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SOLO, SMALL FIRM & GENERAL PRACTICE DIVISION

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION

Exhibit No. 6Date: 2/23/15Bill No. HB272

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Collaborative Law: A New Approach to Divorce

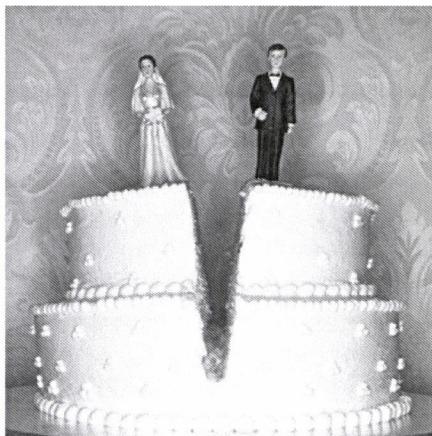
Vol. 32 No. 1

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Everybody thinks they need their day in court. But do they really? That "day in court" can be very costly, both financially and emotionally. There are alternative methods for resolving legal disputes—commonly referred to as alternative dispute resolution (ADR) processes—that do not involve going to court. Mediation and arbitration have been around for a long time, but there is another, less well known process that is coming to the forefront: collaborative law.

The concept started in 1990 when Stu Webb, a divorce lawyer in Minneapolis, grew tired of the frustrations and roadblocks of the court system. So he began telling his clients that he would help them reach agreement to the terms of their marital dissolutions, but not in court. And, if they chose to file their divorce in court, then he would no longer represent them. The concept of helping people resolve their problems without tactics, stonewalling, delays, and drama began to catch on. Groups of lawyers throughout the country have been popping up, calling themselves collaborative practice groups. Today, there are more than 5,000 members of the International Academy of Collaborative Professionals (collaborativepractice.com) located in 24 countries throughout the world.



What Is Collaborative Law?

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When thinking about divorce, one typically thinks of the courthouse, a judge, subpoenas, hearings, and a trial. All the while, the parties have no control over what is going on—either the process or the end result. But there is a better way.

Enter the collaborative process. In this process, each spouse retains his or her own attorney for emotional support and legal advice. All four individuals sign a process agreement that there will be open communication and full disclosure—and no one will go running off to court. In the unfortunate event that the process breaks down and one of the parties feels the need to file (i.e., go down the litigation path), none of the professionals involved can participate in the litigation. This is a key element in the collaborative process; everyone has skin in the game. The collaboratively trained attorneys guide the process by facilitating the face-to-face meetings, helping to prioritize interests and concerns, and gathering the necessary documents.

The collaborative process focuses on negotiating a settlement that meets everyone's interests. This is different than the positional bargaining that takes place during heated litigation. Positional bargaining, as you have in litigation, is adversarial and pits the parties against one another. There is little focus on future relationships and little hope of coming to an agreement that meets everyone's needs. The interest-based bargaining that takes place in a collaborative process, on the other hand, focuses on meeting everyone's underlying concerns, needs, and interests. The parties are encouraged to communicate what's important about an issue rather than argue about a specific position or desired end result. If both parties want the same item, the professionals ask why that item is important to each of them. Often what comes out in that discussion is a deeply held fear or concern. Identifying that fear opens the door to resolving the problem.

If the parties are struggling to communicate with each other, as is so often the case when couples divorce, a neutral mental health professional can be utilized to "coach" the individuals on how not to press those hot buttons that can so easily derail a conversation. If there is a power imbalance where one party always had more control over the decision making during the marriage, the coach can assist the weaker individual to find his or her voice and can assist the stronger individual to find the patience to sit quietly and listen with the goal of not just "hearing" but comprehending. Coaches are often the most important piece of a successful collaborative process. Think about it: Couples fall out of love and get divorced when they stop or can't communicate. Devising a win/win property division and parenting plan requires effective communication.

And let's not forget about the most important individuals in the

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process: the children. In a collaborative process, the children remain at the forefront of discussions. The children can be given a voice by utilization of a child specialist. What may be most desirable for a parent may not necessarily be in the best interest of the child. The child specialist is able to hear not only what the parents think and feel but also how the child feels. The child specialist can also provide answers and empathy to the child in a safe environment.

If there are complicated financial issues that need to be addressed, a neutral financial specialist can participate in the process. The financial specialist may be a business appraiser, a tax specialist, or a financial planner. The type of financial specialist depends on what skill set is needed to address the specific issues that the couple faces. Some spouses need help developing a budget because they never dealt with their financial issues while being married. If the couple owns a closely held business, that business will need to be appraised. If one of the parties has fluctuating income, an accountant may be helpful in crafting a creative alimony or child support plan. Creativity is not something that you can get from a court.

The goal of the collaborative process is to reach a settlement before anyone files in divorce court. Once a couple comes to agreement, a legally binding settlement agreement is written by the collaborative counsel; once signed by both spouses, the papers are filed with the court for the approval of the judge.

The Benefits of Collaborative Law

The two attorneys, the coach, the child specialist, and the financial specialist comprise the collaborative team. The team works together to help the parties. Sound expensive? It may sound that way, but when you consider the cost of litigation, it is much less expensive than having your day in court. And the cost savings goes beyond the checkbook. Let's take a look at the benefits of collaborative law as opposed to traditional litigation.

- You are not in court, so the dispute, the process, and the resolution remain private.
- The parties address problems and issues in a forward-focused manner, rather than hanging on to past harms and hurts.
- The parties' interests and concerns are explored to identify areas of mutual benefit.
- The parties make fully informed decisions without the pressure of a court-imposed deadline.
- The process can lead to creative resolutions that work for the entire family, outcomes that are often not available from a judgment by the court.
- Relationships can be preserved, if not healed, in a collaborative setting; in court they are often damaged even further.
- Neutral specialists can join the team to streamline information gathering and sharing.

This all sounds so great, so why isn't everyone doing it? Well, a lot of people are still not aware of it. Traditional divorce litigators don't talk about it. Maybe that is because they are afraid of losing billable hours from not spending all that time in the courthouse updating the judge on the lack of progress being made. Or maybe it is because they don't want to learn how to do things differently. I

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hear old-school litigators say that collaborative divorce is “easy,” but that could not be further from the truth. You can’t hide behind a motion to compel, or a subpoena, or a brief. The process requires communication, understanding, empathy, and patience. You are not only practicing law, but you are truly being a counselor of law.

More importantly, it’s not something that everyone can do. The collaborative process requires that everyone involved be committed to working with and not against the other party to achieve results—and act like sensible adults. It requires managing emotions, being interested in the well-being of the other person, putting the children’s interests before your own, and being committed to the process. Being short-sighted won’t work. The individuals must look to the long-term interests of the entire family regarding both their finances and their ongoing relationships.

Litigation still has a place for parties who cannot or will not play fair and reach agreement, but for the vast majority of couples, court is simply not the venue for resolving the intricate, personal, emotional issues surrounding the dissolution of a marriage.

The Future of Collaborative Law: Beyond Divorce?

Given the benefits realized and general success in the area of domestic relations, there has been a recent movement to apply collaborative law to other types of civil disputes where preserving relationships and privacy is important. The federal government has begun to include collaborative processes in the menu of services and training offered by entities such as the Federal Labor Relations Authority and the Bureau of Land Management of the U.S.

Department of Interior. Many areas of law are incorporating this relatively new form of alternative dispute resolution: probate, trust and estate, personal injury, business, real estate, construction, medical error, and employment.

The collaborative process is voluntary and confidential. This is crucial in the health care industry. The process protects the reputation of the hospitals and health care professionals, as well as the welfare of the patient by addressing the interests of all the parties involved. Resolution of disputes through this process gives medical professionals a better chance to continue to treat their patients, to work with each other, to protect their reputation, and to return to their shared interest in delivering excellent health care services.

Companies understand that the people they employ are their greatest assets. The collaborative process offers employers and employees a way to resolve legal conflicts and employee complaints that does not result in hardening of positions, loss of productivity, emotional turmoil, and large legal bills. This is especially important when the employment relationship is continuing.

The construction industry has much to gain from the collaborative process. A serious construction dispute may halt a project for months or even years. Parties need a quick resolution to remain on schedule, avoid penalties, complete the project, and free up capital for other projects. By placing a clause in the construction contract that all parties will consult with trained collaborative counsel before proceeding with any other form of dispute resolution, parties can settle matters quickly and privately before their disputes turn into full-blown litigation for the community, potential future customers, and their competitors to see.

Much estate planning is done to keep the heirs out of court so as to preserve family relationships, and the successful marketing of the living trust has focused on the idea of avoiding probate. However, the conflicts that previously arose in probate estates are now reappearing in probate court as trust litigation. Estate planning, trust, and probate attorneys can utilize the collaborative process to mitigate or even avoid post-death litigation.

Because collaborative law is becoming so popular and widespread, the Uniform Law Commission recognized the need for uniformity in the practice of collaborative law from state to state and adopted the Uniform Collaborative Law Act (UCLA) in 2009 (with amendments in 2010). Since then, the states of Alabama, Delaware, Hawaii, Maryland, Michigan, Nevada, New Jersey, Ohio, Texas, Utah, and Washington, as well as the District of Columbia, have enacted the UCLA or some form of it. As of December 2014, the UCLA had been introduced and was pending as legislation in Florida, Illinois, Massachusetts, Oklahoma, and South Carolina. In states such as Florida, where the UCLA has not yet been enacted, local judges are teaming up with local collaborative professionals and creating local rules and administrative orders endorsing and regulating collaborative law. If you haven't seen collaborative law in your neighborhood yet, you will soon.