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"Lawyers Who 'Just Say No' to Litigation: Practitioners of 'Collaborative Law' Seek a Handshake, Not a Court Date"

By David A. Hoffman and James E. McGuire

The husband approached the divorce negotiations with apprehension. His wife knew – and, what was worse, her lawyer knew – that he had lost three jobs in recent years because of his addiction to Internet pornography. He was concerned that he could lose custody of his children because he did not dare take this case to court – the judge, he feared, would have no sympathy.

But the two lawyers had agreed, even before they sat down to negotiate, that neither of them would go to court. The lawyers – both members of the fledgling "collaborative law" movement – focused primarily on issues of custody and child support, dealing with the inflammatory addiction issues in a direct but non-punitive manner. A settlement was reached.

This case, and thousands like it around the country, are the product of a quiet revolution brewing in the legal community. Beneath the radar of the media, and barely noticed even by the legal press, a substantial number of lawyers have taken an unprecedented "just say no" approach to litigation.

In the field of divorce law, "collaborative lawyers" agree to address their clients' problems solely through negotiation, so long as the other side does the same. Under principles adopted by the Collaborative Law Council (an organization of 40 Massachusetts attorneys) and other similar organizations around the country, if settlement discussions fail, the collaborative attorneys must refer the case to other counsel.

Another sign of a notable shift in the legal world is the growing use of "settlement counsel," business lawyers who specialize in negotiation and settlement techniques,

while their colleagues (usually in the same law firm) focus on litigation strategies. Other lawyers are abandoning law altogether to establish practices as mediators and partnering consultants.

Of course, litigation is essential, to some degree, in any civilized society – to protect individual rights and police the rules of commerce. But not every case needs to be litigated.

“I don’t take litigation cases any more,” says Brookline attorney Rita Pollak, president of the Collaborative Law Council. “By referring them to other lawyers, I can focus my efforts on problem solving without the acrimony, which is far more consistent with my personal values and better for my clients.”

By turning away from litigation, these lawyers are going against the grain of our legal – and popular -- culture, which glorifies the rigors of courtroom battle through fiction, the news, and TV dramas. The excitement of the courtroom is, indeed, seductive. But as former Chief Justice Warren Burger once observed, “The entire legal profession – lawyers, judges, law teachers – has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers – healers of conflicts.”

These new healers of conflict are changing the legal landscape. Indeed, one of the purposes of the collaborative law movement is not only to remove any financial incentive to litigate but also to turn lawyers into creative problem solvers. For example, in divorce cases, for which collaborative law is particularly well suited, lawyers and clients on both sides meet together to share information, explore options, and talk openly about their objectives. Does the marital home need an appraisal? Why not hire an appraiser jointly, instead of each side hiring one? Are there disagreements about the children? Why not meet jointly with a psychologist for advice, rather than hire expert witnesses and litigate the question?

Collaborative law has attracted lawyers and clients because it gives spouses a better chance of dissolving their marriage with a modicum of dignity, privacy, and cooperation.

Like divorce cases, employment termination cases are often suitable for collaborative lawyering. Fired employees have an interest in a quick resolution so that they can get on with their lives; employers, who wish to retain their good reputations in a tight labor market, often find that out-of-court negotiations are preferable to years of expensive litigation.

Although collaborative law is in its infancy in Massachusetts – the Council is less than a year old – similar groups have been rapidly forming throughout the United States. The first collaborative law group was founded in 1990 by four lawyers in Minneapolis. Since then, several thousand lawyers throughout the country – in San Francisco, Cincinnati, and Dallas, among other places – have begun practicing collaborative law.

As collaborative law has developed, so has the related concept of settlement counsel. Lawyers who specialize in negotiating complex business disputes are beginning to emerge as players in large law firms around the country.

Settlement counsel usually have extensive training in mediation and other modern dispute resolution techniques. These attorneys find that by specializing in the practice of peace, they can frequently achieve better results for clients than by relying solely on waging war.

The growing use of settlement counsel – who differ from collaborative lawyers in that they are not disqualified from participation if settlement efforts fail – arises from two fundamental insights about legal disputes.

First, even though most cases are settled without the need for a trial, the settlement usually occurs only after substantial resources are spent on pretrial preparations. Many clients, and settlement counsel, are looking for ways to cut to the chase early in the process.

Second, experienced lawyers know that durable and fair settlements can be reached only if the interests of all parties are thoughtfully explored. Superficial attempts at settlement are usually unproductive.

New approaches create new tools. Settlement counsel introduce parties to the concept of a voluntary information exchange and ask: "What information would help you reach a fair resolution, focusing on the interests and objectives of both parties?" This contrasts with the usual questions asked in litigation and trials: "What happened and who was at fault?"

In one recent case, settlement counsel was brought in to help resolve insurance claims involving the underground storage of natural gas in New England. Large volumes of natural gas had been stored in the summer for winter use. When the company started to retrieve the gas, it was gone.

The company claimed it had migrated to adjoining property; the insurance company claimed the gas was still there. Litigation loomed. The case was projected to be a battle of experts with years of discovery and months of trial. Settlement counsel arranged for an experts' roundtable discussion as part of a voluntary information exchange. No depositions were taken and all relevant documents were produced voluntarily. The case quickly settled.

Settlement counsel also use techniques not usually seen in court. An apology has the power to repair ruptured business relations. Rebuilding broken lines of communications can create opportunities for joint problem-solving.

Two more new developments in the legal world – mediation and partnering – provide lawyers still other ways to avert courtroom showdowns.

During the past decade, several thousand attorneys in the U.S. have taken mediation training courses – typically 30-40 hours of lectures and role play – to learn the techniques of creativeproblem solving. Several hundred of these lawyers have given up

the practice of law for full-time mediation work; the rest are weaving mediation into their legal work as an important part of their practice.

Mediators serve in a neutral capacity, facilitating negotiation but representing neither side. In years past, mediation was the province of mental health professionals, community activists, and a few retired judges. Lawyer-mediators were found, if at all, solely in labor-management negotiations. Today lawyer-mediators – some of whom refer to themselves as "recovering litigators" -- are becoming ubiquitous, and their advertisements seeking mediation referrals for every kind of dispute – divorce, employment, business, and personal injury – crowd the pages of the legal press.

Partnering, a cousin of mediation, is also proliferating, although in somewhat different circles. It is most often seen as part of complex construction contracts, and involves day-long sessions in which business partners discuss the potential pitfalls in a deal and how to overcome them before they turn to litigation. The personal relationships among the players, and their sense of common mission, prove invaluable.

Lawyers are now taking a closer look at whether partnering can be used to facilitate business deals in areas besides construction. What makes this approach revolutionary is the notion that arms-length business transactions can be more successful, and litigation averted, if the players communicate openly about their objectives rather than playing their cards close to the vest.

Abraham Maslow once said, "He who is good with a hammer thinks everything is a nail." Lawyers have traditionally thought that every dispute is a law suit. But these movements -- collaborative law, settlement counsel, mediation, and partnering -- will provide the public with options they never had before, because lawyers will increasingly have other tools in their satchels beside hammers.

If this revolution succeeds in transforming the legal culture, society will be the winner. Although we will always need litigation, there are enormous potential savings

for society and for individuals when at least some lawyers specialize in creative problem solving and healing conflict.

David A. Hoffman is a lawyer, mediator, and arbitrator at the Boston Law Collaborative, LLC. He is a founding member of the Collaborative Law Council and serves as settlement counsel in employment and commercial cases.

James E. McGuire is an attorney with Brown, Rudnick, Freed & Gesmer in Boston; in addition to his practice as a mediator and arbitrator, he serves as settlement counsel in a wide variety of commercial and intellectual property disputes.