated financial issues that were compounded by the strong emotional needs of each client. Dave's depression had to be acknowledged and managed. His inability to work and his relatively poor work history made Sheila very angry. Sheila was also furious that an affair which had lasted less than two weeks, allegedly caused her marriage to end, against her wishes. Since she was clearly the primary wage earner, as well as the one who had amassed the major marital assets, she felt particularly disadvantaged by this divorce. The financial inequity was bad enough; when Dave claimed a desire to have Grace live primarily with him, along with a request that Sheila pay him child support, the process nearly broke down. Sheila felt that she was being punished for having worked hard, and for having provided a comfortable lifestyle for the family, along with health and dental insurance, retirement benefits and savings for college. She had sacrificed her desire to spend more time with the children because Dave's lack of ambition and energy forced her into a position she claims now to have never wanted.

Another unusual aspect of this case was the fact that Sheila's parents, as part of their own estate planning needs, had gifted Sheila, Dave and each child, $10,000 each year for the last 3 years. The children's gifts were put into college funds. Dave had bought himself a new car with some of the gift money but still had $7,500 in a personal savings account. Sheila had paid down a joint credit card, had taken Dave on a week-long vacation to Paris and had about $13,500 left in her personal savings. Sheila demanded that Dave re-pay her the $30,000 which he had received from her parents. Sheila felt that he had accepted the money under false pretenses, especially during the

last two years (after her fling had been discovered) because Sheila came to believe that Dave did not intend to stay in the marriage, even while engaging in marriage counseling.

Dave and his attorney worked together to break the deadlock with regard to the gifted money. Although it was against his "principles," Dave agreed to take the $7,500 which was left in his savings, and distribute it equally among the 3 children. He also agreed to allow Sheila to take her $13,500 "off the table" when it came to dividing assets. Sheila rejected his proposal.

Collaborative counsel agreed that since an impasse had been reached they would recommend the following option: hire a retired Probate Court judge, who was also a trained collaborative attorney, to act as an arbitrator for this one issue. The attorneys advised their clients that they would have to waive their right of appeal and accept the arbitrator's decision as a final adjudication of the matter. The attorneys created a simple protocol with the arbitrator, agreeing to submit an agreed upon statement of facts and a three-page argument, and appear for an in-person meeting where the clients (not counsel) would each have the opportunity to speak with the arbitrator for 20 minutes. It would be up to the arbitrator to allow rebuttal, either by the parties or counsel.

Once this process was presented to the parties, the case settled. Sheila accepted Dave's proposal, and it was not necessary to use the arbitrator's services. The imminence of a decision by a third party (the arbitrator) was a factor in precipitating the agreement. The overall cost of the collaborative process for Dave and Sheila was modest in comparison to what they would have spent to litigate their divorce.

Conclusion

Although collaborative law may not be appropriate for every case, attorneys seeking to offer a full range of dispute resolution alternatives to their clients should consider discussing collaborative arrangements with them. To make this a realistic option, there should be greater discussion and education about collaborative law among lawyers.

In appropriate cases, collaborative law gives the clients the opportunity to resolve their divorce or other family law disputes without the expense and delay of litigation. In our view and the view of other collaborative law practitioners, this form of family law practice makes our jobs more fulfilling as well.

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