

## **Collaborative Law Reaches Out**

by Stefani Quane and Rachel Felbeck

Pauline Tesler, author of the book *Collaborative Law*, says collaboration has reached a turning point: In the U.S and Canada, some now consider collaborative law a mainstream divorce-resolution process. Collaborative law is currently practiced in at least 26 states, Canada, England, Ireland, and Australia.

### **Collaborative law's origins**

For those of you new to the concept, collaborative law is a term coined in 1990 by Minnesota attorney and mediator Stu Webb. Collaborative law describes a dispute-resolution process in which clients and their counsel contractually agree that the collaborative lawyers will not go to court. This agreement aims to maximize the attorneys' creative dispute-resolution incentives. If the process fails and the parties choose to go to court, the parties must retain new counsel and new experts. According to Tesler, this non-litigation contract is collaborative law's key defining element. Other guiding principles include timely, full disclosure of relevant information and direct client involvement in negotiations. During negotiations, collaborative attorneys advocate for their clients' interests, not positions, and use non-adversarial, constructive advocacy methods.

Stu Webb began practicing collaborative law because of his frustration with aspects of divorce litigation. After years of practicing adversarial litigation, he concluded that few felt positive about trial outcomes — not the clients, not the judge, not even the attorneys. In addition, for Webb, the hostility between counsel seemed to escalate over the years. As a result, he sent 10 letters to fellow family law attorneys requesting they explore together a more amiable and constructive case-resolution method. Four responded, and a new conflict-resolution method was born.

In the early years, there was no attorney-withdrawal requirement. Webb added the withdrawal requirement after observing negative client consequences when he litigated a case for which he had been the collaborative lawyer.

Since its inception, collaborative law has taken off as a new form of alternative dispute resolution. It has become extremely popular and effective in many areas in North America. For example, in Medicine Hat, Alberta, the family law bar had the unique opportunity to implement a complete collaborative system. There were 20 family law lawyers in the area, and 19 attended the training and became excited about the process (the 20th lawyer was apparently in the hospital at the time and unable to attend the training session). As a result of the nearly complete training and acceptance by the family law bar, the attorneys in Medicine Hat were able to introduce the process to all litigants engaged in family law litigation in that area. Because every family law practitioner encouraged clients to implement collaborative law as a standard form of divorce resolution when appropriate, the Medicine Hat attorneys were able to eliminate the weekly motions calendar from the court system due to the lack of litigated cases.

### **Collaborative benefits**

Collaborative resolution emphasizes maximized client involvement. This direct involvement often results in higher client satisfaction with the process and outcomes. The attorney advocates for the client by empowering the client to express and advocate for his interests in a non-adversarial manner. The attorney ensures the client's interests are understood and addressed where appropriate. It is the clients, however, that together create a solution which works for each party for final resolution of the conflict.

Removing adversarial tactics tends to result in more efficient and productive negotiations. Some collaborative lawyers believe removing positional argument also generates better financial and emotional outcome. However, removing adversarial argument does not mean parties eliminate conflict or disagreement. Rather, conflict and disagreement are acknowledged, expressed where appropriate, and addressed if they are obstructing resolution. Clients can benefit from collaborative law's acknowledgment of their emotional involvement in the issues.

In family law cases, and other cases where there is a continuing relationship or need for the parties to interact (about children or other issues), collaborative law is generally a cost-effective and time-saving process which often keeps intact previously existing relationships. Attorneys guide their clients through the conflict in a manner that allows for the parties to restore or continue, where appropriate, working relationships.

### **Collaborative law and law schools**

The collaborative law movement has become such an accepted part of the legal practice in many jurisdictions that it is now being taught in several law schools. Last fall, for the first time at any law school, a full semester in collaborative law was taught at the University of British Columbia. Other law schools will soon follow suit, including the University of Santa Clara, U.C. Berkeley, Harvard, University of South Florida, and University of Miami. Seattle University's Melinda Branscomb is addressing how collaborative law relates to mediation in her negotiation/mediation course this spring.

Collaborative law also attracted the attention of researchers interested in the efficiency of this model of conflict resolution. Professor Dr. Julie MacFarlane at the University of Windsor (Ontario, Canada) is conducting the first full research study of collaborative law. She reported on her preliminary findings at the International Academy of Collaborative Professionals (IACP) Conference in Vancouver. Her research project included following 135 divorces in four cities — Vancouver, Medicine Hat, San Francisco, and Minneapolis — where she surveyed and interviewed the families and their lawyers throughout the management of their cases. Families self-selected by agreeing to serve as case studies. Her final analysis should be complete later this year.

### **Legislative efforts**

Texas is the first state to implement its own statutory scheme promoting collaborative law in divorces and in suits affecting parent-child relationships. According to Norma Trusch, incoming president of the IACP, the best part about the Texas collaborative development was the willingness of an enthusiastic group of converts to make large commitments of money and time to the development of the movement. They spent a lot of early energy getting the statutes passed,

and once that occurred, the movement took a huge leap forward. Because the collaborative law statutes were enacted by the Legislature, the State Bar of Texas began sponsoring continuing legal education programs to explain the process. This led to the development of the Collaborative Law Institute of Texas, a statewide organization which has produced a first-rate website ([www.collablawtexas.com](http://www.collablawtexas.com)) and provides training throughout the state. The Collaborative Law Institute of Texas has also formed committees to draft uniform protocols and forms, and is planning an annual networking and educational retreat. Several other states are also considering adopting statutory schemes to promote collaborative law.

Other jurisdictions are looking toward modifying local court rules to include separate tracks for cases identified as collaborative cases. In these jurisdictions, the courts do not set trial dates, impose discovery deadlines, or require compliance with scheduling orders. They have requirements to provide the court with progress updates, but otherwise the parties are free to explore collaborative resolution without court intervention.

### **Collaborative law and the RPCs**

One question that nearly always arises in a frank and open discussion of collaborative law is the relationship between collaborative law and the Rules of Professional Conduct. Often, attorneys inquire whether it will be "ethical" to be collaborative even if their client is fully consenting and making an informed decision. The reverse is an even more compelling question: Is it ethical for lawyers to be adversarial if their clients would rather they collaborate intelligently? And where does this word "zealous" come from when it is found nowhere in the RPCs?

RPC 1.2(c) allows a lawyer to "limit the objectives of the representation if the client consents after consultation." Thus, as part of a fee service agreement, there is no ethical violation so long as it is clearly agreed upon between the attorney and client that the attorney will represent him only in a collaborative-law context. The fee agreement should clearly spell out that the client understands and agrees that he will be required to seek litigation counsel if the collaborative process does not succeed, and that the collaborative attorney will withdraw if the case goes to litigation. Further, the collaborative agreement signed by both attorneys and the parties should clearly define that the scope of representation will be limited to the parties proceeding under the collaborative process. Further, RPC 2.1 explains the lawyers' valid role as an advisor.

An attorney in a collaborative context can help the parties look at all sides of an issue to arrive at resolution that is acceptable to both parties. This role as advisor is no different than the role an attorney assumes when he assists a client during a mediation or settlement conference. The attorney in any alternative dispute resolution method gives his client legal advice based on the law, his experience in the local judicial bar, his experience with resolution trends, and whatever other factors may bear weight to assist the client in reaching final resolution of the issue in dispute without resorting to a trial or a hearing on the merits.

Finally, many curious attorneys recognize the risk of undertaking a process that mandates "radical transparency" and full disclosure as part of the contractual agreement. There may be concern that one of the parties is using the process as an easy discovery tool and never intends to operate under the good-faith principles outlined in the agreement. RPC 3.4 mandates that attorneys shall not "destroy, alter or conceal documents with potential evidentiary value and shall

not counsel or assist another person to do so." Similarly, the participation agreement signed by the parties and their attorneys mandates full disclosure and good-faith dealings throughout the process.

In any scenario where an attorney is aware that a party is concealing assets or evidence, that attorney has an ethical obligation to work with the client to prevent that situation from occurring and to take steps to remedy it if the client has already engaged in that type of activity. If he is unable to convince the client to not breach the contract, the participation agreement normally includes a procedure with remedies for resolution. Ultimately, of course, any attorney has a right to terminate his services based upon violations of the agreement or possible violations of RPC 3.4. The attorney's withdrawal does not necessarily violate attorney/client privilege, since no disclosure as to why the attorney is withdrawing is ever required.

The attorney's role in a collaborative context naturally focuses more on the attorney as a counselor or advisor. The attorneys can assist the clients on analyzing each of the legal issues present, discussing the facts, and brainstorming on creative solutions that can be directly tied to resolution to meet both parties' needs. The attorney is thus liberated from costly and often emotionally destructive litigation tactics, motion filings, detailed discovery procedures, etc., and can focus his time and energy on being able to use his skills and expertise to resolve conflicts, instead of increasing or creating conflicts.

### **Collaborative law's limitations**

Collaboration does not work for every lawyer or every situation, nor is it intended to. In some cases, lawyers need to develop new skills and sensitivity when dealing with heightened emotions and communication difficulties. Many attorneys find that mediation training, which includes active-listening skills and redirection techniques, is helpful in assisting the clients during difficult parts of the four-way collaborative meetings.

Sometimes cases don't settle easily, particularly if the lawyers lack the skill and verbal finesse required to assist more difficult cases or clients to settlement. Further, there are always cases and clients for whom the collaborative model will not work. On the other hand, practical experience has shown that actual savings can occur in the collaborative process that makes funds available to bring in other needed professionals, such as financial planners or parenting investigators.

### **Where to get training**

For many years, the only way for a Washington lawyer to get training in collaborative law was to leave the state for a two- or three-day intensive training program. Now, the WSBA is offering a one-day CLE in Seattle on March 5. NW Collaborative Law hosts monthly free CLEs in Bellevue or Seattle, and plans to offer longer one-day CLEs on the interdisciplinary aspect of collaborative law, collaboration for the nonlawyer, communication skills for the collaborative lawyer, and another one or two full-day CLEs with an experienced out-of-state facilitator. Collaborative law issues will also be presented at the NW Annual ADR Conference May 7-8 and other CLEs throughout the state this year.

If you like to travel, there are many CLEs offered across the country. Attorneys interested in starting collaborative groups in their areas can also work like Stu Webb — identify opposing

counsel who might be open to a collaborative approach in an appropriate case and propose this model to them. Model stipulations, and in some cases local rules, are available to allow litigants to opt in to collaborative law via stipulations that define the process.

### **Conclusion**

Civil litigation has a new tool for dispute resolution. Collaborative law is an exciting, innovative method that is here to stay. In the appropriate case, or with the appropriate clients, this model can bring peace and control back to parties in conflict. For attorneys, working within the collaborative model can bring a renewed sense of satisfaction and enjoyment back to the practice of law. Welcome to the new model!

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Stefani Quane (the Lawlady) and Rachel Felbeck are the co-founders of Washington Collaborative Law. They practice family law — in the collaborative style — in the Seattle area.