

Why Collaborative Law?

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The most profound development in the legal profession since the Pound Conference convened in the early 70's and pointed the way to alternative methods of dispute resolution (ADR), is the rapidly growing field collaborative law or collaborative negotiation. So new is this development, that there is no agreed-upon nomenclature to describe it. As we will discuss it in this article, collaborative law refers to an approach to dispute resolution in which the parties are represented by counsel of their own choosing, however the attorneys are chosen because they belong to an identified group or association and have made a commitment to represent their clients in reaching a settlement without resorting to any form of litigation or any adjudicatory procedure. Put another way, the role of the attorneys is to facilitate the development of a voluntary settlement without the threat or use of power. In contrast to the traditional role of attorneys in prosecuting and defending legal causes of action, this is revolutionary.

Although a variety of different models are being developed by interested professionals all across the country, common characteristics link them together in a shared paradigm. The single most important of these characteristics is the commitment to achieve settlement without the use of any form of litigation. The most challenging and controversial aspect of this approach is the contractual obligation of the collaborative attorneys to withdraw from the case if any party chooses to abandon the collaborative law approach. This is disincentive to a party who enters the process without good faith. As this model works to establish itself as a meaningful response to the needs of the consuming public, it is hard for many to overcome the natural skepticism that comes from years of experience in the zero-sum game of adversarial negotiating. In reality, the commitment to withdraw if litigation breaks out is a check against the tendency for attorneys to resort to their well-developed adversarial skills when the going gets tough. As soon as attorneys have gained the experience of completing numbers of collaborative cases, they will acquire the same high level of skill, confidence and creativity that previously garnered them reputations in the field of litigation. Only now these reputations will be for the ability to successfully resolve clients' problems in ways that are constructive, cost-effective, and maximizing in the

outcome to each party.

Another major and distinguishing characteristic of the model is its focus on educating and empowering the client to become pro-active in all phases of the dispute resolution process, especially the settlement. This contrasts starkly with the typical relegation of the client to the caboose of the litigation express where the byzantine procedures of the legal process play such a dominant role in the path to trial or settlement that the client frequently is seen as getting in the way of the strategies of the attorney who is charged with responsibility for aggressively pursuing the interests of the same client.

From the clients' perspective, what does this process offer? Above all else, this approach guarantees the clients control over the process of resolving the dispute, control over the cost of the process and control over the outcome of the dispute. None of these guarantees is associated with the adjudicatory model of an attorney-client relationship. Client dissatisfaction with traditional legal procedures and the role of attorneys in our society is well established. The challenge to the legal profession is to find ways to respond to the evolving needs of the clients who are the consumers of the services that attorneys sell.

The collaborative approach begins with a focus on the needs and issues of the clients and keeps them connected to the process all the way to settlement. Although the traditional litigation model does not consciously attempt to separate the clients from the litigation, de facto separation is the predictable and inevitable outcome of a paradigm that is based on something other than client self-interest. The emphasis on the law as a justification for position-taking in the context of a competitive negotiating model, leads to a process based on strategic maneuvering that is the antithesis of cooperation and collaboration. The emphasis on legal procedures requires the education and experience of skilled attorney. As a result, most of the pre-settlement procedures of litigation are primarily focussed more on the role and activities of attorneys than of the clients. Predictably, the clients feel separated from the process and disconnected from anything that they might do to bring about a resolution.

With this focus on the role of the attorneys and their strategic decision-making responsibilities associated with prosecuting or defending the action, comes the expectation of the client that the attorney will produce the outcome that the client believes is fair and just. When that "fair and just" outcome is not achieved in the

manner expected by the client (which is about 98% of the time), the client naturally holds the attorney responsible for the less than satisfactory result. What is so ironic about the adversary model is that the procedures which define it as an approach to dispute resolution, institutionalize the disconnection between the clients who are responsible for the dispute and who have the greatest potential for creatively solving the issues, from the actual process of preparing for settlement or resolution of the dispute.

From the attorneys' perspective, what does this process offer? Most importantly, the collaborative approach begins with clearly defining the roles of the client and counsel. The clients are responsible for the fact that they are in dispute and it is their responsibility to make decisions on mutually acceptable outcomes that resolve the dispute. The attorneys are responsible for developing the process that allows the clients to accomplish these objectives in the most effective manner possible. It is not the responsibility of the attorneys to resolve the dispute. The significance of this shift in the definition of the attorney-client relationship is profound and in the context of legal tradition, it is not an exaggeration to describe it as revolutionary. Freed from responsibility for the outcome and committed to developing the process, the tasks of the attorney become pragmatic, specific, and constructive. With the clients becoming more responsible for the outcome, the most effective work is done in face to face meetings so that the clients have the opportunity to grow into the responsibilities that rest with them. With the clients fully participating, the attorneys undertake the following process developments:

- Identification of the clients' respective needs, interests and issues;
- Development of process rules, agendas and time lines;
- Identification and exchange of all relevant information and documents;
- Development of all possible solutions to the issues without limiting the search to the law model;
- Educating the clients as to both sides of all the issues, all the settlement possibilities, the consequences of each particular outcome to each party and the needs and interests of each of the parties;
- Helping the parties develop settlement proposals built on addressing the greatest needs of each;
- Helping the parties negotiate their settlement proposals based on a commitment to achieving an outcome that is mutually acceptable and mutually beneficial to

each party.

There are a number of attractive features that have attorneys forming their own collaborative law groups and marketing this new approach to dispute resolution:

- The frustration and futility of so many elements of the litigation approach.
- The stress and strain of the adversarial relationships that color daily practice of law as a profession.
- The inability to focus on positive, constructive and creative solutions to problems in the context of the litigation model.
- The client dissatisfaction with the relationship and outcome that are so frequently the by-product of that approach.
- The realization that the institutionalized procedures of litigation are not addressing the clients' needs nor are they providing a source of professional pride and satisfaction as much as they are creating stress and eventually, professional burnout.

While it is true that any one, individual attorney can apply collaborative practices to any case to good effect regardless of the level of awareness of opposing counsel, there is an exponential increase in value and effectiveness that comes from a community of attorneys forming an organized association of collaborative professionals and training together to develop their own protocols of practice and codes of conduct. The formation of a Collaborative Law group or association creates the ability to promote and market the types of services and the kinds of skills that the consuming public wants from the legal profession. It is a safe prediction that within a decade, we will have three mainstream dispute resolution choices: collaborative law, mediation and litigation. As professionals, attorneys will have the opportunity to define how they represent clients and clients will have the opportunity to select how they wish to engage the services of their attorney in resolving their disputes.

Biography

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