

Family Law Newsletter



July-August 2002

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Making Sense of Collaborative Law

by Robert P. Wildau

To most attorneys including this one, on the first hearing “collaborative law” sounds like a contradiction in terms. Lawyers go to court to find out who’s right and who’s wrong, so what’s to collaborate about? Or if people are truly collaborating, why should they need to resort to law at all?

What is “collaborative law” anyhow? In a nutshell, it is a process of working through a legal dispute, usually a domestic matter, in which the parties and their counsel agree not to resort to the courts.¹ Their so-called “participation agreement” includes rules of engagement whereby the lawyers will

- Cooperate in providing disclosure and discovery
 - Model for their clients a commitment to honesty, dignified behavior, and mutual respect
 - Neither prepare nor file any document with any court except by mutual agreement
- Similarly, the parties agree
- Not to ask or expect their attorneys to advance unethical or illegal positions
 - To make full and fair disclosure to their attorneys and each other of all pertinent facts
 - To communicate respectfully and constructively with each other, discussing settlement only in conference – not at unannounced times by telephone or unannounced appearances.

The common commitment is cemented by the lawyers’ promise that if they cannot reach a negotiated solution, both will withdraw so the parties can hire other counsel to litigate their case.

Collaborative Law is a movement still largely concentrated in the domestic field that grew from one burned-out divorce lawyer’s cry, “There must be a better way!”² The various collaborative divorce models developing across the country have in common a “team approach” whereby each side may have a therapist or coach as well as a lawyer, and one financial advisor may act as a consultant for both. But what gives the process its unique dynamic is the lawyers’ agreement to put down some of their professional weapons.³

How Does Collaborative Law Work, and Why?

The Structured Four-Way Commitment. Achieving the goal of the Collaborative Law contract means NOT having to go to court. The requirement that all the lawyers be disqualified in the event of a breakdown assures that participating counsel are motivated to make the process succeed. Thus the diplomat’s skills become as important as the warrior’s



in “winning” the case. Openness, candor, and cooperation replace guardedness, secrecy, and threats as the techniques most likely to achieve success. Walking out in anger, or provoking the other side to do so, ceases to be a viable tactic.

Setting up collaborative representation in a divorce is an educational process culminating in a set of agreements about how the two parties and their lawyers will work together. First one’s own client needs to hear about the basics of divorce law, the dispute-resolution continuum,⁴ and the range of a lawyer’s services from which he can choose. The collaborative lawyer keeps responsibility for solving the problem firmly on the client’s shoulders rather than proposing successive solutions for the client to criticize. She does help the client identify his substantive goals and priorities, and when she is confident that the client understands the choices before him, they sign a Collaborative Law retainer agreement.⁵ Then together they plan how to draw the other party into the collaborative mode.

The first attorney will suggest the collaborative model to the other spouse’s attorney if one has been identified, and if necessary will provide information about it.⁶ If not, she will write and propose the model directly to the second spouse, providing a list of counsel trained and knowledgeable in the process.⁷ While prior training is beneficial, the basics of Collaborative Law can certainly be learned in the context of one’s first case.⁸ Once both parties and their lawyers have had their questions answered and are ready to sign on, customarily they will set up their first four-way meeting to execute the basic agreement to use Collaborative Law.⁹

The agenda at the first “four-way” may include discussions about the employment of neutral experts regarding the finances and psychological issues

continued on page 3

Collaborative Law (continued)

regarding the children. The lawyers should already have conferred to review any interim problems and identify “hot-buttons,” but the primary function of the meeting is to install a collaborative “container” around the parties and their issues, including a schedule of further meetings. Each side then usually conducts a short debriefing session, to take stock of what worked and what didn’t, after which the process should be ready to move into the phase where the real work gets done.

Without court rules setting discovery deadlines, documents still get produced because no one is being made to comply by pressure from an opponent. Instead of a financial expert’s time being eaten up in deposition defending one side’s view of the facts, he can be running “what-if” projections on alternative settlement numbers for both parties. Effective cooperation, rather than the risk of what might happen in court, propels the process because if it stalls and causes a loss of trust, both parties and both lawyers will have failed.

Team Approach. Collaborative Law, as practiced in Georgia and elsewhere, gives equal emphasis to the financial and emotional aspects of divorce, as well as the legal processes with which lawyers are most comfortable. Some divorce lawyers are satisfied with their own expertise in all these areas, and may even see other professionals as threatening their control of a case. But for many others, sending the client to a communications skills coach or child development specialist is a relief from burdens they feel less equipped to handle.

Financial planners, using modern software to analyze the long-term impacts of alternative support arrangements, can help the parties find the most tax-efficient solutions, while satisfying both the paying and receiving spouse that they will work as projected. The collaborative model encourages the parties to hire one expert to evaluate property, instead of making them pay two to do the same work and defend their disparate findings.

The expanded professional team approach offers clients a coordinated, consistent and efficient group of professionals who know how to work together effectively to serve the interests of the re-structured post-divorce family. In the manner of “free trade” versus “protectionism,” it also increases the overall professional

Notes from the chair (continued)

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Each addition of the Family Law Newsletter contains our respective addresses, phone numbers and e-mail addresses. I hope that you will submit questions, comments and input to one or all of us.

The Family Law Newsletter has a new editor, Kurt Kegel, of Atlanta, Georgia. He will be assisted by Susan Hargus, also of Atlanta. We thank Richard Nolen for the long hours and successful effort he has contributed to the newsletter in the past year. Our newsletter is historically one of the best. If you know any local news, new judges, local rules, news about your firm, please contact your newsletter so that the information maybe included in an upcoming issue. As always, Kurt Kegel is looking for useful articles and hot tips.

Thank you for allowing me to serve as your Chair. We will continue to be one of the most active Sections in the Bar. Our success, as always, is due to the efforts of the entire membership.

services pie by encouraging referrals between the disciplines.

Success is Measured Differently. Our legal system relies on the notion that two or more professional adversaries representing the parties to a dispute will draw forth all information relevant to the contest in the process of advocating their clients’ best positions, thereby allowing the decision-maker to determine the “truth” and to make the best decision. This process assumes that the only real interest of the parties is to “win”. In that sense it reflects the attitude that upon the decision to divorce, the marital relationship becomes a mere struggle for power or property wherein the participants must compete to “win” the power and its associated by-products.¹⁰

While hardball trial lawyers may dismiss the notion of law as a “healing profession,” it remains true that every encounter our clients have with us or the courts tends either to serve or deter healing. Particularly is this so in the stressful passage of a divorce. Ignoring the scarring impact of a litigated divorce on the parties doesn’t diminish the damage done.¹¹

Collaborative Law goes beyond allocating interests in the “marital” and the “separate” estates, to value and preserve a third, their invisible “relational” estate. This is a range of interests vitally important to clients, but usually treated as inevitable collateral damage in adversarial divorce proceedings. It includes the children’s relationships with the extended family of both parents, the web of friendships the spouses shared, their ability to parent effectively after the divorce, and to meet comfortably at future life passages such as graduations, marriages, births and funerals. It also includes the ability of each client to look back on his or her own conduct during the divorce with a sense of dignity and self-respect. Divorce achieved collaboratively preserves to the clients the integrity that comes from valuing what was positive in the marriage as a chapter in their respective life histories. It enables them to feel that under the greatest stress they behaved consistently with deeply held religious and ethical values.¹²

Questions Lawyers Most Frequently Ask About Collaborative Law

What About The Duty of Zealous Representation? Every lawyer seems to remember the concept of “zealous representation” from law school, but may forget its true place in the hierarchy of his duties. It certainly does not oblige him to use any and all means to achieve everything his client may demand during the course of a representation, or to fight tooth-and-nail for every last dollar on the table. Indeed no one of the functions of a lawyer—advisor, negotiator, intermediary and advocate—has primacy over the others.

“As advocate,” says the Preamble to the Georgia Rules of Professional Conduct, “a lawyer zealously asserts the client’s position under the rules of the adversary system.” As negotiator, it also says, “a lawyer seeks a result advantageous to the client, but consistent with the requirements of honest dealing with others.” The Rules encourage lawyer and client to discuss and agree on the goals of the representation and the means used to achieve them.¹³ That ethical dialogue often ultimately produces a set of objectives quite different from what the client brought to her first meeting with counsel.

But how different can those objectives be? Collaborative Law is part of a continuing proliferation of dispute resolution alternatives which includes the “retainer for limited purposes” or “un-bundled legal services.”¹⁴ In California, where the latter concept originated, a well-reasoned opinion says that it is ethical for a lawyer even to ghost-write pleadings and give legal advice to a client without appearing as counsel of record, or even disclosing his role to the court.¹⁵ Where a retainer agreement excludes the pursuit of rights and remedies that a court could provide, obviously the

continued next page

Collaborative Law (continued)

careful lawyer will make sure the client understands and accepts the risks associated with those limitations. According to the California opinion, he may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention. With respect to such problems he would be obliged to advise a client about his or her rights, the alternatives available under the circumstances, the consequences of each, their cost and the likelihood of their success.¹⁶

Under Georgia law, absent any other agreement an attorney has apparent authority as to procedural or tactical matters¹⁷ but it is the client who decides issues that affect her substantive rights, including the settlement of her claim.¹⁸ Accordingly, though the Collaborative Law retainer agreement alters the usual allocation of authority on procedural issues, it changes nothing about substantive matters. Furthermore though the attorney's services may be limited, they must nonetheless be competently provided, i.e. with the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.¹⁹ The protections of the lawyer-client privilege, and the lawyer's other duties of loyalty, diligence and confidentiality are likewise unaffected.

Does Collaborative Law "Protect the Client" (and Thereby the Lawyer Against a Malpractice Claim)? Answering this question requires us first to consider how much "protection" the divorce client enjoys under prevailing practice. We start by noting that there is rarely a domestic outcome that hits every one of the client's original targets. The conventional wisdom used to be that if either spouse left the courthouse happy, the other one must have gotten a bad deal. Depending of course on the facts of the case, the standard by which most family lawyers would expect to have their work judged is that the settlement should be economically at least workable, with no unhappy surprises or unforeseen tax consequences, and should give both spouses the chance to be good parents to their children.

Being a competitive exercise, litigation²⁰ proceeds by selective disclosure and tactical maneuver, mobilizing evidence and witnesses favorable to one side and suppressing or discrediting the ones favorable to the other. Particularly where clients are disturbed and vulnerable as in a divorce, the warrior's first instincts are to "throw up a perimeter" and fire off heavy rhetoric or onerous discovery to let the other side know they're in for a fight. We hear the client groan, but persuade him that it's for his own "protection." The tone thus having been set, the other side responds in kind. Differences between the parties are emphasized so as to eclipse areas of agreement. To the first offer of settlement the stout-hearted advocate may say, perhaps over-protectively, "I wouldn't let my client agree to that."

The lawyer's instinct to prove her zeal by adopting the client's positions and attitudes often leads to unrealistic expectations. Reality may not set in until trial looms or the liquid assets that might have provided a readjustment cushion have been consumed in the struggle. Hasty settlement on the courthouse steps undermines any sense of control in the client, and increases the risk of drafting errors. When the terms are less favorable than the client was prepared to expect, he may be subject to either "buyer's" or "seller's remorse". And the high emotions and unpredictable results of a jury trial carry their own risks of dissatisfaction. A suit for the higher fees incurred only invites a counterclaim for malpractice.

Removing the element of combat naturally disconcerts lawyers who have not learned other ways to resolve a clash of interests. Being accomplished in the use of the Civil Practice Act to ferret out discoverable information or to preclude untimely claims and issues, one may feel unprotected or even helpless without those weapons in hand. But are they necessary to provide a client the essential

benefits of legal representation? The Collaborative Law approach recognizes that in domestic matters, the client often has enough knowledge of the essential facts, or enough trust in the other party, for instance, to proceed without court-supervised discovery.²¹ Furthermore, expertly hidden assets may well not be discoverable with any reasonable degree of effort. So little if any value may be given up by renouncing the tools of formal discovery.

Unlike mediation without the assistance of lawyers, clients in Collaborative Law can have as much hand-holding as they want. They get the benefit of the lawyer's investigative and analytical skills in detecting any possible fraud as the facts are assembled. They get sound real-time advice in setting goals and skilled help in negotiating. And it all proceeds at a pace not dictated by the "hurry up and wait" demands of a court calendar, so the parties have time to reality-test each other's proposals, and to get comfortable with their deal before signing it. The main difference from litigation is that the lawyer's advocacy is focused on persuading the other spouse rather than a judge or jury.

Collaborative Law cannot work with parties who have significant psychiatric problems, or where there is a pattern of domestic violence or with people who are fundamentally dishonest or unscrupulous, or unable or unwilling to follow through on their commitments. But for parties who are willing to invest in the process, it offers a more satisfactory outcome than litigation, and accordingly more real protection for both client and lawyer.

But Don't Clients Hire Fighters Not Settlers? A lawyer who like most bills himself as a fighter is likely to attract clients who want to fight. When one's only tool is a hammer, everything looks like a nail. But in the writer's experience, one who casts oneself as a settler of disputes attracts a remarkable number of callers who fear getting enmeshed in litigation more than they fear getting less than top dollar at trial.²²

Some of course are looking for an easy way out. They want the mediator to make the other spouse accept their views, and don't understand that he can't just tell the couple how to resolve their issues. That opposite spouse may be tempted to use mediation but feels vulnerable even with counsel at his elbow, assuming he can find a lawyer willing to take such a mere advisory role. These people share a belief that hiring an attorney will mean losing control of their cases and that the lawyers will delay resolution by inflaming feelings on all sides. Many can afford to pay for good counsel but stumble around on bad advice because they can't overcome their gut-level dislike of lawyers. Collaborative Law is a framework in which this potential clientele can be served. Since the first Georgia Collaborative Law training in October, 2000, some 83 lawyers and 53 other professionals have taken it. But public awareness has grown quickly from stories on ABC-TV and Fox News in Atlanta, and Collaborative Law has been regularly featured in the past year at family law and ADR seminars, both in Georgia and nationally. The more it is understood and promoted as an option by the mainstream of the domestic bar, rather than draw away existing business it stands to attract more.

Conclusion

Collaborative Law is a genuinely new paradigm for the legal resolution of disputes. It has particular advantages in family matters as a structure in which lawyers can help divorcing spouses find genuine "win-win" solutions with all the protections of conventional representation, and express their better selves in the process.

(Endnotes)

¹ "Neither party nor his or her attorney will use the public judicial process during the course of the Collaborative Law Process", Principles of the Collaborative Law Institute of Georgia, available at <http://>

continued next page

Collaborative Law (continued)

collaborativelawga.com/principles.html.

² Stuart G. Webb, Esq.; see generally Collaborative Law Institute of Georgia Program Materials October 12-13, 2000, p. 01-002, Institute of Continuing Legal Education in Georgia.

³ “We bury the hatchet / But leave the handle sticking out.” Garth Brooks, *Ropin’ the Wind*, 1991, © Major Bob Music and Warner-Chappell Publications.

⁴ Douglas H. Yarn, *Alternative Dispute Resolution, Practice and Procedure in Georgia*, (2d ed. 1997), §2-3; Pauline H. Tesler, *Collaborative Law, Achieving Effective Resolution in Divorce Without Litigation*, (American Bar Association Section of Family Law, 2000), p. 59.

⁵ See Tesler, *supra*, Chapter 7, Form 3, among an excellent set of forms for this purpose, on floppy disk as well as text.

⁶ Tesler, *supra*, Chapter 7.

⁷ Members of the Collaborative Law Institute of Georgia are listed at <http://collaborativelawga.com/members.html>. Counterpart organizations in other states can be found at <http://www.collabgroup.com/>, the Website of the International Academy of Collaborative Professionals.

⁸ “There is really only one irreducible minimum condition for calling what you do ‘collaborative law’: you and the counsel for the other party must sign papers disqualifying you from ever appearing in court on behalf of either of these clients against the other. Beyond that requirement, all else is artistry, ...,” (emphasis in original) Tesler, *supra*, p. 6.

⁹ Tesler, *supra*, Chapter 7, Form 4.

¹⁰ See Janet Weinstein, *And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System*, 52 U. Miami L. Rev. 79, 82-83 (1997).

¹¹ Tesler, *supra*, p. 21, n.14.

¹² Tesler, *supra*, p 80.

¹³ Ga. R. Prof. Conduct r. 1.2 (eff. 1-1-01), and Com. 1 thereto;

State Bar of Georgia Handbook, Part IV, pp. H-23-24.

¹⁴ California attorney-mediator Forrest W. (“Woody”) Mosten, an inactive member of the Georgia Bar and former clinical professor at Mercer Law School, is credited with coining this term in 1993. Mosten is also the author of *Unbundle Your Law Practice: How to Deliver Legal Services a la Carte for Improved Service and Profits*, (ABA Law Practice Management Section, September, 2000).

¹⁵ Formal Opinion No. 502 (November 4, 1999), Los Angeles County Bar Association Professional Responsibility and Ethics Committee available at <http://www.lacba.org/showpage.cfm?pageid=431>.

¹⁶ *Id.*, citing *Nichols v Keller*, 15 Cal.App. 4th 1672, 1684-87, 19 Cal.Rptr. 2d. 601 (1993).

¹⁷ OCGA §15-19-7 (2001).

¹⁸ OCGA §15-19-6 (2001)

¹⁹ Ga. R. Prof. Conduct, 1.1, (eff. 1-1-01) State Bar of Georgia Handbook, Part IV, p. H-23.

²⁰ “Litigation: A machine which you go into as a pig and come out of as a sausage.” Ambrose Gwinnett Bierce, *The Devil’s Dictionary* (1911).

²¹ If a Collaborative Law attorney learns that his client has withheld or misrepresented information that should have been disclosed, the participation agreement requires him to withdraw. If deception is discovered later, a settlement agreement reached via a Collaborative Law process is no more or less susceptible to being annulled for such a reason than any other negotiated agreement.

²² Reliable statistics on pro se filings are remarkably difficult to come by. One source, unconfirmed by the Office of Court Administrator, reported that, some 31% of the cases filed and assigned to the Family Division of Fulton Superior Court in 2001 had no attorney listed—clearly not only for financial reasons.